

# QUELLING THE RAGING FIRE: RESTORATIVE JUSTICE AS A RESPONSE TO VIGILANTISM IN SOUTH AFRICA\*

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## SUMMARY

Vigilantism is a persistent problem in South Africa. The problem largely emanates from people's dissatisfaction with how the police, or the criminal justice system, deals with crime. There are high levels of crime in communities and the general feeling is that little has been done to curb it. Thus, the acts of vigilantism fill the vacuum left by unsatisfactory law enforcement or the criminal justice system. Although vigilantism constitutes criminal behaviour that warrants punishment, vigilantes are often viewed as proactive citizens fighting crime. Put differently, vigilantism is seen as an attempt by community members to deal with crime. One crime-intervention strategy that involves the community legally in finding appropriate solutions is restorative justice. Accordingly, research indicates that restorative justice has the potential to reduce crime. Given that crime is what triggers vigilantism, there is a reason to believe that restorative justice might eliminate the chances of people resorting to vigilantism. The purpose of this article is to examine restorative justice as a method of dealing with vigilantism in South Africa.

## 1 INTRODUCTION

Vigilantism is not a new phenomenon in some communities in South Africa. Studies indicate that vigilantism can be traced back to the early 1930s.<sup>1</sup> It was previously seen as the natural response of marginalised Black people against the injustice and brutality of the apartheid regime.<sup>2</sup> Today, vigilantism

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\* Some parts of this article are based on the author's unpublished master's dissertation titled *Restorative Justice as an Alternative Sentencing Option in South Africa: A New Approach to Crime* (University of South Africa) 2019.

<sup>1</sup> Botha "Vigilantism in South Africa in the Pre- and Post-1994 Periods: Causes, Similarities and Differences" 2015 28(3) *Acta Criminologica* 18.

<sup>2</sup> Mtshali "The Complex Legacy of Vigilantism in South Africa" (2019-12-26) *The New Yorker*.

is justified as filling the vacuum left by unsatisfactory law enforcement<sup>3</sup> or the criminal justice system.<sup>4</sup> In most instances, vigilantism occurs as a result of community members being dissatisfied with the way in which the police or the conventional criminal justice system deals with crime.<sup>5</sup> As aptly defined by Swanepoel *et al*, vigilantism includes

“the illegal and violent acts or threats of such acts directed at individuals threatening the community order, by self-appointed law enforcement groups consisting of private citizens in reaction to the absence or ineffectiveness of formal systems and aims to reclaim order, and protected by a conspiracy of silence.”<sup>6</sup>

Vigilantism, in other words, can be described as conduct that involves people taking the law into their own hands in an attempt to serve justice, because of the perceived failure of the government and its criminal justice agencies to deal effectively with (suspected) criminals.<sup>7</sup>

The 2017/18 crime statistics report released by the South African Police Service indicate that 849 people were killed in incidents that the police classified as mob justice.<sup>8</sup> Some commentators have suggested that the total number of deaths could be considerably higher than what has been reported. This is because it is not easy to determine motives in murder cases.<sup>9</sup> It was further reported during the 2019/20 count that 1 202 people lost their lives due to suspected acts of vigilantism.<sup>10</sup> This shows an increase by 353 deaths compared to the 2017/18 count. It is argued that incidents of vigilantism will continue to rise as long as communities feel unsafe and believe they have the capacity to protect themselves.<sup>11</sup> As an example, in 2021, eight people reportedly died in the hands of vigilantes in Zandspruit, Johannesburg.<sup>12</sup> Deaths associated with vigilantism are commonly perpetrated through stoning, torturing of suspects, and what is known as

<sup>3</sup> Harris *As for Violent Crime That's Our Daily Bread: Vigilante Violence During South Africa's Period of Transition* (2001) 27; Nel *Crime as Punishment: A Legal Perspective on Vigilantism in South Africa* (Doctor of Laws thesis, Stellenbosch University) 2016 3; Manyane “No One Deserves Such a Brutal and Horrible Death” (2021-05-23) *IOL News*; Nel “How South Africa Can Turn the Rising Tide Against Vigilantism (2017-02-17) *The Conversation*.

<sup>4</sup> Nel *Crime as Punishment* 10; “Vigilantism” (2019-03-04) *The Witness*.

<sup>5</sup> Nel *Crime as Punishment* 162; Martin “Vigilantism and State Crime in South Africa” 2012 1(2) *State Crime* 229.

<sup>6</sup> Swanepoel, Duvenhage and Coetzee “Vigilantism: A Theoretical Perspective as Applied to People's Courts in Post-1994 South Africa” 2011 36(1) *Journal* 117.

<sup>7</sup> Martin 2012 *State Crime* 229; Nel *Crime as Punishment* 2; Ngema “Vigilantism Don't Take Law Into Your Own Hands” (2018-05-28) *IOL News*.

<sup>8</sup> Cupido *The Development of Vigilantism in South Africa* (Master's dissertation, Stellenbosch University) 2021 1; Lancaster “Is Mob Violence Out of Control in South Africa?” (2019-03-05) *Daily Maverick*; Pieterse “Vigilantism” (2019-03-04) *The Witness*.

<sup>9</sup> Lancaster (2019-03-05) *Daily Maverick*.

<sup>10</sup> Moyo-Kupeta “Mob Justice is a Language in South Africa” (2021-05-30) *IOL News*.

<sup>11</sup> Pieterse (2019-03-04) *The Witness*.

<sup>12</sup> Manyane (2021-05-23) *IOL News*.

necklacing (where a car tyre is placed on a suspect's shoulders and set alight).<sup>13</sup>

As is evident from the above, vigilantism does not reduce crime. Instead, it contributes to an increase in the overall level of crime, and undermines the rule of law.<sup>14</sup> Moreover, it can cause irreparable harm, as innocent people may be assaulted or even killed.<sup>15</sup> While there is a risk that the wrong person may be punished, those who embrace vigilantism argue that the legal system faces the same kind of problem.<sup>16</sup> They make reference to instances where courts have convicted and sentenced people who were falsely accused of crime.<sup>17</sup> Accordingly, they argue that "if mistakes are grounds for deeming something illegal or moral, then our justice system fits the bill as well".<sup>18</sup> It should be noted that although vigilantism does not in itself constitute a criminal offence because it is not expressly prohibited by law, vigilantes can be prosecuted for other crimes (such as murder and assault) flowing from their actions. Today, many people have been charged for vigilante-related activities.<sup>19</sup>

Interestingly, although the perpetrators of vigilantism may be deemed to deserve punishment,<sup>20</sup> they are often seen in their communities as proactive citizens fighting crime.<sup>21</sup> Hence, vigilantes tend to receive support,<sup>22</sup> even when they go as far as killing someone.<sup>23</sup> Vigilantism is thus seen by those who support it as an attempt to address the problem of crime.<sup>24</sup> If this is the case, then community members should start contributing positively to the fight against crime. In other words, they need to come up with effective and acceptable ways of dealing with crime, rather than resorting to violence. One way in which community members can find appropriate solutions to crime is to support restorative justice. There is a belief that if the State adopted more inclusive alternate methods of dealing with crime – such as restorative justice – this might increase the likelihood of citizen buy-in<sup>25</sup> and therefore counter vigilantism, in particular because research shows restorative justice

<sup>13</sup> Lancaster (2019-03-05) *Daily Maverick*; Pieterse (2019-03-04) *The Witness*.

<sup>14</sup> Sekhonyane and Louw *Violent Justice, Vigilantism and the State's Response* (2002) 4.

<sup>15</sup> Nel *Crime as Punishment* 59–60; Pieterse (2019-03-04) *The Witness*.

<sup>16</sup> Rokhy "Vigilantes Should Be Able to Fight Crime Without Interference" (2011-10-31) *Daily Sundial*.

<sup>17</sup> Rokhy (2011-10-31) *Daily Sundial*. See the case of *Khanye v State* 2017 (2) SACR 630 (CC), where the court ordered the release of the accused who had spent 14 years in prison for a crime that they did not commit. It was proved in court that they were innocent.

<sup>18</sup> Rokhy (2011-10-31) *Daily Sundial*.

<sup>19</sup> Schnitzler, Dithage, Kgalema, Maepa, Mofokeng and Pigou *Guardian or Gangster? Mapogo a Mathamaga: A Case Study* (2001) 14–15; Clark "South Africans Are Taking the Law Into Their Own Hands" (2018-11-29) *Foreign Policy*.

