__Restorative Justice__ is the only (theoretical) approach that provides a formal basis for the use of wide discretion in sentencing alternatives.....

A CALL TO AGENTS OF CHANGE IN THE JUSTICE SYSTEM:

GUIDELINES IN THE USE OF RESTORATIVE JUSTICE IN SENTENCING FOR MAGISTRATES

•

JUDGES

•

PROSECUTORS

•

PROBATION OFFICERS

Mike Batley, Restorative Justice Centre, 2014

This publication was supported by a grant from the

Open Society Foundation of South Africa (OSF-SA)

The comments and suggestions from a number of colleagues from the fields of law, social work, probation, ethics and conflict resolution in the development of this paper are gratefully acknowledged.

Website: www.rjc.co.za

Email: mike@rjc.co.za

Tel: 072 214 3880

INTRODUCTION

At a public lecture at the University of Pretoria, Professor John Winterdyk asked rhetorically whether the criminal justice system is a false prophet, in the sense that it promises much more than it can deliver. He was clear in his view that this is indeed the case, and went on to suggest that the only reason we maintain the criminal justice system more or less in its existing form is that it fulfils the same role as an old jacket: we are attached to it for a number of sentimental reasons and even though it no longer fulfils its purpose, we cannot bring ourselves to get rid of it. He suggested a focus on risk factors and protective factors at various levels as an alternative approach.

This thinking resonates with the approach taken in the National Development Plan (2012:356) which recommends that an integrated approach to safety and security be co-ordinated across a variety of departments, the private sector and community bodies, and with the Integrated Social Crime Prevention Strategy published by the Department of Social Development. This paper holds that such an integrated approach needs to be infused with the values and ethos inherent in the philosophy of restorative justice and adopted by practitioners in the justice system.

Over the last several years restorative justice has gained significantly in acceptance in South Africa: key policy documents are the Child Justice Act, 2008, the National Policy Framework for Restorative Justice (RJNPF) (2014) and the Policy Directives of the National Prosecuting Authority. Despite these documents and a very promising supportive jurisprudence, the actual level of implementation appears to remain limited and isolated. While there are many reasons for this, including economic, this paper proceeds from the assumption that uncertainty and a lack of knowledge on the part of sentencing officers, prosecutors, and probation officers also plays a significant part.

The RJNPF provides a good basis for nurturing shared understanding about restorative justice and the Policy Directives guide prosecutors in the exercise of their discretion at a pre-trial level, but there are no guidelines for the application of restorative justice processes or as an approach specifically at the sentencing stage. South Africa is not alone in this: an internet search on www.rjonline.org (a major repository of articles on restorative justice) as well as the Guidelines Manual of the US Sentencing Commission revealed NO direct guidance on the use of restorative justice either as a general approach or as a specific process in sentencing. This presents both sentencing officers, as well as probation officers in their task of supporting courts to arrive at appropriate sentences, with significant difficulties. This paper aims to address these difficulties by outlining the current status of the criminal justice system in responding to crime, referring to some hopeful signs and from this perspective suggesting foundations for practical application as well as some specific guidelines in the use of restorative justice.

THE CURRENT STATUS OF THE CRIMINAL JUSTICE SYSTEM IN RESPONDING TO CRIME

The practical shortcomings of the criminal justice in South Africa have been well documented. For the purposes of this paper it is sufficient to note the following:

- The budget of the SAPS increased by 222% between 2003/04 and 2013/14, while it's number of personnel increased by 50, 7%. Although the number of arrests increased by 47%, the number of finalised court cases dropped during the same period by 22,4%(Newham 2013);

- The facilities of the Department of Correctional Services have remained in a permanent state of overcrowding for many years. During 2013 the Minister publicly stated that it is the highest in Africa, even though it dropped from a level of 38%in 2007/08 to 28% in 2013 (Ensor, Business Day Live 26 August 2013);

- The exact rate at which people released from prison re-offend remains controversial (Celliers and Smit 2007: 86 suggest that it could be as high as 94%) but it is generally accepted as very high;

- In 1996 the SA Law Reform Commission appointed a Committee to investigate all aspects of sentencing. In its report at the end of 2000, the Commission stated that

  > The South African sentencing system faces various problems. There is a perception that like cases are not being treated alike; that sentencers do not give enough weight to certain serious offences; that imaginative South African restorative alternatives are not being provided for offenders that are being sent to prison for less serious offences; that sufficient attention is not being paid to the concerns of victims of crime; and that, largely because of unmanageable overcrowding, sentenced prisoners are being released too readily. ((South African Law Reform Commission, 2000: Discussion Paper 82, xxix).

  Despite considerable public debate since then, none of the Commission's recommendations have been implemented.

- Since 2003/04, certain crime levels have decreased significantly and have more recently stabilised. Despite this, victim surveys suggest that people do not feel significantly safer, and it is generally accepted that crime levels are still unacceptably high. The most recent Victims of Crime Survey that was conducted (2012), found that 'about 37% of households believed that the level of both violent and non-violent crime had decreased in their area of residence during the period 2009 to 2011. About 35% said that crime had increased, while less than 30% of the households believed that crime had stayed the same' (2). Significantly, 'In relation to the perceptions of what government should spend money on in order to reduce crime, two-thirds (66, 8%) of households were of the view that social and/or economic development was the more effective way of reducing crime. About twenty per cent of households indicated that resources should be focused on law enforcement in order to combat crime, while only 13,6% felt that resources should be allocated to the judiciary/courts in order to effectively reduce crime' (2).

The shortcomings of the main concepts on which the criminal justice system operates, retribution and deterrence, have also been well documented (see du Toit et al in van der Merwe (ed) 2009 for an integrated outline of how these notions form the basis for sentencing practice in South Africa). Several sources (Skelton (2005), van Ness and Strong(2002), van der Merwe (2007), van Ness (2005) have been summarised to reflect these shortcomings below (Batley in Tswaranang Legal Advocacy Centre:2012).

Since at least the early 1970s there has been growing dissatisfaction in many countries with the criminal justice system, both in the way it is conceptualised and in the way it functions. The various streams within this comprehensive movement have included the restitution movement, the victims' rights and support movement, the prison abolition movement, and more recently the therapeutic jurisprudence movement. Specific concerns that have been expressed include:

- the fact that criminal proceedings tend to exclude victims, despite the fact that they are the very people most affected by the crime incident;
- the inadequacies in the conceptual foundations and practices of criminal justice;
- the recognition that imprisonment causes suffering and debilitation;
- the inadequacies of retribution alone as a governing theory;
- that imprisonment itself increases the likelihood of re-offending and that sentencing officers overuse imprisonment (Wright 2010:7) and
- the appropriateness of making offenders accountable to their victims.

In South Africa, our legislators have pursued the concept of minimum sentencing legislation (trying to enforce a minimum amount of punishment for certain crimes) as a primary response to the high crime rate. The prevailing criminological view is that 'minimum sentencing has no deterrent effect or that any short-term deterrent effect tends to wither away over time' (Tonry, 2006:7, see also van Zyl Smit 2004: 248 and Terblanche 2008:16). Despite this, much debate between restorative justice proponents and just desserts theorists has continued to focus on how much or how little punishment is appropriate and trying to find consensus about particularly the lower levels (Skelton 2006: 17-24).

Leaving aside this vexed question of deterrence, there is also the matter of how utilizing a certain amount of punishment censures a criminal act. According to Skelton (2006:22), this act of 'denunciation', has gained recognition as a major function of and a justification for sanctioning. While denunciation is not limited to one particular theory, in the South African jurisprudence context of dignity, 'the means used to effect the denunciation must be compatible with the values society seeks to affirm' (22). She argues that through its emphasis on participation by victims, offenders and communities, restorative justice 'creates the most appropriate framework for denouncing crime in South Africa' (23). **The challenge is to move beyond the view that punishment is the only means we have for denouncing an act and to explore other tools and methods**.

