

Therapeutic jurisprudence and restorative justice: healing crime victims, restoring the offenders

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OPSOMMING

Terapeutiese regsleer en herstellende geregtigheid: die genesing van slagoffers van misdade en herstel van die oortreders

Terapeutiese regsleer, wat afgekort kan word as TR, is 'n proses waardeur die hof gebruik word om genesing vir slagoffers van misdaad en vir die oortreders te bewerkstelling, aangesien vergoeding, hoe groot ook al, nie die skade wat aangerig is ongedaan kan maak nie. TR behels die verskillende maniere waarop die reg as 'n instrument van genesing en rehabilitasie gebruik kan word en oor hoe om die anti-terapeutiese uitwerking van die reg te verminder. Verder sien herstellende geregtigheid (HG) kriminele viktimisering as skadelik vir persoonlike verhoudings. HG bied regverdigheid of gelykheid, eerder as straf, vir die oortreder as die basis vir geregtigheid aan. Die doel hiervan is om die wonde van al die partye wat deur die kriminele optrede geraak is te genees. Weens die uitwerking van misdaad word slagoffers met verskeie behoeftes gekonfronteer as gevolg van die skade wat hulle aangedoen is. Die ontwrigting en gebrek aan beheer wat slagoffers verduur is skadeliker as enige fisieke of finansiële verlies en kan nie deur vergoeding aangespreek word nie. Slagoffers van misdaad moet weer 'n gevoel van beheer en veiligheid in hulle lewens herwin. Om oortreders vir hulle dade verantwoordelik te hou lewer 'n wesenlike bydrae tot die genesing van misdadaanslagoffers, maar dit is ook die eerste tree om aan die oortreders ware genesing te besorg. Dit is wat terapeutiese regsleer en herstellende geregtigheid vermag.

Die artikel ondersoek die gebruik van TR en HG in kriminele regsprosesse, met spesifieke klem op die toepassing van die konsepte in Suid-Afrikaanse regstelsels.

1 Introduction

Therapeutic jurisprudence, which is also known as TJ, is a process whereby the court is used to effect and promote healing for crime victims and offenders.¹ TJ considers the various ways the law may be utilised as

1 Slobogin 'Therapeutic jurisprudence: five dilemmas to ponder' 1995 *Psychology public policy and law* 193-94.

an instrument of healing, rehabilitation, and also how to reduce the anti-therapeutic effects of law.² TJ incorporates law, social work, and psychology, and, furthermore, tries to address the emotional, and psychological well-being of crime victims and offenders as they encounter the legal system.³ Most importantly, therapeutic jurisprudence stresses the human impact of all areas of the law.⁴ Although therapeutic jurisprudence does not exclusively advocate a focus on therapeutic considerations, it does seek to inculcate them with legal considerations⁵ with a view to finding out how the law can be used as a therapeutic agent without displacing due process.⁶

Therapeutic jurisprudence somehow encourages a client-centred philosophy according to Carl Rogers.⁷ By nature, the client-centred approach is humanistic.⁸ It is a non-directive psychotherapy, it is reflective, and encourages the clarification of points.⁹ Therapeutic jurisprudence provides crime victims with empathetic listening in an open-minded environment, and, if the parties are genuine about their experience of the crime, healing can take place.¹⁰

At the introductory level of therapeutic jurisprudence, it focused primarily on the therapeutic or anti-therapeutic effects of the court system on the criminal offenders, although, it also considered the possibility of providing some sort of effect for the crime victims and the community at large.¹¹ Early forms of therapeutic jurisprudence considered the rehabilitation of the criminal offenders and provided healing effects for them but did very little to ensure or provide for the healing of the crime victims.¹²

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- 2 Erez & Hartley 'Battered immigrant women and the legal system: a therapeutic jurisprudence perspective' 2003 *Western Criminology Review* 155-156.
 - 3 Bason 'Therapeutic jurisprudence: facilitating healing in crime victims' 2013 *Phoenix Law Review* 1018.
 - 4 Freckelton 'Therapeutic jurisprudence misunderstood and misrepresented: the price and risks of Influence' 2008 *Thomas Jefferson Law Review* 580.
 - 5 Hartley & Petrucci 'Practicing culturally competent therapeutic jurisprudence: a collaboration between social work and law' 2004 *Washington University Journal of Law & Policy* 133-138.
 - 6 Hartley & Petrucci *supra* n5 at 137.
 - 7 Bason *supra* n3 at 1019.
 - 8 *The C Rogers Reader* (1989) eds. H Kirschenbaum & V Henderson xiv-xv.
 - 9 Rogers xi & xiv Rogers pioneered a major new approach to psychotherapy known as the nondirective client-centered and person-centered approach Rogers believes that all individuals have within themselves the ability to guide their own lives in a manner that is both personally satisfying and socially constructive in a particular type of helping relationship we free the individuals to find their inner wisdom and confidence and they will make increasingly healthier and more constructive choices.
 - 10 Bason *supra* n3 at 1019.
 - 11 Erez & Hartley *supra* n2 at 155-156.
 - 12 Nolan 'Redefining criminal courts: problem-solving and the meaning of justice' 2003 *American Criminal Law Review* 1541.

2 How therapeutic jurisprudence promote the healing of crime victims

The effect of crime on the crime victims is that it produces anxiety, fear, depression, humiliation, anger, powerlessness, and a sense of betrayal for the person who experienced it.¹³ Additionally, when going through the criminal process, crime victims may experience psychologically damaging issues such as invisibility in the proceedings and the legal profession's¹⁴ reluctance to accept the crime victims as having a *locus standi* in the proceedings; and this in spite of the fact that it is the crime victims who have suffered the harm as a result of the crime. In this way, the crime victims have been underestimated and underappreciated.¹⁵

There are some values regarded as having healing effects in TJ. Such values include, but are not limited to, the following: crime victims' voice; validation; respect; and self-determination which the justice system has been promoting.¹⁶

Therapeutic jurisprudence is meant to reduce the psychological harm experienced by crime victims as a result of the crime and also secondary victimisation by the criminal justice system.¹⁷ Furthermore, therapeutic jurisprudence, firstly, recognises, secondly, highlights, and, thirdly, explores the potential for positive and negative impacts upon crime victims. As a therapeutic agent, it possesses a great capacity to heal and repair the psychological trauma experienced by the crime victims.¹⁸ In order to have a successful crime victim-centred approach, therapeutic jurisprudence needs to be considered on an individual basis on three levels: viz micro, mezzo, and macro. The reason for this is that crime victims differ with regard to what outcome they consider to have a healing effect.¹⁹ Additionally, the perception of the crime victims of a therapeutic outcome is different from the criminal justice's perception of a therapeutic outcome.²⁰ It is believed that the client-centred approach leads to positive therapeutic consequences for the clients;²¹ it is similarly

13 Winick 'Foreword: therapeutic jurisprudence perspectives on dealing with victims of crime' 2003 *NOVA Law Review* 535.