<sup>20</sup> Maele *Community Perceptions on Vigilantism in Matome Village* (Master's dissertation, University of Limpopo) 2018 83; Nel (2017-02-17) *The Conversation*.

<sup>21</sup> Nel (2017-02-17) *The Conversation*; *S v Dikqacwi* [2013] ZAWCHC 67 6.

<sup>22</sup> Manyane (2021-05-23) *IOL News*; Nel (2017-02-17) *The Conversation*.

<sup>23</sup> Nel *Crime as Punishment* 223.

<sup>24</sup> Martin 2012 *State Crime* 229; Nel *Crime as Punishment* 162.

<sup>25</sup> Nel (2017-02-17) *The Conversation*.

has the potential to reduce crime, which, as indicated above, is what triggers vigilantism.

This article examines restorative justice as a way to deal with vigilantism in South Africa. Not much research has been done on restorative justice and its impact on vigilantism. The article aims to be a contribution in this field. There is however a comprehensive body of research on a restorative justice approach to wrongdoing. Moreover, studies have been undertaken focusing on the vigilantism phenomenon. This information is evaluated, analysed and interpreted to achieve the article's objective. The article begins by discussing police inefficiency and the dysfunctional criminal justice system as the cause of vigilantism in South Africa. Thereafter, it provides a brief exposition of restorative justice, followed by a discussion of the concept of community participation in dealing with crime. It further provides the reasons that community involvement in the justice process can be effective in reducing crime and in countering vigilantism. This is followed by a discussion of the current legislative framework for restorative justice practices in South Africa. The article ends with a brief conclusion and some suggestions.

## **2 POLICE INEFFICIENCY AND A DYSFUNCTIONAL CRIMINAL JUSTICE SYSTEM AS A CAUSE OF VIGILANTISM IN SOUTH AFRICA**

Police inefficiency and a dysfunctional criminal justice system are familiar causes of vigilantism in South Africa. Reports indicate that vigilantism is prevalent in "communities where people feel they are not being serviced appropriately by the police".<sup>26</sup> This perception often leads to people losing trust in the police.<sup>27</sup> Results from the survey conducted in 2018 demonstrate that 66 per cent of participants do not trust the police.<sup>28</sup> In 2021, the public trust in the police declined to 27 per cent.<sup>29</sup> Crime in many instances is not reported to the police, because people believe that the police are failing to solve it.<sup>30</sup> Because of a lack of confidence in the police, many people seek assistance outside government for protection against crime, such as using private-security services.<sup>31</sup> For those who cannot afford similar services, vigilantism becomes an alternative option.<sup>32</sup> In 2019, it was estimated that 3,5 per cent of households in South Africa belong to vigilante groups.<sup>33</sup> According to reports, people seek help from these groups, because they are

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<sup>26</sup> Clark (2018-11-29) *Foreign Policy*.

<sup>27</sup> Lancaster (2019-03-05) *Daily Maverick*; Moyo-Kupeta (2021-05-30) *IOL News*.

<sup>28</sup> Lancaster (2019-03-05) *Daily Maverick*; Moyo-Kupeta (2021-05-30) *IOL News*.

<sup>29</sup> Bruce "South Africa Must Rethink Its Community Safety System in Poor Urban Areas" (2022-11-02) *Daily Maverick*; Roberts and Gordon "South Africans Have Low Trust in their Police. Here's Why" (2022-03-28) *The Conversation*.

<sup>30</sup> Botha 2015 *Acta Criminologica* 26–27; Pieterse (2019-03-04) *The Witness*.

<sup>31</sup> Lancaster (2019-03-05) *Daily Maverick*.

<sup>32</sup> Lancaster (2019-03-05) *Daily Maverick*; Sekhonyane and Louw *Violent Justice 2*.

<sup>33</sup> Lancaster (2019-03-05) *Daily Maverick*.

seen as more effective than the police.<sup>34</sup> In other words, community members are forced to rely on vigilante groups for protection against crime. As one disgruntled member put it,

“If only the police would do their job the people in the community wouldn’t *have to* take the law into their own hands. I mean they are not doing anything from what I can see.”<sup>35</sup>

There is a similar link between perceived poor functioning of the criminal justice system and vigilantism.<sup>36</sup> Studies suggest that people often resort to vigilantism because they feel that the courts are not executing their functions efficiently.<sup>37</sup> A recent survey that measured South Africans’ trust in different institutions revealed that most participants (53 per cent) expressed little or no trust in the courts.<sup>38</sup> Based on research, the following are among the reasons that people are dissatisfied with the court system:

- a) not enough convictions;
- b) cases taking a long time to be finalised;
- c) no proper notices for hearings are served on victims; and
- d) courts being too lenient on criminals.<sup>39</sup>

As far as leniency is concerned, there are reports of incidents in other countries, where offenders have been attacked by members of the public after they have been acquitted or given a too-lenient sentence.<sup>40</sup> Similarly, in South Africa, there are instances where community members collectively pay the bail of offenders and thereafter kill them.<sup>41</sup> In most cases, the public is opposed to bail being granted to someone accused of serious crimes.<sup>42</sup> In view of this, the State often objects to the accused’s bail, citing their safety as one reasons for their objection.<sup>43</sup>

In addition to the above-mentioned reasons, the issue of perpetrators being granted bail has also emerged as a ground for dissatisfaction.<sup>44</sup> Bail is perceived by some members of the public as a mechanism that serves the interests of offenders as opposed to those of victims and the wider community.<sup>45</sup> It is seen to allow the suspects of crime to return to their communities to flaunt their freedom and continue with criminal activities.<sup>46</sup>

<sup>34</sup> Nel *Crime as Punishment* 162.

<sup>35</sup> *Ibid.*

<sup>36</sup> Nel (2017-02-17) *The Conversation*; Pieterse (2019-03-04) *The Witness*.

<sup>37</sup> Nel *Crime as Punishment* 255.

<sup>38</sup> Moosa and Hofmeyer *South Africans’ Trust in Institutions and Representatives Reaches New Low* (2021) 7.

<sup>39</sup> Botha 2015 *Acta Criminologica* 24.

<sup>40</sup> Haas *Public Support for Vigilantism* (Doctoral thesis, Leiden University) 2010 17.

<sup>41</sup> Harris *As for Violent Crime* 33.

<sup>42</sup> Aschaiek *Understanding Punishment and Crime Control in South Africa’s Marginalized Communities* (2019) 3.

<sup>43</sup> Khoza “Four Murder-Accused Farmers Denied Bail” (2021-04-13) *Sowetan Live*.

<sup>44</sup> Harris *As for Violent Crime* 35.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

Some researchers have attributed this perception to people's lack of knowledge about how the criminal justice system operates.<sup>47</sup> Accused persons are, by law, entitled to be released on bail if they meet certain requirements. Moreover, being granted bail does not mean that they will never have to stand trial. Although this bail-related misunderstanding can be seen as "understandable given that most South Africans have never experienced the benefits of a properly functioning criminal justice system",<sup>48</sup> it does show the extent to which due process remains an unfamiliar concept to many people.<sup>49</sup> This can also be seen in some of the reasons that people are dissatisfied with the police. For example, one reason that vigilante activities are supported by communities is that, in the case of theft, vigilantes not only punish perpetrators, but also get back the stolen property.<sup>50</sup> As part of due process, the police are required to retain the stolen property to present it as evidence of crime in the forthcoming criminal proceedings. It would thus appear to be insufficient just to address the shortcomings of the conventional criminal justice system and police inefficiency without also educating the public about due process.<sup>51</sup>

### 3 WHAT IS RESTORATIVE JUSTICE PRACTICE?

Restorative justice is a concept that is subject to various interpretations.<sup>52</sup> There is no consensus among scholars on a common definition of restorative justice. The absence of a universally accepted definition can be attributed to the fact that restorative justice can be applied in different contexts. Apart from dealing with crime, it can be used to resolve conflicts in schools, families and workplaces.<sup>53</sup> In the criminal context, restorative justice is a process that is aimed at repairing the injustice emanating from crime.<sup>54</sup> It proceeds from the premise that crime is conduct that results in harm to people and their relationships.<sup>55</sup> Restorative justice is defined by the South African Department of Justice as:

"an approach to justice that aims to involve the parties to a dispute and others affected by the harm (victims, offenders, families concerned and community members) in collectively identifying harms, needs and obligations through

<sup>47</sup> Harris *As for Violent Crime* 54; Nel *Crime as Punishment* 198–199.

<sup>48</sup> Harris *As for Violent Crime* 54.