Brunk (2001) has pointed out how constraining the conventional approach based on a preoccupation with inflicting pain is – there really are very limited options open to a sentencing officer. In Brunk's view (2001: 54)

> Restorative Justice is the only (theoretical) approach that provides a formal basis for the use of wide discretion in sentencing alternatives.....By taking away the focus of criminal justice from the preoccupation with pain and suffering, and defining sanction in a much broader way, Restorative Justice permits a much more creative approach to sentencing alternatives. That sanction is most "just" that best accomplishes the full restoration of the offender, victim and the community to a more satisfying relationship. Given the complexity of social relationships and personalities, there are numerous ways in which this restoration can be accomplished. Restorative Justice allows wide flexibility and discretion in sentencing without its being perceived as a compromise of justice.

It is instructive at this point to consider some perspectives from various streams within the field of criminology. Gottfredson and Hirschi's general theory of crime (1990) draws a number of elements from the sociological stream of criminology together. Rooted in a view that crime arises out of the ordinary everyday routine of life because it is often easy and attractive to do, they suggested that four key elements induce people to comply with rules: attachment, commitment, involvement and belief (Hirschi in Rock: 13). Gottfredson and Hirschi (1990: 3-14) draw on the philosopher Bentham to describe four general sources of sanction systems:

- Physical: the natural consequences arising from the criminal or deviant act, which lead to distinctions between what is prudent or reckless behaviour;
- Political (that is, sanctions based on state power): Bentham wished to use the principles of utility to justify state sanctions of individual behaviour and typifies the approach of the classical school to use its general theory of behaviour and a theory of crime as a guide to public crime control policy. Decisions of the state determine what acts are regarded as criminal or non-criminal. Key dimensions of political sanctions to modify behaviour that are still clearly seen today are the concepts of certainty, severity and celerity;
- Moral: Bentham did not make a clear distinction between social and legal sanctions, but regarded the actions of neighbours and the community as the most important sources of pain or pleasure to the individual. In Gottfredson and Hirschi's view, modern criminologists in the classical tradition tend to minimize their importance, while those in the social control and social disorganization traditions rank them above political sanctions. Social sanctions determine which behaviour is regarded as conforming to or deviating from acceptable norms;
- Religious: while Bentham acknowledged the power of religious belief or scruple to exert influence on behaviour, he regarded this as hard to quantify. Sanctions within this area would distinguish between sin and righteousness.

Gottfredson and Hirschi conclude that the view prevailing in most criminal justice systems and the political sanctions they impose are **largely redundant**. In contrast, they claim that research confirms that, in the absence of social control, criminal, deviant, sinful and reckless behaviour will flourish, and that the value of social sanctions is largely overlooked by the criminal justice system. On the basis of this analysis, they proposed that the absence of self-control is the key concept lacking in both the classical and positivistic schools. They regard self-control as combining social (external) control with an individual's response to the temptations of the moment, thus recognising the simultaneous existence of social and individual constraints on behaviour (1990: 87 -89).

In the psychology stream of criminology, Hollin (2007: 43–70) points out that there has been a shift from a behavioural perspective to a cognitive one. This is reinforced in the risk-focused prevention stream that addresses the factors that lead to crime. Farrington (2007: 623- 629) lists the following risk-focused preventions:

- Skills training. Typical interventions target risk factors of impulsiveness and low empathy through cognitive-behavioural skills training programmes. An example that is particularly relevant to this paper is that of Ross and Ross (1995), which includes social skills training, lateral thinking, critical thinking, values education, assertiveness training, social problem solving, social perspective training and role-playing.

- Parent education;
- Parent training;
- Pre-school programmes;
- Multiple-component programmes that combine parent training, teacher training and child skills training.

Evidence of this stream of thinking can be seen in South Africa, initially in the White Paper on Safety and Security (1998), which appears to have been largely ignored (Pelser 2007:2). Since then it has been taken up by Holtmann (2008), the model proposed by Burton *et al.* from The Centre for Justice and Crime Prevention (2009) and government's Integrated Social Crime Prevention Strategy (2011) and National Development Plan (2012). The influence of this thinking is also seen in the content of programmes that are rendered at a diversion level and as adjuncts to non-custodial sentences for both children and adults.

By remaining preoccupied with punishment, the criminal justice system uses only external, behavioural tools, which are largely ineffective. **The challenge is to find ways to expand this repertoire to be able to connect with and support mechanisms of informal social control.** This can be done by recognising the value that the above kind of programmes have as part of creative, individualized sentences, and by building relationships between sentencing officers and community based efforts. This will be expanded on later.

One further perspective serves to illustrate the pointlessness of excessive reliance on the criminal justice system and behavioural, politically based sanctions. In three out of four cases, violent crimes occur in conditions that do not involve a robbery, but rather inter-personal violence (murder, attempted murder, assault or rape)(Addendum to the Annual Report 2011/12 relevant to the SAPS Analysis of the National Crime Statistics 2011/2012). Furthermore, SAPS figures suggests that roughly nine out of ten cases of assault GBH and assault common, four out of five cases of murder, and three out of four cases of rape which are recorded by the police are reported to involve perpetrators who are known to the victim. (Bruce 2010:42). An immediate implication of this exceptionally high level of inter-personal crime is that it cannot be policed or reduced by typical hard-line security measures or punishment: these crimes arise out of relationship-based conflict and should therefore be addressed at this level. It is for this reason that restorative justice, with its emphasis on the relational dimensions of justice, holds much promise.

SOME HOPEFUL SIGNS

The scenario outlined above is certainly bleak. There is a large body of evidence from several disciplines which indicates that to continue administering justice based on conventional legal thinking is a dead-end street. Fortunately, there are also a number of positive developments that can serve as platforms for sentencing officers to become more 'imaginative', 'innovative and proactive', 'humane and balanced' as the SALRC (see above) and du Toit et al (2009) have called for.

The first sign is the emergence of a uniquely South African brand of judicial activism and relates to the title of this paper. Skelton (2013) describes and analyzes the SA restorative justice jurisprudence. She explains that South Africa has set a new trend internationally in applying restorative justice to civil law. In tracing this application in the housing law case *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), she shows how Sachs J, writing for a unanimous Court, found a way to infuse the Prevention of Illegal Eviction Act[1] with restorative justice values, particularly the value of encounter through meaningful engagement or mediation. Referring to Sachs' references to this judgement in a later text, Skelton concludes that this 'is an approach that creates a platform for social justice that will be achieved through dialogue and compromise' (11). This development of a responsible activist role on the bench grows out of an earlier observation by Sachs that 'Undue judicial adventurism can be as damaging as excessive judicial timidity' (2002 in de Vos 2009). De Vos quotes Khoza and Ndlovu to say that 'Accordingly, what we need is a balancing act, something between the two approaches. This would be desirable in SA, which has great social inequalities, poverty and many other social evils created by apartheid'. This is a very direct appeal to sentencing officers to direct their work in the pursuit of social justice. Skelton ends her article by saying that

> the Constitutional Court has infused sentencing with restorative justice thinking, has developed procedural requirements for meaningful engagement where the law did not provide it, and has developed the common law of defamation in a restorative direction. These judgments reflect a type of judicial activism, in that they have departed from strict adherence to received ways of doing justice, and have infused an *ubuntu*-linked restorative justice way of thinking into their interpretation of the law. South African courts are enjoined by section 39 of the Bill of Rights to develop the common law and to interpret statutes in a manner that promotes the spirit, purport and objects of the Bill of Rights. Restorative justice and *ubuntu* are not expressly included in the Bill of Rights, but the Court's interpretation has drawn these concepts into its constitutional jurisprudence from the post-amble to the Interim Constitution and from its commitment to the ongoing project of nation-building and reconciliation.

