



Restorative justice as a possible approach to decolonising the aspect of punishment in the South African criminal justice system

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ABSTRACT

This dissertation examined restorative justice as a possible approach to decolonising the punitive aspect of the South African criminal justice system. The research is rooted in the broader discourse of decolonisation, decoloniality, and Africanisation, focusing on how these concepts can transform epistemologies and practices inherited from colonial and Western legal systems. The study argues that the current justice system, grounded predominantly in Roman-Dutch and English legal traditions, marginalises African customary law and its restorative values. Through a literature-based analysis, the dissertation explores theories of crime and punishment, the philosophical foundations of restorative justice, and comparative perspectives from Western, Eastern, and African indigenous systems.

Findings indicate that restorative justice, anchored in values of *Ubuntu*, reconciliation, and community participation, aligns closely with African customary law and offers a viable mechanism to decolonise sentencing. By integrating restorative principles into South African penal policy, the justice system can move towards inclusivity, rehabilitation, and social restoration rather than retribution and exclusion. The study concludes that adopting restorative justice is not only consistent with constitutional imperatives but also essential for achieving genuine epistemic and structural decolonisation within South Africa's legal framework.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	v
1 Chapter 1: Introduction and problem statement	1
<i>1.1 History of South African colonisation</i>	<i>1</i>
<i>1.2 Sentencing</i>	<i>5</i>
<i>1.3 Restorative justice</i>	<i>6</i>
<i>1.4 Restorative justice in terms of African customary law.....</i>	<i>7</i>
<i>1.5 Decolonisation, Africanisation and decoloniality.....</i>	<i>7</i>
<i>1.6 Research question.....</i>	<i>8</i>
<i>1.7 Study methodology</i>	<i>9</i>
<i>1.8 Limits of the study</i>	<i>9</i>
<i>1.9 Chapter layout.....</i>	<i>10</i>
2 Chapter 2: Decolonisation.....	11
<i>2.1 Introduction</i>	<i>11</i>
<i>2.2 Decolonisation.....</i>	<i>13</i>
<i>2.3 Africanisation</i>	<i>15</i>
<i>2.4 Decoloniality</i>	<i>17</i>
<i>2.5 Decolonisation in South Africa.....</i>	<i>18</i>
<i>2.6 Conclusion</i>	<i>22</i>

3 Chapter 3: Theories on crime and punishment.....	24
<i>3.1 Introduction</i>	<i>24</i>
<i>3.2 The development of crime theories</i>	<i>26</i>
<i>3.2.1 Classical crime theory.....</i>	<i>26</i>
<i>3.2.2 Positivist school of thought.....</i>	<i>26</i>
<i>3.2.3 Interactionist theories</i>	<i>27</i>
<i>3.2.4 Critical criminology.....</i>	<i>28</i>
<i>3.2.5 Conclusion.....</i>	<i>28</i>
<i>3.3 Theories of punishment</i>	<i>28</i>
<i>3.3.1 Deterrent theory.....</i>	<i>28</i>
<i>3.3.2 Retributive theory.....</i>	<i>30</i>
<i>3.3.3 Preventive theory.....</i>	<i>31</i>
<i>3.3.4 Reformatory theory</i>	<i>31</i>
<i>3.3.5 Conclusion.....</i>	<i>32</i>
<i>3.4 Restorative justice</i>	<i>32</i>
<i>3.5 Conclusion</i>	<i>38</i>
 4 Chapter 4: Restorative justice in an African, Eastern and Western context: Comparative analysis.....	 40
<i>4.1 Introduction</i>	<i>40</i>
<i>4.2 Western perspective on punishment</i>	<i>42</i>
<i>4.3 Eastern perspective on punishment</i>	<i>44</i>

<i>4.4 African indigenous justice systems</i>	<i>46</i>
<i>4.5 Conclusion</i>	<i>52</i>
5 Chapter 5: The South African legislative framework.....	54
<i>5.1 Introduction</i>	<i>54</i>
<i>5.2 Imprisonment</i>	<i>57</i>
<i>5.3 Community corrections.....</i>	<i>60</i>
<i>5.4 Minimum sentences</i>	<i>61</i>
<i>5.5 Restorative justice in sentencing</i>	<i>63</i>
<i>5.6 Conclusion</i>	<i>65</i>
6 Chapter 6: Conclusion	68
BIBLIOGRAPHY	73

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AIJS	African Indigenous Justice Systems
CJA	Child Justice Act
CPA	Criminal Procedure Act
DOJ&CD	Department of Justice and Constitutional Development
FGC	Family-Group Conferences
JICS	Judicial Inspectorate for Correctional Services
NVEO	Natural Volatiles and Essential Oils Journal
OJJDP	Office of Juvenile Justice and Delinquency Prevention
PELJ	Potchefstroom Electronic Law Journal
SACJ	South African Journal of Criminal Justice
SAJHR	South African Journal on Human Rights
S. Afr. J. Philos	South African Journal of Philosophy
SCA	Supreme Court of Appeal
TCA	Traditional Courts Act
TDR	Traditional Dispute Resolution
UNODC	United Nations Office on Drugs and Crime
VIP	Victim-Impact Panel

1 Chapter 1: Introduction and problem statement

1.1 History of South African colonisation

Prior to colonisation, the southern regions of Africa were inhabited by primarily nomadic tribes, with their own unwritten and largely indigenous systems of justice.¹ In 1652 the Dutch arrived and settled in the Cape.² Their impact on the criminal justice system was fairly constrained and it took a while before they began to have an impact on the region around Cape Town.³ Where they did have an impact, their implementation of the justice system was as brutal and unforgiving as in continental Europe.⁴

In 1806 the British colonial powers replaced the Dutch in the Cape.⁵ The British started integrating their own criminal proceedings rather quickly, but Roman-Dutch law retained its influence over substantive criminal law and is still largely in place today.⁶ The early 1800s marked a period when European settlers and Africans came into frequent contact, and a prolonged string of military conflicts took place in what is today known as the Eastern Cape.⁷ By that time, most of the eastern parts of South Africa were inhabited by different Nguni speaking peoples and the Bantu peoples lived more inland.⁸ All of these societies tended to be organised into local tribes led by local chiefs.⁹ Law and order for common disputes were managed in terms of traditional justice systems.¹⁰ Today, these traditional justice systems form part of African customary law. African customary law comprises customs and traditions that have gained recognition over time serving as evidence of a legal history spanning centuries.¹¹ Their ways of resolving disputes placed a strong

¹ Terblanche 2020 *SACJ* 5.

² Terblanche 2020 *SACJ* 5; Stapleton *A Military History of South Africa: From the Dutch-Khoi Wars to the End of Apartheid* 2.

³ Terblanche 2020 *SACJ* 5.

⁴ Terblanche 2020 *SACJ* 5.

⁵ Marudu and Maimela 2021 *De Jure Law Journal* 56.

⁶ Marudu and Maimela 2021 *De Jure Law Journal* 57; Bennett and Pillay 2003 *SAJHR* 218.

⁷ Terblanche 2020 *SACJ* 5; Stapleton *A Military History of South Africa: From the Dutch-Khoi Wars to the End of Apartheid* ix.

⁸ Terblanche 2020 *SACJ* 5; Marudu and Maimela 2021 *De Jure Law Journal* 57.

⁹ Terblanche 2020 *SACJ* 5.

¹⁰ Terblanche 2020 *SACJ* 5.

¹¹ Humby et al *Introduction to Law and Legal Skills in South Africa* 120.

emphasis on bringing the disputing parties together.¹² This meant that rather than emphasising the punishment of criminals, the justice system focused on mending the ruptured relationships between parties.¹³ This, however, is not to say that there was a uniform system among the various clans and tribes.¹⁴

Originally, the colonisers left the indigenous people to govern and regulate themselves, but over time the British started to interfere more with African customary law.¹⁵ Under the influence of the Europeans, the formalisation of criminal procedures eventually spread throughout the entirety of South Africa.¹⁶ The British annexed Natal in 1843 and declared Roman-Dutch law the law of the land.¹⁷ This posed some problems as it was impossible to enforce Roman-Dutch law on the vast groups of indigenous people.¹⁸ A movement existed that advocated the official recognition of indigenous customary law.¹⁹ However, there was no uniform system of customary law and the magistrates in the colony differed in their application of customary law based on their understanding (or lack of) of it.²⁰ In order to achieve uniformity the British decided to codify customary law.²¹ This decision was supported by the Lieutenant-Governor of the time and contemporary experts in colonial development, because it was believed that it would help in guiding the magistrates.²² The Natal Legislative Council enacted section 10 of the *Native Administration Law* of 1875, which mandated the codification of customary law.²³ This forced Theophilus Shepstone, a self-proclaimed expert on indigenous life and

¹² Gabagambi 2020
https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa1.html#:~:text=1.-,Introduction,a%20crime%20or%20a%20dispute.

¹³ Gabagambi 2020
https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa1.html#:~:text=1.-,Introduction,a%20crime%20or%20a%20dispute.

¹⁴ Gabagambi 2020
https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa1.html#:~:text=1.-,Introduction,a%20crime%20or%20a%20dispute.

¹⁵ Humby et al Introduction to Law and Legal Skills in South Africa 120.

¹⁶ Terblanche 2020 *SACJ* 5.

¹⁷ Bennett and Pillay 2003 *SAJHR* 217-218.

¹⁸ Bennett and Pillay 2003 *SAJHR* 218.

¹⁹ Bennett and Pillay 2003 *SAJHR* 218; Marudu and Maimela 2021 *De Jure Law Journal* 57.

²⁰ Bennett and Pillay 2003 *SAJHR* 218.

²¹ Marudu and Maimela 2021 *De Jure Law Journal* 57; Bennett and Pillay 2003 *SAJHR* 218.

²² Bennett and Pillay 2003 *SAJHR* 218.

²³ Bennett and Pillay 2003 *SAJHR* 218.

the Secretary of Native Affairs in Natal, to begin the project of codifying customary law.²⁴ Shepstone opposed the project on the basis that it would force an artificial rigidity to customary law.²⁵ He was correct in his assumption, and the first Natal Code of Native Law, which was enacted in 1875, was a failure as it did not accurately represent the basis of customary law and social practice; it was so vague that magistrates were still free to interpret it as they saw fit.²⁶ A new Code was created in 1878 but it still did not reflect the reality of customary law.²⁷ The Code needed amendments, and finally, in 1891 a Code that was more acceptable to the authorities came into existence.²⁸ However, the Code was still very flawed, and the means of amending it was given over to the Governor-General and the Department of Native Affairs.²⁹ It was revised in 1932, 1967 and again in 1987, which is the current *Natal Code*.³⁰ Indigenous people were not part of the process, but rather colonial groups like the Department of Native Affairs and the colony's Legislative Council were charged with its formulation and amendments despite their ignorance and misunderstandings of the subject matter.³¹

British authorities annexed the territories of Transkei, which contained a sizable number of self-governing African states, as far back as 1879.³² Transkei's criminal law was codified in the *Transkei Penal Code* of 1886 (*Penal Code*).³³ The Cape Government Commission's report of 1883 on "Native Laws and Customs" presented recommendations that led to the creation of the 1886 *Penal Code*.³⁴ The Imperial authorities in London had ordered the Commission to consult the indigenous

²⁴ McClendon 1997 *Journal of Legal Pluralism and Unofficial Law* 122.

²⁵ Bennett and Pillay 2003 *SAJHR* 219.

²⁶ Kompi 2021 *South African Journal of Cultural History* 51; Bennett and Pillay 2003 *SAJHR* 219.

²⁷ Bennett and Pillay 2003 *SAJHR* 219

²⁸ Bennett and Pillay 2003 *SAJHR* 219

²⁹ Bennett and Pillay 2003 *SAJHR* 220.

³⁰ Bennett and Pillay 2003 *SAJHR* 220.

³¹ Bennett and Pillay 2003 *SAJHR* 219-220.

³² Koyana *Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law* 14.

³³ *Native Territories Penal Code Act* 24 of 1886.

³⁴ The Cape Government Commission on Native Laws and Customs 1886; Koyana *Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law* 16.

population.³⁵ Owing to this, the Secretary of State for the colonies wrote in a letter that authorities were not only entitled but also obligated to ensure that the laws governing the administration of the native districts were ones they could approve of.³⁶ Traditional leaders and their followers had no concerns about the establishment of a penal code following the Commission's consultation process.³⁷ All they demanded was that their traditions remain.³⁸ Such practices as circumcision, *intonjane* (which is a practice like circumcision to bring girls into adulthood), and *lobolo* were not to be prohibited and indeed never were.³⁹

The *Penal Code* was enacted to avoid another chaotic form of legal pluralism.⁴⁰ The customary form of criminal law was well established in the Transkei area, Natal had the *Natal Code of Zulu Law* as mentioned above,⁴¹ and even magistrates applied it in their courts; but colonisation also introduced Roman-Dutch criminal law.⁴² It led to a situation where the magistrates did not know which laws to enforce, and the people did not know which laws to follow.⁴³ Thus, the *Penal Code* was created to strengthen or build bridges between the diverse communities and applied to all people in Transkei, irrespective of colour or class.⁴⁴ It also reflected the influence of English law and Roman-Dutch law and affected customary criminal law.⁴⁵ Furthermore, English law had a significant influence on how criminal procedures

³⁵ Koyana *Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law* 16.

³⁶ Koyana *Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law* 16

³⁷ Koyana *Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law* 16.

³⁸ Koyana *Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law* 16.

³⁹ Koyana *Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law* 16.

⁴⁰ Koyana *Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law* 16.

⁴¹ Bennett and Pillay 2003 *SAJHR* 218.

⁴² Marudu and Maimela 2021 *De Jure Law Journal* 57; Koyana *Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law* 16.

⁴³ Marudu and Maimela 2021 *De Jure Law Journal* 57; Koyana *Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law* 16-17.

⁴⁴ Koyana *Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law* 17.

⁴⁵ Koyana *Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law* 17.

were regulated.⁴⁶ The *Criminal Procedure Act* 56 of 1955 was enacted to consolidate the laws relating to the procedures in criminal proceedings.⁴⁷ The 1955 act was later amended by several amendment acts, including the *Criminal Procedure Amendment Act* 9 of 1968, which was later repealed in 1977, until the current *Criminal Procedure Act* 51 of 1977 was enacted.⁴⁸ The *Criminal Procedure Act* 51 of 1977 is currently facing review with several discussion papers already published.⁴⁹

1.2 Sentencing

The types of sentences South African courts may impose have been prescribed by legislation for nearly two centuries.⁵⁰ Currently, the courts may only impose the sentences listed in section 276(1) of the *Criminal Procedure Act* 51 of 1977 (*CPA*).⁵¹ These sentences are: imprisonment, including life imprisonment and imprisonment for an indefinite period,⁵² periodical imprisonment,⁵³ declaration as a habitual offender,⁵⁴ committal to any lawful institution,⁵⁵ a fine,⁵⁶ correctional supervision,⁵⁷ and imprisonment with the option to be put under correctional supervision.⁵⁸ The *Child Justice Act* 75 of 2008 (*CJA*) holds jurisdiction over the procedures to be followed when dealing with child offenders. The *CJA* protects the interests of the child in every aspect of the criminal proceedings and its approach to sentencing

⁴⁶ Terblanche 2020 *SACJ* 5.

⁴⁷ South African Government date unknown <https://www.gov.za/documents/criminal-procedure-act-19-may-2015-1252#:~:text=The%20Criminal%20Procedure%20Act%2056,proceedings%20and%20matters%20incidental%20thereto>.

⁴⁸ South African Government date unknown <https://www.gov.za/documents/criminal-procedure-act-19-may-2015-1252#:~:text=The%20Criminal%20Procedure%20Act%2056,proceedings%20and%20matters%20incidental%20thereto>.

⁴⁹ South African Government 2025 <https://www.gov.za/news/media-statements/justice-and-constitutional-development-review-criminal-procedure-act-20-feb>.

⁵⁰ Terblanche 2020 *SACJ* 6.

⁵¹ Terblanche 2020 *SACJ* 6.

⁵² Section 276(1)(b) and 286B(1) of the *Criminal Procedure Act* 51 of 1977.

⁵³ Section 276(1)(c) of the *CPA*.

⁵⁴ Section 276(1)(d) of the *CPA*.

⁵⁵ Section 276(1)(e) of the *CPA*.

⁵⁶ Section 276(1)(f) of the *CPA*.

⁵⁷ Section 276(1)(h) of the *CPA*.

