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The possible application of the principles of restorative justice to crimes of violence committed between intimate partners in South Africa

School of law: college of law and management studies

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This mini dissertation is submitted in partial fulfilment of the LLM degree in advanced criminal justice 2024, under the supervision of: Professor Stephen Peté

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I, Kamogelo Innocentia Nkwatle (nee Mahila) declare that:

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B. This dissertation has not been submitted for any degree or examination at any other university.

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The subject of restorative justice has been one of the driving forces behind the transformation and development of the South African criminal justice system following the apartheid era. The Constitution of the Republic prioritises and gives recognition to the needs and rights of all citizens of South Africa (hereinafter ‘RSA’), including victims of crime¹. Our legislature has taken significant steps in developing our law to include restorative justice principles and programs which promote the participation of victims in the criminal justice process, through the department of Correctional Services and department of Justice & Constitutional Development².

South African case law³ requires that the interests of society should be considered from the commencement of criminal proceedings (when bail is considered) right up until the conclusion (sentencing) thereof⁴. This is to ensure that the court always bears in mind throughout the proceedings that injustice has not only been committed against the State but also against the actual victim of crime⁵ whose rights have been infringed by the crime.

The act of unlawfully and intentionally assaulting another, in cases where direct force is involved, continues to be a growing and ever prevalent offence within our country⁶ as evidenced by our crime statistics. South African citizens have the constitutional rights to personal dignity and to bodily integrity and to not be subjected to live in fear especially in their homes⁷. The main focus of this dissertation is to determine the manner in which the principles of restorative justice may be able to play a role in crimes of violence between intimate partners, such violence is commonly referred to as ‘gender-based violence.’

¹ Chapter two of our Constitution contains the Bill of Rights which lists all human rights applicable to all South Africans. Section 10, 11 and 12 will be more relevant for this dissertation which provides for the right to human dignity, life and safety and security of the person respectively.

² The Department of Correctional Services promotes victim participation and empowerment in criminal proceedings through various programs designed for restorative justice intervention, such as victim – offender dialogue, family conferencing and requesting the written opinion of the victim when considering whether to release a sentenced prisoner on parole. This department gets involved once an accused has been sentenced and is now under their directive. While the criminal proceedings are pending in court, it is the Department of Justice and Constitutional Development that plays a significant role. From the preliminary stages of criminal proceedings, a victim will be requested to write a statement on their attitude regarding the release on bail of an accused and then again be consulted on whether they wish to mediate the matter or proceed to trial. After conviction and at sentencing stage, the victim will then be given an opportunity to give a victim impact statement either orally or in writing.

³ *S v M* 2007 (2) SACR 539 (CC) wherein the Constitutional Court referred to what is commonly referred to as the ‘Zinn triad’ in *S v Zinn* 1969 (1) SACR (Ap).

⁴ Ibid.

⁵ See Constitutional Court decision of *S v Mashaba* (CC 29/2021) [2022] ZAMPMBHC 92.

⁶ https://www.saps.gov.za/services/downloads/2023-2024_-_3rd_Quarter_WEB.pdf accessed 20 April 2024.

⁷ Ibid note 1.

Furthermore, this thesis focuses on the way in which broken families may possibly be restored through interventions within the criminal justice system which come into operation when intimate partners involved in violence against each other, no longer wish to proceed with a criminal trial. This thesis will further examine the way the system may be able to ensure that the rights of such intimate partners are protected throughout the process and the possibility of how further violence may be limited.

Most South Africans hold the view that the justice system protects and prioritizes the rights of the accused persons over and above those of the victims, and that victims are not given enough recognition by the courts. This is displayed through comments made on social media and on the news, and with people chanting outside courts with placards often demonstrating the cry out of victims of gender-based violence⁸. Often courts take judicial notice of this⁹. This then draws attention to the fact that it is important to strike a balance between seeking to rehabilitate an offender and giving a sense of justice to the victim and ultimately, possibly restoring relationship between the offender and the victim. In this dissertation, the current application of restorative justice principles will be discussed and evaluated, and how the application of the present restorative justice interventions may be improved upon.

⁸ <https://www.fordfoundation.org/news-and-stories/stories/ending-gender-based-violence-in-south-africa-one-march-at-a-time/> accessed on 14 July 2024.

⁹ S v Tshabalala and Another 2020 (2) SACR 38 (CC) also see S v Ntuli [2019] ZACC 48.

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I. INTRODUCTION

a) *Definitions:*

The criminal justice system of RSA is founded upon the Constitution¹⁰ (herein after ‘The Constitution’). Legislation and case law gives effect to the Bill of Rights¹¹ and in addition to this, restorative justice forms part of the principles of international law¹² which our Constitution recognises and seeks to develop and integrate into justice system.

The process of defining the concept of ‘restorative justice’ by international scholars began in 1977 to describe the processes which sought to resolve disputes outside the traditional criminal justice system¹³. Restorative justice has been defined by Omale as, ‘a problem-solving approach to crime which involves the parties themselves and the community generally, in an active relationship with statutory agencies.’¹⁴

A renowned organization in the United Kingdom known as the ‘Mediation UK’¹⁵ defines restorative justice as, ‘a process whereby victims, offenders and communities are collectively involved in resolving how to deal with the aftermath of an offence and its implications for the future’. The latter definition is relevant to this dissertation as it provides the background to the concept of restorative justice as defined internationally. However, several scholars have criticised the latter definition as being narrower than the former as it somehow excludes the role of the criminal justice system and legislation in the alternative dispute resolution processes. RSA derived its definition from these historical definitions.

South African scholars have also given a contextual definition of ‘restorative justice’. For purposes of this dissertation this definition will be most relevant. In RSA¹⁶, restorative

¹⁰ The Constitution of South Africa Act 108 of 1996 (herein after the Constitution).

¹¹ Section 39(2) of the Constitution.

¹² Section 39(1)(b) of the Constitution.

¹³ DJO Omale ‘Justice in history: An examination of African restorative justice and the emerging restorative justice paradigm (2006) *African Journal of Criminology & Justice Studies* 2(2).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ The government booklet on restorative justice is based on ‘The Service Charter for Victims of Crime in South Africa’ which is an important instrument for promoting justice for victims of crime in South Africa. It is also known as the ‘Victim’s Charter’ and, it too was drafted to give effect to the bill of rights in the South African Constitution as well as the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 (GA/RES/40/34).

justice is preferably defined, amongst other definitions, as ‘an approach to justice that aims to involve the parties to a dispute and others affected by the harm (i.e victims, offenders, families concerned and community members) in collectively identifying harms, needs and obligations through accepting responsibilities, making restitution, and taking measures to prevent a recurrence of the incident and promoting reconciliation.’¹⁷

It is clear from the preferred definition in RSA, that it is impractical and almost impossible to deal with the concept of restoring justice in isolation, in other words, it is an inclusive process between the offender and the victim. One cannot address the issue of restorative justice by looking at the victim in isolation as the process of restorative justice is inherently inclusive and has many role players to ensure that it is effective and reaches the desired outcome. The various restorative justice programs and outcomes will be discussed in chapter two below.

b) Historical background:

South African law was developed from the Roman – Dutch law and our courts have highlighted the major role that the Roman – Dutch law played in the development of our jurisprudence. In the Constitutional Court case of *Le Roux v Dey*¹⁸ the court highlighted the essence of Roman-Dutch law when it described its legal system as a ‘rational, enlightened system of law, motivated by considerations of fairness.’ The court held further that, ‘in virtually every aspect of Roman-Dutch law one will find equitable principles and remedies which give concrete expression to its underlying concern with justice and fairness.’ There are a number of concepts relating to restorative justice to be found in the Roman – Dutch law, one of those is illustrated by the writer G.J. Van Niekerk¹⁹ who points out that ‘the Roman-Dutch defamation remedy of *amende honorable*²⁰ is compatible with the African concept of ‘ubuntu’ against the backdrop of the fundamental constitutional values of human dignity, fairness and reconciliation and the affirmation of these values in restorative justice.’

¹⁷ Llewellyn, J.J. and Howse, R., 1999. Institutions for restorative justice: The South African truth and reconciliation commission. *The University of Toronto Law Journal*, 49(3), pp.355-388.

¹⁸ *Le Roux v Dey* 2011 (3) SA 274 (CC) in par [198].

¹⁹ Van Niekerk GJ ‘*Amende honorable and ubuntu: an intersection of ars boni et aequi in African and Roman-Dutch jurisprudence?*’ (2013) 19(2) *Fundamina: A Journal of Legal History* at 397-412.

²⁰ Defined as, ‘reparation for a crime or injury formerly consisting in such a formal and humiliating acknowledgment of offense and apology as will restore the injured or offended honor of the one wronged.’ – Dictionary, M.W., 2002. Merriam-webster. On-line at <http://www.mw.com/home.htm>, 8(2).

According to Van Niekerk,²¹ African customary law and its underlying principles are founded on ubuntu, ' and even though this concept has not been strictly defined in our jurisprudence, it can be agreed that it refers to 'humanity'. This is in line with the provisions of section 10 of our Constitution²².

The South African justice system seemingly incorporated (as per the government restorative justice booklet referenced above)²³, the restorative justice approach because statistics indicated that the punitive approach to justice was not producing the results desired in firstly decreasing the levels of crime and secondly rehabilitating and deterring offenders and potential offenders (crime statistics discussed below). The restorative justice programmes are not imposed on the parties involved, most especially the victim, but are encouraged where the victim no longer wishes to proceed with the conventional criminal justice proceedings. The following discussion depicts how some restorative justice practices were introduced into our justice system.

c) The Truth and Reconciliation Commission:

The advent of the democratic regime brought about the Truth and Reconciliation Commission (herein after 'the TRC'), which combined indigenous and Christian values.²⁴ The TRC process, as specific, limited and 'sui generis' as it was, was a good example of an effort to strive for restorative justice in RSA. The TRC mainly dealt with the crimes committed during the apartheid era and afforded, willing participants, both victims and offenders, an opportunity to reconcile and get the closure needed by those affected by the crimes. It also afforded immunity from prosecution to those offenders who came and confessed their participation in the commission of crimes against humanity which were politically motivated and took the time to offer their sincere apologies to the victims.²⁵

The justice system needed to create a platform within which people were able to reconcile after an injustice has occurred and thus 'forgive and forget' or 'forgive and reform' and this was the main reason why the TRC was formed, to give effect to this within a new

²¹ Van Niekerk, op cit note 17.

²² Section 10 of the Constitution.

²³ See note 16 above.

²⁴ Angelo Kevin Brown 'The Traditional Restorative Justice Practices That Have Influenced Southern Africa In Minding the Gap Between Restorative Justice, Therapeutic Jurisprudence, and Global Indigenous Wisdom' (2023) IGI Global 56 – 75.

²⁵ Ibid.

democratic era. The process resulted in the resurfacing of restorative justice philosophy,²⁶ and this was one way in which restorative justice was introduced into participation within the South African criminal justice system.