While the development of jurisprudence is obviously largely the domain of the higher courts, it does not exclude sentencing officers functioning in the lower courts. What is required is ongoing, systematic work on the part of sentencing officers to nurture their understanding of the context in which criminal acts occur, in a way that 'takes account of cultural, structural, psychological and physical violence' (Henkeman 2013:7), and to employ this understanding in the pursuit of social justice in the sentences they craft.

Henkeman (2012: 246) has made a further call for restorative justice practitioners to 'point out the hitherto "invisible" interaction between individual and structural factors, as well as make appropriate policy recommendations. Restorative justice practitioners are in a position to render structural violence visible through the cases they mediate'. The UN Handbook on Restorative Programmes (2006:9-12) also includes a call to practitioners to identify factors that lead to crime and to inform authorities responsible for crime reduction strategy.

The second sign to note is the approach known as therapeutic jurisprudence, which calls for sentencing officers to understand that their work can accomplish therapeutic outcomes. In advocating for the implementation of this approach in South Arica, van der Merwe (2010:101)shows how therapeutic jurisprudence,

1 Prevention and Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

together with, inter alia, restorative justice, has been identified as part of the comprehensive law movement referred to earlier in response to dissatisfaction with lawyering and the legal system. She quotes Susan Daicoff to the effect that all these streams have 'two core common features':

> They all explicitly seek to: (1) optimise human well-being in legal matters, whether that well-being is defined as psychological functioning, harmony, health, reconciliation or moral growth; and (2) focus on more than legal rights, so they include the individual's values, beliefs, morals, ethics, needs, resources, goals, relationships, communities, psychological state of mind, and other concerns in analysis of how to approach the legal matter at hand.

In an endeavour to explain the differences between traditional versus therapeutic court procedures and officers, van der Merwe (2010:100)quotes Goldberg who lists the following as representative of a typical traditional approach to court procedures: 'a focus on the legal outcome; being case orientated and rights-based; accept only the applicable law; being backward-looking and legalistic and compliance to applicable law. In contrast, therapeutic court procedures would embrace a therapeutic outcome; be people orientated; be interests – or needs based; incorporate or rely on social science findings or research; be forward-looking, common-sensical and identify the underlying problem in the legal matter.'

A third hopeful sign can be seen in du Toit et al's Commentary on the Criminal Procedure Act (in van der Merwe (ed): 2009: 28-10A to 10-B1). Despite affirming the traditional rationales for sentencing and punishment of retribution, prevention, deterrence and reformation, s/he also includes 'integration', a combination of all or some of these aims (28-10). Although they view this as a compromise between retribution and deterrence, they then explicitly acknowledge the validity of restorative justice 'where appropriate'. They go on to refer to most of the superior court judgements that deal with restorative justice as well as local and international academic texts on sentencing. They point out that the application of restorative justice is not necessarily limited to minor cases, and that the Criminal Procedure Act, 1977 as amended has a number of provisions that can be utilised to include restorative justice outcomes, specifically sections 297 and 300. They also confirm that restorative justice can help address overcrowding of prisons, assist offenders to accept responsibility and change their behaviour and can also promote harmony (28-10B). This perspective is taken further in the proposals of the SALRC and endorsed by Terblanche (2008) in which the current four purposes of sentencing, (that is, retribution, prevention, deterrence and reformation,) should be replaced by an attempt on the part of the sentencer to find an optimal combination of restoring the rights of the victim, the protection of society and a crime-free life for the offender. Skelton and Batley (2008: 46) noted this development with approval, expressing the hope that it would provide new impetus to sentencing reform. Both the SALRC report and Terblanche (2008) also recommend that imprisonment should only be used where it is required for the protection of society and introduce the idea of reparation as a new substantive sentencing option; these proposals are fully congruent with a restorative approach to sentencing and as such can be seen as part of this platform for sentencing officers to undertake new directions.

A fourth sign is the policy and jurisprudence environment that supports the implementation of restorative justice. The National Policy Framework for Restorative Justice, initially approved by the Justice, Crime Prevention and Security Cluster in 2011, was amended in 2014. The document now not only defines restorative justice and all related practices, but also connects restorative justice with indigenous approaches to justice, *ubuntu* and the jurisprudence on human dignity. 'The emphasis in restorative justice on relational dimensions such as affirming the worth of victims, offenders and community members alike suggests that this is an important avenue that may provide not only a bridge between the African and Western notions of justice, dignity and rights, but also offer significant perspectives and approaches for addressing some of the major shortcomings in our current justice system' (4). Other references to restorative justice feature in the Victim Empowerment Policy and can also be seen in the development of the practice of obtaining victim impact statements prior to sentencing (see Müller and Van der Merwe 2006 and van der Merwe 2013).

There is a further aspect to this fourth dimension in the growing recognition of the value of dialogue and how this can create conditions conducive for the offering and acceptance of apology and forgiveness. Skelton (2013) has written comprehensively on the development of restorative justice jurisprudence. She traces the development of this jurisprudence through ten Constitutional Court cases that cut across political matters, housing and eviction law, defamation law and criminal law. Not only are all these matters linked explicitly to South Africa's national project of reconciliation, but 'the repeated references to face-to-face engagement in the judgments create positive opportunities for genuine apology, remorse, forgiveness and other restorative outcomes to emerge naturally' (26). Further evidence of this development can be seen in the decision by the Department of Justice and Constitutional Development through The Rules Board for Courts of Law to promote mediation in civil matters at magistrates courts through the 'Amendment of Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa' (Government Gazette no 183 18 March 2014). A pilot project in this regard was initiated in December 2014 and is confirmation of the recognition of the value of dialogue by the justice system as a whole[2]. Legal Aid South Africa, a statutory body that provides legal assistance to people unable to afford it, has also started mediating civil matters.

A fifth hopeful sign is one that is generally overlooked and concerns the public education aims inherent in the criminal justice system. Schweigert (1999b: 29) regards an incident of crime as a failure in moral learning on the part of the offender, his/her community and possibly the surrounding society, but maintains that this presents an opportunity for moral learning. This opportunity is lost if punishment is understood only as expelling an evil from the community. However, a number of educational aims can be identified in conventional criminal justice responses: 'correcting the offender, restoring social order and security, repairing harm to the victim, re-affirming moral values and reminding all observers of the public will' (1999b: 29).

Proceeding from the basis that 'moral learning is a natural and continuous social process and moral education is a consciously structured process to intervene in and to strengthen this natural learning process' (1999a: 174 and 1999b: 31), Schweigert draws on Hampton (1995) to articulate the assumptions supporting the view that conventional criminal justice and punishment have educative aims (1999b: 31):

- They entail a judgement of moral wrongdoing;
- They entail a belief in human freedom;
- The punishment is intended to benefit the offender directly and is not only about demonstrating the power of the state to enforce the law;
- Crime is not viewed as an illness that needs to be treated or a handicap that requires rehabilitation;
- The criminal justice system seeks to communicate moral truth in the face of wrongdoing, including the denunciation of the offender's wrongdoing and culpability and a declaration of the innocence of the victim.

Together, these assumptions reflect the view of an individual as a social and moral person, accountable at once to a particular community and to an understanding of right and wrong and therefore educable and capable of choice.

