

THE PERSPECTIVES OF SOUTH AFRICAN LEGAL PROFESSIONALS ON RESTORATIVE JUSTICE: AN EXPLORATIVE QUALITATIVE STUDY

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Disillusionment with especially imprisonment has led to the option of implementing restorative justice. However, restorative justice is not currently utilised to its fullest potential extent in South Africa. A possible explanation for the limited application was investigated by exploring the views that legal professionals hold about restorative justice. In order to obtain an in-depth understanding of these opinions, a qualitative research methodology was employed. It revealed a generally positive disposition by the participants towards restorative justice, although some cautionary preconditions were recommended. This exploratory finding opens the door for forensic professionals to consider this option more frequently.

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INTRODUCTION

Growing crime rates are a great concern in South Africa and a resulting “tough on crime” approach is widely proclaimed. The practical application of this approach is primarily evident in the focus on more arrests and prosecutions, on the one hand, and harsh sentences for individuals convicted of crimes, on the other (Batley & Maepa, 2005). Despite this strategy, however, crime remains a problem, leading to an increasing awareness and realisation that the current methods of responding to crime are not effective. In fact, data from a large body of research suggest that long sentences and harsh punishments on their own have very little deterrent effect (Gould, 2013). It is understandable that South Africa is following the global trend of looking for alternative ways to respond to crime and the way crime is dealt with globally (Pardini, 2016; Sherman, Nevroud & Nevroud, 2016).

Forensic social workers and psychologists are also increasingly pleading for alternatives to imprisonment, especially concerning less serious crimes or where the offender does not pose a danger to society. There are multiple reasons for this; for example, rehabilitation in prisons has largely failed, the costs of imprisonment have become almost unaffordable, prison overcrowding is an appalling reality, while innocent persons such as the family are also punished in the process.

The search for an alternative method to imprisonment has resulted in the formalisation of restorative justice, a concept which has a proverbial long past but a short history. Unfortunately many courts are still relatively unfamiliar with, or even wary of, this “non-traditional innovation”.

Against this background the goal of this exploratory study was to gain a more qualitative and thus in-depth understanding of the perspectives of legal professionals in South Africa on restorative justice. In the process a possible explanation for the limited application of restorative justice was also explored. In order to present the goal of the article in a logical format, a literature review will first give a short overview of restorative justice from an indigenous perspective, followed by an account of the research methodology used. The results are presented and discussed next, before the article draws some conclusions.

LITERATURE REVIEW

A definition of restorative justice widely accepted by its advocates is provided by Zehr (2015:39), which is an adaptation of Marshall’s (1999) description: “Restorative justice is a process whereby parties with a stake in a specific offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the

future" (also see Clark, 2012; Hargovan, 2011; Wood & Suzuki, 2016). The goal is repairing the harm caused by the crime and involving the often neglected victim and the community.

An important aspect that is often overlooked by the Western-oriented courts in South Africa is that restorative justice is firmly embedded in African cultural traditions (Schoeman, 2016; Skelton, 2007). In this regard Pillay (2005) argues that race and cultural identity could be considered reasons behind several cultural groups feeling alienated from the criminal justice system. These forgotten, or ignored, traditional African roots of restorative justice will be discussed next.

Indigenous roots of restorative justice

The enforced changes brought about by colonisation have had profound consequences in the application of justice in colonised countries: "indigenous restorative justice was repressed in favour of a retributive justice ... which limited decision making to members of a small elite" (Naude, Prinsloo & Ladikos, 2003:1; also see Clamp, 2016).

Before European colonisation, the social structure of indigenous cultures was communitarian. People lived in close proximity to one another and a community was characterised by close interpersonal relationships and inter-dependence. This way of life influenced and directed the way these communities responded to crime and disputes between members. Reconciliation formed the basis of this process (Mangena, 2015; Skelton, 2007).

It has been argued that traditional indigenous justice practices and restorative justice have many factors in common, and this is especially true for traditional African justice. (Sherman & Strang, 2009).

Restorative justice in the African context

Despite the influence of colonisation, traditional methods of dispute resolution have remained relevant and active in especially traditional African communities (Mekonnen, 2010). Omale (2006) suggests several reasons for the preference to resort to traditional African methods of administering justice, such as limited access to the formal criminal justice system by people living in rural areas; inadequate methods of applying offered by the formal criminal justice system to resolve disputes between individuals where close relationships and interactions characterise the relations between rural community members; minor disputes in rural communities not being accommodated because of the limited resources of the criminal justice systems in most African countries; the tendency among rural community members to avoid the involvement of "outsiders" (such as the urban police and criminal justice officials) in disputes in the community; and lastly, the reluctance of rural communities to rely on the formal justice system could be related to the mistrust of "settlers" or of colonial justice.

It has been asserted by African scholars that the traditional African method of administering justice is very similar (if not exactly the same) as restorative justice (Mangena, 2015; Tshehla, 2004; Tutu, 1999). In confirmation of this claim, Skelton (2007) highlights several factors common in both traditional African justice and

restorative justice: both processes aim for reconciliation and restoring peace in the community; both approaches promote social norms which emphasise community duty as well as individual rights; dignity and respect are considered to be central values; both processes share the view that a crime is a harm done to the individual and the broader community; simplicity and informality of procedure are common features of both approaches; the law of precedent does not apply to the outcomes of either process; community participation is actively encouraged in both processes; and restitution and compensation are highly valued by both traditional African justice and restorative justice.