Another indication that principles of restorative justice are significant within the South African criminal justice system is the importance of mediations, discussions and deliberations within the customary law system. When one learns about the architectural structure of the Constitutional Court²⁷, one discovers that it was inspired by the indigenous customs of conflict resolution which took place by the indigenous people ‘under a tree.’ In indigenous practice, a victim and an offender would be summoned by the head of the community (‘Induna’ as referred to in the Zulu nation) or the king in that area and the matter would then be resolved through mediations, discussions and then deliberations, this symbolised community group conferencing which is a form of restorative justice programme discussed more in detail in the following chapter.

d) The primary focus of this dissertation:

As noticed from the title of this dissertation, the focus will be on crimes committed between intimate partners. The decision to focus on this topic stems from the amendments to the Domestic Violence Act²⁸ (discussed in detail below) as well as the rising number of cases involving violence, as evidenced from the crime statistics discussed more in detail in chapter three below. When coming to crimes involving gender-based violence, the position is such that post the commission of an offence and at the conclusion of most criminal trials, the victim does not get reinstated or restored to the original position (or at least as close as possible) that he/she had been before the commission of the offence. The reason is that even though the offender is sentenced to pay a fine or to serve a period of imprisonment, the victim usually remains with the emotional scars and psychological harm resulting from the incident without any recourse. Yes, one might argue that the victims of crime are satisfied once an accused has been sentenced, but how does the system assist with the healing process?

Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the State- it is an injury or wrong done to another person and this reasoning

²⁶ Ibid.

²⁷<https://www.concourt.org.za/index.php/aboutus/thebuilding#:~:text=The%20court%20chamber%20is%20more,to%20the%20Great%20African%20Steps>. Accessed on 17 July 2024.

²⁸ Domestic Violence Act 116 of 1998 as amended.

forms part of the basic purpose and aim of restorative justice.²⁹ It is to aim as much as possible to restore the parties and possibly the relationship that they shared before the offence and to also find ways to rehabilitate the offender through other means than the criminal justice system where he or she would end up with a criminal record. It is further to promote victim empowerment. It is obvious that the principle itself cannot find a blanket application in all forms of criminal offences as the seriousness and gravity of the offence would have to be considered even in matters involving violence, i.e. the degree of violence and any injury inflicted would be taken into consideration.

Alternative dispute resolution (a form of restorative justice program discussed in chapter two), as well as traditional tribunals, allow that in unrelated instances such as stock theft, the victim be compensated for example the cow he lost or that the offender and sometimes his family, undertake to hand over another cow to him. The main point here, is to marry customary practices to resolve conflict between two people, to the formal criminal justice system and to incorporate the same thinking towards crimes involving violence, as the focus in this study will be on the role that restorative justice may be able to play in cases involving crimes of violence committed between intimate partners in RSA. This thesis will also focus on how victims are accommodated by the legal system through active participation/inclusion and whether there has been significant development in our law regarding domestic violence. Furthermore, to find ways in which the offender can also be rehabilitated without prosecution, from committing similar offences in future and in certain instances to restore families. The two processes do not have to be interlinked per se, secondarily victimizing the complainants, but may run separately but concurrently. At times restorative justice is initiated at the instance of the victim and in those instances, the processes are carried out together.

e) Specific Offences and definitions:

It is thus imperative, to define what ‘assault’ and ‘gender-based violence’ are in the context of this dissertation and discuss the elements attached to each definition. ‘Assault’ is defined as ‘the unlawful and intentional application of force on another person (or inspiring the belief that force is about to be applied)’³⁰. The elements thereof are that there must be application of force (direct physical assault on another) or the inspired subjective belief that force is about to be applied (indirect assault like a threat) which is intentional and against the law (unlawful). There

²⁹ S v Matyityi 2011 (1) SACR 40 (SCA) paras 16 -17.

³⁰ Kallie Snyman & Shannon Vaughn Hoxtor *Snyman’s Criminal Law* 7 ed (2020).

is also the additional element of ‘intent to do grievous bodily harm’ which normally refers to an assault where a weapon or instrument is used.

‘Gender based violence’ (herein after ‘GBV’) is ‘violence directed against a person because of that person’s gender or violence that affects persons of a particular gender disproportionately.’³¹ The European Commission’s definition is the most significant historical foundation upon which South Africa derived its definition of gender-based violence. It is clear from this definition that the offence must be committed by one gender against a person of the opposite gender.

f) The purpose of this thesis:

The focus of this paper is to discuss whether the restorative justice programmes (discussed in chapter two) in RSA’s criminal justice system, cater to both the victims of crime as well as the offenders, where the violence is between intimate partners and furthermore, whether our justice system has developed significantly in this regard and finally to recommend ways in which developments can be improved upon.

The rationale of the thesis is to measure the effective incorporation of restorative justice programs within our South African criminal justice system, how well it may contribute to a well- rounded justice system that caters for victim inclusion. Furthermore, the importance of this study is informed by the daily cases one sees in criminal courts as a Prosecutor, one sometimes feels that the system could always do more, to restore and place the victim of crime in the position they were in before the commission of the offence. Whether it is to restore the victim mentally, emotionally or physically long after the commission of the offence and conclusion of the criminal trial. This is not always possible, but the law must be codified in a way that caters more for victims of crime.

g) Research Questions:

At the end of the discussion this thesis aims to answer the following questions:

1. Whether the principle of restorative justice being actively implemented within the South African criminal justice system?

³¹ https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/what-gender-based-violence_en accessed on 11 July 2024.

2. Whether restorative justice play vital role in cases of gender based violence between intimate partners in South Africa? If so, what can be done to ensure that role players all come together to ensure same is implemented and what developments have transpired since the birth of the Constitution?
3. Does restorative justice in South Africa promote victim empowerment?
4. Are the emotional and psychological needs of victims of gender based violence sufficiently recognized and protected throughout criminal proceedings?
5. How can families be repaired and restored through the criminal justice system where intimate partners no longer wish to proceed with the criminal trial and how can the system ensure that their rights are protected through the process and limit or eliminate the possibility of reoffending?

h) Research Methodology:

This is a qualitative study, and the methodology adopted in this dissertation was desktop research which analysed an extensive range of documentary data. The data utilised in the desktop research was sourced using search engines such as Sabinet, Google scholar, Jstor, Saflii and others using key words such as ‘gender-based violence’, ‘restorative justice’, ‘intimate partner violence’, ‘assault’, Domestic Violence Act’ amongst others.

The researcher has extensive experience in this field, which assisted her in identifying the relevant sources of data used in this dissertation. The experience of the researcher in the field includes the fact that she is currently employed by the National Prosecuting Authority as a Public Prosecutor and was previously employed by Legal Aid South Africa as an attorney. Furthermore, the researcher has both direct and indirect experience through her previous interaction with victims of cases involving intimate partner violence.

Finally, the researcher has gained experience through interaction with stakeholders from the department of justice and constitutional development, department of correctional services, the South African Police Service, department of social development, department of health and some local tribal authorities who play a vital role in restorative justice processes.

i) Chapter Breakdown:

The chapter breakdown of the thesis is as follows:

Chapter One: Introduction and Background:

In this chapter I will define restorative justice and provide a brief historical background of the concept. I will also define what the meaning of ‘gender-based violence’ and ‘intimate partners’ are in the South African context and in the context of this dissertation as well as the common law definition of assault and assault with intent to do grievous bodily harm.

Chapter Two: Programmes in support of restorative justice

In this chapter I will discuss restorative justice as a response to some of the gender based violence cases in RSA, specifically in the context of incidents between persons who are in an intimate relationship. I will also discuss some of the restorative justice programmes that are currently being implemented in RSA and whether they can be applied to effectively address the injustice caused by the offence.

Chapter Three: An International perspective versus South African Perspective on restorative justice legal principles

Outlined and carried out in this chapter is a comparative discussion of the legal principles of restorative justice applied in other countries, including the United States of America versus those applied in RSA. In this chapter, the writer highlights the approach to restorative justice in cases involving domestic violence and gender-based violence in the abovementioned country as a response to healing families and relationships.

Chapter Four: Case law and restorative justice: A victim centered approach

This chapter is discussion on developments in the law relating to restorative justice against case law of matters involving gender-based violence.

Chapter Five: Recommendations and Conclusion

This chapter is a summary of the discussion on existing documents pertaining to restorative justice and contains recommendation that legislation be passed to codify restorative justice principles and guidelines for all relevant stakeholders.

II. PROGRAMMES IN SUPPORT OF RESTORATIVE JUSTICE

a) *Truth and Reconciliation Commission as a form of restorative justice programme*

As mentioned in the first chapter, restorative justice was historically displayed in RSA through the TRC. The writer herein submits that the TRC falls under the category of what is commonly known as ‘victim-offender dialog’ where victims (or their families) come face to face with their perpetrators to try and get answers from them regarding the commission of the offence. It can also be classified under ‘family group conferencing’ and both these programmes will be discussed in detail below. The TRC process will not be discussed at length as it sought to address the crimes committed during apartheid which does not relate to this thesis. The mentioning of it was to indicate to the reader that it marked the first significant and public programme of restorative justice and is the most common example that South Africans can relate to.

b) *The National Development Plan and the Victim’s Service Charter:*

In 2011, the National Development Plan was published by the government of RSA and Chapter 12 set out that the aim was to build safer communities³². Therefore, the Justice, Crime Prevention and Security Cluster was formed which comprises of *inter alia*, South African Police Service, Department of Home Affairs, Department of Justice & Constitutional Development and the South African National Defense Force. The cluster not only focuses on the reduction of crime but also the streamlining of the criminal justice system as well as correctional services system to improve all aspects of justice, crime prevention and security through better understanding of the work of the departments that fall within this cluster.³³ The mission and vision of the Cluster, is to promote victim empowerment by giving effect to the provisions of the Victim’s Charter.

The Service Charter for Victims of Crime in South Africa³⁴ in its preamble states as follows:

³² <https://www.nationalplanningcommission.org.za> accessed 18 May 2024.

³³ <https://gbv.org.za> accessed on 14 May 2022.

³⁴ South African Department of Justice and Constitutional Development, 2008. Service Charter for Victims of Crime in South Africa.

‘Hereby adopt this Victims’ Charter to provide for the consolidation of the present legal framework in South Africa relating to the rights of and services provided to victims of crime and to:

- Eliminate secondary victimization in the criminal justice process.
- Ensure that victims remain central to the criminal justice process.
- Clarify the service standards that can be expected by and are to be accorded to victims whenever they encounter the criminal justice system; and
- Make provision for victims’ recourse when standards are not met.’

To ensure that victims remain central to the criminal justice process even at preliminary stages (arrest and bail application) and considering the disturbing rate in which gender-based violence incidents are rising, it has become mandatory that a victim be consulted with regards to their safety, should an accused person apply to be released on bail. What usually happens in practice is that the investigating officer approaches the complainant and obtains a sworn statement from her/him detailing how their safety would be affected should the accused be released on bail³⁵. This would then be read on record by the Prosecutor during bail application proceedings. In March of 2023, the amended provisions of the Criminal Procedure Act³⁶ (herein after ‘CPA’) came into effect which now lists matters involving GBV in schedule 5 for purposes of a bail application. This means that the onus now rests with the accused, to show the court that it is in the interests of justice that he be released on bail.³⁷ The following chapter which deals with South African law relating to gender-based violence will further elaborate on these amendments. This is just to highlight one of the ways to ensure protection of victims in the early stages of criminal proceedings.

The Service Charter for Victims outlines the rights of a victim during criminal proceedings,³⁸ and it must be noted as stated therein that these rights and programmes may be implemented at any stage after the commission of the offence. In other words, the framework of restorative justice programmes as per our governmental guidelines, can take place either at pre- trial stage, at pre- sentence stage as well as after conclusion of the trial.

³⁵ Section 60(4)(a) of the Criminal Procedure Act 51 of 1977 as amended.

³⁶ Ibid.