⁵⁸ Section 276(1)(i) of the *CPA* in the discretion of the Commissioner of Correctional Services or a parole board.

emphasises restoration and rehabilitation over punishment.⁵⁹ The sentences currently available to child offenders are: community based sentences,⁶⁰ restorative justice sentences,⁶¹ a fine or alternatives to a fine that result in symbolic restitution,⁶² correctional supervision,⁶³ compulsory residence in a child and youth care centre,⁶⁴ imprisonment as a last resort,⁶⁵ postponement or suspension of passing sentence.⁶⁶

1.3 Restorative justice

Restorative justice is a process involving the victim, the offender and, if applicable, the community in order to search for solutions to repair and reconcile and rebuild relationships.⁶⁷

Currently, South Africa is still primarily using a retributive justice system, which focuses on punishing the victim instead of rehabilitation, with the accusatorial system being dominant in court.⁶⁸ Within the accusatorial system, victims are not active decision makers and are not involved in determining the sentence of the accused, rather the presiding officers led by legislation make these decisions.⁶⁹ Restorative justice differs in this aspect as victims and offenders are involved in the decision-making process and work together to reach an amicable solution that satisfies the needs of justice and the dignity of the victim.⁷⁰

⁵⁹ Section 69 of the *Child Justice Act* 75 of 2008.

⁶⁰ Section 72 of the *CJA*.

⁶¹ Section 73 of the *CJA*.

⁶² Section 74 of the *CJA*.

⁶³ Section 75 of the *CJA*.

⁶⁴ Section 76 of the *CJA*.

⁶⁵ Section 77 of the *CJA*.

⁶⁶ Section 78 of the *CJA*.

⁶⁷ Mangena 2015 *S. Afr. J. Philos.* 2.

⁶⁸ The accusatorial system has little or no regard for the victim of an offence and places the offender at the centre of interrogations. Department of Justice and Constitutional Development *Restorative Justice: The Road to Healing* 3.

⁶⁹ Department of Justice and Constitutional Development *Restorative Justice: The Road to Healing* 4.

⁷⁰ Department of Justice and Constitutional Development *Restorative Justice: The Road to Healing* 4.

1.4 Restorative justice in terms of African customary law

The term African traditional justice systems (TJS) refers to all of the methods that African people or communities have used to resolve conflicts or disputes since the dawn of time and that have been passed down from one generation to the next.⁷¹ The majority of TJS are reflected in traditional African norms and values since they are ingrained in African customary laws.⁷² They have remained resilient up to this point because they are a component of Africa's social fabric.⁷³

Most of TJS engage the victims, wrongdoers, and the entire community in defining the harm, as well as in the search for a resolution that is agreeable to all stakeholders.⁷⁴ They are valid and successful because they involve acts, processes and choices that are culturally relevant.⁷⁵ African conventions, rituals, religions, and values guide human affairs and form the cornerstone of the continent's administrative justice structure.⁷⁶ The compliance rate with TJS judgments is higher than with official court systems owing to social and religious sanctions.⁷⁷

1.5 Decolonisation, Africanisation and decoloniality

Decolonisation is the process of "physically removing colonising powers from an area".⁷⁸ Decoloniality, in contrast, is about changing the patterns of power left over by colonisation as it impacts on labour, culture, the production of knowledge, and interactions.⁷⁹ Decoloniality's goal is asserting African identity.⁸⁰ It is about recognising the challenges faced by South Africa and Africa as a whole.⁸¹ In the

⁷¹ Karuiki *African Traditional Justice Systems* 1.

⁷² Karuiki *African Traditional Justice Systems* 2.

⁷³ Karuiki *African Traditional Justice Systems* 2.

⁷⁴ Karuiki *African Traditional Justice Systems* 3.

⁷⁵ Karuiki *African Traditional Justice Systems* 3.

⁷⁶ Karuiki *African Traditional Justice Systems* 3.

⁷⁷ Karuiki *African Traditional Justice Systems* 3.

⁷⁸ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 382.

⁷⁹ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 382-383.

⁸⁰ Ntshoe 2020 *South African Journal of Higher Education* 269; Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 390.

⁸¹ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 390.

African context these attempts at decoloniality have also been referred to as "Africanisation".⁸² The most obvious attempt the courts have made to "Africanise" the South African legal system is with the introduction of *ubuntu*.⁸³

Humanity, compassion and interconnectedness are three characteristics of the *ubuntu* value system.⁸⁴ According to various definitions, *ubuntu* is an African philosophy that emphasises, among other things, humaneness, the needs of the most vulnerable people, respect for humanity, interconnectedness, moral virtue, compassion and group solidarity.⁸⁵

The necessity to expand the representation of black people and women in the judiciary has dominated discussions concerning the restructuring of South Africa's justice system.⁸⁶ The laws themselves have received little consideration despite the Constitution's recognition of customary law.⁸⁷ Incorporating restorative justice may help to remedy this.⁸⁸

1.6 Research problem

South African law is predominantly based on western knowledge systems brought about through colonisation and apartheid. Very little consideration is given to indigenous systems. This can cause conflict between modern systems and indigenous cultures. The attempts at decolonising the legal system has failed because too much attention has been given to the people enforcing the laws as opposed to the laws and system itself. Restorative justice will be investigated in this

⁸² Mangena 2012 *S. Afr. J. Philos* 3.

⁸³ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 386.

⁸⁴ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 387.

⁸⁵ Radebe and Phooko 2017 *South African Journal of Philosophy* 239-240.

⁸⁶ Velthuisen 2016 <https://theconversation.com/why-south-africas-tentative-moves-toward-restorative-justice-need-support-51286>.

⁸⁷ Velthuisen 2016 <https://theconversation.com/why-south-africas-tentative-moves-toward-restorative-justice-need-support-51286>.

⁸⁸ Velthuisen 2016 <https://theconversation.com/why-south-africas-tentative-moves-toward-restorative-justice-need-support-51286>.

dissertation as a possible tool for decolonising the punishment aspect of the South African criminal justice system.

1.7 Research question

Given the exposition above, the study aims to answer the following primary research question: How can restorative justice contribute to decolonising the punishment aspect within the South African criminal justice system?

1.8 Study methodology

A literature review of journal articles, case law, government publications, and legislation was the chosen research method. The legal historical method was used to a lesser degree. A broad comparative study was also used to examine the possible differences and similarities between Eastern and Western law and its connection, if any, to restorative justice. The jurisdictions for the comparative study are broad to include any system seen as Western, or Eastern. This is kept deliberately wide as this dissertation does not aim to compare one nation's policies to another but to compare and analyse differences in philosophy pertaining to punishment and offending.

1.9 Limits of the study

The research study is limited to elements of punishment within a criminal justice system. The focus is on the current South African criminal justice system.

References are made to other criminal justice systems, such as African Indigenous Justice Systems found in South Africa and Africa generally.

The author acknowledges that the topics covered in this study are delicate and susceptible to varying interpretations. Particularly, indigenous customs and viewpoints that the author is not personally acquainted with are mentioned. Despite this, every attempt has been made to approach these with academic integrity and respect. The opinions stated should not be interpreted as an authoritative report, but rather as a contribution to ongoing current scholarly discussion.

1.10 Chapter layout

The next chapter will define decolonisation, decoloniality and Africanisation. Crime theories and theories of punishment will be explored in chapter 3, and restorative justice's position will be identified within these theories. Chapter 4 will explain restorative justice, *ubuntu*, and African indigenous justice systems as well as Eastern and Western perspectives on punishment. South Africa's sentencing structure will be discussed in chapter 5 and the existence or potential of restorative justice in the sentencing structure will be identified. Chapter 6 will be a summary and conclusion.

2 Chapter 2: Decolonisation

2.1 Introduction

Colonisation is a political and economic relationship in which peoples' or a nation's sovereignty depends on the power of another nation, the *metropole*, transforming the aforementioned *metropole* into an empire.⁸⁹ It is widely acknowledged that it occurs when one country imposes its will on others through subjugation on all fronts – military, economic, political and cultural.⁹⁰ On the other hand "coloniality" refers to long-lasting power systems that emerged due to colonisation but extend beyond the boundaries of colonial governments to influence culture, interpersonal relationships, the production of knowledge, and labour.⁹¹

Several European nations came to an agreement on the rules that led to the colonialism of several African governments following the Berlin Conference of 1884.⁹² Many African countries experienced colonisation up until the 1960s.⁹³ South Africa only gained its colonial independence in 1961.⁹⁴ Although physical colonial presence was absent in many African nations, Eurocentric knowledge systems, cultural practices, and behaviours persisted.⁹⁵

Decoloniality was a political movement that emerged in the 1960s and focused on empowering Africans and criticizing Western imperialism's production of knowledge that put European knowledge at the center of the continent.⁹⁶ The South African legal system was, and is still, influenced by Roman-Dutch and English law.⁹⁷ Roman-

⁸⁹ Auriacombe and Cloete 2019 *African Evaluation Journal* 2.

⁹⁰ Auriacombe and Cloete 2019 *African Evaluation Journal* 2.

⁹¹ Maldonado-Torres 2007 *Cultural Studies* 243.

⁹² *General Act of the Berlin Conference on West Africa* 26 of 1885.

⁹³ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 381.

⁹⁴ Hayes 1980 *The International History Review* 453.

⁹⁵ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 381.

⁹⁶ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 381.

⁹⁷ Terblanche 2020 *SACJ* 5.

Dutch and English law has been criticised as conservative and non-progressive and many feel that this is stiling the discussion around decolonisation in South Africa.⁹⁸

South Africa is proud of its post-1994 Constitution, particularly its Bill of Rights, which is meant to protect every South African citizen.⁹⁹ The Bill of Rights also recognises the rights of the country's indigenous population with section 39 explaining that customary law runs concurrently with common law.¹⁰⁰ South Africa's 1996 Constitution confirms several fundamental rights and aims to achieve social justice.¹⁰¹ Social justice is a multifaceted concept that encompasses civil, political, and social rights, as well as material redistribution and participatory citizenship.¹⁰² Courts and legislators have tried to incorporate customary law concepts such as *ubuntu* into the South African legal system.¹⁰³

However, there is some criticism that these attempts, and section 39's claim about the status of customary law, are merely superficial.¹⁰⁴ Customary law's constitutional advancement has been delayed in terms of legislative and judicial reform and development, and the legislature shows no interest in improving the dire circumstances that customary law finds itself in.¹⁰⁵ In order to quickly resolve disputes arising under customary law, the legislature has begun substituting common law for what it deems to be "non-transformative and undeveloped" customary law.¹⁰⁶ Due to the inadequate development and reform of customary law, the judiciary and the legislature have the authority to limit its development in terms of its application and interpretation.¹⁰⁷ It is extremely important to engage in the process of establishing indigenous peoples' human rights in South Africa by laying

⁹⁸ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 381.

⁹⁹ Morudu and Maimela 2021 *De Jure Law Journal* 54.

¹⁰⁰ Section 39 of the *Constitution of the Republic of South Africa*, 1996.

¹⁰¹ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 381.

¹⁰² Ntshoe 2020 *South African Journal of Higher Education* 263.

¹⁰³ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 381.

¹⁰⁴ Morudu and Maimela 2021 *De Jure Law Journal* 55.

¹⁰⁵ Morudu and Maimela 2021 *De Jure Law Journal* 55.

¹⁰⁶ As witnessed in *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC).

¹⁰⁷ Morudu and Maimela 2021 *De Jure Law Journal* 55.

the groundwork and ensuring that their legal systems and rights are given consideration.

The question is whether the measures provided for in the *Constitution* are sufficient to ensure decolonisation of the South African legal system, or if more can be done to ensure real decolonisation of the South African legal system that could have a practical and real-world impact on achieving social justice in the country.

The aim of Chapter 2 is to define and explain the concepts of decolonisation, decoloniality, and Africanisation. After explaining these concepts, this chapter focuses on how the courts have interpreted and approached decolonisation; customary law and several instances of case law are also discussed. At the end of the chapter the case law is evaluated, and an opinion is given about the application of customary law and the process of decolonisation.

2.2 Decolonisation

Decolonisation is one of the most important political, international, and cultural concerns facing the modern world.¹⁰⁸ It has led to the dissolution of an outmoded imperial hegemony and the rise of new countries in the world.¹⁰⁹ There is no denying that decolonisation is an important topic, but the definition of what it is seems to differ depending on the different proponents of the idea and their own agendas.

Some authors define decolonisation as physically driving out colonising powers from a region.¹¹⁰ Others define it as a reference to the political process by which a dependent territory is liberated from colonial rule.¹¹¹ Some authors define decolonisation as the process of eliminating the remnants of colonialism or colonisation.¹¹² With reference to higher education, decolonisation has been defined in terms of four paradigms, namely, decolonisation as Africanisation, decolonisation

¹⁰⁸ Devenish 2013 *The Journal of Transdisciplinary Research in Southern Africa* 310.

¹⁰⁹ Devenish 2013 *The Journal of Transdisciplinary Research in Southern Africa* 310.

¹¹⁰ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 382.

¹¹¹ Devenish 2013 *The Journal of Transdisciplinary Research in Southern Africa* 310.

¹¹² Auriacombe and Cloete 2019 *African Evaluation Journal* 2.

as indigeneity, decolonisation with regard to racial undertones, and decolonisation as *ubuntu*.¹¹³ Although this article focuses exclusively on decolonisation within higher education, similarities can be seen between what it contends and what the legal profession faces in its struggle for decolonisation. For example, the education system places a higher focus on Western knowledge and structures, often disregarding African and Eastern knowledge as superstitious. Similarly, the legal profession places higher value in Western legal and knowledge systems, with little regard given to African forms of justice systems. According to Hungwe and Ndofirepi,¹¹⁴ the core problem that decolonisation faces is epistemic injustice.¹¹⁵ This will be discussed below.

Epistemic injustice refers to the wilful underappreciation of the knowledge traditions of formerly colonised peoples.¹¹⁶ Epistemic injustice takes two forms, namely testimonial injustice, and hermeneutical injustice.¹¹⁷ When the hearer assigns the speaker a credibility deficit owing to their preconceived notions about the social group to which the speaker belongs, this is known as testimonial injustice.¹¹⁸ Hermeneutical injustice is the intentional trivialisation of a society's sources of collective knowledge and shared experiences.¹¹⁹

Epistemic injustice, according to some, is the continuation and entrenchment of the supremacy of the Westernised educational perspective over the African educational worldview.¹²⁰ Epistemic diversity has decreased as a result of Western traditions becoming the norm for all knowledge and the methods that underpin them being viewed as the only sources of authentic knowledge.¹²¹ Because Western traditions hold institutional and epistemic power, they serve as the centre of knowledge, suppressing and demeaning other types of knowledge.¹²² The systematic endeavour

¹¹³ Hungwe and Ndofirepi 2022 *South African Journal of Higher Education* 55.

¹¹⁴ Hungwe and Ndofirepi 2022 *South African Journal of Higher Education* 55.

¹¹⁵ Hungwe and Ndofirepi 2022 *South African Journal of Higher Education* 55.

¹¹⁶ Maxwell 2018 *Alternative Law Journal* 41.

¹¹⁷ Hungwe and Ndofirepi 2022 *South African Journal of Higher Education* 56.

¹¹⁸ Maxwell 2018 *Alternative Law Journal* 41.

¹¹⁹ Maxwell 2018 *Alternative Law Journal* 41.

¹²⁰ Hungwe and Ndofirepi 2022 *South African Journal of Higher Education* 56.

¹²¹ Hungwe and Ndofirepi 2022 *South African Journal of Higher Education* 57.

¹²² Hungwe and Ndofirepi 2022 *South African Journal of Higher Education* 57.

to downplay and disregard the inherent worth of African culture, customs, and practices is the main "disease" of education in Africa.¹²³ The notion that knowledge is colonised and must be decolonised has been present since the mid-1970s across several academic boundaries.¹²⁴

This can be applied to the field of law. As noted above, South Africa's justice system is mostly based on English and Roman-Dutch law, both strong sources of Western knowledge. A very small percentage of South African law is given over to indigenous law, and nearly none of South Africa's legal infrastructure is based on African systems. A common misconception held by the public is that African knowledge is primitive and superstitious and thus the Western system is better.¹²⁵

2.3 Africanisation

Africanisation has been defined in many ways depending on the proponent's understanding and their agenda. Makgoba¹²⁶ focuses on culture and identity, pointing out that Africanisation is an inclusive process that highlights how important it is to validate African identities and cultures in the global society. Mollema and Naidoo¹²⁷ explain it as a blending of African customs and ideas into already established principles. Louw¹²⁸ regards Africanisation as a means of identifying and accepting our "otherness", of moving beyond individual identities, and of finding common ground. Hungwe and Ndofirepi¹²⁹ propose that Africanisation is the reclaiming and reassertion of African identity and knowledge systems. While different scholars have different ideas about what Africanisation is, there seem to be some common themes that are stressed, such as the need to identify shared experiences; affirm African culture, traditions, and value systems; promote

¹²³ Mollema and Naidoo 2011 *Journal for Juridical Science* 50.