This outlook on life is characteristic of the African philosophy of *ubuntu*, where understanding and not vengeance is a basic concept (Mokgoro, 1997). Described as such, it is clear that the concept of restorative justice resonates with the philosophy of *ubuntu*. Van Niekerk (2013:412) also emphasises that South Africa's highest courts have commented on their "interrelation with the African principle of *ubuntu*, which is regarded as a fundamental postulate of African customary law and in effect the foundation of restorative justice in African jurisprudence".

Restorative justice in the South African context

Skelton (2007) argues that South Africa's indigenous basis of knowledge of traditional justice practices is an enormous advantage in explaining and promoting restorative justice in South Africa (also see Mangena, 2015). Because the principles of restorative justice are not new, one can argue that the restorative justice movement is simply a recent return to traditional methods of African justice. Despite the traditional heritage of restorative justice and wide familiarity with its principles, however, it does not play the role it deserves in the criminal justice system of South Africa.

As the criminal justice system in South Africa is based on Western concepts, the question arises as to whether justice wouldn't be more relevant and accessible if it were to be based on (South African) experiences, traditions and values. While several of the central principles of restorative justice are consistent with the African worldview and therefore more relatable and accessible to South Africans, it seems that it is ideally suited to the African context (Ovens, 2003; also see Mangena, 2015).

METHODOLOGY

Research design

In order to gain a more extensive understanding of the opinions held by legal professionals in South Africa regarding restorative justice, a qualitative method was employed. This method provides the researcher with a deeper and thus more comprehensive understanding of the data than a quantitative method. It is also more flexible and can be adjusted to fit the specific situation (Roller & Lavrakas, 2015; Ruben & Babbie, 2016).

Ethical clearance was received from the Research Committee of the Faculty of Humanities at the University of the Free State, while permission was also obtained from the Office of the Judge President in Pretoria.

Sampling and data collection

In this study the total population of participants is referred to collectively as “legal professionals”. They were sub-divided into five groups, namely judges, magistrates, prosecutors, advocates and lawyers. The aim was to obtain five participants for each of the five groups. However, for two of the groups (prosecutors and magistrates) only four participants could be obtained. Thus 23 participants were included in this study.

A convenience sampling methodology was applied to identify participants for this study, with accessibility as one of the main principles (Maree, 2013). As a result of practical and logistical constraints (for example, availability during normal working hours for participants) sufficient data could not be obtained by means of face-to-face interviews. The qualitative research questionnaire (“questerview”) method was therefore electronically employed (Davies, 2014; McCleod, 2008), a method the participants preferred: a self-compiled questionnaire consisting of 10 open-ended questions relating to particular aspects of restorative justice. The questionnaire was completed by the participants and returned electronically.

The biographical data of the participants were as follows:

- * *Age*: 30-45 = 4; 46-60 = 15; 61-70 = 4. Average: 54 years.
- * *Gender*: Male = 21; Female = 2.
- * *Language*: Afrikaans = 14; English = 3; Sesotho = 4; Other = 2.
- * *Race*: White = 15; Black = 5; Coloured = 2; irrelevant = 1.
- * *Legal experience in years*: 10-20 = 5; 21-30 = 9; 31- 40+ = 9. Average: 28 years

To simplify the analysis of the data, a separate document was created for each question and the responses of all the participants were captured per question. Each question was analysed separately to extract themes related to that specific question based on the responses of the participants. This process is called thematic analysis, which Braun, Clarke and Terry (2015:95) describe as “a method for identifying, analysing and reporting patterned meaning or ‘themes’ in qualitative data”. Thematic analysis was chosen to analyse data as it is a flexible method that allows themes to emerge from data. In addition, the thematic analysis is not derived from any specific theoretic stance or epistemological position, which is in accordance with the present study (Kerkelä *et al.*, 2015). In some cases the same theme and similar feedback appeared under more than one question. In order to avoid duplication, the theme and feedback were mentioned and discussed only once.

RESULTS AND DISCUSSION

The exposition of the analysis was arranged in the following manner: each question was dealt with individually and presented as a separate heading, with the analysed themes that emerged from each question explored under this heading; the themes that emerged from the data are discussed with excerpts from participants’ responses that corroborate each theme together with the identifying code included in italic font. In order to preserve anonymity, each participant had an identifying code assigned to them. These codes were

constructed by applying the following logic: first participants were categorised according to the sub-group they belonged to with a capital letter. These sub-groups were as follows: Judges = J; Magistrates = M; Prosecutors = P; Advocates = A; and Lawyers = L. To distinguish between participants from each group, each participant was assigned a number. Thus, the five participants in the sub-group "Lawyers" were assigned the identifying codes L1, L2, L3, L4 and L5. This method was applied to all the sub-groups. As this study followed a qualitative methodology, the findings were not explored in terms of quantities or statistical averages, but discussed in terms of "the majority" or "most" (indicating a significant majority), "the minority" (a significant minority) "a similar number of" (no significant difference in opinion) and "a number of" (a relatively small number of, or a few). The focus was therefore on exploring the themes that emerged and the trends observed from the data. The discussion of each question follows next:

- **Suitability of restorative justice in the South African context**

Question: Do you think restorative justice is suitable in the South African context?