³⁷ Section 60 (11)(b) of Act 51 of 1977.

³⁸ Ibid note 19.

c) *Restorative Justice Programmes which may be applicable to intimate partner violence:*

Noting the provisions of the Victim's Charter highlighted above, it then follows that restorative justice programmes should aim to give effect to the provisions therein and hence this dissertation is focusing on violence perpetrated between intimate partners and whether restorative justice programmes may be able to provide a useful tool in ensuring that victims of such violence are heard and catered to throughout criminal proceedings. It must be highlighted that the concept of restorative justice is for the benefit of the victim on the one side and hence the importance that victims willingly participate in these programmes, and on the other side, it aims to rehabilitate the offender by making him accept responsibility for his actions.

In this chapter I will discuss a few programs that are currently being implemented in our justice system to promote victim empowerment through restorative justice interventions. Those programmes that we as stakeholders incorporate in practice, including alternative dispute resolution, diversion, victim – offender mediation dialogue, the usage of victim impact statements in criminal proceedings, correctional supervision, written/verbal apologies and family group conferencing respectively. The discussion herein seeks to establish whether these forms of interventions may be suitable for crimes involving violence between intimate partners since no programme can find a blanket application. The following are the some of the restorative justice programs currently being implemented in our justice system:

i) *Alternative Dispute Resolution: Historical origin and modern practice:*

One of the restorative justice interventions is Alternative Dispute Resolution (herein after 'ADR') and that is when the parties come together to try and resolve the matter formally, in the presence of a mediator. It qualifies as a restorative justice intervention as the result is that the matter is resolved outside of formal court, as such it is also applicable in criminal proceedings as per the National Prosecuting Authority Policy Guidelines.³⁹

³⁹<https://www.npa.gov.za/sites/default/files/uploads/Annexure%20A%20PART%2051%20Corporate%20ADRM.pdf> accessed on 15 July 2024.

Albert Fiadjoe, writes that,

‘The origins of ADR trace to the traditional societies. Traditional societies, without the trappings and paraphernalia of the modern state, had no coercive means of resolving disputes. So, consensus building was an inevitable and necessary part of the dispute resolution process. The court system only developed as a necessary by-product of the modern state. Societies in inter alia Africa, were practising non-litigious means of dispute resolution long before the advent of the nation state, for the building of long-term relationships was the bedrock on which those societies rested.’⁴⁰

In RSA, once the victim has opened a criminal case of assault with intent to do grievous bodily harm against an intimate partner, but later decides that she/he wishes to reconcile and possibly withdraw charges, the prosecutor, after consulting with the victim may arrange for a formal mediation to take place⁴¹. It important to note that this is not the only scenario in which mediation can take place as it can also be initiated by representations submitted by the accused to the State. The prosecutor then plays the role of a mediator, once satisfied that the victim is not being threatened or coerced into withdrawing charges. The aim of this is to resolve the matter without going through a criminal trial. It is important to note that this is done with the full consent of the complainant⁴².

The benefit of ADR is that the complainant is not exposed to the formal criminal proceedings in court (which tentatively amount to secondary victimization by having the victim testify about the incident in open court). Furthermore, in the event that the process is successful, between intimate partners who have children together, a family is restored.

Faris, in his doctoral dissertation states that, ‘the crux of the matter is that ADR is unofficially effecting procedural reform by making it possible to exclude certain disputes from the public system [criminal court] of dispute resolution and to deal with these disputes privately.’⁴³

⁴⁰ Faris, J.A., 1995. *An analysis of the theory and principles of alternative dispute resolution* (Doctoral Dissertation, University of South Africa).

⁴¹https://www.npa.gov.za/sites/default/files/uploads/Annexure%20A%20PART%2051%20Corporate%20ADRM_0.pdf accessed 19 December 2024.

⁴² Ibid.

⁴³ Ibid note 40.

ii) *Diversion:*

Diversion is a form restorative justice intervention and usually follows as an outcome of ADR. However, an offender can also be diverted by a prosecutor in his/her discretion⁴⁴. Diversion refers, 'to diverting a child⁴⁵, adolescent or adult accused of committing a crime away from formal court procedures towards a more constructive and positive solution.'⁴⁶ It comprises of many programmes aimed at rehabilitating an offender who has taken responsibility for his actions. In South African law, this type of restorative justice intervention is mostly applied to children in conflict with the law⁴⁷ although applicable to adult offenders as well⁴⁸. Diversion requires that offenders:

- Are held accountable for the crime committed and takes on the responsibility to make amends for their misconduct; and
- Embark on a healing process for themselves, their families, the victim(s) and the community as a whole.

In practice, diversion usually occurs at the early stages of criminal proceedings (for matters such as theft by shoplifting), in most instances on the day that the matter is brought to court for first appearance. However, in the context of offences involving minimal violence, an offender is usually diverted at the stage when either the complainant indicates to the prosecutor that he/she no longer wishes to proceed with the case or at the request of the offender by way of submitting representations for diversion to the prosecution. What usually happens in practice is that, if the prosecution accepts the representations, the offender would then be diverted to NICRO⁴⁹ for a 30-day period, to undergo diversion programs. This is also applicable to matters involving violence between intimate partners but where no injuries were inflicted (common assault). The case would be postponed for a period exceeding 30 days to allow for that diversion program and a report to be filed from NICRO indicating whether the

⁴⁴<https://www.npa.gov.za/sites/default/files/uploads/Prosecution%20Policy%20%28w.e.f.%20June%202013%209.pdf> accessed on 19 December 2024.

⁴⁵ According to section one of the Child Justice Act 75 of 2008, 'diversion' means 'diversion of a matter involving a child away from the formal court procedures in a criminal matter by means of the procedures established by Chapter 6 and Chapter 8.'

⁴⁶ <https://www.nicro.org.za/index.php/en/help/diversion-vs-non-custodial-sentencing> accessed on 26 March 2024.

⁴⁷ Section one of the Child Justice Act 75 of 2008 states that, 'restorative justice' means 'an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.'

⁴⁸ Ibid note 41.

⁴⁹ South African National Institute for Crime Prevention and the Reintegration of Offenders.

offender complied with instructions and thereby completed the program. Given the current levels of crime in the country, diversion may no longer be the most suitable program to address the issue of gender-based violence, although in some instances it may be a powerful tool to restore families, in cases where the violence occurred for the first time between partners and no serious injuries were inflicted. This depends on the willingness of the offender to participate and learn from this program. Victims do not partake in the diversion program but are informed by the Prosecutor or the Investigating Officer of the decision to divert the accused if the diversion was not an outcome of the ADR process between parties.

iii) Victim- Offender Mediation and Dialogue:

Victim- Offender Mediation and Dialogue is a programme that resembles ADR, however, unlike ADR, it often takes place after a criminal trial is concluded. In practice it is usually under the supervision of the correctional services officials and not a prosecutor. The victim and the offender are given an opportunity to meet in a secure and structured setup to partake in a discussion about the offence that occurred. A correctional official will be present to play the role of a mediator. It must be noted once more, that this program allows for the victim to withdraw his/her participation at any stage if they no longer wish to engage in the dialogue⁵⁰. Victim-offender dialogue and mediation is usually used as a tool to offer closure to a victim of crime in the form of question and answer. A victim is allowed to ask the offender anything about the incident to obtain closure. This is the difference between this program and ADR, as this takes place post sentencing. The purpose of the dialogue is to encourage the offender to learn more about the crime's impact on the victim and to take responsibility for harm caused by the offence.

iv) Victim Impact Statement:

A victim impact statement (herein after 'VIS') is not a restorative justice program per se, but it is one way in which victim participation is incorporated in criminal proceedings. It gives the victim a voice during sentencing proceedings in court as it contains the details of how the crime impacted the victim physically, emotionally and financially. It basically aims at victim empowerment. The statement is compiled by the victim with the assistance of the court

⁵⁰ Ibid note 16.

preparation officer, employed by the National Prosecuting Authority. This statement is then read into record by the prosecutor during arguments on sentence and it is then handed in (usually with no objection from the defence) to the court to form part of the record. The court must consider its contents when considering a suitable sentence. A VIS can also be verbal, although this is not preferable as this would mean the victim must once more, enter the witness box, which is somewhat further victimization. This aspect is implemented without fail in criminal proceedings although not so much in the district courts. The usage of VIS needs to be encouraged more in the district courts as, most assault cases are heard in the district courts.⁵¹

v) *Correctional Supervision:*

Restorative Justice programmes may be included as part of the sentence imposed by a trial court. Section 276(1)(h) and (i) of the Criminal procedure Act⁵² provide that a trial court can impose sentences of correctional supervision or imprisonment from which a person can be placed under correctional supervision in the discretion of the commissioner or the parole board respectively. For first offenders, courts usually blend the sentence with a measure of mercy and aim to rehabilitate the offender as opposed to punishing the offender.

In practice, no court in RSA may impose a sentence of correctional supervision without a pre-sentence report either compiled by a correctional official from the department of correctional services. Staff members with qualifications in behavioral sciences or experts in behavioral/social sciences are placed at courts for the drafting of pre-sentence reports which contain the basic/background information about an accused person, which may assist the court in determining a suitable sentence for the person concerned.⁵³

What usually happens in practice is that the accused (now convicted), through his legal representative will apply for the matter to be postponed for the pre-sentence reports to be compiled for the court to take contents thereof into consideration when considering a suitable sentence. There are usually, as stated above two reports that are compiled, if correctional supervision is a possible sentence. The reports are compiled by the probation officer (social

⁵¹ <https://www.npa.gov.za/victim-impact-statement> accessed on 15 July 2024.

⁵² Section 276(1)(h) of the Criminal Procedure Act 51 of 1977 as amended.

⁵³ http://www.dcs.gov.za/?page_id=317#:~:text=Correctional%20supervision%20is%20a%20community,the%20community%20and%20to%20prevent accessed on 01 April 2024.

worker employed by department of social development) and a correctional officer (employed by the department of correctional services). Over and above the personal circumstances of the accused, the correctional officer will usually outline the correctional supervision programs that the accused will be committed to, should the court impose a sentence of correctional supervision.

vi) *Written or verbal apology to victims and other affected people:*

In most cases involving people who are closely related and who wish to restore the relationship, an apology would be a clear display of remorse from the offender to the offended. Within the apology, which can be verbal or written, the offender would describe his behavior and what caused it and would then accept full responsibility for the results of his actions. The department of correctional services promotes this act of restoration because the written apology is also intended to help the offender deal with his emotions towards the crime. The written apology may not necessarily be sent to the victim.

The recommendation herein is that the apology becomes mandatory practice even in early stages during ADR. If parties are in a domestic relationship and share children together, the offender should also tender an apology to the children who may have witnessed violence between their parents. This should be included in the guidelines of Restorative Justice Act discussed below in chapter five.

vii) *Family Group Conferencing:*

In matters involving violence between partners in a domestic relationship, it can almost be taken for granted that children of the couple and extended family members are often affected by the crime. It is important to mention that ‘domestic violence’ is not in itself a crime as the term suggests but, it is the acts that occur within that setup which constitute a crime, for example an assault perpetrated against a partner in a domestic relationship. In such a case, the law will punish the physical assault itself, as that is the defined common law offence.