¹²⁴ Mignolo 2007 *Cultural Studies* 450.

¹²⁵ Mogaj and Motadegbe 2025 *Philosophical Meditations* 91.

¹²⁶ Letsekha 2013 *The Independent Journal of Teaching and Learning* 5,6.

¹²⁷ Cassim and Mabeka 2019 *Journal of Law Society and Development* 15.

¹²⁸ Letsekha 2013 *The Independent Journal of Teaching and Learning* 6.

¹²⁹ Hungwe and Ndofirepi 2022 *South African Journal of Higher Education* 58.

awareness of African consciousness, and figure out how to combine Western and African methods.¹³⁰

The South African legal system has undergone numerous changes since the African Renaissance wave swept the nation.¹³¹ This manifests itself, among other ways, in the re-emergence of the diversity of alternative African legal systems.¹³² The colonial criminal justice system, which "clamped down ... a vast system of law and administration", can be directly blamed for this resurgence.¹³³ There have been calls for Africanisation or the inclusion of Africanness in existing spheres in our country, like education and the law.¹³⁴ The agenda for reform in South Africa was primarily motivated by the desire to reverse decades of injustice brought about by colonisation and apartheid and to bring institutions into compliance with the Constitution.¹³⁵ The broad consensus is that African philosophy, ontology and epistemology are the components of Africanness.¹³⁶ It is important to note that African customs and traditions vary among continents, and because of this, the meaning of Africanness can vary from group to group.¹³⁷

If decolonisation is defined as Africanisation, then it makes sense to characterise it as the process of dismantling colonialism by recognising and validating African experiences and worldviews.¹³⁸ Africanisation is praised for having the ability to both mend the damaged African identity and sense of belonging and undo the negative effects of epistemic injustice.¹³⁹

¹³⁰ Letsekha 2013 *The Independent Journal of Teaching and Learning* 7.

¹³¹ Mollema and Naidoo 2011 *Journal for Juridical Science* 50.

¹³² Mollema and Naidoo 2011 *Journal for Juridical Science* 50.

¹³³ Mollema and Naidoo 2011 *Journal for Juridical Science* 50.

¹³⁴ Cassim and Mabeka 2019 *Journal of Law Society and Development* 15; Mollema and Naidoo 2011 *Journal for Juridical Science* 50.

¹³⁵ Letsekha 2013 *The Independent Journal of Teaching and Learning* 5.

¹³⁶ Mollema and Naidoo 2011 *Journal for Juridical Science* 50.

¹³⁷ Mollema and Naidoo 2011 *Journal for Juridical Science* 51.

¹³⁸ Hungwe and Ndofirepi 2022 *South African Journal of Higher Education* 58.

¹³⁹ Hungwe and Ndofirepi 2022 *South African Journal of Higher Education* 58.

2.4 Decoloniality

Decoloniality is a political movement based on the empowerment of African people and the critique of Western Imperialism's knowledge that emerged in the 1960's as a response to the hegemonic knowledge systems that put European knowledge at the core of Africa.¹⁴⁰

Colonisation left long-lasting psychological effects on the societies they colonised that remain even after liberation.¹⁴¹ This is because the social norms and culture was mostly dictated by the coloniser.¹⁴² Owing to this, members of the previously colonised communities may experience a distorted view of themselves based on the incongruence between their personal view of themselves, and society's view.¹⁴³ This is emphasised and exacerbated by external factors such as the media's portrayal of their community and culture, and the perception and opinions expressed by people outside of their community.¹⁴⁴ This psychological effect is due to colonisation and the principle of decoloniality is to combat the powers and influence that colonisation left on the minds of the colonised.¹⁴⁵

Decoloniality means striving towards a perspective of human existence free from the constraints and demands of one social ideal being imposed above others.¹⁴⁶

The persistence of colonialism in the psyches of both former colonial powers and their former colonies has demonstrated that decoloniality is far more complicated than one may imagine.¹⁴⁷ This is especially true when substituting purportedly

¹⁴⁰ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 381.

¹⁴¹ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 381.

¹⁴² Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 381.

¹⁴³ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 381.

¹⁴⁴ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 381.

¹⁴⁵ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 381.

¹⁴⁶ Mignolo 2007 *Cultural Studies* 12.

¹⁴⁷ Auriacombe and Cloete 2019 *African Evaluation Journal* 4.

indigenous values, customs, and practices for certain colonial legacies.¹⁴⁸ This strict approach to decoloniality has changed over time into a more pragmatic "damage minimalisation and improvement" strategy.¹⁴⁹ This strategy now emphasises the use of Africa-based and Africa-focused mental models that are more in line with African values, cultural norms, and empirical situations and practices rather than simply replacing Eurocentric approaches with African ones.¹⁵⁰

Decoloniality is not always the opposite of colonialism; rather it is an uncompromising attempt to promote Afrocentric guidelines for living.¹⁵¹ African Renaissance should be at the centre of any attempt at decoloniality.¹⁵²

Despite its many appropriations, which occasionally verge on political posturing, decoloniality provides an intersectional approach to a multiplicity of knowledge.¹⁵³ To do this, it puts subaltern knowledges front and centre, which are frequently marginalised and framed by "Western-centric, canonical epistemes".¹⁵⁴

In short, decoloniality is the attempt to change the perception that Western knowledges and ideals are the only ones with worth. Although there are many ways in which decoloniality has been employed, it seems obvious that it is not possible to reject Western knowledge and replace it fully with indigenous knowledge systems and practices, nor should this be our goal. Decoloniality as a tool should be used to incorporate indigenous and Western knowledge and practices.

2.5 Decolonisation in South Africa

The South African *Constitution* has made some strides to acknowledge customary law. For example, section 39 of the *Constitution* not only implies a duty to the courts to develop customary law, but also recognises the rights and freedoms conferred

¹⁴⁸ Auriacombe and Cloete 2019 *African Evaluation Journal* 4.

¹⁴⁹ Auriacombe and Cloete 2019 *African Evaluation Journal* 4.

¹⁵⁰ Auriacombe and Cloete 2019 *African Evaluation Journal* 4.

¹⁵¹ Mashua 2018 *HTS Theological Studies* 6.

¹⁵² Mashua 2018 *HTS Theological Studies* 6.

¹⁵³ Chaka 2020 *Scrutiny* 2 8.

¹⁵⁴ Chaka 2020 *Scrutiny* 2 8.

by customary law to the extent that they are consistent with the Bill of Rights.¹⁵⁵ Furthermore, sections 30 and 31 of the *Constitution* acknowledge the rights of people belonging to a cultural group to use their language and participate in practices according to their culture, as long as it is consistent with the Bill of Rights. Section 211 of the *Constitution* states that the courts must apply customary law where it is applicable, subject to the *Constitution* and any governing legislation. Although the *Constitution* recognises customary law, some authors argue that this recognition is only superficial and that the courts do not do enough to apply and develop customary law.¹⁵⁶ While the South African *Constitution* does feature transformative goals that could result in social justice, these objectives do not inevitably result in a decolonial approach.¹⁵⁷ Such an understanding of social justice would be lacking since it would not account for the past injustices that many South Africans have experienced.¹⁵⁸

Incorporating *ubuntu* into the legal system was the court's first attempt at decoloniality.¹⁵⁹ According to various definitions, *ubuntu* is an African philosophy that emphasises, among other things, the needs of the most vulnerable people, humaneness, respect for humanity, moral virtue, interconnectedness, compassion and group solidarity.¹⁶⁰ *Ubuntu* is an African value system that the courts have incorporated into the justice system, not as a practice to replace another practice, but as a way to inform and influence the already existing system.¹⁶¹

Ubuntu was used in *S v Makwanyane*,¹⁶² one of the first Constitutional Court decisions, to abolish the death penalty. It was utilised in this case to demonstrate

¹⁵⁵ Section 39(2)-(3) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁶ Marudu and Maimela 2021 *De Jure Law Journal* 55.

¹⁵⁷ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 390.

¹⁵⁸ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 390.

¹⁵⁹ Geduld *Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice* 386.

¹⁶⁰ Radebe and Phooko 2017 *South African Journal of Philosophy* 239-240.

¹⁶¹ Radebe and Phooko 2017 *South African Journal of Philosophy* 240.

¹⁶² *S v Makwanyane* 1995 3 SA 391 (CC).

that people cannot lose their humanity and that they cannot be used as a tool, such as by incarcerating someone to dissuade others from committing crimes.¹⁶³

In *Gongqose v Minister of Agriculture, Forestry and Fisheries* (hereafter the *Gongqose* case) a question arose over whether an Act of Parliament could nullify a customary right. The appellants were part of a recognised customary community.¹⁶⁴ The community, known as the *Dwesa-Cwebe* community, had lived in the area for about 300 years.¹⁶⁵ The area was annexed by the Cape government in 1885 and was made into a reserve.¹⁶⁶ It is common ground that the community was dispossessed of their land.¹⁶⁷ Under the apartheid government, they were removed from the area, and their access to the natural resources on which they had relied was completely removed.¹⁶⁸ Instead, White people were given preferential rights under the apartheid government to enjoy the area.¹⁶⁹ In 1996, the community lodged a claim with the Eastern Cape Regional Land Claims Commission for restitution of their land. The land claims were gazetted in 1996.¹⁷⁰

The appellants were charged in the magistrates court with fishing in a protected marine area without permission in contravention of section 43(2)(a) of the *Marine Living Resources Act* 18 of 1998 (*Marine Act*).¹⁷¹ The appellants claimed that they had acted lawfully as they had a customary right to the area.¹⁷² The magistrate found that while they had proven the right, the *Marine Act* had extinguished it and their actions were unlawful.¹⁷³ They appealed to the High Court which held that the *Marine Act* did not extinguish their right but that nevertheless, they needed permission under section 43 or 81 of the *Marine Act* which gives an exception under which someone may receive permission to fish in a marine protected area.¹⁷⁴

¹⁶³ *S v Makwanyane* 1995 3 SA 391 (CC) para 316.

¹⁶⁴ *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 2 SACR 367 (SCA) para 3.

¹⁶⁵ *Gongqose* para 10.

¹⁶⁶ *Gongqose* para 10.

¹⁶⁷ *Gongqose* para 4.

¹⁶⁸ *Gongqose* paras 10-11.

¹⁶⁹ *Gongqose* para 11.

¹⁷⁰ *Gongqose* para 9.

¹⁷¹ *Gongqose* para 15.

¹⁷² *Gongqose* para 26.

¹⁷³ *Gongqose* para 39.

¹⁷⁴ Section 43(3) and s 81(1) of the *Marine Act*.

Without this permission, their actions were unlawful.¹⁷⁵ The appellants then approached the Supreme Court of Appeal (SCA). The issues the SCA had to deal with were: the status of customary law; whether the appellants did have a customary right; when would legislation extinguish a customary right and did the *Marine Act* extinguish their right and were their actions lawful.¹⁷⁶ The SCA held that customary law was protected under the Constitution and subject only to the Constitution and legislation dealing specifically with customary law. The court held that the appellants had indeed proven their customary right. The court further held that legislation could only extinguish a customary right if it specifically dealt with customary law and either expressly or through necessary implication extinguished the right. The court further found that, the appellants having proven their right and the *Marine Act* making no specific mention of customary law, their right could not be extinguished and the appellants thus acted lawfully under the authority of customary law. The SCA set aside part of the High Court's order, upheld the appeal, and set aside the convictions of the appellants.¹⁷⁷

The court's protection of customary law and its protection of the customary community are in line with the ideals of decolonisation and decoloniality. Recognising and incorporating customary law plays a vital role in decolonisation through recognising the authority and self-determination that colonial rule often suppressed, challenging colonial legal systems, revitalising culture, and giving the opportunity for justice and reconciliation.

The courts do recognise customary law, but also protect citizens from customary law provisions that are discriminatory in nature, such as in *Bhe v Magistrate Khayelitsha*¹⁷⁸ (hereafter the *Bhe* case) wherein the courts abolished the rule that only inter-marital male heirs could inherit anything intestate, which was discriminating against female descendants and extra-marital children. The court held that the *Constitution* expressly states that customary law will have a place in

¹⁷⁵ *Gongqose* para 65.

¹⁷⁶ *Gongqose* paras 23, 35, 50, 59, 63, 64.

¹⁷⁷ *Gongqose* para 69.

¹⁷⁸ *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC) para 136.

our legal system.¹⁷⁹ Undoubtedly, several sections of the *Constitution* stipulate that customary law must be incorporated into South African law, not only tolerated, as long as the precise regulations or procedures do not contradict the *Constitution*.¹⁸⁰ The courts also protect against customary law practices that could be harmful such as the practice of *ukuthwala*. *Ukuthwala* is the practice of kidnapping a girl to marry her or forcing her parents into allowing her to marry the kidnapper.¹⁸¹ In *S v Jezile*¹⁸² the accused tried to excuse the abduction and rape of a 14-year-old girl as being sanctioned by the customary practices of *ukuthwala*. The court rightly held that the form of *ukuthwala* that sanctions abduction and rape was not in accordance with the Constitution and therefore unlawful.¹⁸³

2.6 Conclusion

South African courts have a constitutional obligation to recognise customary law and it would be unfair to say that they never apply it or give it its due recognition in cases of customary rights. However, there is still much that can be done on the decoloniality front. The courts have in many cases changed customary law to be more consistent with the values of the *Constitution*. Although there can hardly be fault found in this approach it is also necessary to acknowledge that in doing so it has in some ways westernised customary law. It would only be fair in return to allow customary law to influence our westernised legal structure. In order for decoloniality and epistemological decolonisation to prevail, South Africa needs to acknowledge that there are some customary law practices from which it can benefit and learn. A prime example of this is restorative justice, as is discussed in Chapter 3.

¹⁷⁹ *Bhe* para 41.

¹⁸⁰ *Bhe* para 41.

¹⁸¹ Department of Justice and Constitutional Development *What is Ukuthwala?* 1.

¹⁸² *S v Jezile* 2015 2 SACR 452 (WCC) para 90.

¹⁸³ *Jezile* para 92-96.

3 Chapter 3: Theories on crime and punishment

3.1 Introduction

Punishments are official penalties designed to impede the offender's life, freedom, or property.¹⁸⁴ It is when someone is sentenced to suffer by an authority because they committed a crime.¹⁸⁵ Flew, a prominent philosopher, suggested five criteria for punishment: it must involve a wrongdoing to a victim, it must involve an actual or intended offence, it must have been committed by a person, the punishment must be enacted by a person and cannot merely be a natural consequence of the action, and it must be carried out by a legal authority that the crime was committed against (i.e., the state).¹⁸⁶

Prior to colonisation, the southern regions of Africa were home to largely nomadic tribes with vague, mostly local systems of justice.¹⁸⁷ Although the punishments imposed by African tribes to offenders differed somewhat between tribes, there was a commonality, as most scholars claimed that African TJS all viewed punishment through a restorative lens.¹⁸⁸ This is discussed in greater detail in the next chapter.

When the Dutch colonised Southern Africa, they brought along their own justice system, which they slowly integrated into the colony and enforced on the indigenous people.¹⁸⁹ The Dutch system of punishment was often cruel and severe, and the punishments for the same crimes could differ widely.¹⁹⁰ When South Africa became a British colony, the law became an amalgamation of both Roman-Dutch and English law.¹⁹¹ Over time, the law kept developing, and several Criminal Procedure Acts were published until South Africa eventually reached its current *Criminal Procedure Act* 51 of 1977.¹⁹²

¹⁸⁴ Burchell and Milton 2005 *Principles of Criminal Law* 68.

¹⁸⁵ Burchell and Milton 2005 *Principles of Criminal Law* 68.

¹⁸⁶ Idowu 2024 *Inkanyiso* 1.

¹⁸⁷ Terblanche 2020 *SACJ* 5.

¹⁸⁸ Gade 2013 *S. Afr. J. Philos.* 24-27.

¹⁸⁹ Terblanche 2020 *SACJ* 5.

¹⁹⁰ Botha 1915 *SALJ* 324-326.

¹⁹¹ Van Huyssteen 1989 *SACJ* 287; Terblanche 2020 *SACJ* 5.

¹⁹² Terblanche 2020 *SACJ* 5-6.

