Restoring Justice: Examining the use of restorative justice sentencing practices in cases of gender-based violence offences

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DECLARATION

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ABSTRACT

Gender-based violence ("GBV") has reached pandemic proportions in South Africa and poses a direct threat to the human rights of every individual it impacts.[1] This thesis sets out the potential restorative justice has to restore the human dignity of GBV survivors. The restoration of human dignity in response to crime is shown in this thesis to be an integral part of the transformative constitutional vision.

This thesis explores the potential restorative justice has to restore the human dignity of GBV survivors in court. This thesis outlines the theory of restorative justice as conceptualised in Western academic literature as well as in traditional African legal culture. The link between restorative justice and the value of *ubuntu* is explored and an understanding of restorative justice theory grounded in the value of ubuntu is established. Some of the strongest challenges to the use of restorative justice in cases of GBV come from certain feminist legal theorists. These challenges must be explored to enable an application of restorative justice which is sensitive to the context of GBV. The approaches of various strands of feminist legal theory are examined to find a lens which is able to guide the application of an ubuntu-based restorative justice approach to cases of GBV.

The theoretical framework of this thesis consists of an ubuntu-based approach to restorative justice, guided by an intersectional and ubuntu feminist lens. This theoretical framework is then used to analyse restorative justice jurisprudence to establish whether courts have taken an adequately victim-centric approach in the cases identified. The analysis determines whether the courts can restore the complainants' human dignity in each of the cases by awarding them both material and symbolic restitution.

This thesis works from the hypothesis that courts have not adequately centred victims of crime, particularly GBV survivors, in the application of restorative justice. The Constitutional Court and Supreme Court of Appeal have held that the crime of rape degrades the rights of victims, particularly the right to human dignity, and that courts have a duty to protect these rights.[2] This thesis investigates the extent to which courts have actively prioritised the restoration of the complainant's human dignity

[1] 1997 3 SA 341 (SCA) 344J-345A; *National Strategic Plan on Gender-Based Violence and Femicide* (2020) 2.

[2] S *v Chapman* 1997 3 SA 341 (SCA) 344J-345E.

when applying restorative justice in sentencing practices. Restorative justice cases have been identified as worthy of investigation because of the way victims and their restitution are centred under a restorative paradigm.

This thesis finds that courts have not adequately centred complainants and their restitution when applying restorative justice in cases of GBV.

DEDICATION

This thesis is dedicated to every life touched by gender-based violence; may you find justice.

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Thank you to my supervisor, Prof Thuli Madonsela, it was an honour and a privilege to work with you on a project so close to my heart.

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TABLE OF ABBREVIATIONS

AZAPO	Azanian People's Organisation
BCM	Black Consciousness Movement
CC	Constitutional Court
CLAA	Criminal Law Amendment Act 105 of 1997
CPA	Criminal Procedure Act 51 of 1977
DEVAW	Declaration on the Elimination of Violence Against Women
DPP	Director of Public Prosecutions
GBV	Gender-based violence
GBVF	Gender-based violence and femicide
IPV	Intimate partner violence
LGBTQIA	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual and other gender and sexuality minorities
PIE	Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998
SALRC	South African Law Reform Commission
SCA	Supreme Court of Appeal
TRC	Truth and Reconciliation Commission
UN	United Nations
WHO	World Health Organization

TERMINOLOGY

African Legal Systems/ African Legal Culture: these terms will be used interchangeably to denote the traditional African customary law system used in pre-colonial Sub-Saharan Africa up until present day in South Africa.

Domestic Violence: the definition in Section 1 of the Domestic Violence Act 116 of 1998 will be used throughout this thesis. Section 1 defines Domestic Violence as

> "physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; harassment; stalking; damage to property; entry into the complainant's residence without consent, where the parties do not share the same residence; or any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant."

Gender-Based Violence: The Southern African Development Community, Gender and Development Protocol definition will be used. Article 2 reads:

> "All acts perpetrated against women, men, girls and boys on the basis of their sex which cause or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict."

Grooming: the process of socialising and emotionally manipulating a minor or vulnerable person with the aim of making them more vulnerable to sexual abuse.

Intimate Partner Violence: the definition in Section 1 of the Domestic Violence Act 116 of 1998 will be used throughout this thesis. Section 1 defines Intimate Partner Violence as

> "physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; harassment; stalking; entry into the complainants' residence without her consent or any other controlling or abusive behaviour taking place in domestic relationships."

Offender/Accused: these terms will be used interchangeably to mean the person who has committed a crime.

Restorative Justice Programmes/ Practices: conflict resolution mechanisms which are based on the theory of restorative justice.

Secondary Victim: a person who is not the direct victim of a crime but who has also suffered because of the conflict i.e., the victim's family, friends and the broader community.

Survivor/Victim: these terms will be used interchangeably to refer to the person who is directly impacted by a crime.

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION

1 1 Introduction

The judiciary has emphasised the threat that gender-based violence ("GBV")[1] poses to the equality, freedom, and human dignity of those it affects.[2] In *S v Chapman* ("*Chapman*"),[3] the Supreme Court of Appeal ("SCA") held that:

> "Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation."[4]

The Constitutional Court ("CC") reiterated this sentiment in *AK v Minister of Police*[5] where it was held that because of GBV, the women of South Africa cannot fully enjoy the rights and freedoms guaranteed to them in the Bill of Rights.[6] The court further reiterated the same duty espoused in *Chapman*, namely that courts must send a clear message that they are determined to protect the equality, dignity and freedom of women in the face of GBV.[7]

This thesis investigates to what extent courts have upheld the constitutional rights of GBV victims in the adjudication of rape cases. Given that the SCA and CC held that

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[1] Interim Steering Committee on Gender-Based Violence and Femicide *National Strategic Plan on Gender-Based Violence and Femicide* (2020) 11:

> "The general term used to capture violence that occurs as a result of the normative role expectations associated with the gender associated with the sex assigned to a person at birth, as well as the unequal power relations between the genders, within the context of a specific society. GBV includes physical, sexual, verbal, emotional, and psychological abuse or threats of such acts or abuse, coercion, and economic or educational deprivation, whether occurring in public or private life, in peacetime and during armed or other forms of conflict, and may cause physical, sexual, psychological, emotional or economic harm."

[2] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) paras 33-36 and 62; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae)* 2003 1 SA 389 (SCA) paras 13-15; S *v Chapman* 1997 3 SA 341 (SCA) 344J-345E.

[3] 1997 3 SA 341 (SCA).

[4] 344J-345A.

[5] 2022 11 BCLR 1307 (CC).

[6] Para 1.

[7] Para 2; 1997 3 SA 341 (SCA) 345C-D.

the dignity of the victim is degraded by the act of rape, it will be determined to what degree courts are protecting the rights of GBV survivors by actively restoring their right to human dignity. This thesis pays particular attention to the right of human dignity as it is understood through the value of *ubuntu*.

On her mission to South Africa, the Special Rapporteur stated in the report that much of the widespread patriarchal violence in South Africa is inherited from the division and injustices of the past.[8] The post-amble of the interim Constitution of the Republic of South Africa Act 200 of 1993 indicates that the Constitution acts as a bridge from a past of division and injustice toward a future of human dignity, equality and freedom. Chaskalson CJ (as he then was) expressed that the commitment to this transformative vision is what lies at the heart of our new constitutional order. Therefore, as long as past injustices continue to exist, the aspirations of the Constitution of the Republic of South Africa, 1996 ("Constitution") will "have a hollow ring."[9]

To understand how rape as an act of GBV erodes the human dignity of survivors, the concept of GBV must first be delineated. GBV concerns the various forms of patriarchal violence committed against women, children and LGBTQIA[10] persons. President Cyril Ramaphosa has referred to GBV as a "hyper-pandemic" due to its continued prevalence in South Africa.[11] GBV is often conceptualised as violence primarily against women.[12] However, the same patriarchal gender norms and inequalities that give rise to violence against women typically also give rise to violence against children and LGBTQIA persons.[13] These various forms of violence are

[8] United Nations Human Rights *Council Report of the Special Rapporteur on violence against women its causes and consequences on her mission to South Africa* UN Doc A/HRC/32/42/Add.2 3.

[9] *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 1 SA 765 (CC) para 8.

[10] LGBTQIA is an acronym for Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual and other gender and sexuality minorities.

[11] Interim Steering Committee *National Strategic Plan on Gender-Based Violence and Femicide* 2.

[12] 24.

[13] UN Human Rights Council *Report of the Special Rapporteur* 3.

interlinked and make up the nuanced concept of GBV.[14] The concept of GBV in the South African context is explored in the third chapter of this thesis.

The National Strategic Plan on Gender-Based Violence and Feminicide ("NSP-GBVF") was adopted as a multisectoral approach to combatting GBV. The NSP-GBVF identifies a systemic failure within the justice system to protect, support and access justice. This breakdown is a direct impediment to victims of GBV and increases their risk of further violence.[15] In this regard, the government adopted the Service Charter for Victims of Crime in South Africa ("Victims' Charter") in terms of section 234 of the Constitution[16] to promote justice for victims of crime and ensure the protection of their rights. This section allows Parliament to adopt charters of rights to deepen the culture of democracy established by the Constitution.[17] The Victims' Charter recognises that "crime is more than an offence against the state but also" harm caused by one person against another.[18] A core principle of the Victims' Charter is ensuring that victims remain central to the criminal justice process. The Victims' Charter acknowledges the shift in the criminal justice system and human rights culture in South Africa towards restorative justice.[19]

Barnett argues that there has been a breakdown in the justice system which warrants a paradigm shift. To Barnett, the paradigm of punishment and retribution is in crisis and requires a reframing of crime as an offence by one individual against another. Barnett describes this as the paradigm of restitution.[20] The South African Law Reform Commission ("SALRC") has indicated that a re-evaluation of the South African justice system should take into account African judicial principles. One of these principles is the centrality of the victim and their restitution.[21] In *S v Makwanyane*

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[14] Interim Steering Committee *National Strategic Plan on Gender-Based Violence and Femicide* 11.

[15] 32.

[16] *Wickham v Magistrate, Stellenbosch* 2017 1 SACR 209 (CC) para 23.

[17] Section 234 of the Constitution.

[18] Department of Justice and Constitutional Development *Service Charter for Victims of Crime in South Africa* (2004) 3.

[19] 3.

[20] R Barnett "Restitution: A new paradigm of criminal justice" (1977) 87 *Ethics* 287.

[21] South African Law Reform Commission *Sentencing Restorative Justice (Compensation for victims of crime and victim empowerment)* Project 82 Report Discussion Paper 7 Report (1997) 6.

("*Makwanyane*")[22] it was held that African judicial principles must be considered under the new democratic dispensation. It was held that a key principle in this regard is the constitutionally acknowledged value of *ubuntu*.[23]

Madala J held in *Makwanyane* that the value of *ubuntu* informs the Constitution generally, particularly the Bill of Rights. The court held that *ubuntu* is an African philosophy that denotes humanness, social justice and fairness and is characterised by compassion and respect for humanity and human dignity. Further, the court held that *ubuntu* is deeply linked to the constitutional value of human dignity. [24]

The CC has linked the theory of restorative justice to *ubuntu* as a constitutional value. In *Dikoko v Mokhatla* ("*Dikoko*")[25] Mokgoro J and Sachs J both touched on reconciliation and reparation in defamation cases. Mokgoro J held that the constitutional value of human dignity is closely related to the value of *ubuntu*.[26] Sachs J stated that the key elements of restorative justice harmonise well with the value of *ubuntu* and traditional conflict resolution mechanisms.[27]

This thesis examines the link between restorative justice and *ubuntu* to establish the core principles of an approach to restorative justice grounded in *ubuntu*. It then analyses whether courts have taken up this approach in restorative justice jurisprudence particularly in cases where restorative justice has been used in cases of GBV.

In South Africa, two cases have attempted to apply restorative justice sentencing practices to rape convictions.[28] Both cases resulted in the SCA cautioning against the use of restorative justice in cases of serious offences. These rulings by the SCA limit the application of restorative justice and its potential for transformation within the criminal justice system.[29]

Courts have held that restorative justice as it is understood in relation to *ubuntu* promotes restitution for victims of crime and potentially reconciliation between parties

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[22] 1995 2 SACR 1 (CC).
[23] Paras 365-376.
[24] Paras 237, 263, 308.
[25] 2006 6 SA 235 (CC).
[26] Paras 68-70.
[27] Paras 112-114.
[28] *S v Thabethe* 2009 2 SACR 62 (T); *S v Seedat* 2015 2 SACR 612 (GP).
[29] *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 2 SACR 567 (SCA) paras 20-31; *S v Seedat* 2017 1 SACR 141 (SCA) paras 29-43.

as members of the community.[30] It is argued in this thesis that the promotion of these outcomes advances the right to human dignity.[31] The judiciary is responsible for promoting the right to human dignity and other fundamental human rights.[32] The SCA has held that rape violates the fundamental human dignity of the victim.[33] This thesis further argues that if restorative justice is incorrectly applied or not applied at all to cases of GBV then complainants will not have their human dignity fully restored.

In order to fully investigate the transformative potential of restorative justice, *ubuntu* as a guiding principle may not provide enough insight into the complexities of GBV. It is important to understand the gendered power dynamics between perpetrators and victims when investigating GBV responses. In addition, exploration of how gender inequality can be compounded by other factors such as race, class, disability and age is important. In order to fully explore these concepts, feminist legal theory must also be incorporated into this theoretical framework.

The purpose of this research is to assess the extent to which, in line with the transformative constitutional mandate, the application of restorative justice sentencing is adequately victim-centric. To achieve this, the research investigates if the application of restorative justice in cases of rape convictions adequately addresses feminist and restorative justice theorists' concerns. The transformative potency of restorative justice is investigated particularly regarding the justice system's approach to GBV cases. The analysis of restorative justice practices in sentencing is guided by an examination of the interface between transformative constitutionalism, the value of *ubuntu*, restorative justice and feminist legal theory.

1 2 Research aims

This thesis aims to:

- Explore restorative justice as a theory, and identify its objectives, practical applications, and limitations particularly in restoring victims of GBV.

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[30] 2006 6 SA 235 (CC) paras 122-144 paras 237, 263, 308

[31] Sections 10 and 12(1)(c) of the Constitution.

[32] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) paras 33-36 and 62; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae)* 2003 1 SA 389 (SCA) para 13-15; *S v Chapman* 1997 3 SA 341 (SCA) 344-345.

[33] 1997 3 SA 341 (SCA) 344.

- Determine how restorative justice resonates with the values of the Constitution, in particular the value of *ubuntu*.
- Examine the arguments of feminist legal theorists for and against the use of restorative justice in cases of GBV, particularly regarding meeting the needs of victims.
- Establish the current approach to restorative justice sentencing practices, particularly the manner and circumstances in which restorative justice is applied.
- Explore the axis between restorative justice, *ubuntu* and feminist legal theory to investigate whether courts have embraced transformation in the criminal justice system.

1 3 Research questions

1 3 1 Primary question

To what extent have South African courts adequately considered the centrality of victims, constitutional imperatives and the concerns of feminist and restorative justice theorists when applying restorative justice sentencing practices in cases of gender-based violence?

1 3 2 Subsidiary questions

- Which crimes constitute GBV, and what are their causes and consequences in a South African context?
- In what circumstances and manner of application is restorative justice appropriate for serious offences, particularly GBV offences?
- Have courts adequately upheld the rights of victims when applying restorative justice sentencing?
- What potential does restorative justice have to promote transformative constitutionalism in the criminal justice system regarding the rights of victims and accused or convicted persons?
- To what extent has South African courts' application of restorative justice embraced the value of *ubuntu* and furthered transformative constitutionalism in the criminal justice system?

- What is preventing courts from adequately centring victims and promoting constitutional imperatives when applying restorative justice in cases of GBV?

1 3 3 Hypothesis

South African courts have not adequately considered the centrality of victims and their rights when applying restorative justice sentencing practices in cases of GBV.

1 4 Theoretical framework

This research investigates the theory of restorative justice and its application to sentencing practices, particularly in cases of GBV. The theoretical framework of this thesis can be understood through the metaphor of a sea vessel. The theory of restorative justice is the vessel itself; it is the vehicle through which justice is done. The understanding of restorative justice in this thesis is grounded in the value of *ubuntu*. In this metaphor, the value of *ubuntu* serves as the material of the vessel, as *ubuntu* must permeate its every fibre. Given the emphasis on GBV and the rights of victims, it is argued that feminist legal theory is needed as a rudder to steer the vessel through issues of GBV. This rudder must be able to help the ship navigate complex and nuanced cases of GBV. An overview of these topics and their intersections are provided to solidify the theoretical framework of this research.

In the *Report on Sentencing and Restorative Justice*,[34] the South African Law Commission ("SALRC") frames restorative justice as seeking to view crime as an injury or wrong committed not against the state but a fellow human being. The victim and offender are actively involved in resolving the conflict that has arisen. The state acts as a facilitator in this process in which the main aims are accountability from the offender, active participation of the parties involved, and restoration of the harm done.[35] The Commission considered the opportunity restorative justice poses to

[34] South African Law Reform Commission *Sentencing Restorative Justice (Compensation for victims of crime and victim empowerment)* Project 82 Report Discussion Paper 7 Report (1997).
[35] 9.

incorporate an African perspective on justice by promoting reparation rather than retribution.[36]

Restorative justice has roots in many ancient societies. There are significant similarities between traditional African conflict resolution mechanisms and modern restorative justice practices.[37] The CC has also confirmed the link between restorative justice, the value of *ubuntu* and traditional African conflict resolution processes.[38] The presence of restorative justice in traditional African legal systems is explored in chapter two of this thesis.

The western genesis of restorative justice as a theory of justice can be traced to the seminal works of Eglash,[39] Christie[40] and Barnett.[41] These authors argue that there is a breakdown in the criminal justice system's retributive approach to justice. Eglash puts forward a model of restorative justice which focuses on "creative restitution" and the impact of the crime on the victim.[42] Christie argues that the state has stolen the ownership of the offence and the right to participate from the victim.[43] Christie compares this theft of ownership with informal models of traditional justice seen in some African societies as a framework for conflict resolution.[44] Barnett, as mentioned above, argues that the current breakdown in the retributive justice system necessitates a paradigm shift toward viewing the crime as harm caused to the victim and not to the state.[45]

As mentioned above, in *Dikoko*, Mokgoro J and Sachs J both discussed reconciliation and reparation in defamation cases. Mokgoro J held that the aim of compensation orders must be to restore the plaintiff's dignity, not punish the

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[37] A Skelton "Tapping Indigenous Knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa" in E van der Spuy, S Parmentier & A Dissel (eds) *Restorative Justice: Politics, Policies and Prospects* (2007) 228, 230-237.

[38] *Dikoko v Mokhatla* 2006 6 SA 235 (CC) paras 122-144.

[39] A Eglash "Beyond restitution: Creative restitution" in J Hudson and B Galaway (eds) *Restitution in Criminal Justice* (1977) 91-129.

[40] N Christie "Conflicts as property" (1977) 17 *Brit J Criminology* 1-15.

[41] Barnett (1977) *Ethics* 279-301.

[42] Eglash "Beyond Restitution: Creative Restitution" in *Restitution in Criminal Justice* 91-122.

[43] Christie (1977) *Brit J Criminology* 2.

[44] 3.

[45] Barnett (1977) *Ethics* 287.

defendant.[46] Sachs J held that defamation cases should focus on reparations rather than punishment in line with the constitutional value of *ubuntu*, which he linked to restorative justice.[47] Sachs J held that the key elements of restorative justice harmonise well with the value of *ubuntu* and traditional conflict resolution mechanisms.[48] Both judgments situate *ubuntu*, restorative justice and the restoration of dignity at the centre of the reparation of harm. Other civil court judgments have also expanded upon these links.[49]

This understanding of restorative justice is grounded in the value of *ubuntu* and centres on the restoration of human dignity for the victim. This framing of restorative justice is used to investigate the judgments of *S v Thabethe* ("*Thabethe*") and *S v Seedat* ("*Seedat*") as well as their respective appeal judgments.[50] It is examined whether the courts centred on restoring human dignity for the victim and fully embracing the value of *ubuntu* when applying restorative justice sentencing practices.

To fully explore the restoration of human dignity for GBV survivors, it is necessary to consider a feminist perspective on restorative justice. Adding a feminist element to the investigation of these judgments must aid in embracing the humanity of the parties. It is also imperative to consider the gendered power asymmetries between the parties. GBV is often conceptualised as primarily harm against women but, as mentioned in the introduction, also affects children and LGBTQIA persons.[51]

Feminist legal theorists remain divided on whether restorative justice is appropriate in cases of GBV.[52] There are practical reasons why some feminists are for and against using restorative justice. The arguments against the use of restorative justice largely

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[46] 2006 6 SA 235 (CC) paras 68-70.

[47] Paras 112-133.

[48] Para 114.

[49] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Azanian People's Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC); *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 3 SA 274 (CC); *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC).

[50] *S v Thabethe* 2009 2 SACR 62 (T); *S v Seedat* 2015 2 SACR 612 (GP); *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 2 SACR 567 (SCA); *S v Seedat* 2017 1 SACR 141 (SCA).

[51] Interim Steering Committee *National Strategic Plan on Gender-Based Violence and Femicide* 18.

[52] B Pali & KS Madsen "Dangerous liaisons? A Feminist and restorative approach to sexual assault" (2011) 14 *Temida* 49 51.

relate to concerns about victim safety and the effectiveness of the process. The arguments for the use of restorative justice relate to the active participation and restoration of victims, which is not seen in mainstream justice processes.[53] Hopkins and Koss have explored how each strand of feminism views restorative justice differently on a theoretical basis.[54] The third chapter of this thesis explores various strands of feminism and their interactions with restorative justice. A strand or combination of strands of feminist legal theory were selected to serve as a guide for applying restorative justice to cases of GBV.

Following this, the research explores the axis between restorative justice, *ubuntu* and feminist legal theory to establish how courts have embraced transformation in the criminal justice system. This research focuses on cases where restorative justice has been used to sentence rapists.

1 5 Methodology

This research applies a doctrinal legal methodology and focuses on an analysis of case law. The main framework for this analysis is the lens of restorative justice theory, feminist legal theory and *ubuntu* jurisprudence. Secondary sources are used to establish this framework. These sources include academic literature such as journal articles, dissertations and discussion papers, governmental instruments such as legislation, jurisprudence and South African Law Commission Reports. The ratio of the judgments to be analysed is explored in terms of the manner and circumstances in which restorative justice sentencing practices have been applied.

The research focuses on the use of restorative justice in criminal trials once guilt has been established and a sentence must be handed down.

At the outset, the concept of restorative justice is established with reference to academic literature and case law, particularly with reference to the value of *ubuntu*. The main definitions, aims and applications of restorative justice are outlined along with their limitations.

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[53] 51-52; MP Koss “Restoring rape survivors: Justice, advocacy and a call to action” (2006) 1087 *Ann NY Acad Sci* 206 207.

[54] CQ Hopkins & MP Koss “Incorporating Feminist theory and insights into a restorative justice response to sex offences” (2005) 11 *Violence Against Women* 697.

GBV is then be explored in the South African context, and the various crimes and behaviours which it encompasses are identified. Feminist legal theory is used to establish how and when GBV takes place and how the legal system can and should interact with GBV. Feminist arguments for and against the use of restorative justice in various forms of GBV are examined. For example, it is explored how cases of domestic violence require a more nuanced approach than cases of acquaintance rape because of the role reconciliation and apology play in cycles of domestic violence.[55] The appropriate approach and circumstances for these applications, according to feminist legal theorists, are identified.

The use of restorative justice by our courts in sentencing adult offenders are explored in an overview of the cases where this approach has been explicitly applied. The key cases to be examined are *Thabethe*[56] and *Seedat,*[57] which centre on sentencing persons convicted of rape using restorative justice. The SCA judgments overturned these sentences, and the reasoning is also discussed.[58]

These judgments are critically examined through the lens of feminist legal theory and restorative justice theory as it resonates with the value of *ubuntu*. The input of the victim, her restoration, and the ownership of the offence are discussed with reference to, among others, the work of Christie, Eglash and Barnett. These authors are used as a point of departure to discuss the restorative justice elements of these judgments. The aims of restorative justice, their likelihood of success in these cases, and the appropriateness of the circumstances are explored in depth. CC jurisprudence is analysed to examine the degree to which the SCA embraced the value of *ubuntu* as it embodies human dignity and other constitutional values. Feminist legal theory is used to evaluate the appropriateness of the "substantial and compelling circumstances" identified by the High Court to justify lesser sentences for the offenders. The SCA's interaction with the factors and the testimony of the complainants are also discussed through the lens of feminist legal theory. The similarities and differences between the circumstances of the complainants in each case are compared in the analysis of the judgments.

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[55] Hopkins & Koss (2005) *Violence Against Women* 708.
[56] 2009 2 SACR 62 (T).
[57] 2015 2 SACR 612 (GP).
[58] 2011 2 SACR 567 (SCA).

The approaches to restorative sentencing are then examined through academic commentary with reference to the interface between *ubuntu*, feminist legal theory and the constitutional rights of survivors, namely equality, dignity and freedom. The enquiry focuses on the extent to which courts have addressed the concerns of feminist legal theorists and employ an accurate, balanced and value-driven use of restorative justice to uphold the rights of survivors without undermining the rights of perpetrators.

1 6 Limitations and scope

The scope of this research covers the use of restorative justice in criminal trials once guilt has been established and a sentence must be handed down. This research is limited to assessing restorative justice in sentencing practices post-conviction. At this stage in the trial, it has been established that the offender committed the harm against the victim and that sentencing must occur. The study is primarily concerned with adult offenders and does not examine juvenile offenders' diversion under the Child Justice Act 75 of 2008 ("Child Justice Act").[59] Victim-offender mediation, victim impact statements and correctional supervision are discussed in relation to restorative justice sentencing practices

The limitations of this research are as follows:

- *Ubuntu* is a central element of the theoretical framework of this research but currently has no single definition.[60] *Ubuntu* is grounded in customary law, which is inherently flexible and has faced misinterpretations and distortion due to colonial interference.[61] This poses a challenge to the academic exploration of *ubuntu* as a philosophy.
- The connection between restorative justice, *ubuntu* and feminist legal theory is an under-researched field, and this study is limited by the availability of sources on these connections.
- This research focuses on a small sample of cases that have used restorative justice as a sentencing aid in South Africa.[62]

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[59] Section 41.

[60] Y Mokgoro "Ubuntu and the Law in South Africa" in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 317, 317.

[61] C Rautenbach *Introduction to Legal Pluralism in South Africa* 5 ed (2018) 56.

[62] *S v Seedat* 2015 2 SACR 612 (GP), *S v Seedat* 2017 1 SACR 141 (SCA); *S v Thabethe* 2009 2 SACR 62 (T); *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC); *S*

1 7 Chapter outlines

1 7 1 Chapter 1: Introduction

The scope of the research is outlined regarding the methodology and field of study. An overview of the aims and motivation for the investigation is provided to introduce the research problem.

The core elements of the theoretical framework of this thesis are introduced namely, restorative justice, the value of *ubuntu* and feminist legal theory. The prevalence of GBV in South Africa as it relates to the research problem and motivation is established. Furthermore, the SCA's position cautioning against the use of restorative justice in serious offences is analysed against the backdrop of the objectives of transformative constitutionalism.

1 7 2 Chapter 2: Restorative justice and the value of *ubuntu*

The main aims and principles of restorative justice are explored in this chapter. The practical applications of restorative justice and their limitations are identified. Next, the most prevalent disagreements among academics are identified, namely whether restorative justice can be integrated into a retributive justice system and reconciled with retributive sentencing aims and whether restorative justice is an alternative form of punishment. Jurisprudence on restorative justice as it relates to the value of *ubuntu* is also discussed. The concept of *ubuntu* is then clarified both in terms of its implications for individual rights, flowing from human dignity and its communitarian dimension.

1 7 3 Chapter 3: Feminist concerns regarding restorative justice as a response to gender-based violence

In this chapter, the complexity of GBV as an issue is outlined along with its various crimes. The causes and consequences of GBV are further explored from an intersectional perspective, taking cognisance of the role that socio-economic standing, gender and sexuality, culture and race, among other factors, play in the impact of GBV.

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v Maluleke 2008 1 SACR 49 (T); *S v Shilbubane* 2008 1 SACR 295 (T); *S v Saayman* 2008 1 SACR 393 (E).

The arguments for and against restorative justice in various GBV crimes are explored. The various strands of feminist theory which embrace and reject restorative justice are investigated to establish a theoretical framework for evaluating GBV judgments.

1 7 4 Chapter 4: Restorative justice jurisprudence

An overview of the cases in which restorative justice has explicitly been applied in sentencing practices is given in this chapter.

Thabethe and *Seedat* are focused on, especially the reasoning for using restorative justice and the substantial and compelling circumstances identified by the courts. The factual background of each case is established, including the nature of the relationship between the complainant and the offender and the circumstances in which the rape occurred.

1 7 5 Chapter 5: Analysis of restorative justice case law

Restorative justice jurisprudence is analysed using feminist legal theory and an *ubuntu*-based approach to restorative justice theory discussed in earlier chapters. Particular attention is paid to the cases of *Thabethe* and *Seedat.* The appropriateness of the circumstances for restorative justice, as well as how restorative justice was applied are investigated using this theoretical lens. The practical impact of the offence and the intervention of the courts are compared from a restorative justice perspective. Finally, conclusions on whether the judgments were able to further transformative constitutionalism are drawn in chapter 6.

1 7 6 Chapter 6: Conclusion

This chapter draws conclusions based on the questions from the introduction and the findings in the critical analysis.

CHAPTER 2: RESTORATIVE JUSTICE AND THE VALUE OF *UBUNTU*

2 1 Introduction

Restorative justice is often presented as a solution to many of the issues faced by the criminal system.[1] This research aims to investigate what application an *ubuntu*-based understanding of restorative justice can have to cases of GBV. This application must be victim-centric and uphold the substantive equality of GBV survivors. This chapter aims to uncover the theory of restorative justice as it relates to the value of *ubuntu* to inform the case law analysis in later chapters.

This chapter investigates the presence of restorative justice in ancient societies[2] and traditional African legal systems and values.[3] The development of restorative justice in Western academic thought is also explored. The main aims and principles set out by seminal authors are discussed. Various definitions of restorative justice are examined to clarify the concept. Once the theory has been outlined, the practical applications of restorative justice are discussed further. The various practical and theoretical limitations are also discussed as well as the disagreements among critics. The circumstances in which various academics believe restorative justice is appropriate are then discussed. The value of *ubuntu* is also be explored with reference to case law and academic literature. Once the notion of *ubuntu* has been established independently, the connection to restorative justice is explored with reference to case law, legislation and academic literature. Finally, a working definition of restorative justice is distilled from these discussions to aid the analysis of case law in later chapters. This working definition is not meant to conclusively pin down the concept but rather aid the discussions in this research.

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[1] S Robins “Restorative approaches to criminal justice in Africa: The case of Uganda” in EO Alemika, R Bowd, S Robins, JN Aduba EI Alemika, I Kinnes & AB Chikwanha (eds) *The Theory and Practice of Criminal Justice in Africa* (2009) 57 57.

[2] J Braithwaite “Restorative justice: Assessing optimistic and pessimistic accounts” (1999) 25 *Crime and Justice* 1 2-3.

[3] A Skelton “Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa” in E van der Spuy, S Parmentier & A Dissel (eds) *Restorative Justice: Politics, Policies and Prospects* (2007) 228 228-229.

2 2 Restorative justice in ancient societies

The term “restorative justice” only originated in the 1970s but “justice” in some ancient societies resembled what is now understood as restorative justice today.[4] Braithwaite has suggested that the principles of restorative justice were the dominant approach to justice in many ancient societies around the world.[5] Van Ness argues that in ancient Arab, Greek, and Roman societies, restorative justice was used even for serious crimes such as homicide.[6]

Braithwaite notes that in Africa and other parts of the world outside of European control and tradition restorative justice not only existed in ancient times but remains in modern tradition. Braithwaite argues that European academics often draw upon these cultural resources after the connection to restorative justice in Europe was lost to the Dark Ages.[7] Braithwaite uses the philosophy of *ubuntu* as evidence of the ancient roots and continued use of restorative justice in African culture and legal thought. According to Braithwaite, the Child Justice Act 75 of 2008 (“Child Justice Act”) and its explicit embodiment of the value of *ubuntu* is evidence of the modern use of restorative justice and its incorporation into Western legal tradition.[8]

Mangena claims that restorative justice forms part of the core of African justice systems and that its origin should not be traced only as far back as modern Western developments.[9] Mangena argues further that the presence of restorative justice in African legal tradition has always been linked to the value of *ubuntu*. The two concepts can be considered mutually referential in African legal systems.[10] Consequently, the link between *ubuntu* and restorative justice is explored later in this chapter.

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[4] 228; T Gavrielides *Restorative Justice Theory and Practice: Addressing the Discrepancy* (2007) 20

[5] J Braithwaite *Restorative Justice and Responsive Regulation* (2002) 3; Braithewaite refered to the Child Justice Bill [B49-2002] at the time, this Bill later became the Child Justice Act.

[6] D Van Ness *Crime and Its Victims: What We Can Do* (1986) 64-68.

[7] 5.

[8] 5.

[9] F Mangena “Restorative Justice Deep Roots in Africa” (2015) 34 *SAJP* 1 1.

[10] 3, 4.

Wielenga, Batley and Murambadoro contend that African jurisprudence and African conceptions of justice are not homogenous.[11] The authors caution against conceptualising African dispute resolution mechanisms as alternatives to the criminal justice system or Western approaches to criminal justice.[12] They argue further that African understandings of restorative justice have been approached through external lenses. This trend has led to the African understanding of restorative justice assimilating into Western practice and theory.[13]

In *S v Makwanyane* ("*Makwanyane*"),[14] Sachs J held that the new constitutional ethos requires giving "long overdue recognition" to the African legal tradition as a source of legal ideas and values.[15] This notion speaks to the larger movement to decolonise the legal tradition and legal thinking in South Africa.[16]

The discussions of Western literature on restorative justice below are had with an appreciation of the origins of some of these ideas. The possibility for these ideas to be distorted through a Western lens must also be borne in mind.

2 3 Restorative justice in Western academia

The genesis of restorative justice in Western academia has been traced to the works of Christie,[17] Eglash,[18] Barnett,[19] and Wright.[20] In 1977 these authors each published seminal works on what is now understood to be restorative justice.[21] The main

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[11] C Wielenga, M Batley & R Murambadoro "Beyond restorative justice: Understanding justice from an African perspective" (2020) 9 *Ubuntu Journal of Conflict and Social Transformation* 43, 49.

[12] 46.

[13] 44.

[14] 1995 2 SACR 1 (CC).

[15] Para 365.

[16] F Ruffin "Indigenisation and Africanisation of legal education: Advantaging legal pluralism in South Africa" (2019) 27 *Alternation* 111 113.

[17] N Christie "Conflicts as Property" (1977) 17 *Brit J Criminology* 1-15.

[18] A Eglash "Beyond restitution: Creative restitution" in J Hudson and B Galaway (eds*) Restitution in Criminal Justice* (1977) 91–129.

[19] R Barnett "Restitution: A new paradigm of criminal justice" (1977) 87 *Ethics* 279-301.

[20] M Wright "Nobody came: Criminal justice and the needs of victims" (1977) 16 *How J Penology & Crime Prevention* 22-31.

[21] T Gavrielides *Restorative Justice Theory and Practice: Addressing the Discrepancy* (2007) 20.

principles established in these works are established, and then commonalities among these authors are discussed.

2 3 1 Christie

Christie argues that the criminal justice system has taken conflicts away from the parties which are directly involved and given them to the state. He outlines a court procedure that restores victims' rights to participate in their own conflict.[22] Christie then goes on to frame crimes as offences committed by the offender against a victim, rather than a breach of law committed by the offender against the state.[23]

Christie compares the formal criminal justice system, in which the state plays an important role, to the traditional justice system he witnessed in Africa. His discussion of the African conflict resolution mechanism explores various elements. Christie notes that the parties were physically and symbolically at the centre of the process and that their friends and family played secondary roles. Christie goes on to discuss how the state officials were extremely inactive and were only treated as experts on norms and actions, not the matters of the village where the conflict took place.[24] The connection between restorative justice and traditional African conflict resolution mechanisms, underpinned by the value of *ubuntu*, are explored later in this chapter.

Christie notes that in Western criminal law, the parties do not participate directly rather, they are represented. In Christie's opinion, the state represents the victim to such a degree that they have been completely pushed aside. Christie argues further that the victim then effectively loses twice: once at the hands of the offender and then when their right to participate in the resolution of the conflict is denied.[25]

Christie speaks of restoration not merely as restoring material damages but as restoring the conflict to the hands of the victim. He posits that the conflict itself is more valuable than any property lost. The conflict represents an opportunity to participate in shaping the morals of the community and the law of the land.[26] The state takes on the role of the victim and has the chance to confront the offender about their actions.

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[22] N Christie "Conflicts as property" (1977) 17 *British Journal of Criminology* 1.

[23] 3.

[24] 2.

[25] 3.

[26] 7.

Christie argues that neither the state nor the offender is as interested in this confrontation as the victim is. Christie notes that for the victim, facing their offender may be one of the most important days of their life. [27]

Christie included in their discussion the impact on the humanity of the parties. Christie argues that the victim is so excluded that they may never come to know the offender. Christie notes that, at most, the victim has the chance to be a witness, which can often result in humiliation and re-traumatising during cross-examination. Furthermore, in an ordinary trial, the victim may never have direct contact with the offender. The nuances and regulation of victim-offender interaction, particularly in cases of GBV, are discussed in later chapters. Christie argues that the current approach allows the criminal to remain a stereotypical character in the eyes of the victim.[28] Other authors have pointed out that a dialogue between the victim and offender may also serve to humanise the victim to the offender, who can then fully understand the impact of their actions.[29] Christie argues that when the victim is included in the criminal justice process, the main focus will shift from punishing the offender to the victim's restitution.[30]

Christie suggests that the nature of such an encounter may reduce recidivism but that this is not the main aim of involving the victim, merely an additional benefit. Christie argues that responses to crime should be based on what the parties involved find to be justified by the general values of society.[31] In South Africa, the legal convictions of the community can be understood through the values of the Constitution, including the value of *ubuntu* which are explored further in this research.[32]

Christie proposes the concept of a victim-oriented court. The first stage in Christie's model of justice is to establish whether the law has been broken and whether the accused is the person who broke it. This is in line with the existing criminal justice system. The second stage of Christie's model is for the court to consider the victim's circumstances and the harm caused. A victim-oriented court will consider what the

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[27] 8.

[28] 8, 9.

[29] TF Marshall *Restorative Justice: An Overview* (1999) 11.

[30] Christie (1977) *British Journal of Criminology* 9.

[31] 8, 9.