Theme 1: The majority of participants were of the opinion that restorative justice is indeed suitable in the South African context. In fact, some of the participants suggested that not only is restorative justice suitable, but it is necessary in South Africa: "*Restorative justice principles are not only suitable in South Africa, but it is absolutely imperative that these principles be applied in the South African justice landscape*" (L1); "*Restorative justice is not only suitable and part and parcel of the South African context, but urgently needed*" (M3). Skelton (2007) rightly states that the early years of democracy in South Africa were characterised by restorative justice values such as reconciliation and reintegration (the primary example of this is the Truth and Reconciliation Commission). However, the rising crime rate and corresponding reactions of fear and distrust that the system can protect the average citizen derailed the restorative approach over time in South Africa.

Theme 2: Most participants who answered yes to this question supported their view by stating that there is undue emphasis on retribution in the current South African justice system, and therefore restorative justice could contribute towards providing a more balanced approach. "*Undue emphasis is placed on retribution*" (A1); "*To turn society's mind from retribution to restoration*" (L3). The government response to the rapid increase in crime and the consequent public fear of crime resulted in the adoption of a "tough on crime" approach (Batley, 2013). Thus one could argue that the current method of responding to crime should not change to a new approach, but rather return to an approach that is innate to the new democracy of South Africa.

Theme 3: The emphasis placed on retribution in the South African justice system is evident in the practice of imprisonment as the "go-to" option for dealing with offenders, despite the availability of alternative options. A number of participants mentioned this factor: "*Too long it has been customary to simply imprison offenders despite the availability of the viable, practical and less damaging option of restorative justice*" (L1); "*Often people are sent to jail with dire consequences, where restorative justice*

could have been used instead" (L2); "If restorative justice was applied, jail could have been avoided and the victim more satisfied" (P3). These viewpoints are supported by the international finding that harsher punishments to offenders have little success in preventing crime (Batley & Maepa, 2005; Kleck & Jackson, 2016). It is thus understandable that the Executive Summary of Discussion Paper 82 on a new sentencing framework (South African Law Reform Commission, 2000:xxix) points out that "imaginative South African restorative alternatives are not being provided for offenders that are being sent to prison for less serious offences".

Theme 4: Most participants commented that the use of alternative sentencing options (such as restorative justice) could produce more beneficial results than simply imprisoning an offender. *"Victims gain nothing from the sentence and is still out of pocket whereas, if restorative justice was applied, prison could be avoided and the victim compensated" (L2); "Making restitution to the victim would serve the objects of punishment to a more advanced degree" (J5); "Restorative justice keeps suitable candidates out of prison, thus encouraging rehabilitation within society and less family disruptions" (J4); "Restorative justice promote society's confidence in the administration of justice and people will identify more with the criminal justice system" (M2).* Next to avoiding the already mentioned disadvantages of imprisonment, the Department of Justice and Constitutional Development (2011:10) also states: "Research indicates that offenders who experience restorative justice interventions are less likely to re-commit further offences than similar offenders who are subject to more conventional interventions".

Theme 5: Restorative justice should only be used in suitable circumstances as emphasised by a number of participants: *"Provided it is applied in appropriate cases" (A2); "Only in appropriate cases, the punishment should still fit the crime" (M2); "Depending on the nature of the charges, restorative justice may be applied in South Africa – there are cases where, due to the seriousness of the crimes charged, emphasis is to be placed on retribution" (P3); "Restorative justice could be a suitable option for serious crime, but the field of application should be limited to exceptional and deserving circumstances" (P2).* This viewpoint is in accordance with the principles of restorative justice; the point of departure is that the interests of the community and victim are of essential importance, not only that of the offender.

- **Effectiveness of rehabilitation in prison**

Question: Do you think rehabilitation in prison is effective?

Theme 1: Most participants did not think that rehabilitation in prison is effective. Specific responses included: *"No, it is a dismal failure" (L4); "Not even remotely" (P1); "Definitely not" (L2); "No, statistics prove this" (L5); "There is a wealth of material and cases which lend support to the view that rehabilitation in prison is a figment of the imagination" (A5).*

Theme 2: The majority of participants substantiated their view of the ineffectiveness of rehabilitation in prison by referring to the high incidence of recidivism. *"Recidivism*

remains high" (J4); "*What is disturbing is the fact that all too significant numbers of offenders re-offend*" (P1); "*Very often accused persons in court have previous convictions and history of previous custodial sentences – this would create the impression that rehabilitation is not always achieved in prison*" (J1).

Theme 3: A couple of participants mentioned that in their opinion, few people who are sent to prison display improvement in adaptive and socially acceptable behaviour upon their release. "*Very few people who go to prison come out better people*" (M4); "*Most people come out worse people than they went in*" (J4). Some participants attribute this to the fact that when offenders are sent to prison, they come into contact with hardened criminals, who may have a negative influence on them and their future behaviour. "*People in jail come into contact with hardened criminals and come out worse than they went in*" (L2); "*Prison leads to exposure to criminal behaviour in concentrated forms*" (M3). These views are in alignment with the suggestion by Braithwaite (1999) that offenders might have stopped with criminal activities had they not been sent to prison, where they came into daily contact with other criminals from whom they can learn new criminal skills. In addition, demeaning experiences in prison could therefore engender defiance and anger, which could result in further criminal acts upon release in retaliation. This raises the question as to what extent the prison environment provokes criminal behaviour more than it curbs it.