2 The Access to Justice Conference held in July 2011, under the leadership of the Chief Justice, towards achieving the delivery of accessible and quality justice for all, resolved that steps must be taken to introduce alternative dispute resolution, preferably court-annexed mediation or the CCMA kind of alternative dispute resolution, into the court system;

These assumptions operate even more explicitly in restorative justice and restorative practices (1999b: 31-32):

- A restorative practice confronts the offender not only with law-breaking but also with the wrongfulness of his/her actions.
- A restorative practice draws on the moral authority of the state, through mechanisms such as universal values, the Constitution, and public representatives. It also draws on the authority of the family and local community and the values rooted in familial, cultural and religious traditions. A restorative practice is thus regarded as a public space in which communal values can be expressed, but it does not guarantee that they will be incorporated into the outcome. This is because they are subjected to the test of their alignment with universal values. Schweigert sees two movements in a restorative practice in this regard:
    - raising consciousness of the moral values underlying democratic society;
    - Reinforcing and testing the substantive moral values in families and communities (1999b: 32).
- The offender is confronted as one who has freedom of will and the ability to make better moral choices in the future.
- The sanctions that are developed and agreed on will typically be more constructive for the offender than those imposed by a conventional justice process.
- The process is oriented towards learning rather than rehabilitation, emphasizing active empowerment and choice over passive treatment.
- The concern is not only with the moral wellbeing of the individual offender, but also with that of victim and the broader community.

Restorative practices thus present the whole community with a learning opportunity, in that everyone affected by the crime incident has an opportunity of learning ways of interacting that will reinforce positive behaviour and attitudes and reduce harmful behaviour. 'Ultimately the educative aim of criminal justice is to achieve more resilient and peaceful communities' (1999b: 33).

FOUNDATIONS FOR THE PRACTICAL APPLICATION OF RESTORATIVE JUSTICE IN SENTENCING

To sum up the argument so far:

- At both a utilitarian and conceptual level, the criminal justice system is currently regarded as highly inadequate and ineffective;
- The need for a shift from an exclusive focus on the criminal justice system and its inclination to isolate crime from its context and respond with punishment to an integrated approach that views crime in its context and links responses to social context and social control has been recognised and endorsed at the highest level in South Africa. Denouncing criminal acts and educating individuals and communities have emerged as important additional dimensions to sentencing that require attention;
- Restorative justice has been recognised and affirmed as valid in both policy and jurisprudence;
- Superior courts have set promising precedents and encouraged lower courts to be creative and imaginative in their sentencing, including regarding their use of restorative justice, and to use their position as sentencing officers in the pursuit of social justice.

This discussion requires careful consideration of the matter of Thabethe, a case of stepfather rape dealt with by the North Gauteng High Court and appealed by the prosecution to the South African Supreme Court of Appeal (SCA) (*DPP, North Gauteng v Thabathe* 2011 2 SACR 567). Based on the testimony of the girl (nearly 16 at the time of the offence and over 18 when she testified) as well as the outcome of a victim offender conference, the North Gauteng High Court departed from the required minimum sentence and imposed a sentence of suspended imprisonment together with numerous, onerous conditions. In its judgement, the SCA acknowledged the arguments by the defence and the *amicus curiae* that it is important that the victim's voice is heard and that restorative justice is generally a valid approach. However, the Court found that even though the facts of the case could justify a departure from the required minimum sentence, the sentence imposed by the North Gauteng High Court overemphasised the personal circumstances of the offender at the expense of the seriousness of the offence and the interests of society and did not address the need for general deterrence adequately. The SCA overturned the original sentence and imposed a sentence of ten years direct imprisonment.

Using this case as their main point of reference, van der Merwe and Skelton (forthcoming) have explored what in their view are certain

> unanswered controversial questions of the relevance of victims' (mitigating) views in the determination of an appropriate sentence. Should the victim influence the type of sentence or the length of imprisonment? What does it mean that 'a just penal policy is also victim centred', as the case of *Matyityi* had held? In what way should victims' needs be addressed during sentencing in serious cases? What should the relationship be between the personal and public dimensions of harm in crimes of personal violence? Despite its reiteration that victims' voices must be heard, the court omitted to provide any constructive guidelines in this regard.

Van der Merwe and Skelton investigate how the courts in New Zealand and England Wales have dealt with comparable matters. They conclude:

> It appears that, as a general rule, victims' recommendations as to penalty must be avoided. However, the England and Wales jurisprudence has developed exceptions in this regard when certain categories of victims

> request a more lenient sentence. The standard set by the courts of England and Wales confine this to cases where the suffering of the victims is increased by the sentence set by the courts, or where the forgiveness of the victim indicates that he or she is less negatively affected than might be expected. This approach has, however, only led to a reduction in the custodial sentences imposed in the relevant matters, and not a replacement of the custodial sentence with a non-custodial one. The approach of the appeal courts in England and Wales does not amount to a full application of restorative justice. However, through considering the harms and needs of victims and ameliorating the sentences accordingly, a restorative justice approach is blended with a just deserts requirement for the protection of lower limits. This ensures that the principles of proportionality, certainty and consistency are still generally adhered to. It is concluded that, had the *Thabethe* court taken proper cognisance of comparative legal developments, it might have upheld the sentence for which the victim had expressed a preference. It is, however, possible that concerns for proportionality and consistency would have prevented that outcome. Nevertheless, the recognition of the England and Wales case law would, at very least, have created a better precedent by providing guidelines to inform the complex, but important process of considering victims mitigating opinions in the sentencing process.

Van der Merwe and Skelton focus specifically on the issue of how victims' views should be addressed, and explore this on the basis of comparing court judgements from different countries. However, this is not the only unanswered question that the Thabethe judgment raises. It needs to be noted that the sentence the North Gauteng High Court imposed was based largely on the fact that the victim confirmed that the offender had apologised to her, that she had forgiven him, and that the family relied on him as breadwinner. In the amended sentence that it handed down, the SCA thus overrode not only the views of the victim (by now over the age of 20), but also imposed a sentence that can only have had enormous negative consequences for the family. The SCA judgement emphasizes the need to acknowledge the seriousness of the offence and the views of society. However, the submission of the *amicus curiae* referred to a Constitutional Court judgment (Minister of Home Affairs v NICRO 2005 (3) SA 280 (CC)) that 'the power of denunciation, although important, is constitutionally constrained, and the means used to denounce crime must be compatible with the values society seeks to affirm'. The submission also argued that society has an interest in the healing of its members, and that the risk an offender poses to society needs to be carefully assessed to indicate an appropriate response. The Court did not address any of these issues, nor explain why a sentence of ten years imprisonment was the best or only way to address the needs of the victim and society. In fact, one could say that while the original sentence of the North Gauteng High Court had a number of practical shortcomings, it made a serious attempt to address these issues in a creative way. **The amended sentence of the SCA however, most likely caused great harm to everyone directly affected by this incident (the victim, her family and the offender) for the sake of theoretical denunciation**. If that is so, how can it be considered a just outcome? In view of the earlier discussion above, were there not other, more constructive ways in which denunciation could have been effected, the opportunity for community education and the interests of society addressed?

At a public seminar in November 2011 at which the Thabethe matter was discussed, Dr Martin Wright, an internationally recognised restorative justice scholar, questioned whether the principle 'do no harm' should have been applied by the SCA in its approach. This notion is part of a complex principle known as beneficence. When used as a principle or rule, beneficence 'refers to a normative statement of a moral obligation to act for the others' benefit, helping them to further their important and legitimate interests, often by preventing or removing possible harms'. (Beauchamp 2013:2). The principle has traditionally been used to explore reasons for state prohibition of certain behaviour, typically behaviour that is harmful to people themselves (Stanton 2006:5). However, Beauchamp (2013:14) points out that 'at the hands of many writers, social justice is notably similar to social beneficence. Within this stream,

> (social) justice is concerned with the achievement of well-being, not merely achieving the capabilities to pursue it. In this account, the justice of societies and of the global order can be judged by how well they effect these well-being dimensions in their political structures and social practices. The job of justice is to secure a sufficient level of each dimension for each person and to alleviate the social structures that cause the corresponding forms of ill-being. This theory of well-being and its place in moral theory and social policy could also be expressed in terms of the role of social beneficence (15).