14 Roberts et al eds. *Hearing The Victim: Adversarial Justice Crime Victims And The State* (2011) 235.

15 Bason *supra* n3 at 1020.

16 King 'Restorative justice therapeutic jurisprudence and the rise of emotionally intelligent justice' 2008 *Melbourne University Law Review* 1096.

17 Winick *supra* n13 at 540-541.

18 Wexler 'Two decades of therapeutic jurisprudence' 2008 *Touro Law Review* 17-20.

19 Sandel '10 things every social worker needs to know about domestic violence', available http://www.socialworker.com/.../10_things_every_social_worker_needs_to_know_abou (accessed 2017-01-07).

20 Bason *supra* n3 at 1021.

21 Prochaska & Di Clement 'Trans-theoretical therapy: toward a more integrative model of change' 1982 *Psychotherapy: Theory Research and Practice* 278.

true that in a victim-centred approach, the crime victim's wishes, safety, and well-being take priority in all matters and procedures.²²

There are several reasons why crime victims are advised to be part of a therapeutic process through the criminal justice system:

The first of such purposes is to give crime victims a voice for therapeutic reasons; the second, is to enable the interests and/or views of crime victims to be taken into consideration when making decisions; the third is to ensure that crime victims are treated with respect by criminal justice agencies; the fourth is to minimize the stress crime victims go through during criminal proceedings; the fifth purpose is to increase the satisfaction the crime victims receive from the criminal justice system; and the final purpose is to increase the crime victims' co-operation, premised on the foregoing purposes.²³ It is in this way that crime victims begin to receive healing from the impact of the crime.

The distress experienced by many crime victims in the criminal justice process is due to the fact that crime victims do not understand how the process works and why it does so.²⁴ It is submitted that, if the operators of the criminal justice system made the necessary time available to educate the crime victims on the process and listened to the crime victims' concerns and feedback, there would be a hundred percent assurance that the crime victims would achieve some level of healing. But, if, on the other hand, crime victims feel that their sense of voice, validation, and dignity have not been respected, they will lose confidence in the criminal justice process and hold on to their feelings of anger, vengeance, and anxiety. Such an outcome is anti-therapeutic.²⁵

2 1 Elements of therapeutic jurisprudence

There are three basic steps or components of TJ that can lead to a successful healing of the crime victims or any other party affected by criminal behaviour.²⁶ These steps or components are:

- (1) Apology;²⁷
- (2) Forgiveness;²⁸ and
- (3) Reconciliation.²⁹

22 'Victim-centered approach', available at <https://www.ovcttac.gov/taskforceguide/eguide/1.../13-victim-centered-approach/> (accessed 2017-01-09).

23 Sanders 'Victim impact statements: don't work can't work' 2001 *Criminal Law Review* 448-49.

24 Winick *supra* n13 at 542.

25 Winick *supra* n13 at 543.

26 Daicoff 'Apology forgiveness reconciliation & therapeutic jurisprudence' 2013 *Pepperdine Dispute Resolution Law Journal* 135.

27 Cohen 'Advising clients to apologize' 1999 *Southern Carolina Law Review* 1009.

28 Fincham 'Forgiveness: integral to close relationships and inimical to justice?' 2009 *Virginia Journal of Social Policy and Law* 358-59.

The above components can further be used to heal the impact of crime on individuals, groups, or institutions in dispute or conflict.³⁰ These components may not necessarily and successfully resolve conflict; they can, however, facilitate or be helpful in conflict resolution. Below are some of the ways the components can be used to facilitate conflict between the crime victims and the offenders with a view to providing healing for all the parties affected by the crime.

2 1 1 Apology

Apology takes place when the wrongdoer feels remorseful for what he has done, accepts responsibility for his action, and says that he is sorry.³¹ The wrongdoer also acknowledges the harm he has inflicted on others through his actions and how the actions have affected the lives of others.³² In the process of tendering his apology, the offender may describe his intentions not to engage in the behaviour again.

The apology is tendered directly to the crime victims by the actions of the apologist.³³ If a face-to-face or direct apology is not practicable or possible, a letter, video, or public statement may be substituted. Other means, such as the social media, for example the internet site, Facebook or Twitter, may be used to tender the apology.³⁴ The apology must be sincerely done if it is to be received, and the apologist should avoid any form of excuse, justification, rationalisation, argument, or defensive statements.³⁵ Additionally, the apology must result in a change of attitude or behaviour of the offender. If this is not achieved, the apology is entirely meaningless, both for the victims of the crime and the offenders.³⁶ The end product of an apology not sincerely tendered is that it will be neither non- rehabilitative nor sanative for the offender, while, on the other hand, it will embitter the crime victims.³⁷ Furthermore, the

29 Sosnov 'The adjudication of genocide: gacaca and the road to reconciliation in Rwanda' 2008 *Denver Journal of International Law and Policy* 143.

30 O'Hara 'Group-conflict resolution: sources of resistance to reconciliation' 2009 *Law & Contemporary Problems* i-ii.

31 Fincham *supra* n28 at 358-359.

32 Cohen 'Apology and organizations: exploring an example from medical practice' 2000 *Fordham urban law journal* 1447. Cohen states that apology has three elements: admitting one's fault expressing regret for one's behavior and expressing sympathy for the other's injury.