Therefore, in family group conferencing the children and extended family members are also included in resolving the issue. This program is basically a family meeting which is formally coordinated by trained facilitators from the department of correctional services⁵⁴. The main

⁵⁴ Ibid.

aim of this meeting is to seek a way forward on repairing the affected relationships as a result of the offence committed. It is very much similar to ADR and victim - offender dialogue in that there must be an apology tendered by the offender to the victims of crime. In chapter four, I will elaborate on this when discussing the amendments to the Domestic Violence Act.⁵⁵

d) Concluding remarks:

The above discussed programmes were designed to give effect to restorative justice throughout the stages of the criminal justice process. However, with the current levels of violence and with the disturbing growing number in gender-based violence (statistics from South African Police Service indicated below), the implementation of these programs in every day cases can never find a blanket application simply because some cases may be more serious than others, dictating that the normal course of justice takes place. What is, however, practical is for one or more of the programs be incorporated into criminal proceedings and as stated above for the promotion of usage of VIS even in the district court.

SELECTED CONTACT CRIMES AGAINST WOMEN AND CHILDREN						
Murder, Attempted murder and Assault GBH						
		 WOMAN (18+ yrs)		 CHILDREN (0 to 17 yrs) Boys and		
CRIME CATEGORY	Murder	Attempted murder	Assault GBH	Murder	Attempted murder	Assault GBH
Oct 2021 to Dec 2021	902	1 240	15 692	352	394	2 048
Oct 2022 to Dec 2022	1 101	1 636	17 271	319	488	2 039
Oct 2023 to Dec 2023	1 135	1 830	18 474	285	426	2 281
Count Diff	34	194	1 203	-34	-62	242
% Change	3,1%	11,9%	7,0%	-10,7%	-12,7%	11,9%

18/161 18

⁵⁵ Domestic Violence Act 116 of 1998 as amended.

The above table is taken from the Crime statistics compiled by the South African Police Service for the third quarter of 2023-2024 financial year.⁵⁶ The numbers herein provide clear proof that there's a growing number in incidents of violence perpetrated towards women and children by their intimate partner or father respectively. It further cements the assertion that the criminal process as is, is not resolving the scourge of violence perpetrated across the gender line.

Further to this, in a paper written by Dissel⁵⁷ on the 'victim - offender conferencing' model as a form of restorative justice program, it indicated the scourge of violence amongst partners in intimate relationships in our country. The study conducted therein found that in 90 percent of cases, the parties interviewed for 'victim – offender conferencing' were well known to one another and that, in over 60 percent of these cases the parties were actual intimate partners, if not members of the same family. But even more disturbing and relevant to this dissertation, 33 percent of the people who participated in the program were parties who were currently in an intimate relationship, divorced from each other or separated from one another.

This provides a clear indication that despite cases being opened against intimate partners, the numbers are still on the rise, in my view this is because the behaviour that creates these situations is not being adequately addressed as stated above, domestic violence is more of a pattern of abuse and not isolated in one incident.

⁵⁶ https://www.saps.gov.za/services/downloads/2023-2024_-_3rd_Quarter_WEB.pdf accessed on 20 April 2024.

⁵⁷ Amanda Dissel, 'Restoring the harmony: A report on a victim offender conferencing pilot project' (2000) CSV.R.

III. AN INTERNATIONAL PERSPECTIVE VERSUS SOUTH AFRICAN PERSPECTIVE ON RESTORATIVE JUSTICE LEGAL PRINCIPLES

In assessing whether restorative justice can play a role in crimes involving violence between intimate partners and in pursuit to answer some of the research questions above, it is vital to undertake a comparative study of the legal and restorative justice principles between RSA and those of another country in this regard. Restorative justice has been widely written about and in assessing which country would best fit the context of this dissertation, the writer initially researched restorative justice within the African context and found that countries such as the Democratic Republic of Congo (hereinafter ‘DRC’), which have similar demographics to those of RSA, have embraced restorative justice. However, the DRC was not a suitable comparator in this context since most of the literature seemed to involve war crimes, as opposed to violence between intimate partners⁵⁸.

The writer also found literature on restorative justice in Western countries such as Canada, New Zealand, Australia and Europe as discussed in chapter one. However, most of the data in these countries seemed to focus on child justice matters as opposed to intimate partner violence.⁵⁹ The writer also evaluated the literature on restorative justice principles in the United States of America (hereinafter USA), which seemed to provide for an international and a developed country perspective. The writer found sufficient literature involving intimate partner violence and as such, the USA was found to be a suitable comparator within this context. This chapter focuses on legal principles relating to intimate partner violence in the RSA, in comparison to the USA.

⁵⁸ The research revealed that during the period March 1993 – June 2003, there were several war crimes committed in the DRC and thereafter, in trying to address reparation of those crimes, the United Nations Mapping Report (UNMR) 58 stated that, ‘the DRC has been the scene of appalling abuses against civilians, including massacres, acts of torture and sexual violence, as well as the forced recruitment and use of child soldiers.’ The abovementioned paper suggests, ‘an approach based on restorative justice values and principles such as the Baraza indigenous restorative justice mechanism to provide justice to victims, restore peace and reconciliation in the region, and most importantly, to hold perpetrators accountable for the crimes and human rights violations they have committed.’ Murhula PBB ‘*Indigenous restorative justice mechanisms as a tool for transitional justice in the Democratic Republic of Congo*’ (2022) 22(2) African Journal on Conflict Resolution at 34-51.

⁵⁹ For example, in New Zealand, one writer conducted a study referring to the United Nations Convention on the Rights of the Child giving an overview of the youth justice system and the children in it and discuss how restorative justice is used in the youth justice system. Păroşanu A and Lynch N ‘*Restorative justice and children’s rights in Aoteroa New Zealand – convergence and divergence.*’

a) Case law highlighting Restorative Justice Principles:

In the high court case of *S v Mashaba*⁶⁰, the accused was convicted by the High Court sitting in Mbombela for the murder of an African male. They were not intimate partners, however, the decision of the court when dealing with the issue of sentence, was influenced by international principles which embrace restorative justice. The court during sentencing held as follows:

‘Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Crime and Abuse of Power. The Declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the state but that it is an injury or wrong done to another person. The underlying philosophy of the Service Charter for Victims of Crime in South Africa (also referred to as Victim’s Charter) is to give meaningful content to the rights of all citizens, by reaffirming one of our founding democratic values namely human dignity.’

The high court handed down this judgement in 2021, being twenty-seven years after the new constitutional dispensation, which is indicative of the development of our law and the need to continue embracing restorative justice interventions when appropriate, considering international principles, as this chapter seeks to address.

A good starting point would be to highlight the definition of intimate partner violence/gender based violence in both countries.

b) South African definition:

Intimate partners are persons who are in what is commonly referred to as a ‘love relationship’ with one another, and this type of relationship is classified as a domestic relationship according to the amended Domestic Violence Act⁶¹(herein after the ‘DVA’). The provisions of chapter one of the DVA define what a domestic relationship is as follows:

⁶⁰ *S v Mashaba* (Sentence) (CC 29/2021) [2022] ZAMPMBHC 92 (7 December 2022).

⁶¹ Act 116 of 1998.

“Domestic relationship” means a relationship between a complainant and a respondent in any of the following ways:

- a. They are or were married to each other, including marriage according to any law, custom or religion
- b. They live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- c. They are the parents of a child or are persons who have or had parental responsibility for that child;
- d. They are family members related by consanguinity, affinity or adoption; they are or were in an engagement, dating or customary relationship including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- e. They share or recently shared the same residence.’

The preamble of the DVA⁶² highlights that the levels of crime relating to domestic violence in South Africa demanded that there be enactment of legislation that will give effect to the rights of women and children affected by gender-based violence. It states therein that, victims of domestic violence are among some of the most vulnerable members of society and that domestic violence takes many forms. It goes on further to provide that such acts are perpetrated across a variety of domestic relationships and finally that some of the current remedies available in the law have not been instrumental in providing remedy to those who suffer at the hands of their perpetrators.

The Act⁶³ further defines ‘domestic violence’ as, ‘physical abuse inter alia, where such conduct harms, or may cause imminent harm to the safety, health or wellbeing of the complainant.’ Only physical abuse is highlighted herein amongst those included in the definition as it is relevant for this thesis although violence is a broad concept. In terms of section one of the DVA ‘physical abuse’ includes:

- ‘(a) Physical violence or threats of physical violence towards a complainant;
- (b) To deprive the complainant of their liberty or threatening to do so;
- (c) To administer, attempt to administer or threaten to administer-
 - (i) Any drug;

⁶² Ibid.

⁶³ Ibid.

(ii) Any scheduled substance, that affects or may affect a complainant's judgement or decision-making abilities or is harmful to the health or wellbeing of the complainant; or

(iii) Any chemical or other substance that is harmful to the health or wellbeing of the complainant, to a complainant without the complainant's consent; or

(d) Withholding or threatening to withhold a complainant's medication’.

It is therefore clear that the DVA has expanded the definition to include other forms of abuse such as emotional violence, financial abuse and stalking etc., but for purposes of this dissertation, focus will be on ‘physical violence or threats of physical violence towards a complainant.’

c) Definition in the United States of America:

In the USA, domestic violence is termed ‘intimate partner violence ’(herein after ‘IPV’), which is defined as, ‘violence committed by a current or former boyfriend or girlfriend, spouse or ex-spouse.’⁶⁴ Intimate partner violence is also widely referred to as ‘battering ’in the USA, which refers to violence against women by their male partners and is accepted to be the most common form of intimate partner violence.⁶⁵ So it is clear then that battering is actually an offence that falls under the umbrella definition of intimate partner violence although the terms are used interchangeably. Furthermore, just as in our country, intimate partner violence can be said to be a wide concept which encompasses ‘coercive techniques ’ such as verbal, psychological, emotional, sexual and economic control. ‘Statistics in the USA show that each year, 1.3 to 5.3 million women experience IPV.’⁶⁶ This number is obviously alarming as in the above indicated numbers in South Africa.

The scope of intimate partner violence also includes persons who are dating and according to USA statute⁶⁷, a ‘dating partner ’refers ‘to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.’

⁶⁴ Modi MN Palmer S. and Armstrong A ‘*The role of Violence Against Women Act in addressing intimate partner violence: A public health issue.*’ (2014) 23(3) *Journal of women's health* at 253-259.

⁶⁵ U.S Department of Justice, 1999b.

⁶⁶ Ibid.

⁶⁷ Violence Against Women Reauthorization Act of 2022.

In chapter two above, reference was made to the study conducted by Amanda Dissel⁶⁸, wherein she wrote on the ‘victim - offender conferencing’ model as a form of restorative justice program, she further stated therein that the crime statistics may not be a true reflection of the extent of abuse between intimate partners as majority of the crimes go unreported to the officials since most victims fear retaliation, shame and the risk of not being believed. This is, unfortunately, an unfortunate reality as most victims choose to continue their relationship with an abusive partner for various reasons. Another disheartening reality about domestic violence is that, when the abuse is perpetrated by a man on a woman, often the victims are financially dependent on their abusive partners and thus, sending him to jail results in a double jeopardy because ultimately, the family would be left without a stable income.

d) Procedure in court when applying for protection orders:

This dissertation is about restorative justice and the possible application thereof to intimate partner violence, it is therefore crucial that the recourses available to the victim be highlighted herein since one of the aims of restorative justice is victim empowerment. It is submitted that, obtaining a protection order against an abusive partner can give a sense of empowerment to a victim. As such, in terms of the DVA, a complainant can approach the magistrates’ court to apply for a protection order against their partner. An interim protection order will always be granted by the court as courts are bound by the law to grant immediate interim protection to a complainant who claims to be in danger. The court will then allocate a future date for the matter, for the respondent to be given an opportunity to show cause as to why the interim order should not be made a final order. This goes towards giving effect to our well-known principle of the ‘audi et alteram partem rule.’⁶⁹ Depending on what is presented before the court, it may confirm the interim order, or order that the interim order be set aside.