Over the years, theories of crime began to emerge. Crime theories provide an explanation for abnormal or criminal behaviour.¹⁹³ These theories are often tested empirically.¹⁹⁴ Many theories of crime allow for the drawing of conclusions on how to avoid crime, which often find their way into the implementation of criminal policy.¹⁹⁵ Those who study crime theory are criminologists. The study of crime, and criminal behaviour is known as criminology.¹⁹⁶ It is based on ideas of sociology, anthropology, economics, psychology, and statistics.¹⁹⁷ Criminologists study a wide range of connected fields including: criminals' characteristics, causes of criminal activity, the effect of crime on communities and individual persons, and strategies to stop crime.¹⁹⁸ Different crime theories have informed different punishment theories, and development in criminology has led to the development of how punishment theories are applied.¹⁹⁹ The crime theories are dealt with below to give context as to what the reasons are for choosing punishments. Their inclusion in this dissertation is to help demonstrate why people commit crimes and whether restorative justice measures can be used as a method to prevent crime.

Theories of punishment, often include guidelines for dealing with crimes and offenders.²⁰⁰ The goal of punishment theory is to protect a society that lacks law and order by considering the fundamentals that guide the imposition of punishment on the offender.²⁰¹ There are four different kinds of theory of punishment, namely: the deterrent theory, retributive theory, preventive theory, and reformative

¹⁹³ Wickert C 2019 <https://soztheo.de/theories-of-crime/?lang=en>.

¹⁹⁴ Wickert C 2019 <https://soztheo.de/theories-of-crime/?lang=en>.

¹⁹⁵ Wickert C 2019 <https://soztheo.de/theories-of-crime/?lang=en>.

¹⁹⁶ Maryville University date unknown <https://online.maryville.edu/online-bachelors-degrees/criminal-justice/resources/what-is-criminology/>.

¹⁹⁷ Alemika 2020 *Acta Criminologica* 1; Maryville University date unknown <https://online.maryville.edu/online-bachelors-degrees/criminal-justice/resources/what-is-criminology/>.

¹⁹⁸ Maryville University date unknown <https://online.maryville.edu/online-bachelors-degrees/criminal-justice/resources/what-is-criminology/>.

¹⁹⁹ UNODC 2018 <https://www.unodc.org/e4j/en/organized-crime/module-6/key-issues/classical-pain-pleasure-decisions.html>.

²⁰⁰ Sootak 2000 *Juridica International* 68.

²⁰¹ Sootak 2000 *Juridica International* 68.

theory.²⁰² These are not the only theories on punishment, but are the most commonly found in academic literature. These are discussed in detail below.

The aim of this chapter is to identify restorative justice in the context of theories of punishment. Accordingly, the development of crime theories is explained, and the four types of punishment theory are explored to provide context for the development of restorative justice.

3.2 The development of crime theories

3.2.1 Classical crime theory

Classical crime theory, or the classical school of criminology, emerged around the middle of the eighteenth century.²⁰³ It held that because people were believed to have free will, crime was the result of reasoned decisions.²⁰⁴ The pain-pleasure principle, which states that humans act to maximise pleasure and minimise suffering is applied to make this decision.²⁰⁵ Classicists believe that humans are inherently hedonistic and will always behave in a manner that promotes self-gain and thus the best way to prevent crime is to threaten people with suffering.²⁰⁶

3.2.2 Positivist school of thought

The positivist school of thought emerged in contrast to the strict laws that the classical school advocated for.²⁰⁷ In essence, positivism emphasises the cause-and-effect relationship between humans and their surroundings.²⁰⁸ It is a deterministic perspective of humanity. A few specific elements have been identified as contributing to crime because of their inherent negative connotations.²⁰⁹ As a result, several theories have emerged, the most significant of which, for the scope of this

²⁰² Sootak 2000 *Juridica International* 68.

²⁰³ Schneider 1991 *Acta Criminologica* 19.

²⁰⁴ Schneider 1991 *Acta Criminologica* 19.

²⁰⁵ UNODC 2018 <https://www.unodc.org/e4j/en/organized-crime/module-6/key-issues/classical-pain-pleasure-decisions.html>.

²⁰⁶ UNODC 2018 <https://www.unodc.org/e4j/en/organized-crime/module-6/key-issues/classical-pain-pleasure-decisions.html>.

²⁰⁷ Fryer 1989 *Acta Criminologica* 25.

²⁰⁸ Fryer 1989 *Acta Criminologica* 25.

²⁰⁹ Fryer 1989 *Acta Criminologica* 25.

paper, is the strain theory.²¹⁰ The strain theory states that people are inherently moral and want to conform to society.²¹¹ Deviance only occurs when there is a significant strain or stress.²¹² A prime example of this is poverty; people living in severe poverty do not necessarily want to commit crimes, but some see it as the only way to survive. The solution to crime according to this school of thought is to deal with issues in society that can contribute to this stress and strain.²¹³

3.2.3 Interactionist theories

Interactionist theories contend that social interactions are the source of criminal behaviour.²¹⁴ Relationships and group participation lead to socialisation and learning processes.²¹⁵ Stated differently, the adage "you are known by the company you keep" aligns well with the interactionist viewpoint, since the people you surround yourself with have the power to shape your attitudes and subsequent actions.²¹⁶ Interactionists believe in the labelling theory, which states that adding a negative label to someone will encourage them to behave negatively; calling someone a delinquent will cause negative feelings in the person and cause them to behave like a deviant.²¹⁷ They suggest that to minimise crime, people's interactions with these negative labels should be minimised as should their exposure to other people with these labels.²¹⁸ For example, a drug offence is better treated medically rather than criminally; by exposing drug users to other criminals in the prison system, we in fact encourage more deviant behaviour because they will learn more criminal behaviour through socialisation.²¹⁹

²¹⁰ Fryer 1989 *Acta Criminologica* 25.

²¹¹ Nickerson C 2023 <https://www.simplypsychology.org/mertons-strain-theory-deviance.html>.

²¹² Nickerson C 2023 <https://www.simplypsychology.org/mertons-strain-theory-deviance.html>.

²¹³ Nickerson C 2023 <https://www.simplypsychology.org/mertons-strain-theory-deviance.html>.

²¹⁴ OpenOregon 2024 <https://openoregon.pressbooks.pub/criminologyintro/chapter/4-6-interactionist-theories/>.

²¹⁵ OpenOregon 2024 <https://openoregon.pressbooks.pub/criminologyintro/chapter/4-6-interactionist-theories/>.

²¹⁶ OpenOregon 2024 <https://openoregon.pressbooks.pub/criminologyintro/chapter/4-6-interactionist-theories/>.

²¹⁷ Thompson 2023 <https://revisesociology.com/2016/08/20/labelling-theory-crime-deviance/>.

²¹⁸ Thompson 2023 <https://revisesociology.com/2016/08/20/labelling-theory-crime-deviance/>.

²¹⁹ Thompson 2023 <https://revisesociology.com/2016/08/20/labelling-theory-crime-deviance/>.

3.2.4 Critical criminology

Critical criminology questions conventional criminology.²²⁰ The idea that inequality affects crime is the common thread throughout critical perspectives.²²¹ The main focus of most of the early criminological theory was class inequality and its effects.²²² While many critical academics continue to emphasise the importance of class disparities, racial and gender inequalities are also receiving attention.²²³ According to critical criminologists, in order to prevent crime and ensure a fair justice system, social and economic inequalities must be attended to, especially within marginalised communities.²²⁴

3.2.5 Conclusion

There are many more branching theories of crime than the four briefly discussed above, but an in-depth criminological overview is not within the scope of this paper. The inclusion of theories of crime is to point out why scholars believe crime exist; therefore, this is included to explain further in the dissertation how restorative justice might respond to these reasons.

3.3 Theories of punishment

3.3.1 Deterrent theory

Imprisonment is regarded by criminal justice systems worldwide as the most significant type of punishment.²²⁵ Two fundamental purposes of incarceration are: firstly, because of their confinements, offenders are stopped from committing new crimes, secondly, prospective offenders should be discouraged from committing crimes by the prospect of or experience of incarceration.²²⁶ When referring to public enforcement of the law, which includes the government's implementation of rules

²²⁰ Lang 2016 *The Encyclopaedia of Crime and Punishment* 1.

²²¹ Lang 2016 *The Encyclopaedia of Crime and Punishment* 1.

²²² Lang 2016 *The Encyclopaedia of Crime and Punishment* 1.

²²³ Lang 2016 *The Encyclopaedia of Crime and Punishment* 1.

²²⁴ Ramirez-Thompson *Criminology: Foundations and Modern Applications* section 2.

²²⁵ Du Preez and Muthaphuli 2019 *Just Africa* 34.

²²⁶ Du Preez and Muthaphuli 2019 *Just Africa* 34.

pertaining to criminal law, deterrence is the process of stopping future conduct that is or could be detrimental to society.²²⁷ According to this theory, punishment needs to be severe, definite, and swift in order to prevent crime.²²⁸

Deterrence may be divided into two main categories: general and specific.²²⁹ General deterrence aims to prevent the general population from committing crime.²³⁰ The idea is that if people see how criminals are punished, it will scare them away from crime.²³¹ Specific deterrence aims to prevent just that criminal from committing crime in the future.²³² The idea is that the punishment for the crime should be so unpleasant that the offender is unwilling to commit crime again for fear of punishment.²³³

Research conducted has shown that increasing already lengthy prison sentences has little deterrent effect; policies that increase the likelihood of being caught deter crime more effectively than those that increase punishment, and crimes involving conscious planning can be deterred more easily than those related to addiction or impulsive emotions.²³⁴

South Africa relies heavily on prison sentences to deter crime, but the efficacy is questionable. South Africa's detention facilities are overcrowded; although the average is 48% overcrowding, some facilities are more than 100% overcrowded.²³⁵ Nearly 100 000 persons were sentenced to prison in 2024, with 59 574 more inmates awaiting sentencing.²³⁶ There are currently 18 795 inmates serving life sentences in South Africa.²³⁷ Despite this, South Africa's crime index is the highest in Africa, and the fifth highest crime index in the world sitting at a staggering 75.4 in 2024.²³⁸

²²⁷ Raskolnikov "Deterrence Theory: Key Findings and Challenges" 179.

²²⁸ Abramovaite *et al.* 2022 *European Journal of Criminology* 1663.

²²⁹ Du Preez and Muthaphuli 2019 *Just Africa* 36.

²³⁰ Du Preez and Muthaphuli 2019 *Just Africa* 36.

²³¹ Raskolnikov "Deterrence Theory: Key Findings and Challenges" 180.

²³² Du Preez and Muthaphuli 2019 *Just Africa* 36.

²³³ Abramovaite *et al.* 2022 *European Journal of Criminology* 1664.

²³⁴ MN House Research *Do Criminal Laws Deter Crime? Deterrence Theory in Criminal Justice Policy: A Primer* 1.

²³⁵ JICS *Annual Report 2023/2024* 28.

²³⁶ JICS *Annual Report 2023/2024* 28.

²³⁷ JICS *Annual Report 2023/2024* 29.

²³⁸ Cowling 2024 <https://www.statista.com/statistics/1399476/crime-index-south-africa/>.

Furthermore, South Africa has a recidivism rate of between 86%–94%.²³⁹ This means that between 86%–94% of sentenced criminals return to committing crime. It is clear by these numbers alone that the deterrent theory is not effective in South Africa.

3.3.2 Retributive theory

The premise of the retributive theory is that an offender should endure punishment corresponding with the seriousness of the offence committed.²⁴⁰ According to retributive theories punishment is appropriate because the wrongdoer deserves it. Although these views are more consistent with our feelings of common sense, they run the risk of turning into vindictive behaviour.²⁴¹

The retributive view holds that since people can freely choose, they must be held accountable for their acts when they choose to commit crimes.²⁴² The retributive theory makes a distinction between negligent and intentional behaviour.²⁴³ As a result, intentional behaviour is punished more harshly than negligent behaviour.²⁴⁴ The retributive idea of "just desserts" also implies that the punishment for the criminal must be appropriate with the severity of the offence.²⁴⁵

The application of the retributive theory is clear to see in the sentencing structure of South Africa. Less serious offences may incur a sentence of a fine to be paid, whereas more serious offences may lead to harsh prison sentences or even life imprisonment.²⁴⁶

²³⁹ Lötter 2023 <https://theconversation.com/nine-out-of-10-south-african-criminals-reoffend-while-in-finland-its-1-in-3-this-is-why-218131>.

²⁴⁰ Bedau *Journal of Philosophy* 601.

²⁴¹ Vandendriessche 2014 *South African Journal of Philosophy* 114.

²⁴² Naidoo 2016 *SACJ* 161.

²⁴³ Naidoo 2016 *SACJ* 162.

²⁴⁴ Naidoo 2016 *SACJ* 162.

²⁴⁵ Naidoo 2016 *SACJ* 162.

²⁴⁶ Bertelsmal et al. Criminal Procedure in the Magistrates' Court: A Practical Guide 16-1; Regulation A25(11) *National Building Regulations and Building Standards Act* 103 of 1977

3.3.3 Preventive theory

The goal of preventative or preventive theory is to either temporarily or permanently stop an offender's crime.²⁴⁷ This theory supports life imprisonment and the death penalty.²⁴⁸ The state administers preventative punishment, which may include house arrest, jail, or the seizure of property, in an effort to stop future offences.²⁴⁹

The deterrent theory and preventive theory are very similar. Where the deterrent theory aims to deter society and the offender from committing crimes, the preventive theory aims to prevent the offender from committing future crimes.²⁵⁰ There are three main approaches to promoting preventive punishment: by fostering a dread of punishment; by rendering a criminal temporarily or permanently unable to commit a crime; and by promoting reformatory forms of punishment that seek to make the offender a law-abiding citizen again.²⁵¹

South Africa applies this theory through the use of imprisonment, harsher punishments for repeat offenders, and the confiscation of property to avoid repeat offences.²⁵²

3.3.4 Reformatory theory

By emphasising offenders' rehabilitation and reintegration into society, the reformatory theory of punishment opposes conventional punitive methods of criminal justice.²⁵³ According to this theory, people should not only be punished but also reformed so they may live law-abiding lives after being released.²⁵⁴ The reformatory theory seeks to lower recidivism rates and advance a society that is

²⁴⁷ Mondal 2021 *International Journal of Humanities and Social Science Studies* 99.

²⁴⁸ Mondal 2021 *International Journal of Humanities and Social Science Studies* 99.

²⁴⁹ Scheepers Pretorius Inc. date unknown <https://sandpattorneys.co.za/three-theories-punishment-criminal-law-shaped-way-world-seeks-retribution/>.

²⁵⁰ Gupta 2024 <https://articles.manupatra.com/article-details/Theories-of-punishment>.

²⁵¹ Gupta 2024 <https://articles.manupatra.com/article-details/Theories-of-punishment>.

²⁵² Section 103 of the *Firearms Control Act* 60 of 2000; section 51 of the *Criminal Law Amendment Act* 105 of 1997.

²⁵³ Yadav 2021 *NVEO* 16944.

²⁵⁴ Yadav 2021 *NVEO* 16944.

safer and more just by concentrating on resolving the underlying causes of criminal activity.²⁵⁵

Instead of emphasising the crime itself, the reformatory theory of punishment concentrates primarily on the criminal.²⁵⁶ Therefore, changing the offender's conduct and assisting them in becoming more responsible and law-abiding members of society is the primary goal.²⁵⁷

A prime example of the reformatory theory in South Africa is the sentence to correctional supervision. This sentence is aimed at correcting the offenders' behaviour under supervision through various methods including community service, house arrest, and monitoring.²⁵⁸

3.3.5 Conclusion

There are many theories of punishment, the above mentioned being only the most common in Western approaches to sentencing and quite visible in South Africa's sentencing framework as discussed above. Western approaches to sentencing are dealt with more thoroughly in the Chapter 4 along with Eastern and African approaches to sentencing and crime. It is evident that no one theory of punishment can be used in isolation; they work best when combined. However, based on South Africa's crime index and the overpopulation in detention centres it appears that the current system is not effective at reducing either crime or recidivism.

3.4 Restorative justice

The goal of restorative justice is to involve the offender, victim, and the community affected by an offence.²⁵⁹ This is done to involve all parties in identifying needs,

²⁵⁵ Yadav 2021 *NVEO* 16944.

²⁵⁶ Rest the Case 2024 <https://restthecase.com/knowledge-bank/reformative-theory-of-punishment>.

²⁵⁷ Rest the Case 2024 <https://restthecase.com/knowledge-bank/reformative-theory-of-punishment>.

²⁵⁸ Section 50-52 of the *Correctional Services Act* 111 of 1998.