33 Daicoff *supra* n26 at 136.

34 Smith 'Apologies in law: an overview of the philosophical issues' 2013 *Pepperdine Dispute Resolution Law Journal* 1.

35 Smith & Griswold 'Speech at the interdisciplinary study of conflict and dispute resolution symposium: forgiveness: what when why?' (2009).

36 Daicoff *supra* n26 at 136. Daicoff noted that an apologist's responsible repentant attitude as worthy of note because it helps deescalate tensions between the factions in conflict.

37 Smith 'Against court-ordered apologies' 2013 *New Crime Law Review* 40-49. Smith argued that a voluntary apology has potential for far greater benefits to the offender society and the crime victims in comparison to court-ordered coerced apologies.

quality of an apology cannot be evaluated until the offenders' behaviour is subsequently observed.³⁸

2 1 2 Forgiveness

Forgiveness takes place when the crime victims accept the apology of the offenders, and in addition, show that they, the crime victims, are no longer angry with the offenders and are able show mercy to the offenders.³⁹ Usually the crime victims want to describe the harm done to them by the offenders' criminal actions.⁴⁰ Additionally, crime victims sometimes ask questions about the criminal's act such as, 'Why me?' and 'Why did the offender do what he did?' Answers are provided by the offender.⁴¹ The offenders' explanation of his action to the crime victims goes beyond merely listening to or hearing the apology; this is because forgiveness involves a certain form of expression of acceptance of the apology by the crime victims.⁴² The end result of an accepted apology is humour, a more lighthearted exchange, collaboration between the crime victims and the offenders with regard to the possibility of solving the criminal behaviour and how to repair the harm done with a view to preventing recurrences of the behaviour in the future.⁴³

2 1 3 Reconciliation

Reconciliation may not necessarily follow apology and forgiveness. Reconciliation, however, takes place when the offender and the crime victims move away from the adversarial position of anger, blame, shame, and resentment, towards a mutual appreciation of each other with a view to brokering peace and harmony amongst themselves.⁴⁴ There is vertical and horizontal harmony when reconciliation occurs. Horizontal harmony is the kind of harmony which reconciles warring parties, conflict amongst people in a community, dispute between a criminal offender and the crime victims, while, on the other hand, vertical harmony refers to the offender being reconciled to God his Creator.⁴⁵

38 *Ibid.*

39 Cohen 'Advising clients to apologize' 1999 *Southern California Law Review* 1015. Cohen defines apology as cessation of resentment against the offender.

40 Zehr *The Little Book Of Restorative Justice* (2002) 14-15.

41 *Idem* at 14-15.

42 Daicoff *supra* n26 at 136.

43 Scheff 'Community conferences: shame and anger in therapeutic jurisprudence' 1998 *Revista Juridica Upr* 103-04.

44 Sosnov 'The adjudication of genocide: gacaca and the road to reconciliation in Rwanda' 2008 *Denver Journal International Law & Policy* 143.

45 Daicoff *supra* n26 at 139.

3 Benefits of apology, forgiveness and reconciliation

In traditional civil and criminal legal matters, there is always guilt, shame, anger, and grief. Irrespective of the foregoing, however, offenders can still derive some benefits from rehabilitation and from not re-offending.⁴⁶ Apology, forgiveness, and reconciliation can, in addition, produce the following benefits:

- (1) They reduce negative emotions of guilt, anger grief and shame;
- (2) They improve the potential for individual reform;
- (3) They maximize the therapeutic aspects of legal matters; and;
- (4) They minimize the anti-therapeutic aspects for offenders and the affected crime victims.⁴⁷

4 Therapeutic jurisprudence: Advancing the healing of crime victims in the criminal justice system

Advocates of therapeutic jurisprudence support the view that giving a voice to the crime victims has the effect of improving the mental condition and welfare of crime victims.⁴⁸ The harmful effects to crime victims of feeling silenced and excluded from criminal processes, as well as the therapeutic advantages of being heard, have been at the centre of scholarly discourse.⁴⁹ The neglect and abuse of crime victims in the criminal justice process only buttresses the weaknesses of justice systems which marginalised the suffering of crime victims and so magnify it.⁵⁰ Punitive measures taken against the offender do very little to heal the wounds of the crime victims' and their families as a result of the crime. Healing, instead, is an arduous, dynamic and lengthy process that requires crime victims to take active steps to facilitate their own recovery from the effects of the crime.⁵¹

46 Silver *The Affective Assistance Of Counsel Practicing Law As A Healing Profession* (2007) 14-15.

47 Winick *supra* n13 at & Perez 'Aging driving and public health: a therapeutic jurisprudence approach' 2010 *Florida Coaster Law Review* 189.

48 Freckelton 'Therapeutic jurisprudence misunderstood and misrepresented: the price and risks of Influence' 2008 *Thomas Jefferson Law Review* 584.

49 O'Hara 'Victim participation in the criminal process' 2005 *Journal Law & Public Policy* 240.

50 *Idem* at 239.

51 Erez 'Who's afraid of the big bad victim? victim impact statements as victim empowerment and enhancement of justice' 1999 *Criminal Law Review* 545.

5 Nature and scope of therapeutic jurisprudence

The legal system and justice mechanisms put in place by a nation affect everyone in that society in one way or another, but it is trite to state that more often than not, some people in the society, such as crime victims and their families, criminal offenders, and witnesses are more affected by the legal system than others.⁵² The law affects people under its control economically, socially, and also in their interactions or relationships with others. Based on what has been said before, therapeutic jurisprudence confidently believes that the law also affects the wellbeing or otherwise of people.⁵³ Therapeutic jurisprudence studies the law in order to examine how it affects the wellbeing of those involved in its operation.⁵⁴ Therapeutic jurisprudence is very wide in scope; as a result, it has been extended to many areas of domestic as well as international law. Therapeutic jurisprudence was, for instance, extended to some aspects of South Africa's Truth and Reconciliation Commission after the apartheid era.⁵⁵