[32] 2007 5 SA 323 (CC) paras 28, 51.

offender can do for the victim as well as what the community and the state can offer. Only once this has been established is the subject of punishment broached in the third stage of this trial. This punishment must be necessary in addition to restitution for the victim. It is important to note here that Christie's model does not exclude punishment in favour of restoration or restitution; these outcomes can exist together where they are useful. The fourth stage of this trial takes place after sentencing, and herein the judge must consider the offender's circumstances and rehabilitation.[33] Christie argues that through this model, the courts can blend civil and criminal law to re-orientate the court process towards the victim.[34]

2 3 2 Eglash

Eglash proposed that restorative justice focus on restitution and the impact of the crime on the victim with both victim and offender being actively involved in the criminal justice process. According to Eglash, the offender is not removed from the community or the situation; rather, their behaviour is reversed through restitution, in contrast to retributive justice, which solely focuses on punishment and the offender's behaviours.[35] According to Eglash, distributive justice focuses on treating the offender's behaviour and the underlying emotional conflict that motivated the crime. In distributive and retributive justice models, both the offender and victim are passively involved in the criminal justice process. The offender is removed from the community and situation. The negative behaviour exhibited by the offender ceases due to deterrence, avoidance of punishment or treatment of the underlying emotional conflict.[36]

Eglash outlines four types of restitution which are possible in a restorative justice model. "Spontaneous restitution" allows the offender to decide if and how they will offer restitution. This is most commonly seen in minor interpersonal conflicts. "Mandatory restitution" requires a court to decide if and how the offender will make restitution; this is seen in civil court cases. "Ritual restitution" allows the offender to decide if they are going to make restitution but how it is delivered is decided by

[33] 10.
[34] Christie (1977) *British Journal of Criminology* 11.
[35] Eglash "Beyond restitution: Creative restitution" in *Restitution in Criminal Justice* 91.
[36] 91, 92.

someone else. This is often seen in religious organisations where a person will voluntarily decide to join a faith knowing that they will need to make amends. However, how they make amends is decided by their religious leader.[37] "Creative restitution" is what Eglash believes is the most promising for the justice system. Here the offender is ordered to make amends for the harm they have caused but is allowed to decide how they will do so.[38]

Eglash offers four requirements for creative restitution to ensure that the restitution is neither disproportionate nor trivial. First, the restitution must be active, requiring some effort from the offender. Second, the effort must be constructive and relate to the offence's victim. Third, constructive restitution must be related to the nature of the harm caused or the damages incurred. Lastly, the relationship between the restitution and the offence must be reparative of the harm caused. [39]

Eglash describes two fundamental characteristics of creative restitution: the extra mile and mutual help. The reparative effort should not only restore the situation to its prior condition but also aim to leave the victim in a better situation than they were in before the offence. The second characteristic is that the offender should strive to help others in a similar situation, as seen in substance abuse programmes.[40]

Eglash indicates that a system of restitution is, at its core, victim-oriented. The main aim of a restorative model of justice is that the victim must be given restitution for the harm done to them. Models of justice which focus on punishment or treatment are offender-oriented and only view victim restitution as an incidental benefit of the response to crime.[41]

2 3 3 Barnett

Barnett discusses the topic of restitution and victim-oriented justice and focuses on the need for a paradigm shift. Barnett claims that the paradigm of punishment is in crisis, and there needs to be a shift toward a paradigm of restitution.[42] Restitution

[37] 92, 93.
[38] 93, 94.
[39] 94.
[40] 94, 95.
[41] 98, 99.
[42] Barnett (1977) Ethics 280.

views crime as an offence by one individual against the rights of another. Justice under this paradigm is when the offender corrects the wrong they have caused.[43]

Barnett outlines two forms of restitution; “punitive restitution” and “pure restitution”. Punitive restitution frames restitution as a method of punishment for the offender and adopts restitution into the punishment paradigm.[44] Pure restitution focuses on the victim and what they are owed. Barnett argues that if restitution is the main focus of the criminal justice process, then other goals such as deterrence or rehabilitation can be incidentally achieved through this process. [45]

Barnett contends that the paradigm of restitution is inherently flexible and centres on the victim's rights. The action of the offender creates a debt to the victim, which must be repaid. This debt becomes the property of the victim and can be treated as any other. The debt may be assigned, delegated or inherited by another. Barnett goes on to raise the issue of double damages, where civil claims are also possible as well as restitution claims. Barnett argues that the method in which this is addressed in civil law must be applied to restitution cases to avoid punishing the offender twice.[46]

2 3 4 Wright

Wright argues that too little attention is paid to victims in the aftermath of crime. According to Wright, the main aim of crime response is focused on the offender and their punishment. Wright argues that a constructive response to crime may be of more symbolic and practical value to victims.[47]

Wright argues that both the offender and the community should help the victim. Similarly, the offender should also be required to make amends to both the victim and the community. These amends should be made in an attempt to show respect for the victim’s feelings and as a way to offer practical help. The offender should be reintegrated rather than further excluded. Thus, they should be allowed to heal the breach they have caused in the community.[48]

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[43] 287.
[44] 288.
[45] 289.
[46] 291.
[47] Wright (1977) *How J Penology & Crime Prevention* 22.
[48] 30,31.

Wright contends that compensation funds should be more widely available for victims of crime. These funds are established by the state for victims of violent crime but often exclude instances where the offender and victim live together. The rationale for this exclusion is that the offender may benefit from the victim's compensation if they live together.[49] The complexity of instances of domestic violence and other forms of GBV are discussed in later chapters when establishing the appropriateness of restorative justice as a response to these instances.

These aforementioned compensation funds express community concern for the victims of crime but do not create opportunities for the offender to directly make amends to the victim.[50] Wright notes that some jurisdictions have made victim-offender mediation an optional part of the criminal justice process but that this is often limited to less serious offences. The outcome of these sessions predominantly focuses on reaching an agreement between victim and offender, particularly regarding financial compensation. Apology and emotional reconciliation may not always be the main aim of the mediation sessions. Wright argues that all of the justifications for punitive punishment can be more effectively met by restorative justice processes.[51]

2 3 5 Analyses of early scholars

There are several commonalities which can be drawn from the works of Christie, Eglash, Barnett and Wright. These shared ideas and features of African restorative justice are compared to determine what these principles of restorative justice have to offer victims of GBV.

All these authors express some level of dissatisfaction with the criminal justice system, especially regarding addressing the needs of victims. Christie argues that victims have lost their right to participate in conflicts and outlines a court procedure which restores the rights of victims to participate in their own conflict.[52] Barnett focuses on the need for a paradigm shift away from a paradigm of punishment which he claims is in crisis and towards a paradigm of restitution.[53] Eglash indicates that a system of

[49] Ministry of Justice *Criminal Injuries Compensation Scheme 2012* 11/12 34.
[50] Wright (1977) *How J Penology & Crime Prevention* 25.
[51] 26.
[52] Christie (1977) *British Journal of Criminology* 1.
[53] Barnett (1977) *Ethics* 280.

restitution is at its core victim-oriented. Models of justice which focus on punishment or treatment are offender-oriented and only view victim restitution as an incidental benefit of the criminal justice system if it does occur.[54] Wright argues that too little attention is paid to victims in the aftermath of crime. The main aim of crime response is always focused on the offender and their punishment. Wright argues that a constructive response to crime may be of more symbolic and practical value to victims of crime.[55]

This dissatisfaction with the criminal justice system is accompanied by the notion that the manner in which victims are treated must change. Christie and Barnett outline victim-oriented court systems in which restitution is the primary objective.[56] Wright explores the use of state-run victim compensation funds and the possibility of offenders paying reparations to victims.[57] Eglash and Barnett both emphasise the importance of restitution for victims of crime.[58]

Christie, Barnett and Eglash express the idea that the victim should be a more important party in the crime control process or take ownership of the conflict. Christie argues that the victim owns the crime and that it has effectively been stolen by the state.[59] Barnett describes the crime as a debt created which becomes the victim's property.[60] Eglash states that in a restorative justice model the victim takes on a much more active role compared to models of retributive justice in which they are much more passive.[61]

This idea that the victim is either entitled to or should take on a more important role in the criminal justice system stems from the framing of crime which these authors use. Christie, Barnett and Eglash all explicitly frame crime as harm caused by one individual against another. This is an opposing view to the retributive justice approach

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[54] Eglash “Beyond restitution: Creative restitution” in *Restitution in Criminal Justice* 98, 99.
[55] Wright (1977) *How J Penology & Crime Prevention* 22.
[56] Christie (1977) *British Journal of Criminology* 10, 11; Barnett (1977) *Ethics* 288, 289.
[57] Wright (1977) *How J Penology & Crime Prevention* 23-27; Barnett (1977) *Ethics* 288, 289.
[58] Barnett (1977) *Ethics* 288, 289; Eglash “Beyond restitution: Creative restitution” in *Restitution in Criminal Justice* 94-96.
[59] Christie (1977) *British Journal of Criminology* 1-3.
[60] Barnett (1977) *Ethics* 291.
[61] Eglash “Beyond restitution: Creative restitution” in *Restitution in Criminal Justice* 91, 92.

which frames crime as a breach of law that an individual commits against the state which may or may not result in additional harm caused to others.[62]

This framing of crime then leads the authors to argue that justice should be carried out through restitution and not necessarily punishment. Christie argues that a natural consequence of the victim's involvement in the trial is that their restitution becomes the central focus.[63] Barnett states that in the new paradigm he outlines, once guilt is established the main focus of the trial is not sentencing and punishment but rather victim restitution.[64] Eglash identifies restitution as the primary goal of a restorative justice model and outlines criteria for constructive and effective restitution.[65] The authors also question the importance of punishment as a goal of the criminal justice system over goals such as restitution and healing.[66]

These models suggested by the authors are similar in many ways. Victim restitution is the main aim of each model.[67] Christie and Barnett both posit that guilt must be established first and then the restitution of the victim determined.[68] Only once restitution has taken place is punishment discussed according to Christie.[69] Barnett's model does not allow the offender to be punished deliberately, but the goals of a retribute system may still be incidentally achieved.[70] In both Christie and Barnett's model, the circumstances of the offender must be considered when deciding on their treatment. [71] Barnett posits that the danger the offender poses to the community must be considered when deciding on whether they should be imprisoned. The means of the offender to provide restitution must be considered as well.[72] These models are compared to the approaches of courts in the cases of *Thabethe* and *Seedat* in the fifth chapter of this thesis.

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[62] Barnett (1977) *Ethics* 28, 291; Christie (1977) *British Journal of Criminology* 1, 3; Eglash "Beyond restitution: Creative restitution" in *Restitution in Criminal Justice* 91,92.

[63] Christie (1977) *British Journal of Criminology* 9.

[64] Barnett (1977) *Ethics* 287,291

[65] Eglash "Beyond restitution: Creative restitution" in *Restitution in Criminal Justice* 91.

[66] 91,92; Wright (1977) *How J Penology & Crime Prevention* 22.

[67] Christie (1977) *British Journal of Criminology* 9; Eglash "Beyond restitution: Creative restitution" in *Restitution in Criminal Justice* 91.

[68] Christie (1977) *British Journal of Criminology* 10; Barnett (1977) *Ethics* 289.

[69] Christie (1977) *British Journal of Criminology* 10.

[70] Barnett (1977) *Ethics* 289.

[71] Christie (1977) *British Journal of Criminology* 9,10 Barnett (1977) *Ethics* 289-291.

[72] Barnett (1977) *Ethics* 289-291.

Barnett and Wright indicate that the aims of a retributive justice system can be met just as effectively if not more effectively by a system based on restorative justice. Retributive justice systems typically justify their punishment with goals of deterrence, reformation, rehabilitation, disablement, and elicitation of remorse. Barnett and Wight argue that these goals can be more effectively met in a restorative justice system.[73] In the fifth chapter of this thesis, the achievement of restorative and restitutive goals are evaluated in the cases of *Thabethe* and *Seedat*.

Many of these ideas existed in African legal culture and the African understanding of restorative justice. Although, comparisons or criticisms of a retributive justice system are not a central feature of African restorative justice. African restorative justice is not posited as a more effective alternative as it is the dominant model of justice in African legal culture.[74] That is not to say that retributive punishments were unheard of in African justice systems.[75]

There are many similarities between the ideas posited by these authors and the features of African restorative justice practices. The active participation of the victim and the focus on their restitution is a common feature of African justice systems. Christie even notes that his arguments for criminal justice reform are based on his experience of watching African restorative justice practices take place.[76] Understanding a crime as an act against another person, not the state, is another feature that resonates with African legal culture. Crime is framed as a disruption of the relationships between individuals as well as between the community and individuals.[77] Naturally, the main aim of conflict resolution is to address the harm that has been committed.[78] Again, these are similarities between the arguments of these Western authors and African restorative justice. It is clear from this comparison that the essence of restorative justice as it has been understood in African legal systems has been

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[73] 289-291; Wright (1977) *How J Penology & Crime Prevention* 23-27.

[74] Wielenga, Batley & Murambadoro (2020) *Ubuntu Journal of Conflict and Social Transformation* 46, 47.

[75] 48.

[76] Christie (1977) *British Journal of Criminology* 2.

[77] Wielenga, Batley & Murambadoro (2020) *Ubuntu Journal of Conflict and Social Transformation* 49,50; Skelton “Tapping indigenous knowledge” in *Restorative Justice* 232.

[78] Skelton “Tapping indigenous knowledge” in *Restorative Justice* 231; Mangena (2015) *SAJP* 6.

repackaged by these authors as a response to the failings of retributive criminal justice systems.

2 3 6 Later developments in Western restorative justice scholarship

After 1977 restorative justice continued to gain popularity in the West. However, authors began to move away from framing restorative justice as diametrically opposed to retributive justice and rather moved to harmonise the two approaches. Gavrielides has argued that these early authors focused on introducing restorative justice as a radical concept to garner attention and firmly establish the theory. This radical approach resulted in over-emphasising restorative justice's incompatibility with retributive justice. Some later authors continued this trend but eventually, there began to be a push for harmonising the two systems.[79] The extent to which courts have harmonised restorative and retributive justice is discussed in later chapters with reference to case law and academic commentary.

Zehr developed the concept of restorative justice in Western scholarship and built upon the work of early authors.[80] Zehr proposes that restorative justice is a new lens through which the justice system may be viewed rather than an entirely new system that requires abandoning the existing model as some earlier authors suggested.[81] This may be an approach which is appealing to survivors of GBV who do not want to completely divert their case to alternative restorative justice systems.

With this restorative lens, Zehr posits many of the same solutions as early Western theorists for shortfalls within the criminal justice system. These solutions are all features of African restorative justice practices. Zehr sees crime as damage to relationships which creates an obligation to enact restoration. He argues that the current criminal justice system views crime and justice through a retributive lens and thus has become preoccupied with the punishment of the offender. Justice through a restorative lens is achieved when the victim, offender and community collaboratively find a solution to reconcile and restore the parties involved.[82] Justice then becomes

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[79] Gavrielides *Restorative Justice Theory and Practice* 38, 39.

[80] 23.

[81] Barnett (1977) *Ethics* 280; Eglash "Beyond restitution: Creative restitution" in *Restitution in Criminal Justice* 98, 99.

[82] H Zehr *Changing Lenses* (1990) 181.

restoration rather than retribution and the primary goal of the criminal justice system is to heal the harm caused by the crime.[83]

Similarly, the criminal justice reforms developed by Van Ness use African restorative justice to address the shortcomings of retributive justice. Van Ness argues that the aim of the criminal justice system should be to address the harm caused to the victim and thus restore the community.[84] He argued that offenders must be held responsible for the harm they have caused through compensation or restoration and should only be removed from the community as a last resort.[85] This is in line with what early authors believed about the justice system. The possibility of imprisonment contemplated by Van Ness was not addressed by many of the early authors. However, Barnett similarly claimed that the decision to remove the offender from the community should be made based on whether they are a danger to society – not merely to inflict punishment.[86] Community safety as well as victim safety are one of the main concerns of feminist theorists.[87] These theorists favour an approach to criminal justice which bases the decision to imprison on the danger posed by the offender rather than purely the aim of punishment

Braithwaite advocated for incorporating aspects of restorative justice into the existing criminal justice system.[88] Braithwaite developed the idea of reintegrative shaming, which utilises the community's ability for social control. He distinguishes between reintegrative shaming, which is more constructive, and stigmatising shaming, which does not aim to bring the offender back into the community.[89] Braithwaite argues that the power of the community to shame an individual who has caused harm can be an effective method of crime control and deterrence.[90] This approach shows resonance with the value of *ubuntu* and the approach of African conflict resolution

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[83] 186.

[84] Van Ness *Crime and its Victims* 157.

[85] 178,179.

[86] Barnett (1977) *Ethics* 289-291.

[87] J Stubbs "Domestic violence and women's safety: Feminist challenges to restorative justice" in H Strang & J Braithwaite (eds) *Restorative Justice and Family Violence* 42 57; H Hargovan "Doing justice differently: Is restorative justice appropriate for domestic violence" (2010) 2010 *Acta Criminologica* 25 27.

[88] Braithwaite (1999) 25 *Crime and Justice* 104-105.

[89] J Braithwaite *Crime, Shame and Reintegration (*1989) 55.

[90] 81-83.

mechanisms, which also aim to reintegrate the offender back into the community by involving the community in crime control.[91]

Braithwaite also developed standards for using restorative justice based on empirical research and international human rights instruments. These standards include maximising standards, constraining standards, and emerging standards. Maximising standards aim to maximise certain beneficial consequences and include preventing further injustice and restoring human dignity, property loss, safety, damaged relationships, communities, freedom, compassion, and peace. Constraining standards specify specific rights and limits including non-domination, empowerment, honouring legally enforced upper limits on sanctions, equal concern for all parties, respectful listening, accountability, and respect for human rights.[92] Emerging standards specify possible outcomes for restorative justice practices including but not limited to remorse, forgiveness, apology, mercy and condemnation of the harm done.[93]

These standards are predominantly in line with the reform which feminist legal theorists call for. The focus on communities and damaged relationships fit into the cultural feminist view of legal reform which is discussed in the next chapter.[94] The emphasis on empowerment and prevention of further injustice aligns with most strands of feminist legal theory and their approach to the adjudication of GBV crimes.[95] One element of Braithwaite's standards which may be contentious are the emerging standards of apology and forgiveness. These are two elements which feminists have deemed inappropriate to require from GBV survivors.[96] Notably, Braithwaite does not indicate that these are required but that they may emerge organically from a restorative justice process.[97]

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[91] 1995 2 SACR 1 (CC) para 242; D Louw "The African concept of ubuntu and restorative justice" in *Handbook of Restorative Justice* 161.

[92] J Braithwaite "Setting standards for Restorative Justice" (2002) 42 *Brit J Criminol* 563 569.

[93] 570.

[94] CQ Hopkins & MP Koss "Incorporating feminist theory and insights into a restorative justice response to sex offences" (2005) 11 *Violence Against Women* 693 700; C Gilligan *In a Different Voice* (1982) 5.

[95] Stubbs "Domestic violence and women's safety" in *Restorative Justice and Family Violence* 52; S Curtis-Fawley & K Daly "Gendered Violence and restorative justice" (2005) 11 *Violence Against Women* 603 627-629.

[96] K Daly & J Stubbs "Feminist Engagement with Restorative Justice" (2006) 10 *Theoretical Criminology* 9 17.

[97] Braithwaite (2002) *Brit J Criminol 570*.

Marshall is another prominent author in Western scholarship.[98] Marshall's assessment of restorative justice is characteristic of an African approach to restorative justice which early authors have also borrowed. These features are again also posited as solutions to issues in the existing criminal justice system. Marshall determined that restorative justice is primarily concerned with the restoration of the victim, the offender and the damage caused by the offence.[99] Marshall identifies the primary objectives of restorative justice. It aims to attend to the needs of victims. It also aims to reintegrate offenders into the community thereby preventing reoffending and enabling offenders to take responsibility for their behaviour. Marshall claims that restorative justice promotes community involvement in the rehabilitation of both victims and offenders as well as the prevention of crime. It provides a means of "avoiding escalation of legal justice" and its concomitant delays and costs. This last outcome identified by Marshall touches on his discussion of the relationship between restorative justice and the criminal justice system.[100] This topic is one of the major points of contention between restorative justice theorists that is discussed below.

The goals of restorative justice identified by Marshall align with various reforms to the criminal justice system that feminist theorists have called for.[101] One crucial difference is that Marshall argues that the nature or seriousness of a crime should not determine whether restorative justice is used whereas some feminists argue that certain sexual offences can never be appropriate for restorative justice.[102] The appropriate circumstances for restorative justice, specifically in instances of GBV are discussed below. Feminist debates regarding the use of restorative justice as a response to various kinds of GBV are discussed in later chapters.

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[98] Gavrielides *Restorative Justice Theory and Practice* 27.

[99] Marshall Restorative Justice: An Overview 7.

[100] 8.

[101] 7; Daly & Stubbs "Feminist Theory" in *Handbook of Restorative Justice* 160; J Stubbs "Relations of domination and subordination: Challenges for restorative justice in responding to domestic violence" (2010) 33 *UNSW Law Journal* 970 980; Curtis-Fawley & Daly (2005) *Violence Against Women* 621.

[102] Marshall Restorative Justice: An Overview 25; M Koss "Restoring rape survivors: Justice advocacy and a call to action" (2006) 1807 *Ann NY Acada Sci* 206 222; Stubbs "Domestic violence and women's safety" in *Restorative Justice and Family Violence* 53.

2 4 Defining restorative justice

For the purposes of this research, restorative justice can be understood as: An approach to crime which brings together the victim, offender and community, after the establishment of guilt. The parties are brought together to determine victim restitution and attempt reconciliation and reintegration where possible. This approach is informed by the value of *ubuntu* which denotes human dignity, social cohesion and fairness.

This definition of restorative justice is based on the discussion of restorative justice theory above as well as the existing definitions discussed below. It is put forward that in a comprehensive definition of restorative justice, such as this, one needs to address who is involved, what is happening, when it happens and why it happens. As stated above, this definition is not meant to definitively distil restorative justice as a concept but rather provide a functional understanding upon which later research can be premised.

2 4 1 Foreign and international definitions

Restorative justice is notoriously difficult to define, however, some formulations have become widely accepted.[103] Marshall has formulated one of the most widely accepted definitions of restorative justice: "a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future."[104]

This thesis submits that this definition views restorative justice as a process and places a heavy emphasis on the parties involved. The outcome of the process is mentioned but the form that such an outcome might take is not identified. This type of definition differs from the value-based approaches of other definitions.[105]

Another frequently quoted definition is Zehr's adaptation of Marshall's definition:

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[103] A Skelton & M Batley *Mapping Progress, Charting the Future: Restorative Justice in South Africa* (2006) 6.

[104] Marshall *Restorative Justice: An Overview* 5.

[105] J Braithwaite & H Strang "Introduction: Restorative Justice and Civil Society" in J Braithwaite & H Strang (eds) *Restorative Justice and Civil Society* (2001) 1 1.

> "a process to involve, to the extent possible, those who have a stake in a specific offence to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible."[106]

This definition builds on Marshall's definitions by identifying specific outcomes such as healing, addressing the harm done and restoration. This thesis submits that this definition is more indicative of restitution being the central aim of a restorative justice process rather than emphasising the mechanics of the process. In contrast to Marshall's formulation, this definition is less about who is present or what is being done and more about why the process is taking place. The goals and underlying values of restorative justice are clearer from this definition, yet the mechanics of the process are still apparent. Importantly Zehr's inclusion of "to the extent possible" indicates that the outcomes of a restorative justice process are not absolute in every case.

The United Nations has defined a restorative justice process as one in which:

> "the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party."[107]

This definition is also process-based, but it sheds light on who the parties of restorative justice processes are. It also indicates that a facilitator is often necessary for these processes, which was not mentioned in either of the previous definitions.

2 4 2 South African definitions

Skelton and Batley note that the difficulties surrounding identifying a definition of restorative justice have led some authors to identify a set of values instead.[108] Van Ness and Strong have determined the values of encounter, amends, recognition and inclusion as central to defining restorative justice.[109] This definition was used by the

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[106] H Zehr *The Little Book of Restorative Justice* (2002) 37.

[107] United Nations Economic and Social Council *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* E/RES/2002/14 2.

[108] Skelton & Batley *Mapping Progress, Charting the Future* 6.

[109] D van Ness & K Strong, *Restoring Justice* (2002) 56, 79, 99, 123.

Constitutional Court in *Dikoko v Mokhatla* ("*Dikoko*")[110] and linked to the value of *ubuntu* which are expanded upon further in this chapter.

Also in a South African context, the Truth and Reconciliation Commission ("TRC"), as well as the SALRC, have both dealt with the concept of restorative justice, including its main aims and practical implications. The Child Justice Act and Service Charter for Victims of Crime in South Africa ("the Victims' Charter") have also sought to define restorative justice in specific contexts.

The SALRC identified restorative justice as a model of criminal justice based on reparation which aims to materially or symbolically repair the harm caused by an offence. The goal of restorative justice is to heal the wounds of all parties who have been impacted by the crime. In this process, the offender bears an obligation of reparation to the victim and the community.[111]

The SALRC has defined restorative justice as a process which:

> "seeks to redefine crime, interpreting it not so much as breaking the law, or offending against the State, but as an injury or wrong done to another person. It encourages the victim and the offender to be directly involved in resolving conflict and thereby becoming central to the criminal justice process with the State and legal professionals becoming facilitators, supporting a criminal justice system which aims at offender accountability, full participation of both the victim and the offender and making good or putting right the wrong."[112]

This definition does not formulate restorative justice as a process but rather as an approach to justice. The goals of this approach are outlined as the focal point of the definition. The definition gives an indication of how these goals can be achieved within the criminal justice system.

Notably, the TRC relied on this definition and linked the value of *ubuntu* to the theory of restorative justice.[113] The SALRC also noted that traditional African principles of

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[110] 2006 6 SA 235 (CC) para 144.

[111] South African Law Reform Commission *Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment) Project 82 Report* (1997) 8.

[112] 9.

[113] The Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report Volume 1 (*1998) 125-126.

justice might help centre victims of crime in conflict resolution practices.[114] These connections are elaborated upon below in the discussion of the value of *ubuntu* and its connection to restorative justice.

The Victims' Charter indicates that there has been a general trend in human rights culture and the criminal justice system away from a retributive approach and towards restorative justice. The Charter indicates that the understanding of crime as harm caused by one person against another and not just an offence against the state is central to the theory of restorative justice.[115]

The Child Justice Act defines restorative justice in the context of juvenile diversions as:

> "an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation."[116]

This definition integrates many elements of previous definitions. It indicates the mechanics of the process, the focus on restoration, as well as reconciliation and reintegration of the offender.

From this discussion, the elements of the working definition for this research have been established. The value of *ubuntu* and its relationship to restorative justice are expanded upon below.

2 5 The practical applications of restorative justice

Restorative justice has many practical applications and encompasses several programmes and practices, including victim-offender mediation, family group conferencing and sentencing circles, community restorative boards, victim compensation funds and sentencing practices. These processes take place within

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[114] South African Law Reform Commission *Sentencing Restorative Justice Project 82 Report* 6.

[115] Department of Justice and Constitutional Development *Service Charter for Victims of Crime in South Africa* (2004) 3.

[116] S1.

modern criminal justice systems, but some are also reflected in traditional conflict resolution practices in Africa and various indigenous cultures.[117]

2 5 1 Victim-offender mediation

Victim-offender mediation is one of the earliest and most common restorative justice practices. Typically, the mediation session takes place between the victim and offender with a facilitator present.[118] The process of victim-offender mediation usually begins with the case being referred to mediation by an official in the criminal justice system, however, the victim may request referral themselves.[119] The victim and offender are invited separately to participate in the mediation programme. The mediator may meet with each party separately before the mediation session takes place. [120] This initial meeting ensures that the victim is not re-traumatised by the mediation process and that the offender is genuine in their willingness to make amends.[121] Typically, the mediation session begins with the victim explaining the offence and its impact.[122] The offender responds to the victim's statement and then discussions of restoration will begin.[123] Victims are often given considerable input on the scope of the resolution but the offender needs to voluntarily take responsibility for the offence and the restitution they will offer.[124] The mediator will assist the parties in compiling an agreement specifying how the offender will make amends over a specific period.[125] The mediator will typically then prepare a report on the proceedings to be sent back to the court.[126]

Dandurand and Griffith have identified four requirements for victim-offender mediation to take place. First, the offender must accept responsibility for the harm they

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[117] Y Dandurand & C Griffith *Handbook on Restorative Justice Programmes* 2 ed (2006) 12.
[118] 24.
[119] 25.
[120] Gavrielides *Restorative Justice Theory and Practice* 33.
[121] Dandurand & Griffith *Handbook on Restorative Justice Programmes* 25.
[122] 24.
[123] Marshall *Restorative Justice: An Overview* 11.
[124] Dandurand & Griffith *Handbook on Restorative Justice Programmes* 25.
[125] Gavrielides *Restorative Justice Theory and Practice* 31; Dandurand & Griffith *Handbook on Restorative Justice Programmes* 25.
[126] Gavrielides *Restorative Justice Theory and Practice* 31, 33.

have caused, or at the very least the offender cannot deny responsibility. Second, the victim and offender must have agreed on the fundamental facts of the case before the session starts.[127] Marshall stresses the importance of confidentiality in restorative justice practices as parties cannot use any information or admission from the mediation to their advantage later in court.[128] The limitations of and practical issues surrounding restorative justice are explored below. Third, both parties need to fully understand the process of victim-offender mediation and voluntarily decide to participate. Finally, the mediation sessions must be safe for both parties to participate in, and the parties need to be assured of this safety.[129] The appropriate circumstances for restorative justice programmes and the factors that need to be taken into account are discussed in the next chapter.

These programmes can run parallel to the criminal justice system, diverting cases out of the system entirely.[130] Victim-offender mediation can be partially incorporated into the court system, where the outcome of the mediation session is considered at sentencing. The mediation process can also exist adjacent to the criminal justice system and mediation for serious offences can take place after a conviction has been secured.[131]

The operation style of the victim-offender mediation programme may differ. Some programmes take place using in-person mediation while others have the parties communicate indirectly through the mediator. Mediation sessions can either have victims meet with their offenders or have groups of victims and unrelated offenders meet to discuss making amends.[132] This is often helpful when victims have not had their offender identified or convicted.[133] Victim-offender mediation sessions may focus more on the needs of the offender or take into account the needs of both the victim and offender. Certain mediation programmes may only accept certain types of cases, based on the seriousness of the offence or the age of the offender.[134]

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[127] 25.

[128] Marshall *Restorative Justice: An Overview* 28.

[129] Dandurand & Griffith *Handbook on Restorative Justice Programmes* 25.

[130] 31.

[131] Gavrielides *Restorative Justice Theory and Practice* 31.

[132] 32.

[133] Marshall *Restorative Justice: An Overview* 12.

[134] Gavrielides *Restorative Justice Theory and Practice* 32.

The model of victim-offender mediation is very similar to some African practices where the victim and offender come together to discuss restitution for the harm caused.[135] Many of these practices often heavily involve the family members of the parties and their community. This inclusion of family members is possibly more closely related to family group conferencing, which is also based on cultural practices.

2 5 2 Family group conferences

Family group conferences are a model of restorative justice practice which began in New Zealand, and which reflects Māori traditional conflict resolution.[136] Family group conferences typically involve a wider range of participants than victim-offender mediation. The victim, offender, their family members, secondary victims, community representatives and the police come together with a mediator to discuss the offence.[137] This process requires the offender to already have admitted guilt and voluntarily agreed to participate. Typically, the offender begins the process with a description of the incident, and then the victim and other participants indicate how the offence has impacted each of them. The offender is then confronted with the human impact of their behaviour and encouraged to take accountability.[138] After thoroughly discussing the offence and its impact, the victim then identifies their desired outcomes from the meeting.[139] The aim of this process is for the parties to draw up an agreement setting out the obligations placed on the offender.[140]

There are many similarities and differences between family group conferencing and victim-offender mediation. Both processes involve a dialogue through which the victim has an opportunity to be heard by other parties and find an emotional resolution. Both processes also allow for the offender to be held directly accountable and make amends to the parties who have been impacted by the harm that has been caused.[141]

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[135] Christie (1977) *British Journal of Criminology* 2; Wielenga, Batley & Murambadoro (2020) *Ubuntu Journal of Conflict and Social Transformation* 48-50.

[136] Gavrielides *Restorative Justice Theory and Practice* 33.

[137] Marshall *Restorative Justice: An Overview* 14.

[138] MS Umbreit *Family Group Conferencing: Implications for Crime and Victims* (2000) 2.

[139] Gavrielides *Restorative Justice Theory and Practice* 34.

[140] Umbreit *Family Group Conferencing* 2.

[141] 3.

Family group conferencing recognises a wider scope of impacted parties and provides an opportunity for the community to participate in conflict resolution.[142]

This practice is based on Māori practices but does show some resonance with African restorative justice practices.[143] This is another example of historic restorative justice traditions being incorporated into the criminal justice system. These practices are still the primary conflict resolution mechanism for many people today.[144]

2 5 3 Sentencing circles

Sentencing circles are also another restorative justice practice which has been traced to the traditions of indigenous Canadians.[145] These practices may be used at various stages in the criminal justice process or be completely separate from the formal court system. These are community-directed programmes which run parallel to the criminal justice system. Typically, the offender must apply to the committee of the sentencing circle to have their case heard. In this process, the parties, including the offender and community members, discuss the sentencing plan for the offender. Usually, the process begins with an explanation of what occurred, and then each party is allowed to speak. The ultimate goal is to promote each party's healing and allow the offender to right their wrongs. This process is very community oriented and creates a sense of shared responsibility in finding a constructive solution to the issue. [146]

2 5 4 Community restorative boards

Community restorative boards are similar to sentencing circles in that they are community-led restorative justice programmes which interact with the criminal justice system. Offenders are typically ordered to participate in the board's public meetings. The board organises meetings between the victim, offender and community. The

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[142] 5.

[143] Gavrielides *Restorative Justice Theory and Practice* 33; Christie (1977) *British Journal of Criminology* 2; Wielenga, Batley & Murambadoro (2020) *Ubuntu Journal of Conflict and Social Transformation* 48-50.

[144] Wielenga, Batley & Murambadoro (2020) *Ubuntu Journal of Conflict and Social Transformation* 46.

[145] Dandurand & Griffith *Handbook on Restorative Justice Programmes* 31.

[146] Gavrielides *Restorative Justice Theory and Practice* 34,35.

meeting is meant to be a constructive confrontation which encourages the offender to take accountability for their actions. Community ownership of the offence and the crime control process is encouraged through the use of direct participation and meaningful consequences. Typically, the meeting is led by the board which discusses the offence and its impact. The board then proposes sanctions which all parties then discuss to come to an agreement on the time period and obligations imposed. The offenders are required to report back to the board about their fulfilment of these obligations. The board then submits a report to the court regarding the terms of the agreement and the offender's conduct.[147]

2 5 5 Victim compensation funds

Victim compensation funds are also a form of restorative justice in that they provide for victim restitution. The SALRC investigated the possibility of establishing such a fund.[148] Wright argues that state-funded compensation funds are important for victim restoration but do not include the offender in the process of restitution and so may not be maximally restorative.[149] As discussed above with reference to Wright's argument, there are many limitations to victim compensation funds. In the past victims have been excluded from compensation if they live with their offender or if the victim's way of life was deemed to invite the risk of violence.[150]

2 5 6 Sentencing practices

Sentencing practices can incorporate restorative justice elements in many ways. A court may take into consideration the outcome of mediation or conferences and include the conditions of the agreement in the sentence. This often results in reduced incarceration time for the offender. Judges may incorporate rehabilitation centres and community service into sentencing conditions as a form of restorative justice. This embodies Elgash's creative restitution approach.[151] The use of restorative sentencing

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[147] 35, 36.

[148] South African Law Reform Commission *Sentencing Restorative Justice Project 82 Report* 47.

[149] Wright (1977) *How J Penology & Crime Prevention* 25.

[150] 24.

[151] Eglash "Beyond restitution: Creative restitution" in *Restitution in Criminal Justice* 93.

practices in South Africa are explored in chapter four with reference to case law and academic commentary.

2 6 Practical and theoretical limitations of restorative justice

There are many limitations to restorative justice, practically and theoretically. While restorative justice creates the opportunity for greater victim involvement and satisfaction there are also risks to their rights which must be mitigated. [152] Marshall indicates that victims have the right to justice and the right not to be re-victimised by the crime control process. The right to justice includes the condemnation of the offender's actions, which is typically executed through judicial sanctions. The increased direct involvement of the victim helps to secure this condemnation; however, mediators must be trained in the nuances of power imbalances to ensure that the victim's interests are not neglected. Marshall also suggests that serious offences require judicial oversight of the mediation process's outcome.[153] To prevent revictimisation, victim participation must be voluntary and well-informed. Victims should also be allowed to determine the timing of the mediation according to their own needs and not the convenience of the court system. Similarly, the victim must be allowed to decide if they want to participate in direct face-to-face mediation or have the mediator act as a liaison. Marshall argues that best practices require that a victim is never faced with an ultimatum regarding their participation in mediation sessions.[154]

The fair treatment of the offender is also a concern as restorative justice practices often occur adjacent to or outside the formal criminal justice system. Mediation programmes need to be designed to treat all offenders equally as far as possible. Similarly, Marshall notes that while it is unlikely that innocent accused persons will plead guilty and enter into mediation to avoid prosecution, there must be safeguards in place to prevent this. Defendants need to have the same rights and protections as in the formal criminal justice system and cannot be denied legal advice.[155] In the South African context, the constitutional rights to a fair trial and access to courts will always

[152] Marshall *Restorative Justice: An Overview* 11.

[153] 23.

[154] 24.

[155] Marshall *Restorative Justice: An Overview* 23.

need to be upheld in restorative justice programmes.[156] As with victims' interests, mediators must be well trained in power dynamics to mitigate risks of unfairness, breach of confidentiality or safety issues.[157] In the next chapter, the concerns of feminist legal theorists are explored in relation to the use of restorative justice in cases of gender-based violence and these issues.

The balance between the offender and the victim is also one of the issues identified by Marshall.[158] Marshall argues that the offender and the victim should not be treated as equals as the offender owes an obligation to the victim. Other authors merely argue that mediators need to be trained in the existing power imbalances that may be present.[159] This is especially a concern where the victim and offender were known to each other before the offence or where a repeated pattern of violence exists, such as in cases of domestic violence.[160] This is a recurrent concern of feminist theorists whose specific views are discussed in the next chapter.

The suitability of cases for restorative justice is also a concern. Many critics argue that restorative justice is inappropriate for serious cases; however, Marshall claims that there is very little evidence to substantiate these views. Marshall argues that while there is an increased risk in cases of serious offences, there is much more to gain as well.[161] The referral of the case should not, in Marshall's view, be based on the circumstances of the offender, the offence or the convenience to the court but rather it should be based on the readiness of the victim and their needs.[162]

2 7 Scholarly disagreements

Gavrielides identified six major disagreements amongst restorative justice theorists. First, theorists differ on whether restorative justice is a new paradigm of justice or a complementary model to the current paradigm. According to Gavrielides, some authors argue that restorative justice is a complete and independent model which

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[156] Sections 34, 35 of the Constitution.

[157] Marshall *Restorative Justice: An Overview* 23, 27, 28.

[158] 24.

[159] Umbreit *Family Group Conferencing* 6,7.

[160] Hopkins & Koss (2005) *Violence Against Women* 712.

[161] Marshall *Restorative Justice: An Overview* 25.

[162] 25, 26.

should replace the current criminal justice system. Others argue that restorative justice is only a complementary paradigm that must be supported by the current criminal justice system.[163]

As discussed above, early authors particularly emphasised the independent nature of restorative justice and its incompatibility with existing systems. Gavrielides suggests this emphasis is because of how deeply ingrained retribution was in the existing justice system and a desire to draw attention to the new concept of restorative justice. Later authors sought to blend restorative justice into the existing criminal justice system once they began trying to implement the theory in practice. This disagreement has still not been settled and Gavrielides indicates that the confusion and misunderstanding it creates can hinder development in the field of restorative justice theory.[164]

The second disagreement amongst authors is whether restorative justice practices should occur within or outside the criminal justice system. This disagreement differs from the previous one in that it is not an issue of whether restorative justice is an independent model of criminal justice but whether it should be implemented as a complementary process or as a separate system to which cases are diverted.[165] Authors such as Daly and Immarigeon argue that implementing restorative justice should happen in parallel to the existing criminal justice system.[166] Their concern is that integrating restorative practices into a retributive system may result in these programmes being completely assimilated or peripheralised over time.[167]

The third disagreement centres on the definition of restorative justice. Some authors argue that the definition should be process-based while others argue for an outcome-based or value-based definition.[168] McCold and Wachtel have noted that a process-based definition may exclude restorative justice programmes which are not completely restorative, as there are many different kinds of restorative justice programmes.[169] However, an outcome or value-based definition may open the net too wide and include

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[163] Gavrielides Restorative Justice Theory and Practice 38.

[164] 39.

[165] 39, 40.

[166] K Daly & R Immarigeon “The past, present, and future of restorative justice: Some critical reflections” (1998) 1 *Justice Review* 21 37.

[167] Gavrielides *Restorative Justice Theory and Practice* 39.

[168] 40.