Theme 4: Regarding the prison environment, a few participants mentioned that prison facilities are incapable of addressing the issue of rehabilitation. "*A prison is an unnatural environment where rehabilitation cannot be practised and applied*" (M3); "*The prison environment is not conducive to rehabilitation*" (P2). Batley (2005:27) shares this view in a statement: "Conditions in the average prison are far more detrimental to rehabilitation than any good served by therapeutic programmes".

Theme 5: Overcrowding is mentioned by most participants as the main reason for the failure of rehabilitation in prison. "*Prisons are overcrowded*" (A4); "*The prison population keeps climbing*" (L3); "*In many instances, largely due to overcrowding, prison has an adverse rather than a positive impact on an inmate*" (J5); "*Effective rehabilitation is hindered by the high prison population*" (P2). Various authors such as Muntingh (2005) and Singh (2016) point out that restorative justice options could alleviate the overcrowding problem by lowering the prison population. They add that this would facilitate effective administration of correctional facilities and proper (and more effective) correctional treatment of offenders who are incarcerated.

Theme 6: A second factor related to overcrowding of prison facilities which stood out from participants' responses as a possible contributor to ineffective rehabilitation is the lack of resources. "*There are not sufficient/adequate facilities available*" (A3); "*Lack of sufficient qualified personnel*" (A2); "*There is not sufficient professional service providers to cater to the needs of offenders*" (A5). As argued in Theme 5, however, a reduction in the prison population may result in more resources becoming available to manage prison facilities more effectively.

Theme 7: It was suggested that rehabilitation may not be effective because “*sometimes it is better for offenders in prison than outside*” (L5). This statement refers to the socio-economic circumstances of some offenders and implies that basic living needs (such as food and shelter) are better provided in prisons than on the streets. This relates to the socio-economic circumstances of many individuals in South Africa, which suggests a vicious cycle – people commit crime because of a lack of resources as a result of unemployment, which leads to being sent to prison. Researchers such as Khwela (2015) and Prinsloo, Ladikos and Naude (2003) in South Africa emphasised the adverse socio-economic factors of offenders as a main contributing factor to recidivism.

Theme 8: Some participants, however, felt that rehabilitation may be effective to a certain degree. “*Rehabilitation programmes undertaken in the prison system, if performed efficiently, may help rehabilitate offenders*” (P3); “*Only in circumstances where constructive crime rehabilitation programmes and skills development programmes exist*” (J5). The suggestion therefore is that the effectiveness of rehabilitation programmes depends on the necessary resources being available.

- **The use of alternative and creative sentencing**

Question: Should alternative and creative sentencing be used more often?

Theme 1: Most participants felt that alternative sentencing should be utilised more often. They emphasised that there are many ways of imposing punishment without resorting to custodial sentences, and that the most important purpose of punishment should be to try to restore the damage that has been caused by an offence. The nature of the participants’ responses were similar to that given in Theme 3 of Question 1.

Theme 2: Some participants pointed out that at the moment people are very discouraged by the high crime rate and thus they want increasingly harsher punishments for offenders. This may result in reluctance among communities to accept alternative methods of punishment. “*The community is so sick and tired of crime they want increasingly harsher sentences*” (P1); “*For restorative justice to be accepted by the community, it is important that measures be put in place to ensure compliance*” (A1). Given the high incidence of crime (especially violent crime), authors such as Leggett (2005) and Super (2016) suggest that restorative justice alternatives could be perceived as being “soft on criminals”. However, he also concludes that South African victims of crime may not be as vindictive and focused on retribution as one might expect, and that South Africans in general may be more receptive to restorative methods of resolving criminal incidents. In contradiction to the view about society’s vengeful reaction to crime, another respondent felt that alternative sentences may be welcomed by the community: “*Alternative sentences are more ‘visible’ to the community – the community does not witness punishment when the offender is in prison, but they will see him if he works in public as part of his community service*” (L2).

- **The contribution of victims to the justice process**

Question: Do you believe victims should play a more active part in the justice process? How could they contribute?

Theme 1: Almost all the participants responded that the victim should indeed play a more active role in the justice process. A few even pointed out that in the current criminal justice system the victim is hardly involved, if at all. “*Often the victim is not very well represented in court*” (M2); “*Victims are mostly forgotten during the whole legal process, especially thereafter*” (P1); “*Victims are seldom heard and the consequences of crimes are not properly brought to the attention of the court*” (M4). Victim participation is foundational to restorative justice. The *United Nations Handbook on Restorative Programmes* (United Nations, 2006:9) specifically describes one of the objectives of restorative justice as “supporting victims, giving them a voice, encouraging them to express their needs, enabling them to participate in the resolution process and offering them assistance”. Thus, in order for restorative justice to be seriously considered by legal professionals in the South African justice system, it is important for them to understand the importance of victim participation in the process.

Theme 2: Many participants felt that the victim should have an opportunity to confront the offender. “*Victims should have an opportunity to face the offender, confront him with the consequences of the offence and be made to feel to have a place in the process*” (L4); “*The victim should be allowed to vent out their anger in a controlled environment so that offenders can appreciate the damage of their actions*” (J4); “*Victims are owed an apology and hearing the offender apologise may go a long way towards healing*” (A5); “*Victims should be allowed the opportunity to know more about the offender and understand the underlying factors causing the behaviour of offenders*” (P2). The benefit of restorative justice in this regard is that it provides a safe environment in which victims can express their anger (and any other emotions related to their experience of the crime) in a constructive way, which is generally not available in the current criminal justice system (Batley, 2005).