²⁵⁹ DOJ&CD date unknown
<https://www.justice.gov.za/rj/rj.html#:~:text=Restorative%20Justice%20sees%20crime%20as,to%20prevent%20future%20re%20offending>.

obligations, and harms through taking responsibility, making amends, taking steps to stop the incident from happening again, and encouraging reconciliation.²⁶⁰

Restorative justice processes can be used at various stages of the criminal justice system; pre-reporting: restorative justice measures can be implemented before a matter escalates to official proceedings.²⁶¹ Pre-trial: restorative justice processes can be implemented both after the charge and before the trial if the prosecutor chooses to refer the matter to such processes and an agreement is reached.²⁶² Pre-sentence: restorative justice can be part of the sentence or form the actual sentence with various conditions attached.²⁶³ Post-sentence: restorative justice can be introduced after the sentence as part of rehabilitation or a reintegration programme.²⁶⁴

The courts have looked favourably on the incorporation of restorative justice. In *S v M*,²⁶⁵ the court argued that sentences should focus more on restorative justice and the needs of victims of crime. In *S v Shilubane*,²⁶⁶ the court states that restorative justice initiatives like community service should be considered more seriously by courts for offenders who do not pose a serious danger to society. The court in *S v Saayman*²⁶⁷ agreed with the court in *S v Shilubane* but added that restorative justice should be applied in appropriate circumstances to be fully effective.

²⁶⁰ Department of Justice and Constitutional Development *Restorative Justice: The Road to Healing* 1.

²⁶¹ Department of Justice and Constitutional Development *Restorative Justice: The Road to Healing* 7.

²⁶² Department of Justice and Constitutional Development *Restorative Justice: The Road to Healing* 7.

²⁶³ Department of Justice and Constitutional Development *Restorative Justice: The Road to Healing* 7.

²⁶⁴ Department of Justice and Constitutional Development *Restorative Justice: The Road to Healing* 8.

²⁶⁵ *S v M* 2007 2 SACR 539 (CC) para 59.

²⁶⁶ *S v Shilubane* 2005 JOL 15671 (T) para 6.

²⁶⁷ *S v Saayman* 2008 1 SACR 393 (E) para [I].

Additionally, more recognition is given to the notion that community sentences, based on serving others and the community, and restoration, form part of an African tradition.²⁶⁸

The westernised restorative justice philosophy originated in the 1970s in North America. In 1974 in Canada, two probation officers brought the victims and offenders of a vandalism case together to discuss the harm done and what could be done to rectify the situation.²⁶⁹ This led to the formation of the Victim-Offender Reconciliation Program which in turn lead to further innovations in North America.²⁷⁰ At the same time in Europe, a Norwegian criminologist, Nils Christie, was arguing that by not letting victims and offenders deal with the offence and the effects of the offence, the state was robbing them of the right to participate in the resolution of their case.²⁷¹

There have been movements to reform the South African sentencing structure.²⁷² The most extensive of these movements was led by the South African Law Commission (the SALC), and their findings were published in the year 2000 in a report.²⁷³ According to the report, there are various problems facing the South African sentencing structure, among these; restorative justice alternatives are not efficiently utilised; and the victims of crimes are not awarded enough consideration.²⁷⁴

The report also found, while researching restorative justice measures, that there was significant support for awarding victims a larger role in sentencing offenders, that restorative justice measures for less serious offences was met favourably and

²⁶⁸ South African Law Commission *Report Project 82 Sentencing (A New Sentencing Framework)* 2.

²⁶⁹ UNODC date unknown <https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-8/key-issues/1--concept--values-and-origin-of-restorative-justice.html>.

²⁷⁰ UNODC date unknown <https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-8/key-issues/1--concept--values-and-origin-of-restorative-justice.html>.

²⁷¹ UNODC date unknown <https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-8/key-issues/1--concept--values-and-origin-of-restorative-justice.html>.

²⁷² Terblanche 2020 *SACJ* 14.

²⁷³ South African Law Commission *Report Project 82 Sentencing (A New Sentencing Framework)* November 2000.

²⁷⁴ South African Law Commission *Report Project 82 Sentencing (A New Sentencing Framework)* xviii.

that most people felt that the current system does not award enough compensation to victims.²⁷⁵ According to the report, the ideal system would allow for victim participation and restorative actions.²⁷⁶

In cases that are suitable for alternative dispute resolution outside of the official system, this discipline aims to accommodate both offenders and victims of crime.²⁷⁷ It also creates opportunities for parties to deal with the consequences of their actions together, trying to bring about peace and reconciliation or to make amends.²⁷⁸

Any kind of crime may benefit from the use of restorative justice.²⁷⁹ Some transgressions, such as sexual assaults, hate crimes, and domestic abuse, might present unique difficulties for the restorative process.²⁸⁰ It is, however, important to note that using restorative justice measures does not necessarily mean that the offender gets off without an appropriate sentence or escapes justice. Restorative justice is a tool that can be used to repair relationships, to help victims get closure, and to help offenders take responsibility for their actions and, hopefully, commit to rehabilitation.

The practice of restorative justice is not independent. Its organisation and procedures are a component of a continuous interaction with the informal and formal environments.²⁸¹ Initiatives for restorative justice can only be successful when collaborations occur with relevant institutions and groups, including the criminal justice system, probation services, social work agencies, and victim support organisations.²⁸²

²⁷⁵ South African Law Commission *Report Project 82 Sentencing (A New Sentencing Framework)* 20.

²⁷⁶ South African Law Commission *Report Project 82 Sentencing (A New Sentencing Framework)* 20.

²⁷⁷ Greyvenstein 2019 *Servamus* 79.

²⁷⁸ Greyvenstein 2019 *Servamus* 79.

²⁷⁹ Restorative Justice Council date unknown <https://restorativejustice.org.uk/about-restorative-justice>.

²⁸⁰ Restorative Justice Council date unknown <https://restorativejustice.org.uk/about-restorative-justice>.

²⁸¹ Aertson 2007 *Acta Juridica* 91.

²⁸² Aertson 2007 *Acta Juridica* 91.

3.4.1 Restorative justice initiatives

Community reparative boards, victim-impact panels, victim-offender mediation, circle sentencing, and family-group conferences are some of the most popular initiatives often linked to restorative justice.²⁸³

Community reparative boards are usually made up of a limited number of people in the community who have undergone extensive training for their role; reparative boards meet in person with offenders who have been ordered by the court to take part in the process.²⁸⁴ The boards work with offenders to create penalty agreements, keep an eye on compliance, and report compliance to the court.²⁸⁵ The board does not sentence the offender but makes suggestions to the court about how the harm can be restored in the interest of the community.²⁸⁶

A victim-impact panel (VIP) is a non-punitive space where victims of crime can discuss what impact the crime has had on their lives and that of their families.²⁸⁷ Sometimes it is the direct victim of the crime and sometimes it is the surviving family members of the victim who take turns sharing their story and experience.²⁸⁸ The purpose of the VIP is for the victims to speak with offenders about the effects of their crime to raise a sense of empathy in the offender, which would hopefully motivate the offender to not commit the crime again.²⁸⁹ Studies of victim-impact panels have shown mixed results.²⁹⁰

Victim-offender mediation is the process of helping victims and offenders meet to talk about misconduct, its effects, and how to "make things right" in a secure environment in accordance with restorative justice concepts.²⁹¹ This affords the victim the opportunity to talk to the offender and ask them questions, it provides

²⁸³ OJJDP *Restorative Justice Literature Review* 1.

²⁸⁴ Karp and Walther "Community Reparative Boards in Vermont: Theory and Practice" 199-200.

²⁸⁵ Karp and Walther "Community Reparative Boards in Vermont: Theory and Practice" 199-200.

²⁸⁶ Karp and Walther "Community Reparative Boards in Vermont: Theory and Practice" 199-200.

²⁸⁷ Rojek, Coverdill, and Fors *Criminology* 1320.

²⁸⁸ Gorelick Law Offices date unknown <https://www.gorelick-law.com/what-is-a-victim-impact-panel>.

²⁸⁹ Rojek, Coverdill, and Fors *Criminology* 1319-1321.

²⁹⁰ Rojek, Coverdill, and Fors *Criminology* 1321.

²⁹¹ Hansen and Umbreit *Conflict Resolution Quarterly* 100.

closure and an opportunity to look someone who hurt you in the eye.²⁹² The offender benefits from this if they are open to the process, by getting a chance to see the real-world consequences that their actions have had on people, and to begin the process of taking responsibility for their actions and making up for the harm they caused.²⁹³

Circle sentencing is a formal part of the sentencing structure in criminal courts. It is formed by the magistrate, the prosecutor, representation for the offender, the victim, the offender, and members of the community.²⁹⁴ In order for circle sentencing to be applicable, the offender needs to have plead guilty to the crime.²⁹⁵ The purpose of the circle is to discuss the consequences of the crime and the possible sentences that could restore the harm done and rehabilitate the offender.²⁹⁶ It started in Australia, mainly for aboriginal offenders of small crimes like theft, but its practice has grown to include non-aboriginal offenders and it has even gained some recognition and use in other countries like the USA and Canada.²⁹⁷

Family-group conferences (FGCs) are mediated conversations that provide the victims, the perpetrator, and their families and friends the opportunity to talk about the effects of the crime and determine how the perpetrator should be held responsible.²⁹⁸ Typically, a conference starts with a professional facilitator bringing together the victim, the perpetrator, and each party's supporters to talk about the incident and the suffering it has caused.²⁹⁹ Each participant describes how the incident affected their lives, while the perpetrator describes the occurrence itself.³⁰⁰ The offender is supposed to confront the human consequences of their crime as

²⁹² Umbreit *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* xvi-xvii.

²⁹³ Umbreit *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* xvi-xvii.

²⁹⁴ Lillies "Circle Sentencing: Part of the Restorative Justice Continuum" 162.

²⁹⁵ Lillies "Circle Sentencing: Part of the Restorative Justice Continuum" 163.

²⁹⁶ Rashimi *Wisconsin Women's Law Journal* 295.

²⁹⁷ Lillies "Circle Sentencing: Part of the Restorative Justice Continuum" 162; Rashimi *Wisconsin Women's Law Journal* 295.

²⁹⁸ OJJDP *Restorative Justice Literature Review* 1-2.

²⁹⁹ OJJDP *Restorative Justice Literature Review* 1-2.

³⁰⁰ Umbreit and Zehr *Federal Probation* 25.

part of this process.³⁰¹ The victim is then given the chance to voice their emotions, enquire about the offence, and specify the goals of the meeting.³⁰²

3.4.2 The Truth and Reconciliation Commission and restorative justice

At the end of apartheid in the early 1990s and the start of the democratic era, the Truth and Reconciliation Commission, a system that was put in place to deal with the impact of apartheid and which focused on reconciliation and restoration, opened the doors that allowed the restorative justice philosophy to take place.³⁰³ The South African government recognises that there is a correlation between restorative justice and justice found in African customary courts, this being that both focus strongly on community and reconciliation.³⁰⁴

The South African government explains that restorative justice views crime as an offence against the victim and justice is achieved when the offender makes amends for the harm done to the victim and community.³⁰⁵ Furthermore, restorative justice also acknowledges that the offender needs help and aims to identify the changes that must be made in order to prevent reoffending.³⁰⁶ South Africa does have some restorative justice practices which sees the involvement of the victim, but it is not the norm.³⁰⁷ This is discussed in greater detail in Chapter 5.

3.5 Conclusion

Although there are many theories of why crime exists and how to punish offenders, there really is no one answer or one solution. Some people commit crimes in order to benefit themselves, while others commit it out of economic or emotional

³⁰¹ OJJDP *Restorative Justice Literature Review* 1-2.

³⁰² Umbreit and Zehr *Federal Probation* 25.

³⁰³ Department of Justice and Constitutional Development *Restorative Justice: The road to healing* 3.

³⁰⁴ Department of Justice and Constitutional Development *Restorative Justice: The road to healing* 3.

³⁰⁵ Department of Justice and Constitutional Development *Restorative Justice: The road to healing* 4.

³⁰⁶ Department of Justice and Constitutional Development *Restorative Justice: The road to healing* 4.

³⁰⁷ Velthuisen 2016 <https://theconversation.com/why-south-africas-tentative-moves-toward-restorative-justice-need-support-51286>.

desperation. Some criminals also have psychological problems or deviations which none of the crime theories really acknowledge. There is no hard or fast rule for which punishment theory is the best or the most effective. Restorative justice is just one of many methods that can be used to prevent crime. Although none of the restorative justice practices offer deterrence for first-time offenders, it can effectively be used to end recidivism. It is also an excellent way to get the community involved in fixing some of the issues that lead to crime, and to give victims a chance to be heard and to gain closure.

In the end, restorative justice is not about punishing; it is about mending relationships, restoring communities, and restoring trust between people. It requires honesty, integrity, and a shift of responsibility. It can also serve as a mechanism to assist the overcrowded justice system. There are hundreds of convicted offenders in prison awaiting sentence or serving sentences. Their presence in our detention centres causes overcrowding, health risks, the emergence of harder criminals and a very overburdened justice system. Would it not be better where applicable to present offenders with the opportunity for restorative justice measures? Including these restorative justice measures in sentencing could potentially be considered as a decolonised punishment, where more emphasis is placed on community values and the restoration of relationships than on retribution.

4 Chapter 4: Restorative justice in an African, Eastern and Western context: Comparative analysis

4.1 Introduction

Justice is a difficult concept to define. People often talk about seeking justice or meting justice out without giving due thought to what it means and how interpretations of justice can differ. Justice is essentially a potential, but not a required aspect of a social structure that governs men's interactions with one another.³⁰⁸ A just society means that people are happy, justice is society's striving for happiness.³⁰⁹ According to some, justice is the conformity to norms that represent appropriateness in decision-making situations.³¹⁰ According to Plato,³¹¹ justice is a trait that allows people to put aside their illogical urge to experience every pleasure and to derive a sense of self-satisfaction from every item and instead allow themselves to do a single task for the good of society as a whole.³¹²

Fairness is often linked to justice, though it is not a synonym, if someone receives a punishment for a wrong done, we think of this as fair and just, but the punishment needs to be fair for us to consider it just.³¹³ Some people think of retribution as justice; if a person hurts me, he needs to be hurt back in order for justice to be served.³¹⁴ Whereas others think of justice as the resolution of socio-economic or political issues, if a person commits a crime because someone or something drove them to it, justice is not served until the driving force is also dealt with.³¹⁵

Justice is sometimes viewed as a negative virtue whose requirements may be satisfied by doing nothing more than righting wrongs committed against other people.³¹⁶ Nonetheless, most well-developed theories of what exactly qualifies as

³⁰⁸ Kelsen *What is Justice? Justice, Law, and Politics in the Mirror of Science* 1.

³⁰⁹ Kelsen *What is Justice? Justice, Law, and Politics in the Mirror of Science* 1.

³¹⁰ Colquitt and Rodell "Measuring Justice and Fairness" 188.

³¹¹ Bhandari 1998 *The Paideia Archive: Twentieth World Congress of Philosophy* 44.

³¹² Bhandari 1998 *The Paideia Archive: Twentieth World Congress of Philosophy* 44.

³¹³ Colquitt and Rodell "Measuring Justice and Fairness" 188.

³¹⁴ Colquitt and Rodell "Measuring Justice and Fairness" 188.

³¹⁵ Colquitt and Rodell "Measuring Justice and Fairness" 188.

³¹⁶ Campbell *Justice in Political Theory* 2.

injustice include at least a general notion of justice that extends beyond making amends for past wrongs and include an impression of just human relationships.³¹⁷

The criminal justice system exists to mete out justice to those deemed deserving, and to ensure that justice is served in society. The criminal justice system's official purpose includes processing arrests, determining guilt or innocence, and, in the event of guilt, determining the proper punishment.³¹⁸

The criminal justice system in South Africa comprises six main parts or players: the police, the prosecution service, the presiding officer, the Department of Justice, the prison system, and parole officers or social workers.³¹⁹ When South Africa became a democracy and the Constitution became supreme, people started talking about *ubuntu* as part of justice.³²⁰ Justice needs to be informed and aligned with the principles of *ubuntu* to ensure that constitutional rights are upheld, and human dignity is preserved in the justice system.

There are several interpretations of what *ubuntu* means. The diverse meanings provided by various dictionaries accurately reflect this. According to the Oxford Dictionary, it is an action that is marked by compassion, kindness, empathy, and care for others; however, the Collins English Dictionary states that it is a term characterising humanity or fellow feeling.³²¹ The nuances of attempting to explain or translate the phrase *ubuntu* are somewhat difficult. *Ubuntu* is difficult to translate into a Western language, save from stating that "my humanity is caught up, is inextricably bound up, in what is yours," according to Archbishop Desmond Tutu.³²² *Ubuntu* as a concept will be explored more fully below.

This chapter considers Eastern, Western and indigenous African justice systems and what role, if any, restorative justice has played in these systems. Eastern refers to

³¹⁷ Campbell *Justice in Political Theory* 2.