It is submitted that, should partners continue to live together as a couple, a protection order can, in some cases, cause the relationship between the parties to further break down. This view stems from the presumption that the party against whom the protection order was

⁶⁸ Amanda Dissel op cit note 33 discussion commenced on page 20.

⁶⁹ ‘It is a firmly established rule of common law that a judge or anyone exercising a judicial function must hear both sides of every case: not only the plaintiff or prosecutor, but also the defendant must be heard. This rule is recognized in England as one of fundamental justice, and a failure to observe it makes the whole proceeding defective and voidable. In the United States of America the principle is part of the notion of “due process” and is equally well protected.’ Kelly J M ‘Audi alteram partem’ (1964) 9 *Nat. LF* 103.

issued, may now have to walk on eggshells, not knowing how to relate to their partner and being in fear of contravening the protection order. The same partner may also in turn become more passive aggressive towards the complainant, having been aggrieved by the fact that the partner sought a protection order against them. So, it is therefore my considered view that a protection order may not always be the solution to curb violence between partners.

e) S v Baloyi: intimate partner violence as a crime affecting family life and the community:

The constitutional court matter of *S v Baloyi and others*⁷⁰, finds relevance in this chapter as the facts of the matter involve intimate partner violence and moreover, the court's finding, that such acts of violence do not only affect the parties involved but go beyond to also affect the family as a whole and at times the surrounding community. This is the basis of restorative justice. The court herein was further tasked with declaring a provision in the Prevention of Family Violence Act⁷¹ invalid in so far as it placed a reverse onus on an accused to prove his innocence.

i) Factual background of the matter:

There was a dispute between the appellant, an army officer, and his wife, the complainant. The complainant laid a charge of assault against the appellant with the police and was advised by them to obtain an interdict in terms of the abovementioned Act⁷². The interdict was granted by a magistrate sitting in Pretoria, who ordered the appellant not to assault the complainant and their child and further not to prevent them from leaving or entering their joint home. The court also issued a warrant for the arrest of the appellant although suspended. Sometime after, the appellant allegedly assaulted the complainant again and threatened to kill her. The complainant reported this to the police, and she was requested to make an affidavit in terms of the Act setting out the alleged facts of the incident. The police then arrested the appellant and brought him before a magistrate for an enquiry into the alleged breach of the interdict.

⁷⁰ *S v Baloyi and Others* 2000 (2) SA 425 (CC). The court herein referred to legal principles developed in the United States of America relating to intimate partner violence and this is the reason why the said case is discussed in chapter three of this dissertation as opposed to chapter two, since chapter two merely discusses restorative justice programmes and not the law.

⁷¹ Section 3(5) of the Prevention of Family Violence Act 133 of 1993.

⁷² *Ibid.*

ii) *Judgement of the Court:*

The court held that every form of crime has harsh consequences on the society and that what distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and on family life⁷³. The court further held that, the law commission, supporting the need for appropriate legislation to reduce and prevent family violence, invoked the following quotation from a document drafted by the US National Council of Juvenile and Family Court Judges:

‘Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. It violates our communities’ safety, health, welfare, and economies by draining billions annually in social costs such as medical expenses, psychological problems, lost productivity and intergenerational violence.’⁷⁴

Not only did the constitutional court embrace the law commission’s submissions with regards to the domestic violence and its effects on South African families, but it also embraced the same viewpoint held in the USA. And this is what this chapter seeks to demonstrate that the stance held in the USA is similarly the position in RSA. The court also highlighted the reality of the extent of damage that this violence has, not only the intimate partners themselves, but the extended family as well and this is probably why the amended DVA has created a statutory offence against both parties, if violence occurs in the presence of minor children⁷⁵. This is obviously in line with section 28 (2) of the Constitution which highlights that in any matter concerning the child, the best interests of the child are of paramount importance. The Children’s Act⁷⁶ also provides same, giving effect to the Constitutional provision.

⁷³ In the United States, Donna Wills writes: ‘Besides being ‘an unacknowledged epidemic in our society, ’ domestic violence is the leading cause of injury to women, a major factor in female homicide, a contributing factor to female suicide, a major risk for child abuse, and a major precursor for future batterers and violent youth offenders. The State cannot ignore the human tragedies that are caused by domestic violence. ‘Mandatory Prosecution in Domestic Violence Cases: Domestic Violence: The Case for Aggressive Prosecution’ (1997) 7 *UCLA Women’s Law Journal* 173 at 174-5.

⁷⁴ South African Law Commission Discussion Paper 70 (Project 100) *Domestic Violence* (1997) para 2 - citing the *Model Code on Domestic and Family Violence* Nevada: 1994, drafted by the National Council of Juvenile and Family Court Judges.

⁷⁵ Section 5(1) of the Domestic Violence Act 116 of 1998 Regulations (2022).

⁷⁶ Section 9 of the Children’s Act 38 of 2005 provides that the child’s best interests is of paramount importance in all matters concerning the care, protection and well-being of a child.

f) *The Bill of Rights and intimate partner violence:*

The Bill of rights, contained in chapter two of our constitution, provides for basic human rights that each South African citizen, including noncitizens are entitled to. Relevant to this dissertation are sections 10, 11 and 12 which provide for the rights to human dignity, life and freedom and security of the person respectively. Section 12(1) of our Constitution, states as follows:

‘*Everyone* has the right to freedom and security of the person, which includes the right—
inter alia... (c) to be *free from all forms of violence* from either public or private source.’

Emphasis is hereby put on section 12 because it is most relevant for this dissertation although all abovementioned rights are classified as non – derogable rights under section 37 of the Constitution. This simply means that under no circumstances, including state of emergency, can these rights be limited under section 36⁷⁷ which is the limitation clause. However, these rights are not only applicable to victims of violent crimes, but also to ‘everyone’ including the offenders, there is no exclusive protection. This is why in my introductory chapter I mentioned that many South Africans hold the view that the law protects the accused persons more than victims of crime, and part of the reason is due to the fact that section 35 of the Constitution is solely enacted to oversee the rights of arrested, detained and accused persons.

⁷⁷ Section 36 of the Constitution of South Africa Act 108 of 1996 provides as follows:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Section 35 is subject to limitation under section 36⁷⁸, however, the rights of the abovementioned persons are usually so guarded and at times to the detriment of the victims who suffer at their hands⁷⁹. Further to this, it is a well-known fact that the Constitution is the supreme law of our land⁸⁰ and consequently the most referenced law publicly, so ordinarily, the average citizen would be more familiar with the rights contained therein as opposed to the provisions of the Victim's Charter. Therefore, in any situation where the balancing of rights come into play, it is submitted that the Victims' Charter would hold less persuasive value than the Constitution or any Act of parliament because it is not an enacted piece of legislation.

g) *Intimate Partner Violence and Restorative Justice in the USA:*

i. *Probation and Correctional Supervision:*

When coming to international law, which forms part of the discussion in this chapter, section 233 of the South African Constitution⁸¹ provides that international law should be considered when interpreting the Bill of Rights. In the USA court case of *United States v Doe* (2003)⁸², the court highlighted the importance of applying a restorative justice approach during sentencing proceedings. The court herein was dealing with the matter of an accused who happened to be a juvenile Indian boy who had allegedly sexually assaulted a teacher, he was further charged with the offence of 'juvenile delinquency consisting of assault with a dangerous weapon with the intent to do bodily harm.' The court held that, 'the use of restorative justice practices, such as victim – offender mediation should be included as a condition of probation.' Similarly, the provisions of the Criminal Procedure Act⁸³ in section

⁷⁸ Section 36 of Act 108 of 1996, which has been termed 'the limitation clause'. This section provides, inter alia, that 'the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...' the section then lists the factors that should be taken into account whenever a right is subject to limitation.

⁷⁹ During court proceedings, usually the rights of the accused, especially if in custody, are prioritized above those of the victim. An accused person can delay proceedings in various ways including changing legal representation multiple times. In most instances the court hardly takes into account that justice delayed is justice denied especially for a complainant who keeps coming to court only to be told that their case is not proceedings. Tables turned, if a complainant misses a court appearance without good cause, those are grounds for the court to refuse a further postponement for the State.

⁸⁰ Section 2 of Act 108 of 1996.

⁸¹ Section 233 of Act 108 of 1996 provides that, 'when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

⁸² *United States v Doe*, 488 F. 3d 1154 – Court of Appeals, 9th Circuit 2007.

⁸³ Act 51 of 1977.

276(1)(h)⁸⁴ provide for correctional supervision as a sentencing option, which has been discussed in detail in chapter two above. This is, however, an indication of the similarities of the legal principles in both countries.

ii. Restorative justice and battering in the USA:

In addressing the issue of battering in USA, a study undertaken by Presser and Gaarder⁸⁵, noted that prior research stemming from the 1990s indicated that victims of battering who are given a voice during criminal proceedings felt more empowered to seek help and to further end the toxic relationship. According to this article, mediation was seen to be one of the earliest forms of restorative justice intervention applied to battering cases, but this, however, attracted a lot of criticism from the feminists' groups who viewed this as an escape from dealing with the matter in criminal courts. Mediation was applied with much reluctance as many stakeholders held the view that it was intrusive to 'internal affairs.' The most common forms interventions in the USA include: victim – offender mediation, family group conferencing and sentencing circles and probation. Probation and mediation are applied in the same manner as in RSA⁸⁶, whilst sentencing circles tend to focus more on the interests of the community at large and how social factors influence the commission of offences.

The study⁸⁷ conducted herein was relevant for this thesis hence extensively referenced. When addressing the issue of the possible application of restorative justice models to the offence of battering, the writer mentions that a few things need to be considered, namely:

1. Prioritizing the well-being of the victim:

Under this subheading it was emphasized that the rights of the victim and her well-being must be prioritized over the relationship that she shares with her abusive partner. It is further emphasized that restorative justice intervention should not be undertaken with an end goal of reconciliation in mind.⁸⁸ The

⁸⁴ Ibid note 43.

⁸⁵ Presser L and Gaarder E, 'Can restorative justice reduce battering? Some preliminary considerations' (2000) *Social Justice*, 27(1(79) at 175-195.

⁸⁶ According to the above-mentioned article (ibid), victim- offender mediation involves dialogue, facilitated by a trained mediator, during which victims and offenders are encouraged to 'identify the injustice, to make things right and to consider future actions.' Family group conferences on the other hand invite various support persons including family and close friends to the meeting between the victim and offender, all present participants would then discuss the pattern of the crime, interventions and reparations.

⁸⁷ Ibid.

⁸⁸ Ibid note 72 at page 186.

recommendation is that the mediators should be careful not to send the wrong message, and it that it must be clear by them that the victim is not responsible for the violent actions of the perpetrator.

The above recommendation is directly in line with the message that this dissertation seeks to emphasise. That, in as much as it would be ideal to reconcile families, it must still be borne in mind that the incident is a lived experience for the victim and as such his/her wellbeing must take preference over and above the possibility of reconciliation, especially in cases where it appears that the offender is not prepared to take full accountability for their actions.