5.1 Application of therapeutic jurisprudence in the South African criminal justice system

A therapeutic jurisprudence approach to sentencing through a restorative justice initiative or programme if judiciously applied will have its place in the SA criminal justice system; however, caution needs to be exercised carefully with a view to avoiding its abuse.⁵⁶ The South African judiciary should give adequate consideration to the application of TJ and RJ, paying particular attention to serious cases so as not to send the wrong message to society and to the perpetrators of heinous crimes. It is noted however, that the absence of proper guidelines for the SA judicial officers to follow in the application of TJ during the sentencing phase further aggravates these concerns.⁵⁷ Although TJ and RJ may advance a new way of administering justice, the onus and responsibility is on the South African courts to impose sentences which are balanced.⁵⁸

In addition to what has been said, a more therapeutic jurisprudence method to criminal justice can be considered at various stages of the trial process in SA if the authority deems it fit in its prosecutorial process. The stages are pleading stage, pre-sentence, sentencing and post sentencing

52 King 'Restorative justice therapeutic jurisprudence and the rise of emotionally intelligent justice' 2008 *Melbourne University Law Review* 1111.

53 Wexler & Winick eds *Essays In Therapeutic Jurisprudence* (1991) 1111.

54 King *supra* n52 at 1111.

55 Allan & Allan 'The South African truth and reconciliation commission as a therapeutic tool' 2000 *Behavioral Sciences & the Law* 459.

56 Broom 'A therapeutic Approach to the Prosecution and Sentencing of Revenge Sales' LL.M thesis University of Pretoria 2010 31.

57 Batley 'Call For Agents Of Change: Guidelines For The Use Of RJ In Sentencing' 2014 6.

58 Van der Merwe 'A new role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act 2008' 2013 *De Jure* 1022.

phases.⁵⁹ Along the line of the foregoing reasoning, the Policy Directives of the National Prosecuting Authority in SA have thrown more lights on the understanding of TJ and RJ and the exercise of a prosecutor's discretion at a pre-trial level.⁶⁰

As a result of what has been, a therapeutic or healing approach to a criminal trial may be used during the sentencing phase of proceedings, whereby the court may request any information which the court thinks relevant in the determination of an appropriate sentence.⁶¹ Section 274 of the Criminal Procedure Act⁶² gives unfettered powers to the courts in SA in this respect and paves the way for the introduction of a restorative justice procedure to be implemented or for the imposition of a condition for the postponement or suspension of a sentence.⁶³ In this connection, a victim-offender mediation/conference at this point of proceedings could serve as a change in healing the crime victim and restitution between all parties affected by the criminal conduct of the offender and in addressing the needs of the offender through a referral to some form of assistance programme.⁶⁴

6 Restorative justice: Restoring the offenders

6.1 Origin of restorative justice

Many nations and jurisdictions across the globe and many cultures have their own indigenous or local means of restorative justice practices, values, and principles which are highly rooted in their community's response to crimes of various natures.⁶⁵ In the western legal system, for example, making amends to the crime victims and the community after the commission of crime is a well-entrenched form of practice of restoring justice to the crime victims.⁶⁶

Around 1970, the restorative justice process came into the agenda of the criminal justice system when community activists, justice system personnel, and scholars started advocating restorative justice principles in response to the gender equality movement in Europe and North America.⁶⁷ Following this, many jurisdictions began to experiment with

59 Skelton & Batley 'Restorative Justice: A contemporary South African review 21(3) *Acta Criminologica* 2008 37-51.

60 Batley *supra* n57 at 5.

61 Skelton & Batley *supra* n59 at 37-51.

62 51 of 1977.

63 Section 297 of the Criminal Procedure Act.

64 Van der Merwe *supra* n58 at 1022-1038.

65 Umbreit 'Symposium restorative justice in the twenty first century: a social movement full of opportunities and pitfalls' 2005 *Marquette Law Review* 255.

66 Umbreit n56 *supra* at 225.

67 Koss & Achilles 'Restorative justice responses to sexual assault national online resource center for violence against women' http://www.vawnet.org/AssocFilesVAWnet/AR_RestorativeJustice.pdf. (accessed 2017-01-19).

programmes patterned after a youth programme which had had its origin in Canada.⁶⁸ As a consequence of this, restorative justice models started to be developed around the world for use with young offenders or adults for any criminal act.⁶⁹

Presently, restorative justice is popularly used and widely practiced in different forms the world over for offenders of any crime.⁷⁰ Owing to the benefits and usefulness of restorative justice, international organisations, such as the United Nations, have encouraged and advised countries to incorporate the restorative justice process in all aspects of their criminal justice systems.

6 1 1 Restorative justice defined

Restorative justice views crime as a conflict between three sets of people:

- (1) The victims;
- (2) The community members; and
- (3) The offenders.⁷¹

It is trite law that those mostly affected by any criminal act should have the opportunity to be actively involved in its settlement and resolution.⁷² Restorative justice is different from the criminal justice system in that it offers an alternative to the traditional system that will allow crime victims to have a voice in their path to justice.⁷³

6 1 2 Effect of restorative justice on crime victims and offenders

One of the effects of restorative justice is that, firstly, it reduces recidivism, secondly it creates more change for offenders and, thirdly, it provides healing for crime victims.⁷⁴ This is why restorative justice is an

68 Kasparian 'Justice beyond bars: exploring the restorative justice alternative for victims of rape and sexual assault' 2014 *Suffolk Transnational Law Review* 380.

69 United Nations Office on drugs and crimes *Handbook On Restorative Justice Programmes* (2006) 26-27.

70 Naylor 'Effective justice for victims of sexual assault: taking up the debate on 'alternative Pathways'' 2010 *University of New South Wales Law Journal* 665-66.

71 Koss & Achilles. Koss and Achilles are of the opinion that restorative justice recognises three constituencies: firstly survivor/victims and secondarily victimised family and friends who suffer distress along with their loved one secondly community members who experience less safety and social connection when they perceive high levels of crime and low deterrence yet who simultaneously may be contributing to an environment of sexual violence and thirdly offenders as well as their families and friends who experience guilt and shame that is associated with being accused of crime or belonging to the interpersonal relationship context from which the offense arose.