<sup>49</sup> Harris *As for Violent Crime* 5, 54.

<sup>50</sup> Harris *As for Violent Crime* 21; Nel *Crime as Punishment* 197.

<sup>51</sup> Harris *As for Violent Crime* 55.

<sup>52</sup> Murhula and Tolla "The Effectiveness of Restorative Justice Practices on Victims of Crime: Evidence From South Africa" 2021 10(1) *International Journal for Crime, Justice and Social Democracy* 100.

<sup>53</sup> Umbreit and Armour *Restorative Justice Dialogue: An Essential Guide for Research and Practice* (2011) 183.

<sup>54</sup> Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 191.

<sup>55</sup> Allan, Beesly, Attwood and McKillop "Apology in Restorative and Juvenile Justice" 2014 21(2) *Psychiatry, Psychology and Law* 176; Batley "Restorative Justice in South Africa" in Peacock (ed) *Victimology in South Africa* 2ed (2013) 115; Zehr *Changing Lenses: A New Focus for Crime and Justice* (1990) 181.

accepting responsibilities, making restitution, and taking measures to prevent a recurrence of the incident and promoting reconciliation.”<sup>56</sup>

Accordingly, restorative justice acknowledges the impact of crime on community members and calls for their involvement in the search for appropriate solutions. As postulated by Sachs J,

“central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control.”<sup>57</sup>

As is evident from the above definition, restorative justice emphasises that an inclusive decision-making process should be used to repair the harm caused by crime. In practice, various dialogue-orientated processes are used, and these include: victim-offender mediation; family-group conferencing; circles; and panels.<sup>58</sup> They are aimed at enabling the affected parties to talk about the incident of the crime and its impact, and to decide how the harm of crime should be repaired.<sup>59</sup> The common outcomes of these processes include:

- a) an apology;
- b) restitution in kind or in monetary terms, aimed at compensating the victim for the loss suffered;
- c) performing some service for the victim;
- d) performing community service as a way of making right to the community;
- e) referral of the offender to some form of assistance programme to address some of his/her needs; and
- f) a plan to address what future steps can be taken by all involved to reduce the possibility of the recurrence of the crime committed.<sup>60</sup>

This idea of enabling the affected parties to decide on what should happen is equivalent to returning the power of resolving conflicts of crime to where it belongs. It has long been argued that the State (its representatives) and lawyers have stolen this power from parties affected by crime.<sup>61</sup> From a

<sup>56</sup> Department of Justice and Constitutional Development *Restorative Justice: The Road to Healing* (2011) 3–4.

<sup>57</sup> *S v M* 2007 (2) SACR 539 (CC) 62; South African Law Commission *Report: Sentencing (A New Sentencing Framework)* (2000) par 3.3.34.

<sup>58</sup> Although similar in focus, these practices differ in terms of the number of people who may participate in each. Unlike victim-offender mediation for example, others involve family members, community members and other relevant stakeholders. Another difference is that with circles, the participants sit in a circle during the process.

<sup>59</sup> Kurki “Evaluating Restorative Justice Practices” in Von Hirsch, Roberts, Bottoms, Roach and Schiff (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003) 293.

<sup>60</sup> Batley “Ngwana Phosa Dira Ga a Bolawe: The Value of Restorative Justice to the Reintegration of Offenders” 2008 26 *SA Crime Quarterly* 28.

<sup>61</sup> Christie “Conflicts as Property” 1977 17(1) *The British Journal of Criminology* 4–7; McCold “What is the Role of Community in Restorative Justice Theory and Practice?” in Zehr and Toews (eds) *Critical Issues in Restorative Justice* (2004) 168; Johnstone “Restorative Justice for Victims: Inherent Limits?” 2017 5(3) *Restorative Justice: An International Journal* 384.

restorative justice point of view, no matter how competent these professionals may be in performing their respective duties, they do not have the necessary knowledge to address the harm that results from crime. Only the affected parties have the required knowledge of what they need from the justice process and are therefore able to come up with appropriate responses.<sup>62</sup>

Since the emphasis is on the harm caused by crime, restorative justice is not only focusing on victims and their needs, but also on the harm suffered by other stakeholders, such as the community.<sup>63</sup> While it places less emphasis on punishment, restorative justice does require that the offender be held accountable. Accountability is achieved when offenders through their participation in restorative justice processes are made to realise the impact and consequences of their actions and encouraged to rectify the wrongs they have done.<sup>64</sup> According to research, this is likely to change behaviour among offenders.<sup>65</sup> In this context, accountability in restorative justice is not only beneficial to victims, but also to society and offenders themselves.<sup>66</sup>

As in most countries, restorative justice is not a new concept in South Africa. Its approach is similar to how African people deal with disputes.<sup>67</sup> Moreover, several pieces of legislation refer to restorative justice as one method of dealing with crime.<sup>68</sup> Also, its principles have been introduced into the sentencing process in several court judgments.<sup>69</sup>

## 4 RESTORATIVE JUSTICE AND THE COMMUNITY

### 4.1 Who is “community” in restorative justice?

From a restorative justice perspective, there are two types of community that are harmed by crime.<sup>70</sup> These are micro-communities and macro-communities. The micro-communities, also known as communities of care, consist of family members, friends (of both victim and offender) and other

<sup>62</sup> Barton “Theories of Restorative Justice” 2000 2(1) *Australian Journal of Professional and Applied Ethics* 1.

<sup>63</sup> Zehr *The Little Book of Restorative Justice* (2002) 22–23.

<sup>64</sup> Zehr *The Little Book* 16.

<sup>65</sup> Bidois “The Value of Restorative Justice” 2016 42(4) *Commonwealth Law Bulletin* 604; Johnstone *Restorative Justice: Ideas, Values, Debates* (2002) 13; Louw and Van Wyk “The Perspectives of South African Legal Professionals on Restorative Justice: An Exploratory Qualitative Study” 2016 52(4) *Social Work* 503.

<sup>66</sup> Zehr *The Little Book* 16.

<sup>67</sup> Louw and Van Wyk 2016 *Social Work* 492.

<sup>68</sup> See ss 69 and 73 of the Child Justice Act 75 of 2008; s 52(1)(g) of the Correctional Services Act 111 of 1998; s 2 of the Probation Services Amendment Act 35 of 2002.

<sup>69</sup> *S v M supra*; *S v Shilubane* 2008 (1) SACR 295 (T); *S v Seedat* 2015 (2) SACR 612 (GP); *S v Maluleke* 2008 (1) SACR 49 (T); *S v Tabethe* 2009 (2) SACR 62 (T); *S v Saayman* 2008 (1) SACR 393 (E).

<sup>70</sup> Naudé “An International Perspective of Restorative Justice Practices and Research Outcomes” 2006 31(1) *Journal for Juridical Science* 116.

people who share meaningful personal relationships.<sup>71</sup> Members of a micro-community provide all kinds of support and care that we may need in life, and their concerns and opinions are most likely to influence how we conduct ourselves.<sup>72</sup> In essence, these are people who have an ongoing relationship of concern for both victim and offender.<sup>73</sup> As far as this type of community is concerned, crime largely affects relationships. For example, crime reduces trust between offenders and their family members, who often feel ashamed of offenders' conduct.<sup>74</sup> Moreover, family members of victims often blame themselves for what happened. They feel that they should have done something to protect their loved ones and may hold a grudge against the offender.<sup>75</sup> This demonstrates that crime can "produce a hostile relationship where no previous relationship existed".<sup>76</sup> From respective communities of care, family members need the opportunity to describe how they have been affected by crime, and to see offenders acknowledging the wrong. Communities of care further need the chance to listen to the victim describing the impact of crime; encourage good behaviour of offenders; and support the role of offenders and victims in repairing the harm caused by crime.<sup>77</sup>

Macro-communities, on the other hand, are comprised of groups of people who do not have a personal relationship but are defined by geographical area or membership.<sup>78</sup> An example of a macro-community is the area or neighbourhood in which one resides, or the state, club, or professional associations to which one might belong.<sup>79</sup> For this type of community, crime affects broader society because it results in a loss of a sense of public safety.<sup>80</sup> This, in turn, disturbs the public's sense of trust.<sup>81</sup> From the macro-community perspective, reparative actions should also focus on protecting the neighbourhood and society at large against crime.<sup>82</sup> In essence, restorative justice interventions should also focus on reducing crime. Some researchers consider crime reduction to be secondary to restorative

<sup>71</sup> McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156; Naudé 2006 *Journal for Juridical Science* 116.