³¹⁸ Feeley 2024 *Law & Society Review* 407.

³¹⁹ South African Government date unknown <https://www.gov.za/faq/justice-and-crime-prevention/how-does-criminal-justice-system-work>.

³²⁰ *S v Makwanyane* 1995 3 SA 391 para 151.

³²¹ Hailu *Ubuntu: A Literature Review* 2.

³²² Tutu *Speech: No Future without Forgiveness* 7.

the Middle East and Asia. Western refers to Europe and North America. Indigenous African justice system refers to the systems used by indigenous African people prior to colonisation as well as its continued existence in indigenous African communities.

4.2 Western perspective on punishment

The Western perspective on punishment is shaped by democratic values, human rights frameworks, and an evolving understanding of fairness and effectiveness.

America and Europe have mostly set the tone for punishments in Western systems.³²³ For most of its existence, the United States was perceived as more democratic, progressive, and compassionate than continental Europe because its criminal penalties were less harsh than those of Europe.³²⁴ The obsession with torture, which had its roots in mediaeval times and would not be completely abandoned until the nineteenth century, "stain[ed]" and "disgraced" European criminal law in the eyes of Americans throughout the Revolutionary period.³²⁵

Theorists and philosophers argued that a democratic nation would want to have milder punishments so as not to offend the public, and that a nation possessing a social contract between the state and the public would not act cruelly.³²⁶ As democracy evolved, America started focusing on rehabilitation as an important factor of imprisonment and Europe followed soon after.³²⁷ However, rehabilitation fell somewhat out of favour in America and in most Western countries in the 1970s.³²⁸ As opinions shifted, less of an emphasis was placed on rehabilitation and more was placed on retributive measures.³²⁹ America and most Western countries developed stronger policies with a more severe view of crime and lengthier prison sentences.³³⁰ Many countries in Europe, like Sweden and Finland, did not have a

³²³ Kleinfeld 2016 *Stanford Law Review* 937.

³²⁴ Kleinfeld 2016 *Stanford Law Review* 935.

³²⁵ Langbein *The Origins of Adversary Criminal Trial* 340-342.

³²⁶ Kleinfeld 2016 *Stanford Law Review* 935-936.

³²⁷ Kleinfeld 2016 *Stanford Law Review* 936.

³²⁸ Tonry 2013 *Crime and Justice: A Review of Research* 144; Rogan 2018 *Howard Journal of Crime and Justice* 327; Tonry 2022 *Crime and Justice* 27.

³²⁹ Tonry 2022 *Crime and Justice* 27.

³³⁰ Rogan 2018 *Howard Journal of Crime and Justice* 327.

significant policy change, but nonetheless, rehabilitation as a goal of sentencing was less emphasised.³³¹

One common perspective of punishment sees punishment almost exclusively as a method of crime control.³³² According to this perspective, known as penology, the goal of penal facilities and sentencing procedures is obvious: to lower crime rates and keep individual offenders in check.³³³ However, penology has evolved and traditional penology, in its widest definition, is the methodical examination of criminal institutions, including the possibility of abolishing them.³³⁴ Penology, in a more limited sense, is either the concentrated study of how well correctional sentencing works to deter future crimes or the close inspection of prisons and the regular acts of violence and prejudice that affect inmates.³³⁵ Through this evolution of penology, more consideration is given to the effects of incarceration on the mentally ill and the importance of reintegrating people so that they feel part of the societal whole again.³³⁶

Another perspective on punishment is to ask the question of "what is just"? Punishment is not seen as merely a tool to stop crime, but as a way to achieve justice, and sometimes justice can be achieved, not by imposing a harsh or lengthy prison sentence, but by enrolling the offender in a rehabilitative programme.³³⁷

The theories of punishment as discussed in Chapter 3 form part of the Western perspective on punishment.³³⁸

There is no singular Western theory or perspective on punishment. It has evolved over the centuries and across cultures. Europe, which once prescribed sentences of maiming and harsh corporal punishments for small offences like theft and adultery,

³³¹ Tonry 2022 *Crime and Justice* 27.

³³² Garland 1991 *Crime and Justice: A Review of Research* 116.

³³³ Garland 1991 *Crime and Justice: A Review of Research* 116.

³³⁴ Arrigo and Milovanovic *Revolution in Penology: Rethinking the Society of Captives* 9.

³³⁵ Arrigo and Milovanovic *Revolution in Penology: Rethinking the Society of Captives* 9.

³³⁶ Arrigo and Milovanovic *Revolution in Penology: Rethinking the Society of Captives* 17-19.

³³⁷ Garland 1991 *Crime and Justice: A Review of Research* 116.

³³⁸ Tonry 2022 *Crime and Justice* 18-20.

now advocate rehabilitation programmes for even the most violent of criminals.³³⁹ America has so many different voices pushing so many different agendas that it is hard to really pinpoint their perspective anymore. Some advocate a harsher view on crime, while others advocate restorative justice practices, which relate more to indigenous and Eastern perspectives on punishment.³⁴⁰

4.3 Eastern perspective on punishment

The Eastern perspective on punishment encompasses a wide range of philosophical, religious, and cultural traditions, often emphasising harmony, moral reform, and collective well-being over strictly punitive measures. While interpretations vary across regions, key themes emerge from influences like Confucianism, Buddhism, Hinduism, and Islamic traditions.

Confucianism is one of three major influences on Chinese law, the others being Buddhism and Legalism.³⁴¹ Confucianism's central tenet is the value of moral integrity, which has an impact on one's environment via the concept of cosmic harmony.³⁴² Ren, or "humanity," is the virtue that leads to this moral character and cultivates other virtues like humility, benevolence, and respect.³⁴³ Legalism is a more Western school of thought and punishment is seen as a function of the state or ruler's authority and emphasises social order and respect for hierarchy.³⁴⁴ This aspect advocates strict laws and severe punishments to maintain order.³⁴⁵ Chinese law is divided into two parts *Li* and *Fa*.³⁴⁶ *Li* is the application of moral principles to control human conduct in conformity with natural law and is influenced by Confucianism.³⁴⁷ *Fa* refers to the legalism part of Chinese law and encompasses criminal law and punishment.³⁴⁸ Whereas *Fa* is compulsive, punitive, and subject to

³³⁹ Rogan 2018 *Howard Journal of Crime and Justice* 327.

³⁴⁰ Tonry 2013 *Crime and Justice: A Review of Research* 144.

³⁴¹ Lee and Lai 1978 *Hastings Law Journal* 1307.

³⁴² Yao *An Introduction to Confucianism* 26.

³⁴³ Yao *An Introduction to Confucianism* 26.

³⁴⁴ Huxley 1995 *Journal of the International Association of Buddhist Studies* 47.

³⁴⁵ Ramzan, Akhter and Rubab *FWU Journal of Social Sciences* 54-55.

³⁴⁶ Lee and Lai 1978 *Hastings Law Journal* 1308.

³⁴⁷ Pan *Chinese Philosophy and Law* 1.

³⁴⁸ Pan *Chinese Philosophy and Law* 2.

judicial consequence, *Li* is persuasive, preventative, and enforced by social sanction.³⁴⁹

Although attempts have been made by scholars and legal theorists to "Westernise" Chinese law, they have never been able to fully rid Chinese law of Confucianism.³⁵⁰ Many modern policy makers still draw inspiration from Confucianism and other Chinese philosophies when attempting to tackle China's current controversies.³⁵¹

Buddhism is a religion that originated in India, and which has become one of the largest religions in the world.³⁵² Buddhists encourage moral behaviour and compassion, which are mirrored in the principles of community and service; they aim for peace during chaos.³⁵³ Buddhist ethics are founded on openness, compassion, serenity, universality, and understanding.³⁵⁴ Buddhism sees the law as a tool for accomplishing specific goals and it only becomes significant when it is based on ethics.³⁵⁵ Buddhist law holds that punishment has no purpose unless it is accompanied by empathy for the condemned and a wish to transform them into new human beings.³⁵⁶ Buddhism has influenced many legal systems across Southeastern and Eastern Asia.³⁵⁷ For example, in Thailand the law and the constitution have been influenced by Buddhism throughout their history.³⁵⁸ The phrase "Thailand is a democracy with the King as Head of State" reveals how Buddhism primarily shapes Thai perceptions of their constitutional identity, which are founded on Buddhist Kingship and hold that the King is bound by the *dhamma* rather than the constitution.³⁵⁹ *Dhamma* or *dharma*, refers to the truth of the

³⁴⁹ Pan *Chinese Philosophy and Law* 2.

³⁵⁰ Gao and Walayat 2020 *Pace Law Review* 236.

³⁵¹ Gao and Walayat 2020 *Pace Law Review* 236.

³⁵² Harvey *An Introduction to Buddhism: Teachings, History and Practices* 1.

³⁵³ Conze *Buddhism: Its Essence and Development* 13.

³⁵⁴ Pandey 2019 *Nepal Law Review* 347.

³⁵⁵ Pandey 2019 *Nepal Law Review* 347.

³⁵⁶ Pandey 2019 *Nepal Law Review* 347.

³⁵⁷ Huxley 1995 *Journal of the International Association of Buddhist Studies* 52.

³⁵⁸ Merieau 2018 *Asian Journal of Comparative Law* 288.

³⁵⁹ Merieau 2018 *Asian Journal of Comparative Law* 289.

universe, including law and relationships, and is one of the core teachings of Buddhism.³⁶⁰

Hinduism has influenced legal literature in India.³⁶¹ Hindus hold that karma—the cosmic rule of cause and effect—and samsara—the never-ending cycle of life, death, and reincarnation—are true.³⁶² Hindus want to attain *dharma*, a way of life that places a strong emphasis on morality and good behaviour.³⁶³

Islamic law is influenced by the Qur'an and Islamic religious practices.³⁶⁴ This system is often criticised as harsh by the West as it includes corporal punishment and includes strict retributive practices.³⁶⁵ Crime is only dealt with harshly after it has been established without doubt that the person who committed the crime did so for their own reasons and that it was not something that another reasonable person would have done.³⁶⁶ An individual is not marginalised for the benefit of society; rather, the connection between the individual and society is examined in a balanced manner.³⁶⁷ Every protection is offered within the Islamic legal and social framework to ensure that there is never a justification for someone to commit a crime.³⁶⁸

4.4 African indigenous justice systems

The term "African indigenous justice systems" (abbreviated "AIJS") refers to all the methods that African groups or peoples have used to settle disputes and conflicts throughout history and that have been transferred from one generation to the next.³⁶⁹ Other terms, including community, traditional, non-formal, informal,

³⁶⁰ Lee and Lai 1978 *Hastings Law Journal* 1313.

³⁶¹ Lubin, Davis and Krishan "Introduction" 1.

³⁶² Lubin, Davis and Krishan "Introduction" 3.

³⁶³ Lubin, Davis and Krishan "Introduction" 3.

³⁶⁴ Hakeem, Haberfeld and Verma *Policing Muslim Communities* 7.

³⁶⁵ Ramzan, Akhter and Rubab *FWU Journal of Social Sciences* 54-55.

³⁶⁶ Hakeem, Haberfeld and Verma *Policing Muslim Communities* 7.

³⁶⁷ Ramzan, Akhter and Rubab *FWU Journal of Social Sciences* 56.

³⁶⁸ Ramzan, Akhter and Rubab *FWU Journal of Social Sciences* 56.

³⁶⁹ Karuiki *African Traditional Justice Systems* 1.

customary, indigenous, and non-state justice systems, have also been used to characterise "AIJS".³⁷⁰

Social duties, consensus-based decision-making, communitarianism, strong group coherence, social cohesiveness, and social punishments are the foundations of AIJS judicial systems.³⁷¹ These include using established conflict resolution techniques, conciliation, admitting guilt or wrongdoing, making compensatory concessions, and engaging in a ceremonial commensality in which sharing food represents the amicable resolution of conflicts and the return to the regular course of social life.³⁷²

One of the fundamental tenets of many ancient practices is *Botho* or *Ubuntu* (humaneness), which holds that "I am a human because you are human" and that one must do all in one's power to preserve the great harmony that is always threatened by bitterness, rage, and the desire for retribution.³⁷³ It fosters partnerships by uniting individuals to collaborate harmoniously.³⁷⁴

Since these practices offer flexibility, operate voluntarily, create connections, promote restorative justice and grant some degree of control to the parties in the process, they can help increase access to justice.³⁷⁵ They are also accessible to the rural poor and the uneducated.³⁷⁶ The majority of traditional justice systems are focused on restoration, building relationships (instead of punishment), the promotion of peace, the interests of the parties, and not the division of rights between the parties to the dispute.³⁷⁷

There are many tribes across Africa and the customs and traditions differ based on geographical location and history. However, there are certain similarities among the

³⁷⁰ Karuiki *African Traditional Justice Systems* 1.

³⁷¹ Karuiki *African Traditional Justice Systems* 2.

³⁷² Karuiki *African Traditional Justice Systems* 2.

³⁷³ Baikiakedi *Beijing Law Review* 657.

³⁷⁴ Baikiakedi *Beijing Law Review* 657.

³⁷⁵ Karuiki *African Traditional Justice Systems* 2.

³⁷⁶ Aiyedun and Ordor *Law, Democracy & Development* 154; Karuiki *African Traditional Justice Systems* 2.

³⁷⁷ Aiyedun and Ordor *Law, Democracy & Development* 155; Karuiki *African Traditional Justice Systems* 2.

different tribes.³⁷⁸ For example, the welfare of the community is given precedence above personal interests.³⁷⁹ It is referred to as *dekaworwor* among the Ewe tribe of Botswana and "*biako yɛ*" or "*kor yɛ*" among the Akan of Ghana.³⁸⁰ This is comparable to the *Ubuntu* ideology, which prioritises the community over the individual.³⁸¹

The concept of *ubuntu* suggests that none of us are born complete and that we will constantly require others.³⁸² *Ubuntu* is the belief that when the community is ill, nobody can be healthy.³⁸³ *Ubuntu* claims that the only reason I am human is because you are, "I dehumanise myself if I take away your humanity".³⁸⁴ Justice, in this context, is defined as community restoration, or the reconstruction of the community to include people who have been injured or previously excluded.³⁸⁵ *Ubuntu* embraces principles such as the dominance of the family group above the individual, the connectivity of all individuals, and the necessity of kindness towards everyone in the community.³⁸⁶

Through the idea of *ubuntu*, the spirit of restorative justice is ingrained in African civilisation.³⁸⁷ The foundation of restorative justice is the idea that all aspects of life are interconnected and have an influence on one another, and that this interdependence and connection foster a strong feeling of shared responsibility.³⁸⁸ This description reflects the African philosophy of *ubuntu*.³⁸⁹

In the majority of African nations, customary law is unquestionably the oldest legal system.³⁹⁰ Headmen, chiefs, and monarchs served as the leaders of these collective

³⁷⁸ Hassan 2021 *Journal of Law, Society and Development* 5.

³⁷⁹ Hassan 2021 *Journal of Law, Society and Development* 5.

³⁸⁰ Hassan 2021 *Journal of Law, Society and Development* 5.

³⁸¹ Hassan 2021 *Journal of Law, Society and Development* 5.

³⁸² Gathogo *Studia Historiae Ecclesiasticae* 4.

³⁸³ Gade 2013 *S. Afr. J. Philos.* 25.

³⁸⁴ Gade 2013 *S. Afr. J. Philos.* 25.

³⁸⁵ Gade 2013 *S. Afr. J. Philos.* 25.

³⁸⁶ Skelton and Frank "Conferencing in South Africa: Returning to Our Future" 104.

³⁸⁷ Hassan 2021 *Journal of Law, Society and Development* 5.

³⁸⁸ Skelton *Acta Jurídica* 231-232.

³⁸⁹ Skelton *Acta Jurídica* 231-232.

³⁹⁰ Soyapi 2014 *PELJ* 1441.

communities.³⁹¹ The traditional authorities in these communities were in charge of administering justice.³⁹² Traditional leadership was controlled by men, as the tribes were predominantly patriarchal, and there was a clear gender gap in traditional judicial administration.³⁹³

There was no dominating ethnic or religious group among the pre-colonial African populations, who were ethnically and culturally varied.³⁹⁴ In the absence of official power, local communities settled conflicts using unwritten customary law and processes.³⁹⁵ The rules were founded on shared cultural values and moral principles that resulted in a legally enforceable agreement for participants.³⁹⁶ This approach was adopted by communities to punish offenders and settle conflicts between members using a variety of methods.³⁹⁷

For instance, during the Rwandan Genocide, Rwanda established Gacaca courts to handle the majority of genocide cases that the normal courts and Rwanda's International Criminal Tribunal were unable to handle.³⁹⁸ The first known issue solvers, the headmen or patriarchs of households, are credited with creating the Gacaca system.³⁹⁹ They resolved conflicts by gathering on the grass to discover the truth, restore social peace, punish the culprit, and provide presents to the victim.⁴⁰⁰ Establishing the truth, accelerating procedures, eliminating impunity, and bringing Rwandans together via their own traditions amid conflicts were the goals of the Gacaca Courts.⁴⁰¹ This practice of converging on the grass or in a circle with

³⁹¹ Soyapi 2014 *PELJ* 1441.