2. Standardized screening procedures:

It was highlighted that for successful intervention in these sensitive matters, communication needs to be channeled effectively. The reason for this is that the whole process is driven at healing the injustice committed to the victim, therefore, the way the offender communicates to her needs to be in such a way that promotes healing. So, the facilitators need to ensure that before any engagements between the parties, the communication methods of the wrongdoer are screened.

It is submitted that the guideline above, seeks to emphasise the importance of body language and correct usage of words during engagements to avoid any manipulation or gaslighting from the offender directed at the victim. Passive aggressive behavior during the dialogue which may be driven at influencing the victim to concede with whatever might be said by the offender also needs to be guarded against as this can cause further harm to a victim.

3. Victim – offender Mediation in cases of battering:

The study and research showed that with regards to cases of battering in the USA, mediation is not recommended. The preferred restorative justice programmes would be those of sentencing circles and family group conferencing as they involve more participants and reduce the possibility of confrontation. What also stands out is that it must be understood from the word go that victim participation is voluntary, it must be the victim who elects to go the alternative dispute resolution route and the system pushing her towards same.

The above three recommendations will be referred to in the conclusion chapter below.

h) Concluding Remarks:

USA model and developments of the restorative justice system is very similar to the ones adopted in RSA, probably because both countries applied as their foundations, the principles applied in Canada, New Zealand and Australia. What is clear is that restorative justice is widely understood to be a personal experience of the victim which is influenced by other underlying socio - economic factors. The study in USA concludes with the concession that, restorative justice models do not hold the ultimate solution to the issue of intimate partner violence and that it may not be the most suitable way of addressing the core issues. The fear is that should the victim – offender dialogue be instituted at the preliminary stages of criminal proceedings, this might be misconstrued by feminist groups as a nullification of the gravity of the offence. However, on the upside, it was stated that the application of restorative justice methods in such cases may cause an increase in the number of cases reported as it offers victims an alternative option to the criminal justice system which some might have lost faith in.

In conclusion, the USA, just as in RSA, does not have specific legislation passed to effectively implement restorative justice programmes. The existing criminal justice policies and legislation are used to apply these interventions, which in my view limits the full potential of the restorative justice process. What is clear, however, is that in most countries, restorative justice processes are readily applied in cases involving juveniles as opposed to those of intimate partner violence due to the severity and seriousness of the offence.

IV. CASE LAW AND RESTORATIVE JUSTICE: A VICTIM CENTERED APPROACH

This dissertation is based on the principles of restorative justice, particularly in respect of cases involving violence between intimate partners. As seen in the chapters above, there has been many scholarly writings and studies with regards to restorative justice but the aim of this thesis is also to assess the developments in law over the years and whether the restorative justice principles may be used and applied to, first address the issue of violence between parties in an intimate relationship and secondly, to reduce the number of incidents and prevent reoffending.

This chapter is a discussion on two relevant case law involving domestic violence between intimate partners and as already established in chapter three above, intimate partners are in a domestic relationship. One of the ways in which to assess whether restorative justice interventions may be applicable to cases of violence is to study them in relationship to decided cases.

a) TN v ZM (CA114/2022) [2023] ZAECGHC 60:

The first case to be discussed is the Eastern Cape high court division case of TN vs ZM⁸⁹, which case was heard on appeal following the application and subsequent granting of a protection order in the district court.

i) Brief facts of the case:

The appellant (male) and the respondent (female) were involved in a romantic relationship from which two children were born. The children were still minor children at the time of hearing this application. Their relationship came to an end at some point. During 2019 the respondent opened a criminal case of assault against the appellant. The appellant stated that the respondent opened that case against him in retaliation of a prior criminal case of assault that he had opened against her. In both cases of assault, the state declined to prosecute. In her

⁸⁹ TN v ZM (CA114/2022) [2023] ZAECGHC 60 (23 May 2023).

application for a protection order, the respondent (in casu) and the applicant then, stated that she was 'living in fear, unable to predict when the next attack will come.' She further cited 'emotional and psychological trauma and that the children exposed to violence.' She continued to state that the actions of the Applicant herein caused anxiety, depression and emotional distress to the elderly people she resided with and that she fears for her life and that of her family.

iii) Appeal hearing:

The interim order in this case was made final by the court a quo and the matter was thereafter taken on appeal by the appellant (the respondent then). The respondent in the appeal matter was not present at the appeal hearing. The appeal court set aside the final protection order because the respondent had not produced any evidence that the applicant had communicated in any way with the respondent herein and that she had further failed to produce any evidence with regards to the alleged assault on her. The court held that the magistrate who granted the final order was misdirected.

iii) Analysis and commentary on the case:

The matter discussed above is not a criminal matter and was not heard in the criminal court but a civil case between the parties. Be that as it may, the facts are relevant to this dissertation since there was an alleged assault between them as intimate partners. It is submitted that, in as much as the decision of the appeal court is correct, insofar as the burden of proof remains with the party who alleges, one thing that is clear is that the parties herein are in a troubled domestic relationship. The most disturbing factor, which is a concern nationwide, is that there are children involved in this cycle of violence. The Constitution⁹⁰ regards a child's best interest as of paramount importance which must be emphasized herein, and this is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children.

It is further submitted herein that restorative justice interventions should have been implemented by the court a quo, being the district court at which the cases of assault were declined to be prosecuted. That court should have, since there were counter charges opened

⁹⁰ Section 28(2) of the Constitution of South Africa Act 108 of 1996.

between the parties, conducted a formal mediation at which counseling at the NICRO facility should have been recommended for both parties. Furthermore, the civil court at which the respondent appeared to show cause why the interim order should not be made final against him, should have referred the matter to the family care social workers to assist with the regulation of the relationship between the parties since the children are clearly affected by the domestic violence. This appears from the contents of the affidavit upon which the applicant had based her application for an interim protection order wherein she lists the children as some of the people affected.

It is in instances such as these that role players in the justice system should be able to identify that there is a root cause that needs to be addressed between parties. These are the opportunities to restore families and victims of violence, through programs like family group conferencing as discussed above in chapter two. By so doing, it would have been established whether indeed the applicant ever assaulted the respondent, since she seemed to be less interested in the appeal hearing as it often happens that a person be falsely implicated in the commission of a crime, which appears to have been the case herein.

The Transvaal high court division case of *S v Maluleke*⁹¹ wherein the court mentioned the key role of restorative justice in our country, is a key indication that our courts have embraced the need for a restorative approach to justice. The court held 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 emphasizes the need for reparation, healing and adding to overcrowding in jails and creating greater risks of recidivism.’

The court went on further to quote *Batley and Maepa*⁹² and held that, ‘while improving the efficiency of the criminal justice system is necessary, applying harsher punishment to offenders has been shown internationally to have little success in preventing crime.

Moreover, both these approaches are flawed in that they overlook important requirements for the delivery of justice, namely: considering the needs of victims, helping offenders to take responsibility on an individual level; and nurturing a culture that values personal morality and encourages people to take responsibility for their behavior. Considering that crime rates in

⁹¹ *S v Maluleke* 2008 (1) SACR 49 (T).

⁹² *Maepa T, Batley M, Dissel A, Dodd J, Leggett T, Mbambo B, Muntingh L, Naude B, Prinsloo J & Skelton A, ‘Beyond Retribution: Prospects for Restorative Justice in South Africa’ (2005) 111 Institute for Security Studies Monographs at 156.*

RSA remain high and that government's focus appears to be on punishment rather than justice, a different approach is needed.'

The case of Maluleke was reported in 2008, which is more than ten years ago and goes to show how open minded the judiciary has always been to be exploring a justice system that has a restorative element to it. The courts have also been alive to the fact that the jail system is not the most effective when coming to address the levels of crime and rehabilitate offenders. It was also emphasised by the court that the victim of crime must be considered throughout the criminal justice process, which points toward the need for a more victim centered system.

b) S v Robertson 2023 (2) SACR 156 (WCC):

In the Western Cape high court case of S v Robertson⁹³, the facts are equally concerning but more disturbing, however, very relevant to the discussion herein as the case also involves multiple incidents of intimate partner violence. This case gives a clear picture of the fact that the root cause of violent conduct between intimate partners, needs to be addressed at its earliest stage to prevent recidivism.

i. Brief facts of the case:

The victims and the deceased in this matter were all in a romantic (intimate) relationship with the accused. The victim in counts one to four was in a relationship with the accused for eight years and two sons were born of the union. The victim in counts five and six is the wife of the accused, Mrs Robertson. One child was born of the marriage. Counts seven, eight and nine relate to the deceased, who was the intimate girlfriend of the accused at the time she died.

The accused herein was charged and convicted on all nine counts after having pleaded not guilty to all in terms of section 115 of the CPA⁹⁴. Three charges were for contravening section 17(a) of the DVA⁹⁵, another for robbery with aggravating circumstances, two charges

⁹³ S v Robertson 2023 (2) SACR 156 (WCC).

⁹⁴ Section 115 of the Criminal Procedure Act 51 of 1977 as amended makes provision for an accused to tender a plea of not guilty to the charge or charges.

⁹⁵ Section 17 of the DVA provides that, 'notwithstanding the provision of any other law, any person who –(a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7; (b) contravenes the provisions of section 11(2)(a); (c) fails to comply with any direction in terms of the provisions of section 11(2)(b); or (d) in an affidavit referred to section 8(4)(a), wilfully makes a false statement in a material respect, is guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and in the case

for assault with the intent to do grievous bodily harm and one for assault common. The final two charges were for rape and the murder of the deceased. The evidence lead during trial was that in every intimate relationship that the accused had with each of the complainants and the deceased, the accused would resort to violence in times of conflict, and this had been the case since his early 20s. Each of the complainants obtained a protection order against him but he would on several occasions contravene the court orders, hence the first three counts.

ii. Sentencing proceedings:

The high court when dealing with the issue of sentencing Mr Robertson highlighted the triad as mentioned in *S v Zinn*⁹⁶. Of greater significance was that the court should also consider the objectives of punishment being that of prevention, deterrence, reformation and retribution when considering a suitable sentence to be imposed. In casu, a pre-sentence report was compiled by the probation officer, detailing the personal circumstances of the accused and extensively elaborated on his childhood traumas. In summary, the accused grew up in an abusive home environment where his father would constantly abuse his mother physically and otherwise in his presence. Apparently by the time his father turned over a new leaf it was already too late as the domestic violence was etched in his mind. The probation officer further added that, ‘only a few mitigating aspects could be found and one of them was the exposure and internalization of violence and humiliation that the accused may have suffered during his immature stages of bio-psychosocial development.’⁹⁷

In addition, victim impact statements from the complainants as well as the family of the deceased were compiled, read into the record and handed in as exhibits for the court to take its contents into account when considering a suitable sentence. A VIS plays a very key role in sentencing proceedings as highlighted in chapter two, and further confirmed by Edwards and Haslett in that, ‘one of the core objectives of the restorative justice philosophy is to create a platform for the victim affected by the violence to explain how the crime impacted them.’⁹⁸

of an offence contemplated in paragraph (b), (c) or (d), to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

⁹⁶ Ibid note 3, the triad consists of the interests of society, the personal circumstances of the accused as well as the seriousness of the offence.

⁹⁷ Ibid note 79.

⁹⁸ Edwards, A and Haslett, J ‘Domestic Violence and Restorative Justice: Advancing the Dialogue’ (2003), presented at the 6th International Conference on Restorative Justice.