[169] P McCold & T Wachtel “Restorative justice theory validation” in E Weitekamp & HJ (eds) *Kerner Restorative Justice: Theoretical Foundations* (2000) 110 113-119.

practices which have restorative elements but are not restorative in nature.[170] For this reason, Strang and Braithwaite have proposed that definitions use a combination of both process and value-based approaches.[171]

The fourth area where theorists differ is the number of stakeholders who are involved in a restorative justice process. Authors such as Christie argue that the key stakeholders are the victim and the offender as they are the parties who are most impacted by the crime.[172] The other school of thought on this matter widens the scope of stakeholders to include all those who are touched by the offence. This extends the list beyond the victim and offender to their family and friends, , the officials concerned with the sentencing of the crime, judges and prosecutors, and community workers and counsellors who are not related to the crime but may assist in finding a solution.[173] Zehr and Mika have identified the primary victims as those who are directly impacted by the crime but argue that family members and the affected community are also victims to a lesser degree.[174]The impact of this disagreement is that theorists do not agree on which processes can constitute restorative justice practices. The first camp views victim-offender mediation as the only available restorative justice process as it only includes the victim and offender. The second group argues that restorative justice encompasses family group conferences and sentencing circles as these practices also account for the community's interests.[175]

The fifth dispute is whether restorative justice is an alternative to punishment or an alternative punishment.[176] Wright argues that restorative justice measures can never be punitive and so exists as an alternative to punishment.[177] McCold and Watchel similarly conceptualise restorative justice as distinctly separate from punitive

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[170] Gavrielides *Restorative Justice Theory and Practice* 40; J Braithwaite & H Strang Restorative Justice and Civil Society (2001) 2,3.

[171] Braithwaite & Strang “Introduction” in *Restorative Justice and Civil Society* 2.

[172] Christie (1977) *British Journal of Criminology* 2.

[173] Gavrielides *Restorative Justice Theory and Practice* 41.

[174] H Zehr & H Mika “Fundamental concepts of restorative justice” (1998) 1 *Contemporary Justice Review* 47 51.

[175] Gavrielides *Restorative Justice Theory and Practice* 41; Umbreit *Family Group Conferencing* 2; Dandurand & Griffith *Handbook on Restorative Justice Programmes* 27-31.

[176] Gavrielides *Restorative Justice Theory and Practice* 41.

[177] M Wright “Can mediation be an alternative to criminal justice” in B Galaway & J Hudson (eds) *Restorative Justice: International Perspectives* (1996) 227 236-237.

measures.[178] Walgrave and Bazmore argue that restorative justice is inherently constructive and cannot be inflicted as punishment for its own sake. However, they concede that restorative justice does not require retributive or rehabilitative models to be completely cast aside.[179] However, they indicate that restorative justice practices can include coercive processes but should be reasonable, restorative, and respectful.[180] The other group of theorists such as Daly argue that restorative justice practices are an alternative punishment not an alternative to punishment. Daly argues that restorative justice creates obligations for the offender and so is in fact an alternative punishment. In this sense, punishment is any sanction which is in some way burdensome or unpleasant. Daly argues that this is a more inclusive view of crime as it allows the idea of punishment to exist even when the primary response to crime is restitution.[181] Christie proposes a model of criminal justice in which the primary aim is restitution and once the victim has been restored, attention shifts to whether punishment is necessary for the offender.[182]

The final disagreement that Gavrielides identifies is the flexibility of restorative justice principles. Authors disagree on the extent to which these principles need to be strictly adhered to. Gavrielides uses the example of "voluntariness" as a principle of restorative justice practices in that the victim and offender voluntarily participate in the process.[183] Zehr and Mika argue that restorative justice does emphasise voluntariness over coercion but if offenders do not willingly accept their obligations they may be required to do so anyway.[184] This is in stark contrast to the principles of the New Zealand Family Group Conference procedure whereby the conference may only take place if both the victim and offender have agreed to participate.[185] Gavrielides also

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[178] McCold & Wachtel in *Restorative Justice: Theoretical Foundations* 113-114.

[179] L Walgrave & G Bazmore "Reflections on the future of restorative justice for juveniles" in L Walgrave & G Bazmore (eds) *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (1999) 359 361, 365-366.

[180] L Walgrave "On restitution and punishment: favourable similarities and fortunate differences" in A Morris & G Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001) 17 22-23.

[181] K Daly "Revisiting the relationship between retributive justice and restorative justice" in H Strang & J Braithewaite (eds) *Restorative Justice: Philosophy to Practice* (2000) 39.

[182] Christie (1977) *British Journal of Criminology* 10, 11.

[183] Gavrielides *Restorative Justice Theory and Practice* 42.

[184] Zehr & Mika (1998) *Contemporary Justice Review* 51.

[185] Ministry of Justice *Restorative Justice Best Practice in New Zealand* (2004) 12.

notes that it may be difficult to ascertain whether the participation of the offender is truly voluntary if the participation is an alternative to continued prosecution.[186]

2 8 Appropriate circumstances for the use of restorative justice

Many authors have stated that not all cases are appropriate for the application of restorative justice. Some authors have proposed guidelines or criteria for deciding which cases are appropriate for restorative justice.

Skelton and Batley argue there must be a direct and identifiable victim who is willing to participate in the programme. The authors claim that restorative justice can be used in serious offences, but it will depend on other circumstances in the case not the severity of the offence. In cases of serious offences, there may be a heavy impact on the victims and restorative justice may aid them in finding answers or closure regarding the crime. [187] This indicates that restorative justice may have application in cases of GBV which often have long-lasting impacts on victims' lives.[188] Skelton and Batley argue, however, that where there are extreme power imbalances restorative justice may not be appropriate.[189] Feminist authors have also argued that the presence of power imbalances in certain cases of GBV, such as domestic violence, makes restorative justice mediation ineffective.[190] These concerns are discussed further in the next chapter.

Marshall argues that the offender must be freely willing to participate and cannot do so merely because they assume they will receive a lesser sentence.[191] However, Marshall posits that restorative justice should not be limited to lesser offences. Marshall claims that there is no proof that restorative justice is inappropriate for serious offences. Marshall argues that these circumstances offer more to gain in that the victims are deeply impacted by the crime and can be restored.[192] This claim directly

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[186] Gavrielides *Restorative Justice Theory and Practice* 43.

[187] Skelton & Batley *Restorative Justice in South Africa*13-14.

[188] Interim Steering Committee *National Strategic Plan on Gender-Based Violence and Femicide* 23-29.

[189] Skelton & Batley *Restorative Justice in South Africa*14.

[190] Stubbs "Domestic Violence and Women's Safety" in *Restorative Justice and Family Violence* 57-60.

[191] Marshall *Restorative Justice: An Overview* 25.

[192] 25

opposes the arguments of some feminist authors, which are discussed in the next chapter.[193]

Dandurand and Griffith argue that when determining the suitability of a case for restorative justice measures, the risks for all parties involved must be considered.[194] The authors identify a number of potential considerations when determining a case's suitability for restorative justice. It must be considered how serious the offence was and whether there were any aggravating factors involved in the commission of the offence. The offender's previous offences must be considered as well as the mental and emotional state of the offender. It must also be examined if there have been any further acts of violence or intimidation committed by the offender against the victim. The nature of the relationship between the victim and the offender must be considered. The victim's circumstances must be evaluated as well, including their age and willingness to participate in restorative justice. It must be considered if they are immediately at risk of revictimisation. It must be considered if the offender has accepted responsibility for the offence. It must also be considered whether the offender and victim agree upon the facts of the case or if there are there still facts in dispute.[195]

Furthermore, Dandurand and Griffith have argued that the basic principles of restorative justice set out three main requirements for referrals to restorative justice programmes. First, there must be sufficient evidence to charge the offender. Second, both the victim and the offender must give free and voluntary consent to participate in the programme. Third, power imbalances and cultural differences between the parties must be taken into account. If a referral is made despite the presence of a power imbalance, the programme facilitator must be made aware of the dynamic.[196]

The criteria set out by these authors are used in later chapters to analyse restorative justice case law. The suitability of the case's circumstances is discussed, along with whether the court considered these factors.

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[193] Stubbs (2010) *UNSW Law Journal* 979.

[194] Dandurand & Griffith *Handbook on Restorative Justice Programmes* 73.

[195] 73.

[196] 74.

2 9 The judicial understanding and application of *ubuntu*

Since the promulgation of the interim Constitution, *ubuntu* has entered into South African law. *Ubuntu* has often been linked to the theory of restorative justice.[197] It is pertinent to establish *ubuntu* as an independent concept first before discussing its connection to restorative justice. Establishing *ubuntu* as an independent concept will avoid conflating the notions of *ubuntu* and restorative justice when establishing the link between them.

The meaning of *ubuntu* is nuanced and contextual.[198] Case law in which the meaning of *ubuntu* has been substantially discussed and given content as a constitutional value and interpretive aid is furthermore discussed. Cases in which *ubuntu* was mentioned in passing or in which the court has merely repeated definitions used in previous cases have been omitted.

2 9 1 *S v Makwanyane*

The case of *Makwanyane*[199] addressed the constitutionality of the death penalty under the interim Constitution. This was the first case to mention the value of *ubuntu* in South Africa and one of the most prominent to date with six of the eleven judges discussing the value of *ubuntu* in their reasoning. This is also one of the few cases to give deeper meaning to *ubuntu* in addition to the application of the value.[200]

The post-amble of the interim Constitution of the Republic of South Africa, Act 200 of 1993 ("interim Constitution") indicates that in the new constitutional dispensation of South Africa "there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation." The meaning of this provision and its mention of the value of *ubuntu* were explored in the case of *Makwanyane.*

Chaskalson CJ wrote the majority judgment in which he found that the death penalty was not a reasonable and justifiable limitation of fundamental human rights.[201]

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[197] TW Bennet *Ubuntu: An African Jurisprudence* (2018) 79.

[198] 31, 32.

[199] 1995 2 SACR 1 (CC).

[200] AJN Geduld *Ubuntu as a Constitutional Value: A Social Justice Perspective* LLD Dissertation North-West University (2020) 120.

[201] 1995 2 SACR 1 (CC) para 146.

Chaskalson CJ considered the value of *ubuntu* in the evaluation of South Africa's approach to crime in the new constitutional dispensation. He held that the justice system must strive to prevent crime and not pursue harsh retribution for society to embody the value of *ubuntu*.[202]

Many of the other judgments went further into outlining the concept of *ubuntu*. Langa J held that *ubuntu* can be understood as a culture that emphasises communalism over the independence of individuals. According to Langa J, *ubuntu* recognises the mutual unconditional respect, dignity, and value that individuals and the community must recognise in each other. Langa J also held that a central feature of *ubuntu* is the value it places on the life and human dignity of every person.[203] Madala J similarly held that *ubuntu* as it is understood in the post-amble of the interim Constitution encompasses the concepts of humanness, social justice and fairness.[204] Mahomed J held that the need for *ubuntu* in the interim Constitution expresses the ideals of love and recognition for the humanity of others and the community.[205]

Mokgoro J dedicated a significant portion of her judgment to the value of *ubuntu*. She held that *ubuntu* generally translates to "humanness" and is often expressed through the phase *umuntu ngumuntu ngabatu.*[206] This phrase translates to "a person is a person through other people".[207] Mokgoro J notes that *ubuntu*, at its core, denotes humanity and morality but carries with it the fundamental values of group solidarity, compassion, respect and human dignity. This deep appreciation for human dignity emphasises conciliation over confrontation when dealing with conflict in the community.[208]

Sachs J also extensively discussed the value of *ubuntu* and indicated that African law and legal thinking should be given recognition as a source of legal ideas and values.[209] Sachs J noted that African traditional conflict resolution mechanisms embodied the value of *ubuntu* and conceived punishment as constructive and

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[202] Para 131.
[203] Para 225.
[204] Para 237.
[205] Para 263.
[206] Para 308.
[207] Louw "The African concept of *ubuntu* and restorative justice" in *Handbook of Restorative Justice* 161 161.
[208] 1995 2 SACR 1 (CC) para 308.
[209] Paras 374-376.

corrective. Punishment aimed to reset the balance which had been disturbed by the offender's actions.[210]

The court also considered the practical implications of *ubuntu* as a constitutional value. Madala J held that the value of *ubuntu* "permeates the Constitution generally".[211] In response to the constitutionality of the death penalty, he was doubtful that a crime control method which completely rejected the possibility of rehabilitation was at all in line with the value of *ubuntu*.[212] Madala J held that an approach which views punishment as a means to reintegrate the offender back into the community is more in line with *ubuntu*.[213] The reformative theory of justice as a model which is possibly more in line with *ubuntu*.[214] Some authors have argued that *ubuntu* is most closely linked to restorative justice.[215] Other authors have argued that Madala J's reasoning is indicative of a link between *ubuntu* and restorative justice.[216] The interface between these two concepts is explored below.

2 9 2 *Azanian People's Organisation v President of the Republic of South Africa*

Azanian People's Organisation ("AZAPO") v President of the Republic of South Africa[217] dealt with the constitutionality of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("National Unity Act"), which provided an opportunity for amnesty for persons who had committed politically motivated crimes. AZAPO argued that subsection 20(7) of the National Unity Act, which prevented someone who had received amnesty from being held criminally and civilly liable, was unconstitutional. The Constitutional Court held that the provisions of the Act were not unconstitutional as they must be read in line with the post-amble of the interim Constitution. The post-amble states that there is a need for understanding, reparation and *ubuntu*, not

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[210] Para 376.
[211] Para 237.
[212] Para 241.
[213] Para 242.
[214] Para 242.
[215] Mangena (2015) *SAJP* 11; Skelton "Tapping indigenous knowledge" in *Restorative Justice* 232-233.
[216] D Cornell and N Muvangua "Introduction" in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* 1 14.
[217] 1996 4 SA 671 (CC).

retaliation, vengeance or victimisation.[218] It has been argued that in this case, the court established a judicial link between reconciliation and *ubuntu* in criminal and civil matters.[219]

2 9 3 *Albutt v Centre for the Study of Violence and Reconciliation*

Albutt v Centre for the Study of Violence and Reconciliation[220] is often considered a sequel to the AZAPO case as it also dealt with the work of the TRC and victims' dissatisfaction.[221] President Mbeki pardoned several offenders who had committed politically motivated crimes in an attempt to address the "unfinished business" of the TRC.[222] The court did not specifically address the value of *ubuntu*, but Skelton has noted that a link to *ubuntu* can be drawn in that the court emphasises nation-building, reconciliation and the importance of victim participation in achieving these objectives.[223]

2 9 4 *Barkhuizen v Napier*

Barkhuizen v Napier[224] dealt with the constitutionality of time limitation clauses, which limit the time period in which contracting parties can institute legal action. The applicant contended that the time limitation clause contravened the right to approach a court for redress.[225] Ngcobo J held that the constitutionality of time limitations clauses must be decided based on whether they are against public policy. Public policy is understood as the legal convictions of the community, which in the new constitutional dispensation are informed by the values of the Constitution.[226] Ngcobo

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[218] Para 19.
[219] Geduld *Ubuntu as a Constitutional Value* 126.
[220] 2010 2 SACR 101 (CC).
[221] A Skelton "The South African Constitutional Court's restorative justice jurisprudence" (2013) 1 *Restorative Justice: An International Journal* 126.
[222] Para 4.
[223] Skelton (2013) 1 *Restorative Justice: An International Journal* 127; 2010 2 SACR 101 (CC) para 69.
[224] 2007 5 SA 323 (CC).
[225] Para 1.
[226] Para 28.

J held that public policy is now informed by the value of *ubuntu*.[227] A time limitation clause would be unconstitutional and against public policy if it was unreasonable or if the circumstances surrounding the clause were unreasonable.[228] The value of *ubuntu* was used to evaluate the context of the parties. If there was an imbalance of bargaining power between the parties, the court held that this would constitute unreasonable circumstances. The fact that many people in South Africa are poor, illiterate and vulnerable creates the opportunity for unequal bargaining power between contracting parties.[229]

This judgment has been criticised for not adequately elaborating on the value of *ubuntu* and the role of constitutional values when evaluating the circumstances of parties. The court also broadens the notion of *ubuntu* beyond "reconciliation and restorative justice" to include the vulnerability of members of the community indirectly.[230]

2 9 5 *Port Elizabeth Municipality v Various Occupiers*

Port Elizabeth Municipality v Various Occupiers ("*Port Elizabeth Municipality*")[231] dealt with an eviction order under the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). Sachs J held that PIE is aligned with the values of the Constitution and that the spirit of *ubuntu* suffuses the entire Constitution and specifically linked the characteristics of grace and compassion to the notion of *ubuntu*.[232] Furthermore, the constitutional order as it embraces the value of *ubuntu* recognises both individual rights and communitarian philosophy.[233]

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[227] Para 51.
[228] Para 58.
[229] Paras 64-65.
[230] Geduld *Ubuntu as a Constitutional Value* 127.
[231] 2005 1 SA 217 (CC).
[232] Paras 11, 37.
[233] Para 37.

2 9 6 *Joseph v City of Johannesburg*

Joseph v City of Johannesburg[234] dealt with the duty of the municipality to supply electricity to residents after their landlord had failed to pay the electricity bill.[235] The court used the values of the Constitution to interpret the constitutional duties of the municipality.[236] In a footnote to this interpretation, Skweyiya J argues that the principle of Batho Pele or "People First" gives practical expression to the constitutional value of *ubuntu*. He argues that courts must go beyond the common law conception of rights, which relies on individual entitlements.[237] Geduld argues that this understanding of *ubuntu* as "People First" means that the provision of basic services to the community must take president over economic considerations.[238]

2 9 7 *Afriforum v Malema*

Afriforum a v Malema[239] involved hate speech and racial tensions in South Africa.[240] The court noted that *ubuntu* is an important source of law in the context of damaged relationships between both individuals and communities. *Ubuntu* can assist in reaching acceptable solutions to both parties in conflict.[241]

The court noted that although *ubuntu* is not mentioned in the final Constitution, there is a plethora of *ubuntu* jurisprudence which can be drawn upon to give meaning to the concept.[242] Lamont J held that *ubuntu* stands in contrast to vengeance, prefers to re-

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[234] 2010 4 SA 55 (CC).
[235] Paras 1-2.
[236] Paras 41-48.
[237] Para 46.
[238] Geduld *Ubuntu as a Constitutional Value* 129.
[239] 2011 6 SA 240 (EqC).
[240] Paras 1-10.
[241] Para 18.
[242] The court referred to: *S v Makwanyane* 1995 3 SA 391 (CC) paras 131, 225, 250 and 307; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37; *Dikoko v Mokhatla* 2006 6 SA 235 (CC) paras 68-69, 112 and 115-116; *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) para 238; *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) para 145; *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 38; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 51; *Bhe v Magistrate, Khayelitsha, (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) paras 45 and 163.

establish harmony between parties so as to restore the dignity of the aggrieved party without wounding the defendant, favours restorative justice over retributive justice. It aims to foster reconciliation rather than estrangement of parties. *Ubuntu* also aims to sensitise the offender to the harm they have caused the victim or at least promote mutual understanding over punishment. It also favours face-to-face dialogue in which parties can reach an agreement rather than foster conflict to determine which party emerges victorious.[243]

The court held that in the new constitutional dispensation, parties who were once seen as enemies have now become brothers. Despite past injustices and differences, all members of society must embrace each other as brothers in the spirit of *ubuntu*.[244] It has been noted that the court did not use *ubuntu* as an interpretive tool but rather as an enforceable right.[245]

2 9 8 *Resnick v Government of the Republic of South Africa*

Resnick v Government of the Republic of South Africa ("Resnick")[246] dealt with an eviction order under section 4 of PIE. The court referred to the case of *Port Elizabeth Municipality*[247] when contemplating whether the eviction order against the appellant was just and equitable to the court. The court drew upon Sachs J's comments on the spirit of *ubuntu* suffusing the entire Constitution and embodying grace and compassion.[248] Davis J held in *Resnick* that *ubuntu* recognises the humanity of human beings who have been treated as outsiders and underpins the values of solidarity, compassion and human dignity.[249]

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[243] Para 18.
[244] Para 108.
[245] Geduld *Ubuntu as a Constitutional Value* 131.
[246] 2014 2 SA 337 (WCC).
[247] 2005 1 SA 217 (CC).
[248] Para 37.
[249] 343.

2 9 9 *Van Vuuren v Minister of Correctional Services a*

Van Vuuren v Minister of Correctional Services ("*Van Vuuren*")[250] dealt with the parole eligibility of an offender who had been sentenced to life incarceration. Nkabinde J held that *ubuntu* is a value that recognises that in order to uphold the human dignity of an offender, they must be rehabilitated to the point of repossessing the full scope of their rights.[251]

2 9 10 *Dikoko v Mokhatla*

Dikoko[252] concerns a defamation case in which certain judgments dealt with the notion of *ubuntu* and restorative justice as a means to heal the injury caused by the defamatory comments.[253] Mokgoro J held that the notion of *ubuntu*, which is based on a deep respect for the humanity of others, informs the constitutional value of human dignity. She held that a defamation remedy which is based on *ubuntu* would prioritise restoring the dignity of the plaintiff and healing the fractured relationship between the parties. Mokgoro J linked the constitutional value of *ubuntu* to the theory of restorative justice.[254]

Sachs J similarly held that the primary aim of defamation cases must be to repair the damage caused and not to punish the defendant. The constitutional value of *ubuntu* must be acknowledged in defamation cases to achieve this objective.[255] Sachs J notes that the value of *ubuntu* is often invoked to conveniently justify legal findings after they have been arrived at.[256] Sachs J held that despite this trend, the value of *ubuntu* is still integral to the South African constitutional ethos and embodies the spirit of reconciliation which was needed for our nation to emerge from the Apartheid regime. Sachs J reaffirmed the position in *Port Elizabeth Municipality* that the value of *ubuntu* permeates the entire Constitution.[257]

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[250] 2012 1 SACR 103 (CC).
[251] Para 51.
[252] 2006 6 SA 235 (CC).
[253] Paras 5, 68, 114.
[254] Paras 68, 69.
[255] Para 112.
[256] Para 113.
[257] 2005 1 SA 217 (CC) para 37; 2006 6 SA 235 (CC) para 113.

He also held that there is a deep connection between the value of *ubuntu* and the theory of restorative justice.[258] These judgments are explored further when the link between *ubuntu* and restorative justice is discussed below.

2 9 11 *Centre for Child Law v Director-General, Department of Home Affairs*

Centre For Child Law v Director-General, Department of Home Affairs[259] dealt with the constitutionality of section 10 of the Births and Deaths Registration Act 51 of 1992, which prevented an unmarried father from giving notice of the birth of a child under his own surname in the absence of the mother. The court evaluated the standing of unmarried fathers in a society based on *ubuntu*.[260] The court considered the meaning of *ubuntu* held in *Makwanyane,* emphasising the link between the value of *ubuntu* and the right to human dignity.[261] The court also considered Mokgoro J's understanding of *ubuntu* as it relates to everyday life and its emphasis on mutual help and strong family obligations.[262]

The Constitutional Court held that "the application of the right to human dignity embraces and stands alongside the value of *ubuntu*."[263] The court held that unmarried fathers were being deprived of their human dignity and of *ubuntu*. Section 10 was held to have not only infringed on these fathers' human dignity but also perpetuated the social stigma around unmarried parents. This devaluation of the bond between these parents and their children was held to be inconsistent with the value of *ubuntu* as it is embraced by the right to human dignity.[264]

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[258] Para 124.
[259] 2022 2 SA 131 (CC).
[260] Para 65-67.
[261] Para 65.
[262] Para 66.
[263] Para 67.
[264] Para 67.

2 10 Scholarly understanding of *ubuntu*

2 10 1 Ramose

Ramose is one of the foremost writers on the topic of *ubuntu*.[265] Ramose views *ubuntu* as an African philosophy which underpins the human dignity of all Bantu-speaking people. His ideal translation of *ubuntu* is "humanness" and not "humanism", as it is often taken to mean.[266] The English language, according to Ramose cannot fully convey the meaning of the maxim "*umuntu ngamuntu nga bantu*." However, it can be taken to mean that:

> "to be a human being is to affirm one's humanity by recognising the humanity of others and, on that basis, establish humane relations with them."

Ramose offers and extensive linguistic analysis of *ubuntu* and the phrases associated with it. *Ubuntu* is the combination of two words: "*ubu*" and "*ntu.*" The prefex *ubu* conveys the meaning of being in general. Ramose argues that *ubu* is "enfolded being" which is always oriented towards unfoldment in that *ubu* is always orientated towards *ntu* in a continual manifestation of modes of being.[267] Ramose explains that *ubuntu* is not only and expression of being human but also a command to become a human by proving oneself to be the embodiment of *ubuntu*.[268]

Ramose contends that *ubuntu* is foundation of the African philosophy of Bantu-speaking people. *Ubuntu*, according to Ramose, is the legal, ethical and social criteria for human worth.[269] Ramose argues that the exclusion of *ubuntu* from the final Constitution and its inclusion as an after-thought in the interim Constitution undermines the political and economic standing of all marginalised race groups. Ramose goes as far as to argue that this exclusion violates the right to life of these groups.[270]

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[265] MB Ramose "Ubuntu: Affirming a right and seeking remedies in South Africa" in L Praeg & S Magdla (eds) *Curating the Archive* (2014) 121-136; MB Ramose *"*An African perspective on justice and race*"* (2001) 3 *Polylog: Forum for Intercultural Philosophy* 1-27; MB Ramose *African Philosophy Through Ubuntu* (1999).
[266] MB Ramose "The philosophy of ubuntu as a philosophy" in PH Coetzee & APJ Roux (eds) *Philosphy from Africa: a text with readings* (2002) 230 231.
[267] 230.
[268] 231.
[269] 230-232.
[270] Ramose "Ubuntu: Affirming a right and seeking remedies in South Africa" in *Curating the Archive* 122.

Ramose's understanding of *ubuntu* has been described as rigid in that he firmly insists that the traditional notion of *ubuntu* is fundamentally incompatible with South African law.[271] He identifies four key areas of incompatibility between *ubuntu* and South African law. First, Ramose argues that *ubuntu* cannot be reconciled with the Western notion of constitutional supremacy.[272] Second, he argues that the understanding of justice underpinned by *ubuntu*, which focuses on equilibrium and consensus, and the Western sense of justice, which focuses on the rights of individuals, are irreconcilable. This relates to the third difference, which is the issue of prescription in Western law. Ramose argues that prescription cannot be harmonised with the continuous nature of law in African tradition. Lastly, the religious aspect of *ubuntu* is incompatible with the secular nature of South African law. Ramose argues that the spiritual nature of *ubuntu* cannot be removed from its understanding.[273]

2 10 2 Bennet

Bennet is another author who has written extensively on the topic of *ubuntu* and the law.[274] Bennet does not support a rigid understanding of *ubuntu* but rather argues that the principle is flexible and dependent on context. *Ubuntu* is inherently ambiguous and difficult to define, similar to the legal notions of "wrongfulness" or "reasonableness." He suggests that rather than a strict definition, a sense of the term should be sought.

Bennet distinguishes the general meaning of *ubuntu* from the meaning of *ubuntu* as a legal term. The general meaning of *ubuntu* has two components: the experience of being a person and how a person behaves towards the community. Bennet notes that this behaviour is characterised by "caring, compassion, unity, tolerance, respect, closeness, generosity, genuineness, empathy, consultation, compromise, hospitality, the fullness of human life, truthfulness, self-respect and integrity."[275]

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[271] Geduld *Ubuntu as a Constitutional Value* 95.
[272] Ramose in *Curating the Archive* 128.
[273] MB Ramose "The philosophy of ubuntu as a philosophy" in PH Coetzee & APJ Roux (eds) *Philosophy from Africa: Test with Readings* (2002) 236.
[274] T Bennet "Ubuntu: An African equity" (2011) 14 *PELJ* 30-60; TW Bennet *Ubuntu: An African Jurisprudence* (2018).
[275] Bennet *Ubuntu* 32.

Bennet also notes that there is a sense of interconnectedness that *ubuntu* also carries with it. This can be understood through the adage: "*umuntu ngamuntu ngabantu*" which is translated as either "a person is a person through other people" or "I am because we are."[276] Bennet notes that unfortunately, this notion of community to which the interconnectedness relates is often misappropriated by certain groups to serve their own needs.[277] On this note, Ramose has gone as far as to say that the democratisation of South Africa and the use of *ubuntu* in reconciling the nation were misused to avoid responsibility for the atrocities of Apartheid. In Ramose's opinion, *ubuntu* does not call for democratisation but rather decolonisation and equilibrium, which necessitates restoring balance.[278] The understanding of *ubuntu* and reconciliation by the TRC in the aftermath of Apartheid is explored below. Bennet has discussed the manner in which *ubuntu* has been linked to both reconciliation and restorative justice, which is discussed below.[279]

2 10 3 Cornell

Cornell argues that there are two key components to *ubuntu* as a relational ethic: people need each other to realise individual growth, which is achieved by fulfilling the mutual obligations a person has to others.[280] Despite this emphasis on the importance of interconnectedness and the community, Cornell argues that *ubuntu* cannot be simplified as communitarianism. *Ubuntu* does not privilege the community over the individual. The community does not exist without the individuals it consists of, and those individuals reach their full potential through the existence of the community.[281]

2 10 4 Metz

Metz views *ubuntu* as a moral theory which can be interpreted for modern life in South Africa. Although it has roots in pre-colonial African tradition, like Roman-Dutch law is

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[276] 33.

[277] 34.

[278] Ramose (2001) *Polylog: Forum for Intercultural Philosophy* 14.

[279] See the text to part 2 9 4 above.

[280] D Cornell *Law and Revolution in South Africa* (2014) 69.

[281] D Cornell & K van Marle "Exploring ubuntu: tentative reflections" (2005) 5 *Afr Hum Rts LJ* 195 205, 206.

developed for modern South African law, so can *ubuntu* find modern application.[282] Metz also uses the adage "a person is a person through other people" to describe the normative account of what *ubuntu* prescribes should be valued in life: personhood, selfhood and humanness. Metz argues that this indicates that the ultimate goal in life should be to become a complete person and that this can only be achieved by strengthening and valuing communal relationships.[283]

Ubuntu and traditional African conflict resolution mechanisms show two recurrent themes in the notion of the community: solidarity and identity. These two themes go hand in hand. For people to identify with each other is for them to think of themselves as a part of the same group. Solidarity requires people to act in a mutually beneficial manner for themselves and the group. While these are two distinct concepts that can exist separately, *ubuntu* prescribes the types of communal relationships in which identity and solidarity are realised together.[284]

Metz has also discussed what outcomes *ubuntu* prescribes for certain judicial processes, including the criminal trial and amnesty tribunals for politically motivated crimes.[285] Metz has noted that many authors have argued that *ubuntu* denotes reconciliation, social cohesion and restorative justice. However, when this is applied on a larger scale, it is often relegated to an alternative dispute mechanism for juvenile offenders and minor offences. Metz explores how *ubuntu* can be incorporated into a mainstream approach to judicial reasoning and punitive responses to crime.[286]

Metz argues that an *ubuntu*-based conception of reconciliation does not require forgiving the offender as many have argued, but rather prescribes when and how judges should punish offenders. This approach would not centre on goals of retribution or fear-based deterrence. Instead, a sentencing goal of reconciliation would require offenders to reform themselves and restore victims in a manner that should be burdensome to the offender. Metz argues that this approach would simultaneously

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[282] T Metz "Ubuntu as a Moral Theory and Human Rights in South Africa" (2011) 11 *Afr Hum Rts LJ* 532 536.

[283] 537.

[284] 537.

[285] T Metz "The reach of amnesty for political crimes: Which burdens on the guilty does national reconciliation permit?" (2010) 3 *CCR* 243-270; T Metz "Reconciliation as the Aim of a Criminal Trial: Ubuntu's Implications for Sentencing" (2019) 9 *CCR* 113-134.

[286] Metz (2019) *CCR* 114.

disavow crime and foster cooperation and mutual aid.[287] This approach to sentencing and criminal justice mirrors the vision of many restorative justice theorists in many ways. The interface between this approach and that of restorative justice is expanded upon below.

2 11 The link between restorative justice and the value of *ubuntu*

Archbishop Desmond Tutu has observed that restorative justice, especially regarding the work of the TRC, is characteristic of traditional African justice systems and the value of *ubuntu*. He draws this conclusion from the emphasis on rehabilitation, restoration and reintegration present in restorative justice processes.[288] The link between restorative justice and *ubuntu*, particularly as it practically informs traditional African conflict resolution mechanisms, is explored below with reference to case law, legislation and academic literature.

2 11 1 Case law and legislation

Cornell and Muvangua have identified cases in which restorative justice and *ubuntu* have been linked or used to inform each other. In their opinion, the judgment of Madala J links restorative justice and *ubuntu*.[289] Madala J, as mentioned above in the case discussion of *Makwanyane*, noted that *ubuntu* is more in line with the reformative theory of punishment which seeks to rehabilitate the offender.[290] Cornell and Muvangua argue that this theory of punishment is rooted in restorative justice and that this judgment links restorative justice and *ubuntu*. Their understanding of *ubuntu* is that it requires a system of restorative justice which seeks to heal the harm that the offender has caused.[291]

In *Dikoko*,[292] Mokgoro J held that traditional African culture and conflict resolution mechanisms have recognised that the main aim of the law should be to restore

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[287] 115.

[288] D Tutu *No Freedom Without Forgiveness* (1999) 51.

[289] Cornell & Muvangua *Ubuntu and the Law* 14.

[290] *S v Makwanyane* 1995 2 SACR 1 (CC) para 242; see the text to part 2.6.1 above.

[291] Cornell & Muvangua *Ubuntu and the Law* 14.

[292] 2006 6 SA 235 (CC).

harmony between parties and address the damage done to relationships.[293] As discussed above she held that the aim in defamation cases should be to repair the relationship between parties, not to punish the defendant financially. She held that similar to restorative justice sentencing practices, compensation remedies based on *ubuntu* should aim to restore the plaintiff's dignity and sensitise the defendant to the harm they have caused.[294]

Mokgoro J held that regardless of whether the disputed Roman-Law principle of *amede honorable* was part of South African law, the law of defamation should be developed in line with the value of *ubuntu* which emphasises restorative justice rather than retributive justice. To develop the law in line with the value of *ubuntu* and restorative justice means focusing on repairing relationships between community members, fostering apology and promoting mutual understanding where possible.[295] This understanding of *ubuntu* and restorative justice is compared to the understanding of restorative sentencing in criminal cases in later chapters.

Sachs J discusses the link between *ubuntu* and restorative justice and identified the key elements of the latter being: encounter, reparation, reintegration and participation as per Van Ness and Strong.[296] Sachs J held that restorative justice harmonises well with traditional dispute mechanisms which are underpinned by the value of *ubuntu*.[297] He noted that while restorative justice and *ubuntu* are usually invoked in criminal law matters involving children, there is no reason that this should be the extent of their application.[298]

Cornell and Muvangua argue that this connection between restorative justice and *ubuntu* identified in *Makwanyane* was practically carried out in the cases of *S v Shibulane*[299] and *S v Maluleke.*[300] These cases used restorative justice as a sentencing principle and are explored in later chapters.

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[293] Para 68.
[294] Para 68.
[295] Para 69.
[296] Van Ness & Strong *Restoring Justice* 56, 79, 99, 123.
[297] 2006 6 SA 235 (CC) para 114.
[298] Para 115.
[299] 2008 1 SACR 49 (T).
[300] 2008 1 SACR 295 (T)

In *van Vuuren*, Nkabinde J held that restorative justice is linked to the value of *ubuntu*. As discussed above, she held that *ubuntu* recognises the human dignity of offenders, which required rehabilitation in the context of the case. She further held that restorative justice, in this case, was similarly aimed at the rehabilitation of the offender as well as reconciliation with the community. She noted that while these aims are important, they must be weighed against the interests of the community to be protected from crime.[301] The offender, in this case, had been convicted of violent crimes and sentenced to life incarceration for murder, robbery with aggravated circumstances, theft and possession of an unlicensed firearm.[302]

Bennet argues that one of the most comprehensive and systemic implementations of *ubuntu* and restorative justice is that of the Child Justice Act. Section 2(b)(ii) provides that the Act aims to promote the spirit of *ubuntu* through "supporting reconciliation by means of restorative justice response." The Traditional Courts Bill[303] is another piece of legislation which exemplifies this link. The Bill aimed to promote the traditional justice system based on the notions of reconciliation and restorative justice.[304] Rautenbach has observed the parallels between *ubuntu*, and restorative justice expressed by the Bill.[305]

2 11 2 The Truth and Reconciliation Commission

The TRC established by the National Unity Act worked to investigate the gross human rights violations which took place under the Apartheid regime.[306] The TRC found that the "need for *ubuntu*, not victimisation" in the interim Constitution required strengthening restorative justice dimensions.[307] The definition of restorative justice used by the TRC has been discussed above. The TRC found that there are various

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[301] 2012 1 SACR 103 (CC) para 51.

[302] Para 5.

[303] Traditional Courts Bill B1-2012.

[304] Clause 2(a).

[305] C Rautenbach "Legal reform of Traditional Courts in South Africa: Exploring the links between ubuntu, restorative justice and therapeutic jurisprudence" (2015) 2 *J Int'l & Comp L.* 275 288.

[306] See the Long Title of the Promotion of National Unity and Reconciliation Act 34 of 1995.

[307] Truth and Reconciliation Commission of South Africa *Report Volume 1* (1998) 126.

restorative justice elements such as communal healing and restoration present in traditional African values to which *ubuntu* is a fundamental philosophy.[308]

2 11 3 Skelton

Skelton has identified areas of overlap between modern restorative justice processes and traditional African dispute mechanisms, which are underpinned by the value of *ubuntu*.[309] The first similarity is the aim of reconciliation and restoration of harmony among the group. Skelton argues that this emphasis on the community's peace and reconciliation is linked to the value of *ubuntu*. The second similarity is a communitarian ethos which emphasises both the rights of the individual and the duties of the community and individual.[310] The third similarity is the core values of dignity and respect for the parties involved. This also links to the value of *ubuntu*. The fourth similarity is the lack of division between civil and criminal matters. Crimes or conflicts are seen as harm caused to both the individual and the community as a whole.[311] The fifth similarity is that these processes are flexible and often informal, allowing the parties' needs to guide their form.[312] The sixth similarity is that the rule of stare decisis is usually not followed by either process. The seventh similarity is the promotion of community input and ownership of the crime. The eighth similarity is that both processes have great transformative potential for participants, especially concerning reparation, reconciliation and recidivism.[313] The final similarity that Skelton has identified is that restitution, either physical or symbolic, is valued by both processes.

There are also many important differences which Skelton identifies. Skelton notes that restorative justice is typically progressive and open to change, whereas traditional courts attempt to preserve customs in traditional dispute mechanisms.[314] Traditional

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[308] 127.
[309] Skelton "Tapping indigenous knowledge" in *Restorative Justice* 228-229.
[310] 232.
[311] 233-234.
[312] 234.
[313] 236.
[314] 237.

conflict resolution processes are less inclusive of children or professionals such as social workers or lawyers than restorative justice processes.[315]

2 11 4 Bennet

Bennet discusses the link between *ubuntu* and restorative justice as well as the link to reconciliation which is an element of both restorative justice and *ubuntu*.[316] Bennet notes that the first mention of *ubuntu* in South African law is found in the interim Constitution's post-amble, titled "National Unity and Reconciliation."[317] The post-amble addressed the need for reconciliation and reconstruction in South Africa. As mentioned above, it calls for "understanding but not for vengeance … reparation but not for retaliation … for *ubuntu* but not for victimisation." Mureinik describes this transition as a shift from a culture of authority to a culture of justification, with the Constitution serving as a bridge to facilitate this change.[318]

Bennet also notes that this link to reconciliation is a connection to restorative justice and *ubuntu*. This link is established by the core elements of *ubuntu*, particularly the promotion of peaceful co-existence and social cohesion.[319] *Ubuntu* often serves as a justification for the introduction of restorative justice, particularly in the work of the TRC, which is elaborated upon below.[320] This connection has been established in case law and legislation since the work of the TRC.[321] Bennet notes that in case law *ubuntu* has been associated with restorative justice and reconciliation to give these concepts indigenous cultural legitimacy. This link has been used to restore or maintain the dignity of defamation plaintiffs and criminal offenders.[322]

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[315] 238.