72 Kasparian n58 *supra* at 390.

73 Kasparian n58 *supra* at 391.

74 Sanders 'Restorative justice: the attempt to rehabilitate criminal offenders and victims' 2008 *Charleston Law Review* 928.

effective alternative to the traditional imprisonment or incarceration. Additionally, because restorative justice reduces reoffending, it is submitted that it is more cost effective than the traditional form of imprisonment.⁷⁵

Furthermore, restorative justice has positive psychological effects on offenders, and it helps the offenders to desist from criminal behaviour.⁷⁶ Similarly, restorative justice has effectively had an impact on crime victims in that it has been shown to be more satisfying for them. Crime victims mostly come out of restorative justice conferences less upset about the crime, less apprehensive, and less afraid of re-victimisation.⁷⁷

7 Implementation of restorative justice programme

Advocates of restorative justice believe that RJ is a process rather than simply being a programme.⁷⁸ But in order to have a full understanding of restorative justice principles, it becomes important to examine the programmes that embody the various principles:

- (1) 'Restorative justice programmes are naturally fit for offenders of non-violent crimes and for young offenders, but the successes of existing restorative justice programmes may provide the opportunity for expansion to inculcate other offenders into the programmes.'⁷⁹
- (2) Restorative justice programmes generally focus on dialogue between the offenders and crime victims, and can include victim-offender mediation, group conferencing, or other programmes that allow crime victims and offenders to work together to create an appropriate response to the criminal act;⁸⁰ and;
- (3) Restorative justice programmes include creative alternatives to incarceration and programme that can be implemented into prison life to help rehabilitate offenders.⁸¹

Annette van der Merwe noted that 'within the South African context, restorative justice is described as a new way of doing justice, either as an alternative or within the criminal justice system, *and* that, while offenders are held accountable, the victim is always central.'⁸²

75 Parker 'Penal reform and the necessity for therapeutic jurisprudence' 2007 *Georgetown Journal of Legal Ethics* 866.

76 Lauwaert & Aertsen eds. *Desistance And Restorative Justice Mechanisms For Desisting From Crime Within Restorative Justice Practices* (2015) 4.

77 Tyler 'Re-integrative shaming procedural justice and recidivism: the engagement of offenders' psychological mechanisms in the Canberra rise drinking-and-driving experiment' 2007 *Law & Society Review* 555.

78 Umbreit n56 *supra* at 294.

79 Todres 'Towards healing and restoration for all: reframing medical malpractice reform' 2006 *Connecticut Law Review* 715-18.

80 Umbreit n56 *supra* at 254-255.

81 Sanders n74 *supra* at 933.

82 Van der Merwe *supra* n58.

Restorative justice procedures have been associated with crimes involving children, as prescribed in the Child Justice Act,⁸³ but are also used in cases involving adults, particularly in light of the National Prosecuting Authorities Strategy 2020.⁸⁴

Finally, offenders are usually advised to admit their guilt to enable them take part in restorative justice programmes.⁸⁵

Restorative justice has been described as an alternative measure to the retributive justice method; it is, however, noted that restorative justice is not soft or mild on crime.⁸⁶ Restorative justice does not encourage incarceration or punishment, but, when the criminal fails to comply with the alternative programme of restorative justice, he will be sentenced to a term of imprisonment.⁸⁷

8 Goals of restorative justice

The goal of restorative justice is not to create a greater sense of justice in the criminal justice system,⁸⁸ but rather to provide appropriate and meaningful responses, through judicial case dispositions, to the crime victims, the offenders and any other party affected by criminal behaviour.⁸⁹ Such meaningful and appropriate responses will include the restoration of what the crime victims have lost and a sense of vindication, as well as accountability for the offenders.⁹⁰

There are three basic goals or objectives of restorative justice, namely: personal accountability, competency development, and community safety.

83 Various Restorative justice procedures are prescribed in terms of section 32 of the Act, such as victim-offender mediation and various diversion programmes.

84 The strategy by the National Prosecuting Authority is in line with its commitment to aligning itself with crime and recent prosecutorial trends as well as the demands of society. The Prosecuting Authority considered the broader environment growing international prosecutorial trends as well as the escalating crime rate in South Africa when formulating this strategy.

85 Drake 'Victim-offender mediation in Texas: when eye for eye becomes eye to eye' 2006 *South Texas Law Review* 660.

86 Ring 'Study finds novel sentencing program works' 2007 *Rutland Herald* b2.s

87 Parker 870.

88 Spon 'Juvenile justice: a work in progress' 1998 *Regent University Law Review* 40.

89 *Ibid.*

90 *Ibid.*

8 1 Personal accountability

In restorative justice, accountability is the responsibility for one's behaviour and taking steps to repair the harm caused by criminal act.⁹¹ Additionally, accountability is beneficial to the criminals, crime victims, and the community where the crime was committed when all the parties affected by the crime are active participants in determining the appropriate punishment for the offender under the circumstances.⁹²

The goal of accountability is to restore as many crime victims as possible and make the offenders aware of the impact of their crime.⁹³ Making the offenders aware of the impact of their crime does three things:

- (1) it teaches offenders that actions have consequences;
- (2) it shows that they are capable of repairing the harm they caused; and
- (3) it demonstrates that they can avoid the same behaviour in the future.⁹⁴

Before the offenders can accept responsibility for harming others, a support system is needed to be put in place, for example, a sense that there is an opportunity for the offenders to gain acceptance in the community in which the crime was committed.⁹⁵ In this connection therefore, accountability and support must go hand-in-hand.

The benefits of restorative justice to the offenders are numerous. They include but are not limited to, the following:

- (1) Greater satisfaction with justice operators from crime victims, which include the court, prosecutors, and the prison systems;
- (2) Greater community satisfaction with the criminal justice system;
- (3) Increased options for creative forms of accountability because of input from the crime victims, offenders, and the community;
- (4) Increased fulfillment of requirements by the offenders because the accountability strategies are fair and reasonable; and
- (5) The crime victims' involvement in determining the offenders' punishment.⁹⁶

8 1 1 Competency development

The rehabilitation and reintegration of the offenders is best achieved when offenders are allowed to build competencies and further

91 Bilchik 'Guide for implementing the balanced and restorative justice model' 2005 Office of juvenile justice and delinquency prevention report. <http://www.ncjrs.org/pdffiles/167887.pdf>. (accessed 2017-01-21).