A report from the clinical psychologist who examined the accused was also used during sentencing. In this report the psychologist addressed the prevalence of crimes relating to gender-based violence and femicide. 'Femicide' is the intentional killing of a woman by her intimate partner.⁹⁹

The report from the psychologist detailed that, 'gender-based violence and femicide have been recognised as a social and humanitarian problem and further that intimate partner violence, amongst others, is a social problem which constitutes a massive violation of women's basic human rights. The clinical psychologist also stated therein that according to the World Health Organization's review of femicide, about 35% of women worldwide have experienced physical or sexual violence at the hands of their intimate partner.'¹⁰⁰

iii. Analysis and commentary on the case:

The case of Robertson is an unfortunate display of the escalation of violence in intimate relationships as it started with common assault on the first complainant, then assault with intent to do grievous bodily harm on the second and then ultimately, the deceased became a victim of femicide. According to the evidence lead during sentencing his parents tried, clearly without success, to intervene and equip him with more constructive ways to address conflict. The means provided to him by his parents were not specifically mentioned in the case and thus unknown. The timeline of these offences was also not outlined but, the assault common was said to have occurred nine years prior to the date of conclusion of the trial and said to be the first offence committed as stated above. This is a clear indication that had the correct measures been put in place on how to deter and rehabilitate the accused at that stage, the deceased could've probably escaped her untimely death. When addressing the constitutional rights that females are entitled to freely enjoy, the supreme court of appeal in the case of *S v Chapman*¹⁰¹ held that:

'Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

⁹⁹ World Health Organization (2012), Centre for the Study of Violence and Reconciliation (CSVR) 2015, 'Femicide Census' (2016).

¹⁰⁰ Ibid.

¹⁰¹ *S v Chapman* 2007 (2) SACR 3 (SCA).

It is an undisputed fact that women suffer more at the hands of their male counterparts in intimate relationships and the usage of VIS was one the ways in which the voices of the victims were included in the proceedings. In case of *S v Mashaba*¹⁰², the constitutional court, when echoing the words of the court in *S v Matyityi*¹⁰³, held that:

‘By accommodating the victim and/or their representative during the sentencing process the court will be better informed before sentencing about the aftereffects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim and/or their families, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim and/or their families be placed before the court. That in turn will contribute to the achievement of the right sense of balance, and in the ultimate analysis will enhance proportionality rather than harshness.’

Still on the analysis of the case, the record also reflects that Mr Robertson apologized to the family of the deceased during the proceedings and his legal representative further argued that the accused was a suitable candidate for rehabilitation as he was young and would benefit from the restorative justice programs from the Department of Correctional Services. The writer agrees with the submissions made on his behalf by the attorney as, Mr Robertson would have obviously not been a suitable candidate for pre-trial restorative justice programs due to the gravity of the offences he committed.

However, some programmes may be implemented after sentencing such as family group conferencing, a further written apology to the families and his children, and victim empathy groups where he will be educated on how his actions affected the victims. The conferencing can only take place if the victims are willing to participate. Importantly, restorative justice can also only be considered if the accused takes full responsibility for his actions and admits to the commission of the offence, which is quite difficult to consider when an offender maintains his innocence even after conviction. During family group conferencing, the offender must take the victim, and every other person affected by his actions into his confidence regarding the reasons why he committed those offences. At that point this is where a formal apology, mentioned above, may be tendered to the affected people. This apology may be written or verbal.

¹⁰² *S v Mashaba* (CC 29/2021) [2022] ZAMPMBHC.

¹⁰³ *S v Matyityi* 2011 (1) SACR 40 (SCA).

c) Other Relevant Case Law:

The Supreme Court of Appeal when dealing with an appeal against sentence lodged by the Director of Public Prosecutions in *DPP v Thabethe*¹⁰⁴ at paragraph 21 referred to *S v Matyityi*¹⁰⁵ at paragraphs 16 -17, wherein Judge Ponnan addressed the sentencing process and inclusion of victims therein as follows:

‘An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centered. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, by reaffirming one of our founding democratic values, namely human dignity. It enables us, as well, to vindicate our collective sense of humanity and humanness. The charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and, in future, is likely to have. By giving the victim a voice, the court will have an opportunity to truly recognise the wrong done to the individual victim’.

Ponnan J, back in 2011, also correctly summed up the approach that should essentially be a guiding principle for all our courts when dealing with sentencing and this is probably the reason the Constitutional Court, in 2002¹⁰⁶ also echoed the same sentiments of the SCA in this matter. In as much as the Victim’s Charter is internationally derived and recognized locally, it is not often that litigants reference it in criminal proceedings and the only reasonable explanation for this is, could be that it is not an Act of parliament and thus has less persuasive value. This point will be elaborated on in chapter five below.

¹⁰⁴ *DPP v Thabethe* (619/10) [2011] ZASCA 186 (30 September 2011).

¹⁰⁵ *Ibid* note 61.

¹⁰⁶ *S v Mashaba*, *op cit* note 49.

In addition to the above, another paper written by Dissel and Ngubane¹⁰⁷ highlights that ‘domestic violence’ is not a crime per se, like the common law offences of ‘assault’ and ‘assault with intent to do grievous bodily harm’ and that it is merely a term which sums up a series of events or a continuous pattern of violent abuse. This is why it was stated above that the Robertson case is a prime example of this, that long before the pattern of violence that the accused witnessed growing up could be termed ‘domestic violence’, it was a reality in his home and it is unfortunate, that when the damage was already done, the justice system attempts to retrospectively repair it.

d) Concluding Remarks:

In RSA, the practice of restorative justice must be in keeping with the rule of law, consistent with the basic human rights as well as our Constitution¹⁰⁸ and the courts have always embraced the idea of restorative justice as shown above. It is also evident that our courts encourage the consideration of restorative justice as part of sentencing because it tends to promote rehabilitation of an offender. This is a shortcoming, and it is thus submitted that, for less serious offences it should be implemented at the early stages of proceedings. Our South African courts readily embrace the implementation of restorative justice when dealing with matters of young offenders, in accordance with the Child Justice Act¹⁰⁹ for the same reason of rehabilitation and deterrence. This is not necessarily flawed, however, the same regard must be given to matters involving family violence to encourage healing and restoration before escalation of the issues as in the Robertson case above.

The two cases discussed herein are some of the examples of the reality of some families in RSA and demonstrate how the justice system needs to be transformed to effectively address this social ill that is domestic violence. I must express my hope in that the amended DVA will, to a certain extent address gender-based violence, since harsher sanctions have been ordained by the legislature. Evidence of same can only be seen as the implementation rolls out in our courts and furthermore, in future crime statistics.

¹⁰⁷ Dissel, A. and Ngubeni, K, ‘Giving women their voice: Domestic violence and restorative justice in South Africa’ (2003) Centre for the Study of Violence and Reconciliation.

¹⁰⁸ Ibid note 13.

¹⁰⁹ Child Justice Act 38 of 2005.

V. CONCLUSION AND RECOMMENDATIONS

Mahatma Ghandhi is quoted in the above-mentioned book by Fiadjoe¹¹⁰,

'I realized that the true function of a lawyer was to unite parties... A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.'

This dissertation was written, in line with other written works quoted throughout, to drive the point that the formal justice system, commencing from arrest to sentence stage, is not the only recourse to criminal and social injustice. The emphasis is that there are other ways in which to approach crimes affecting intimate partners, which may better serve them and society at large in a more constructive and reconciliatory manner which encourages healthy family setups.

Restorative Justice, although usually implemented more easily with regards to petty offences (such as theft by shoplifting), can be implemented even in cases involving violence and I am alive to the fact that the degree of violence plays a key role. As noted in paragraph two above, there are different stages at which it can be implemented and in cases involving violence between intimate partners, the stage as which it is implemented is crucial for the best outcome for all parties involved. It must be acknowledged that the approach cannot serve as a blanket approach as each case will have to be dealt with on its own merits.

The key role players, being the officials in law enforcement and correctional services, would have to decide each case on its own facts to determine firstly, which programme/s to implement and secondly, at which stage in the proceedings. It is hereby submitted that, based on the high levels of gender-based violence in our country, pre-trial restorative justice can no longer serve as a meaningful way to resolve disputes unless, as stated in paragraph three above, a protection order is put in place. Therefore, to serve the interests of justice, it may be best that with regards to offences involving serious violence that restorative justice only be

¹¹⁰ Ibid at 24.

implemented at the conclusion of criminal proceedings, by way of incorporation in sentencing.

In the end, it has become clear that a formal codification of restorative justice principles, in the form of statute and its implementation thereof is long overdue in RSA. This piece of legislation must include criteria as to how to approach and implement restorative justice programmes. An example would be that only first offenders should be considered as suitable candidates for restorative justice programmes to be implemented at preliminary stages. Another example would be that it must be mandatory that a protection order be in place between the parties who continue to live together and no longer wish to proceed with the formal criminal proceedings. Implementation of the latter example has already commenced in accordance with the amendments to the DVA regulations and CPA respectively.

On the 27th – 29th February 2024, the former Minister of Justice, Mr Ronald Lamola hosted a national conference on the review of the integrated criminal justice system and the review of the Criminal Procedure Act 51 of 1977 as amended with all stakeholders, whereat one of the main topics was how increased victim participation can be encouraged in the criminal justice proceedings. One of the objectives of the conference was to propose recommendations to address the identified gaps and challenges in achieving an efficient, modern, fair and transformed integrated criminal justice system.¹¹¹ It was established during the conference that a victim centered approach needs to be encouraged and enhanced in our justice system but no mention was made as to the codification of restorative justice principles as the service charter for victims of crime in South Africa is still considered to be sufficient.

The current challenge we have in our country is that not many role players in the justice system are familiar with the Victims' Charter and it is the responsibility of the government to ensure that this changes. The first step is to codify restorative justice principles into an Act, then to train officials to be familiar with same, to further train them on how to conduct mediation and lastly educate them on the restorative justice programmes, in that way, a victim centered approach will be achieved more timeously and efficiently.

In most household setups in RSA where intimate partners live together as a family, the income is usually generated by the man. If both partners are employed, it is common that the

¹¹¹ <https://www.justice.gov.za/events/2024events/202402-ICJS-Conference.html> accessed on 16 June 2024.

man would be earning more than the female. Restorative justice not only repairs the harm done between them as partners but the family setup, because should the same breadwinner be sent to prison, the rest of the family, including the victim, would be left without an income. This would serve as a double jeopardy on some level. This is why restorative justice would better serve such family setups, rather than the formal criminal process. It is for this reason that Louw and Van Wyk¹¹² hold the view that the current restorative justice models are not suited to resolve the South African crime rate crises relating to domestic violence, despite the traditional heritage of restorative justice and wide familiarity to its principles. The scholars mentioned above, further state that due to the reason that our justice system in RSA originates from Western concepts, it might not be easy for us to relate to the western models of restorative justice and that our programs herein should be based on South African experiences, traditions and values as stated above in chapter one.

It is submitted herein that, to some extent our restorative justice programmes are African based, since most have more to do with community-based conferencing and mediation, which is the traditional way of resolving conflict as described in the first chapter. It must also be borne in mind, however, that the study mentioned above¹¹³ was conducted in 2015 and since then there has been more work done (as seen in above chapters) to implement and promote the incorporation of restorative justice interventions as part of the criminal justice process.