[316] Bennet *Ubuntu* 79.

[317] 76.

[318] E Mureinik "A bridge to where? Introduction to the interim Bill of Rights" (1994) 10 *SAJHR* 31 32.

[319] Rautenbach (2015) *J Int'l & Comp L* 275.

[320] Bennet *Ubuntu* 79.

[321] Child Justice Act.

[322] Bennet 83-84.

2 11 5 Metz

Metz has explored a model of sentencing in which the primary aim is the reconciliation of the parties. He bases this conception of a criminal trial on the ethic of *ubuntu* but acknowledges that others have linked *ubuntu*'s objectives to restorative justice.[323] Metz's conception of *ubuntu* as a moral ethic entails communal relationships allowing individuals to reach their full potential through sharing their life with others and caring for them.[324] This understanding of *ubuntu* informs his view of reconciliation as:

> "a condition consequent to interpersonal conflict in which those directly affected by it interact on a largely voluntary, transparent and trustworthy basis for the sake of compossible ends largely oriented towards doing what is expected to be good for one another and in which those associated with victims disavow wrongdoing that was part of the conflict."[325]

There are two elements to this understanding of reconciliation: reform of behaviour to restore harmony to the communal relationship and a strong disavowal of the harm which caused the conflict. In the context of a criminal trial, reconciliation requires truth-seeking and punishment.[326] Metz views one of the core aims of a reconciliation-based criminal trial to be the determination of innocence and guilt. This requires a fact-finding inquiry into who is guilty and to what degree. Reconciliation requires an accurate understanding of what has transpired for the victim and offender to move forward from it. Such reconciliation may require punishment for the harm caused by the offender to be disavowed and communal harmony to be restored. Metz notes that Sachs J held that *ubuntu* requires restorative justice and prioritising reconciliation over punishment. Metz argues that an *ubuntu*-based conception of reconciliation often requires punishment in the form of burdensome compensation to the victim.

2 11 6 Louw

Louw discussed the connection between restorative justice and *ubuntu* by exploring their overlapping aims and characteristics. He distils restorative justice as the process

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[323] Metz (2019) *CCR* 114.
[324] 120.
[325] 122.
[326] 122-124.

of reaching consensus through dialogue that aims to reintegrate a community impacted by crime.[327]

There is an element of consensus in both restorative justice and *ubuntu*. Restorative justice processes, as discussed above, bring together the victim, offender and community to discuss the harm done and agree on how the offender can make amends. Louw discusses the endless capacity for the pursuit of consensus and reconciliation, which many African traditions possess in the name of *ubuntu*.[328] The desire for agreement is intended to protect individuals and minority voices in a discussion. Unfortunately, the desire for consensus is often misappropriated to enforce conformity.[329] The issue of restorative justice processes allowing one party to dominate the meeting to promote a narrative of reconciliation is also raised by critics of the theory.[330] Louw argues that *ubuntu* and restorative justice may allow for a hierarchy of voices at times but that each role player is ultimately given an equal chance to be heard.[331] Marshall also argues that facilitators can be trained to counteract power dynamics and ensure that meetings are fair.[332]

2 11 7 Mangena

Mangena argues that restorative justice has deep roots in Africa, as evident in traditional conflict resolution mechanisms and the value of *ubuntu*.[333] He argues that although restorative justice may have different meanings and connotations across different African cultures, there are still key features. Restorative justice programmes are primarily concerned with repairing the harm done to the victim, usually through dialogue and reparation. Restorative justice processes are meant to be rewarding most importantly to the victim but also to the offender. A restorative justice process will

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[327] Louw “The African concept of *ubuntu* and restorative justice” in *Handbook of Restorative Justice* 161.

[328] 162.

[329] 163.

[330] Marshall *Restorative Justice: An Overview* 24.

[331] Louw “The African concept of *ubuntu* and restorative justice” in *Handbook of Restorative Justic*164.

[332] Marshall *Restorative Justice: An Overview* 24.

[333] Mangena (2015) *SAJP* 1, 2.

involve a meeting between the parties, which must have a facilitator. Family or other interested parties may also be involved in the meeting.

Mangena states that at its core, *ubuntu* is underpinned by the notion that the conflict must be resolved collectively and the interests of the community are greater than that of any individual. Mangena argues that *ubuntu* and restorative justice are deeply linked and cannot be conceptualised in isolation. The African tradition of community or group engagement between the victim, offender and their families clearly indicates the link between restorative justice and *ubuntu*.[334]

2 12 Findings

The value of *ubuntu*, as it resonates with restorative justice, places emphasis on reconciliation, humanity and reparation.[335]

In *Dikoko,* it was held that this emphasis on reparation does not necessarily require financial compensation but rather shifts the court's focus to the restoration of the complainant.[336] This can take the form of an apology when the harm done to the complainant is personal rather than financial.[337] This thesis submits that in the case of *Dikoko* the remedy of apology in response to an act of defamation served restitution in two ways: it directly or "materially" as well as symbolically repaired the harm done to the complainant. This thesis argues that both this "material" and "symbolic" restitution is necessary to restore the human dignity of an injured party fully. This is also in line with Wright's argument that a restorative justice response to crime, restitution must have both practical and symbolic value.[338]

The value of *ubuntu* is closely linked to human dignity and has been generally held to permeate the Constitution and can be understood as a constitutional value itself.[339] Human dignity is also one of these core values of the Constitution.[340] As such, this

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[334] 7.

[335] 2006 6 SA 235 (CC) paras 68, 113-114.

[336] Paras 68-69; The facts of *Dikoko* are discussed above at 2 9 10.

[337] Para 70.

[338] Wright (1977) *How J Penology & Crime Prevention* 22.

[339] 1995 2 SACR 1 (CC) para 237; 2006 6 SA 235 (CC) paras 113-114.

[340] Section 7(1) of the Constitution.

thesis argues that an approach to restorative justice which is grounded in the value of *ubuntu* must work to restore the human dignity of complainants. Further, an understanding of restorative justice grounded in the value of *ubuntu* seeks to restore human dignity by materially and symbolically restituting complainants.

The Supreme Court of Appeal ("SCA") has held that rape is an act which fundamentally undermines the human dignity of victims.[341] The SCA further held that women of South Africa are entitled to the protection of these rights right to human dignity.[342] The Constitutional Court has held that violence against women constitutes gender discrimination which the state is obliged to prevent and address.[343] The next chapter explores how much of the GBV present in South Africa today is a continuation of the structural violence of the past. Courts bear a duty to address past injustices and inequalities in South Africa. This thesis submits that GBV crimes degrade the human dignity of survivors of GBV and that courts bear a duty to restore this human dignity. This is based on the transformative constitutional mandate to address past injustices and address existing inequalities.

This thesis further submits that an approach to restorative justice grounded in *ubuntu* can restore the human dignity of survivors of GBV through a combination of material and symbolic restitution.

2 13 Conclusion

Restorative justice is often framed as a panacea for all shortfalls of the criminal justice system and its retributive approach.[344] This chapter has explored restorative justice as it is grounded in the African notion of *ubuntu* as well as how the theory has been developed through a Western lens. The fundamental characteristics of restorative justice have been established through investigating both approaches. It has been established that victim restitution and reconciliation of all parties are fundamental elements of restorative justice. Restorative justice has many practical applications which are often linked to indigenous practices. There are several important limitations

[341] 1997 3 SA 341 (SCA) 344.
[342] 345.
[343] Para 62.
[344] Robins "Restorative approaches to criminal justice in Africa" in *The Theory and Practice of Criminal Justice in Africa* 57.

to restorative justice which must be borne in mind when determining whether a case is appropriate for the application of restorative justice.

In South Africa, restorative justice is deeply linked to the value of *ubuntu* as a feature of both African legal culture and as a value of the Constitution. *Ubuntu* offers a more meaningful and authentic understanding of restorative justice. It has also been established that under the new Constitution, African legal culture must be given credit where it is due.

From the discussions in this chapter a working definition of restorative justice has been formulated:

Restorative justice is an approach to crime that brings together the victim, offender and community after establishing guilt. The parties are brought together to determine victim restitution and attempt reconciliation and reintegration where possible. The value of *ubuntu*, which denotes human dignity, social cohesion and fairness, informs this approach.

This thesis submits that an approach to restorative justice that is underpinned by the value of *ubuntu* aims primarily to restore the human dignity of the victim. Human dignity in this approach is restored by materially and symbolically restituting the victim. The restoration of the human dignity of victims of crime furthers the transformative constitutional imperatives of courts.

The theoretical framework of this thesis is described using the metaphor of a sea vessel. Restorative justice is the vehicle for the implementation of justice. It is the vessel itself. The value of *ubuntu* constitutes the vessel's fabric; it infuses every fibre of restorative justice. This vessel must now be able to traverse the treacherous waters of GBV. A rudder must be used to steer the vessel through these waters. For that, a feminist lens is needed.

In the next chapter, the concept of GBV is delineated to determine what requirements the feminist lens must meet in order to serve as the best possible “rudder” to guide this approach. A variety of feminist theories are explored, and the one with the greatest potential identified.

CHAPTER 3: FEMINIST CONCERNS REGARDING RESTORATIVE JUSTICE AS A RESPONSE TO GENDER-BASED VIOLENCE

3 1 Introduction

This chapter will examine feminist legal theory to establish a lens to guide the application of restorative justice in cases of gender-based violence ("GBV"). First the concept of GBV is outlined along with its prevalence in South Africa and its impact on human rights. Next, an overview of various prominent strands of feminism and their respective engagements with restorative justice are provided. The strand with the greatest potential to bolster the application of restorative justice to cases of GBV to restore human dignity is subsequently identified. This strand will need to offer a contextual understanding of GBV in all its forms and give a critical but solution-based approach to restorative justice. Importantly, this lens must aid an *ubuntu*-based approach to restorative justice in upholding the values of the Bill of Rights and restoring the human dignity of GBV survivors.

Once the various strands have been canvassed, the arguments of specific feminist authors for and against the use of restorative justice are outlined. These arguments are used to analyse case law to establish whether these concerns and benefits are practically taken into account by the courts in their application of restorative justice.

3 2 Gender-based violence: Defining and exploring the concept

GBV is an umbrella term for the various forms of violence resulting from normative gender expectations and unequal power dynamics between genders. These expectations and dynamics are also influenced by the context of the society within which they take place.[1]

The NSP-GBVF recognises that GBV includes "physical, sexual, verbal, emotional, and psychological abuse or threats of such acts or abuse, coercion, and economic or educational deprivation, whether occurring in public or private life, in peacetime and

[1] S Bloom *Violence Against Women and Girls: A Compendium of Monitoring and Evaluation* (2008) 14.

during armed or other forms of conflict, and may cause physical, sexual, psychological, emotional or economic harm."[2]

GBV is often understood as "violence against women and girls" but men and boys can also experience forms of GBV such as domestic violence and intimate partner violence ("IPV").[3]

The Southern African Development Community Protocol on Gender and Development defines GBV as:

> "All acts perpetrated against women, men, girls and boys on the basis of their sex which cause or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict"[4]

This thesis submits that this definition of GBV is the best suited to the present research. This definition is comprehensive in its understanding of why and how GBV takes place and who it impacts. As such this definition of GBV is used throughout this thesis. All future uses of the term "GBV" in this thesis refer to this definition. The various crimes and acts of violence that constitute GBV in various contexts are elaborated upon.

GBV encompasses many forms of violence, including violence against women and girls ("VAWG"), IPV, domestic violence, femicide, violence against LGBTQIA+ persons, sexual violence (including rape and other forms of sexual assault), and child abuse. These concepts are all interconnected and nuanced. For instance, a single act of violence can simultaneously qualify as child abuse, domestic violence, and sexual assault. While many of these terms may overlap and interconnect, they each denote separate considerations and contexts which impact the type of response they necessitate. Each of these concepts is established to examine the full scope of GBV in all of its various contexts.

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[2] Interim Steering Committee *National Strategic Plan on Gender-Based Violence and Femicide* 11.

[3] Bloom *Violence Against Women and Girls Compendium* 14.

[4] Article 2.

The United Nations ("UN") Declaration on the Elimination of Violence Against Women[5] ("DEVAW") defines violence against women as:

> "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[6]

Furthermore, DEVAW states that violence against women can be understood as encompassing but not being limited to:

> "(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
> (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
> (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

The Committee on the Elimination of Discrimination Against Women has stated that GBV is a form of discrimination that prevents women from enjoying rights and freedoms in the same way that men do.[7]

Violence against women and girls can result in femicide, which the NSP-GBVF has been defined as:

> "as the killing of a female person, or perceived as a female person on the basis of gender identity, whether committed within the domestic relationship, interpersonal relationship or by any other person, or whether perpetrated or tolerated by the State or its' agents and private intimate femicide is defined as the murder of women by intimate partners, i.e. "a current or former husband or boyfriend, same-sex partner, or a rejected would-be lover".

[5] UN Doc A/RES/48/104.

[6] Article 1.

[7] CEDAW General Recommendation No. 19: Violence against women (1992) para 1.

> Intimate femicide is defined as the murder of women by intimate partners, i.e., "a current or former husband or boyfriend, same-sex partner, or a rejected would-be lover."[8]

The World Health Organization ("WHO") defines IPV as:

> "behaviour by an intimate partner or ex-partner that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse and controlling behaviours."[9]

IPV is a form of domestic violence which is defined in the Domestic Violence Act 116 of 1998 as:

> "physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; harassment; stalking; entry into the complainants' residence without her consent or any other controlling or abusive behaviour taking place in domestic relationships"[10]

No national statistics from the police on domestic violence rates are available because of the nature of crime reporting. Domestic violence is not recorded as a specific crime but rather a range of crimes such as assault, murder or damage to property etc. This can make addressing the issue of domestic violence, more difficult.[11] There is also a high rate of co-occurrence between instances of IPV and acts of child abuse.[12] The WHO describes child abuse as a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress.[13]

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[8] Interim Steering Committee *National Strategic Plan on Gender-Based Violence and Femicide* 2; N Abrahams, S Matthews, LJ Martin, C Lombard. & R Jewkes "Intimate partner femicide in South Africa in 1999 and 2009" (2013) 10 *PLOS Medicine* 3.

[9] World Health Organisation "Violence Against Women" (2021) *World Health Organisation* <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> (accessed 30-07-2022).

[10] Section 1.

[11] UN Human Rights Council *Report of the Special Rapporteur* 5

[12] 5, 6.

[13] World Health Organisation "Child Maltreatment" (2020) *World Health Organisation* <https://www.who.int/news-room/fact-sheets/detail/child-maltreatment> (accessed 04-10-2022).

Violence against LGBTQIA+ persons can be classified as GBV when the act of violence is committed against the person based on their LGBTQIA+ identity.[14] These acts of homophobia or transphobia may include murder, assault, rape or other acts of intimidation and violence.[15]

Heterosexism is defined by the NSP-GBVF as: "Discrimination or prejudice by heterosexuals against homosexuals – a system of oppression that considers heterosexuality the norm and discriminates against people who display non-heterosexual behaviours and identities."[16]

Transphobia can be defined as:

> "is the fear, hatred, disbelief, or mistrust of people who are transgender, thought to be transgender, or whose gender expression doesn't conform to traditional gender roles, that is, the behaviours, values, and attitudes that a society considers appropriate for both male and female."[17]

The NSP-GBVF defines homophobic rape as: "the sexual violence against lesbians, the term acknowledges the punitive and hateful elements of the crime."[18] The NSP-GBVF defines sexual gender-based violence or sexual violence as:

> "Any sexual act or unwanted sexual comments or advances using coercion, threats of harm or physical force, by any person regardless of their relationship to the survivor, in any setting. It is usually driven by power differences and perceived gender norms. It includes forced sex, sexual coercion and rape of adult and adolescent men and women, and child sexual abuse and rape."

These acts of sexual violence are criminalised by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("Sexual Offences Amendment Act") as sexual offences, which include the following categories: rape, compelled rape, sexual assault, incest, bestiality, "statutory rape", sexual exploitation or grooming,

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[14] Interim Steering Committee *National Strategic Plan on Gender-Based Violence and Femicide* 17-18, 28-29.

[15] 12,15.

[16] 12.

[17] 15.

[18] 12.

exposure to or display of pornography.[19] The Sexual Offences Amendment Act defines rape as the unlawful and intentional sexual penetration of one person by another. This definition expanded the narrow common law definition of rape which was limited to vaginal penetration. The statutory definition includes a broader range of violations against people of any gender.[20]

The feminist lens selected to bolster the application of restorative justice to cases of GBV will need to address all of these different types of GBV and all of the contexts within which it takes place. The context of GBV in South Africa and its contributing factors are discussed next.

3 2 2 The context, causes and consequences of gender-based violence in South Africa

The NSP-GBVF is a policy framework that aims to provide a multi-sectoral approach to combat gender-based violence and femicide ("GBVF"). The NSP-GBVF recognises that factors such as race, poverty, HIV status, sexual orientation and gender identity or expression can intensify the vulnerability to violence.[21]

The Special Rapporteur on Violence Against Women, its Causes and Consequences ("the Special Rapporteur") compiled a report on the state of GBV in South Africa after a visit to the country in 2015. The Special Rapporteur noted that South Africa is a society deeply influenced by the violence of its past and "characterised by divisions of race, class and gender." The violence of the apartheid era is still very present in modern South Africa, which is still plagued by patriarchal norms and attitudes towards women. The pattern of disparity inherited from apartheid also means that violence against women and children in rural areas and informal settlements is all but inevitable.[22]

The Special Rapporteur has said that the fundamental causes of GBV are "unequal power gender relations, patriarchy, homophobia, sexism and other harmful

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[19] Sections 8-14.

[20] Preamble of the Sexual Offences Amendment Act.

[21] Interim Steering Committee *National Strategic Plan on Gender-Based Violence and Femicide* 17. Abrahams et al (2017) *PLoS ONE* 1 2; E Mills, T Shahrokh, J Wheeler, G Black, R Cornelius & L van den Heever *Turning the Tide: The Role of Collective Action for Addressing Structural and Gender-Based Violence in South Africa* IDS Evidence Report No. 118 23.

[22] UN Human Rights Council *Report of the Special Rapporteur* 3.

discriminatory beliefs and practices" with poverty being a contributing factor.[23] As mentioned above, alcohol, drugs and unemployment are additional triggers of GBV. Certain groups are also more vulnerable to GBV because of socio-economic inequality or a lack of resources. These include historically disadvantaged race groups, disabled persons, LGBTQIA persons, refugees and migrants, people living in rural areas or informal settlements and the elderly.[24]

Empirical studies have corroborated these findings of the Special Rapporteur. Studies have shown that GBV is prevalent in all sectors of South African society but that the more types of oppression a group faces, the more at risk they are of facing GBV and the fewer resources they have to protect themselves.[25]

This thesis does not seek to suggest that GBV only occurs within historically disadvantaged groups or that only certain groups who face multiple types of oppression need to be protected. These studies indicate that GBV happens in many different contexts to many different groups across South African society. As such, this thesis argues that any response to GBV needs to take that into account. The prevalence and nature of GBV shown in these studies indicate that the feminist lens used to guide the application of restorative justice to cases of GBV must be able to address all of the contexts in which GBV occurs. This requires the lens to be able to tackle and inform multiple intersecting forms of oppression.

3 2 3 Gender-based violence as a human rights issue

The complex and prevalent nature of GBV has been explored in the previous section and in this section, threat GBV poses to fundamental human rights is explored.

The Constitutional Court in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)*[26] held that violence against women constitutes gender discrimination and the state is obliged by the Constitution and international law to prevent this discrimination and protect the rights of women.[27] The court held that

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[23] 3.

[24] Interim Steering Committee *National Strategic Plan on Gender-Based Violence and Femicide* 30-33; UN Human Rights Council *Report of the Special Rapporteur* 3.

[25] Mills et al *Turning the Tide* IDS Evidence Report No. 118 24-27.

[26] 2001 4 SA 938 (CC).

[27] Para 62.

while the primary engine for law reform is the legislature, the judiciary must develop the common law to be in line with the objectives of the Bill of Rights.[28]

This judgment then guided the Supreme Court of Appeal ("SCA") in *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae)*[29] in which it was held that under section 12(1)(c) of the Constitution the right to freedom and security of the person includes the right to be free from all forms of violence from either public or private sources. The court held that the state is obliged to refrain from invading these rights and take active steps to prevent these rights from being violated.[30] This decision echoes the Constitutional Court's comments in *S v Baloyi (Minister for Justice Intervening) ("Baloyi").*[31] In *Baloyi* it was held that the state is obliged by the Constitution and international law to protect the right to be free from private or domestic violence. Sachs J held that the constitutional promise of a non-sexist society in which equality and non-discrimination are guaranteed is directly undermined when domestic violence is left unaddressed.[32]

The SCA has also commented on the act of rape as an invasion of constitutional rights and the state's obligation to protect these rights. In *S v Chapman*[33] it was held that rape is a serious offence that constitutes a "humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim".[34] The court held that women of South Africa are entitled to the protection of these rights and that courts are duty-bound to send a clear message that they are determined to protect the rights of all women and show no mercy for those who seek to invade these rights.[35]

It is clear from these judgments that the prevalence of GBV in its various forms is a threat to the human rights of every individual it impacts. This thesis argues that by threatening human rights, particularly the right to human dignity, GBV poses a threat to the transformative vision of the Constitution.

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[28] Para 33-36.
[29] 2003 1 SA 389 (SCA).
[30] Paras 13-15.
[31] 2000 2 SA 425 (CC).
[32] Paras 11-13.
[33] 1997 3 SA 341 (SCA).
[34] 344.
[35] 345.

3 3 Gender-based violence and restorative justice: Feminist perspectives

3 3 1 Feminist engagement with restorative justice theory

Feminist theory, including feminist legal theory, is very diverse and cannot be treated as a monolith.[36] Various feminist theories have different approaches to restorative justice and criminal justice reform in general. These strands of feminist theory and their engagement with restorative justice are outlined to give a broad understanding of feminist legal theory and its expectations of criminal justice.

For the purposes of this research, a feminist lens must be constructed through which an *ubuntu*-rooted restorative justice model is approached. This feminist lens must be capable of aiding the application of restorative justice to cases of GBV. This lens must be able to do three things. First, it must be able to adapt to the many different contexts in which GBV exists, including other forms of inequality which influence GBV. Second, it must be able to critically evaluate restorative justice as a theory and find fault with its application to GBV but offer solutions to those faults. Third, this feminist lens must be able to harmonise with the values of the Constitution and bolster the ability of restorative justice to uphold the constitutional rights of GBV victims.

3 3 2 Liberal feminists

Vergini de Freitas argues that liberal feminists view women as identical to men and advocate for the identical treatment of men and women.[37] Hopkins and Koss posit that liberal feminists are often labelled as “sameness feminists” for this emphasis on the identical nature of men and women.[38]

Vergini de Freitas posits that this group of feminists strive for a neutral legal system that equally sanctions gendered and non-gendered violence. Some authors posit that liberal feminists strive to work with the state as an ally to achieve these reforms.[39] Moller Okin, a prominent liberal feminist writer, argues that women’s rights must be

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[36] BO Vergini de Freitas *Restorative Justice, Intersectionality Theory and Domestic Violence: Epistemic Problems in Indigenous Settings* LLM Thesis University of British Columbia (2011) 117.

[37] F Olsen “Sex of Law” in D Kairys (ed) *The Politics of Law* (1982) 691 694-695.

[38] Hopkins & Koss (2005) *Violence Against Women* 698.

[39] Vergini de Freitas *Restorative Justice, Intersectionality Theory and Domestic Violence* 126.

viewed as human rights for equality to be truly achieved. Furthermore, gendered human rights abuses must be treated the same as all other human rights abuses:

> "The problem is that existing theories, compilations, and prioritizations of human rights have been constructed after a male model. When women's life experiences are taken equally into account, these theories, compilations, and prioritizations change significantly. Examples of issues that come to the fore, instead of being virtually ignored, include rape (including marital rape and rape during war), domestic violence, reproductive freedom, the valuation of childcare and other domestic labour as work, and unequal opportunity for women and girls in education, employment, housing, credit, and health care."[40]

In this quote, Moller Okin points out the masculine construction of human rights models which results in a differentiation between men and women.[41] Dally and Stubbs posit that liberal feminists are concerned with any differentiation between men and women in the legal system, even when the differentiation supposedly protects women's rights and interests.[42] For instance, some authors argue that many liberal feminists do not support statutory rape laws which they view as legislative reinforcement of the notion that men are sexually aggressive and women are inherently sexually passive.[43]

Vergini de Freitas argues that liberal feminists offer the most intense challenges to the use of restorative justice practices in cases of GBV. According to Vergini de Freitas liberal feminists are concerned that offenders of GBV who participate in restorative justice practices may not receive comparable sanctions to those sentenced under the formal criminal justice system.[44] Hopkins and Koss conversely argue that restorative justice centres on the victim and can sanction gendered crime in the way same as non-gendered crime. In doing so, restorative justice can satisfy the demands for equal and identical treatment from liberal feminists.[45] However, liberal feminists are

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[40] S Moller Okin "Feminism, Women's Rights and Cultural Differences" (1998) 13 *Hypatia Springs* 32 34-35.

[41] 34, 35.

[42] K Daly & J Stubbs "Feminist Theory, feminist and anti-racist politics and restorative justice" in G Johnstone & DW van Ness (eds) *Handbook of Restorative Justice* (2007) 149 150.

[43] W Williams "The equality crisis: Some reflections on culture, courts, and feminism" in KT Bartlett
& R Kennedy (eds.) *Feminist Legal Theory* (1991) 15 20-21.

[44] Vergini de Freitas *Restorative Justice, Intersectionality Theory and Domestic Violence* 126-127.

[45] Hopkins & Koss (2005) *Violence Against Women* 699.

concerned that restorative justice practices which draw upon indigenous conflict resolution mechanisms may carry with them traditions of patriarchy. Some liberal feminist authors, Moller Okin among them, argues that the community's cultural norms may devalue women's autonomy in favour of group consensus.[46]

As a feminist lens for the purposes of this research, liberal feminism meets some but not all of the criteria outlined above. First, liberal feminism does address the need to address GBV with equal fervour as non-gendered crimes or human rights abuses. However, liberal feminism does not provide an understanding of how other forms of oppression interact with gender inequality. As a result, a liberal feminist lens cannot offer a contextual understanding of GBV. For instance, liberal feminism cannot assist in cases where socio-economic conditions, race or sexuality contribute to GBV. Second, liberal feminism offers critiques of restorative justice where it is grounded in customary law or traditional practices but does not provide solutions to this problem. Liberal feminists do not indicate how traditional practices rooted in patriarchal cultures can be adapted to promote women's autonomy. Lastly, liberal feminism harmonises well with the constitutional value of equality but only accounts for gender as a ground for discrimination under section 9. As a result, liberal feminism cannot uphold the constitutional rights of GBV victims who experience other forms of discrimination in their experience of GBV.

3 3 3 Cultural or difference feminists

Olsen posits that cultural feminists or "difference feminists" emerged partially as a response to liberal feminist advocation for "sameness" and identical treatment.[47] Hopkins and Koss argue that cultural feminists accept that men and women have inherent differences but argue that masculine institutions have undervalued feminine traits.[48] Some authors posit that cultural feminists argue that the law is inherently masculine and patriarchal, which disadvantages women when certain uniform standards are applied. For instance, the use of parenthood as a mitigating factor in

[46] S Moller Okin, M Nussbaum, J Cohen, M Howard & M Craven *Is Multiculturalism Bad for Women?* (1999) 12-22.

[47] Olsen "Sex of law" in *The Politics of Law* 695

[48] Hopkins & Koss (2005) *Violence Against Women* 699; Olsen "Sex of law" in *The Politics of Law* 695.

sentencing indirectly advantages women who have children over women who are childless. This differentiation reinforces traditional patriarchal gender roles for women.[49]

Gilligan, a prominent cultural feminist writer, argues that the feminine "ethic of care" must be promoted to establish women's equality. [50] Gilligan describes how women approach moral issues as an ethic of care:

> "Women's construction of the moral problem as a problem of care and responsibility in relationships rather than as one of rights and rules ties the development of their moral thinking to changes in their understanding of responsibility and relationships, just as the conception of morality as justice ties development to the logic of equality and reciprocity. Thus, the logic underlying an ethic of care is a psychological logic of relationships, which contrasts with the formal logic of fairness that informs the justice approach."[51]

This "ethic of care" stands in contrast to the masculine "ethic of justice" which values hierarchy, logic and order.[52] Authors submit that cultural feminists believe that the feminine "ethic of care" must be promoted in the justice system for legal reform to bring about gender equality.[53] There is however some disagreement as to whether the feminine "ethic of care" should be held in equal regard to masculine justice or if it should supersede masculine traits.[54]

Some authors posit that modern cultural feminists argue that men and women have no inherent differences but argue that traits and values which society views as feminine are devalued and underrepresented.[55] According to Daly and Stubbs, later developments in feminist theory continued to advocate for underrepresented, feminine voices but did not insist that all women have inherent traits to justify this inclusion.[56]

Most cultural feminists are particularly accepting of alternative approaches to justice, especially when these approaches seek to centre victims' experiences and

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[49] A Burgess-Proctor "Intersections of Race, Class, Gender, and Crime Future Directions for Feminist Criminology" (2006) 1 *Feminist Criminology* 27 33.
[50] Hopkins & Koss (2005) *Violence Against Women* 699; K Daly & J Stubbs "Feminist engagement with restorative justice" (2006) 10 *Theoretical Criminology* 9 10.
[51] C Gilligan *In a Different Voice* (1982) 73.
[52] 30.
[53] Hopkins & Koss (2005) *Violence Against Women* 699-700.
[54] Daly & Stubbs (2006) *Theoretical Criminology* 10; Olsen "Sex of Law" in *The Politics of Law* 696.
[55] Hopkins & Koss (2005) *Violence Against Women* 699.
[56] Daly & Stubbs (2006) *Theoretical Criminology* 11.

women's voices.[57] Some authors argue that cultural feminists reject the state as a mechanism for advancing women's rights as they argue it has been steeped in masculine tradition.[58] This leads cultural feminists to accept restorative justice as a feminine alternative to the formal criminal justice system.[59] Daly and Stubbs have identified concern amongst cultural feminists that an approach which overvalues a communal ethic may undermine individual rights and freedoms.[60]

This thesis submits that cultural feminism does not meet the criteria for being an appropriate theoretical lens for this research. First, a cultural feminist lens does not provide a contextual understanding of GBV, which takes into account all of the various forms of oppression that may influence victims' experience of GBV. Cultural feminists evaluate gender inequality in isolation and do not take into account how other forms of oppression can impact women. As such, cultural feminists have been critiqued for homogenising women and not giving due attention to a diverse range of women's voices.[61] This makes it unsuitable for approaching GBV in contexts where there are contributing factors such as race, class, and sexuality are at play. Second, cultural feminism offers somewhat of a critical approach to restorative justice but does not offer any solutions to the concerns it raises. Cultural feminists have not indicated how to balance a communal ethic with individual rights and freedoms in a restorative justice model. They have merely raised the issue that overvaluing a communal ethic may erode individual rights.[62] Moreover, cultural feminists have been critiqued for only viewing restorative justice as an inherently feminine alternative to the formal (masculine) justice system. Critics have argued this is a misunderstanding of restorative justice.[63] Lastly, it must be determined to what extent cultural feminism can harmonise with the values of the Constitution and uphold the rights of GBV victims. Due to the lack of attention to sites of oppression other than gender, cultural feminism is unable to address all of the forms of inequality faced by victims of GBV. As a result,

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[57] Hopkins & Koss (2005) *Violence Against Women* 699.

[58] Vergini de Freitas *Restorative Justice, Intersectionality Theory and Domestic Violence* 129

[59] Hopkins & Koss (2005) *Violence Against Women* 700.

[60] Daly & Stubbs (2006) *Theoretical Criminology* 11.

[61] A Stone "Essentialism and anti-essentialism in feminist philosophy" (2004) 1 *Journal of Moral Philosophy* 135 137-142.

[62] Daly & Stubbs (2006) Theoretical Criminology 11.

[63] K Daly "Restorative Justice: The Real Story" (2002) 4 *Punishment & Society* 64-66.

this lens cannot aid the transformative constitutional mandate to address all forms of injustice.[64]

3 3 4 Radical feminists

Hopkins and Koss argue that radical feminists, often called "dominance" feminists, believe that gender is the primary site of oppression.[65] Other authors submit that radical feminists believe that the law is a vehicle for the dominance of men over women.[66] Burgess-Proctor argues that radical feminists believe that male dominance primarily takes place through male control of female sexuality.[67] Hopkins and Koss posit that to radical feminists, sexual violence is the most extreme form of this control.[68]

Hopkins and Koss argue that radical feminists disagree with cultural feminists that there is a universal feminine voice or ethic. They believe that the illusion of such a phenomenon is an effect of male dominance and patriarchal norms.[69] Mackinnon, one of the most prevalent radical feminist writers, has strongly dismissed the cultural feminist notion of a female voice:

> "I am troubled by the possibility of women identifying with what is a positively valued feminine stereotype. It is "the feminine." It is actually called "the feminine" in the middle chapter of the book. Given existing male dominance, those values amount to a set-up to be shafted. I am particularly worried about the legal impact of this." [70]

Mackinnon argues that a the "feminine voice" cannot exist without a radical change in gendered power dynamics: "Give women equal power in social life. Let what we say matter; then we will discourse on questions of morality. Take your foot off our necks; then we will see in what tongue women speak."[71]

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[64] 2021 2 SA 54 (CC) para 97.

[65] Hopkins & Koss (2005) *Violence Against Women* 700.

[66] Vergini de Freitas *Restorative Justice, Intersectionality Theory and Domestic Violence* 130-131; Hopkins & Koss (2005) *Violence Against Women* 699-700.

[67] Burgess-Proctor (2006) *Feminist Criminology* 29.

[68] Hopkins & Koss (2005) *Violence Against Women* 701.

[69] 699-701.

[70] EC Dubois, MC Dunlap, CJ Gillian, CA Mackinnon & CJ Menkel-Meadow "Feminist discourse, moral values, and the law-a conversation" (1985) 34 *Buff L Rev* 11 74-75.

[71] C Mackinnon *Difference and Dominance: On Sex Discrimination* (1984) 390.

Daly and Stubbs argue that radical feminists also reject liberal feminists' views that the state is an ally in the pursuit of gender equality. The authors posit that to radical feminists, the state is so deeply entrenched in masculine control that it has become part of the oppression women face.[72] Hopkins and Koss argue that radical feminists are primarily concerned with sexuality and sexual violence. Restorative justice programmes that address sexual offences are in line with the radical feminists' agenda.[73] Some radical feminists remain cautious of alternative forms of justice, especially in traditional settings as male dominance may still persevere.[74]

A radical feminist lens does not meet the criteria of an appropriate theoretical framework for the purposes of this research. First, while radical feminism is concerned with sexual violence, it does not address some of the other sites of oppression which may aggravate GBV. For instance, radical feminism cannot aid in navigating how race, class, culture and sexuality influence GBV. This makes it unsuitable for the purposes of this research. Second, radical feminism is cautious of masculine power influencing the formal justice system and alternative traditional restorative justice mechanisms. There is little discussion amongst radical feminists on how to navigate these systems other than completely restructuring them. The feminist lens for the purposes of this research will need to be able to work within the court system and traditional African justice systems to promote gender equality. A radical feminist lens which opposes both the formal state justice system and traditional justice systems is not best placed to fulfil this purpose.

Lastly, radical feminism's commitment to transforming gendered power relations and restructuring systems that create oppression aligns with the transformative constitutional vision. However, despite radical feminism's alignment with the values of the Constitution, it does not address forms of oppression other than gender. Thus, it cannot assist in upholding the rights of GBV victims who experience GBV in tandem with racial, class or sexuality-based oppression.

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[72] Daly & Stubbs "Feminist Theory" in *Handbook of Restorative Justice* 150-151.

[73] Hopkins & Koss (2005) *Violence Against Women* 700-701.

[74] Vergini de Freitas *Restorative Justice, Intersectionality Theory and Domestic Violence* 131-132.

3 3 5 Marxist feminists

Hopkins and Koss identify Marxist feminism as a strand of feminism which addresses the intersection of class and gender.[75] Davis is one of the foremost Marxist feminist writers and has argued the following about gender, race and class in the suffragette movement:

> '"Woman' was the test, but not every woman seemed to qualify. Black women, of course, were virtually invisible within the protracted campaign for woman suffrage. As for white working-class women, the suffrage leaders were probably impressed at first by the organizing efforts and militancy of their working-class sisters. But as it turned out, the working women themselves did not enthusiastically embrace the cause of woman suffrage. Although Susan B. Anthony and Elizabeth Cady Stanton persuaded several female labour leaders to protest the disfranchisement of women, the masses of working women were far too concerned about their immediate problems—wages, hours, working conditions—to fight for a cause that seemed terribly abstract."[76]

This thesis submits that Davis's assessment of the suffragette movement shows that early feminist movements often did not consider the equality of women who were not affluent or white. Davis's Marxist feminist view accounts for the fact that Black and poor women were often reliant on men due to class exploitation or racial oppression.[77]

Some Marxists argue that restorative justice practices merely act as a proxy for the formal criminal justice system and do not offer a significant enough challenge to the status quo.[78]

A Marxist feminist lens is partially suitable for the purposes of this research. First, a Marxist feminist lens is able to address how socio-economic factors impact GBV. Marxist feminists have raised concerns about the higher levels of violence against poor women.[79] Davis's approach to Marxist feminism adds a third element of race to the intersection of class and gender.[80] However, this lens still leaves some elements such as culture and sexuality unaddressed. Second, as discussed above, Marxist feminism does not align itself with restorative justice but does not offer solutions to its critiques.

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[75] Hopkins & Koss (2005) *Violence Against Women* 701.
[76] A Davis *Women, Race and Class* (1981) 82 83.
[77] 83-84.
[78] G Pavlich *Governing Paradoxes of Restorative Justice* (2005) 7, 8.
[79] DJ Curran & CM Renzetti *Theories of Crime* (2004) 211.
[80] Davis *Women, Class and Race* 82-83.

This makes it unsuitable as a tool for the purposes of this research. Third, Marxist feminism does not provide an answer to forms of oppression other than race, class and gender, which makes it unsuited to fully bolster the rights of GBV victims who experience other forms of oppression. This is also not fully aligned to the values of the Constitution which envisions equality as non-discrimination on a number of listed grounds beyond what Marxist feminism can provide.[81]

3 3 6 Post-modernist feminists

Hopkins and Koss submit that post-modernist feminists use the notion of social constructionism to conceptualise oppression. The authors posit that post-modernists argue that institutions such as the legal system create categories of women that are then regulated by the law.[82] Daly and Stubs argue that post-modernist feminists shifted away from the dominance model of radical feminists and began to analyse the legal and social discourses which construct gender dynamics.[83] Burgess-Proctor submits that post-modernists rejected the essentialists' universal "truths" regarding women's oppression and notions of justice in favour of multiple, more nuanced truths.[84]

Butler, a notable post-modernist feminist writer, argues that gender and sex are not inherent characteristics as essentialist schools of thought have posited, but rather, they are social constructs. She argues the following in this regard:

> "If the immutable character of sex is contested, perhaps this construct called 'sex' is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all."[85]

There is some disagreement on whether post-modernist feminists accept restorative justice. Hopkins and Koss argue that because restorative justice practices allow parties to be seen outside of their pre-designated categories of victim and offender, they are accepted by post-modernist feminists.[86] Cameron argues that restorative

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[81] Section 9(3) of the Constitution.

[82] Hopkins & Koss (2005) *Violence Against Women* 702.

[83] Daly & Stubbs "Feminist theory" in *Handbook of Restorative Justice* 151.

[84] Burgess-Proctor (2006) *Feminist Criminology* 29.

[85] J Butler *Gender Trouble: Feminism and the Subversion of Identity* (1990) 10, 11.