This language bears remarkable resemblance to that used regarding therapeutic jurisprudence and reinforces the call from superior courts for sentences to address issues of social justice.

Spies, a recognised authority on incest, has provided cautious endorsement of the use of restorative justice practices in addressing the needs of incest victims, including children (2009:22). She lists the following needs that can be met:

- To regain self power and self acceptance
- Let go of guilt feelings and to confirm that the victim was not responsible for the abuse
- Establish their innocence as children
- To regain the right to make decisions
- To regain trust in others
- To establish personal boundaries.

These perspectives support the approach taken by the North Gauteng High Court and raise doubts about the actual justice of the SCA judgement as it concerns the needs of the victim.

However, to return to the SCA's concern about the interests of the community, one must ask whether the incident in question could not have been denounced in a more constructive way, and whether the SCA's judgement had proper regard to the educative aims of the justice system. It seems clear that the act of imposing either a suspended sentence with onerous conditions (as the original sentence did) or a sentence of ten years direct imprisonment many kilometres away from the community where the incident occurred can only have had little if any denunciatory or educative value. In considering how this might have been done differently (with the benefit of several years' hindsight), the discussion above drawing on the work of Schweigert is helpful. It must be noted that the victim offender conference was conducted by a social worker employed by the provincial department of social development who had received some basic training in restorative justice. However, she was not specifically equipped to deal with a matter of this complexity. In addition, she worked in a rural context, dealt with a wide range of matters and was also responsible for a large geographic area. In her preparation and facilitation of the conference in question, she did not appear to have drawn in any additional support for any of the family members or for herself as the facilitator. In the meeting with the family that she facilitated she alone was present with the victim, the mother and the stepfather. This lack of support for the victim and facilitating the meeting alone in particular are cause for great concern and will be dealt with below.

Schweigert (1999a: 164-165) draws on Naroll (1983), Bronfenbrenner (1996) and Benson (1997) to outline three dimensions of social disintegration: the breakdown of moralnets, particularly the band, the weakening of family life and the absence of developmental assets. These assets include elements such as support, boundaries, structured time use, positive values and social competencies. From this perspective he suggests three principles to guide restorative practices. Firstly**, bringing together** the moral authority in **personal**

communal traditions and the moral authority in **interpersonal universal norms** in a meeting recognizes that these sources of authority are complementary. Using an existing or specially constituted community as the mode of intervention recognizes the point made in moralnet theory that the band, rather than the family unit alone, is the site where interventions are most effective. The family unit is regarded as too small to carry and transmit the moral code, which is carried in what Naroll (in Schweigert 2000:75) calls the moralnet. He defines this as 'the largest primary group that serves a given person as a normative reference group'. In various societies this could be 'a foraging band, a village, a military unit, or a religious congregation'. Drawing together all individuals and representatives of groups who have an interest in resolving an incident of crime or violence is thus a particular constitution of the band relevant to the individuals involved. Schweigert (2002:35) refers to this particular constitution as 'community –in-action'. The authority of these two sources (communal and universal) is called upon by the recognition that crime is both a personal injury, part of interpersonal conflict, as well as a violation of the laws of the state acting as custodian of the moral authority residing in universal norms. This authority of the constituted community is further strengthened by the voluntary, free and equal participation of participants, the fact that decision-making is largely consensual, and the actions that respectfully support both those who have been harmed and the perpetrators (Schweigert 1999a: 176).

Secondly, the most effective way of engaging this complementarity between the two sets of norms is when restorative practices **focus** on what Schweigert calls the '**space between spaces'**. This refers to focusing not on individuals, families or institutions, but on the space where these social bodies intersect. Thirdly, **restorative practices pursue the moral development of the whole community,** rather than individual moral development only, not in any way minimizing individual development, but building on it to accomplish broader aims.

Focusing on the practical issues of whether a matter should be dealt with in one-on-one mediation or larger group conferencing, Umbreit (2001:304-305) has pointed out that in the one-on-one scenario, the offender is unlikely to understand the full impact of his/her behaviour, whereas this is more likely to occur in a larger group. However, in the larger group there is also the danger that the primary victim's needs may not receive as much attention as those of other family and community members. A very delicate and informed balance needs to be maintained.

Reflecting on this rather complex but insightful analysis, one can conclude that the facilitator could have approached the victim offender conference in question more usefully in the following way:

- Acknowledge the context within which the original incident[3] occurred. As an impoverished rural community, incest and other forms of sexual and gender based violence were likely to be high;
- Identify other stakeholders who are concerned about this issue – health professionals, religious leaders, educational authorities;
- Identify who comprised the 'band' for this family: it could have been a small geographical community, a religious group or both;
- Engage with the leaders from this 'band' as well as other stakeholders about the issue of incest;
- Identify suitable leaders and stakeholders to be present at the victim offender conference;

3 In the case in question, there was only a single incident at stake. In developing an understanding of how such matters should be dealt with more generally, it must be borne in mind that in the context of incest this is likely to have occurred over time with a grooming process which systematically grooms the child and damages the ability to make decisions.

- Identify from this group and others individuals who could fulfil specific roles such as clarifying and affirming community and universal values, supporting the victim, the mother, the stepfather. This needs to be done with great sensitivity and in consultation with the family to ensure that they do not feel that their dignity and privacy are being compromised;

- Invite a suitable co-facilitator

- Convene the conference, which would now comprise a number of additional people besides the family;

- At every stage (during preparation, during the conference and afterwards), ensure that the child received the necessary therapy and support to be able to participate in the conference in such a way that her best interests were clearly protected.

- Facilitate the conference following the usual process:

    - The facilitator opens the session, explaining the process and rules;

    - Both parties describe the incident from their point of view[4];

    - With the help of the facilitator, the parties identify the various issues and interests that underlie the incident(s)

    - Ways of resolving the incident and restoring equity are explored;

    - The terms of an agreement are spelled out;

    - The facilitator closes the session, confirming the agreement and the next steps that will be taken.

- Within this framework, ensure that the following are explicitly addressed:

    - The full physical, emotional and social impact of the incident on the victim and on the family

    - An acknowledgement of the guilt of the offender and the innocence of the victim

    - Affirm the values of autonomy, boundaries and respect and denounce the behaviour of the offender

    - Explore ways to support the victim in her journey of healing

    - Explore ways to ensure that the victim is safe from further abuse

    - Explore ways to support the offender and hold him accountable

    - Ensure that the immediately above 3 points are monitored over an extended period of time

    - Explore ways to address the public concerns, such as public opportunities at which sexual mores and values can be affirmed, stories of victims can be shared highlighting the impact of broken sexual mores, encouraging others to speak out about abuse and emphasizing the need for parents to protect their children in situations of family violence and abuse.

4 It is acknowledged that this is extremely difficult for an abused and disempowered child to do and so requires very intentional steps.

It is submitted that this kind of approach would arguably have addressed both the victim's needs more effectively and would also have addressed the community's needs for deterrence, denunciation and education in far more tangible ways than was the case. It would have given expression to Brunk's injunction referred to earlier that

> That sanction is most "just" that best accomplishes the full restoration of the offender, victim and the community to a more satisfying relationship. Given the complexity of social relationships and personalities, there are numerous ways in which this restoration can be accomplished. Restorative Justice allows wide flexibility and discretion in sentencing without its being perceived as a compromise of justice.