Theme 3: Most participants indicated the sentencing process as the area in which the victim can make the greatest contribution to the justice process. “*The views of victims should be taken into account for sentencing*” (A4); “*Victims can contribute a great deal to sentencing by testifying*” (M4); “*Victims can contribute by testifying before sentence is passed and explaining how she or he was affected by the crime*” (A2).

Theme 4: Another area participants indicated where victims should be more involved is when offenders are considered for parole. “*If an offence has been committed against a person, that person should have a say when the perpetrator is considered for parole*” (A5); “*Victims’ views must be part of the record and they must be involved in parole decisions*” (M2); “*The victim should be heard in sentencing and the parole process*” (J2).

Theme 5: However, some participants did highlight some cautionary aspects to be taken in consideration related to participation. “*Yes, victims should be allowed a more active part, but regulated and controlled*” (M3); “*One should bear in mind that victims often only want revenge – if their input could be monitored by objective standards it would be very useful*” (L2); “*Although the victim is the one whose rights were abused, one should still recognise that it is the state that prosecutes*” (L4).

This suggests a need to compile procedural guidelines and a framework for practical application of restorative justice options regarding victim involvement in the sentencing procedure and parole process. Such guidelines could assist in making restorative justice practices more legitimate in the eyes of legal professionals as well as inform victims of the various options available to them should they be willing to participate in the justice process.

- **The role of the wider community in the justice process**

Question: Do you think the wider community should have a more active role in the justice process? What should that role be?

Theme 1: Approximately half of the participants felt that the community should have some role in the justice process. Those participants who emphatically replied yes to this question indicated that because the community (and not only the victim) is also affected by crime, they should be allowed to be involved in the process. “*Crimes affect communities directly, therefore the community should be involved in the administration of justice*” (J4); “*Communities also suffer, crime affects everyone, therefore they should all take part*” (L4); “*Different sectors of the community are subject to different types of crime; therefore their concerns should be presented to the police, prosecution, and chief magistrates regularly*” (M1).

As mentioned in the literature review, South African society is traditionally communitarian by nature, and thus Batley (2008) and Oelofsen (2015) argue that the collective nature of South African society (in contrast to the individualistic character of Western society) may indicate restorative justice as a more suitable response to crime.

Theme 2: Participants mentioned that the first step the community can take towards making a contribution to the justice process would be to report crime and to cooperate with the police. “*Police complain that crime is not being reported because the community looks the other way*” (L4); “*Often crimes stay unsolved because the people with the relevant information are reluctant to provide it to the police*” (P4); “*The community should be involved in consultation and cooperation with the police*” (A3). It seems, then, that if the community indicates the need to be more involved in the justice process, they should take the first step by assisting the police in crime detection.

Theme 3: Many participants indicated that the community could be very useful in providing insight into the impact of a crime on a particular community. “*In appropriate circumstances, a relevant community member can testify to relate insight on how crime has affected the community*” (P3); “*Yes, the community can express their feelings about the crime*” (J3); “*In respect to violent crime, members of the community are better placed to relate the impact of the crime to the court*” (A2).

Theme 4: It has also been suggested that the community should share their views on the suitability of an offender as a candidate for community service in their neighbourhood. The community could also provide insights through their view of what an appropriate sentence may be. “*The community should express their opinion on whether an offender is suitable to be allowed to do community service in their neighbourhood*” (J3); “*There should be meetings held to hear what the community’s views are regarding how*

offenders should be dealt with and what sentences should be imposed” (A5); “*They can make sentencing suggestions*” (P2). Insights into the way that the community has been affected by a crime could therefore also provide indications for actions by an offender to atone for his offence. For example, if vandalism is a problem in a given community, they may suggest community service in the form of having the vandal wash off graffiti, or having the vandal repair the damage he/she has caused.

Theme 5: Many participants pointed out that the community can play a vital role in the reintegration of the offender. “*Community participation is essential in improving the relationship between the offender and the public in general*” (J4); “*The affected community should play an active role and be encouraged to facilitate reintegration of the offender*” (J2); “*The community should take responsibility for wrongdoers*” (L4). Batley (2005) argues that restorative practices resulting in greater community involvement will lead to improved social integration of an offender and a reduction in criminal behaviour. Although it is not always easy to get the community involved, the value of a system of volunteering should not be underestimated.

Theme 6: Some participants provided a tentative yes to community involvement in the justice system, but indicated that this participation should be to a limited degree. “*In a limited way only because the wider community is clueless about our legal system*” (A4); “*As long as the intention of their involvement is not to revert to traditional or ‘bush courts’*” (J2); “*But to a limited extent only, in appropriate cases (particularly in minor offences that affect the community directly) a report on their views might be helpful*” (J5). This concern may be related to the perception of participants regarding the anger and fear of communities directed towards offenders and subsequent requests for harsher punishments.

Theme 7: Those participants who felt that the community should not have a more active role in the justice process reasoned as follows: “*No, their views will be from the one extreme to the other – it is impossible to satisfy everyone*” (M2); “*The opinion of the masses does not always reflect what the public opinion is*” (L2); “*The wider community should be limited to that of the victim*” (A3).

Theme 9: A few participants indicated that they cannot see any practical way in which the community can play a more active part in the justice system, and therefore their answer to this question is no. “*I cannot think of any way the community could in practice play a more meaningful and active role*” (J1); “*It is difficult to perceive how community participation can be achieved on a practical level*” (A1). Another respondent took a similar view: “*I am of the opinion that a properly trained judiciary should take the opinion of the community into consideration – and that should be the extent of their involvement*” (L5). The community would thus have to be educated and informed about the criminal justice system and any alternative options in order for them to contribute more actively to the criminal justice process.