[86] Hopkins & Koss (2005) *Violence Against Women* 702.

justice practices may not be able to overcome the constructed social dynamics of the community. Cameron's concern is that women who participate in these restorative justice practices as victims will feel pressured to put the interests of the offender and the community above their own. This is particularly a concern in indigenous sentencing circles where traditionally constructed hierarchies may be more deeply entrenched. Cameron argues that these practices reinforce gender hierarchies by assigning women the role of restoring the offender rather than addressing their own restitution.[87]

Post-modernist feminism does not fully meet the criteria of the feminist lens needed for this research. First, it is not able to address all contexts in which GBV takes place. Post-modernist feminism does not fully account for other intersecting points of oppression which may influence a victim's experience of GBV. Second, post-modernist feminism accepts the possibility of restorative justice being used in cases of GBV but critiques the use of traditional conflict resolution mechanisms that may have patriarchal tendencies. Post-modernist feminist authors do not offer a solution to this issue other than avoiding the practices altogether. Third, post-modernist feminism is not best placed to uphold the constitutional rights of GBV victims as it cannot inform restorative justice practices where more than one form of oppression is present.

3 3 7 Multiracial feminists

Hopkins and Koss argue that multiracial feminists used the post-modernist social construction theory to advocate for the importance of racial identity in gendered oppression.[88] Zinn and Dill argue that multiracial feminism is an anti-essentialist theory which also focuses on the importance of social relationships and connectedness.[89] Alcoff argues that multiracial feminists are distinct from essentialist feminist schools of thought in that gender is not the primary site of oppression.[90]

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[87] A Cameron "Sentencing circles and intimate violence: A Canadian feminist perspective" (2006) 18 *Can J Women & L* 479 488-489; A Cameron "Stopping the violence: Canadian feminist debates on restorative justice and intimate violence" (2006) 10 *Theoretical Criminology* 49 57-58.

[88] Hopkins & Koss (2005) *Violence Against Women* 702.

[89] MB Zinn & BT Dill "Theorizing difference from multiracial feminism" (1996) 22 *Feminist Studies* 321 322.

[90] L Alcoff & E Potter *Feminist Epistemologies* (1999) 3-4.

bell hooks, a prominent multiracial feminist, has described her understanding of feminism thus:

> "Feminism is the struggle to end sexist oppression. Its aim is not to benefit solely any specific group of women, any particular race or class of women. It does not privilege women over men. It has the power to transform in a meaningful way all our lives."[91]

This strand of feminism incorporates critical race feminism, post-colonial feminism and lesbian feminism and is often conflated with intersectional feminism. All of these schools of thought reject the notion that the oppression of women can be viewed in isolation from other forms of oppression. However, the former theories each focus on particular identities and their construction, whereas intersectional theory includes all marginalised identities and their interactions with each other.[92]

There is a large degree of overlap between multiracial feminist theory and restorative justice theory in human rights debates.[93] Multiracial feminists have mixed opinions on the use of restorative justice in cases of GBV. Restorative justice mediation sessions may work better than traditional retributive models to address the power imbalance between parties.[94] However, there is still concern that the racial inequality present in the legal system may interfere with this application of restorative justice. Certain race groups have empirically been shown to receive lower prosecution rates for GBV crimes committed against them.[95] Multiracial feminists have expressed concern that these women may be inadvertently diverted to restorative justice programmes at a disproportionate rate when criminal prosecution may be more appropriate.[96]

Multicultural feminist theory only partially meets the criteria for the feminist lens needed for this research. Multicultural feminist theory can inform the application of

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[92] Vergini de Freitas *Restorative Justice, Intersectionality Theory and Domestic Violence* 142.

[93] Hopkins & Koss (2005) *Violence Against Women* 703.

[94] MP Koss "Blame, shame, and community: Justice responses to violence against women" (2000) 55 *American Psychologist* 1332 1336.

[95] MA Whatley "Victim Characteristics influencing attributions of responsibility to rape victims: a meta-analysis" (1996) 1 *Aggression and Violent Behaviour* 81 82; Hopkins & Koss (2005) *Violence Against Women* 703.

[96] Koss (2000) *American Psychologist* 1334,1336.

restorative justice in a variety of contexts by contextualising the racial and class identities of parties in the proceedings. This thesis argues that these are very important considerations in the South African contexts as our country has a long history of racial and class-based oppression which greatly informs present-day inequalities. There are however, many more grounds for oppression present in South Africa other than race, class and sexuality; for instance disability, ethnicity and migrant status can also be important sites of oppression to consider. This thesis argues that there are other strands of feminist theory which are better placed to inform circumstances where multiple forms of oppression are present.

Multicultural feminists offer critical insight regarding the practical considerations needed when applying restorative justice to cases of GBV. The concerns raised by multicultural feminists are noteworthy however they are not accompanied by constructive solutions which makes this strand of feminist less suited to the needs of this research. Multicultural feminism has strong potential to bolster restorative justice's ability to uphold the rights of GBV victims where multiple forms of oppression are present. However, multicultural feminism may not be the most advantageous strand of feminism for the purposes of this research as it is limited to the grounds of race, class and sexuality when considering overlapping forms of oppression. The feminist lens for this research needs to take into account all forms of oppression present in a given case.

3 3 8 Intersectional feminists

Crenshaw first used intersectional theory to explore the compounded forms of oppression faced by Black women on the basis of both race and gender.[97] Crenshaw argued that Black women experience oppression in a unique way that single-axis models cannot account for:

> "These problems of exclusion cannot be solved simply by including Black women within an already established analytical structure. Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into

[97] K Crenshaw "Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics" (1989) 8 *UCLF* 139 140.

account cannot sufficiently address the particular manner in which Black women are subordinated."

Vergini de Freitas notes that in recent years intersectionality has been adopted into mainstream debates to explore all forms of intersecting inequalities.[98] Intersectionality is a prominent tool in social activism to explore interactions between injustices such as racism, sexism, homophobia, classism and many other factors.[99]

The Constitutional Court in *Mahlangu v Minister of Labour*[100] indicated that courts must be aware of patterns of group disadvantage and discrimination along intersectional lines.[101] The Constitutional Court further held that the transformative constitutional mandate requires courts to address the inequalities of the past, which still remain in place today.[102] Intersectionality, according to the Constitutional Court, is an important tool in this endeavour as it enables courts to examine multiple, compounding forms of inequality among groups and individuals.[103] The degree to which these various strands of feminism can offer an intersectional perspective of inequality as a tool to address past injustice is evaluated in this chapter. Atrey argues that this judgment indicates that intersectionality is a tool for constitutional interpretation and has now become a general part of constitutional law.[104]

Hopkins and Koss argue that because of the ability to integrate a post-colonial lens into intersectionality, some restorative justice practitioners were able to engage with indigenous restorative justice conflict mechanisms[105] in a more complex manner.

This thesis argues that intersectional feminism shows the greatest potential as a lens to guide the application of restorative justice in cases of GBV. Intersectional feminism is able to address the many diverse forms of GBV present in South Africa. This is because intersectionality considers all intersecting forms of oppression that

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[98] Vergini de Freitas *Restorative Justice, Intersectionality Theory and Domestic Violence* 140-142.

[99] T Kupupika "Shaping our freedom in dreams: Reclaiming intersectionality through black feminist legal theory" (2021) 107 *Virginia Law Review Online* 27 29.

[100] 2021 2 SA 54 (CC).

[101] Para 90.

[102] Para 97.

[103] Para 95, 102.

[104] S Atrey "Beyond discrimination Mahlangu and the use of intersectionality as a general theory of constitutional interpretation" (2021) 21 *IJDL* 168 172-175

[105] Hopkins & Koss (2005) *Violence Against Women* 703.

may impact a group or individual's experience of GBV. This thesis submits that intersectionality can integrate with a pre-colonial understanding of restorative justice but still critically engage with the application of restorative justice in a manner that upholds the constitutional rights of victims. This is possible because an intersectional lens engages with every form of oppression and injustice present in a given case.

3 3 9 African and *ubuntu* feminists

Coetzee argues that African feminism has largely been absent from the broader Western global feminist movement.[106] Some authors argue that African women's struggle for liberation informed some early Western feminist authors, even if credit was never given.[107] Coetzee notes that early African feminists were reluctant to claim the term "feminist" as it had historically centred white women. Similarly, Coetzee claims that early African feminists also sought to address misconceptions of African womanhood perpetuated by male African authors.[108] Gqolo, a prominent African feminist, raises similar concerns about the Black Consciousness Movement's handling of the oppression faced by Black women in South Africa:

> "First, BC [Black Consciousness] ideology rests on the unsatisfactory premise that race is the *primary* oppressive force for all those racially subjugated in South Africa. This supposition is puzzling in that it pronounces a hierarchy of oppression. It is also ironic that exploring the "primary" oppression invariably leads to the repudiation of all other forms of oppression. This is particularly so in an ideology which expressly seeks to eliminate injustice."[109]

Many African feminists have worked to reconcile the identities of "woman" and "African".[110] Ogundipe-Leslie created alternatives such as "Stiwanism" (Social

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[106] A Coetzee *African Feminism as Decolonising Force: A Philosophical Exploration of the Work of Oyeronke Oyewumi* D Phil dissertation Stellenbosch University (2017) 1.

[107] E Salo & A Mama "Talking About Feminism in Africa" (2001) 50 *Agenda* 58 60.

[108] Coetzee *African Feminism as Decolonising Force* 4.

[109] PD Gqolo "Contradictory locations: Black women and the discourse of the Black Consciousness Movement (BCM) in South Africa" (2001) 2 *Meridians* 130 134 [footnotes omitted].

[110] M Ogundipe-Leslie *Re-Creating Ourselves: African Women & Critical Transformations* (1994) 219-228.

Transformation Including Women in Africa), which focused on the socio-economic equality of African women.[111] African feminism centres the experiences of African women in the struggle for equality, African feminists have also written extensively on how the value of *ubuntu* informs this liberation.

Du Plessis identifies *ubuntu* feminists as a sub-division of African feminists and argues that this group uses a collective understanding of mutual care to inform intersectional forms of oppression which lead to gender inequality.[112] Du Plessis has identified the key principles of *ubuntu* feminism as: a feminist ethic of care, centralising a mutually obligated life, understanding justice as equality, facilitating a call to social action, and avoiding the homogenisation of women.[113]

Cornell and van Marle believe that *ubuntu* is able to address the tension in feminist debates between the relational, "ethic of care" view of the self and the individualistic and autonomous view of the self.[114] Cornell and van Marle also argue that *ubuntu* can offer a new perspective to gender-blind ideals of interrelatedness. *Ubuntu* feminism is strongly linked to an ethic of care due to its promotion of a mutual obligation of between people and communities. However, *ubuntu* feminism offers a genderless approach to this ethic of care which is cognisant of all forms of inequality and oppression. Much like intersectional feminism, *ubuntu* feminism resists not only gender inequality, but also injustice of any kind.[115]

Some authors argue that African tradition and *ubuntu* perpetuate patriarchal hierarchies and cannot be compatible with gender equality.[116] Keevy argues that any adoption of *ubuntu* into law will need to pass constitutional muster.[117] There is little scholarship on *ubuntu* feminism and restorative justice; however, the value of *ubuntu* and the theory of restorative justice are closely linked as discussed in the previous chapter.

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[111] 229.

[112] G Du Plessis "Gendered human (in)security in South Africa: what can ubuntu feminism offer?" (2019) 51 *Acta Academia* 41 45.

[113] 44.

[114] D Cornell & K van Marle "*Ubuntu* feminism: Tentative reflections" (2015) 36 *Verbum et Ecclesia* 1 4.

[115] 4-6.

[116] R Morgan & S Wieringa *Tommy Boys, Lesbian Men and Ancestral Wives* (2005) 261.

[117] I Keevy "*Ubuntu* versus the core values of the South African Constitution" (2009) 34 *JJS* 19 40-44.

African feminism and *ubuntu* feminism show potential as a lens for the purposes of this research but must be supported by another strand of feminism. First, African and *ubuntu* feminism provide a contextual understanding of GBV as it relates to the experience of Black African women in South Africa. *Ubuntu* feminism, like intersectional feminism, speaks to the many kinds of injustice and oppression which can impact GBV. This makes it a useful tool for bolstering the constitutional rights of GBV survivors in the application of restorative justice. However, intersectionality remains a key element of this potential. Second, *ubuntu* feminism can harmonise well with an approach to restorative justice which is grounded in the value of *ubuntu*. This can bridge the three elements of the theoretical framework of this research: restorative justice, *ubuntu* and feminist legal theory. Third, *ubuntu* feminism has the potential to harmonise well with the values of the Constitution. This is partly because the value of *ubuntu* informs the Constitution generally.[118] This thesis submits that *ubuntu* feminism shows potential to uphold the constitutional rights of GBV survivors in the application of restorative justice as it is concerned with all forms of injustice as well. This thesis submits that *ubuntu* feminism shows the potential to provide a gendered perspective to the application of *ubuntu* in this research. Thus, *ubuntu* feminism can bolster an *ubuntu*-based approach to restorative justice in cases of GBV.

3 3 10 Findings

This thesis submits that a blend of an intersectional feminist and *ubuntu* feminist lens has the most potential for the purposes of this research. An intersectional-*ubuntu* lens can offer an understanding of how various forms of inequality and oppression interact in cases of GBV. This lens also provides solutions for its critiques of restorative justice and harmonises well with the values of the Constitution, particularly the value of *ubuntu*. This blended approach also effectively upholds the constitutional rights of GBV survivors in various contexts, including other forms of oppression.

3 4 Feminist arguments against restorative justice

Beyond the theoretical engagement with restorative justice, there are many practical concerns which have been raised by feminist legal theorists regarding the use of restorative justice in cases of GBV.

[118] *S v Makwanyane* 1995 3 SA 391 (CC).

3 4 1 Victim safety

Victim safety and wellbeing are a major concern amongst some feminist legal theorists; however, these concerns often depend on the type of GBV in question. Daly and Stubbs have argued that because restorative justice processes are often informal, they may permit power imbalances to go unchecked. These power imbalances can reinforce abusive behaviour.[119] Hopkins and Koss have similarly identified safety concerns in programmes that use direct or face-to-face mediation sessions.[120]

There are some feminist concerns regarding the use of restorative justice specifically in cases of domestic violence. In cases where there is an ongoing pattern of violence, a direct mediation session may create an opportunity for further abuse to occur.[121] In cases of isolated acts of domestic violence, a mediation session may inadvertently encourage the victim to return to a dangerous situation.[122] Apologies often result from restorative justice processes; however, they form part of the cycle of domestic violence. In cases of domestic violence, these apologies or displays of remorse are often made in bad faith to encourage the victim to return to the relationship. In facilitating an apology, the mediation session may encourage the victim to accept the offender's apology and return to a dangerous relationship.[123] Coker argues that these risks can be mitigated by modifying restorative justice programmes. However, the potential benefits of restorative justice may still not materialise for victims of domestic violence.[124]

Hopkins and Koss have investigated the use of restorative justice in cases of sex offences committed against acquaintances with Coker's concerns in mind.[125] Many

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[119] Daly & Stubbs (2006) *Theoretical Criminology* 17.

[120] Hopkins & Koss (2005) *Violence Against Women* 709.

[121] J Stubbs "Domestic violence and women's safety: Feminist challenges to restorative justice" in H Strang & J Braithwaite (eds) *Restorative Justice and Family Violence* 42 57.

[122] 59-60.

[123] Stubbs "Domestic violence and women's safety" in *Restorative Justice and Family Violence* 58.

[124] D Coker "Enhancing autonomy for battered women: Lessons from Navajo Peacemaking" (1999) 47 *UCLA L Rev* 1 75-80, 103-107.

[125] CQ Hopkins, MP Koss & KJ Bachar "Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities" (2004) 23 *St. Louis U Pub L Rev* 289 301.

concerns about domestic violence are not applicable to cases of acquaintance sexual assault.[126] Hopkins and Koss found that in cases of acquaintance rape, where there was no ongoing pattern of violence, there was less risk of further psychological or physical harm being done to victims as a result of the restorative justice mediation sessions.[127]

These concerns have been raised by restorative justice theorists regarding the general use of restorative justice programmes. Marshall, like Coker, argues that these are valid concerns which can be mitigated if programmes are designed with these risks in mind and facilitators are trained correctly regarding safety, power dynamics and victim wellbeing.[128] Direct and indirect mediation sessions are often available to suit each case's circumstances.[129]

3 4 2 Manipulations of the process outcome by offenders

Another concern among some feminist legal theorists is the possibility of offenders manipulating restorative justice processes to their advantage and the victim's detriment.[130] Stubbs notes that there is concern that the psychological effect of domestic violence on victims may impact their ability to advocate for their own needs and interests effectively.[131] Hooper and Busch argue that power dynamics in domestic violence cases may interfere with the results of direct mediation sessions as parties cannot negotiate on an equal footing.[132] There is a concern in domestic violence cases that it is much easier for the offender to manipulate the victim and the mediation process where the offender and the victims have children together or where their

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[126] 302.

[127] Hopkins & Koss (2005) *Violence Against Women* 710; Hopkins, Koss & Bachar (2004) *St. Louis U Pub L Rev* 302.

[128] Marshall *Restorative Justice: An Overview* (1999) 25; Coker (1999) *UCLA L Rev* 77-80, 103-107.

[129] Daly & Stubbs (2006) *Theoretical Criminology* 17.

[130] 17.

[131] Stubbs "Domestic Violence and Women's Safety" in *Restorative Justice and Family Violence* 56.

[132] S Hooper & R Busch "Violence and the Restorative Justice Initiatives: The Risks of a New Panacea" (1996) 4 *Waikato L Rev* 101 108.

economic resources are shared.[133] It cannot be easily determined whether the victim is truly exercising their freedom, and it is difficult for them to negotiate freely in these situations.[134]

Hopkins and Koss note that cases of acquaintance rape, where the parties did not have any significant pre-existing relationship it may pose less of a risk for manipulation.[135] Often the main goal for the victim in these cases may only be for the offender to understand the violation of consent they have committed and to admit wrongdoing. In many cases of acquaintance rape, the offender may not understand that they have committed an offence, and the victim may not need or want an apology but rather an admission of accountability and wrongdoing.[136]

3 4 3 Pressures on victims

Some authors argue that victims who participate in restorative justice programmes may feel pressured to accept apologies or may be unable to advocate for their own needs effectively.[137] The emphasis on group conformity and reconciliation that these programmes often embody may pressure victims into accepting certain outcomes even if they do not truly desire them.[138]

Marshall has argued that this is a legitimate concern that can be mitigated if facilitators are trained to enable victims to advocate for their own needs.[139] In a practical sense, this was one of the concerns raised in the case of *S v Thabethe* where the victim asked for a restorative justice sentence, and the court was unsure if her family had pressured her to do so. The court's response was to send the parties to a restorative justice mediation programme which was aware of the concerns of the court and feminist theorists.[140] This case is discussed further in the next chapter.

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[133] Stubbs "Domestic Violence and Women's Safety" in *Restorative Justice and Family Violence* 45.

[134] Hopkins & Koss (2005) *Violence Against Women* 713.

[135] Hopkins, Koss & Bachar (2004) *St. Louis U Pub L Rev* 301.

[136] Hopkins & Koss (2005) *Violence Against Women* 710

[137] Daly & Stubbs (2006) *Theoretical Criminology* 17; Hooper & Busch (1996) 4 *Waikato L Rev* 108.

[138] Daly & Stubbs (2006) *Theoretical Criminology* 17.

[139] Marshall Restorative Justice: An Overview (1999) 27.

[140] 2009 2 SACR 62 (T) para 26-34.

As discussed in the second chapter, the community plays a major role in restorative justice programmes such as family group conferences and sentencing circles. This can lead to a broader support system for the parties and may improve offender accountability. However, according to some feminist authors, restorative justice literature has not paid enough attention to communities' role in facilitating violence.[141] Some feminist legal theorists argue that community norms may reinforce patriarchal violence or victim-blaming attitudes, which can be detrimental to victims of GBV. Another issue is that not all communities have sufficient resources or connections to participate effectively in restorative justice programmes.[142]

If the victim and offender are closely related, family members may have mixed allegiances to the victim and the offender. The victim may be pressured to forgive their offender or may be blamed by family members.[143] Coker argues that in cases of domestic violence where family members are involved in the mediation process, they may side with the offender because of intimidation or victim-blaming norms within the community.[144] Koss argues that involving family members who hold patriarchal beliefs may be beneficial to the victim as it provides an opportunity to re-educate these individuals. This benefits the victim by creating a new opportunity for prevention strategies and diminishing the norms and attitudes which lead to GBV.[145]

3 4 4 Effective method of crime control

Some feminist theorists are concerned that restorative justice programmes may not have enough of an effect on offenders. There is still a widespread sentiment that without judicial sanctions or custodial sentences, offenders may reoffend or pose a danger to society.

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[141] Stubbs "Domestic Violence and Women's Safety" in *Restorative Justice and Family Violence* 55.

[142] R Lewis, R Dobash, R Dobash & K Cavanagh "Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence" (2001) 10 *Social & Legal Studies* 117-119; Marshall Restorative Justice: An Overview (1999) 28-29.

[143] Stubbs "Domestic violence and women's safety" in *Restorative Justice and Family Violence* 55-56.

[144] Coker (1999) *UCLA L Rev* 76-77.

[145] Koss (2000) *American Psychologist* 1339.

Where the offender is not from the same community as the victim, traditional community-based programmes such as Canadian sentencing circles that are based on indigenous practices are often ineffective as a method of crime control.[146] This is also the case where not all members of the community share the same cultural values.[147]

Some feminist legal theorists argue that restorative justice may be viewed by offenders, the community and even potential offenders as a less serious option. There is a concern that this sends the message that the offence was less serious, and many theorists argue that restorative justice is not appropriate for serious offences, especially sexual offences.[148]

Some feminists believe rehabilitation is more appropriate than retributive sanctions in cases of domestic violence. This is premised on the idea that the patterns of violence and control exhibited by offenders in these cases are learnt behaviours which can be corrected through therapeutic intervention, as seen in some restorative justice programmes.[149] The use of rehabilitation does not exclude the possibility of criminal sanctions, especially where offenders still pose a danger to society.[150]

3 4 5 Some crimes are not appropriate

Stubbs has argued that the specific needs of victims will greatly differ depending on their circumstances, the kind of offences they are subjected to and their relationship with their offender. Stubbs argues that these considerations are vital to cases of GBV and are too often overlooked by restorative justice advocates.[151]

Koss argues that sexual violence of any kind is inappropriate for mediation and should rather be referred to criminal prosecution.[152] Acorn similarly argues that the emphasis placed on reconciliation and forgiveness in restorative justice practices is

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[146] Stubbs “Domestic Violence and Women’s Safety” in *Restorative Justice and Family Violence* 54.

[147] 51; Hopkins, Koss & Bachar (2004) *St. Louis U Pub L Rev* 309.

[148] H Hargovan “Doing justice differently: is restorative justice appropriate for domestic violence” (2010) 2010 *Acta Criminologica* 25 27.

[149] Lewis et al (2001) *Social & Legal Studies* 105 121.

[150] 122.

[151] J Stubbs “relations of domination and subordination: challenges for restorative justice in responding to domestic violence” (2010) 33 *UNSW Law Journal* 970 979.

[152] M Koss “Restoring Rape Survivors: Justice Advocacy and a Call to Action” (2006) 1807 *Ann NY Acada Sci* 206 222.

inappropriate for cases of sexual violence as it undermines the victim's experience.[153] As discussed above, the importance of forgiveness is a debated topic amongst scholars and is not always a necessary outcome in restorative justice programmes.[154]

Acorn argues that the role of apology in cycles of domestic abuse can mean that restorative justice interventions only perpetuate harmful behaviours.[155] Domestic violence victims may not be able to self-advocate. Domestic violence victims' main focus is not on previous acts of violence that have taken place, but the prevention of further acts of violence.[156]

IPV and domestic violence are some of the most contentious applications of restorative justice.[157] Some authors argue that domestic violence cases are entirely inappropriate for community conferences as there is little to no guarantee that the community or family members will condemn the offender's actions.[158] Coker notes that victims of IPV may end up negotiating for their own safety in mediation proceedings rather than working towards reconciliation and restitution.[159] Some scholars have noted that there is not enough empirical research regarding the pressure on IPV victims to forgive their abusive partners when engaging in mediation sessions.[160]

3 5 Feminist arguments for restorative justice

Despite the many practical concerns regarding the use of restorative justice in cases of GBV, some feminist scholars remain optimistic regarding the potential benefits. In some ways restorative justice interventions are more beneficial to victims, offenders,

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[153] Acorn *Compulsory Compassion: A Critique of Restorative* (2004) 73.

[154] Daly & Stubbs "Feminist Theory" in *Handbook of Restorative Justice* 161; Zehr *The Little Book of Restorative Justice* 8.

[155] Acorn *Compulsory Compassion: A Critique of Restorative* (2004) 73.

[156] Stubbs "Domestic Violence and Women's Safety" in *Restorative Justice and Family Violence* 53.

[157] Daly & Stubbs "Feminist Theory" in *Handbook of Restorative Justice* 160; Zehr *The Little Book of Restorative Justice* 11, 39.

[158] Lewis et al (2001) *Social & Legal Studies* 117-119.

[159] Coker (1999) *UCLA L Rev* 76.

[160] Hopkins, Koss & Bachar (2004) *St. Louis U Pub L Rev* 304; J Penell & G Burford "Feminist praxis: Making family group conferencing work" in H Strang and J Braithwaite (eds) *Restorative Justice and Family Violence* 108-109.

and their communities than traditional retributive options or a complete lack of intervention.[161] However, some feminist advocates argue that restorative justice is most beneficial to victims as a parallel system to the formal criminal justice system and not as an alternative.[162]

3 5 1 Victim voice and participation

Some feminist legal theorists argue that restorative justice programmes offer an opportunity for victim empowerment which is not often available in the traditional justice system.[163] Ideally, the restitution and needs of the victim are central to restorative justice programmes. Some authors argue that victims can have their voices heard and may find it empowering to confront their offenders in a controlled environment.[164] Victims also have more decision-making power in restorative justice programmes than in the traditional criminal justice process.[165]

3 5 2 Victim validation and offender responsibility

Some authors argue that restorative justice programmes also validate the victim's account of events.[166] Daly and Stubbs note that many victims may find it empowering to have their stories heard without being blamed.[167] There is also more of an opportunity to directly hold the offender accountable for their actions as restorative justice programmes typically take place after the offender has admitted guilt.[168]

While there is a major concern regarding imbalances of power, some feminist advocates argue that restorative justice programmes can result in rebalancing power

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[161] S Curtis-Fawley & K Daly "Gendered violence and restorative justice" (2005) 11 *Violence Against Women* 603 618-619.

[162] 619-620.

[163] Stubbs "Domestic violence and women's safety" in *Restorative Justice and Family Violence* 52; Curtis-Fawley & Daly (2005) *Violence Against Women* 627-629.

[164] Koss (2000) *American Psychologist* 1338; Curtis-Fawley & Daly (2005) *Violence Against Women* 627-629.

[165] Daly & Stubbs "Feminist theory" in *Handbook of Restorative Justice* 160; Stubbs (2010) *UNSW Law Journal* 980; Curtis-Fawley & Daly (2005) *Violence Against Women* 621.

[166] Curtis-Fawley & Daly (2005) *Violence Against Women* 621.

[167] Daly & Stubbs (2006) Theoretical Criminology 17.

[168] Curtis-Fawley & Daly (2005) *Violence Against Women* 622.

relations between the victim and offender. Some feminist authors also argue that these programmes can change the offender's behaviour where there is genuine remorse and accountability.[169] Some feminist legal theorists argue that another major benefit of restorative justice programmes is that the victim is vindicated, and the actions of the offender are appropriately condemned.[170]

As mentioned above, many feminist scholars argue that the inclusion of the community and family members in mediation sessions may unduly expose the victim to victim-blaming or patriarchal attitudes.[171] Koss argues that if the inclusion of these individuals can also provide an opportunity for re-education about these harmful beliefs. If done correctly, this can be an effective prevention strategy.[172]

3 5 3 Communicative and flexible environments

Restorative justice processes are inherently flexible and can be tailored to the needs of the parties and their circumstances.[173] Some authors argue that this can be a less intimidating process for victims who may feel alienated by the criminal justice system.[174]

3 5 4 Relationship repair

If the parties aim to repair their relationship, restorative justice programmes offer an opportunity for constructively addressing the harm that has been done to the victim.[175] There is also a greater chance for reconciliation than in the traditional adversarial justice system. This opportunity to repair relationships is often seen as a potential

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[169] B Hudson "Restorative justice: the challenge of sexual and racial violence" (1998) 25 *Journal of Law and Society* 237 247; Curtis-Fawley & Daly (2005) *Violence Against Women* 621.

[170] Koss (2000) *American Psychologist* 1338; Daly & Stubbs (2006) Theoretical Criminology 17.

[171] Stubbs "Domestic Violence and Women's Safety" in *Restorative Justice and Family Violence* 54.

[172] Koss (2000) *American Psychologist* 1339; Daly & Stubbs (2006) Theoretical Criminology 17.

[173] Curtis-Fawley & Daly (2005) *Violence Against Women* 617, 631.

[174] 615.

[175] 621.

benefit by some feminist scholars, however, others have argued that it is detrimental to victims who may return to dangerous relationships.[176] Coker has argued that restorative justice programmes can be adapted to mitigate risks when parties are in an ongoing relationship.[177]

3 7 Conclusion

There are many practical and theoretical concerns raised by various strands of feminist legal theorists regarding the use of restorative justice in cases of GBV. Some feminist legal theorists raise practical concerns around the use of direct mediation sessions and the possibility of these sessions being detrimental to victims of GBV. Many of these concerns are shared by restorative justice theorists and can be mitigated with the correct design of programmes, training of facilitators and selection of appropriate cases. Theoretically, each strand of feminist theory has a different approach to restorative justice. Most are positive about using restorative justice, where their issues with the criminal justice system and patriarchal norms are considered.

This chapter sought to identify a feminist lens through which an *ubuntu*-based approach to restorative justice may be guided. Intersectional feminism has been chosen as the primary lens for this purpose as it offers the greatest potential to inform the application of restorative justice in the widest range of GBV cases. *Ubuntu* feminism will also be used to inform the value of *ubuntu* from a gendered perspective. This understanding of the value of *ubuntu* is used to ground the approach to restorative justice used in the theoretical framework of this thesis.

[176] 615, 617.

[177] Coker (1999) *UCLA L Rev* 77-80, 103-107.

CHAPTER 4: RESTORATIVE JUSTICE JURISPRUDENCE

4 1 Introduction

This chapter examines all cases in which restorative justice has been explicitly used to sentence offenders to establish the current approach to this practice. The factual background of each case is established, including the nature of the relationship between the complainant and the offender and the circumstances in which the offence occurred. The cases of *S v Thabethe* ("*Thabethe*") and *S v Seedat* ("*Seedat*") are focused on, especially the court's reasoning for using restorative justice and the substantial and compelling circumstances identified by the courts to justify lesser sentences.

4 2 *S v Shibulane*

The first explicit recognition of restorative justice in sentencing is *S v Shibulane* ("*Shibulane*").[1] This case recognised that under a restorative justice approach, the interests and restitution of the complainant are a factor for sentencing considerations, along with the traditional sentencing triad.[2] The court also considered the likelihood of recidivism as a practical impact of harsh custodial sentences under a retributive paradigm.[3] The court did not refer to restorative justice theorists in its application of restorative justice.[4]

In this case, the accused pleaded guilty to the theft of seven fowls to the value of R216,16.[5] The court *a quo* sentenced the accused to nine months imprisonment which the appeal court held was disturbingly inappropriate.[6] The appeal court considered that the accused was a first-time offender who showed genuine remorse.[7] The state advocate and the Deputy Director of Prosecutions agreed that the nine-month

[1] 2008 1 SACR 295 (T); M Watney "The role of restorative justice in the sentencing of adult offenders convicted of rape" (2015) 4 *TSAR* 844 847.
[2] Para 4.
[3] Para 6.
[4] Para 5.
[5] 2008 1 SACR 295 (T) paras 2, 4.
[6] Para 7.
[7] Para 2.

custodial sentence was too harsh and should be replaced with a fine and a suspended sentence.[8]

The High Court considered the factors laid out in the triad of Zinn to determine an appropriate sentence:

> "The guiding light to sentencing still remains the oft-quoted dictum… 'Punishment should fit the criminal as well as the crime, be fair to the accused and to society, and be blended with a measure of mercy'". [9]

The court then considered the interests of the complainant and their restitution, seemingly adding a fourth leg to the test:

> "I have little doubt in my mind that, in line with the new philosophy of restorative justice, the complainant would have been more pleased to receive compensation for his loss. An order of compensation coupled with a suspended sentence would, in my view, have satisfied the basic triad and the primary purposes of punishment."[10]

Unfortunately, consent was not obtained from the complainant per section 300 of the Criminal Procedure Act 51 of 1977 ("CPA"), and so a compensation order could not be handed down.[11] The High Court held that alternatives to direct imprisonment might be able to address the overcrowding in prisons and issues of recidivism.[12]

The High Court also considered the practical implications of the sentence, not only for the complainant but for the community and the accused as well:

> "It is furthermore counterproductive, if not self-defeating, in my view, to expose an accused like the one *in casu* to the corrosive and brutalising effect of prison life for such a trifling offence. The price which civil society stands to pay in the end by having him emerge out of prison a hardened criminal far outweighs the advantages to be gained by sending him to jail."[13]

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[8] Paras 2, 3.

[9] Para 4; quoting *S v V* 1972 3 SA 611 (A) 614D and *S v Zinn* 1969 2 SA 537 (A) 540G.

[10] 2008 1 SACR 295 (T) para 4.

[11] Para 4.

[12] Para 5.

[13] Para 6.

The court set aside the court *a quo*'s sentence and substituted it with a fine of R500. The court also handed down a sentence of six months which was entirely suspended on the condition that the accused did not default on the fine or reoffend.[14]

4 3 *S v Maluleke*

S v Maluleke ("*Maluleke*")[15] followed *Shibulane's* approach but acknowledged the role customary law can play in restorative justice sentencing. Although the accused was convicted of a serious offence, this case built onto the restorative justice approach in *Shibulane*. The court recognised the opportunity that restorative justice creates to incorporate customary law into the criminal justice system.[16] The court's approach to restorative justice was grounded in African legal thinking and the work of restorative justice theorists.[17] The court also recognised that the core elements of restorative justice are victim restitution, reconciliation and offender accountability.[18]

The court considered factors which would justify a harsher sentence, such as the seriousness of the offence. The court held that the "sustained and brutal attack" carried out by the accused resulted in the death of a young person who was tied up at the time of the assault and could not defend themselves.[19] The court noted that despite all of the mitigating factors, the crime of murder is still a serious offence which calls for a severe sentence, but not necessarily incarceration. The court recognised that there is precedence for community service and suitable conditions being used to sentence an offender guilty of intentionally killing another person.[20]

In this case, the accused and her husband were convicted of murder for causing the death of a young person who had broken into their home.[21] Upon apprehending the would-be thief, the accused and her husband tied him up before assaulting him while he was unable to defend himself. As a result of this assault, the deceased passed

[14] Para 7.
[15] 2008 1 SACR 49 (T).
[16] Para 30.
[17] Paras 27-41.
[18] Para 28.
[19] Para 6.
[20] Para 12 in reference to *S v Potgieter* 1994 1 SACR 61 (A).
[21] Paras 1, 2.

away.[22] The accused's husband had passed away before the trial's start, so the High Court's judgment only focuses on the accused's sentencing.[23]

The court took into account many factors when considering an appropriate sentence for the accused. There were many mitigating factors which could justify a lesser sentence. Bertelsmann J noted that the accused and the deceased were known to each other as they lived in a small, close-knit community and were extended family members.[24] The court also considered the circumstances of the accused and her family. The accused had four dependent children, and her only source of income was a child grant.[25] Her late husband had been suspended from the police before his death, so the accused did not receive a pension as his widow.[26] The accused was a first-time offender who did not pose a danger to the community and seemed genuinely remorseful.[27]

The court held that the circumstances of this case allowed for an opportunity to introduce restorative justice into sentencing practices.[28] The court held that restorative justice cannot heal all of the effects of crime but that it can become a tool to reconcile the victim, offender and community. The court held that restorative justice is a useful alternative to imprisonment that may also ease the burden on correctional facilities.[29]

The court then established its own understanding of restorative justice:

> "Restorative justice has been developed by criminal jurists and social scientists as a new approach to dealing with crimes, victims and offenders. It emphasises the need for reparation, healing and rehabilitation rather than harsher sentences, longer terms of imprisonment, adding to overcrowding in jails and creating greater risks of recidivism.
>
> 'While improving the efficiency of the criminal justice system is necessary, applying harsher punishment to offenders has been shown internationally to have little success in preventing crime. Moreover, both these approaches are flawed in that they overlook important requirements for the delivery of justice, namely:
> - considering the needs of victims;

[22] Paras 3, 6.
[23] Para 4.
[24] Para5.
[25] Para 7.
[26] Para 8.
[27]Para 9.
[28] Para 25.
[29] 2008 1 SACR 49 (T) paras 32-34.

- helping offenders to take responsibility on an individual level; and
- nurturing a culture that values personal morality and encourages people to take responsibility for their behaviour.

Considering that crime rates in South Africa remain high and that government's focus appears to be on punishment rather than justice, a different approach is needed.'
Per Mike Batley & Traggy Maepa Beyond Retribution Prospects for Restorative Justice in South Africa at 16."[30]

The court continued:

> "The author underlines that restorative justice shifts the focus of the criminal process from retribution to healing and re-establishing societal bonds. It concentrates on the development of the offender into a responsible member of society, through the process of acknowledging the hurt suffered by the victim and society and taking steps to eliminate the effects of the crime upon these individuals and the community at large."[31]

The court uses the following definition of restorative justice from Cormier:

> "Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by the crime victim(s), offender and community to identify and address their needs in the aftermath of the crime, and seek a resolution that affords healing, reparation and reintegration, and prevents further harm."[32]

The court referred to authors who have argued that restorative justice creates an opportunity to introduce customary law into the formal justice system.[33] The court held further that incorporating customary law principles into the traditional justice system must be cautiously approached. An incorrect application of customary law may do more harm than good. The court held that other countries, such as Canada and New Zealand have shown great progress in incorporating their customary law into their formal criminal justice systems.[34] This shows that the court considered an understanding of restorative justice which is grounded in African legal thinking and

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[30] Para 26.
[31] Para 29.
[32] Para 28 in reference to R Cormier *Restorative Justice: Directions and Principles – Developments in Canada* (2002) 1.
[33] 2008 1 SACR 49 (T) para 30.
[34] Paras 32-34.

that considers the work of restorative justice theorists. The court's approach to restorative justice explicitly recognises the elements of victim restitution, reconciliation and accountability as evident in Cormier's definition.