<sup>72</sup> Gerkin *Seeking Justice for Victims and Offenders: A Needs-Based Approach to Justice* (Doctor of Philosophy thesis, Western Michigan University) 2006 66; McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156.

<sup>73</sup> Hill "Restorative Justice: Sketching a New Legal Discourse" 2008 4(2) *International Journal of Punishment and Sentencing* 54.

<sup>74</sup> McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156.

<sup>75</sup> McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156–157.

<sup>76</sup> Heath-Thornton "Restorative Justice" (26 August 2018) <https://www.britannica.com/topic/restorative-justice> (accessed 2021-01-22).

<sup>77</sup> McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156–157.

<sup>78</sup> Gerkin "Who Owns This Conflict? The Challenge of Community Involvement in Restorative Justice" 2012 15(3) *Contemporary Justice Review* 279; McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156; Naudé 2006 *Journal for Juridical Science* 116.

<sup>79</sup> Gerkin 2012 *Contemporary Justice Review* 279; McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156.

<sup>80</sup> Gerkin *Seeking Justice* 67; McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 157.

<sup>81</sup> Heath-Thornton <https://www.britannica.com/topic/restorative-justice>.

<sup>82</sup> McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 157.

justice.<sup>83</sup> This view ignores the restorative justice aim of addressing the harms of crime. Since this community experiences feelings of unsafety because of crime, there is a need for its members to feel safe. It is therefore difficult to see how crime reduction cannot be one of the priorities of restorative justice. In fact, there is an argument that for restorative justice to operate as a mainstream response to crime, its practices and policies need to address widely accepted goals of criminal justice (such as crime reduction) while at the same time preserving restorative principles.<sup>84</sup>

Since members of a macro-community have no direct ties to victims and offenders, they usually participate in restorative justice processes as parties who represent the wider community interests<sup>85</sup> or social norms that have been violated by the offender.<sup>86</sup> These representatives come from different sections of society and are usually people with a good understanding of local cultures and communities.<sup>87</sup> Members of this community can also participate as volunteers whose role is to facilitate (or mediate) restorative justice processes. Community volunteers play a critical role, as many restorative justice practices largely depend on them.<sup>88</sup> With proper training, these volunteers can be as effective as legal professionals in fulfilling their duties.<sup>89</sup>

Given that crime causes harm to members of each community in different ways, and that all have different needs that must be met if one is to experience a full sense of justice, both communities are key in restorative justice.

## 4.2 Community participation in the justice process and its potential to reduce crime

As already indicated, restorative justice emphasises community participation in the justice process. For this to happen, proponents of restorative justice contend that there is a need to “change the role of justice professionals and the mandate of the justice system to ensure that communities are

<sup>83</sup> Bezuidenhout “Restorative Justice With an Explicit Rehabilitative Ethos: Is This the Resolve to Change Criminality?” 2007 20(2) *Acta Criminologica* 44; Doolin “But What Does It Mean? Seeking Definitional Clarity in Restorative Justice” 2007 71(5) *The Journal of Criminal Law* 432; Robinson and Shapland “Reducing Recidivism: A Task for Restorative Justice?” 2008 48 *British Journal of Criminology* 339.

<sup>84</sup> Robinson and Shapland 2008 *British Journal of Criminology* 340.

<sup>85</sup> Maglione “Communities at Large: An Archaeological Analysis of the ‘Community’ Within Restorative Justice Policy and Laws” 2017 25 *Critical Criminology* 457; Rossner and Bruce “Community Participation in Restorative Justice: Rituals, Reintegration, and Quasi-Professionalisation” 2016 11(1) *Victims & Offenders* 108.

<sup>86</sup> Dzur and Olson “The Value of Community Participation in Restorative Justice” 2004 35(1) *Journal of Social Philosophy* 95.

<sup>87</sup> Maglione 2017 *Critical Criminology* 457.

<sup>88</sup> Asadullah “Community Praxis: Exploring a Community Engagement Framework for Restorative Justice in British Columbia, Nova Scotia, and Bangladesh” 2020 5(3) *Journal of Community Safety and Well-Being* 114.

<sup>89</sup> United Nations Office on Drugs and Crime *Handbook on Restorative Justice Programmes* 2ed (2020) 9.

encouraged to assume greater responsibility”.<sup>90</sup> Furthermore, communities need to be capacitated to deal with crime more effectively; which is what restorative justice aims to achieve.<sup>91</sup> Some scholars believe that encouraging communities to take responsibility for solving crime makes communities accountable and this strengthens them in the process.<sup>92</sup> The call for roles to change is consistent with the view that decision-making powers should be returned to their rightful owners. The argument is that government should relinquish its exclusive authority over prosecuting and punishing offenders<sup>93</sup> to enable the community to have a say in how conflicts of crime should be dealt with. In other words, a shift in roles means that community members move from being service recipients to decision makers.<sup>94</sup> This means that community members would be able to play a more meaningful role in the justice process than being only considered when the State needs information or witnesses.<sup>95</sup>

What exactly should the role of community members be in the justice process? As highlighted above, in restorative justice, they participate in identifying the harms of crime, as well as in finding ways to repair them. This includes offering the necessary support to victims and others affected by crime. Moreover, community members contribute to finding ways to prevent future crimes. This is because restorative justice interventions, as noted, also focus on addressing the underlying causes of crime.<sup>96</sup> One other role of the community (as discussed below) is to facilitate the reintegration of offenders. Given such roles, the participation of community members can be seen as having advantages over criminal justice agencies and may be able to deal with crime more effectively.

There have been encouraging results from community-based restorative justice programmes implemented in some areas in South Africa. One such programme is the so-called Zwelethemba model, which was introduced in Zwelethemba township, Cape Town.<sup>97</sup> This model was established in 1997

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<sup>90</sup> Bazemore and Schiff *Juvenile Justice Reform and Restorative Justice: Building Theory and Policy From Practice* (2005) 68.

<sup>91</sup> *Ibid.*

<sup>92</sup> McCold *Restorative Justice: The Role of the Community* Paper presented to the Academy of Criminal Justice Sciences Annual Conference, Boston (March 1995) <https://www.iirp.edu/news/restorative-justice-the-role-of-the-community> (accessed 2022-12-12).

<sup>93</sup> Schmid “Restorative Justice: A New Paradigm for Criminal Justice Policy” 2002 34 *VUWLR* 125; Christie 1977 *The British Journal of Criminology* 4–7; McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 168; Johnstone 2017 *Restorative Justice: An International Journal* 384.

<sup>94</sup> Dzur and Olson 2004 *Journal of Social Philosophy* 94.

<sup>95</sup> Tshehla “The Restorative Justice Bug Bites the South African Criminal Justice System” 2004 17 *SACJ* 3.

<sup>96</sup> See also Skelton “Tapping Indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and the Denunciation of Crime in South Africa” 2007 28(2) *Acta Juridica* 234; Skelton and Batley “Restorative Justice: A Contemporary South African Review” 2008 21(3) *Acta Criminologica* 47.

<sup>97</sup> Froestad and Shearing “Practicing Justice – The Zwelethemba Model of Conflict Resolution” in Slakmond, Campos, and Pinto (eds) *Justicia Restaurativa* (2005) 14; Martin “Vigilantism and Informal Social Control in South Africa” 2010 23(3) *Acta Criminologica* 66.

and ran until 2009. Its purpose was to “empower poor and marginalised communities to strengthen their security governance capacities”.<sup>98</sup> Built around the process of peace making, the Zwelethemba model provided the method to resolve conflicts in the community without resorting to violence.<sup>99</sup> With peace-making gatherings, people who are believed to have knowledge and capacity to offer a solution that could reduce the likelihood of conflict continuing are invited.<sup>100</sup> Accordingly, the Zwelethemba’s method of conflict resolution also focused on identifying root causes as well as future-oriented solutions.<sup>101</sup> It is believed that peace is likely to occur when effects of conflict are mitigated, and the chance of conflict recurring is reduced.<sup>102</sup> More than 113 000 disputes, ranging from sexual offences, assault and property crimes, have been resolved through this programme, before it was discontinued owing to a lack of funding.<sup>103</sup> Acknowledging its potential for successfully reducing contact crimes, it was recommended in 2014 that a system of community-based mediation to resolve disputes similar to the community peace-making programme be reintroduced – and this time with a call for government to provide the necessary financial assistance.<sup>104</sup> Thus, as far as contact crimes are concerned, a recent study that examined the effectiveness of peace-making programmes in various countries, including South Africa, showed positive results. Using peace-making techniques to prevent violence in areas notorious for gangsterism and crime, this study found that Cape Town experienced a reduction of 14 per cent in murder, 29 per cent in attempted murder and 10 per cent in serious assault cases respectively.<sup>105</sup>

Another interesting community-based project is the Justice and Restoration Programme (JARP) that was introduced in Phoenix, KwaZulu-Natal province.<sup>106</sup> It is an initiative aimed at providing an alternative method of dealing with crime and conflict in the community. Phoenix is an area that often experiences high levels of crime, unemployment and substance abuse.<sup>107</sup> A community survey conducted in 2006 demonstrated that crime continues to be a problem in this area and that there was a need for a holistic crime-intervention programme – hence the implementation of JARP in 2007.<sup>108</sup> Apart from community members, JARP involves representatives

<sup>98</sup> Nel *Crime as Punishment* 332; Froestad and Shearing in Slakmond *et al* (eds) *Justicia Restaurativa* (2005) 14.