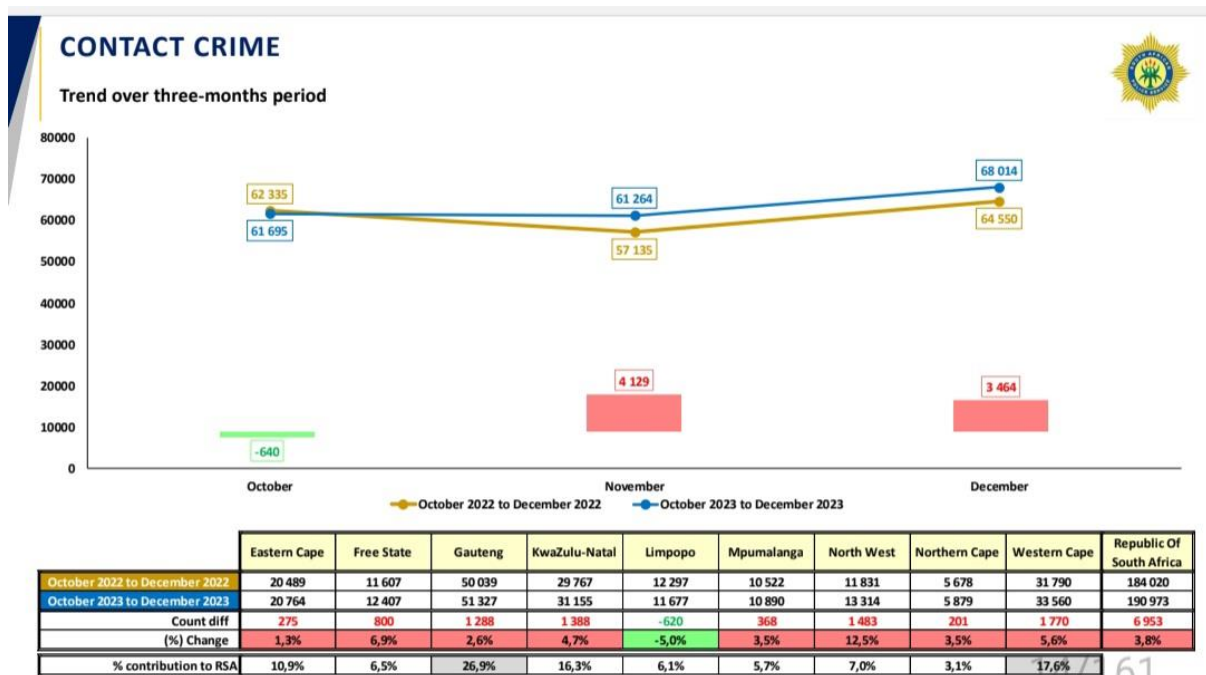
The work written by Louw and Van Wyk was for the purposes of this dissertation, very resourceful as, qualitative research was carried out, and additionally, they sampled some views from legal professionals regarding their views on restorative justice. When asked whether restorative justice would be applicable in all types of offences, most of their participants responded that it would be better for such models to be applied only to 'less serious' offences which have to do with property such as theft and fraud. The participants indicated that cases involving violence would have to be taken on a case-by-case basis, since generally, contact crimes are regarded as serious and disturbingly on the rise especially gender-based violence. The below table also bears reference herein. The general feel of the study is that restorative justice is welcomed as another way to finalizing cases and ensuring justice is served on the aggrieved party, however, that there still needs to be a 'mental shift'

¹¹² D Louw and L Van Wyk 'The perspectives of South African legal professionals on restorative justice: an explorative qualitative study' (2016) *Social Work* 52(4) at 490-510.

¹¹³ Ibid.

of the officials involved in the criminal process to be more open to and receptive of the concept of restorative justice.

It is quite so that the DVA, and consequently the CPA were amended to send a stronger message to perpetrators that violent conduct, in any form will no longer be acceptable, most especially across the gender line. Today, cases involving domestic violence with serious infliction of injuries, which may warrant a higher sentence than the one that would be imposed in a district court, are tried and decided in the regional court which can impose imprisonment as a sentence from five years and above. This is due to the rising numbers in such cases, which have shown that suspended sentences, as well as sentences of imprisonment with an option to pay a fine do not necessarily serve as a deterrence nor do perpetrators become rehabilitated by these sentences as most become repeat offenders. The below table, taken from the crime statistics by the SAPS¹¹⁴, is sufficient evidence that the criminal justice system as it is, is not resolving the current issue of violence in our country.



The table above indicates the number of contact crimes reported over a three-month period between October 2023 and December 2023 as compared to the period between October 2022 and December 2022. During this period, there was a rise in the number of reported cases in

¹¹⁴ Ibid note 47.

all provinces except Limpopo. There can be no clearer proof, that this has become a matter of national importance. A 'contact crime' is, 'a crime in which the victim becomes the intended target of violent conduct or in cases where the victims find themselves to be in the area or place which is targeted by criminals and they then become subjected to the use of threats of violence by that perpetrator.'¹¹⁵

Relevant to this dissertation is the fact that a party in an intimate relationship with the offender, is the obvious target of violent conduct which is indeed carried out against them. Assault common, Assault GBH, attempted murder and sexual assault amongst others, fall under this category of crimes.

Furthermore, the prison system in RSA has not proven to be the most effective rehabilitation center, as mentioned by the participants in the abovementioned study¹¹⁶as some officials from the department of correctional services stated that factors which contributed to the inefficiency of the system is lack of resources to address effective rehabilitation, overcrowding in our prisons and furthermore, the interaction between first offenders and hardened criminals as some leave the prison system worse than they came in due to the gangsterism inside.

Although it can be said that restorative justice is currently being implemented in RSA as discussed in the programmes under chapter two above, it is however submitted that a lot more still needs to be done in trying to restore families and curbing the repetition of the same behavior. As shown in chapter four above, with those case studies, the ability to identify that a case is suitable to be dealt with outside of a criminal court is a crucial one for relevant officials and as such training needs to be provided to all role players.

Restorative justice can play vital role in cases of gender-based violence between intimate partners in RSA, however, it is submitted that the rationale should be line with the study conducted by Louw and Van Wyk above. The degree of violence is a crucial factor that needs to be considered when deciding whether the normal course of justice should take place or whether the case should be dealt with in accordance with restorative justice, or further, whether a combination of both would best resolve the matter. To this extent, the injuries inflicted on the

¹¹⁵ Ibid.

¹¹⁶ Ibid.

victim would also have to be a consideration herein, as well as the instrument, if any, used to inflict those injuries. As is trite in our law, each case must be decided on its own merits, and this should be the underlying consideration when dealing with these cases.

In answering the question whether restorative justice in RSA promotes victim empowerment, my submission would be that, not entirely. The greatest motivation behind writing this dissertation was the very fact that our justice system has no section under law that extensively addresses the rights of the victim throughout criminal proceedings. The rights stipulated in the Bill of Rights are applicable to all South Africans, including accused persons, as section 7¹¹⁷ therein provides that, 'the bill of rights is the cornerstone in RSA. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. 'It remains that most of the restorative justice is applied with regards to the accused, the decision whether to send him to NICRO for diversion programs, the decision whether he must be sentenced to correctional supervision and the decision to mediate the matter so that the case against him can be withdrawn. Even though alternative dispute resolution/formal mediation may provide for compensation, nothing more, in the normal course of practice, is offered to the victim in the form of referral at the state's expense to psychological or emotional counseling.

On the other side of the coin, we as prosecutors and police officials, are often faced with the lack of cooperation from a victim of crime once they have opened a case. Most intimate partners would open a case of assault against their partner and thereafter show a lack of interest in the matter possibly due to the guilt they feel towards their partner or their children if any, the interference of family members and the fact that they still love the person and wish to no longer proceed with any formal proceedings including mediation or family conferencing. This would obviously make it difficult for officials to refer the matter for restorative justice programmes.

Overall, to address the issue of a victim centered approach would be an Act of Parliament passed in this regard, detailing how to apply restorative justice programs and making it mandatory for all role players, in their discretion of course, to make use of these programs.

¹¹⁷ Section 7 of the Constitution of South Africa Act 108 of 1996.

As it stands, the emotional and psychological needs of victims of gender-based violence are not sufficiently recognized and protected in criminal proceedings. As stated above, victims are not usually referred for psychological or emotional counseling, often this is only done for young children who have been abused or raped. A victim centered approach would demand that each court have a social worker on site to provide any counseling and support to victims even during, for example, mediation between the parties. If there is no social worker on site, referral must be given to victims who are clearly in abusive domestic relationships and who need intervention.

The most important and final question that this dissertation had to answer is how families can be repaired and restored through the criminal justice system where intimate partners no longer wish to proceed with the criminal trial and, furthermore, how the system can ensure that their rights are protected through the process and limit or eliminate the possibility of reoffending. It is submitted that this can only be achieved through the promotion of rights of the victims in the form of education. Most victims don't know their rights in terms of the DVA. The only thing they know is that assault is a crime. Most victims don't know that assault is a wide concept which involves the use of words as a threat, which some only know as harassment. Education is key, and codification of restorative justice model to equip officials in applying these programmes to assist families, because in as much as there is the Victims' Charter, the weight that it holds when arguing in a court of law is obviously not as persuasive as that of an Act of parliament.

As it stands, family group conferencing is being implemented by the correctional service officers once an offender has been sentenced, to bring healing, for rehabilitation and sometimes with a view of releasing the offender on parole. This needs to change, so that it is implemented even at the court of first instance since a lot of family members prevent these matters from being resolved effectively by prematurely interfering and coercing the victim to withdraw charges. To reduce the possibility of reoffending the partners would have to be referred to mandatory counseling by professional social workers.

The court in *S v Maluleke*¹¹⁸ correctly held that, 'it is obvious that restorative justice cannot provide a single and definite answer to all the ills of crime and its consequences. Restorative justice cannot ensure that society is protected against offenders who have no wish to reform,

¹¹⁸ Ibid note 45.

and who continue to endanger our communities. But on the other hand, restorative justice, properly considered and applied, may make a significant contribution in combating recidivism by encouraging offenders to take responsibility for their actions and assist the process of their ultimate reintegration into society thereby. 'The court further added that, '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 and the offender. It may provide a whole range of supple alternatives to imprisonment which would ease the burden on our already overcrowded correctional institutions.

In conclusion it must be conceded that crimes involving serious violence cannot only be addressed through restorative justice programs. The normal course of justice would have to take place and be blended with some restorative justice. The normal course of justice includes the application of the DVA, CJA and proceeding with a criminal trial. The proposal herein is that matters involving less violence, such as assault common using hands/ clenched fists and assault by threat, be dealt with in accordance with restorative justice principles, provided that the victim is a voluntary participant who no longer wishes to proceed with the 'normal 'justice process and that the offender has no previous convictions and furthermore accepts responsibility for his actions. These would have to be among the criteria set out in the Act, and in this way, we get to repair the harm caused between the two parties and the family. It remains that restorative justice cannot be applied in all matters, as restorative justice is not a process that aims to replace the criminal justice system but offers an alternative application of the law and hence each case would still have to be dealt with on its own merits.

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Mrs Kamogelo Innocentia Nkwatle (Nee Mahila) (221110286)
School Of Law
Pietermaritzburg

Dear Mrs Kamogelo Innocentia Nkwatle (Nee Mahila),

Original application number: 00020108

Project title: The possible application of the principles of restorative justice to crimes of violence committed between intimate partners in South Africa.

Exemption from Ethics Review

In response to your application received on 30 November 2022 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

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

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Matthew Blain Kimble
obo Academic Leader Research
School Of Law

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