The court then considered the case's suitability for applying restorative justice. The court took into account the parties' willingness to enter into a customary reconciliation meeting when assessing the appropriateness of restorative justice sentencing practices for the case.[35] The court noted that it was part of the customs of the community that after an unlawful killing, elders from both families would meet to attempt to apologise and reconcile.[36] The court found that the accused had not yet taken part in this custom but that both she and the deceased's mother were willing to do so.[37] This enabled the court to involve the community in the sentencing and rehabilitation process.[38] The court ultimately handed down an eight-year suspended sentence on the condition that an apology was duly issued.[39]

4 5 *S v M (Centre for Child Law as Amicus Curiae)*

S v M (Centre for Child Law as Amicus Curiae) ("S v M")[40] also dealt with the sentencing of an offender convicted of fraud. The Constitutional Court held that correctional supervision upholds a core tenet of restorative justice that the community rather than the criminal justice system is the primary source of crime control.[41] However, this alternative sentencing option is also contingent on the accused agreeing to correctional supervision conditions.[42] This promotes offender responsibility and community participation. The court sentenced the accused to four years imprisonment but suspended the sentence on the condition that she undergo counselling and correctional supervision and compensate as well as apologise to the victims of her crimes.[43] Sachs J held that the accused needed to be sentenced to community service

[35] Para 13.
[36] Para 14.
[37] Paras 16, 20.
[38] Para 21.
[39] Paras 13-19, 25.
[40] 2008 3 SA 232 CC.
[41] Para 62.
[42] Paras 59-62.
[43] Para 62.

in addition to correctional supervision to address the harm suffered by the community.[44] The Constitutional Court held that restorative justice requires that the offender directly acknowledge their wrongdoing to the victim.[45]

The court considered the current approach to sentencing, which uses the triad of Zinn to balance the nature of the crime, the circumstances of the accused and the interests of the community. Sachs J confirmed that when determining an appropriate sentence, the court must consider the main purposes of punishment, deterrence, prevention, reform and retribution. The court held that the Constitution now informs these purposes of punishment.[46] This lead the court to grapple with the implications of section 28(2) on sentencing considerations.[47]

In this case the accused was a 35-year-old mother of three minor children. She had previously been convicted of fraud and reoffended while on bail. The correctional supervision report compiled for the court indicated that the accused would be an ideal candidate for correctional supervision. However, the regional court sentenced the accused to four years imprisonment. [48] The High Court later overturned one of the convictions and shortened the accused's sentence to one of eight months, after which she was allowed out on correctional supervision.[49] The accused later appealed her sentence to the Constitutional Court on the grounds that imprisonment of a primary caregiver is contrary to the child's best interests under section 28(2) of the Constitution.[50]

The Constitutional Court held that of the legitimate choices available to a sentencing court, the form of punishment imposed must be the least damaging to the interests of children.[51] The court held that it is not the sentencing of a primary caregiver that threatens the child's interests but rather the imposition of a sentence without considering section 28(2). Sachs J outlined a sentencing formula for courts which are required to sentence primary caregivers. This formula included the integration of

[44] Para 73.
[45] Para 72.
[46] Paras 10-11.
[47] Paras 11-12.
[48] Para 2.
[49] Para 3.
[50] Paras 1, 5.
[51] Para 33.

practical considerations into the triad of Zinn. Sachs J held that if a sentencing court is to hand down a custodial sentence the court must take steps to ensure that the children of the incarcerated person will be adequately cared for.[52] By introducing these sentencing considerations, the Constitutional Court may arguably be setting a trend towards a cognisance of the practical implications of sentencing. The court considered whether a custodial sentence or correctional supervision would be appropriate for this case.[53]

4 4 *S v Saayman*

S v Saayman ("*Saayman*")[54] is the next case in which restorative justice was explicitly used to sentence the offender. The court laid down important requirements for the application of restorative justice, which are discussed in later chapters when analysing later case law. The court held that for restorative justice to be used in sentencing, two requirements must be met: the circumstances must be appropriate and restorative justice must be developed in line with the Constitution.[55] The court referred to Braithwaite's theory of reintegrative shaming and the work of other restorative justice theorists including Cormier's definition of restorative justice.[56]

The court referenced the approach to restorative justice used in *Maluleke*:

> "In dealing with the principles of restorative justice Bertelsmann J stated in para 26 as follows:
>
> 'Restorative justice has been developed by criminal jurists and social scientists as a new approach to dealing with crimes, victims and offenders. It emphasises the need for reparation, healing and rehabilitation rather than harsher sentences, longer terms of imprisonment, adding to overcrowding in jails and creating greater risks of recidivism'…
>
> 'In addition, restorative justice, seen in the context of an innovative approach to sentencing, may become an important tool in reconciling the victim and the offender, and the community

[52] Para 36.
[53] Para 57.
[54] 2008 1 SACR 393 (E).
[55] 402I-403A.
[56] 400A-402E.

> and the offender. It may provide a whole range of supple alternatives to imprisonment. This would ease the burden on our overcrowded correctional institutions.'"[57]

The court also referred to the Constitutional Court's comments on restorative justice in *Dikoko v Mokhatla* and *S v M:*

> "In *Dikoko v Mokhatla* … Sachs J, with reference to Skelton … stated as follows in para 114:
> The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation. Encounter (dialogue) enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Reparation focuses on repairing the harm that has been done rather than on doling out punishment. Reintegration into the community depends upon the achievement of mutual respect for and mutual commitment to one another. And participation presupposes a less formal encounter between the parties that allows other people close to them to participate.
>
> In *S v M (*Centre for Child Law as Amicus Curiae) … Sachs J stated in para 62 as follows:
>
> Another advantage of correctional supervision is that it keeps open the option of restorative justice in a way that imprisonment cannot do. Central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control.
>
> In para 72 Sachs J continued as follows:
>
> To start with, her offer to repay the persons she defrauded appears to be genuine and realistic. It would have special significance if she is
> required to make the repayments on a face-to-face basis. This could be hard for her, but restorative justice ideally requires looking the victim in the eye and acknowledging wrongdoing."

This shows that the court's approach to restorative justice was grounded in the work of restorative justice theorists and the developments made in previous judgments. The court has referenced previous judgments that held that for restorative justice to be effective, there must be some kind of dialogue or face-to-face encounter between the victim and offender. The outcomes of this interaction are preferably restitution and reconciliation or at least accountability if reconciliation is not possible.

[57] 2008 1 SACR 393 (E) 402A-403I.

The issue, in this case, was the trial court's misapplication of restorative justice.[58] In the regional court, the accused pleaded guilty to six counts of fraud, amounting to R13 000.[59] The accused had 203 previous fraud convictions and one for theft.[60] The trial court attempted to craft a sentence which attempts to restore relations between the parties, in line with restorative justice.[61] There is no indication that the parties were known to each other prior to the offence.[62]

The accused was sentenced to two years imprisonment, suspended for five years. The sentence was suspended on the condition that the accused stand in the lobby of the Commercial Crimes Court for fifteen minutes with a sign apologising for the crimes they had committed against the complainants.[63] This sentence was intended to serve as deterrence, punishment and restitution for the complainants.[64] The trial court indicated that this sentence was motivated by the inconvenience and humiliation caused to the complainants and the fact that the accused had not offered any apology to them. The sentence was meant to balance the interests of the accused and the complainants.

This is evident in the High Court's discussion of the regional magistrate's refusal to grant leave to appeal:

> "In his judgment refusing such leave the regional magistrate stated, with regard to a contention that the condition of suspension imposed by him was unprecedented, that that did not render his sentence shockingly inappropriate nor 'at odds with the concept of restorative justice'. He stated further that what the court was attempting to achieve was 'to try and restore the relations between the parties by assisting the accused to tender an apology in public to the complainants'. He reiterated that he had been motivated in imposing such a condition by the inconvenience and humiliation occasioned to the complainants in consequence of the accused's fraudulent acts and by the fact that the accused had, until the sentencing stage of the trial, tendered no apology whatsoever to any of them. He then added that the accused's list of previous convictions was such that an effective sentence of two years' imprisonment would have been appropriate, but that he had 'decided to go the other route in the interests of the accused and decided to balance the interest of the

[58] 396E, 397C.
[59] 395 I.
[60] 395G-H.
[61] 396E.
[62] 403 F-J.
[63] 396B-E.
[64] 395J-396A.

> accused as well as the interests of the complainants in the matter by adding that condition."[65]

The accused appealed the sentence and argued that the conditions were inappropriate for two reasons. First, the conditions were inconsistent with the accused's right to human dignity and freedom from inhumane punishment. Second, the conditions were inconsistent with the principles of restorative justice that the trial court sought to apply.[66]

Pickering J held that the trial court's sentence was thoughtful and comprehensive in that it considered the rehabilitation of the accused and the interests of the victim and the community. The trial court's sentence was intended to address the harm caused to the complainants. It was the execution of these intentions which the High Court held to be inappropriate.[67] The High Court considered the conditions set out by the trial court in light of the constitutional right to dignity.[68] The High Court held that ordering a convicted person to stand in public under police supervision with a sign that proclaims their guilt is a degrading punishment that is inconsistent with constitutional values. Furthermore, the court held that such punishment does not foster an apology as the court *a quo* intended.[69]

In considering the humiliation caused by the magistrate's court order, Pickering J considered Braithewaite's theory of reintegrative shaming which is in line with restorative justice. The court found that the order did not constitute reintegrative shaming but rather stigmatising shaming, which outcasts the offender and expects them to reoffend.[70] The High Court held that these conditions violated the accused's right to human dignity and freedom from cruel or inhuman punishment.[71] The court held that it was regrettable that the regional court had not imposed a condition for the suspended sentence which was compatible with restorative justice. Ultimately the High

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[65] 369F-H.
[66] 397C.
[67] 397D-E.
[68] 397F.
[69] 399B-C.
[70] 400D-I.
[71] 401E.

Court overturned the condition for the suspended sentence and did not impose any of its own conditions.[72]

4 6 *S v Thabethe*

Two attempts have been made to apply restorative justice to rape convictions, the first of which was *Thabethe*. In this case, the court held that in light of this case's substantial and compelling circumstances, restorative justice could be applied in full measure.[73] The court did not refer to restorative justice theorists or the developments made in previous cases. However, the court did refer the parties to victim-offender mediation to ensure that restorative justice was an appropriate sentencing option.[74]

The court held that restorative justice could be applied to ensure that the offender continued to acknowledge his guilt and responsibility, that he apologised to the complainant and helped her find closure and recompensation. Furthermore, he needed to perform community service and continue to support his family financially.[75] The court held that restorative justice had already received judicial recognition in previous cases and that it could be applied to serious offences in appropriate circumstances.[76] On appeal, the Supreme Court of Appeal ("SCA") overturned this sentence and cautioned against the use of restorative justice in cases of serious offences.[77] The SCA did not make extensive reference to the work of restorative justice theorists but did consider the submission of the *amicus,* who was a prominent South African restorative justice theorist.[78] The court did not consider the previous developments made in restorative justice sentencing practices but rather referred to previous judgments in which the courts noted the seriousness of the offence.[79]

The facts of this case and the reasoning of the courts will now be explored. In this case the accused and complainant were effectively stepfather and daughter and they lived together in the same home with the complainant's mother and siblings. The

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[72] 404A-B.
[73] Para 36.
[74] Paras 26-33.
[75] 2009 2 SACR 62 (T) paras 36, 40.
[76] Para 39.
[77] 2011 2 SACR 567 (SCA) para 19, 20.
[78] Para 15.
[79] Paras 16-18.

accused was the sole breadwinner of the family, consisting of the complainant, her mother and three other children.[80] The complainant's mother did not receive enough income from her employment as a domestic worker to support the family on her own.[81] On the day of the assault, the complainant had left home without her parent's knowledge and was found by the accused much later in the day at what was suspected to be her boyfriend's home. On the way back to their home the complainant begged the accused not to tell her mother where she had been. The accused then pressured the complainant to have sexual intercourse with him in exchange for not telling her mother about her whereabouts. Once confronted about this incident the next day, the accused handed himself over to the police.[82] Immediately after the attack, the accused was asked to leave the home by the mother of the complainant[83] The accused pleaded guilty to raping his fifteen-year-old stepdaughter in the regional court and was referred to the High Court for sentencing.[84]

When sentencing the accused, the High Court considered the testimony of the complainant and her mother. Initially, the complainant's mother asked for a harsh custodial sentence. Later it was discovered that she only requested it because she thought it was expected of her. In actuality, her feelings on the matter were more complex, given that the accused was the breadwinner of the family.[85] The complainant then testified and requested that the accused not receive a custodial sentence as he was the family's sole breadwinner. The complainant also testified to the fact that the family had reconciled in the years since the incident and that it would be in the best interests of her and her family for the accused to remain out of prison so that he could financially support their family.[86] Bertelsmann J was initially sceptical of this request and asked to speak to the complainant privately in his chambers.[87] Eventually, the court found that the complainant did genuinely want the accused to remain unincarcerated but referred the matter to a restorative justice centre for guidance.[88]

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[80] 2009 2 SACR 62 (T) paras 5, 7.
[81] 2011 2 SACR 567 (SCA) para 7.
[82] Para 5.
[83] 2009 2 SACR 62 (T) para 9.
[84] Paras 12-14.
[85] Para 18.
[86] Para 24.
[87] Paras 21, 22.
[88] Paras 22, 26.

The court held that the victim-offender mediation programme was essential to determine whether the wishes expressed by the complainant were genuine and if a non-custodial sentence would truly benefit all parties involved.[89] The accused formally apologised during the mediation session and the complainant accepted the apology.[90] A formal agreement was drawn up between the parties to regulate interactions between them and to refer the matter to the court if the accused should reoffend.[91] The court also determined that a suitable sexual offender programme existed within the jurisdiction of the probation officer.[92]

The court held that there were several substantial and compelling circumstances to justify a sentence below the statutory minimum prescribed.[93] The Criminal Law Amendment Act 105 of 1997 ("CLAA") allows a court to hand down a sentence below the statutory minimum when substantial and compelling circumstances are present.[94] The court listed the following circumstances as substantial and compelling in this case:

"(a) The accused is a first offender;
(b) The accused exhibited remorse throughout; and
(c) Pleaded guilty at both stages of the trial;
(d) Genuine remorse should be taken into account;
(e) Although the victim was under 16 when the offence was committed, she reached that age within a few days of that date;
(f) The rape was not preceded by grooming of the victim but occurred on the spur of the moment;
(g) Although rape is always a heinous crime, particularly if it occurs within the family, ought to attract a severe sentence, it is not irrelevant that the victim was not injured physically;
(h) The rape was therefore not one of the worst kind of rape,
(i) The accused had remained involved in the family of which he and the victim were part;
(j) The accused continued to support the family, including the victim, throughout the period from the commission of the offence to the end of the trial;

[89] Para 28.
[90] Para 30.
[91] Para 31.
[92] Para 34.
[93] Para 35.
[94] Part 1 of Schedule 2 thereto, read with s 51 of the CLAA.

(k) The accused and the victim's mother resumed their cohabitation during the trial and another child was born from this union before the sentencing process was concluded;
(l) The family was entirely dependent upon the accused;
(m) The victim was fully aware of this fact and came to the conclusion that it would not be in the family's interest that the accused be incarcerated;
(n) This conclusion was reached in spite of the fact that the victim was suffering obvious emotional trauma as a result of the invasion of her physical, emotional and psychological integrity to which she had been subjected;
(o) This conclusion was reached by the victim independently and without obvious outside influence;
(p) The accused and the victim participated in a successful victim/offender programme;
(q) The accused maintained his employment and fulfilled his obligations in that regard throughout the trial;
(r) If the accused were to be sentenced to imprisonment, he would lose his employment and income and the family would lose its only source of support;
(s) This might lead to the loss of the family home;
(t) It was clearly not in the family's interest to remove the accused from their lives;
(u) It was also not in the interests of society to create secondary victims by the imposition of punishment upon the accused, that would leave at least five indigent persons dependent upon social grants;
(v) The accused represents no threat to the community or society at large, as it is highly unlikely that he will reoffend;
(w) The accused is a good candidate for rehabilitative therapy and is able to render community service at a suitable facility that is available;
(x) He spent four years on bail while the trial was in progress, attended every single court date and observed his bail conditions."[95]

Bertelsmann J determined that in light of these factors, this case was one in which restorative justice could provide an appropriate sentence which punishes the offender, restores the victim, addresses the harm caused and benefits the community.[96] The court sentenced the offender to ten years imprisonment, fully suspended on the condition that the accused continued to financially support the complainant and her family, as well as complete community service and a sexual offender programme.[97] The Director of Public Prosecutions ("DPP") appealed the sentence to the SCA.

[95] 2011 2 SACR 567 (SCA) para 35.
[96] Para 41.
[97] Paras 39-40.

The SCA's most notable principle was the court's cautious approach to using restorative justice in response to serious offences. The SCA then considered the role of restorative justice in the criminal justice system and held that restorative justice could be a viable sentencing option but only in suitable circumstances.[98] Bosielo JA cautioned against using restorative justice in cases of serious offences that "evoke profound feelings of outrage and revulsion" in ordinary members of society. The court stated that it was not attempting to lay down a general rule on the matter, only caution against the inappropriate application of restorative justice.[99] The SCA ultimately set aside the High Court's sentence and replaced it with one of 10 years imprisonment as per the statutory minimum.[100]

The DPP argued that the sentence handed down by the High Court was "disturbingly inappropriate" given the nature and gravity of the offence and the close relationship between the parties which had been violated.[101] The DPP argued that the High Court had overemphasised the personal circumstances of the accused and not given enough weight to the interests of the community and the gravity of the offence.[102]

The accused argued that the circumstances of the case were exceptional and justified the deviation from the minimum prescribed sentence. The accused contended that restorative justice allowed the family to reunite and achieve reparation and reconciliation completely. The accused contended that the wounds which had been caused had already been healed.[103]

The SCA noted the high rates of rape in South Africa and the court's previous comments in *Chapman* regarding the serious nature of rape and its threat to the constitutional ethos.[104] Furthermore, the court noted its previous comments on the particularly grievous nature of rape within a father-daughter relationship.[105]

The SCA considered the testimony of the complainant and her mother as well as the mitigating factors identified by the High Court.[106] The SCA subsequently

[98] Para 19.
[99] Para 20.
[100] Para 31.
[101] Paras 4, 12.
[102] Para 13.
[103] Para 14.
[104] Paras 16, 17.
[105] Paras 17, 18.
[106] Paras 6-11.

considered the role of victims in sentencing and held that although a victim's voice needs to be heard, it cannot be treated as decisive.[107] The court considered its previous comments in *S v Matyityi* ("*Matyityi* ")[108] regarding the nature of the victim's voice.[109]

In *Matyityi* the court found that an enlightened and just sentencing policy needs a variety of sentencing options to be available so that the most appropriate sentence can be used for the case. The court also found that such a sentencing policy must also be victim centred and that in South Africa, the principle of restorative justice is the foundation of victim empowerment. The Victims' Charter affirms this position and indicates that victims need to be accommodated in the criminal justice system. The court also noted that the Victims' Charter also seeks to affirm the dignity of survivors of sexual offences. The court in *Matyiyti* held that, as a society, we could affirm our humanity by affirming the dignity of gender-based violence ("GBV") survivors. The court noted that the Victims' Charter seeks to give complainant's a more prominent role in the criminal justice system. The court held that allowing victims to participate in the sentencing process also provides the court with more information about the impact of the crime and so a more balanced and proportional sentence can be crafted.[110] Ponnan JA held in *Matyityi* that if the court does not listen to the victim's voice, then it only has half of the necessary information.[111] Ponnan JA held that by giving the victim a voice in court, the court can more accurately recognise the extent of the harm done to the victim.[112] The court also noted that courts generally do not have the experience necessary to draw conclusions regarding the impact of a rape on the rape survivor.[113]

While the SCA quoted these comments from *Matyityi,* some authors have noted that there was no indication of how these comments should be interpreted or applied

[107] Para 21.
[108] 2011 1 SACR 40 (SCA).
[109] 2011 2 SACR 567(SCA) para 21.
[110] 2011 1 SACR 40 (SCA) para 16.
[111] Para 17.
[112] Para 16.
[113] Para 17.

in the present case.[114] Ultimately, the court held that any crime that threatens society's well-being deserves to be severely punished.[115]

4 7 S *v Seedat*

The case of *Seedat*[116] was the second attempt to apply restorative justice to a rape conviction. This case took place after the SCA's judgment in *Thabethe*; however, the High Court did not follow the SCA's approach. The High Court awarded a compensation order with no term of imprisonment for a conviction of rape.[117] The court's justification for this sentence was the substantial and compelling circumstances of the case and the request for compensation from the complainant.[118] The court held that this sentence was appropriate when taking into account "the gravity of the offence, the interests of society, the retributive aspects, rehabilitation, deterrence and the interests of the victim."[119] On appeal, the SCA reinforced its position in *Thabethe* that using restorative justice in cases of serious offences should be approached with caution.[120]

The court held that while the victim's voice must be considered when weighing sentencing considerations, it cannot be decisive:

> "Whilst I accept that the complainant may have thought that it would be appropriate to make the appellant rather pay monetary compensation for what he did, her views are not the only factor to be taken into account. Rape has become a scourge in our society and the courts are under a duty to send a clear message, not only to the accused, but to other potential rapists and to the community that it will not be tolerated … Whilst the object of sentencing is not to satisfy public opinion, it needs to serve the public interest … Criminal proceedings need to instil public confidence 'in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime'.

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[114] D Kloppers & H Kloppers "Herstellende geregtigheid in gevalle van seksuele oortredings en die uitsprake van die hoogste hof van appèl in DPP v Thabethe en Seedat v S" (2017) 14 *LitNet Akademies* 345 350.

[115] 2011 2 SACR 567(SCA) para 22.

[116] 2015 2 SACR 612 (GP).

[117] Para 50.

[118] Para 31.

[119] Para 47.

[120] 2017 1 SACR 141 (SCA) para 38.

> Indeed, the public would justifiably be alarmed if courts tended to impose a suspended sentence coupled with monetary compensation for rape."[121]

However, the court noted that a compensation order for a rape conviction would elicit public outcry:

> "As the state has contended, a sentence entailing a businessman being ordered to pay his rape victim in lieu of a custodial sentence is bound to cause indignation with at least a large portion of society. This is so because rape is considered one of the most serious offences."[122]

The SCA held that a sentence needs to also serve the public's interests, but it does not need to satisfy public opinion.[123] The SCA's consideration of public interest and the voice of the victims as factors for sentencing are analysed in the next chapter with reference to restorative justice theory and feminist legal theory.

An overview of the facts of this case and the reasoning of the courts are provided next. The accused, in this case, was a businessman who had sold the complainant a lamp and delivered it to her home. Upon delivery, he offered to demonstrate that the lamp was in working condition. The complainant and the accused then moved toward the complainant's bedroom to test the lamp. The complainant and the accused agreed on the facts up to the point of entering the bedroom. The accused testified that he tested the lamp and then left the complainant's home immediately. The complainant testified that, just as she was about to leave, the accused grabbed her and raped her. After he left, she ran outside to call for help, but no one came. She then went back inside her home and tried to call the police, but her call was not picked up. Finally, she sent her daughter a missed call. When her daughter phoned her back, the complainant accused her of sending the accused to her house to rape her. The complainant did not report the rape to the police until a few days after the incident.[124] A doctor examined the complainant and found that she had injuries consistent with rape.[125]

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[121] Para 39.
[122] Paras 39, 40.
[123] Para 39.
[124] Para 4.
[125] Paras 6-8.

The accused was convicted of rape in the magistrate's court and sentenced to seven years imprisonment.[126] The accused then appealed the conviction and sentence to the High Court. The accused pleaded not guilty in the High Court and denied that he had committed any act of sexual penetration against the complainant.[127]

The trial court took note of the complainant's request for a more lenient sentence in exchange for financial compensation.[128] The statutory minimum sentence for a rape conviction of this nature is ten years imprisonment. The trial court found that due to the accused's advanced age and ill health and the fact that he was considered a first offender, there were substantial and compelling circumstances to justify a lesser sentence of seven years imprisonment.[129]

On appeal to the High Court, the accused testified that the complainant was so drunk at the time of the incident that they decided not to ask her about payment for the lamp and left after delivering it.[130] The accused also sought leave to adduce further evidence which scrutinised the findings of the complainant's medical examination.[131] During the complainant's cross-examination, the accused engaged in what the High Court deemed to be "character assassination." The accused alleged that the complainant habitually became heavily intoxicated and that at the time of the assault, she may have been so intoxicated that she could not remember the identity of her attacker and merely assumed the accused was to blame.[132] The accused also suggested that the complainant's repeated requests for monetary compensation in place of a custodial sentence implied that she had not been assaulted at all and was merely trying to extort money from the accused.[133]

The High Court held that the trial court erred in not using restorative justice as an alternative sentencing mechanism and ordering the accused to compensate the victim.[134] The High Court held that rape is a serious and incredibly prevalent crime that

[126] Para 1.
[127] Paras 1, 2.
[128] 2015 2 SACR 612 (GP) para 31.
[129] Para 31.
[130] Para 9.
[131] Paras 11-14.
[132] Para 27.
[133] 2017 1 SACR 141 (SCA) para 25.
[134] Para 33.

violates the victim's dignity, security and well-being.[135] The High Court took note of the application of restorative justice in *Thabethe* and the SCA's comments regarding the use of restorative justice in serious offences.[136]

The High Court then considered the extent of the accused's conviction and held that the accused's acts of both vaginal and anal rape did constitute separate and repeated rape. The High Court held that the court *a quo* had erred in only convicting the accused of one count of rape.[137] It should be noted that the prescribed minimum sentence for repeated counts of rape is life imprisonment. The court, nevertheless, proceeded to sentence the single count of rape for which the accused was convicted.[138]

The High Court held that section 300 of the CPA did not apply in this instance for compensation of the complainant and that the magistrate had erred in believing that this provision prevented a restorative justice order.[139] The court continued and stated that the magistrate should have considered section 297(1)(a)(i)(aa) of the CPA, which allows for the postponement of a sentence on the condition of compensation where there is a statutorily prescribed minimum sentence for the offence.[140] The High Court held that once the trial court decided to hand down a sentence below the statutory minimum, it was no longer enjoined to the provisions of the minimum sentencing mechanism. Thus, the court held that it could exercise its discretion in terms of section 51(5) of the CLAA and section 297(1)(a)(i)(aa) of the CPA.[141] On appeal to the SCA, it was held that the High Court had misread these provisions and had made an error in law.[142]

The court held that the request of the complainant and the age of the accused justified using restorative justice sentencing mechanisms to award the victim compensation.[143] The victim requested the use of restorative justice to offer a more lenient sentence in exchange for compensation. The victim's reasoning for

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[135] Para 37.
[136] Paras 45-46.
[137] Para 35.
[138] Para 35.
[139] Para 39
[140] Para 40.
[141] Para 42.
[142] 2017 1 SACR 141 (SCA) paras 29-37.
[143] Para 48.

compensation suggested that the best way to make the offender suffer for her to receive any justice would be through financial compensation.[144] The court handed down a five-year suspended sentence on the condition that the accused financially compensate the complainant.[145]

The state appealed the sentence handed down by the High Court.[146] The state argued that the High Court had made an error on a question of law.[147] The SCA held that the High Court had misinterpreted the sections of the CPA and the CLAA, which it had relied upon to hand down a fully suspended sentence. The SCA held that the High Court had conflated section 297(1)(a)(i)(aa) and section 297(4) of the CPA. The SCA held that section 297(1) does not apply to this case as it specifically does not deal with offences for which a minimum sentence has been prescribed by statute. Furthermore, the provision only deals with the postponement of a sentence and not the suspension thereof. The SCA further held that when a statutory minimum is prescribed, a sentence can only be partially suspended in terms of section 297(4) of the CPA, not fully suspended as the High Court intended.[148] The SCA also noted that the High Court had not handed down a competent sentence in terms of this provision.[149] Rather than handing down a sentence for a specific number of the year which would then be suspended, the court ordered that "sentencing of the accused is suspended for a period of five years" on certain conditions.[150] The SCA held that this is not a competent sentence as no law permits a court to suspend the sentencing of an accused.[151]

The SCA then considered what an appropriate sentence would be in these circumstances.[152] The court considered the request of the complainant, however as discussed above it held that these views are not decisive.[153] Finally, the court considered that the accused had complied with the High Court's compensation order

[144] Para 14.
[145] Paras 49-50.
[146] Para 29.
[147] Para 19.
[148] Paras 31-36.
[149] Para 36.
[150] 2015 2 SACR 612 (GP) para 50.
[151] 2017 1 SACR 141 (SCA) para 36.
[152] Para 37.
[153] 2017 1 SACR 141 (SCA) paras 39, 40.

and had already given the complainant R15 000, which he was unlikely to recover. The court noted the complainant's willingness to comply with what he assumed was a competent court order.[154] Ultimately the court sentenced the accused to four years imprisonment with no compensation order.[155]

4 8 Conclusion

Restorative justice has been partially applied in a handful of cases to a variety of offences. The application of restorative justice by lower courts was often grounded in the work of restorative justice theorists, and in one instance, the court made reference to African legal culture.[156] The lower courts have been willing to apply restorative justice in cases where the complainant explicitly requests a lower sentence.[157] The link between restorative justice and lower sentences in judicial reasoning is explored in the next chapter.

Two attempts have been made to apply restorative justice to rape convictions. In both *Thabethe* and *Seedat*, the SCA upheld appeals against these sentences and cautioned against using restorative justice in inappropriate circumstances. The SCA did not elaborate on what circumstances are considered appropriate or inappropriate for restorative justice but cautioned against its use in cases of serious offences. The cases of *Thabethe* and *Seedat* are two quite different factual circumstances and the rationale for the use of restorative justice in each differs. However, both were considered to be inappropriate for restorative justice. In the next chapter, the difference between the circumstances of these cases and the court's rationale for restorative justice is analysed using the theoretical framework outlined in previous chapters.

[154] Paras 41, 42.
[155] Para 43.
[156] 2008 1 SACR 49 (T) para 27-41.
[157] 2009 2 SACR 62 (T) para 24, 40; 2015 2 SACR 612 (GP) para 31, 50.

CHAPTER 5: ANALYSIS OF RESTORATIVE JUSTICE CASE LAW

5 1 Introduction

In this chapter, the appropriateness of the circumstances of the case for restorative justice is evaluated with reference to the facts of the case and academic literature. The application of restorative justice and the court's reasoning are examined with reference to the theoretical framework outlined in previous chapters. It is also examined to what extent the courts applied an approach to restorative justice grounded in the value of *ubuntu* and guided by intersectional feminism.

To what extent courts take the concerns of feminist legal theorists and the arguments of restorative justice scholars into account when applying restorative justice in each of these cases is also evaluated. This is done by establishing whether the court consulted restorative justice and feminist legal theorists when considering the appropriateness of the circumstances of the case for the application of restorative justice. It is subsequently examined whether the court's reasoning for the use of restorative justice and their approaches to restorative justice were grounded in the value of *ubuntu* and guided by intersectional feminism. It will also be established to what degree the courts consulted theorists regarding this application.

It is also investigated whether the court's application of restorative justice furthered the transformative constitutional vision by restoring the human dignity of the complainant. The circumstances of the parties before the offence, after the offence, and after the court's intervention are compared to establish the degree of restoration in each case. This comparison establishes the practical impacts of the offence and the court's approach to sentencing. The practical impacts are discussed in light of restorative justice's aim to restore the victim, offender and community.[1] This thesis has already argued in previous chapters that true restoration requires both material restitution and symbolic restitution. This leaves the objective to establish whether the parties practically benefited from the sentence and whether the court attempted to bring them as close as possible to their position prior to the offence. For the purposes of this discussion, the community is considered a party impacted by the offence.

[1] A Eglash "Beyond restitution: Creative restitution" in J Hudson and B Galaway (eds*) Restitution in Criminal Justice* (1977) 94-96; R Barnett "Restitution: A new paradigm of criminal justice" (1977) 87 *Ethics* 298.

5 2 Case law prior to *S v Thabethe*

5 2 1 *S v Shibulane*

Shibulane was the first explicit use of restorative justice to sentence an offender.[2] Watney noted that the court considered the practical impact of the sentence and the benefit it could have for the victim, the offender and the community.[3] The court used restorative justice to lower the sentence handed down by the trial court for a minor offence. It should be noted that this case was premised on the notion that a lighter sentence was needed, which may have impacted how restorative justice was approached.

The court did not discuss the appropriateness of the circumstances for restorative justice, but the offender's remorse was noted.[4] Watney argues that remorse is a necessary precondition for the application of restorative justice sentencing.[5] As per Skelton and Batley's requirements, the victim, in this case, was direct and identifiable.[6] Many authors argue that both the offender and the victim must be willing to participate in restorative justice for the theory to have appropriate application in a given case.[7] The court did not consider referral to a restorative justice programme outside of the court system and did not inquire whether the parties were willing to participate. This thesis argues that the court only perceived restorative justice as a sentencing option which was available to justify a lesser sentence that it already had in mind. The court did not conduct a substantive enquiry into the circumstances of the case and their appropriateness for restorative justice.[8] The court took note of the prosecution's and state advocate's agreement for the sentence to be reduced and then concluded that restorative justice would be appropriate.[9]

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[2] M Watney "The role of restorative justice in the sentencing of adult offenders convicted of rape" (2015) 4 *TSAR* 847.

[3] 847.

[4] 2008 1 SACR 295 (T) paras 2-5.

[5] Watney (2015) *TSAR* 854.

[6] A Skelton & M Batley *Mapping Progress, Charting the Future: Restorative Justice in South Africa* (2006) 13.

[7] Marshall Restorative Justice: An Overview 25; Y Dandurand & CT Griffith *Handbook on Restorative Justice Programmes* (2006) 73.

[8] 2008 1 SACR 295 (T) para 2.

[9] Paras 3-5.

This thesis submits that the court did not enquire into the circumstances of the complainant and the accused for an intersectional feminist enquiry. Factors such as gender, class, culture and race were not discussed. This is especially unfortunate considering the accused stole the fowls to eat them, which raises questions as to his financial means and socio-economic standing that are left unanswered. A foray into the intersectional identities of the parties could have guided the court's sentencing considerations. Such an approach arguably would have lent itself to a more robust understanding of the circumstances of the case and best positioned the court to apply restorative justice in a manner that embodies transformative constitutionalism.

This thesis argues that even though the restitution of the complainant was considered in line with restorative justice, it was not the main focus of the case.[10] The court primarily focused on the accused, the interests of the community and the nature of the offence when considering restorative justice.[11] This differs from the approach of academics theorists who argue that restorative is victim centred and primarily deals with the restitution of the complainant.[12] This victim-centred notion of restorative justice has been acknowledged in the Victims' Charter, which the court did not refer to in its recognition of restorative justice as a part of South African law.[13]

This thesis submits that the court's application of restorative justice was not grounded in the work of restorative justice theorists and did not embody the value of *ubuntu*. This conclusion is drawn from the fact that the victim was not adequately centred on the application of restorative justice. This thesis submits that the court focused too heavily on the circumstances of the accused and the burden imprisonment places on overcrowded correctional facilities when justifying restorative justice.[14] These objectives are achievable through restorative justice, as authors have pointed out.[15] However, this thesis submits that the reform of the offender and the reduction of

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[10] Para 4.

[11] Para 4; in reference to *S v V* 1972 3 SA 611 (A) 614D and *S v Zinn* 1969 2 SA 537 (A) 540G.

[12] N Christie "Conflicts as Property" (1997) 17 *British Journal of Criminology* 9; Eglash "Beyond restitution: Creative restitution" in Restitution in *Criminal Justice* 91; Barnett (1977) *Ethics* 287.

[13] Department of Justice and Constitutional Development *Service Charter for Victims of Crime in South Africa* (2004) 3; Watney (2015) *TSAR* 847; 2008 1 SACR 295 (T) para 4.

[14] 2008 1 SACR 295 (T) para 5.

[15] Barnett (1977) *Ethics* 289-291; M Wright "Nobody came: Criminal justice and the needs of victims" (1977) 16 *How J Penology & Crime Prevention* 23-27.

prison overcrowding are incidental benefits of restorative justice and not the main aims. This thesis maintains the argument that the main aim of an *ubuntu*-based approach to restorative justice is still to ensure restitution to restitute the victim and restore their human dignity.

It is now discussed whether the court furthered the objectives of transformative constitutionalism by restoring the human dignity of the complainant. As argued above, true restoration is the material and symbolic restitution of the complainant. In line with restorative justice as grounded in *ubuntu* and guided by intersectional feminism, it is considered whether the court attempted to bring the parties closer to their original position and practically benefit the parties.

The circumstances of the parties, before the offence, after the offence and after sentencing, will now be compared. Before the offence, the complainant had the seven fowls, and afterwards, they were not in possession of these fowls. Before the offence, the accused did not have the birds, and the community was presumably in harmony without the disturbance caused by the accused. The accused admitted to cooking and eating the birds after stealing them and so could not return them to the complainant.[16] Afterwards, the accused expressed genuine remorse over his actions.[17] From an *ubuntu*-based perspective, the actions of the accused also caused a rift within the social fabric of the community.

After sentencing, the accused paid a fine of R500 and received a suspended sentence of six months imprisonment.[18] According to the court, the accused showed genuine remorse for his actions and seemed very unlikely to reoffend or become a hardened criminal, which the court suspected a lengthy term of imprisonment would result in.[19] The accused appeared to be a reformed member of society who was ready to reintegrate into the community.[20]

After sentencing, the complainant was in the same position they were in after the offence, nothing had practically changed for them. The court considered compensating the complainant for the value of the stolen property but was unable to do so due to procedural issues. Unfortunately, an application for compensation under section 300

[16] 2008 1 SACR 295 (T) para 4.
[17] Para 2.
[18] Para 7.
[19] Para 5.
[20] Para 2.

of the CPA was not lodged, and the complainant was left without material restitution.[21] The court noted the genuine remorse of the accused and the fact that restorative justice would have the accused compensate the complainant.[22] However, the court made no mention of an apology or face-to-face reconciliation between the parties despite invoking restorative justice as a sentencing option.

From this discussion, certain conclusions may be drawn. First, the court did not explicitly consider whether the circumstances of the case were appropriate for the application of restorative justice. However, the circumstances of the case still sufficiently align with the guidelines laid down by theorists. The court did not discuss intersectional feminism, which may have guided it towards an approach that better embodies transformative constitutionalism. The sentence handed down by the court did not materially or symbolically restitute the complainant, and as such, their human dignity was not restored. Only the offender was closer to their original position after the intervention of the court. The community and the complainant were left unaddressed by the sentence.

However, it must be acknowledged that the court did accept that the compensation of the complainant would have been its course of action if not for the procedural issues. This thesis finds that the court's approach did not fully embrace an understanding of restorative justice grounded in *ubuntu* and guided by intersectional feminist legal theory. As a result, the court's approach did not further transformative constitutionalism, as the human dignity of the complainant was not fully restored through material and symbolic restitution.

5 2 2 *S v Maluleke*

The court's consideration of the appropriateness of the circumstances of this case for restorative justice in consultation with the work of theorists is discussed next. *Maluleke* dealt with a much more serious offence than *Shibulane*, the murder of a young person.[23] Notably, this case applies restorative justice to a serious crime and the sentence was not appealed to a higher court. The court held that the crime of murder

[21] Para 4.

[22] Paras 2, 4.

[23] 2008 1 SACR 49 (T) para 1,2.

calls for a severe sentence but not necessarily imprisonment.[24] The circumstances, in this case, were arguably quite appropriate for restorative justice as the victim and the offender were part of the same small community. Moreover, both the offender and the victim's family were willing to partake in a restorative justice process.[25] In this case, the use of restorative justice arose from the defence's investigation of mitigating circumstances. It emerged that both the accused and the family of the deceased would be willing to comply with the customary reconciliation tradition of their community. The court did consult the work of restorative justice theorists in its conceptualisation of restorative justice but did not directly investigate what theorists have posited regarding guidelines for appropriate circumstances.[26]

The court's application of restorative justice will now be considered. The court followed the lead of the parties and incorporated the traditional custom of apology into the sentencing conditions.[27] This shows that the court's understanding of restorative justice resonates with African legal culture, which in turn embodies the value of *ubuntu* as discussed in earlier chapters. However, the court does not explicitly mention the value of *ubuntu* in its discussion of restorative justice theory. This thesis argues that the court's approach to restorative justice embodies the value of *ubuntu* through this recognition of African legal systems but that this link is not sufficiently brought to the forefront. The court also, unfortunately, does not explicitly mention intersectionality. This thesis submits that intersectionality could have assisted the court in considering the circumstances of the accused and the deceased. The accused was a single mother at the time of trial, and the deceased had entered the accused's home as a burglar before he was killed. These circumstances speak to broader socio-economic conditions and gendered power relations, which would have been easier to consider with the aid of intersectional feminism.