<sup>99</sup> Martin 2010 *Acta Criminologica* 66; Nel *Crime as Punishment* 333.

<sup>100</sup> Froestad and Shearing in Slakmond *et al* (eds) *Justicia Restaurativa* 17.

<sup>101</sup> Froestad and Shearing in Slakmond *et al* (eds) *Justicia Restaurativa* 17; Nel *Crime as Punishment* 333.

<sup>102</sup> Nel *Crime as Punishment* 333.

<sup>103</sup> Nel *Crime as Punishment* 333–334.

<sup>104</sup> Nel *Crime as Punishment* 334; O’Regan and Pikoli *The Report of The Commission of Inquiry Into Allegations of Police Inefficiency and a Breakdown in Relations Between SAPS and the Community in Khayelitsha* (2014) 452.

<sup>105</sup> Vernon *Local Peacebuilding: What Works and Why* (2019) 28.

<sup>106</sup> Hargovan “Doing Justice Differently: A Community Based Restorative Justice Initiative in KwaZulu-Natal” 2009 22(3) *Acta Criminologica* 68.

<sup>107</sup> Hargovan 2009 *Acta Criminologica* 69.

<sup>108</sup> *Ibid.*

from the National Prosecuting Authority, the South African Police Service, the Department of Justice and Constitutional Development, the Department of Social Development, and other relevant stakeholders. It makes use of mediation to handle cases that are referred to it either by prosecutors or the police. If mediation between victim and offender is successful and an acceptable solution is reached, this could lead to the case being removed from the court's roll.<sup>109</sup> An evaluation of JARP's impact on crime revealed that most offenders who participated in this programme experienced a change in their behaviour.<sup>110</sup> Similarly, based on its potential to reduce reoffending, it was recommended that the programme be replicated and expanded to other areas in the province.<sup>111</sup>

Similarly, research conducted in other jurisdictions on community-based restorative justice programmes indicates positive results. One such programme is the Restorative Community Conferencing (RCC) that was implemented in Alameda County, California USA.<sup>112</sup> As with JARP, apart from being a pre-adjudication diversion programme for offenders, the RCC involves, among others, the community and law-enforcement agencies in trying to find a solution to the harm caused by crime. If participants are not able to reach an agreement on a plan to repair the harm, or the offender fails to complete the plan, the case then goes through the traditional court process.<sup>113</sup> The results from the study done on the RCC showed that offenders were 44 per cent less likely to commit further crimes within 12 months of completing this programme than those whose cases were dealt with through the courts.<sup>114</sup> Moreover, there is evidence that this programme has managed to help offenders fix their relationships with family members.<sup>115</sup> This opportunity to mend relationships, as shown below, can go a long way to influencing behavioural change in offenders.

Another programme showing evidence-based success is the Mornington Island Restorative Justice (MIRJ) project located in Queensland, Australia.<sup>116</sup> MIRJ is also a community-led programme that aims to "strengthen local capacity to manage conflict in its own way, without having resort to violence or use external agencies like the police and courts".<sup>117</sup> Thus far, more than 100 disputes have been successfully mediated through this programme. The outcomes achieved through mediation include the prevention of escalation of violence<sup>118</sup> and a reduction of crime.<sup>119</sup> Based on the results of a 2014

<sup>109</sup> Hargovan 2009 *Acta Criminologica* 71.

<sup>110</sup> Hargovan 2009 *Acta Criminologica* 73.

<sup>111</sup> Hargovan 2009 *Acta Criminologica* 84–85.

<sup>112</sup> Baliga, Henry, and Valentine *Restorative Justice Conferencing: A Study of Community Works West's Restorative Justice Youth Diversion Program in Alameda County* (2017) 1.

<sup>113</sup> Baliga *et al Restorative Justice Conferencing* 3–4.

<sup>114</sup> Baliga *et al Restorative Justice Conferencing* 7.

<sup>115</sup> Baliga *et al Restorative Justice Conferencing* 13.

<sup>116</sup> Colmar Brunton *Mornington Island Restorative Justice Project Evaluation: Final Report* (2014) 3.

<sup>117</sup> *Ibid.*

<sup>118</sup> Standing Committee of Attorneys-General *National Indigenous Law and Justice Framework* (2013) 23.

evaluation of the MIRJ Project, most participants (91 per cent) indicated that they feel safe, because of the project's interventions in their community.<sup>120</sup>

The above discussion sought to demonstrate the potential of community-based restorative justice programmes to deal with crime. Therefore, there is evidence that they do result in some reduction in crime. Moreover, they tend to have a positive effect on offenders' behaviour.

## 5 THEORITICAL EXPLANATIONS FOR WHY RESTORATIVE JUSTICE MIGHT REDUCE CRIME AND COUNTER VIGILANTISM

There are several accounts as to why restorative justice might be effective in reducing crime. One is that it involves the community in its attempt to find solutions to crime and its consequences. Community members have a better knowledge of the root causes of crimes that are committed within it.<sup>121</sup> As Dzur and Olson point out, "community members have a better sense of who is doing what, when, and where in their neighborhoods".<sup>122</sup> Therefore, they are well positioned to know what is happening in the life of the offender and what could have led to their criminal behaviour. In this way, community members stand a good chance to break the cycle of crime.<sup>123</sup> According to proponents of restorative justice, this informal (social control) monitoring of criminal activity is more effective than the formal efforts of the police.<sup>124</sup> They argue that community members "provide a level of surveillance that can never be matched by the police in a free, democratic society".<sup>125</sup> Those who align themselves with this view assert that it would be difficult for law-enforcement agencies to deal with crime effectively without the involvement of local communities who know their areas.<sup>126</sup>

With social control there is also a threat of social ostracism that might deter crime.<sup>127</sup> This is simply because when an individual commits a crime, members of the community know about it and this might lead an offender to be rejected and ostracised by the community.<sup>128</sup> Research suggests that offenders worry about facing rejection.<sup>129</sup> For this reason, they are likely to

<sup>119</sup> Colmar Brunton *Mornington Island* 63.

<sup>120</sup> Colmar Brunton *Mornington Island* 110.

<sup>121</sup> Dzur and Olson 2004 *Journal of Social Philosophy* 95; Kgosimore "Restorative Justice as an Alternative Way of Dealing With Crime" 2002 15(2) *Acta Criminologica* 69; Manaliyo "Barriers to Community Participation in Crime Prevention in Low Income Communities in Cape Town" 2016 8(1) *International Journal of Social Sciences and Humanity Studies* 271.

<sup>122</sup> Dzur and Olson 2004 *Journal of Social Philosophy* 95.

<sup>123</sup> Kgosimore 2002 *Acta Criminologica* 73.

<sup>124</sup> Dzur and Olson 2004 *Journal of Social Philosophy* 95.

<sup>125</sup> *Ibid.*

<sup>126</sup> Manaliyo 2016 *International Journal of Social Sciences and Humanity Studies* 270.

<sup>127</sup> Dzur and Olson 2004 *Journal of Social Philosophy* 95.

<sup>128</sup> Chikadzi "Challenges Facing Ex-Offenders When Reintegrating Into Mainstream Society in Gauteng, South Africa" 2017 53(2) *Social Work* 293.

<sup>129</sup> *Ibid.*

be deterred from committing crime. These arguments taken together suggest that informal social control has more potential to reduce crime than conventional policing or the criminal justice system. Social control is however likely to achieve the desired results in societies where there is a shared interest in creating safer communities. Research demonstrates that communities that share common understandings and values tend to be more determined to achieve common interests, including maintaining safety and order.<sup>130</sup> Arguably, vigilantism shows that community members share a concern with the police for maintaining safe neighbourhoods.