92 Spon *supra* n88 at 41.

93 Miller 'Balanced and restorative justice: bringing victims offenders and the community to the table' 2005 *Children's Legal Rights Journal* 2.

94 *Idem* at 3.

95 Bilchik *supra* n91.

96 *Idem* at 16.

strengthen their relationships with other members of the society who are law abiding. This increases the offenders' ability to become contributing members of the society.⁹⁷ When offenders are engaged in productive activities, such as working or voluntarily taking part in a civic-based project, they acquire new and useful skills which will increase their self-esteem.⁹⁸ Contrary to the traditional justice system which is purely punitive by nature, restorative justice objectives are treatment and services to those affected by the delinquent behaviour of the offenders. This is because decision-making and skill acquisition for the offenders can be used as restorative processes.⁹⁹

The offenders' competencies are best built and developed when the offenders are given the opportunity to provide service to people in the community. This makes the offenders less passive, and they become learners and service providers.¹⁰⁰

When offenders develop their competencies, it gives a sense of hope for the criminals. The reason for this is that the principal objectives of offenders' competency development is to direct the offender's case disposition, which ultimately gives the offenders a meaningful opportunity to grow into responsible citizens.¹⁰¹ In addition to the foregoing, competency development enhances the offenders' ability to do something very productive that other member of the society value.¹⁰² This enhances the offenders' sense of self-worth and increases public affirmation of their new behaviours and learned skills.¹⁰³ Finally, the end products of competency development are measurable increases in the behaviour of the offenders and their decision-making abilities, and, secondly, the society's acceptance of the offenders.¹⁰⁴

8 1 2 Society/community safety

The final objective of restorative justice is the safety of the society or community from crime and criminals with a view to its having an immediate and long-term effect as well as seeing criminals taking

97 Bazemore & Umbreit *Conferences Circles Boards And Mediations: Restorative Justice And Citizen Involvement In The Response To Youth Crime* (1999) ii.

98 Spon *supra* n88 at 43.

99 Miller *supra* n93 at 3.

100 Miller *supra* n93 at 3.

101 'Balanced and Restorative Juvenile Justice' <http://juvenile.clark.wa.gov/balanced.html.com>. (accessed 2017-01-28).

102 'Balanced and restorative justice practice: competency development' <https://www.ojdp.gov/pubs/implementing/competency.html.com>. (accessed 2017-01-28).

103 Neff 'Self-compassion self-esteem and well-being' 2011 *Social and Personality Psychology Compass* 1.

104 'Treatment of juvenile offenders and their reintegration into society' 2010 South African police service division training: education training and development research & curriculum development 3.

responsibility for their conduct.¹⁰⁵ In usual sentencing, the safety of the public and the punishment of the offenders are closely related and the offenders are imprisoned to serve as deterrence.¹⁰⁶ But in restorative justice, societal safety requires practices that will minimise risk and promote the society's capacity to manage and control criminal behaviour.¹⁰⁷ Furthermore, restorative justice pays attention to the long-term benefits of humanitarian approach that brings to the foreground ambitions of forgiveness, healing, reparation and reintegration, thereby giving the offenders the opportunity to change their criminal behaviours by working with responsible members of the society.¹⁰⁸ The safety of the society is achieved when members of the society believe that they are able to control crime with a view to fostering peace because crime has an impact on society in a variety of ways according to the nature and extent of crime committed.¹⁰⁹

There are practical steps that may be employed in improving the safety of society. One such step is a prevention policy which primarily promotes non-repressive measures to prevent crime and to minimise crime-related risks and consequences. The aim is to reduce crime to its barest minimum and its least serious while increasing the public perception of safety.¹¹⁰ Furthermore, restorative justice is not concerned only with just and balanced processes; instead, it also concerns itself with effective outcomes and consequences for both the crime victims and the offenders.¹¹¹

9 Principles of restorative justice

9 1 Focused on relationship

One of the first principles of restorative justice is that it is a relational approach which is based on relationships between the crime victims and

105 European project restorative justice and crime prevention *Restorative Justice And Crime Prevention Presenting A Theoretical Exploration An Empirical Analysis And The Policy Perspective* (2010) i.

106 Muhlhausen 'Theories of punishment and mandatory minimum sentences' 2010 *Centre of Data Analysis* 1.

107 Bucqueroux 'A comprehensive approach to reducing crime and violence in our culture' 2004 *Restorative Justice Community* 14.

108 Mantle Fox & Dhami 'Restorative justice and three individual theories of crime' 2005 *Internet Journal of Criminology* 3.

109 Adebayo 'Social factors affecting effective crime prevention and control in Nigeria' 2013 *International Journal of Applied Sociology* 71.

110 The Czech Republic 'Crime prevention strategy 2008 -2011', available at <http://www.mvcr.cz/mvcren/file/crime-prevention-strategy-2008-2011-pdf.aspx>. (accessed 2017-01-29).

111 Young 'Restorative justice: concepts and practices' International organisation for victim assistance, available at <http://www.iovahelp.org/About/.../RestorativeJusticeConceptsAndPractices.pdf>. (accessed 2017-01-29).

the offenders, and it does not focus only on the individual level.¹¹² The relational approach directs its attention to the relationships between and among the parties affected by the criminal act. The fact remains that the experiences, needs, and perspectives of the crime victims, the offenders and the society matter a lot and are central to restorative justice principles. These experiences, needs and perspective do not matter in contrast to, or in competition with, all the parties affected by the crime, but in relation to one another.¹¹³ Consequent upon the foregoing, therefore, attention to the crime victims, the offenders and the society as they are in relation with one another is central to a restorative justice approach.¹¹⁴

This idea of relationships in restorative justice pays particular attention on the nature or character of the different parties involved in, or affected by, the situation and it builds a trusting relationship among the parties.¹¹⁵ What restorative justice does in the circumstance is that it views the needs and perspectives of crime victims as being central to the resolution of justice issues,¹¹⁶ and it reflects on commitments of equal respect, equal care, equal concern, and equal dignity.¹¹⁷ In this connection, it is asserted that justice of a restorative nature is concerned with what happened, what harm resulted, and what needs to be done to make things right.¹¹⁸

9 1 1 Holistic and comprehensive

Apart from being relationally based and relationship focused, restorative justice processes are similarly relational in their understanding of issues and harms.¹¹⁹ By showing an understanding of issues and harms, the restorative approach is comprehensive and holistic¹²⁰ in the manner in which it responds to crime victims and offenders' case. It is inadequate and non-restorative if the attention is narrowly focused on the crime without due consideration being given to the cause of the crime, the contexts in which the crime was committed, the implications of the

112 Llewellyn Archibald Clairmont & Crocker 'Imagining success for a restorative approach to justice: implications for measurement and evaluation' 2013 *The Dalhousie Law Journal* 301.