- **Suitability of restorative justice for certain types of offences**

Question: Do you think restorative justice is more suitable for certain types of offences than for others? Please specify which type of offences you think would be suitable for restorative justice.

Theme 1: Most participants indicated that restorative justice would be more suitable for “less serious” offences, meaning crimes related to property such as theft and fraud. “*Restorative justice is more suitable for minor offences*” (J5); “*Petty crimes (e.g. theft) and where the offender can repay/compensate for stolen goods are more suitable for restorative justice*” (J3); “*Any offence where there is an option for a fine is suitable for restorative justice*” (A2). Such responses support Batley’s (2005) concern that restorative justice will be perceived as appropriate only for less serious offences as well founded. The inverse of this viewpoint (i.e. that restorative justice is not suitable for serious crime) is the basis of the next theme.

Theme 2: Many participants felt that restorative justice is unsuitable for crimes involving violence. “*Generally, restorative justice is wholly unsuitable for violent crimes*” (J5); “*I am not convinced that it is applicable to violent crimes where society demands the removal and isolation of a perpetrator – such as rape and murder*” (L1); “*Crimes that may not be suitable for restorative justice include rape, murder, robbery and serious assault*” (J2).

Theme 3: Some participants felt that restorative justice should be suitable for any and every type of offence. However, they did state that the application should depend on the circumstances of the particular case. “*No, restorative justice should be an option and available for any crime, the facts of the matter must dictate*” (M2); “*All types of offences/crimes are suitable; however, the specific circumstances of each case should rather indicate if restorative justice is appropriate or not*” (A2); “*Restorative justice can be achieved in any crime, it is just easier in some crimes – each case must be considered on its own merits*” (M3).

- **The implementation of restorative justice in the current justice system**

Question: Would restorative justice be easy to implement in the current justice system? Or should things have to change drastically in order for it to be implemented?

Theme 1: Those participants who felt that it would be relatively easy for restorative justice to be implemented in the current criminal justice system suggested that the only change required would be a shift in mind-set, particularly for the role players in the legal system such as prosecutors, magistrates and judges. “*I think it could be fairly easy; we just require a mind-shift with all those who are involved*” (L2); “*I think it would require a change in mind-set more than a change in procedures*” (L4); “*Presiding officers in the Magistrate’s court and High Court should be aware of restorative justice as this entails a mind-shift from other known sentencing options*” (P2). These viewpoints suggest that for restorative justice to be accepted and implemented would not require a drastic new reformulation of the criminal justice system, but rather require a change in the way legal professionals think about how justice objectives should be approached.

Theme 2: A few participants mentioned that if victims and the community were to be informed of and educated about restorative justice, it would be easier for them to accept it, and thus also easier to implement. “*Awareness, awareness, awareness – only when the perception that non-custodial sentences are lenient/soft/ inappropriate changes, then our society will start to see the benefits of restorative justice*” (L1); “*Victims and the community at large will have to be galvanised to participate – it should be part of the wider endeavour by society to rid us of crime*” (L4). These views tie in with Theme 10 in Question 5, suggesting that the creation of awareness and the provision of information about restorative justice practices, as well as alternative options which could be provided by restorative justice, are crucial in the implementation and acceptance of it in the current justice system.

Theme 3: Some participants pointed out that some restorative justice principles are already being implemented to some degree. “*Restorative justice is already implemented in the Department of Correctional Services*” (J2); “*The Criminal Procedure Act already caters for the involvement of victims of aggressive crimes when the offender is considered for parole, and diversion from prison is also catered for*” (A5). Batley (2013) explains that although there is no South African policy that explicitly addresses restorative justice issues, there have been several policy initiatives that pertain to restorative justice since the emergence of the new democratic South Africa in 1994. These include the Probation Services Amendment Act (Act 35 of 2002); the Child Justice Act (Act 75 of 2008); the Executive Summary of Discussion Paper 82 on a new sentencing framework; the Discussion Paper 94 on community dispute resolution structures and the National Policy Framework for Restorative Justice, which was approved by the directors-general of the justice, crime prevention and security cluster in 2011.

Theme 4: Suggestions have been made regarding how restorative justice could be implemented within the current justice system without too much difficulty. “*It can be implemented within the existing system; it can be used as part of diversion programmes or during sentencing as mitigating*” (M1); “*It should not be difficult; correctional supervisors can be used to monitor it*” (M2); “*It could possibly be achieved through conditions made applicable to suspended sentences*” (J1). It would be useful to investigate those areas within the current criminal justice system where restorative justice could be implemented fairly easily in conjunction with the current practices which are in place, such as diversion programmes and community service orders.

Theme 5: Some participants indicated that training in restorative justice principles and practices for presiding officers would be essential for its successful implementation. “*Relevant authorities need to be trained and aware of victims' rights and victim interests in crimes affecting them*” (J4); “*It can be implemented in the current system, provided that the judge is trained*” (L5); “*For successful implementation we need professionals trained in restorative justice and its implementation*” (P3). Naude and Prinsloo (2005) share this view and argue that the understanding and support of legal professionals are essential if they are to propose restorative justice options for offenders (also see Van Ness & Strong, 2015).