Lubaale argues that the manner in which the court conceptualised restorative justice may have negatively impacted the later use of restorative justice in cases of serious offences.[28] In this regard, Lubaale argues that the court's understanding of

[24] Para 12.
[25] Paras 5, 19, 20.
[26] Paras 26-31.
[27] Para 22.
[28] EC Lubaale "Restorative justice and cases of serious offending: A South African and Canadian perspective" (2017) 38 *Obiter* 302.

restorative justice was based on the premise that it excludes custodial sentences and is an alternative to the conventional justice system.[29] Lubaale posits that the best approach to restorative justice is to view it as a guiding principle which can be harmonised with the conventional approach to criminal justice. This approach would prevent judges from choosing between restorative justice goals, such as restitution and reconciliation, and retributive justice outcomes, such as imprisonment.[30]

This thesis submits that the court in *Malulek*e did not adequately consult the work of restorative justice theorists in its approach. Many authors have argued against the idea that restorative justice is an alternative to mainstream criminal justice, which precludes punishment.[31]

The practical impact of the offence and the sentence on the parties are now discussed. This discussion will assist in determining whether the complainant was materially and symbolically compensated in order to restore their human dignity in the interest of transformative constitutionalism. Before the offence, the deceased was alive, and the accused was living a seemingly normal life with her family. Before the offence, the community was presumably in harmony with no disruption has occurred. After the offence, the deceased was no longer alive, and his family was deeply traumatised by his loss.[32] After the offence, the accused's husband lost his job as a police officer because of his role in the death of the deceased. The accused was left with no income and a family to look after.[33] It is not indicated whether the offence psychologically impacted the accused, but the court noted that she did regret her actions.[34] The close-knit community suffered as a result of the accused's actions. The community suffered the loss of a young life, and a rift between extended family members was created. The accused's husband was also suspended from his job as a police officer after the offence, which meant that the community had one less police officer to protect it.

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[29] 302.

[30] 304.

[31] K Daly "Revisiting the relationship between retributive justice and restorative justice" in H *Restorative Justice* 39; Gavrielides Restorative Justice Theory and Practice 38-39; Christie (1977) *British Journal of Criminology* 10, 11.

[32] Para 19.

[33] Para 8.

[34] Para 10.

After the sentencing, the deceased's family presumably would have received an apology in line with the custom of their community. The court held that the evidence submitted regarding the custom indicated that a lack of an apology effectively added insult to injury. The outcome of the custom was intended to be an apology and the reparation of the relationship between the families. The deceased's mother indicated that she wanted answers from the accused about her son's death.[35] The accused would need to provide these answers and offer an apology for reconciliation to take place. While nothing can bring back the accused, the rift between the extended family members can be repaired once the customary apology is issued. The parties are not in the same place as they were before the offence, but they are closer to it than they were before the court intervened. The community was partially restored as the rift between its members was healed. This thesis finds that the family of the deceased was symbolically compensated by the apology made by the accused. No material restitution was made to the family. As such, the human dignity of the family as the only surviving victims of this crime was partially restored, and the transformative connotational vision was partially upheld.

This thesis finds that the court did consult restorative justice theorists in its conceptualisation of restorative justice. The court did not explicitly consult the works of restorative justice theorists regarding the appropriateness of the circumstances of the case for the application of restorative justice. The court did notably make a connection between restorative justice and the African legal system but did not explicitly mention the value of *ubuntu* in this regard. This thesis finds that a more thorough investigation into an explicitly *ubuntu*-based approach to restorative justice, guided by intersectionality, may have aided the court in restoring the human dignity of the deceased's family and thus promoting transformative constitutionalism.

5 2 3 *S v M*

In light of *S v M*, this section looks at whether the court consulted the work of restorative justice theorists as to the appropriateness of the circumstances for applying restorative justice. This thesis submits that the court did not explicitly consult with the work of restorative justice theorists, although the case refers to the SALRC reports

[35] Para 20.

and the case of *Dikoko v Mokhatla* when introducing the theory of restorative justice. Nevertheless, the circumstances of the case are analysed to investigate the appropriateness of restorative justice regarding the work of theorists. This discussion will assist with evaluating the court's application of restorative justice and restoration of the complainant.

The court did not explicitly consult restorative justice or feminist legal theorists when determining if this case was appropriate for restorative justice. The circumstances of the case are be discussed with reference to restorative justice theorists for the sake of later analysis. The case of *S v M* dealt with a non-violent offence and a repeat offender who was a single mother of three children. It is not indicated that the accused and the complainants were known to each other or had any relationship before the offence.[36] The accused was found to have defrauded the complainants of almost R20 0000.[37] The correctional supervision report compiled for the regional court found that the accused was a suitable candidate for correctional supervision.[38] It was not indicated whether the accused and the complainant were willing to participate in a restorative justice process. It was indicated that the accused had made a considerable effort to change her ways since the trial court decision.[39]

It is important to note that the accused was willing to reform and that she was found to be a suitable candidate for correctional supervision. According to some authors, the willingness of the accused and their circumstances are factors to consider when referring a case to restorative justice.[40] This thesis submits that this case was appropriate for the application of restorative justice. However, this thesis submits that the court's reasoning could have benefitted from explicit reference to guidelines laid down by theorists regarding the victims and the circumstances of the case.[41]

This thesis submits that the court's application of restorative justice is grounded in the value of *ubuntu* even though it is not explicitly invoked. This is evident in the

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[36] 2008 3 SA 232 (CC) para 2.

[37] Para 3.

[38] Para 2.

[39] Para 38.

[40] Marshall *Restorative Justice: An Overview* 25; Dandurand & Griffith *Handbook on Restorative Justice Programmes* 73-74.

[41] Skelton & Batley *Restorative Justice in South Africa* 13; Marshall *Restorative Justice: An Overview* 25; Dandurand & Griffith *Handbook on Restorative Justice Programmes* 73-74.

Constitutional Court's prioritisation of both restoration and reconciliation. Skelton has noted that Sachs J's approach to restorative justice in *S v M* centres on the restoration of relationships. Sachs J noted that simply paying back the victims was not sufficient, M needed to meet with them face to face and apologise for her actions. She would also be reintegrated into the community instead of being exiled by imprisonment.[42] While it is accepted that a face-to-face apology promotes reconciliation, this thesis submits that an apology of this nature also provides symbolic restitution. This is evident in the Constitutional Court's judgment in *Dikoko v Mokhatla*. In this case, it was held that an *ubuntu*-based approach to compensation indicates that an apology is able to recognise the human dignity of the person being compensated.[43] The court also provided material restitution for what was lost by ordering the accused to compensate the complainants for their loss financially.[44]

The court's application of restorative justice was not guided by an intersectional feminist lens. Such an approach may have aided the court in navigating complex issues regarding the constitutional rights of children and primary caregivers. The court could have used an intersectional approach when balancing the competing rights and interests in this case. The court held that it had to consider both the duty to family care and the duty to punish criminals.[45] This is a nuanced issue which may have been made clearer with an intersectional understanding of M and her circumstances.

To establish whether the human dignity of the complainants was fully restored, the practical impact of the sentence is explored, and the practical impact of the offence and the court's intervention on the victim, offender and community is compared. The circumstances of the parties prior to the offence, after the offence and after the court's intervention can be compared to establish the practical impact of the restorative justice sentence. Prior to the offence, the complainants were in possession of all of their money and property, and the accused had shown a pattern of reoffending prior to this offence.[46] After the offence, the complainants lost at least R19 000 due to the accused's actions. The accused had thus fraudulently gained R19 000 but faced a lengthy prison sentence from the regional court due to her actions. After the offence,

[42] Skelton (2013) *Restorative Justice: An International Journal* 128-129.
[43] 2006 6 SA 235 (CC) paras 68-69.
[44] 2008 3 SA 232 (CC) para 77.
[45] Paras 37-39.
[46] 2008 3 SA 232 (CC) para 2.

the children of the accused were at risk of being left without a primary caregiver, not as a direct result of the offence but because of the regional court's sentence.

After the intervention of the Constitutional Court, the accused was ordered to undergo counselling to make sure she had indeed changed her ways and to compensate and apologise to the complainants. After the intervention of the Constitutional Court's sentence, the complainants received compensation directly from the accused with a face-to-face apology. This sentence placed the complainants as close to their circumstances prior to the offence as possible. After the court-ordered community service and counselling, the accused would have been in a better position than prior to the offence as she was empowered with the skills to manage her finances and care for her children without reoffending. The community would have also been in a better position after the offence as the sentence included community service as restitution and reformed an offender who had harmed the community.

This thesis argues that the sentence handed down by the Constitutional Court did, in fact, restore the human dignity of the complainants by offering them both symbolic and material restitution. Moreover, the sentence upholds the core principles of restorative justice by placing the complainants, offender and community in a better position than they were before. This thesis submits that the court's approach to restorative justice is grounded in the value of *ubuntu* but was not guided by intersectional feminism. Nevertheless, the court did manage to further the transformative constitutional vision by restoring the human dignity of the complainants.

5 2 4 S v Saayman

The notable contribution to restorative justice jurisprudence made by the court in *Saayman* is identified first. The court held that for restorative justice to be applied, the circumstances of a case must be appropriate for restorative justice, and restorative must be developed in line with the Constitution.[47] The court did not elaborate on what circumstances would be deemed appropriate or whether the circumstances of the present case were appropriate for restorative justice.

It will now be discussed to what extent the court grounded its application of restorative justice in the work of theorists and whether its application is indicative of

[47] 2008 1 SACR 393 (E) 402I-403B.

an *ubuntu*-based understanding of restorative justice guided by intersectional feminism.

Despite finding that for restorative justice to be applied, the circumstances must be appropriate, the court did not discuss the appropriateness of the circumstances nor make mention of academic literature on the matter. In this case, the accused and the complainants were not known to each other, and the crimes were not of a violent nature.[48] The accused showed a pattern of reoffending, with 203 previous convictions for fraud.[49] The crimes caused the complainants to suffer a considerable degree of "embarrassment and inconvenience" and resulted in some of the complainants being blacklisted by the credit bureau.[50] The court noted that the complainant's attitudes towards the sentencing of the accused were unknown, and they were not invited to attend the accused's display of apology ordered by the regional court.[51] It was also not discussed whether the accused was generally willing to participate in a restorative justice process, only that the regional court's attempt at restorative justice sentencing was inappropriate.[52]

The court's application of restorative justice will now be considered. The court emphasised the need for the use of restorative justice to be in line with the Constitution.[53] It can be inferred that *ubuntu* as a constitutional value must underpin this application, given the Constitutional Court's comments regarding *ubuntu* as a constitutional value in *S v Makwanyane*.[54] The court further emphasised the importance of true reconciliation as an element of restorative justice.[55] The court noted that the conditions set down by the trial court did not foster a true apology and could not be considered a proper application of restorative justice.[56] The court also noted that restorative justice must be applied in appropriate circumstances.[57] The court did not expand upon which circumstances are appropriate and which are not.

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[48] 395H-J.
[49] 395F-G.
[50] 395H-J.
[51] 403F-J.
[52] 396E-J.
[53] 403A-B.
[54] 1995 2 SACR 1 (CC) para 237.
[55] 2008 1 SACR 393 (E) 403 F-J.
[56] 396E-G.
[57] 403A-B.

This case dealt with a non-violent offence, but none of the comments made by the court indicated that they were excluding serious offences from their comments. As a High Court judgment, this case is not binding precedent in other courts but can hold persuasive value.[58] However, the comments made by the court regarding the requirements for the application of restorative justice were not mentioned by other courts in later cases. Neither the High Court nor the Supreme Court of Appeal (SCA) mentioned these requirements in the cases of *Thabethe* and *Seedat.*

The circumstances of the parties before the offence, after the offence and after the intervention of the court are assessed to establish the practical impact of the offence and the court's approach to sentencing. Before the offence, the complainants were not defrauded or blacklisted. The accused had committed many previous acts of fraud before the offence and showed no signs of stopping her criminal behaviour. Before the offence, the community was plagued by a repeat offender who broke down trust within the community through fraud and theft.

After the offence, some of the complainants were blacklisted and collectively, all had lost over R13 000. After the offence, the accused had fraudulently gained R13 000. The community also suffered as a result of the accused's actions, as a rift had been caused between community members. As previously mentioned, crimes such as fraud and theft weaken the trust between community members.

After the High Court's sentencing, the accused was no longer required to stand in the Commercial Crimes Court holding a placard displaying her name and crimes.[59] The other conditions of her sentence still stood. The accused was sentenced to two years in prison, suspended for five years on the condition that she undergo correctional supervision for eighteen months and complete sixteen hours of community service by the regional court, which were not overturned.[60] The High Court did not impose any further conditions in line with restorative justice, and either did not or could not involve the complainants in the conditions placed on the accused.[61] Accordingly, after the intervention of the court, the complainants were still in the same position they were after the offence. The community was somewhat in a better position

[58] T Humby, L Kotze & A du Plessis *Introduction to Law and Legal Skills in South Africa* (2012) 198-199.

[59] 2008 1 SACR 393 (E) 403A-B.

[60] 396E-I.

[61] 403H-J.

as the accused was ordered to complete community service as an act of restitution, but the rift between the community members was not addressed.

The court's approach to restorative justice was not explicitly grounded in the value of *ubuntu*; however, it was developed to be in line with the Constitution and the right to human dignity. The value of *ubuntu* is closely linked to the value of human dignity and permeates the Constitution generally.[62] This thesis thus submits that the court's application of restorative justice was only somewhat linked to the value of *ubuntu*. This thesis also submits that the court's application of restorative justice was also not guided by intersectional feminism as evident in its lack of consideration of the intersectional identity of the accused. The complainants were not materially or symbolically restituted; thus, their human dignity was not fully restored. The facts of this case are very similar to the Constitutional Court case of *S v M*. It is unfortunate that the High Court did not follow the Constitutional Court's approach to restoring the complainants' human dignity, which would have furthered transformative constitutionalism.

5 3 An analysis of *S v Thabethe*

The High Court and SCA judgments in *Thabethe* are analysed in this section by establishing whether the circumstances of the case were appropriate for restorative justice and whether the court discussed these factors with reference to the work of theorists. Second, the court's application of restorative justice is analysed to determine whether the court's reasoning for an application of restorative justice was grounded in the value of *ubuntu* and guided by intersectional feminism. Lastly of what practical benefit the court's intervention was to the victim, offender and community is assessed. This is necessary to establish whether the complainant was materially and symbolically restituted, to restore her human dignity, and to further the transformative constitutional vision.

[62] 1995 2 SACR 1 (CC) para 237.

5 3 1 The appropriateness of the circumstances

In this case, the court identified a number of substantial and compelling circumstances to justify the use of restorative justice to hand down a lesser sentence.[63] The court did not investigate explicitly, with reference to the work of restorative justice and feminist legal theorists, whether the case was appropriate for the application of restorative justice.

The circumstances of this case are evaluated in terms of their appropriateness for restorative justice with reference to the work of theorists. In this case, the parties had an existing relationship which they had worked to repair.[64] The offender had shown genuine remorse and worked to reconcile with the victim and the rest of the family.[65] The offender turned himself into the police, pleaded guilty and made an effort to appear at every court date and participate in victim-offender mediation.[66] In the mediation session, the offender formally apologised to the victim and agreed to the terms of the mediation agreement.[67] These are all factors which restorative justice theorists have identified as indicators that a case is suitable for restorative justice.[68]

As discussed in the first and second chapters, an *ubuntu*-based approach to restorative justice centres on the restitution of the victim and restoration of relationships in response to conflict.[69] Notably, reconciliation and restoration of the parties' relationship had already occurred before sentencing.[70] This leaves the restitution of the complainant as the primary goal to be addressed by an *ubuntu*-focused restorative justice approach. The complainant indicated that the accused would be financially supporting her and her family as he had before the offence. This financial support had been a continuous feature of the family dynamic and was not meant to serve as restitution to the complainant.[71] No restitution had taken place

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[63] Para 35.
[64] 2009 2 SACR 62 (T) para 30.
[65] Para 35 (b), (i)-(k).
[66] 2011 2 SACR 567 (SCA) para 5; 2009 2 SACR 62 (T) para 35 (c), (x).
[67] 2009 2 SACR 62 (T) para 31.
[68] Skelton & Batley *Restorative Justice in South Africa*13-14; Marshall *Restorative Justice: An Overview* 25; Dandurand & Griffith *Handbook on Restorative Justice Programmes* 73.
[69] Skelton "Tapping indigenous knowledge" in Restorative Justice 228-236; Truth and Reconciliation Commission of South Africa *Report Volume 1* (1998) 127.
[70] 2009 2 SACR 62 (T) para 30, 35.
[71] Para 25.

before the court's judgment, and restitution for the complaint was not discussed or ordered by either the High Court or the SCA.[72] The lack of restitution is discussed later in this analysis.

Other important factors to consider include the fact that the victim testified as to the reconciliation that had taken place between her and the accused and that she wished for the accused not to be imprisoned. The victim also specifically requested that the accused not be imprisoned.[73] The High Court was sceptical of this request as the victim could have been pressured by her family or the offender to make this request.[74] As discussed above, feminist theorists argue that courts and mediation programmes must handle cases of violence within a familial or domestic relationship with care.[75] Much of the victim's motivation for her request was financial dependence on the accused.[76] It is unclear whether she would have made such a request if her family had had another stable income. Feminist theorists have also noted that financial dependence on the offender can make some cases of gender-based violence ("GBV") inappropriate for restorative justice measures as victims cannot freely advocate for their own needs in mediation sessions.[77]

The court briefly touched on questioning the genuine motivations of the victim in her request for a lighter sentence but did not explicitly mention feminists' concerns or reference theorists.[78] The court referred the matter to restorative justice mediation to determine if the victim was genuine in her request but did not discuss the nuances of GBV and restorative justice.[79] Such a discussion, with reference to the arguments of feminist theorists, may have better prepared the court to address the complexity of this case. The court did not explicitly consider the power imbalance between a father figure who has committed an assault on a minor child.

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[72] 2009 2 SACR 62 (T) para 41; 2011 2 SACR 567 (SCA) para 30.

[73] 2009 2 SACR 62 (T) paras 25, 24, 30.

[74] Para 21.

[75] Stubbs "Domestic violence and women's safety" in *Restorative Justice and Family Violence* 45; S Hooper & R Busch (1996) *Waikato L Rev* 108; Hopkins & Koss (2005) *Violence Against Women* 713.

[76] 2009 2 SACR 62 (T) paras 20, 24.

[77] Daly & Stubbs (2006) *Theoretical Criminology* 17; Hooper & Busch (1996) 4 *Waikato L Rev* 108.

[78] 2009 2 SACR 62 (T) paras 21-25.

[79] Para 26.

Many feminist legal theorists have written extensively on the sensitivity of cases such as these and the factors which need to be considered.[80] The court brought up the possibility of coercion or pressure from the complainant's family, but the work of theorists was not referenced in this regard. Feminist legal theorists have found that many victims of GBV within a domestic context often forgive the offender when it is not in their best interests. This is often because of a financial reliance on the offender and the power imbalance in place. This thesis argues that the court did not properly investigate these issues through proper consultation with feminist legal theorists.

This thesis submits that the circumstances of this case were appropriate for the application of restorative justice. However, these circumstances were nuanced and complex and thus needed to be handled carefully. Proper consultation with the work of restorative justice and feminist legal theorists would have guided the court's approach to these complex circumstances.

5 3 2 The High Court's application of restorative justice

The High Court's reasoning for using restorative justice and its application is evaluated. It is also investigated whether the court's approach to restorative justice is grounded in *ubuntu* and guided by feminist legal theory with explicit reference to the work of theorists. The factors identified by the High Court as "substantial and compelling" circumstances for the justification of a lighter sentence are evaluated in light of this theoretical framework.[81] The twenty-four factors identified by the High Court were quoted in the overview of the case in the previous chapter. These factors are each discussed in terms of their relevance to restorative justice and feminist commentary.

The court identified the fact that the accused was a first-time offender who had to plead guilty and showed genuine remorse, which must be taken into account.[82] The accused had also made an effort to remain involved in the family and had continued

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[80] D Coker "Enhancing autonomy for battered women: lessons from Navajo peacemaking" (1999) 47 *UCLA L Rev* 75-80, 103-107; Stubbs "Domestic violence and women's safety" in *Restorative Justice and Family Violence* 56; S Hooper & R Busch (1996) *Waikato L Rev* 108; Daly & Stubbs (2006) *Theoretical Criminology* 17.

[81] Para 35.

[82] Para 35(a) to (d).

to support them financially.[83] The accused had willingly participated in victim-offender mediation when asked to do so by the court and appeared to be a good candidate for rehabilitative therapy.[84] The accused was also diligent in attending court dates and adhering to bail conditions.[85] These factors are all relevant to the suitability of the case for restorative justice and the offender's likelihood of rehabilitation and reconciliation. Many authors have identified these as necessary considerations for the application of restorative justice.[86]

Next, the court considered relevant circumstances related to the victim. The court noted that while the complainant was fifteen at the time of the incident, she turned sixteen shortly thereafter. The court mentioned the fact that the complainant was almost sixteen, twice within the judgment.[87] This may be relevant to the seriousness of the offence, which is an important consideration for sentencing.[88] The court also held that the rape was not preceded by grooming or other instances of GBV. The court described the incident as a spur-of-the-moment attack.[89] This is relevant to whether there was an ongoing pattern of violence which feminist theorists argue may make the case unsuitable for restorative justice.[90] This fact is also relevant to whether the accused would be a danger to the victim or the community if released under correctional supervision.[91]

The court then considered factors relevant to the crime itself. The court held that while rape is a particularly heinous crime within a family context, another mitigating factor in the accused's favour is that the victim was not physically injured in the attack. Therefore, the court held that this was "not the worst kind of rape."[92] The SCA has held that courts generally do not have the experience to generalise or draw

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[83] Para (i) and (j).
[84] Para 35(p) and (w).
[85] 2009 2 SACR 62 (T) para 35 (x).
[86] Dandurand & Griffith *Handbook on Restorative Justice Programmes* 73.
[87] 2009 2 SACR 62 (T) para 35(e); para 2.
[88] 1969 2 SA 537 (A) 540G.
[89] 2009 2 SACR 62 (T) para 35 (f).
[90] Stubbs "Domestic violence and women's safety" in *Restorative Justice and Family Violence* 45; S Hooper & R Busch (1996) *Waikato L Rev* 108; Hopkins & Koss (2005) *Violence Against Women* 713
[91] 1969 2 SA 537 (A) 540G.
[92] 2009 2 SACR 62 (T) para 35 (g) and (h).

conclusions about the effects and consequences of a rape on the rape victim.[93] This thesis argues that the High Court's findings regarding the nature of the rape are directly in conflict with the SCA's decision and with the complainant's human dignity.

Not only has the SCA held that court's generally do not have the experience to draw conclusions regarding the impact of rape, but it has also held that rape is a "humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim".[94] Further the SCA held that victims of rape are entitled to the protection of these rights and that courts must send a clear message that they are determined to protect these rights.[95] This thesis argues that the court's finding that the victim's rape was "not the worst kind of rape" is indicative of the judicial perpetuation of patriarchal and structural violence.[96]

This thesis argues that the court did not need to undermine the victim's experience, and thus her human dignity, in order to justify the use of restorative justice. The work of restorative justice theorists shows that serious offences can be suitable for restorative justice if handled correctly.[97] Furthermore, restorative justice and feminist legal theorists indicate that one of the main advantages of applying restorative justice to serious offences is the validation of the victim's experience and the opportunity to heal very severe harm done to the victim.[98] This thesis argues that a proper consultation of academic literature would have assisted the court in applying restorative justice in an appropriate manner that did not downplay the consequences of the rape nor undermine the human dignity of the accused.

It appears that the court in *Thabethe*, intentionally or not, attempted to downplay the impact of the rape on the victim to justify a lighter sentence. The victim herself claimed to have healed from the experience and asked for the accused not to be

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[93] *S v Matyityi* 2011 1 SACR 40 (SCA) para 17.

[94] 1997 3 SA 341 (SCA) 344.

[95] 345.

[96] E Mills, T Shahrokh, J Wheeler, G Black, R Cornelius & L van den Heever *Turning the Tide: The Role of Collective Action for Addressing Structural and Gender-Based Violence in South Africa* IDS Evidence Report No. 11824-27.

[97] Marshall *Restorative Justice: An Overview* 25; Coker (1999) *UCLA L Rev* 75-80, 103-107.

[98] Stubbs "Domestic Violence and Women's Safety" in *Restorative Justice and Family Violence* 52; S Curtis-Fawley & K Daly "Gendered violence and restorative justice" (2005) 11 *Violence Against Women* 627-629.

imprisoned.[99] However, the victim is in a position to speak about her own first-hand experiences and how the assault impacted her. As held by the SCA, the court is not qualified to draw any inferences on the severity of a rape's consequences on a rape victim.[100] This thesis argues that the court tried to downplay the impact of the crime on the complainant to justify a lighter sentence.

To illustrate the error in the reasoning of the High Court in *Thabethe*, it is shown with reference to findings of the SCA and academics that the converse argument can be made on the same facts. The SCA held that the rape was incredibly damaging to the relationship the complainant had with her stepfather and caused her significant psychological and emotional harm. The assault and resultant emotional trauma also set back her education.[101] The evidence indicated that the complainant did not appear to be sexually active at the time of the rape, effectively meaning that her first sexual experience was non-consensual and a deep violation of trust.[102] The High Court even held that the trusting relationship the complainant had with the accused made the rape all the more heinous.[103] The SCA also noted how the accused also took advantage of the complainant's vulnerability to commit the assault.[104] The High Court held that the accused was very close to turning sixteen at the time of the offence. The High Court used this as a mitigating factor to lessen the sentence; however, some authors disagree.[105]

Songca and Karels note that the court heavily emphasised the victim's age being close to sixteen. The authors argue that creative mathematics was a way for the court to prevent the accused from being convicted of sexual offences against a child under the age of sixteen, which would carry a much harsher sentence. The age of the complainant should not be a mitigating factor but rather another reason for a more severe sentence.[106]

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[99] Para 20,24.

[100] 2011 1 SACR 40 (SCA) para 17.

[101] 2011 1 SACR 40 (SCA) paras 5, 6, 18.

[102] Para 18.

[103] 2009 2 SACR 62 (T) para 35 (g).

[104] Para 5.

[105] Para 35 (e).

[106] R Songca & M Karels "Geregtelike en wetgewende reaksies op seksuele misdade deur en teen kinders in Suid-Afrika en die potensiële gebruik van herstellendegeregtigheidspraktyke" (2016) 13 *LitNet Akademies* 444 458.

This thesis finds that the High Court's reasoning regarding the complainant, her age and the impact of the rape were completely inappropriate and in contravention of the values of the Constitution. This thesis argues that this reasoning fundamentally eroded the human dignity of the complainant and undermined the use of restorative justice. It cannot be said that the court's understanding of restorative justice was grounded in the value of *ubuntu* as the value itself is heavily linked to human dignity which the failed to uphold.

The court also considers that the family was financially dependent on the accused and that his imprisonment would leave them with no stable income.[107] The court also considered that the victim was aware of this fact and had argued that it had been in her family's best interest for the accused to remain incarcerated and employed.[108] The court considered this as a factor which motivated a lesser sentence. At face value, this may motivate the accused not to be imprisoned. However, as mentioned in previous chapters, many feminist theorists have pointed to the fact that GBV within a domestic environment often means that victims make compromises for their safety and their own best interests because of financial dependence on the accused.[109] Songca and Karels have argued that courts should not be allowed to deviate from minimum sentences based on economic dependence on the offender alone.[110] The authors wonder if the court would still have pushed for restorative justice if this had not been the case.[111]

The court spoke to the complainant privately about whether she genuinely wanted the accused to remain free but did not actively interrogate the complexity of these circumstances.[112] An investigation into feminist comments on restorative justice would have informed the court of the deeply complex nature of domestic violence and the considerations that need to be made in the application of restorative justice thereto.

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[107] 2009 2 SACR 62 (T) para 5 (i), (l), (m).

[108] Para 28.

[109] Stubbs "Domestic Violence and Women's Safety" in *Restorative Justice and Family Violence* 45; Stubbs "Domestic Violence and Women's Safety" in *Restorative Justice and Family Violence* 56.

[110] Songca & Karels (2016) *LitNet Akademies* 460.

[111]460.

[112] 2009 2 SACR 62 (T) para 21.

The court held that in light of all of these factors, this case was the first rape conviction in which:

> "restorative justice could be applied in full measure in order to ensure that the offender continued to acknowledge his responsibility and guilt; that he apologised to the victim and cooperated in establishing conditions through which she may find closure; that he recompensed the victim and society by further supporting the former and rendering community service to the latter; and that he continued to maintain his family."[113]

This comment shows that the High Court, despite not explicitly referencing the work of restorative justice theorists, still had a comprehensive understanding of the core elements of restorative justice. Those elements include the acknowledgement of responsibility from the offender, the healing of the victim, and the compensation and restoration of the victim and the community. However, one key issue is that the court did not, in fact, order compensation for the victim. The court ordered that the accused continue to support the victim and her family as he had been doing prior to the rape and during the court process. This thesis submits that continuation of financial support is merely the maintenance of the status quo and not true restitution.

It may be helpful to turn to the writings of restorative justice theorists on the nature of restitution to show why the court was mistaken. Eglash specifically identified that restitution in a restorative justice paradigm must relate to the harm done and must be directed towards the victim.[114] This thesis argues that the continued maintenance of the complainant and her family by the accused was completely unrelated to the rape itself and did nothing to heal the harm caused. This thesis further submits that if the court had properly consulted the work of restorative justice theorists on the meaning and purpose of restitution, it could have made an order which correctly restituted the complainant. As it stands, the High Court's sentence did not materially restore the complainant. This thesis submits that the referral to mediation and the resulting apology from the accused did constitute symbolic restitution of the complainant. This partially restores the human dignity of the complainant in line with the transformative constitutional vison. However, this thesis submits that the court's comments regarding

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[113] Para 36.

[114] Eglash "Beyond Restitution: Creative Restitution" in *Restitution in Criminal Justice* 94.

the nature of the rape do just as much, if not more, to erode the human dignity of the complainant.

This thesis finds that the court's reasoning regarding the application of restorative justice was at odds with both the theory of restorative justice and the values of the Constitution. Proper consultation with the work of restorative justice and feminist legal theorists could have aided the court in this regard.

5 3 3 The SCA's application of restorative justice

The SCA's application of restorative justice, or lack thereof, is discussed in this section to determine if the SCA's approach to restorative justice was adequately grounded in the value of *ubuntu* and guided by intersectional feminism. It will also be established if the court adequately consulted the work of theorists when approaching restorative justice in this case.

On appeal, the SCA took a very different approach to restorative justice than that of the High Court. Besides procedural issues, the SCA relied heavily on the seriousness of the offence and the public interest to justify not using restorative justice in this case.[115] The court held that restorative justice could be used in appropriate circumstances but that the nature of the crime was too serious for restorative justice to be used.[116] The court cautioned against the use of restorative justice in all serious offences.[117] The court held that the victim's voice must be heard but cannot be overemphasised.[118] Kloppers and Kloppers argue that if the SCA had given enough weight to the victim's voice and adequately investigated the principles of restorative justice then the court would have ruled that there were sufficient grounds for restorative justice. These authors argue, if the court had done so, it would have noted that the circumstances of the case were appropriate for restorative justice.[119]

These circumstances include the fact that the victim had indicated her preference for a lighter sentence which was in her family's financial interest. Other important

[115] 2011 1 SACR 40 (SCA) para 20.
[116] Para 17,18.
[117] Para 19.
[118] Para 21.
[119] Kloppers & Kloppers (2017) *LitNet Akademies* 362.

factors are the accused's remorse and willingness to make things right.[120] Kloppers and Kloppers note that instead of focusing on a proper inquiry into the principles of restorative justice or giving proper weight to the victim's voice, the SCA relied heavily on the public interest and the deterrent value of the sentence.[121]

Songca and Karels argue that the SCA did not adequately balance restorative and retributive justice.[122] These authors did not agree with the submission of the amicus that the victim's voice cannot outweigh the authority of the court.[123] Songca and Karels believe that restorative justice is victim-centred in nature and must centre on the wishes and restitution of the victim.[124] The authors argue that the court focused too heavily on the seriousness of the crime and did not take an offender-victim-centric approach that centres on the victim's restitution.[125] Songca and Karels argue that the court erred in not blending retributive and restorative justice. In the view of these authors, restorative justice begins where retributive justice ends.[126] Lubaale also argues that the SCA failed to strike a balance between retributive and restorative justice by completely setting aside the High Court's sentence and not providing its own restorative justice sentencing conditions.[127]

This thesis submits that the SCA's decision to let other considerations outweigh the victim's voice indicates that the court failed to centre the victim and her restitution. This thesis submits that proper consultation of restorative justice and feminist legal theory, including the Victims' Charter, would have indicated to the court how important the voice of the victim is in response to crime. Further, it would have been apparent to the court that the serious nature of the crime is not always a reason to avoid restorative justice. In fact, some authors suggest that the proper application of restorative justice to serious offences can offer greater rewards than that of lesser offences. This is because serious offences cause greater harm and restorative justice is primarily

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[120] 362.
[121] 362.
[122] 461.
[123] 458
[124] 461.
[125] 460.
[126] 462.
[127] EC Lubaale "Concessions on custodial sentences: Learning from the New Zealand approach to restorative justice" (2017) 61*SA Crime Quarterly* 33-34.

concerned with restitution and restoration of harm.[128] The SCA has already held that rape is a very serious offence that violates basic human rights.[129] In the *Thabethe* judgment, the SCA does make mention of this finding in *Chapman*; however, the serious nature of rape is taken as a reason not to apply restorative justice.[130] This thesis submits that if the SCA in *Thabethe* had consulted the work of restorative justice and feminist legal theorists along with its previous judgments, it would have been clear that the serious nature of rape is all the more reason to apply restorative justice in this case. This thesis argues that by not applying restorative justice and ensuring the restitution of the complainant, the SCA failed to restore the human dignity of the complainant and thus failed to further the transformative constitutional vision. The impact of the judgment and the lack of restitution or restoration are discussed next.

5 3 4 The practical impact of the offence and the court interventions

This section discusses the circumstances of the victim, offender, and community before the offence, after the offence and after the intervention of each of the courts. This is done to establish to what degree, in line with restorative justice theory, the courts placed these parties as close as possible to their original positions. It is determined whether the court's intervention materially and symbolically restituted the complainant to restore her human dignity in furtherance of the court's transformative constitutional mandate.

Prior to the offence the complainant and the accused were living together as a family, with the accused financially supporting the complainant and fulfilling the role of a quasi-father figure.[131] After the offence, the family dynamic was disrupted for many years, with the accused living outside of the family home immediately after the assault.[132] The complainant moved in with her maternal grandmother for some time before moving back into the family home.[133] The offence took place within a family but all sexual offences, especially those against minors, are an offence to the harmony of

[128] Marshall *Restorative Justice: An Overview* 25; Coker (1999) *UCLA L Rev* 75-80, 103-107.
[129] 1997 3 SA 341 (SCA) 344.
[130] 2011 2 SACR 567 (SCA) paras 16, 20.
[131] 2009 2 SACR 62 (T) paras 1-5.
[132] Para 9.
[133] Para 10.

the community. Although the accused did not pose a threat to the broader community, his actions still harmed the community.

The accused and her mother were deeply traumatised by the assault. The accused testified that she was deeply hurt by the violence caused to her by a man she had trusted after the offence.[134] Over time the family eventually reconciled, and the accused returned to the family home and fathered another child with the complainant's mother.[135] Throughout this time, the accused supported the complainant and her family financially.[136]

During the High Court trial, the complainant and the accused had attended a victim-offender mediation session in which they formally reconciled. During the mediation session, the accused formally apologised to the complainant and the complainant accepted the apology. The two also drew up an agreement to regulate the future conduct of the accused and refer the matter directly to the court if he was to reoffend. The accused was further ordered to undergo a sexual offenders programme and complete community service. Thus, he would be less of a threat to the complainant and the broader community and would have healed any harm caused to the community.

This thesis submits that the High Court's sentence did aim to place the parties as close as possible to their original position.[137] The High Court's sentence did work to reform the accused and address the harm caused to the community.[138] The court's referral of the case to mediation resulted in a formal apology being issued and an agreement to regulate future conduct being drawn up by the parties.[139] This thesis submits that the mediation session did work to restore the victim symbolically. However, as discussed above, the High Court's sentence did not materially restitute the complainant. As discussed in the second chapter, the approach to restitution and restorative justice grounded in *ubuntu* must materially and symbolically restore the victim. This thesis submits that the High Court's judgment only partially restored the

[134] Para 20.
[135] Para 7, 8, 25; 2011 1 SACR 40 (SCA) paras 6, 7.
[136] 2009 2 SACR 62 (T) para 25.
[137] Para 36.
[138] Paras 36, 40.
[139] Paras 30, 31.

human dignity of the offender and thus only partially furthered the transformative constitutional mandate.

This warrants a discussion of the impact of the SCA judgment. After the SCA judgment, the accused was imprisoned, which resulted in the complainant and her family losing their financial income. The accused had kept to the conditions of his correctional supervision, but it is unclear whether he was allowed to complete the conditions before being imprisoned. As mentioned in the *Shibulane* judgment, sending an accused to prison when they are not a danger to the community is often more likely to result in them emerging as a hardened criminals rather than reforming.[140] This thesis argues that the community may not be safer for the accused having been imprisoned, and the complainant and her family are certainly in a worse position than they were before the offence. This thesis submits that SCA's judgment did not place the parties as close as possible to their original position. Further, the complainant was placed in a worse position than she was after the offence had occurred, as she now had to deal with the after-effects of the rape while having no financial support. This thesis submits that the SCA judgment did not materially nor symbolically restitute the victim and thus failed to restore her human dignity. The SCA thus did not promote the interests of transformative constitutionalism in this case.

5 4 An analysis of *S v Seedat*

The case of *Seedat* is analysed in this section to determine to what extent the courts considered academic literature when deciding whether this case was appropriate for restorative justice. it will then be examined whether the courts' approach to restorative justice was grounded in the value of *ubuntu* and guided by feminist legal theory. It will then be determined whether the sentences handed down in each judgment placed the parties as close as possible to their original positions in line with restorative justice theory. Once the practical benefits of the sentence have been established, it is discussed whether the complainant was materially and symbolically restituted to restore her human dignity and thus further transformative constitutionalism.

[140] 2008 1 SACR 295 (T) para 6.

5 4 1 Appropriateness of the circumstances

In the case of *Seedat,* the court did not explicitly reference the works of restorative justice and feminist legal theorists but did identify "substantial and compelling" circumstances to justify a lower sentence in favour of the accused compensating the complainant.

The appropriateness of the circumstances for restorative justice is evaluated with reference to academic literature and case law. The court identified "substantial and compelling circumstances" to justify a sentence below the statutory minimum. These factors were the advanced age of the accused, the ill health of the accused and the fact that he was willing to pay compensation.[141] Watney has argued that only the age of the accused is a relevant factor and alone it is not enough to substantiate the argument for a lesser sentence. Watney posits that the other factors are neutral at best and that any accused with the means to do so would offer compensation in exchange for a lower sentence.[142] Watney argues that these factors are especially egregious in light of the fact that the court opined that the accused should have been convicted of two separate charges of rape for the incident.[143] The court admits that these two convictions would have secured the accused a life sentence but still argues that a lesser sentence is justified.[144] This thesis argues that the factors outlined by the court are not in line with the guidelines outlined by restorative justice theorists.[145]

Kloppers and Kloppers argue that if the courts had properly investigated the circumstances of the case in light of the principles of restorative justice, then it would have immediately been apparent from the accused's lack of accountability that restorative justice was not appropriate for the case.[146] Watney similarly argues that, based on the circumstances, this case was not appropriate for restorative justice.[147]

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[141] 2015 2 SACR 612 (GP) para 31

[142] Watney (2015) *TSAR* 852-853.

[143] 853.

[144] 2015 2 SACR 612 (GP) para 30.

[145] Dandurand & Griffith *Handbook on Restorative Justice Programmes* 73-74; Skelton & Batley *Restorative Justice in South Africa* 13; Marshall *Restorative Justice: An Overview* 25.

[146] Kloppers & Kloppers (2017) *LitNet Akademies* 362.

[147] Watney (2015) *TSAR* 855.