³⁹² Soyapi 2014 *PELJ* 1441.

³⁹³ Soyapi 2014 *PELJ* 1441.

³⁹⁴ Salihu 2020 *Contemporary Justice Review* 354.

³⁹⁵ Salihu 2020 *Contemporary Justice Review* 354.

³⁹⁶ Salihu 2020 *Contemporary Justice Review* 354.

³⁹⁷ Salihu 2020 *Contemporary Justice Review* 354.

³⁹⁸ Le Mon *Rwanda's Troubled Gacaca Courts* 16.

³⁹⁹ Karuiki *African Traditional Justice Systems* 4.

⁴⁰⁰ Le Mon *Rwanda's Troubled Gacaca Courts* 16.

⁴⁰¹ Le Mon *Rwanda's Troubled Gacaca Courts* 16.

members of the community and stakeholders present resembles the Kgotla system in Botswana and the practices of some traditional courts in South Africa.⁴⁰²

In contemporary Botswana, the *Kgotla* institution is still essential for resolving disputes that arise both inside and across groups.⁴⁰³ The *Kgotla* institution strengthens a strong pattern of interaction at the village or town *Kgotla* and promotes serious and open consultation for the community or society at large.⁴⁰⁴ The portrayal of the fundamental human principles of inclusivity, respect, and friendliness gives proceedings a societal relevance that extends much beyond the resolution of trivial individual instances.⁴⁰⁵

In South Africa there are some differences in the procedure of gathering in the traditional courts but fundamentally they are the same.⁴⁰⁶ The parties convene in a circle under a tree or in a building and the headman presides over the gathering and listens to testimony to reach a conclusion.⁴⁰⁷ First the complainant tells their side of the story, then the defendant, and then the floor is open to community members.⁴⁰⁸ The headman makes his decision based on the testimony provided and has a council to advise him.⁴⁰⁹

Traditional or customary dispute resolution (TDR) is based on indigenous conflict settlement procedures and practices that have been utilised for as long as African cultures have existed to settle disagreements.⁴¹⁰ Under TDR, which is directed by community leaders, disagreements are resolved via conversation and debate rather than force, and wrongdoing is corrected through compensation rather than

⁴⁰² Moumakwa *The Botswana Kgotla System: A Mechanism for Traditional Conflict Resolution in Modern Botswana. Case Study of the Kanye Kgotla 3*; Aiyedun and Ordor 2016 *Law Democracy & Development* 170.

⁴⁰³ Moumakwa *The Botswana Kgotla System: A Mechanism for Traditional Conflict Resolution in Modern Botswana. Case Study of the Kanye Kgotla 3*.

⁴⁰⁴ Moumakwa *The Botswana Kgotla System: A Mechanism for Traditional Conflict Resolution in Modern Botswana. Case Study of the Kanye Kgotla 3*.

⁴⁰⁵ Moumakwa *The Botswana Kgotla System: A Mechanism for Traditional Conflict Resolution in Modern Botswana. Case Study of the Kanye Kgotla 3*.

⁴⁰⁶ Aiyedun and Ordor 2016 *Law Democracy & Development* 170.

⁴⁰⁷ Aiyedun and Ordor 2016 *Law Democracy & Development* 170.

⁴⁰⁸ Aiyedun and Ordor 2016 *Law Democracy & Development* 170.

⁴⁰⁹ Aiyedun and Ordor 2016 *Law Democracy & Development* 170.

⁴¹⁰ Hassan 2021 *Journal of Law, Society and Development* 4.

punishment—unless the act was extremely serious, like murder.⁴¹¹ The claim that the ideas and practices of restorative justice are similar to indigenous people's traditions stems from the fact that these characteristics mirror those of restorative justice.⁴¹² Recognition is given to the link between restorative justice and customary law in the *Traditional Courts Act* (TCA).⁴¹³ According to the TCA its goals are to align customs and customary law with the Constitution and uphold their values in dispute resolution through restorative justice and reconciliation.⁴¹⁴ It also states that one of its guiding principles is promoting and upholding principles founded on restorative justice and reconciliation.⁴¹⁵

The most important feature of TDR is its pursuit of restorative justice as a means of fostering social reconciliation between the parties and the community.⁴¹⁶ The goal is to engage in what has been referred to as "reintegrative shaming," which distances the individual from the damaging behaviour they have engaged in.⁴¹⁷

The ratification of the 1996 Constitution presented an ideal chance for the growth of the system of customary law in South Africa. For the first time, customary law was acknowledged by the government as a valid legal system equal to other systems, like common law.⁴¹⁸ For example, section 39 of the *Constitution* does not only imply a duty to the courts to develop customary law, but also recognises the rights and freedoms conferred by customary law to the extent that they are consistent with the Bill of Rights.⁴¹⁹ Furthermore, sections 30 and 31 of the *Constitution* acknowledge the rights of people belonging to a cultural group to use their language and participate in practices according to their culture, as long as it is consistent with the Bill of Rights. Section 211 of the *Constitution* states that the courts must apply customary law where it is applicable, subject to the Constitution

⁴¹¹ Hassan 2021 *Journal of Law, Society and Development* 4.

⁴¹² Hassan 2021 *Journal of Law, Society and Development* 4.

⁴¹³ The *Traditional Courts Act* 9 of 2022.

⁴¹⁴ Section 2(a) of the *Traditional Courts Act* 9 of 2022.

⁴¹⁵ Section 3(1)(d) of the *TCA*.

⁴¹⁶ Toomey 2010 *The Law and Development Review* 164.

⁴¹⁷ Toomey 2010 *The Law and Development Review* 164.

⁴¹⁸ Ntlama *Southern African Public Law* 283.

⁴¹⁹ Section 39(2)-(3) of the *Constitution of the Republic of South Africa*, 1996.

and any governing legislation. The application of this can be seen in cases like *Gonggose v Minister of Agriculture, Forestry and Fisheries* and *Bhe v Magistrate Khayelitsha* as discussed in Chapter 2.⁴²⁰ Traditional courts only have jurisdiction in a certain geographical area and only have jurisdiction over Black people who adhere to the customs of traditional courts.⁴²¹ Some authors argue that this distinction is bad because it creates a racial division between South Africans that enforce the negative belief that the racial groups are "other".⁴²²

4.5 Conclusion

Both Western and Eastern perspectives recognise restorative justice as a viable option for dealing with offenders. In Western perspectives, it might be a newer perspective that has only received recognition and support within the past few decades, but it has steadily been gaining support, it has become a bigger part of many nations' sentencing structures, and there is more literature available on the viability of restorative justice as a method of dealing with crime. In Eastern perspectives it has always been in most systems at least a big if not central part of justice and belief systems. Although the wording and motivation might differ between the West's emphasis on reforming offenders and the East's emphasis on repairing relationships and balance, the goal is the same, to reform offenders, to reintegrate them into society and to restore the damage done to persons and the community. Thus, it can be established that a link exists between restorative justice and justice practices in the West and East.

African indigenous justice systems also recognise restorative justice principles as a core tenet of traditional practices and philosophies through its connection to *ubuntu*. The traditional African systems recognise restorative justice through their practices, regardless of what it has been called through history, and the systems of traditional courts reflect this through their emphasis on community participation and their focus on reconciliation. There is also a strong resemblance between traditional dispute

⁴²⁰ *Gonggose v Minister of Agriculture, Forestry and Fisheries* 2018 2 SACR 367 (SCA); *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC) as discussed in chapter two above.

⁴²¹ Ntlama *Southern African Public Law* 287.

⁴²² Ntlama *Southern African Public Law* 289.

resolution and "new" Western restorative justice measures. The manner in which traditional courts deal with disputes resembles the growing trend of circle sentencing and family-group conferencing as well as victim-offender mediation. Thus, a link exists between restorative justice and indigenous African systems and a resemblance is forming between traditional African practices and new Western approaches.

The jurisdictional distinction of customary courts should not be seen as a racial division, but rather as a cultural one. It would be unwise to subject persons to court processes in which they do not believe and whose authority they would not respect.

If South Africa wants to bridge the racial divide, a possible option would be to incorporate some of the customary law practices into the formal legal system which all South Africans acknowledge and adhere to. An ideal way to start would be to incorporate more restorative justice principles.

5 Chapter 5: The South African sentencing framework

5.1 Introduction

Sentencing refers to the punishment that a court gives to an offender who has been found guilty in court.⁴²³ There are several rules and guidelines that the courts must follow when deciding on a sentence. Section 12 of the *Constitution*, which deals with the freedom and security of persons, establishes the fundamental parameters that the state can use to deal with and punish criminals. The State cannot imprison someone without a valid reason (having been found guilty of a crime that calls for imprisonment as a punishment); it cannot detain someone without a just cause; it cannot torture anyone; and the State (or court) cannot impose a sentence on a guilty offender that could be considered cruel, inhuman, or degrading.⁴²⁴

Other statutory laws, common law, and precedents, in addition to the *Constitution*, establish additional guidelines and restrictions for the sentencing of criminal offenders. Only the sentences specified in section 276(1) of the *Criminal Procedure Act* 51 of 1977 (*CPA*) may now be imposed by the courts. These penalties include periodical imprisonment,⁴²⁵ declaration of habitual offending,⁴²⁶ commitment to any lawful institution,⁴²⁷ a fine,⁴²⁸ correctional supervision,⁴²⁹ imprisonment, including life imprisonment and imprisonment for an indefinite period,⁴³⁰ and imprisonment with the option to be placed under correctional supervision.⁴³¹

The *Criminal Law Amendment Act* 105 of 1997 is a third significant source of the legislative framework for punishment. In order to bring many aspects of criminal law and punishment into compliance with the then-newly established Constitution, this Act eliminated the death penalty from South African law after the Constitutional

⁴²³ Section 274 of the *CPA*.

⁴²⁴ Section 12(1) of the *Constitution of the Republic of South Africa*, 1996.

⁴²⁵ Section 276(1)(c) of the *CPA*.

⁴²⁶ Section 276(1)(d) of the *CPA*.

⁴²⁷ Section 276(1)(e) of the *CPA*.

⁴²⁸ Section 276(1)(f) of the *CPA*.

⁴²⁹ Section 276(1)(h) of the *CPA*.

⁴³⁰ Section 276(1)(b) and 286B(1) of the *CPA*.

⁴³¹ Section 276(1)(i) of the *CPA* in the discretion of the Commissioner of Correctional Services or a parole board.

Court declared it unconstitutional and created minimum sentences for certain categories of serious offences.⁴³²

However, the legislation does not guide the courts in deciding what a fitting sentence would be; instead, the principles of sentencing has been established through case law.⁴³³ This could lead to situations where one accused could get a lighter or heavier sentence than another accused for the same crime. It is expected of the court to impose a fitting sentence, and the nature of the sentence and its quantum is usually considered when determining a fitting sentence.⁴³⁴ This process is under common law mainly left to the discretion of the presiding officer.⁴³⁵ In the case of *S v Zinn*,⁴³⁶ the court established the "trite" principle or the "triad of Zinn".⁴³⁷ According to this principle, when determining what an appropriate sentence is, the court should consider the crime, the offender and the interests of society.⁴³⁸ What should be considered about the triad is left to the presiding officer's interpretation.⁴³⁹ However, in *S v Dodo*,⁴⁴⁰ the Constitutional Court stated that the crime and the sentence should be proportional and should be informed by principles such as the right to dignity and the ban against cruel, degrading and inhumane punishment.⁴⁴¹

Furthermore, it has also been said that the court should consider the four basic aims of punishment.⁴⁴² According to the court in *Director of Public Prosecutions, KwaZulu-Natal v P*,⁴⁴³ when determining an appropriate sentence, the court should consider the primary aims of punishment, namely its deterrent, preventative, reformatory, and retributive characteristics.⁴⁴⁴ Increasingly, the courts also

⁴³² Preface of the *Criminal Law Amendment Act* 105 of 1997.

⁴³³ Terblanche 2020 *SACJ* 6.

⁴³⁴ Terblanche 2020 *SACJ* 10.

⁴³⁵ Terblanche 2020 *SACJ* 10.

⁴³⁶ *S v Zinn* 1969 2 SA 537 (A), hereinafter referred to as *S v Zinn*.

⁴³⁷ Terblanche 2020 *SACJ* 10.

⁴³⁸ *S v Zinn* 540 G-H.

⁴³⁹ Terblanche 2020 *SACJ* 10.

⁴⁴⁰ *S v Dodo* 2001 1 SACR 594 (CC).

⁴⁴¹ *S v Dodo* 2001 1 SACR 594 (CC) paras 26, 37.

⁴⁴² Terblanche 2020 *SACJ* 11.

⁴⁴³ *Director of Public Prosecution, KwaZulu-Natal v P* 2006 1 SACR 243 (SCA).

⁴⁴⁴ *Director of Public Prosecution, KwaZulu-Natal v P* 2006 1 SACR 243 (SCA) para 13.

encourage that consideration be given to the victim of an offence when sentencing of an offender is considered.⁴⁴⁵

Historically and even now, courts have wide discretion to sentence anyone found guilty of a crime to any length of time they see fit within the aforementioned bounds.⁴⁴⁶ The sentencing court must impose a punishment that is permitted by legislation or common law.⁴⁴⁷ A court cannot use its discretion to impose a sentence that is not provided for in sentencing provisions.⁴⁴⁸ It has been said that a rough comparison between the sentence imposed and those that other courts have determined to be suitable is both important and enlightening.⁴⁴⁹ Although it has frequently been noted that no two instances are comparable, courts nonetheless need to aim for some degree of uniformity in sentencing.⁴⁵⁰

South Africa's sentencing structure still relies heavily on the structure provided by its colonisers.⁴⁵¹ Although strides have been made to introduce and recognise customary law, the formal structure which is applicable to the majority of South Africans is still very westernised.⁴⁵² The *CPA* is currently under review, and some of the most noteworthy statements that came from the National Conference on the Integrated Criminal Justice System and the Review of the Criminal Procedure Act, 1977, deal with the importance of victims and victim participation during the criminal justice process as well as the need for trust from the people in the justice system.⁴⁵³ The conference also recognised that in order to manage crime effectively, the contribution of the community is required because a "good criminal justice system is not enough" to deal with crime.⁴⁵⁴ The services provided to inmates with regard to rehabilitation was also discussed, but what is troubling is the conclusion that

⁴⁴⁵ Van der Merwe and Mitchell 2020 *De Jure Law Journal* 1.

⁴⁴⁶ *R v Mapumulo* 1920 AD 56 para 57.

⁴⁴⁷ *Director of Public Prosecutions, Western Cape v Prins* 2012 2 SACR 183 (SCA) para 6.

⁴⁴⁸ *Director of Public Prosecutions, Western Cape v Prins* 2012 2 SACR 183 (SCA) para 6.

⁴⁴⁹ *S v Xaba* 2005 1 SACR 435 (SCA) para 15.

⁴⁵⁰ *S v Xaba* 2005 1 SACR 435 (SCA) para 15.

⁴⁵¹ See Chapter 2.

⁴⁵² See Chapters 2 and 4.

⁴⁵³ DOJ&CD 2024 https://www.justice.gov.za/m_speeches/2024/20240229-ICJS-Conference-DMin.html.

⁴⁵⁴ DOJ&CD 2024 https://www.justice.gov.za/m_speeches/2024/20240229-ICJS-Conference-DMin.html.

when weighing the rights of the offender to receive rehabilitation against the rights of the victims to receive justice, the rights of the victim are given preference.⁴⁵⁵ Although the rights of the victims are important and should be considered and acknowledged, the need, not merely the right, of offenders to receive rehabilitation where possible is imperative if South Africa wants to achieve their goals of reducing crime. It is not the victim that contributes to South Africa's recidivism rate, but the offender who does not receive rehabilitation.⁴⁵⁶ In February 2025 the South African government announced the review of the *CPA* along with the publication of several discussion papers.⁴⁵⁷ Two of these papers relate to the application of restorative justice in the criminal justice system through the use of Alternative Dispute Resolution.⁴⁵⁸

This chapter focuses on the South African sentencing framework and the position or possible position of restorative justice within this framework. Restorative justice is seen as an effective way of introducing African indigenous practices into formal law that can be accepted by the majority of people owing to its recognition by both Western, Eastern, and African indigenous systems.⁴⁵⁹

5.2 Imprisonment

Imprisonment is the most severe sentence available in South Africa since both corporal punishment and the death sentence have been abolished.⁴⁶⁰ Courts have a discretion on which sentences to impose and are guided by legislative framework, precedents, and further guidelines.⁴⁶¹

⁴⁵⁵ DOJ&CD 2024 https://www.justice.gov.za/m_speeches/2024/20240229-ICJS-Conference-DMin.html.