Based on the theory of social control, restorative justice with its involvement of the community might help to counter the problem of vigilantism. This is particularly so since this theory demonstrates a potential to curb crime, which, as indicated before, is the root cause of vigilantism. When members of the community are more involved in the criminal justice process, they get to know each other well (they know who is doing what and when), and this increases informal social control.<sup>131</sup> Involvement “ideally strengthens the social ties that empower community members to deter crime and shame and integrate offenders”.<sup>132</sup> Accordingly, these ties are more likely to restrain impulses that may be found to be unacceptable by the community.<sup>133</sup>

Aside from being powerful agents of social control, community members have the potential to influence offenders towards good behaviour. There is a view among scholars that community members communicate disapproval better than criminal justice professionals, who may be regarded as part of the system.<sup>134</sup> As Braithwaite notes,

“it is not the shame of police or judges or newspapers that is most able to get through to us; it is shame in the eyes of those we respect and trust.”<sup>135</sup>

This view is supported by research that indicates that when the most important people (community of care) in an offender’s life confront them about their behaviour and make it clear that they are hurt and ashamed of it, the offender is likely to think twice.<sup>136</sup> One explanation for why shame that comes from those close to an individual is most likely to have a deterrent effect is that it threatens valued relationships.<sup>137</sup> More importantly, studies further demonstrate that offenders who previously participated in the restorative justice process consistently refer to the support they received

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<sup>130</sup> Manaliyo 2016 *International Journal of Social Sciences and Humanity Studies* 272.

<sup>131</sup> Dzur and Olson 2004 *Journal of Social Philosophy* 96.

<sup>132</sup> *Ibid.*

<sup>133</sup> Asadullah 2020 *Journal of Community Safety and Well-Being* 112.

<sup>134</sup> Dzur and Olson 2004 *Journal of Social Philosophy* 95.

<sup>135</sup> Braithwaite “Restorative Justice: Assessing Optimistic and Pessimistic Accounts” 1999 25 *Crime and Justice* 39–40. See also Dzur and Olson 2004 *Journal of Social Philosophy* 95.

<sup>136</sup> Barton 2000 *Australian Journal of Professional and Applied Ethics* 7–8.

<sup>137</sup> Harris and Maruna “Shame, Shaming and Restorative Justice: A Critical Appraisal” in Sullivan and Tiftt (eds) *Handbook of Restorative Justice: A Global Perspective* (2006) 453.

from the community as having made a difference.<sup>138</sup> Although the kind of difference is not mentioned, it can be assumed that the difference had to do with offenders changing their behaviour, one way or another. Research has consistently demonstrated the potential of restorative justice to reduce reoffending.<sup>139</sup> Similarly, the more restorative justice is able to reduce crime, the more incidents of vigilantism will decline.

Another reason that restorative justice might reduce crime is its emphasis on reintegration of offenders.<sup>140</sup> Reintegration is a process that involves the offender correcting their wrongs and being reaccepted into the community as a law-abiding citizen. Those who are familiar with restorative justice point to the fact that it facilitates this process.<sup>141</sup> This is contrary to the conventional criminal justice system, which tends to hinder the process of reintegration.<sup>142</sup> Yet, there is evidence that failure to reintegrate offenders contributes to reoffending.<sup>143</sup> One of the criticisms against the conventional system is that its sanctions – isolating and alienating offenders from society – are the antithesis of reintegrative strategies.<sup>144</sup> This can be attributed to the system being largely punitive. Even those sanctions that are not as punitive and confining as imprisonment are not geared towards rebuilding the offender's ties with their community.<sup>145</sup> For example, the offender may be required to do community service or pay a fine, but the offender has fewer opportunities to convey their repentance.<sup>146</sup> In this way, the community is denied the chance to demonstrate its acceptance of the offender.<sup>147</sup> In other words, offenders are not only deprived of the opportunity to acknowledge their mistakes, but also to show that they remain part of the law-abiding community and that they are aware of its standards of acceptable behaviour.<sup>148</sup>

Evidence suggests that offenders need to feel a sense of belonging.<sup>149</sup> Furthermore, this sense of belonging can lead to changes in offenders' behaviour, as they will strive to conduct themselves in accordance with the

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<sup>138</sup> Pranis "Peacemaking Circles" in Johnstone (ed) *A Restorative Justice Reader* 2ed (2013) 120.

<sup>139</sup> Bradshaw and Roseborough "Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism" 2005 69(2) *Federal Probation* 17; Sherman, Strang, May-Wilson, Woods and Ariel "Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings From a Campbell Systematic Review" 2015 31 *Journal of Quantitative Criminology* 1; Umbreit and Armour *Restorative Justice Dialogue* 132.

<sup>140</sup> Siegel and Bartollas *Corrections Today* 4ed (2016) 24.

<sup>141</sup> Imiera "Therapeutic Jurisprudence and Restorative Justice: Healing Crime Victims, Restoring the Offenders" 2018 *De Jure* 99.

<sup>142</sup> Roche *Accountability in Restorative Justice* (2003) 29.

<sup>143</sup> Lotter "Why a Resettlement Grant for Ex-Offenders in SA Is a Really Good Idea" (2018-09-18) *IOL News*.

<sup>144</sup> Roche *Accountability* 29.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> Dzur and Olson 2004 *Journal of Social Philosophy* 95–96.

community's standards of acceptable behaviour.<sup>150</sup> This is particularly so as reports indicate that ex-offenders wish to return to society as responsible citizens.<sup>151</sup> Just as offenders have a desire to become responsible citizens, so is there a desire in the community to see this happening. This point was emphasised in the case of *S v M*.<sup>152</sup> Apart from describing the community resources as capable of dealing with the immoral behaviour of an offender, the court held that the community should be seen not just as a crowd of vengeful people who want to see the casting-out of those who commit crimes but, rather as people who are also interested in the moral restoration of one of its members.<sup>153</sup> Put differently, apart from wanting to see offenders being held accountable for their crimes, community members also want to see offenders changing their behaviour.

Given this interest and the fact that offenders wish to be accepted back into society, community members need to play their role. Based on restorative justice reintegrative strategies, part of the community's role is to show love and care to offenders as they serve their sentences.<sup>154</sup> Offenders need to feel that society still cares about them and that they have a chance of being reaccepted. Therefore, when expressing their disapproval, community members need to treat offenders as members of the community who violated its norms only temporarily.<sup>155</sup> Although this is not an easy thing to do, proponents of restorative justice believe that community members are better able to achieve it than criminal justice professionals.<sup>156</sup> Research in restorative justice shows that societies that are more forgiving and respectful, while taking crime seriously, tend to have lower levels of crime than societies that humiliate offenders.<sup>157</sup> Arguably, restorative justice would not only facilitate the successful reintegration of offenders but would also reduce the likelihood of reoffending.

Besides the potential to reduce crime, restorative justice also has potential to provide the form of justice that the community often wants. Reports indicate that people resort to vigilantism because it provides more visible justice to the community than does the criminal justice system.<sup>158</sup> This is consistent with the suggestion that people may be receptive to alternative methods of dealing with crime, such as restorative justice, because they

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<sup>150</sup> Cherry "How the Need to Belong Influences Human Behavior and Motivation. Very Well Mind" (5 March 2021) <https://www.verywellmind.com/what-is-the-need-to-belong-2795393> (accessed 2021/10/25).

<sup>151</sup> Lotter (2018-09-18) *IOL News*.

<sup>152</sup> *Supra*.

<sup>153</sup> Par 75.

<sup>154</sup> Kim and Gerber "The Effectiveness of Reintegrative Shaming and Restorative Justice Conferences: Focusing on Juvenile Offenders' Perceptions in Australian Reintegrative Shaming Experiments" 2012 *International Journal of Offender Therapy and Comparative Criminology* 1065.

<sup>155</sup> Dzur and Olson 2004 *Journal of Social Philosophy* 96.

<sup>156</sup> *Ibid*.

<sup>157</sup> Braithwaite "Shame and Criminal Justice" 2000 42(3) *Canadian Journal of Criminology* 282-283; Lotter (2018-09-18) *IOL News*.