From a feminist legal theorist's point of view, acts of acquaintance rape such as this one are more suited to restorative justice than instances of domestic violence.[148] However, the lack of remorse from the accused and the blatant character assassination of the complainant cannot be said to accord with feminist legal theorists' approach to restorative justice.[149] One of the main issues which feminist legal theorists have with the justice system is the re-victimisation of sexual assault survivors through brutal cross-examination.[150] Not only does this character assassination make the case inappropriate for restorative justice, but it also shows that the court did not show due regard to the concerns of feminist legal theorists.[151]

Watney argues that the court did not follow the guidelines set out by previous judgments for identifying the suitability of a case of restorative justice. These guidelines are the presence of remorse, apology and encounter.[152]

Watney's first guideline of remorse is evident from the use of guilty pleas to indicate accountability and remorse in cases where restorative justice is applied to sentencing practices.[153] Watney quotes the SCA in Matyityi to explore the meaning of remorse in a criminal trial. In *Matyityi* the court held that remorse is not the same as regret. The court held that remorse must be determined by the actions of the accused, not merely their testimony in court. Remorse, according to the SCA, is a factual question regarding the actions of the accused and whether they have fully appreciated and acknowledged the error of their ways. The court must have a proper appreciation of the accused's motivation for the offence, what has provoked them to change their mind, and whether they truly understand the gravity of their actions.[154]

In *Seedat* the accused did not express any remorse, plead guilty or attempt to reconcile with the accused. Instead, the complainant had been subjected to brutal

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[148] Hopkins, Koss (2005) *Violence Against Women* 709-710.

[149] 2015 2 SACR 612 (GP) para 27.

[150] M Koss, K Bachar & C Hopkins "Restorative justice for sexual violence: repairing victims, building community and holding offenders accountable" (2003) 989 *Ann NY Acad Sci* 384 387-388.

[151] Kloppers & Kloppers (2017) *LitNet Akademies* 362; Watney (2015) *TSAR* 855; Koss, Bachar & Hopkins (2003) *Ann NY Acad Sci* 387-388.

[152] Watney (2015) *TSAR* 854-855.

[153] 854.

[154] 2011 1 SACR 40 (SCA) para 13.

cross-examination which the court referred to as "character assassination."[155] Watney is doubtful whether restorative justice can be used when there is no indication of genuine remorse or acknowledgement of any wrongdoing.[156]

Watney's second guideline of apology in the form of personal acknowledgement of wrongdoing was not met either. Watney argues that there is no indication in the case of *Seedat* that the accused personally apologised to the complainant and that compensation was only seen as a convenient way to buy the accused's freedom.[157]

The third guideline identified by Watney is an encounter or dialogue between the offender and the complaint regarding the harm that has been caused and possible restitution. Watney notes that this is an integral component of restorative justice which was absent from the case of *Seedat*.[158] Many restorative justice theorists have similarly argued that both the offender and the victim must be willing to participate in a restorative justice process for the circumstances to be appropriate for the application of restorative justice.[159]

This thesis argues that the lack of remorse, dialogue and apology as well as the accused's treatment of the complainant at trial made the circumstances of this case wholly inappropriate for the application of restorative justice. Further, if the court had taken into account the work of restorative justice and feminist legal theorists it would have been clear that this case was not best placed for the application of restorative justice.

Neither the High Court nor the SCA took the work of theorists into account when deciding if the case was appropriate for restorative justice. Instead, the SCA held that the seriousness of the offence made the case inappropriate for restorative justice.[160] The rationale for and application of restorative justice in each of these judgments are discussed below.

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[155] 2015 2 SACR 612 (GP) para 27.

[156] Watney (2015) *TSAR* 854.

[157] 854.

[158] 855.

[159] Marshall *Restorative Justice: An Overview* 25; Dandurand & Griffith *Handbook on Restorative Justice Programmes* 73.

[160] 2017 1 SACR 141 (SCA) paras 38, 39.

5 4 2 The High Court's application of restorative justice

The court's rationale for using restorative justice and its application thereof are discussed with reference to academic commentary from restorative justice scholars and feminist legal theorists. It is established to what degree the court consulted the work of these theorists and whether the court's approach to restorative justice was grounded in the value of *ubuntu* and guided by feminist legal theory.

This thesis submits that the High Court's main motivation for using restorative justice was the complainant's request for compensation and the mitigating factors in the accused's favour.[161] The court did not explicitly interrogate whether the circumstances of the case were appropriate for restorative justice nor explicitly develop the application in line with the Constitution as held in *Saayman*.[162]

The court did not consider whether any reconciliation had occurred between the parties and relied on the compensation order to prove that restorative justice had taken place.[163] This constituted material financial restitution but not symbolic restitution. As argued above, an understanding of restorative justice grounded in *ubuntu* requires both material and symbolic restitution. As such, this thesis submits that the court's approach to restorative justice was not properly anchored in the value of *ubuntu*. The nature of the compensation awarded is also antithetical to the value of *ubuntu* and the principles of restorative justice.

In this case, the complainant testified that they believed that the best way to make the accused suffer was to force him to pay her compensation. She indicated that she wanted compensation because she believed the accused would be out of prison soon, and she would still be suffering from the trauma he caused her when that happened.[164] This does not align with an understanding of restorative justice which resonates with the value of *ubuntu*. Authors have been clear that in a restorative justice model compensation is meant to restore the victim based on the harm they have suffered, not punish the accused.[165]

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[161] 2015 2 SACR 612 (GP) para 31, 49.

[162] 2008 (1) SACR 393.

[163] Kloppers & Kloppers (2017) *LitNet Akademies* 351.

[164] 2017 1 SACR 141 (SCA) para 14.

[165] Wright (1977) *How J Penology & Crime Prevention* 22, 30-31; Christie (1977) *British Journal of Criminology* 9; Barnett (1977) *Ethics* 289; Eglash "Beyond restitution: Creative restitution" in *Restitution in Criminal Justice* 91,92.

A feminist point of view, in this case, would have more thoroughly considered the interests of the victim and her restitution.[166] Feminist theorists have been clear that one of the main drawcards for using restorative justice in cases of GBV is that the victim's version of events and experiences is validated through a restorative justice process.[167] That validation did not take place in this case. The court allowed the accused to subject the complainant to a brutal cross-examination which the court itself described as "character assassination."[168] As mentioned above, the re-victimisation of GBV survivors is one of feminist legal theorists' main concerns in the criminal justice system and in restorative justice processes.[169] The court did not consider how the accused's attitude towards the complainant hindered the application of restorative justice from a feminist legal theory perspective. The court did not consider referral to a restorative justice programme but if it had, this is one of the factors which would have made the use of restorative justice ineffective.

Academic commentary on the court's application of restorative justice can now be considered. Watney argues that besides the inappropriate circumstances of the case, the court in Seedat also misapplied restorative justice principles. Watney argues that the High Court ignored the serious nature of the crime and overemphasised the personal circumstances of the accused and the views of the complainant. Furthermore, Watney posits that this resulted in an unbalanced sentence under the guise of restorative justice. Watney warns that this sends the message to potential offenders that they can buy their way out of the consequences of their actions.[170]

Lubaale has noted that the High Court did not consider the possibility of balancing compensation as a restorative outcome and a custodial sentence as a retributive outcome.[171] Lubaale commends the High Court for having due regard for the victim's voice. However, Lubaale argues that in suspending the sentence fully the court did not adequately balance the victim's voice and the seriousness of the crime of rape.[172]

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[166] Stubbs "Domestic violence and women's safety" in *Restorative Justice and Family Violence* 52; Curtis-Fawley & Daly (2005) *Violence Against Women* 627-629.

[167] Curtis-Fawley & Daly (2005) *Violence Against Women* 621.

[168] 2015 2 SACR 612 (GP) para 27.

[169] Koss, Bachar & Hopkins (2003) *Ann NY Acad Sci* 387-388.

[170] Watney (2015) *TSAR* 855.

[171] Lubaale (2017) *SA Crime Quarterly* 34.

[172] 34.

Kloppers and Kloppers argue that the only real sign of restorative justice in the case of *Seedat* was the compensation order.[173] Lubaale notes that a guilty plea did not accompany this compensation order.[174] Watney posits that a compensation order alone is not enough to show remorse or apology when considered in context with the rest of the circumstances of the case.[175]

Kloppers and Kloppers also address the fact that section 297 of the CPA does not allow the court to fully suspend a sentence for which there is a statutory minimum.[176] This procedural issue may sway Lubaale's argument that custodial sentences and restorative conditions must be harmonised.[177]

This thesis submits that the High Court's Judgment in *Seedat* does not show an approach to restorative justice which was grounded in the value of *ubuntu* and guided by intersectional feminism. This thesis further submits that the court did not adequately consult the work of restorative justice and feminist legal theorists in its approach to restorative justice. These findings are evident in the court's neglect of symbolic restitution, misrepresentation of material financial restitution, and the lack of reconciliation between the parties was ignored.

5 4 3 The SCA's application of restorative justice

The SCA's approach to restorative justice is considered in this section to establish whether the court's approach to restorative justice was grounded in the value of *ubuntu* and guided by intersectional feminism. It is furthermore determined whether the SCA referred to the work of restorative justice and feminist legal theorists in this approach to restorative justice.

The SCA once again took the position that restorative justice is not suitable for serious offences such as rape.[178] The court did not consider the factual circumstances of the case when determining whether the case was appropriate for restorative justice. This is contradictory to the opinions of many restorative justice theorists. Marshall, and

[173] Kloppers & Kloppers (2017) *LitNet Akademies* 351.
[174] Lubaale (2017) *SA Crime Quarterly* 34.
[175] Watney (2015) *TSAR* 855.
[176] Kloppers & Kloppers (2017) *LitNet Akademies* 352.
[177] Lubaale (2017) *SA Crime Quarterly* 34.
[178] 2017 1 SACR 141 (SCA) para 38.

Skelton and Batley, have argued that the seriousness of the offence should not exclude a case from the application of restorative justice. The authors argue that severe offences that cause greater harm offer a greater reward for applying restorative justice, which seeks to address the harm caused. According to the authors, this makes a case more suitable for restorative justice than retributive justice, which only seeks to punish offenders.[179]

Kloppers and Kloppers argue that although the SCA found that the circumstances of the case were inappropriate for restorative justice, the court failed to deal with two important aspects of restorative justice: the needs of the victim and her request for compensation.[180] The authors are doubtful that if a more thorough investigation of restorative justice had been conducted, the SCA would have considered the use of restorative justice as the circumstances were not appropriate given the accused's lack of remorse.[181] This thesis argues that the SCA came to the correct conclusion – that the case was inappropriate for the application of restorative justice – but that its reasoning was flawed. The work of restorative justice and feminist legal theorists makes it clear that in the case of the offender not admitting guilt and actively seeking to degrade the character of the complainant, restorative justice should not be applied. The seriousness and nature of the offence only require a greater level of expertise from facilitators and more intricate considerations from the court.[182] The reasoning of the court does not align with the work of theorists, and as such, the precedent that was set will make it more difficult for victims of rape to seek compensation and have their human dignity restored.

This is true not only because the SCA has cautioned against the use of restorative justice in cases of serious offences but also due to the manner in which the court considered the victim's voice. Kloppers and Kloppers argue that the SCA only considered the victim's voice as one factor for consideration which allowed it to be outweighed by considerations of public interest and the seriousness of the offence.[183]

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[179] Skelton & Batley *Restorative Justice in South Africa.*13-14; Marshall *Restorative Justice: An Overview* 25.

[180] Kloppers & Kloppers (2017) *LitNet Akademies* 353.

[181] 361.

[182] Marshall *Restorative Justice: An Overview* 25; Skelton & Batley *Restorative Justice in South Africa*13-14.

[183] 362.

In *Seedat* the victim was left with nothing and in her own words lamented that the offender would be released soon and she would be left with the trauma she had endured.[184] This thesis submits that this approach to restorative justice does not embody the value of *ubuntu* as the complainant's human dignity was not restored with either material or symbolic restitution.

The SCA's approach to restorative justice's place in the criminal justice system and its role as a sentencing option will now also be considered. Lubaale agrees with the SCA that the crime of rape is very serious and warrants a custodial sentence but argues that restorative justice can still be applied in this case.[185] Lubaale argues that the SCA's custodial sentence does not preclude the court from considering the victim's request for compensation, as the two are not mutually exclusive. Lubaale argues that restorative justice should not only be seen as an incompatible alternative to retributive sentencing goals. [186] Similarly, Kloppers and Kloppers argue that restorative justice should not have been reduced to a mere sentencing option but viewed as its own independent approach to justice.[187]

This thesis submits that the court's misconception of restorative justice as incompatible with retributive sentencing goals and custodial sentences is the result of an inadequate canvasing of academic literature. Many authors have put forward ideas for incorporating restorative justice into the criminal justice system that incidentally achieves retributive sentencing goals and allows for custodial sentences to be handed down.[188]

This thesis argues that the SCA's did not adequately consult the work of restorative justice and feminist legal theorists in its approach to restorative justice. As a result, the court's understanding of restorative justice did not embody the value of *ubuntu* and was not guided by an intersectional feminist perspective. The next section explores the practical impact of the sentence and its potential to restore the human dignity of the complainant.

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[184] 2017 1 SACR 141 (SCA) para 14.

[185] Lubaale (2017) *SA Crime Quarterly* 34 paras 42-43.

[186] 2017 1 SACR 141 (SCA) paras 34-35.

[187] Kloppers & Kloppers (2017) *LitNet Akademies* 361-362.

[188] Christie (1977) *British Journal of Criminology* 9,10 Barnett (1977) *Ethics* 289-291.

5 4 4 The practical impact of the offence and the courts' interventions

The circumstances of the parties prior to the offence, after the offence and after the interventions of the High Court and the SCA are compared here. It is established whether, in line with an *ubuntu*-based restorative justice theory, the parties were placed as close as possible to their original positions. This analysis also establishes whether the courts' sentences materially and symbolically restituted the complainant to restore her human dignity in line with the vision of transformative constitutionalism.

The practical impact of the offence and the court interventions on the victim, offender and the community will now be compared to establish the extent to which the central harm was addressed. Prior to the offence, the victim was unharmed, and the community had not yet been disturbed. Before the offence, the accused was considered a first-time offender as his previous conviction was more than ten years prior. The offender did not appear to have committed any other crimes in those ten years. After the offence, the victim suffered deep psychological and emotional trauma as a result of the assault committed by the accused. The community suffered due to the harm done to the victim and the threat to the safety and harmony of the community.

After the High Court's intervention, the complainant and the accused had not reconciled. On the contrary, the accused maintained his innocence to the point of assassinating the character of the complainant, presumably subjecting her to further humiliation. The complainant did receive the right to the compensation she requested, and some of the instalments were paid to her.[189] The accused did not undergo any reform or rehabilitation and still maintained his innocence after his conviction. The community did not receive any restitution and remained in the same position as it was after the commission of the offence.

This thesis submits that the High Court's sentence did not place the victim or community in the position they were before the offence was community. Further, it also did not reform the offender. Thus, this thesis argues that the High Court's sentence is not in line with the principles of restorative justice. Furthermore, the sentence fails to restore the complainant symbolically; thus, her human dignity was not fully restored. This is evident in the lack of accountability or remorse shown by the

[189] Para 50.

offender to the accused. Thus, this sentence does not further transformative constitutionalism as it fails to restore the human dignity of the complainant fully.

After the SCA's intervention, the complainant stopped receiving compensation, and the harm to the community remained unaddressed. The accused, who still continued to maintain his innocence, was imprisoned and showed no likelihood of reform. The SCA's sentence was not in line with the principles of restorative justice at all as the court decided not to apply restorative justice. The SCA's sentence does not materially or symbolically restitute the complainant and thus completely fails to uphold her human dignity in the furtherance of transformative constitutionalism.

5 5 Conclusion

In *Thabethe* and *Seedat*, the High Court and SCA did not accurately consider the concerns of restorative justice theorists or feminist theorists. The reasoning of the High Court in *Thabethe* was predominantly sound although the court did not take into account the concerns of feminist legal theorists or restorative justice scholars. As a result, the High Court unnecessarily downplayed the seriousness of the offence to the detriment of the complainant's human dignity.[190] The High Court also did not take into account feminist legal theorist commentary regarding the nuances of GBV within a domestic environment which would have aided the court in navigating the complexity of the case. Ultimately the High Court balanced the restorative and retributive sentencing goals and handed down a sentence which practically benefited the victim, offender and the community. The High Court's sentence partially restored the human dignity of the complainant by symbolically restituting her. However, the High Court's reasoning for applying restorative justice still undermined the human dignity of the complainant. Unfortunately, on appeal, the SCA took a retributive approach on appeal and laid down a precedent which valued the interests of the community and the seriousness of the offence over the explicit requests of the complainant and the practical impact of the sentence. The SCA's sentence did not materially nor symbolically restituted the complainant and thus did not restore her human dignity in the interests of transformative constitutionalism.

[190] 2009 2 SACR 62 (T) para 35(g)-(h).

This thesis argues that the appropriateness of the circumstances for the application of restorative justice was not properly considered by the High Court in Seedat. The court did not take into account the accused's lack of remorse and accountability. If the court had properly considered the arguments of restorative justice scholars, then it would have been clear that this case was not suitable for restorative justice.[191] This thesis submits that the case could only have been made suitable if the accused had come to change his attitude to the victim through mediation or some other means. Furthermore, the court did not consider feminist legal theorist concerns regarding the re-victimisation of complainants. This thesis submits that proper consultation of feminist legal theory would have reiterated the fact that the accused's lack of remorse and treatment of the complainant made the case inappropriate for restorative justice.[192]

This thesis submits that the High Court misapplied restorative justice in the case of *Seedat*. Further, this misapplication of restorative justice led to the SCA reinforcing the precedent that restorative justice should not be applied in cases of rape convictions. Unfortunately, instead of relying on the circumstances of the case as a reason not to apply restorative justice, the SCA relied on the nature of the offence and the public interest. This thesis argues that this reasoning shows a misunderstanding of restorative justice theory, which could have been corrected through a thorough investigation of academic literature on the matter. This thesis also supports academics' arguments that the court's reasoning also enforced the dichotomy between custodial sentences and restorative justice.[193] This thesis submits that the SCA's misunderstanding of restorative justice resulted in the complainant not being materially or symbolically restituted. As such, the complainant's human dignity was not restored in the furtherance of transformative constitutionalism.

The earlier restorative justice jurisprudence shows both important developments that the courts could have utilised in Thabethe and Seedat and important misconceptions perpetuated in these later cases.

Shibulane was the first explicit mention of restorative justice in case law and set some important trends. Although the court does introduce the theory of restorative

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[191] Kloppers & Kloppers (2017) *LitNet Akademies* 353.

[192] Koss, Bachar & Hopkins (2003) *Ann N.Y. Acad. Sci.* 387-388.

[193] Lubaale (2017) *SA Crime Quarterly* 34.

justice as being linked to restitution, the final sentence does not compensate the complainant because of procedural issues. Unfortunately, the court justifies using restorative justice by emphasising the possibility for reform and benefits to the prison system. This thesis has submitted that these are incidental benefits and not the main aim of restorative justice, which still remains restitution. This judgment also does not explicitly consult the work of theorists, which this thesis submits led to the mischaracterisation of restorative justice in this case.

The issues identified in Shibulane also present themselves in later cases. In *Maluleke* the court also failed to sufficiently ground its approach to restorative justice in the work of theorists. This led to a lack of material restitution for the complainant. However, this thesis submits that the court's approach to restorative justice was grounded in African legal culture and as such the value of *ubuntu*. As such, the deceased's family was symbolically restituted and their human dignity was partially restored. Unfortunately, their human dignity could not be fully restored as they were not fully restituted. This thesis also submits that the court's approach to restorative justice was not guided by an intersectional feminist lens which could have assisted in rectifying some of these issues.

Many of these issues are also present in the case of Saayman. The court did not sufficiently consult the work of theorists in its approach to restorative justice. Further, the complainants were not restituted and thus their human dignity was not restored in the interests of transformative constitutionalism. This thesis also submits that because the court did not properly consult the work of theorists, the court's sentence was not victim-centric and rather focused on the reform of the offender. As a result, the victim and the community were not placed as close as possible to their original positions as per restorative justice theory.

It is unfortunate that the sentence in *Saayman* did not restore the complainant nor address the harm to the community as this case took place after the Constitutional Court judgment in *S v M*. The court refers to *S v M* but its sentence does not reflect the approach of the Constitutional Court, despite how similar the facts of the two cases are. The Constitutional Court managed to fully restore the complainants' human dignity by materially and symbolically restituting them. This approach furthers the transformative constitutional vision by restoring the human dignity of the complaints. Thus, this thesis submits that this judgment brings the entire justice system closer to the objectives of transformative constitutionalism.

It is unfortunate that the courts did not adopt the Constitutional Court's approach in the *Saayman*, *Thabethe* and *Seedat* judgments, which were all handed down after *S v M*. The Constitutional Court's decisions are binding on all other courts, and these later judgments should have shown deference to the Constitutional Court's approach. This thesis submits that a proper investigation into the work of restorative justice and feminist legal theorists as well as a thorough engagement with the Constitutional Court's judgment, would have benefited the courts in *Thabethe* and *Seedat.* Such an approach would have enabled the courts to take a victim-centric approach that would materially and symbolically restituted the complainants. This restitution would have restored the human dignity of the complaints and thus upheld the transformative constitutional mandate placed on the courts.

CHAPTER 6: CONCLUSION

In this chapter, conclusions are drawn based on the questions from the introduction and the findings in the critical analysis. The primary research question is addressed first regarding the cases of *S v Thabethe* ("*Thabethe*") and *S v Seedat* ("*Seedat*"). The findings for the secondary questions are then discussed with reference to the theory outlined in the first two chapters and trends identified in the case law analysis. The topics of further research needed in this field are identified, and concluding remarks are made.

6 1 Findings regarding the primary research question

The primary research question of this thesis was "To what extent have South African courts adequately considered the centrality of victims, constitutional imperatives and the concerns of feminist and restorative justice theorists when applying restorative justice sentencing practices in cases of GBV?"

From the analysis of case law in the previous chapter, this research argues that courts have not adequately considered the centrality of victims, constitutional imperatives or the work of theorists in the application of restorative justice to cases of GBV. This is evident in the High Court and Supreme Court of Appeal ("SCA") judgments of *Thabethe* and *Seedat*.

In the case of *Thabethe* the centrality of the victim and her voice was a core element of the court's reasoning for the application of restorative justice. The High Court took cognisance of the victim's request for the accused not to be imprisoned and found that restorative justice would be appropriate.[1] The court found that the victim would be better served by a sentence that allowed the accused to continue to support the victim and her family financially. The court did not consider restitution for the complainant. As such, she was not compensated for the harm which was caused to her. This thesis argues that this shows that the court did not properly consult the work of restorative justice theorists. A thorough investigation of restorative justice theory would have alerted the court to the fact that restorative justice focuses on the participation of the

[1] 2009 2 SACR 62 (CC) paras 24, 36.

victim and their restitution.[2] However, this thesis argues that by referring the parties to mediation, the court was able to ensure that the circumstances were as appropriate as possible for the application of restorative justice. Furthermore, this research finds that the court did not consult the debates of feminist legal theorists regarding the use of restorative justice in cases of GBV that occur in domestic contexts. A consultation of feminist legal theorists would have aided the court in considering whether the victim was able to advocate for her own self-interest considering the complexity of her circumstances.

This thesis finds that the court attempted to meet constitutional imperatives by restoring the complainant's human dignity. This thesis finds that by acknowledging the voice of the victim and working to grant her requests, the court started down the path of restoring the victim's human dignity. However, this thesis argues that the court's findings regarding the rape of the victim degrade her human dignity. These comments overshadow any other progress towards upholding her human dignity.

This thesis finds that the High Court in *Thabethe* attempted to centre the victim in this case but failed to consider her restitution adequately. Further, the court attempted to uphold the human dignity of the victim by granting her request and practically benefiting her in the sentence. However, this thesis argues that the court's findings regarding the nature of her rape degrade the human dignity of the victim far more than the court's sentence is able to uphold it. This thesis argues that these findings were not only contrary to the values of the Constitution, but also indicative of a disregard for the work of restorative justice and feminist scholars. This thesis finds that a proper investigation into the work of restorative justice and feminist legal theorists would have aided the court in centring the victim and her restitution in a manner that upheld her human dignity.

Despite the attempts of the High Court to broaden the application of restorative justice at the victim's request, the SCA took a very different approach. The SCA considered the voice of the victim as a factor in sentencing considerations but held that it must be weighed against all other factors. Ultimately, the SCA held that the

[2] R Barnett "Restitution: A new paradigm of criminal justice" (1977) 87 *Ethics* 288, 289; A Eglash "Beyond restitution: Creative restitution" in J Hudson and B Galaway (eds) *Restitution in Criminal Justice* (1977) 94-96.

public interest and the nature of the crime outweighed the request of the victim. The court did not consider compensation or restitution of any kind for the victim.

This thesis argues that in allowing the voice of the victim to be outweighed, the SCA failed to centre the victim and her restitution adequately. Further, this thesis argues that the SCA did not properly consult restorative justice theory and feminist legal theory. An adequate investigation would have revealed that restorative justice scholars do not all agree that the nature of the crime should rule out the application of restorative justice.[3] Such an investigation would have also revealed that the victim's restitution is the main outcome of any application of restorative justice and that the interests of the community are only one consideration of many.[4] Thus, this thesis argues that an appropriate consideration of the victim's interests would never have led the court to outweigh the victim's voice or ignore her restitution. Further, consultation of case law and feminist legal theory in conjunction with restorative justice would have aided the court in understanding the nature of rape and its seriousness.[5] This investigation would have guided the court to the conclusion that a crime as deeply traumatic as rape requires restitution of the victim above punishment of the offender.

This thesis argues that by overlooking the restitution of the victim, the SCA failed to restore the human dignity of the victim. Further, by not restoring the human dignity of the complainant, the SCA failed in its constitutional mandate.

In the case of *Seedat* this thesis found that the High Court and the SCA both failed to centre the victim, consult restorative justice and feminist legal theory and uphold its constitutional imperatives.

The High Court at face value did centre the victim's request for restitution. However, this thesis argues that the restitution lacked any accountability from the offender and thus failed to meet the requirements of restorative justice fully. Consultation with restorative justice theory and feminist legal theory would have led the court to understand that offender accountability and victim validation are important to the proper application of restorative justice in cases of GBV. This thesis finds that the lack

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[3] Marshall *Restorative Justice: An Overview* 25; Coker (1999) *UCLA L Rev* 75-80, 103-107.

[4] Dandurand & Griffith *Handbook on Restorative Justice Programmes* 73-74; Skelton & Batley *Restorative Justice in South Africa* 13.

[5] 2011 1 SACR 40 (SCA) para 17; 1997 3 SA 341 (SCA) 344; Stubbs "Domestic Violence and Women's Safety" in *Restorative Justice and Family Violence* 52; Curtis-Fawley & Daly (2005) *Violence Against Women* 627-629.

of accountability from the offender should have been given more thought by the court when applying restorative justice. The court's inattention to this factor shows an inadequate understanding of restorative justice's core principles. This thesis argues that the lack of consultation with theorists hindered the court's ability to fulfil its constitutional imperatives in the restoration of the victim's human dignity.

The SCA again allowed the voice of the victim to be outweighed by other considerations. This thesis argues that the SCA's repeated refusal to afford due weight to the voice of the victim led it to fail to uphold its constitutional mandate to promote the human dignity of the victim. Further, proper consultation with restorative justice and feminist legal theory would have assisted the court in centring the victim and restoring her human dignity. Given the lack of accountability from the offender, the court would have, after adequate investigation of the works of theorists, referred the case to mediation and then found a proper balance of restitution and imprisonment for the sentence.

6 2 Findings regarding subsidiary questions

The findings regarding the subsidiary questions are outlined in this section. These findings are drawn from the discussions throughout the earlier chapters of this thesis.

6 2 1 Which crimes constitute GBV and what are their causes and consequences in a South African context

Many crimes which take place within certain contexts have been identified as forms of GBV. These crimes include assault, sexual offences and murder, among others.[6] South Africa has been shown to have staggeringly high levels of GBV which are aggravated by intersecting and compounding forms of oppression.[7] Empirical research has found that the legacy of inequality continues to manifest itself in the GBV experienced today. Moreover, the lasting structural inequality of apartheid has not

[6] Interim Steering Committee *National Strategic Plan on Gender-Based Violence and Femicide* 10-16.

[7] Abrahams, Mathews, Lombard, Martin & Jewkes (2017) *PLoS ONE* 2; Mills, Shahrokh, Wheeler, Black, Cornelius & van den Heever *Turning the Tide* IDS Evidence Report No. 118 23.

been addressed in the constitutional dispensation. In fact, empirical evidence has shown that the judicial system is perpetuating the same patriarchal norms and structural violence that the Constitution sought to eradicate.[8]

6 2 2 In what circumstances and manner of application are restorative justice appropriate for serious offences, particularly GBV offences?

Many authors have put forward criteria for determining if a case is appropriate for restorative justice. Feminist authors, in particular, have identified considerations for the application of restorative justice to cases of GBV.

From the discussion in the second chapter, this thesis finds that the following guidelines have emerged relating to the victim, offender and circumstances of the case. The victim must be identifiable and willing to allow for the application of restorative justice.[9] The age, mental, and emotional state of the victim must be considered along with the likelihood of their re-victimisation.[10] Many authors argue that the offender must be willing to participate in restorative justice out of pure voluntary consent and not because they assume that it will result in a lower sentence.[11] The previous offences, emotional, and mental state of the offender must also be considered. It must also be established whether the offender has taken accountability for the offence or if there are still facts in dispute.[12] For the circumstances of the case to be appropriate, there should not be any facts in dispute, and there must be sufficient evidence to charge the offender.[13]

The seriousness of the offence and any aggravating circumstances must be considered when deciding how to proceed, but this is not reason alone to preclude the application of restorative justice. Instead, aggravating circumstances and the safety of the victim should be considered when deciding how restorative justice will be applied. For instance, indirect mediation can be arranged if the victim is unwilling to meet face

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[8] Mills et al*Turning the Tide* IDS Evidence Report No. 118 24-27.

[9] Skelton & Batley *Restorative Justice in South Africa* 13; Marshall *Restorative Justice: An Overview* 25; Dandurand & Griffith *Handbook on Restorative Justice Programmes* 73-74.

[10] Dandurand & Griffith *Handbook on Restorative Justice Programmes* 73.

[11] TF Marshall *Restorative Justice: An Overview* (1999) 25; Dandurand & Griffith *Handbook on Restorative Justice Programmes* 73-74.

[12] Y Dandurand & CT Griffith *Handbook on Restorative Justice Programmes* (2006) 73.

[13] 73-74.

to face with the offender. The possibility of an imbalanced power dynamic between the offender and the victim is a concern raised by both feminist legal theorists and restorative justice scholars. Authors from both groups have argued that the facilitator of any restorative justice process must be aware of any power imbalances to mitigate potential risks.[14]

6 3 3 Have courts adequately upheld the rights of victims when applying restorative justice sentencing?

This thesis finds that the SCA did not adequately uphold the rights of the victim in the cases of *Thabethe* and *Seedat.* This is evident in the court's inability to restore the human dignity of the victim as discussed with regard to the primary research question.

This thesis also finds that the rights of the victim enshrined in the Victims' Charter have not been upheld. As discussed in the introductory chapter, the Victims' Charter was adopted by parliament in terms of section 234 of the Constitution.[15] This section allows parliament to adopt charters of rights in order to deepen the culture of democracy established by the Constitution.[16] As such, this thesis submits that the Victim' Charter gives content to the rights of the Constitution as they relate to victims of crime. This thesis argues that the SCA's handling of the requests of the complainants in *Thabethe* and *Seedat* eroded the victim's rights to be treated with fairness and have their dignity respected in terms of the Victims' Charter.[17] Further, the right to compensation in *Seedat* was ignored by the SCA.

[14] 73; D Coker "Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking" (1999) 47 *UCLA L Rev* 1 75-80, 103-107.

[15] *Wickham v Magistrate, Stellenbosch* 2017 (1) SACR 209 (CC) para 23.

[16] Section 234 of the Constitution.

[17] Department of Justice and Constitutional Development *Service Charter for Victims of Crime in South Africa* (2004) 6.

6 2 4 What potential does restorative justice have to promote transformative constitutionalism in the criminal justice system regarding the rights of victims and accused or convicted persons?

This thesis finds that an approach to restorative justice which is grounded in *ubuntu* and guided by intersectional feminist legal theory shows great potential to promote transformative constitutionalism.

As mentioned above, restorative justice shows great potential to restore the rights of victims of crime. Restorative justice frames the individual holders of rights as the aggrieved party in a crime and focuses the response to crime as the restoration of these rights. As such the focus of the criminal justice system can become the restoration of human dignity and other constitutional rights.

This thesis submits that two key outcomes emerge when restorative justice is grounded in the value of *ubuntu*. First, due recognition is given to African legal systems which have been undervalued by past injustices.[18] Second, the value of *ubuntu* gives content to the right to human dignity, which is being restored by restorative justice.

This thesis finds that a third and necessary element to the potential for transformative constitutionalism is the use of intersectional feminism. The Constitutional Court has held that intersectionality is a powerful tool for addressing past injustices as the main aim of transformative constitutionalism.[19]

As mentioned above, the theoretical framework of this thesis can be likened to that of a sea vessel. The vessel through which justice for victims of GBV is carried out is the theory of restorative justice. Put differently, restorative justice is the main vehicle for the implementation of justice. The fabric of this vessel is the value of *ubuntu*. The intersectional feminist lens is the rudder steering the vessel through the perilous waters of GBV. The work of intersectional theorists is meant to steer the vessel away from the sharp rocks of injustice and treacherous currents of re-victimisation. Former Chief Justice Langa has already argued that transformative constitutionalism should not be thought of as a destination at which the mandate of transformation ceases.[20] Transformative constitutionalism is rather, the journey on which we have embarked.

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[18] 1995 2 SACR 1 (CC) paras 374-376.

[19] 2021 2 SA 54 (CC) paras 90, 05, 07, 102.

[20] P Langa “Transformative Constitutionalism” (2006) 17 *Stell LR* 351 352.

6 2 5 To what extent have South African courts' application of restorative justice embraced the value of *ubuntu* and furthered transformative constitutionalism in the criminal justice system?

This thesis submits that only some of the courts' application of restorative justice has fully embraced the value of *ubuntu* and furthered transformative constitutionalism. This thesis has found that the Constitutional Court's application of restorative justice in *S v M* is indicative of an approach to restorative justice grounded in the value of *ubuntu*. This is evident in the fact that the accused was ordered to compensate the victims for the money she had defrauded them of and apologise to them in person. This is indicative of the *ubuntu*-based restorative justice, which uses restitution to promote the restoration of human dignity and the possibility of reconciliation.

This judgment also considers how restorative justice can be used to promote the constitutional rights of parties in contact with the justice system. This thesis submits that an approach to sentencing which looks at the impact of a sentence on the constitutional rights of those it impacts is indicative of the promotion of transformative constitutionalism.

This thesis submits that the judgments of the SCA do not promote an approach to restorative justice which embraces the values of the Constitution or promotes transformative constitutionalism. This is partially because the SCA decided not to apply restorative justice in the cases of *Thabethe* and *Seedat*. However, the SCA's understanding of restorative justice in these cases does not indicate a resonance with the value of *ubuntu*. Furthermore, the lack of restitution awarded by the courts and the approach to the victim's voice resulted in the victim's human dignity not being restored. This thesis submits that these judgments are not indicative of an approach which furthers transformative constitutionalism.

6 2 6 What is preventing courts from adequately centring victims and promoting constitutional imperatives when applying restorative justice in cases of GBV?

This thesis finds that persistent misconceptions regarding restorative justice theory due to inconsistent or inadequate consultation of restorative justice and feminist theory are preventing courts from centring victims. This thesis finds that many courts have misunderstood the objectives and values of restorative justice which has resulted in many important misconceptions about restorative justice theory being perpetuated.

Firstly, the notion that restorative justice is only appropriate for lesser crimes and that it is the nature of the crime which should decide whether restorative justice is applied. This can be seen particularly in *Thabethe* and *Seedat*. This thesis submits that while this is a common misconception, the High Court's attempt to downplay the seriousness of the crime in order to justify the application of restorative justice, was a crucial misstep. As a result, the SCA was misdirected to decide whether the nature and severity of the crime was appropriate for the application of restorative justice. The core question should have been whether, given the circumstances of the case, the victim could have been restituted. This issue was not given adequate attention at all because of the focus on the nature of the crime and subsequently, the punishment of the offender.

This links to the second issue regarding the application of restorative justice; the focus on the treatment of the offender rather than the restoration of the victim. *Thabethe* and *Seedat* are notable examples of this issue but all of the cases dealt with in this thesis are indicative of this phenomenon to some degree. This thesis submits that this issue is the result of restorative justice being applied in a retributive criminal justice system which is offender-centric in design. In order to correctly apply restorative justice, courts need to treat the restitution of the victim with at least as much importance as the punishment of the offender.

The third misconception regarding restorative justice is that it can be used as a reason to offer lesser sentences to offenders when there are already mitigating circumstances. This misconception emerges somewhat as a result of the first two issues: that restorative justice is a softer option for lesser crimes and that it is focused on the offender. This misconception is present in almost all of the cases but is particularly obvious in the High Court judgment of *Seedat*. However, this thesis

submits that in almost all of these cases, the conclusion that restorative justice should be applied was arrived at after a consideration of the mitigating circumstances in favour of lowering the accused's sentence. A proper consultation of restorative justice theory would have indicated that restorative justice should not be approach as an alternative to punishment but rather a mechanism for restoration and restitution.

6 3 Further research needed

Now further areas of research are identified based on peripheral issues raised in this thesis. First, some authors have argued that courts should take note of the application of restorative justice sentencing in the jurisdictions of Canada and New Zealand. These jurisdictions have incorporated their own customary law into the formal justice system and also managed to balance custodial sentences and restorative justice according to Lubaale. Further research can be done on a comparison of the approaches of these jurisdictions and South Africa's approach to restorative justice sentencing.

Second, another area of further research is the extent to which courts have considered the interests of the victim as a member of the community when applying the Zinn triad. This triad requires courts to consider the nature of the offence, the circumstances of the accused and the interests of the community. Further research can investigate to what extent courts are currently taking into account the interests of the victim as a member of the community and whether this is sufficient to satisfy the requirements of a restorative justice approach. Based on the findings of this thesis, it appears, at least from the case law examined, that the interests of the victim are not often taken fully into account. Further research could uncover whether a restorative justice paradigm would require courts to add the interests of the victim as a fourth consideration to the existing sentencing triad.

The third area of research which has been identified is the procedure for court-awarded compensation for victims of crime. Currently the legislation in place requires victims to apply for compensation. The Victims' Charter identifies the right to compensation as a fundamental right of victims of crime. It can be investigated whether there is a sufficient duty on the judiciary and the National Prosecuting Authority to inform victims of this right. Furthermore, it can be researched whether

requiring victims to lodge an application for compensation places too great of a burden on victims to the extent that the right to compensation is not being adequately upheld. This investigation can also consider the lack of a victim's compensation fund.

6 4 Conclusion

This thesis has found that South African courts have not adequately considered the centrality of victims, constitutional imperatives and the theorists when applying restorative justice in cases of GBV. This thesis finds that this inadequacy is the result of persistent misconceptions regarding restorative justice and the restitution of victims. This thesis finds that GBV occurs within many contexts in South Africa and that intersectional and *ubuntu* feminist theories are pivotal tools for navigating these contexts. This thesis finds that restorative justice can be appropriate for GBV offences in certain circumstances, provided that the guidelines identified in this research are followed. This thesis finds that the SCA, in the cases of *Thabethe* and *Seedat* has not adequately upheld the rights of victims, particularly the right to dignity as informed by the Victims' Charter. This thesis finds that an approach to restorative justice which is grounded in *ubuntu* and guided by intersectional feminist legal theory shows great potential to promote transformative constitutionalism. This thesis finds that the Constitutional Court's approach to restorative justice has embraced the value of ubuntu and furthered transformative constitutionalism. However, the SCA has not met either of these criteria and has actively hindered the progression of restorative justice jurisprudence. Further research is needed to compare the approaches of foreign jurisdictions and that of South Africa. Further research can also be done on the addition of the victim's interests as a component of the Zinn triad as well as the victim's right to compensation.

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