Had closer attention been paid to both the victim's and community's needs in this way, it is possible that the NPA might not have taken the original matter on appeal, or that the SCA may have handed down a different judgment.

There is a further dimension that needs to be clarified as a point of departure, namely the risk that an offender poses to society. This factor is obviously directly relevant to the kind of sentence that is imposed as part of considering the interests of society. However, it does not feature by name in the four traditional purposes of punishment, although it can perhaps be regarded as part of prevention and deterrence. Du Toit et al (2009) for example, does not use the phrase 'risk posed to society' at all in the discussion about the purposes of punishment. In his discussion of the SALRC report, Terblanche (2008) explains that the report proposes that the seriousness of the offence be the first factor to consider in crafting a sentence, and that this is determined by understanding the harmfulness of the offence and the blameworthiness of offender. This factor must then be added to the factors of an optimal combination of restorative justice, **the protection of society** and a crime-free life for the offender. An objective assessment of the risk the offender poses to society in future obviously becomes a crucial consideration, but to date very little attention has been paid to this factor, either in sentencing itself or in the pre-sentence reports that probation officers compile. A theoretical framework that does address risk is found in both the National Department of Social Development's Policy Framework for the Accreditation of Diversion Services in SA (ND, no page numbers) and Nicro's Non-Custodial Sentencing Stakeholders' Toolkit.

The framework draws on work by Andrews and Bonta (2006) and outlines eight criminogenic or risk factors for crime, as follows:

Table 1. Summary of Risk Factors indicating individuals' likelihood of committing crime

<table>
<tr><td rowspan="8">The "Central Eight" risk factors</td><td rowspan="4">The "Big Four" Risk Factors</td><td>History of antisocial behaviour</td></tr>
<tr><td>Antisocial personality pattern</td></tr>
<tr><td>Antisocial cognition (thinking patterns)</td></tr>
<tr><td>Antisocial associates</td></tr>
<tr><td rowspan="4"></td><td>Family and/or marital problems</td></tr>
<tr><td>School and/or work problems</td></tr>
<tr><td>Leisure and/or recreation choices</td></tr>
<tr><td>Substance abuse</td></tr>
</table>

Assessing the seriousness of the offence and the profile of the offender in relation to these factors with the assistance of a pre-sentence report would enable a sentencing officer to arrive at a substantiated conclusion regarding the risk an offender poses to society.

GUIDELINES FOR THE USE OF RESTORATIVE JUSTICE PROCESSES IN SENTENCING

The discussion above has shown that sentencing officers have a mandate as activists to approach the complex, difficult and controversial task of crafting a suitable sentence in a manner that is 'infused (with) an *ubuntu*-linked restorative justice way of thinking' (Skelton 2013:25) and directed towards promoting social justice and therapeutic aims. The same mandate applies to probation officers and other restorative justice practitioners.

The distinctions made in the RJNPF (2014) and referred to earlier need to be borne in mind:

- Restorative justice is 'an approach to justice'
- 'doing justice restoratively' includes initiatives such as non-custodial sentencing;
- 'restorative practices' refer to conflict-resolution processes (where no crime has been committed) and restorative processes (in the case of a crime), and that these can be conducted at a pre-charge, pre-trial, pre-sentence and post-sentence stage;
- Dealing with offender treatment and rehabilitation as part of or separately from a restorative process requires referral to behavioural and cognitive change interventions such as those outlined by Farrington (2007) (social skills training, lateral thinking, critical thinking, values education, assertiveness training, social problem solving, social perspective training and role-playing).

The assumption is that in dealing with the process of crafting an appropriate sentience in a specific matter with the kind of mindset referred to above, a sentencing officer may wish to refer a matter for the facilitation of a restorative process. We will be dealing here with the practical issues relating to this. Without repeating the provisions of the Practice Standards for Restorative Justice – A Practitioners Toolkit (Frank and Skelton 2007) unnecessarily, a number of references will be made for sake of building shared understanding between restorative justice practitioners and court personnel.

It should also be remembered that prosecutors, in fulfilling their role as *dominus litus* play an active role in referring matters for the facilitation of restorative processes at a pre-trial stage, guided by the NPA Directives in this regard.

How is a restorative process requested?

The most suitable moment to request a restorative process as part of sentencing would be after conviction but before leading evidence in aggravation or mitigation has commenced. Any party could initiate such a request – the defence, state (either on its own behalf or at the request of a victim), or the court. The request should be completed in writing and sent to the agency responsible for these matters (see below). Full details of the offence and the contact details of the victim and offender need to be provided. However, a restorative process could also feature in plea and sentence agreements, or even in a sentence order.

What kinds of cases can be referred?

There are no restrictions as far as the nature of the offence is concerned, apart from the special considerations in sexual and domestic violence offences (see below). The detailed consideration of the Thabethe matter above should not obscure the fact that a restorative process can be facilitated in any kind of offence. Situations where it is evident that the offence arose out of some relational conflict are particularly suitable; property crimes are also very suitable. The willingness of the victim to participate is likely to be the main factor that needs to be considered. Utilizing a restorative process can be a highly effective way of addressing the needs

of victims, for helping offenders accept responsibility, and of addressing the denunciatory and educative aims of sentencing. Standards 4 and 6 listed in Frank and Skelton (2007:12-15) regarding obtaining the informed consent of the victim[5] and the need to address any power imbalances, cultural differences and safety issues must be noted.

Who should facilitate a restorative process?

There are currently no statutory requirements regulating who may fulfil this task. A number of probation officers have received training in restorative justice and facilitation and so may theoretically be able to take on this task in addition to compiling a pre-sentence report. It should be noted though that the skills necessary to compile a report are not the same as those needed to facilitate a restorative process. Specific training in the theory of restorative justice, conflict resolution skills and mediation as a minimum is essential. A number of private agencies also undertake this work. It is likely that there is no such service available in most jurisdictions and it may be part of the activist role of a sentencing officer to lobby with the Departments of Justice and Constitutional Development and Social Development to ensure that this becomes possible.

Does a restorative process replace a pre-sentence report?

This depends on the context and what a sentencing officer is looking for. A restorative process does not replace a pre-sentence report and vice-versa, and on occasion both may be suitable.

Preparation

Standards 7 and 8 regarding the voluntary nature of participation need to be noted (Frank and Skelton 2007:16-18). In view of the discussion above regarding how improvements to the way the Thabethe matter was facilitated the following additional standard can be added:

- Facilitators must identify and engage anyone who has an interest in the outcome of the matter including all relevant community stakeholder groups without compromising the safety of the victim and the victim's ability to participate freely in the RJ process. Where children are involved, every effort should be make to secure a professional person to support the child at the conference

Facilitation

Standards 10 -24 in Frank and Skelton need to be noted (2007: 20-29). It is worth quoting the following standards in full:

Standard No. 13: Participants should be informed that the proceedings are confidential. Parties may make an informed decision, by consensus, to dispense with confidentiality.

Standard No. 14: The participants should be informed of the need to acknowledge and manage power imbalances that may result due to issues such as gender, race, age, economic disparities, etc. in the proceedings.

Standard No. 15: The facilitation of the process should provide all parties with opportunities for participation.

Standard No. 16: The process should expressly acknowledge the harm caused to the victim.

Standard No. 17: The process should recognise and enable the fulfilment of the needs of victims such as the need for the acknowledgement and vindication, the need for answers, and the need for compensation.

5 Applying this to an abused child requires special caution on the part of the facilitator

Standard No. 18: The process should respect the experiences and feelings of offenders.