<sup>158</sup> Clark (2018-11-29) *Foreign Policy*.

tend to offer visible justice. According to the study done by Louw and Van Wyk, some people feel that alternative sentences (especially non-custodial sentences) are more 'visible' to the community, as the community does not witness punishment when the offender is in prison.<sup>159</sup> Chapman<sup>160</sup> observes that even if imprisonment can prove effective in terms of preventing crime, its impact is unlikely to be noticed or even appreciated by the public. This is because community members often see people committing crimes and not being held accountable; they do not see people *not* committing crimes.<sup>161</sup> With restorative justice, community members are there to witness justice in action. This is because they are actively involved in restorative justice processes, including holding offenders accountable, as indicated before. Accordingly, restorative sanctions are likely to give community members a sense that justice has been done. Indeed, justice need not be punitive for it to be recognised. Arguably, justice can also take the form of a restorative outcome that has been determined through following a fair process and that is considered satisfactory.

There is evidence that those who participate in restorative justice tend to experience the process as being fair,<sup>162</sup> and that this can build confidence in the justice system. Several studies indicate fairness of a process as an important factor in willingness to cooperate with the justice system.<sup>163</sup> In other words, people tend to cooperate with the justice system when they consider it to be fair. With the conventional criminal justice system that rarely involves the parties who are affected by crime in dealing with it or takes their needs into consideration, research suggests that these parties might experience the system as being unfair.<sup>164</sup> When this happens, they are more likely to go against the system.<sup>165</sup> This is because they feel alienated and disrespected by the justice system.<sup>166</sup> Vigilantism illustrates this point. Vigilantes also feel that their need for safety and security is not adequately met. Although vigilantism is commonly linked to a lack of confidence in the criminal justice system, it also indicates that the legitimacy of the justice system is at stake.<sup>167</sup> Interestingly, research suggests that people tend to follow the law when they find the norms to be legitimate and deserving of compliance.<sup>168</sup> At the same time, there is evidence that involvement of community members in the justice process can bring legitimacy to the

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<sup>159</sup> Louw and Van Wyk 2016 *Social Work* 497.

<sup>160</sup> Chapman "Fail Better: Sentencing to Protect the Public or to Restore Justice?" 2019 19 *ERA Forum* 405.

<sup>161</sup> *Ibid.*

<sup>162</sup> United Nations Office on Drugs and Crime *Handbook* 9.

<sup>163</sup> Chapman 2019 *ERA Forum* 404; Darling-Hammond, Fronius, Sutherland, Guckenburger, Petrosino, and Hurley "Effectiveness of Restorative Justice in US K-12 Schools: A Review of Quantitative Research" 2020 24 *Contemporary School Psychology* 297.

<sup>164</sup> Suvall "Restorative Justice in Schools: Learning From Jena High School" 2009 44 *Harvard Civil Rights-Civil Liberties Law Review* 562.

<sup>165</sup> Darling-Hammond *et al* 2020 *Contemporary School Psychology* 297.

<sup>166</sup> Naudé 2006 *Journal for Juridical Science* 114.

<sup>167</sup> Haas *Public Support* 16.

<sup>168</sup> Haas *Public Support* 11.

proceedings and lead to increased confidence in the justice system.<sup>169</sup> It can therefore be argued that the perceived fairness of restorative justice processes may increase the likelihood of citizen buy-in and therefore counter vigilantism.

Moreover, since there are indications that, in some instances, vigilantism occurs because of a lack of understanding of the courts' due processes, restorative justice is a concept that most people are familiar with. As stated before, a restorative justice approach is similar to how African people resolve disputes in the customary courts. Restorative justice might therefore be an effective method for reducing vigilantism.

As far as a satisfactory outcome is concerned, studies demonstrate that those who participate in restorative justice processes tend to be satisfied with its outcomes, and this often leads to increased satisfaction with the justice system.<sup>170</sup> One reason accounting for a high level of satisfaction is that restitution agreements that are reached<sup>171</sup> and usually complied with.<sup>172</sup> Since community members often feel that offenders are not being held accountable, they are more likely to be satisfied if offenders comply with restitution agreements, which is one way that an offender can be held accountable for the harm they caused. Equally, this increased sense of satisfaction is likely to generate interest in restorative justice.

Despite its potential, there is one consistently mentioned concern about restorative justice. Critics see it as a soft method of dealing with crime.<sup>173</sup> Thus, in the context of vigilantism, the fact that people are dissatisfied with the way the criminal justice system currently deals with crime might suggest that they do not see the law as hard on offenders – hence the method (violence) commonly used to carry out vigilantism. With this understanding, restorative justice might be seen as not suitable to deal with crime. Although there may be merit in this criticism, research demonstrates that restorative justice is not necessarily a soft punishment.<sup>174</sup> Besides, as argued elsewhere, “we should ask what the value of a harder option is when it achieves nothing more than being harder”.<sup>175</sup> Evidence shows that a punitive approach to criminal justice has little impact on crime reduction,<sup>176</sup> while restorative justice shows promising results in this regard. Thus, there is

<sup>169</sup> Rossner and Bruce 2016 *Victims & Offenders* 109.

<sup>170</sup> Rossetti, Cumbo, Forbes and Bell *Victims' Justice? What Victims and Witnesses Really Want From Sentencing* (2010) 26–27; Umbreit, Coates and Vos “The Impact of Victim-Offender Mediation: Two Decades of Research” 2001 65(3) *Federal Probation* 30–31.

<sup>171</sup> Kurki in Von Hirsch *et al* (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* 298–300.

<sup>172</sup> Naudé 2006 *Journal for Juridical Science* 112; Umbreit and Armour *Restorative Justice Dialogue* 131.

<sup>173</sup> Gade “Is Restorative Justice Punishment?” 2021 38 *Conflict Resolution Quarterly* 144; Naudé 2006 *Journal for Juridical Science* 117.

<sup>174</sup> Gade 2021 *Conflict Resolution Quarterly* 144.

<sup>175</sup> Mokomane *Restorative Justice as an Alternative Sentencing Option in South Africa: A New Approach to Crime* (Master of Laws Dissertation, University of South Africa) 2019 86.

<sup>176</sup> *S v Maluleke supra* par 26; Venter “Restorative Justice: Ruling with a Heart” (11 April 2011) *IOL News*.

reason to believe that people might consider restorative justice as a means of solving the problem of crime. This is particularly so if it can be seen “to be addressing issues of crime and disorder in a community responsive, inclusive, respectful and restorative manner”.<sup>177</sup>

## 6 THE CURRENT LEGISLATIVE FRAMEWORK FOR RESTORATIVE JUSTICE PRACTICES IN SOUTH AFRICA

### 6.1 The Probation Services Amendment Act

The Probation Services Amendment Act<sup>178</sup> was the first to recognise restorative justice as a method of responding to crime. The Act lists restorative justice as part of appropriate sentencing options and empowers probation officers to initiate programmes in this regard.<sup>179</sup> The success of a restorative justice approach in this context depends largely on the availability of probation officers. Moreover, apart from requiring sufficient probation officers to carry out the duties in terms of this Act, they would also need to have a comprehensive knowledge of restorative justice. The good thing is that a capacity-building process has been undertaken in the past, and this saw a significant increase in the number of probation vacancies created<sup>180</sup> and of probation officers receiving training in restorative justice and facilitation.<sup>181</sup>

Pre-sentence reports are essential in assisting courts to determine appropriate sentences;<sup>182</sup> the fact that probation officers are responsible for preparing such reports could make it easier to introduce restorative-justice-based methods of dealing with crime.<sup>183</sup> As Batley notes,

“if these reports can be written from the perspective of restorative justice, and opportunities for applying restorative options are actively explored by informed probation officers, then these officials will constitute a key occupational group for implementing restorative justice.”<sup>184</sup>

Although pre-sentence reports create a platform for applying restorative justice in dealing with crime, they are focused on offenders. Apart from

<sup>177</sup> Nel (2017-02-17) *The Conversation*.

<sup>178</sup> 35 of 2002.

<sup>179</sup> S 2 of 35 of 2002.

<sup>180</sup> Batley “Outline of Relevant Policies” in Maepa (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (2005) 120.

<sup>181</sup> Batley *A Call to Agents of Change in the Justice System: Guidelines in the Use of Restorative Justice in Sentencing for Magistrates, Judges, Prosecutors and Probation Officers* (2014) 19.

<sup>182</sup> Diko, Olofinbiyi and Steyn “A Cause to Unravel the Role of Criminologists in Compiling Pre-Sentence Report: A South African Perspective” 2019 5 *Cogent Social Sciences* 4–5; Terblanche *Sentencing in South Africa* 117.