113 Llewellyn Archibald Clairmont & Crocker 301.

114 Llewellyn & Howse 'Restorative justice-a conceptual framework' 1998 *Ottawa Law Commission of Canada* 72.

115 Gribbon Ruddy & Thornborrow 'Restorative justice: building relationships building communities' available at http://www.iirp.edu/pdf/ON08Papers/ON08_GribbonRuddyThornborrow.pdf (accessed 2017-05-16).

116 Young 'Restorative justice: there is nothing new under the sun' 2010 *International Organisation for Victim Assistance* 5.

117 Llewellyn Archibald Clairmont & Crocker 301.

118 'Restorative justice and practices' 2006 International institute for restorative practices 1, available at <http://www.iovahelp.org/About/.../RestorativeJusticeConceptsAndPractices.pdf>. (accessed 2017-01-29).

119 Llewellyn Archibald Clairmont & Crocker 301.

120 'A restorative approach in school: applying the approach on the day to day' 2011, available at <http://www.chs.ednet.ns.ca/Restorative%20Practices/RA-Citadel-Dec2-2011A.pdf> (accessed 2017-01-29).

crime on the crime victims, the offenders and the community at large since crime increases fear, isolation, the erosion of community morale, and has a detrimental effect on overall quality-of-life, and a decrease in social and leisure activities.¹²¹

10 Restorative justice and the rehabilitative ideal

Modern retributivism and utilitarianism are still very relevant in sentencing policies in present day criminal justice systems.¹²² But, unlike retributivism and utilitarianism, rehabilitative methods as an alternative to punitive measures of the offenders became dominant and known in the early part of the twentieth century.¹²³ Rehabilitation should be one of the goals of any criminal justice system. Even if it is not among the principal goals, the offenders' rehabilitation should enjoy a certain revival through the increasingly growing phenomenon of therapeutic jurisprudence through the judicial system.¹²⁴ Additionally, the rehabilitative ideal sees the offenders as one who is sick and who resorted to crimes because of the illness or sickness, or as a person who is criminally minded owing to the dysfunctional social environment in which he finds himself.¹²⁵ The rehabilitation of the offenders, if viewed differently, simply advocates that to reduce crime effectively, it is not enough to deal with the particular offence, but rather that the criminal justice system also has as its duty the curing or healing of the offenders' illness.¹²⁶ The healing of the offenders is to be actualised by penal treatment whose objective is to bring about positives changes in the character, attitude, and behaviour of convicted offenders.¹²⁷ In other words, offenders are not to be held responsible or blamed for their wrongdoing, but their criminal act should be blamed on their sickness. This is the way restorative justice views the offender and the goals of the criminal justice system. Restorative justice is the foundation of the offenders' duty to repair the harm they have caused to the crime victims.¹²⁸ It is submitted, however, that, in any restorative process,

121 'The impact of crime on victims and communities', available at <http://www.cap.navaa.org/captips/13%20CAPTIPS-4-ImpactCrime.pdf> (accessed 2017-01-29).

122 Gabbay 'Justifying restorative justice: a theoretical justification for the use of restorative justice practices' 2005 *Journal of Dispute Resolution* 390.

123 Allen *The Decline Of The Rehabilitative Ideal: Penal Policy And Social Purpose* (1981) 57.

124 Winick *supra* n13 at & Wexler *Judging In A Therapeutic Key: Therapeutic Jurisprudence And The Courts* eds. (2003) 1.

125 Brunk *Restorative Justice And The Philosophical Theories Of Criminal Punishment In The Spiritual Roots Of Restorative Justice* ML Hadley ed. (2001) 42.

126 *Williams vs New York* 1949 337 US 241 248 The United States Supreme Court Justice Hugo Black stated that retribution is no longer the dominant objective of the criminal law reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

127 Allen *supra* n123 at 57.

128 Merideth 'Restoring a focus on victims in criminal justice' 2009 *Washington University School of Law Restorative Justice Seminar* 4.

offenders should be accorded due respect, and the offenders should be permitted to give an explanation for the reasons that led them to commit the crime.¹²⁹

The indeterminate method of sentencing the offenders has been the channel that enabled rehabilitation to take place, but it is the duty of probation officers to carry out the rehabilitative ideal.¹³⁰

11 Justifications for restorative justice

The justification for restorative justice is that it is not concerned about how much punishment was inflicted on the offenders or how much treatment is provided for the crime victims, but rather by how much reparation, resolution, and reintegration was achieved for all affected by crime.¹³¹ Additional justification for restorative justice states that: 'Restorative justice has implications for enhancing and building support for a more empowering, holistic, and effective re-integrative approach to rehabilitation; and it defines a new role for criminal justice professionals in enhancing the safety and security of communities.'¹³² 'Restorative justice resists crime by building safe, secure and strong communities. Restorative justice prioritises results or outcomes over procedural goals; this is because the test of any response to crime must be whether it is helping to restore the injured parties.'¹³³

Advocates of restorative justice are of the opinion that RJ repairs broken social bonds, it encourages offenders to make reparation to the society, it reintegrates the criminals into the communities, it gives the crime victims the opportunity to receive compensation, and it enables crime victims to be satisfied with the process engaged in the restorative justice programme.¹³⁴

12 Conclusions

In this article, a comprehensive examination of therapeutic jurisprudence and restorative justice has been considered. It has been discovered that therapeutic jurisprudence recognises that the law can be a healing agent: 'can have therapeutic or anti-therapeutic consequences

129 Van Schijndel *Confidentiality And Victim-Offender Mediation* (2009) 396.

130 Bunzel 'The probation officer and the federal sentencing guidelines: strange philosophical bedfellows' 1995 *Yale Law Journal* 940.