Standard No. 19: Offenders should be afforded the opportunity to respond to the obligations created by the offence, including offering reparation.

Standard No. 20: The process should not be a cruel, demeaning or degrading experience for either party.

Standard No. 21: Agreements in restorative justice processes should be entered into voluntarily.

Standard No. 22: Agreements should be reasonable and achievable.

Standard No. 23: The nature of reparation should not be disproportionate to the harm caused.

Standard No. 24: Restorative justice agreements should seek to provide a balance between meeting the needs of the victim and promoting offender reintegration.

In the light of the earlier discussion, the following additional standards are proposed:

- Where children are involved, special attention must be given to:
  - the nature of the crime – and whether the crime was committed over time or a single incident.
  - the power imbalances between offender and victim
  - the pressures on the child victim from other family/community members to comply with the RJ process
  - the ongoing safety of the child if the offender is given a non-custodial sentence
  - the issue of confidentiality
- Restorative justice agreements should address the needs of the immediate and wider community, such as the need for denunciation of the wrongdoing, affirmation of community and universal values and education about values, norms and mores;
- Restorative justice agreements should list any environmental factors that contributed to the crime, which authorities responsible for crime reduction strategy should be informed and by whom.

Monitoring and reporting to court

Standards 25-31 in Frank and Skelton (2007: 30-35) regarding written agreements, informing parties about the consequences of failing to comply with the agreement, monitoring compliance, assessing satisfaction by parties, reporting to court and public disclosure are relevant.

When a restorative justice process has been facilitated for the purpose of informing a sentence, the report should cover the following matters:

- Identifying particulars
- Actions followed during preparation

- Summary of matters discussed during the process
- The agreement reached.

Whatever the specifics of an agreement are, if a non-custodial sentence is selected by the court the outcome of a restorative justice process can be included in one of the following sentence options (Terblanche 2007: 176):

- Conditional postponement or suspension a sentence or caution or reprimand (Section 297)
- Correctional supervision (Section 276 (h))
- A compensation order (section 300) could be used in addition to both the above options.

Specific concerns

Both Standard 6 and 14 in the Practice Standards (Frank and Skelton 2007: 15, 23) refer to the need to deal with power imbalances, cultural differences and/or safety concerns. These can arise in any case, but are likely to be particularly important in matters that involve domestic violence and sexual offences, and especially incest. In view of the additional complexity and sensitivity required they deserve special attention here.

Jülich (2000: 153) makes the following recommendations for facilitators for dealing with restorative justice processes that involve either domestic violence or sexual abuse:

> Prior to the preparation of restorative justice conference facilitators must have an understanding of the following:
>
> - Zero tolerance to violence
> - The dynamics of child sexual abuse and/or domestic violence
> - That these offences are manifestations of an abuse of power and control within a pre-existing relationship.
>
> The preparation for restorative justice conferences must consider the following:
>
> - Selection of appropriate facilitators based on the three points outlined above
> - Mixed gender co-facilitators
> - A series of pre-conference conferences organised by the facilitators with offenders and victims independent of each other
> - Balance of power between victim and offender
> - Safety issues for all participants including facilitators
> - The aims and objectives of the restorative justice conference
> - Accessibility to supervision and debriefing.

Writing in the context of dealing with incest specifically, Spies (2009:22) concurs with this, also emphasizing the importance of thorough preparation before a process and that it must be clear how it will contribute to the healing process. It is also ‘of great importance that the child experiences the perpetrator to be the guilty party

and that the child also receives a word of apology from him/her'. This choice of words is most unfortunate as it does not begin to do justice to what is required of an offender at the profound moment of encountering a victim. Brunk (2001:51) refers to the '"deeply spiritual" aspects of the events that take place when offenders come to terms with the pain they have inflicted on victims or their families and express repentance, and when victims or their families experience personal healing from offenders' acts of repentance and their own ability to forgive'.

It seems clear that the objective of how a restorative process in a matter of domestic violence or sexual abuse can contribute to the healing of a victim and the objective of crafting a suitable sentence must be kept distinct from each other[6].

Writing as both a survivor of abuse as well as a researcher, Jülich (2000: 152) articulated her needs during the trial of 'her' perpetrator as:

- A real voice
- For the offender to understand that he was responsible and accountable for his actions
- For the offender and both our families to understand the impact his offending had on my life
- To understand what had driven him to offend
- To ensure that no other child would be abused by this particular offender.

In her case, these needs were not met by the criminal justice system, but she believes that they could have been met by a restorative justice process. It needs to be noted that she does not make any direct reference to the kind of sentence she felt would be appropriate. Given the difficulty that incest survivors in particular have in working through possible guilt feelings regarding the sexual abuse, their anger and their sense of betrayal by the person whose role should have been their protector great care should be taken not to add a further burden to the victim. Facilitators must be alert to the possible perception that because of her opinion, she is responsible for sending the perpetrator to prison, or, when the perpetrator is the breadwinner, she is responsible for negatively affecting the well-being of the family as a whole. Such a perception could conceivably arise in a discussion about the resolution of an incident and the recommendation that is made to court. Given these complex dynamics and pressures, it is essential that a victim be accompanied by at least one support person of his/her choice during a restorative justice process.

CONCLUSION

Viewed from a number of perspectives, the role that the criminal justice system, and sentencing officers in particular, play in responding to and reducing crime is in crisis and at a crossroads. Politically, the issue is complex and sensitive and one can infer from the way the SALRC's report has been dealt with in contrast to the minimum sentencing legislation that significant, creative initiatives at this level are highly unlikely. Sentencing officers are excellently positioned with strong mandates from the superior courts to play an activist role, using the frameworks of therapeutic justice and restorative justice to link criminal matters to social justice; in this way, sentencing practice can be transformed to become more 'imaginative', 'innovative and proactive', 'humane and balanced' from the ground up. Probation officers can play a supportive role in pursuing this aim, but the primary challenge is to sentencing officers.

6 Thanks to Joan van Niekerk for articulating this distinction.

BIBLIOGRAPHY

Andrews D. &Bonta J. 2006. *The psychology of criminal conduct2nd Edition*. Cincinnati, OH: Anderson.

Batley, M.B.C 2012 *Handbook for counsellors of Abused Women*. Chapter 29: Restorative Justice. Tswaranang Legal Advocacy Centre.

Beauchamp, T. 2013. The Principle of Beneficence in Applied Ethics in *Stanford Encyclopedia of Philosophy.* Downloaded from http://plato.stanford.edu/entries/principle-beneficence on 19 December 2013

Bruce, D. 2010. *Tackling armed violence key findings and recommendations of the study on the violent nature of crime in South Africa.* Johannesburg. Centre for the Study of Violence and Reconciliation, downloaded from www.csvr.org.za accessed 12 November 2011.

CG Brunk, Restorative justice and the philosophical theories of criminal punishment in Hadley, M. 2001. *The spiritual roots of restorative justice*. New York: New York University Press.

Burton, P. *et al.* 2009. *Walking the Tightrope: Youth Resilience to crime in South Africa.* Cape Town. Centre for Justice and Crime Prevention, Monograph Series, No 7.

Cilliers C & Smit J 2007. 'Offender rehabilitation in the South African Correctional System: Myth or reality? ' *Acta Criminologica* 20(2).

Department of Justice and Constitutional Development, 2014. *National Policy Framework for Restorative Justice,* Pretoria.

Department of Social Development. *Policy Framework for the Accreditation of Diversion Services in SA* Pretoria. (ND, no page numbers).

Department of Social Development, 2011.*Integrated Social Crime Prevention Strategy*, Pretoria.