Theme 6: On the other hand, a few participants felt that it would in fact be difficult for restorative justice to be implemented within the current criminal justice system. “*Lack of resources in the current infrastructure would make restorative justice difficult to implement*” (P3); “*The current system cannot cater for restorative justice – we need a drastic new approach*” (A3); “*Restorative justice will require more input than is presently available*” (L5). These views suggest that many of the obstacles faced in the current justice system (such as a lack of resources) would hinder the implementation of restorative justice, and that problems in the current criminal justice system should first be resolved before one should attempt to tackle issues of restorative justice.

- **The influence of restorative justice on crime rates**

Question: Do you think the implementation of restorative justice would have a significant influence on crime rates?

Theme 1: Quite a few participants felt that because of social and economic factors in South Africa, restorative justice would not have a significant impact on crime rates. “*Not in South Africa, due to social and economic constraints*” (L5); “*Given the present social and economic circumstances in South Africa, I am not so sure that restorative justice would drastically reduce the crime rates*” (M4); “*It might affect the crime rate; however, this view may be overly optimistic as restorative justice does not necessarily address the underlying causes of crime*” (P4).

Theme 2: Several other reasons why restorative justice would not significantly influence the crime rate were provided: “*Not at this early stage, there are a number of factors against it, especially the high crime rates (serious and violent crime), and the attitude of the community towards perpetrators and the attitude of perpetrators towards the system*” (P1); “*In the case of hardened criminals, no matter what you do in terms of correcting their behaviour, they still pursue criminal activities*” (P4); “*There is a risk that restorative justice would be seen as a “light” sentence and would therefore not deter prospective offenders*” (J1).

Theme 3: Those participants who felt that the crime rate would be significantly reduced suggested restorative justice as a preventative mechanism for recidivism as a primary contributing factor. They argued that if an offender is confronted with the consequences of his/her crimes, this would result in change and a reduction of their criminal behaviour. “*No doubt that monitoring and programmes resulting from certain forms of restorative justice may have a positive impact on preventing recidivism*” (P3); “*Through interaction with victims, offenders will learn the consequences of their actions and acknowledge the effects of their crimes, which may induce a change in them*” (J4); “*Rehabilitation will be encouraged with society being more accepting and tolerant towards repentant offenders*” (J5).

It appears that the general opinion of the participants is that although restorative justice may not influence the crime rate in terms of crime prevention for potential first-time offenders, it might affect the occurrence of recidivism, which could then impact the crime rate.

- **The impact of restorative justice on the prison population**

Question: Do you think restorative justice could have a significant impact on the prison population?

Theme 1: The majority participants felt that restorative justice could have a significant impact on the prison population. The reason most participants provided in support of this view was that if non-custodial sentences resulting from restorative justice approaches were handed down, it is fairly obvious that fewer people would be sent to prison. “*It would most definitely, because implementation of restorative justice would mean that non-custodial means of punishment are explored*” (P4); “*It speaks for itself, if done properly it can definitely have a significant impact*” (L2); “*No doubt, non-custodial sentences would reduce the prison population significantly*” (P3).

Theme 2: However, some participants felt that restorative justice would only impact the prison population to a limited degree. “*To some extent, for offenders serving sentences for petty offences*” (P1); “*It would help, but to what degree would be speculation*” (M2); “*I think the impact will be limited because I don't foresee it being applied on a broad spectrum*” (P2); “*Maybe in the long run but not at first – my concern is that it could result in bulldozing victims and offenders through the process just to empty the prisons*” (M4).

One can therefore infer that the impact restorative justice may potentially have on the prison population depends primarily on how extensively it would be applied.

- **The main challenge the South African justice system is facing**

Theme 1: The biggest challenge mentioned by most participants was the lack of quality justice as a result of the appointment of legal professionals who are not properly trained and who lack experience. Another factor is that nepotism plays a role in judicial appointments. “*Incompetent and people not properly qualified are employed instead of qualified and competent people*” (A5); “*Incompetent/inexperienced prosecutors, judicial personnel and correctional services*” (A3); “*Corruption and nepotism playing a role in appointing positions*” (P2); “*Inefficiency and incompetence of police, prosecutors and magistrates*” (A1).

Theme 2: Detecting crime and poor investigations were also seen as a big problem. “*Lack of proper investigations by the police*” (L2); “*Incompetent and inexperienced people in the SAPS investigating crimes*” (A3). “*Police cannot tackle crime because they are not equipped, not properly trained and not motivated enough*” (P1); “*Lack of resources and manpower to curb crime*”.

Theme 3: However, all the blame cannot be laid at the feet of the police, as some participants mentioned that the ability of the police to investigate crime is hampered by the fact that the community does not report crime. “*People turn a blind eye to crime*” (J4); “*Society is afraid to report crime and to appear and testify in courts*” (L1). The reason for this perceived apathy of society towards crime may be related to the lack of faith the community has in the criminal justice system. “*People often resort to public violence and self-help instead of enforcing their rights and taking their issues to the*

courts because they have no confidence in the justice system" (J4); "The community has lost faith in the legal system" (P1).