131 Daly & Immariageon 'The past present and future of restorative justice: some critical reflections' 1998 1 *The Contemporary Justice Review* 26.

132 Bazemore & Umbreit 'Rethinking the sanctioning function in juvenile court: retributive or restorative responses to youth crime' 1995 *Crime & Delinquency* 296-316.

133 Van Ness 'New wine and old wineskins: four challenges of restorative justice and a reply to Andrew Ashworth' 1993 *Criminal Law Forum* 301-306.

134 Daly & Immariageon *supra* n131 at 30.

for individuals involved in both the civil and criminal justice systems.¹³⁵ Asks this question: can or should legal rules, procedures, and lawyers' roles be reshaped to enhance their therapeutic potentials while, at the same time not subordinating principles of due process?¹³⁶

One of the greatest advantages of TJ is the use of socio-psychological insights into the law and its applications.¹³⁷ Therapeutic jurisprudence as a field of legal study is geared towards the establishment of humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.¹³⁸

Therapeutic jurisprudence is perceived by scholars as being: 'A sea-change in ethical thinking about the role of law; as a movement towards a more distinctly relational approach to the practice of law which emphasises psychological wellness over adversarial triumphalism';¹³⁹ as a field that supports an ethics of care;¹⁴⁰ a discipline that places great importance on the principle of a commitment to dignity.¹⁴¹ According to Amy Ronner, in the practice of therapeutic jurisprudence, the parties must be given a voice, validation and voluntariness.¹⁴² Ronner argued that litigants are entitled to a voice or the opportunity to narrate their experience or story to a decision maker. If the litigants are given a voice and their story is taken seriously, they feel a sense of validation. Voice and validation create a sense of voluntary participation, one in which the litigants experience the proceeding as less coercive. By nature, 'human beings prosper when they feel that they are making, or at least participating in, their own decisions'.¹⁴³

Finally, TJ provides a perfect framework to integrate social science findings and wisdom regarding the benefits of apology, forgiveness, and reconciliation clearly into the law. It further stresses the need for healing, rehabilitation, and change in behaviour. Therapeutic jurisprudence explains why, in many legal matters, apology, forgiveness, and

135 Peebles 'Therapeutic jurisprudence and the sentencing of sexual offenders in Canada' 1999 *International Journal of Offender Therapy and Comparative Criminology* 280.

136 Klotz 'Cognitive restructuring through law: a therapeutic jurisprudence approach to sex offenders and the plea process' 1992 *University of Puget Sound Law Review* 581.

137 Wexler 'Therapeutic jurisprudence and changing conceptions of legal scholarship' 1993 *Behavioral Sciences and the Law* 19.

138 Wexler 'Therapeutic jurisprudence and the criminal courts' 1993 *William and Mary Law Review* 279.

139 Warner 'Public judgment on sentencing: final results from the Tasmanian jury sentencing study trends and issues in crime and criminal justice series paper no. 407' 2011 *Australian Institute of Criminology* 3.

140 Letourneau 'Effects of sex offender registration and notification on judicial decisions' 2010 *Criminal Justice Review* 295.

141 Lowenstein *Paedophilia: The Sexual Abuse Of Children Its Occurrence Diagnosis And Treatment* (1998) 19.

142 Glab 'Perpetrators and pariahs: definitional and punishment issues for child sex offenders and therapeutic alternatives for the criminal justice system' 2016 *QUT Law Review* 99.

143 Glab *supra* 142 at 99.

reconciliation are important goals. Creative problem solving and holistic justice are the benefits of apology, forgiveness, and reconciliation in legal issues under therapeutic jurisprudence and restorative justice.

The article has also examined restorative justice not as being a replacement for the traditional court system, but rather as an alternative. It is not a legal book or a set of procedures, but it is a different way of thinking and doing justice.¹⁴⁴ A global acceptance and implementation of restorative justice programmes requires a paradigm shift and restorative justice advocates have agreed that a paradigm shift is more important than dozens of pieces of legislation.¹⁴⁵ As a result of this, the acceptance of restorative justice will demand, or need, a different way of thinking and doing things.¹⁴⁶

Restorative justice as a means of bringing back offenders into society can emphasise the importance of treating the true cause of crime. It sees offenders as human beings who can change from their criminal ways, improve their choices, and it can involve the crime victims and community members in the process of punishment and restoration because restorative programmes bring about a lower rate of recidivism than traditional incarceration.¹⁴⁷

When the criminal justice system and its operators continue to pay attention to punitive measures such as offenders' incarceration instead of restorative and rehabilitative programmes, it is trite law that the system is ignoring the evident problems of crime and neglecting, or failing, to see offenders as human beings who are capable of change.¹⁴⁸ It is noted on this backdrop that: 'Rather than restoring or correcting a deficit in the offender, moral rehabilitation aims to repair a breach in the relationships between the offender, the crime victims and the community that the offence has created'.¹⁴⁹

It is submitted at this juncture that it is most appropriate to turn towards restorative justice and therapeutic jurisprudence, implement positive rehabilitative programmes for the offenders, restore crime victims, and address the impact of the crime on the crime victims and the community.¹⁵⁰

144 Sanders 'Restorative justice: the attempt to rehabilitate criminal offenders and victims' 2008 *Charleston Law Review* 937.

145 *Idem* at 938.

146 *Idem* at 938.

147 Parker 'Penal reform and the necessity for therapeutic jurisprudence' 2007 *Georgetown Journal of Legal Ethics* 863.

148 Sanders *supra* n144 at 939.

149 McNeill 'When punishment is rehabilitation' 2012 *The Springer Encyclopedia of Criminology and Criminal Justice* 9.

150 Smit 'Restoring crime victims and communities affected by crime' 2007 *Victim Advisory Council Newsletter* 2.