<sup>183</sup> Batley in Maepa (ed) *Beyond Retribution* 120; *S v Dlamini* 1991 (2) SACR 655 (A) 667 E–G.

<sup>184</sup> Batley in Maepa (ed) *Beyond Retribution* 120–121.

assisting the court in exercising their sentencing discretion,<sup>185</sup> the reports also assist the Department of Correctional Services to recommend types of rehabilitation programme that should accommodate offenders while in prison.<sup>186</sup> Accordingly, there is less emphasis on the harm of the crime to community members, and nor do such community members have a say in what should happen next. This offender-centric approach is inconsistent with the principles of restorative justice.

## 6 2 The Correctional Services Act

Another piece of legislation that embraces a restorative justice approach is the Correctional Services Act.<sup>187</sup> The Act makes provision for restorative justice practices as one of the conditions of correctional supervision. It stipulates that the offender may be required to participate in victim-offender mediation or family-group conferencing.<sup>188</sup> Since the Act provides no further details regarding the process or the implementation of these measures, an example of how mediation between victim and offender may function as part of a condition of correctional supervision can be seen from the approach followed in the case of *S v Tabethe*.<sup>189</sup> Before deciding on an appropriate sentence, the court requested the launch of victim-offender mediation, involving the offender and the victim, under the guidance of the probation officer.<sup>190</sup> During this process, the victim and the offender had the opportunity to discuss the crime that the latter had committed.<sup>191</sup> The probation officer thereafter informed the court that the parties had reconciled.<sup>192</sup> While this judgment may be praised for embracing restorative justice, there seems to be a tendency to focus on offenders and victims to the exclusion of the community.<sup>193</sup> This is so even when the courts use informal mediation to resolve legal disputes.<sup>194</sup>

## 6 3 The Child Justice Act

The latest legislation to espouse a restorative justice approach in criminal matters is the Child Justice Act,<sup>195</sup> which came into operation in April

<sup>185</sup> Terblanche *Sentencing in South Africa* 117.

<sup>186</sup> Diko *et al* 2019 *Cogent Social Sciences* 5.

<sup>187</sup> 111 of 1998.

<sup>188</sup> S 52(1)(g) of 111 of 1998.

<sup>189</sup> *Supra*.

<sup>190</sup> *S v Tabethe supra* 26–28.

<sup>191</sup> *S v Tabethe supra* 33.

<sup>192</sup> *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) 8.

<sup>193</sup> Anderson "Disposal of Criminal Disputes by Informal Mediation: A Critical Analysis" 2017 30(2) *SACJ* 166–167.

<sup>194</sup> The annual report of the National Director of Public Prosecutions in 2015/16 shows that 23 908 cases were referred for informal mediation. With informal mediation, there is no wider community involvement in the process. It seems only the offender, the victim and the mediator play a role; see Anderson 2017 30 (2) *SACJ* 166–167.

<sup>195</sup> 75 of 2008.

2010. As the name indicates, this Act introduced a specific justice system for child offenders. It aims among other things to entrench the principles of restorative justice in criminal proceedings involving children.<sup>196</sup> In terms of this system, children in conflict with the law should as far as possible be diverted from traditional criminal prosecution.<sup>197</sup> In cases where diversion is not possible, the Act provides that child offenders may be tried and sentenced in child justice courts.<sup>198</sup>

As far as the sentencing of child offenders is concerned, there are specific principles in the Act that clearly focus on restorative justice.<sup>199</sup> Accordingly, restorative justice sentences are listed as part of sentences available to child offenders.<sup>200</sup> Moreover, the Act stipulates that in order to encourage a restorative justice approach, sentences may be used in combination.<sup>201</sup> In other words, restorative justice measures may be ordered as part of a sentence.<sup>202</sup> This approach is consistent with the recommendation by the South African Law Commission that all sentences should be implemented in ways that allow opportunities for restorative interventions.<sup>203</sup> For example, restorative justice could be used to justify a reduction of sentences,<sup>204</sup> or even a suspension thereof. This can be seen from the judgment in *S v Hewitt*,<sup>205</sup> where the accused's sentence was partially suspended, conditional upon payment of compensation. The trial court found the accused guilty on two counts of rape and one count of indecent assault and sentenced him to eight years' imprisonment in respect of each of the rape counts, and two years' imprisonment in respect of indecent assault.<sup>206</sup> His sentence on the counts of rape were partially suspended on condition that he pay R100 000 to a fund aimed at combatting the abuse of women and children.<sup>207</sup> Although the elements of restorative justice were not present in this case, the payment of compensation for the benefit of society can be viewed as a positive step towards restoration.<sup>208</sup> Indeed some

<sup>196</sup> See the Preamble of 75 of 2008.

<sup>197</sup> See the Preamble and s 2(d) of 75 of 2008.

<sup>198</sup> See the Preamble and s 63(1)(b) of 75 of 2008.

<sup>199</sup> These principles encourage the child to understand the implications of and be accountable for the harm caused; and promote the integration of the child into the family and community; see ss 69(1)(a) and (c) of 75 of 2008.

<sup>200</sup> S 73(1) of 75 of 2008.

<sup>201</sup> S 69(2) of 75 of 2008.

<sup>202</sup> Lubaale "Concessions on Custodial Sentences: Learning From the New Zealand Approach to Restorative Justice" 2017 61 *SA Crime Quarterly* 35–37; South African Law Commission *Report* par 3.1.8; Van der Merwe and Skelton "Victims' Mitigating Views in Sentencing Decisions: A Comparative Analysis" 2015 35(2) *Oxford Journal of Legal Studies* 367–372.

<sup>203</sup> South African Law Commission *Report* par 3.1.8.

<sup>204</sup> Lubaale 2017 *SA Crime Quarterly* 35–37; South African Law Commission *Report* par 3.1.8; Van der Merwe and Skelton 2015 *Oxford Journal of Legal Studies* 367–372.

<sup>205</sup> 2017 (1) SACR 309 (SCA).

<sup>206</sup> *Supra* 1.

<sup>207</sup> *Ibid.*

<sup>208</sup> Velthuisen "Why South Africa's Tentative Moves Toward Restorative Justice Need Support" (2016-01-14) *The Conversation*.

scholars view compensation orders not only as consistent with the principles of restorative justice,<sup>209</sup> but also with efforts to integrate a restorative justice approach<sup>210</sup> into the sentencing process.

As far as community participation in the justice process is concerned, one of the objectives of this Act is to involve, where applicable, members of the community affected by the crime to encourage the reintegration of child offenders.<sup>211</sup> This cannot be interpreted as actively involving community members in dealing with crime. Judging by experience, even though restorative justice sentences are provided for in the Act, this in no way guarantees community participation.

## 7 CONCLUSION

This article demonstrates that restorative justice can help to deal with the problem of vigilantism. Apart from providing a platform for community participation in dispensing justice, research also shows that restorative justice has the potential to reduce crime. Accordingly, it can be argued that a reduction in crime might counter vigilantism, since crime is what fuels people to engage in vigilante activities. Moreover, there is evidence suggesting that communities participating in restorative justice processes tend to be satisfied with its process and outcomes and this often results in increased satisfaction with the justice system.

If South Africa is to succeed in addressing the problem of vigilantism, more emphasis should be placed on the use of restorative justice as a method of responding to crime and its consequences. The good thing is that restorative justice is not a new concept in South Africa as far as dealing with crime is concerned. The legislative framework for restorative justice practices already exists. However, despite formal recognition, restorative justice is nothing more than a footnote in the current criminal justice system. Therefore, if restorative justice is to receive greater recognition and application in dealing with crime, there is a need for a more comprehensive legislative framework.<sup>212</sup> Currently, the Criminal Procedure Act<sup>213</sup> does not make provision for restorative justice. It is thus suggested that this Act be amended to include restorative justice as one of the options for dealing with crime, following the example of the Child Justice Act.<sup>214</sup> Apart from this, there should be a provision in the Criminal Procedure Act, and other statutes already recognising restorative justice, requiring the inclusion of the community in restorative justice processes.

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<sup>209</sup> Naudé and Prinsloo "Magistrates' and Prosecutors' Views of Restorative Justice" in Maepa (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (2005) 63.

<sup>210</sup> Skelton and Batley 2008 *Acta Criminologica* 44.

<sup>211</sup> See s 2 of 75 of 2008.

<sup>212</sup> Terblanche *Sentencing in South Africa* 193.

<sup>213</sup> 51 of 1977.

<sup>214</sup> 75 of 2008.