Theme 4: A factor that may play a role in the community's lack of confidence in the justice system is slow and drawn-out court processes. *"Lack of human and physical resources result in the backlog of finalisation of cases, which in turn results in the lack of confidence in the justice system" (A5); "Long trial processes leading to the awaiting-trial prisoners spending a lot of time in prison" (P2); "Court processes are very slow, which also undermines confidence in the system" (P1).*

CONCLUSION

The findings of this study indicate that in general legal practitioners find restorative justice to be suitable in the South African context. It was indicated that undue emphasis is placed on retribution and on the extensive use of imprisonment in the current justice system, despite the availability of restorative options. It was, however, emphasised that the application of restorative justice should be limited to suitable and deserving cases.

Most participants unequivocally expressed the view that rehabilitation in prison facilities is not effective. The high recidivism rate was constantly used to substantiate this stance. Contact with hardened criminals, overcrowding and a lack of resources to address effective rehabilitation were mentioned as contributing variables in this regard.

However, the view was expressed that the use of alternative sentences could be challenged by communities reluctant to accept alternative modes of punishment, considering their frustration with the high crime rate and the consequent desire for harsher sentences. The application of alternative sentences for *appropriate* cases might accelerate its acceptance by the community, especially when it becomes clear that they could benefit from it.

Most participants indicated that victims should indeed play a more active role in the justice process, especially considering the very limited involvement they have in the current criminal justice system. The sentencing process and parole considerations for offenders were suggested as the areas where victims could make the greatest contribution in the justice process. Some participants did, however, emphasise that caution should be applied regarding victim involvement, as victims are not constrained by objective standards. Thus, in order to facilitate active victim participation in the justice process, proper procedural guidelines should be compiled.

Many participants held the opinion that the community should have a role to play in the justice process, because they are basically always involved. It was suggested that the community can contribute by, for example, providing insights into the impact of a crime on a particular community and by sharing their views on appropriate sentences for offenders. A few participants, however, could not envision any practical way in which the community could play a more active part in the justice process.

The majority view was that restorative justice would be more suitable for "less serious" offences (such as crimes relating to property), and unsuitable for serious offences such as violent crimes. Some participants did indicate that restorative justice could be suitable

for any type of offence, although it was emphasised that the application should depend on the circumstances of the particular case.

It was emphasised that the implementation of restorative justice in the current justice system would require a mind-shift among legal professionals. Some participants stressed that educating victims and the community on restorative justice could assist in its being accepted by the general population and thus would make it easier to implement. On the other hand, a concern was expressed that a lack of resources would make it difficult for restorative justice to be applied and implemented in the present criminal justice system.

The view was expressed that because of social and economic factors in South Africa at the moment, restorative justice would not impact on crime rates significantly. A counter-argument was presented that although restorative justice may not influence the crime rate, it may result in other benefits, such as greater victim satisfaction.

The lack of quality justice as a result of the appointment of legal professionals who are not properly trained and who lack experience was expressed by most participants as a serious problem. Problematic factors relating to the police (such as the lack of resources and manpower) as well as poor-quality investigations were also raised as concerns by participants. Participants indicated that increasing crime rates and citizens not reporting crimes may be factors contributing to the lack of confidence by the community in the justice system. Further concerns were the lack of resources in the criminal justice system and inadequate training of legal professionals. These factors seem to seriously compromise the ability of the justice system to operate effectively and immediate measures should be taken to address these concerns.

It is encouraging that restorative justice is viewed favourably by the majority of participants. These positive perceptions may indicate a willingness among legal professionals to apply restorative justice more extensively. The study also contributed to insights into various challenges faced in the current criminal justice system in South Africa. It is recommended that these issues should first be addressed before an active endeavour to implement restorative justice is made.

For restorative justice to be utilised and recommended more extensively, it is further imperative that legal professionals be trained and educated in its principles and applications. It will also be beneficial to clarify which types of offences could or should be referred for restorative justice and to develop a framework of guidelines to direct the practices for its implementation. Therefore, it is important that the proper measures and infrastructure be in place to accommodate the application of restorative justice in the South African legal system. It is suggested that victim and community involvement in the justice process should be guided and regulated by objective standards and procedures in order to avoid vindictive and vengeful reactions, and to protect the legal and emotional concerns of all parties.

It is also recommended that mental health professionals such as social workers and psychologists who render services to legal professionals and the courts should also be made aware of the advantages of restorative justice. This could only empower them in an area where their expertise is often sought.

However, for the present authors the value of restorative justice is not only limited to the legal field; its impact stretches much further. Restorative justice has the potential to contribute to the fight against the present *Zeitgeist* of retribution, revenge and mercilessness in South Africa. If the principles of restorative justice could filter through to the broader society – for example, via the court system, which is respected by most – it will be an important step in the right direction.

Although this study produced valuable exploratory insights into the opinions held by legal professionals about restorative justice, the data should be interpreted in the light of its limitations. Firstly, it was an exploratory study that was qualitative in nature. Great caution should therefore be exercised when trying to generalise the opinions of the legal professionals. Secondly, from the biographical data it is clear that the participants did not represent the demographic composition of South Africa. Although this is the result of factors such as our political history and practical-geographical variables, it emphasises the importance of non-generalisability. Thirdly, in a study such as this the quality of the data relies heavily on the quality of responses by participants. Because the data were not collected through face-to-face interviews, it was not possible to ask participants to elaborate on their answers (especially in instances where single-word answers were provided) or to ask follow-up questions. Although the need for this was felt only in a few cases, face-to-face interviews could have brought interesting information to the fore.

As in most exploratory studies, this study will hopefully stimulate future research on a theme that the South African justice system could only benefit from considering. This field is too important to be neglected.

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