De Vos, P. 2009. *Between judicial activism and judicial restraint*. Downloaded from www.constitutionallyspeaking.co.za on 18 December 2013

du Toit et al in van der Merwe(ed). 2009. *Commentary on the Criminal Procedure Act.*28-10A to 10-B1. Claremont: Juta.

Ensor, L. 2013. Overcrowding in South African prisons falls in *Business Day*, downloaded from www.bdlive.co.za on 19 December 2013.

Frank, C. &Skelton, A. 2007. *Practice Standards for Restorative Justice: A Practitioner's Toolkit*. Pretoria, Restorative justice Initiative Southern Africa.

Farrington,D.P. 2007. "Childhood risk factors and risk-focused intervention", in Maguire, M. Morgan, R. Reiner, R. (Eds).*The Oxford Handbook of Criminology (4th ed)* Cape Town: Oxford University Press.

Gottfredson, M.R. &Hirschi, T. 1990.*A general theory of crime*. Stanford, Stanford University Press.

Henkeman, S. 2012 *Restorative Justice as a Peacebuilding tool: a South African case study:* Unpublished PhD thesis, University of KwaZulu Natal, Durban, p246).

Henkeman, S. 2013. '"Pale face"/"Pointy face": SA criminology in denial'. *SA Crime Quarterly no 45*, Pretoria, Institute for Security Studies.

Hollin, C.R. 2007. "Criminological psychology", in Maguire, M. Morgan, R. Reiner, R. (Eds).*The Oxford Handbook of Criminology (4th ed)* Cape Town: Oxford University Press.

Holtmann, B. 2008. "Why law enforcement is not enough". *SA Crime Quarterly no 23*, Pretoria, Institute for Security Studies.

Jülich, S. 2000. 'Appendix 3: Restorative Justice, Child Sexual Abuse and Domestic Violence' in *New Zealand restorative justice practice manual*. Auckland, Restorative Justice Trust.

Müller,K. & A. Van der Merwe 2006. "Recognising the victim in the sentencing phase: the use of victim impact statements in court". *South African Journal for Human Rights* 662-663

National Institute for Crime Prevention and Reintegration of Offenders, 2010.*Nicro's Non-Custodial Sentencing Stakeholders' Toolkit.*

National Planning Commission. 2011. *National Development Plan*. Downloaded from www.npc.gov.za 15 November 2011.

Newham, G. 2013. Warning Lights Flashing: Exploring police abuses and performance in SA. Paper presented at the Institute for Security Studies Conference *National and International persepcives on crime and criminal justice 21 & 22 August 2013*. Downloaded from www.iss.org.za 6 September 2013.

Pelser, E. 2007."How we really got it wrong". *SA Crime Quarterly no 22*, Pretoria, Institute for Security Studies.

Rock,P. 2007. "Sociological theories of crime", in Maguire, M. Morgan, R. Reiner, R. (Eds).*The Oxford Handbook of Criminology (4th ed).*Cape Town: Oxford University Press.

South African Law Reform Commission. 2000. A new sentencing framework. Discussion Paper 82. Pretoria: Government Printer

Schweigert, F. J. 1999a. "Learning the Common Good: principles for community-based moral education in restorative justice". *Journal of Moral Education*, Vol 28: 2 pp163-183.

Schweigert, F.J. 1999(b). "Moral Education in Victim Offender Conferencing". *Criminal Justice Ethics*, Vol. 18: 2 pp. 29-40.

Schweigert, F.J. 2000."Mending the Moralnet: moral education in strengthening personal and family networks". *Journal of Research and Development in Education*Vol 33: 2 pp74-84.

Schweigert, F.J. 2002a. "Solidarity and Subsidiarity: Complementary Principles of Community Development".*Journal of Social Philosophy*, Vol. 33: 1 pp. 33-44.

Schweigert, F.J. 2002b. "Moral and Philosophical Foundations of Restorative Justice", in Perry, J. (Ed.), *Repairing Communities through Restorative Justice.* Lanham, MD: American Correctional Association, pp. 19-37.

Skelton, A.M, 2005 *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice*, unpublished LLD thesis

Skelton, A. 2006. Response from a restorative justice perspective. Paper delivered at the Open Society Foundation for SA conference S*entencing in South Africa*, 25-26 October 2006.

Skelton, A. & Batley, M. 2008. "Restorative justice: a contemporary South African Review". *Acta Criminologica* 21(3) pp37-51.

Skelton, A. 2013. 'The South African Constitutional Court's restorative justice jurisprudence'. *Restorative Justice: An International Journal* 1(1)

South African Police Service. 2012. *Addendum to the Annual Report 2011/12 relevant to the SAPS Analysis of the National Crime Statistics 2011/2012*. Pretoria: downloaded from www.saps.gov.za on 3 June 2013.

Spies, G.M. 2009. Restorative justice: a way to support the healing process of a child exposed to incest. In *Acta Criminologica 22(1)* 2009.

Stanton-Ife, J. 2006. The limits of law in *Stanford Encyclopedia of philosophy*. Downloaded from http://plato.stanford.edu/entries/principle-beneficence on 19 December 2013

Statistics South Africa. 2012.Victims of Crime Survey – reference period Janaury to December 2011.Pretoria, Statistics Sotuh Africa.

Terblanche, S. 2008. *Research on the sentencing framework bill*. Cape Town, Open Society Foundation of South Africa.

Tonry, M. 2006. Keynote address delivered at the Open Society Foundation for SA conference S*entencing in South Africa*, 25-26 October 2006.

United Nations Office On Drugs And Crime United Nations 2006. *Handbook on Restorative Justice Programmes* Criminal Justice Handbook Series available on http://www.unodc.org/pdf/criminal_justice/ 06-56290_Ebook.pdf

United States Sentencing Commission, Guidelines Manual, §3E1.1 (Nov. 2013)

Umbreit, M.S. 2001. *The Handbook of victim offender mediation: an essential guide to practice and research*. San Francsico: Jesey-Bass.

Van der Merwe A 2013 (3) 'A new role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act 75 of 2008' *De Jure* (2013) 1022-1038

Van der Merwe A 2010 *Therapeutic Jurisprudence: judicial officers and victims' welfare – S v M 2007 2 SACR 60 (W)* SACJ 2010(1)

Van der Merwe, A. & Skelton, A. Forthcoming. Victims' mitigating views in sentencing decisions: A comparative analysis

Van Ness, D. 2005. "An Overview of Restorative Justice Around the World". Paper presented at *Eleventh United Nations Congress on Crime Prevention and Criminal Justice,* Bangkok, Thailand, accessed from www.rjonline.org on 12 August 2007.

Van Ness, D.W. & Strong.K.H. (2002). *Restoring Justice*. Cincinnati: Anderson Publishing Company.

Van Zyl Smit, D. 2004. Swimming against the tide: controlling the size of the prision population in SA in Dixon, B. &van der Spuy, E (eds) *Justice gained? Crime and Crime Control in South Africa's transition.* Cape Town: UCT Press.

Winterdyk, J. 2013. "*It's never too late": A paradigm shift to public safety… 'From away'* Public lecture at the University of Pretoria 17 October 2013

Wright, M 2010. *Towards a restorative society: a problem-solving response to harm*. London: Restorative Justice Council.

Cases

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

DPP v Thabethe (619/10) [2011] ZASCA 186 (30 September 2011); Submissions of the *Amicus Curiae*, para 46

RESTORATIVE
JUSTICE CENTRE
communicate • restore • train

Restorative Justice *is the only (theoretical) approach that provides a formal basis for the use of wide discretion in sentencing alternatives.....*

OPEN SOCIETY FOUNDATION
FOR SOUTH AFRICA