⁴⁵⁶ See Chapter 3.

⁴⁵⁷ South African Government 2025 <https://www.gov.za/news/media-statements/justice-and-constitutional-development-review-criminal-procedure-act-20-feb>.

⁴⁵⁸ South African Government 2025 <https://www.gov.za/news/media-statements/justice-and-constitutional-development-review-criminal-procedure-act-20-feb>.

⁴⁵⁹ See Chapter 4.

⁴⁶⁰ See *S v Makwanyane* above.

⁴⁶¹ *S v Holder* 1979 2 SA 70 (A) para 77.

According to these guidelines the sentence must be authorised through either statute or by common law;⁴⁶² the sentence must be unaffected by misdirection or influence.⁴⁶³ The sentence must not be so severe that no other reasonable court would have imposed that sentence.⁴⁶⁴ It is not to be imposed lightly, or without serious reflection.⁴⁶⁵ This is especially true where the aims and requirements of the punishment can be satisfied by a different sentence (such as a fine).⁴⁶⁶ However, imprisonment is not a form of punishment resorted to only when it is required to protect society against the accused, or for exclusively serious offences.⁴⁶⁷ Imposing a short term of imprisonment should not be resorted to lightly, owing to the obvious negative consequences of such sentence.⁴⁶⁸ Alternatives to imprisonment should be seriously considered for first offenders.⁴⁶⁹ Youth should be a strong factor against imprisonment.⁴⁷⁰ A first offence and youth should not disqualify imprisonment as an option, but should only be considered carefully as possible factors against imprisonment.⁴⁷¹

Although illness should not rule out imprisonment, it can be used to influence the decision along with the other factors.⁴⁷² Old age is usually a factor against imprisonment.⁴⁷³ The offender's status as the sole provider of a family who will suffer without them, should be considered as a factor.⁴⁷⁴ The impact of imprisonment on his employment, as well as the offender's standing in society is an important consideration on the court's decision.⁴⁷⁵ The court should keep specific

⁴⁶² *S v Pillay* 1977 4 SA 531 (A) para 12.

⁴⁶³ *S v Pillay* 1977 4 SA 531 (A) para 13.

⁴⁶⁴ *S v Holder* 1979 2 SA 70 (A) 414; *S v de Jager* 1965 2 SA 616 (A).

⁴⁶⁵ *S v Holder* 1979 2 SA 70 (A) 414.

⁴⁶⁶ *S v Holder* 1979 2 SA 70 (A) 415.

⁴⁶⁷ *S v Holder* 1979 2 SA 70 (A) 416.

⁴⁶⁸ *S v Makkahela* 1975 3 SA 788 (C) para 1.

⁴⁶⁹ *S v George* 1992 1 SACR 250 (W) 253.

⁴⁷⁰ *S v Sakabula* 1975 3 SA 784 (C); *S v Mbuyisa* 1988 1 SA 89 (N) 93.

⁴⁷¹ *S v Victor* 1970 1 SA 427 (A) 429.

⁴⁷² *S v Lewis* 1980 1 PH; *S v Mahachi* 1993 2 SACR 36 (Z) 48.

⁴⁷³ *S v Zinn* 1969 2 SA 537 (A) 542.

⁴⁷⁴ *S v Nabote* 1978 1 SA 648 (O); *S v Botha* 1970 4 SA 407 (T); *S v Benetti* 1975 3 SA 603 (T) 605.

⁴⁷⁵ *S v de Moor* 1970 1 PH H62 (N); *S v Botha* 1970 4 SA 407 (T) 409.

and relevant personal circumstances of the offender in mind while sentencing, such as claustrophobia, and homosexuality.⁴⁷⁶

The nature and seriousness of the crime is an obvious, but crucial consideration, since imprisonment can be the only suitable punishment for some crimes.⁴⁷⁷ The prevalence of the specific crime and the need to protect society from this crime should also be considered.⁴⁷⁸ The courts should aim for consistency and, after taking into account all relevant factors, the outcome should not differ so significantly that it amounts to unreasonableness or unfairness towards the accused or another accused person sentenced differently for the same offence. Equal punishment of equal offences should be the fundamental starting point before considering personal circumstances and any other factors.⁴⁷⁹ The fact that the offender might be considered for release on parole should not influence the presiding official's decision on how long the offender should be sentenced.⁴⁸⁰

In cases where a prescribed sentence for an offence includes the imposition of a fine or imprisonment, the court has full discretion over whether the appropriate sanction is the fine or imprisonment, as well as over the amount and duration of the punishment within the previously described parameters.⁴⁸¹

The *CPA* allows for periodic imprisonment for an offender for a minimum of 100 hours and a maximum of 2 000 hours, therefore incarceration need not be a continuous term.⁴⁸²

Circle sentencing can effectively be used in circumstances where an offender has plead guilty to a crime, although it is not yet part of our law.⁴⁸³ Circle sentencing will involve the victim, which is in line with the goal of the Department of Justice

⁴⁷⁶ *S v S* 1977 3 SA 830 (A); *Director of Public Prosecutions, Free State v Mokati* 2022 ZASCA 31 para 87.

⁴⁷⁷ *S v Maarmman* 1976 3 SA 510 (A) 513.

⁴⁷⁸ *S v Maarmman* 1976 3 SA 510 (A); *S v Malinga* 1962 1 SA 439 (T) 694; *Maduna v S* 2017 ZAFSHC 32 para 18.

⁴⁷⁹ *S v Marx* 1989 1 SA 222 (A) 226.

⁴⁸⁰ *S v Leballo* 1991 1 SACR 427 (NM) 401.

⁴⁸¹ *S v Arends* 1988 4 SA 792 (E) 794.

⁴⁸² Section 285 of the *Criminal Procedure Act* 51 of 1977.

⁴⁸³ See Chapter 3.

and Constitutional Development of giving more recognition to victims of crime, and it has an element of rehabilitation and restitution involved which are in line with the goals of restorative justice. Sentencing offenders to imprisonment is serious and jarring to the offender and their families, and often only results in a more hardened criminal re-entering society when the sentence is completed.⁴⁸⁴ In order to minimise the risk of recidivism and maximise the potential for rehabilitation, as part of the imprisonment sentence, the courts should consider adding mandatory rehabilitation courses as a default condition to the sentencing. It is not enough that these programmes are available to offenders; some counselling and community service should be mandatory.

5.3 Community corrections

Community corrections is an umbrella term for non-custodial sentences.⁴⁸⁵ To help restore the connection between the condemned criminal and the community, the court may impose community corrections and sentence the offender to house detention or community service subject to further conditions.⁴⁸⁶

The court may mandate that the offender look for work; find and keep a job; compensate victims; participate in treatment, development, and support programmes; attend mediation between victims and offenders or in FGCs, and pay for the community corrections that the offender has undergone.⁴⁸⁷

The offender should be limited to one or two magisterial districts, live at a specific address, abstain from alcohol and drugs, avoid committing crimes, avoid going to a specific location, avoid contacting a specific person or people, avoid threatening a specific person or people verbally or physically, and should be monitored.⁴⁸⁸ The court may impose any other appropriate condition to the circumstance.⁴⁸⁹

⁴⁸⁴ See Chapter 3.

⁴⁸⁵ Section 1 of the *Correctional Services Act* 111 of 1998.

⁴⁸⁶ Section 52 (a)-(b) of the *Correctional Services Act* 111 of 1998

⁴⁸⁷ Section 52 (c)-(h) of the *Correctional Services Act* 111 of 1998.

⁴⁸⁸ Section 52 (i)-(p) of the *Correctional Services Act* 111 of 1998

⁴⁸⁹ Section 52 of the *Correctional Services Act* 111 of 1998, empowered by Section 276A of the *Criminal Procedure Act* 51 of 1977.

Community corrections or correctional supervision is the closest South Africa has to restorative justice practices, as it encourages mediation, promotes community service, gives the offender the chance to remain a contributing member of society, and provides the offender with a chance to repair the damage done.

5.4 Minimum sentences

In an effort to project a tough-on-crime image, and to enact legislation to abolish the death penalty, the *Criminal Law Amendment Act* 105 of 1997 (Amendment Act) was implemented shortly after the 1994 elections, when the new government replaced the apartheid regime.⁴⁹⁰ It established a number of required minimum sentences for major offences.⁴⁹¹ The court can only impose a different or more lenient sentence if there are significant compelling circumstances.⁴⁹² If an accused person is found guilty of an offence under the Amendment Act, the court must impose at least the minimum sentence specified by the Amendment Act.⁴⁹³

By permitting a court to deviate from the prescribed minimum sentence if it is convinced that an injustice would result from imposing the mandatory sentence, the SCA made it clear that the Act, and in particular section 51 of the Act, is compatible with the principle of constitutional proportionality.⁴⁹⁴ The SCA examined minimum sentences and established a set of guidelines that courts must follow when determining minimum sentences, particularly when dealing with significant and compelling circumstances.⁴⁹⁵ The Constitutional Court upheld the criteria, with Ackerman J. declaring that it is unquestionably accurate.⁴⁹⁶

The court created a test in *S v Malgas*⁴⁹⁷ which states that the courts' power to impose sentences for offences mentioned in Part 1 of Schedule 2 (or imprisonment for other specified durations for offences listed in other sections of Schedule 2) has

⁴⁹⁰ Preamble of the *Criminal Law Amendment Act* 105 of 1997.

⁴⁹¹ Section 51(3)(a) of the *Criminal Law Amendment Act* 105 of 1997.

⁴⁹² Section 51(3)(a) of the *Criminal Law Amendment Act* 105 of 1997.

⁴⁹³ Section 51(3)(a) of the *Criminal Law Amendment Act* 105 of 1997.

⁴⁹⁴ *S v Malgas* 2001 1 SACR 469 (SCA) (hereafter *S v Malgas*) para 25.

⁴⁹⁵ *S v Dodo* 2001 1 SACR 594 (CC) para 50.

⁴⁹⁶ *S v Dodo* 2001 1 SACR 594 (CC) para 51.

⁴⁹⁷ *S v Malgas* para 25.

been curtailed, but not removed, by Section 51 of the Amendment Act.⁴⁹⁸ When imposing a sentence, courts must keep in mind that the Legislature has mandated life in prison (or a specific prescribed period of imprisonment) as the standard punishment for the listed crimes under the specified circumstances, barring compelling evidence to the contrary.⁴⁹⁹ Therefore, the offences in question must evoke a harsh, standardised, and consistent reaction from the courts unless there are and can be proved to be very compelling reasons for a different response.⁵⁰⁰

The court should not go outside of the sentencing scope for trivial reasons. Exclusion criteria include speculative theories that benefit the perpetrator, excessive compassion, a reluctance to punish first-time offenders, personal reservations about the effectiveness of the underlying legislation, and slight variations in co-offenders' personal situations or levels of involvement.⁵⁰¹ However, the Legislature has purposefully left it up to the courts to determine whether the specific facts of each case warrant a deviation from the recommended punishment. Even while the focus is now on the objective seriousness of the crime and the necessity of strong penalties for it, this does not imply that all other factors should be disregarded.⁵⁰² Therefore, all of the elements that are typically taken into account while sentencing still have an impact; none are entirely disregarded.⁵⁰³

The total effect of all the sentencing-related conditions must be evaluated against the composite yardstick and must be sufficient to support deviating from the Legislature's mandated standard reaction.⁵⁰⁴ Using the principles developed in handling appeals against sentences as the only criteria when implementing the legislative provisions is too restrictive.⁵⁰⁵

⁴⁹⁸ *S v Malgas* para 25.

⁴⁹⁹ *S v Malgas* para 25.

⁵⁰⁰ *S v Malgas* para 25.

⁵⁰¹ *S v Malgas* para 25.

⁵⁰² *S v Malgas* para 25.

⁵⁰³ *S v Malgas* para 25.

⁵⁰⁴ *S v Malgas* para 25.

⁵⁰⁵ *S v Malgas* para 25.

The sentencing court has the authority to impose a lesser sentence if, after taking into account the specific facts of the case, it is convinced that an injustice would result from imposing the prescribed sentence because it would be out of proportion to the crime, the criminal, and the needs of society.⁵⁰⁶ The fact that that specific type of crime has been singled out for harsh punishment must be considered in doing so, and the sentence that will be given in place of the mandated sentence must be determined with careful consideration for the benchmark that the Legislature has established.⁵⁰⁷

Minimum sentences stand in the way of restorative justice. They provide strict rules, which are necessary, but create an environment where it is too easy to rely only on what is written and not consider what is right.

5.5 Restorative justice in sentencing

The idea that crime is a violation of individuals, relationships, and communities is a fundamental component of restorative justice that has already been mentioned but merits repeating.⁵⁰⁸ Restorative justice is accomplished by a procedure that calls for the victim and the perpetrator to gather together, where the offender makes amends, with the aim of reintegrating both parties into society.⁵⁰⁹

Around the world, restorative justice ideas and procedures are becoming increasingly prevalent in criminal cases and precedents. The United Nations has also published recommendations on how restorative justice might be utilised in conjunction with the conventional criminal justice system.⁵¹⁰ There are several ways to look at how restorative justice affects sentencing in these systems: it is applied through victim mediation, where compensation is frequently given in lieu of a

⁵⁰⁶ *S v Malgas* para 25.

⁵⁰⁷ *S v Malgas* para 25.

⁵⁰⁸ As discussed in Chapters 1, 3, and 4.

⁵⁰⁹ Batley "Restorative Justice" 117-125.

⁵¹⁰ United Nations Office on Drugs and Crime *Handbook on Restorative Justice Programmes* 13.

sentence and frequently served concurrently with a more conventional punishment like incarceration.⁵¹¹

The recently introduced mediation procedure in South Africa, which gives the offender a chance to make amends with the victim before trial and frequently results in the charges being dropped, is a good example of restorative justice in action.⁵¹² The *Child Justice Act* 75 of 2008⁵¹³ (*CJA*) itself declares that the goal of the Act is to uphold the spirit of *ubuntu* in the child justice system, particularly through the use of the restorative justice approach.⁵¹⁴ Restorative justice has also been widely accepted and embraced when it comes to the sentencing of juvenile offenders in South Africa.⁵¹⁵

By gradually incorporating more restorative justice procedures into its operations, the *CPA* has also begun to embrace the promise of this approach. For instance, it now stipulates that the victim may get restitution or compensation from the court at the time of sentence.⁵¹⁶ When rendering decisions and imposing sentences, the courts are also more mindful of restorative justice.⁵¹⁷ In *S v Shilubane*,⁵¹⁸ the court recognised the chance for justice to be achieved through restorative justice, when the court ordered the offender to pay compensation for the damages he wrought by stealing the complainant's chickens, instead of the standard punishment for theft.⁵¹⁹

A comparable case may be found in defamation rulings, which now include an extra aspect of an apology, which is a direct implementation of restorative justice in our legal system.⁵²⁰

⁵¹¹ Section 299A of the *Criminal Procedure Act* 51 of 1977.

⁵¹² Sections 20 and 21 of the *National Prosecuting Authority Act* 32 of 1998, as amended by the *National Prosecuting Authority Amendment Act* 10 of 2024, and its accompanying internal Directives.

⁵¹³ The *Child Justice Act* 75 of 2008.

⁵¹⁴ Section 2(b) and 2(b)(iii) of the *Child Justice Act* 75 of 2008.

⁵¹⁵ Section 2(b) and 2(b)(iii) of the *Child Justice Act* 75 of 2008.

⁵¹⁶ Section 300 of the *Criminal Procedure Act* 51 of 1977.

⁵¹⁷ *S v Shilubane* 2008 1 SACR 295 (T) para 6.

⁵¹⁸ *S v Shilubane* 2008 1 SACR 295 (T).

⁵¹⁹ *S v Shilubane* 2008 1 SACR 295 (T) para 7.

⁵²⁰ *Le Roux v Dey* 2011 3 SA 274 (CC) para 52.

Restorative justice has also been used for more serious crimes like in *S v Maluleke*,⁵²¹ where the perpetrator and his family truly apologised to the victim's family, resulting in the three-year suspension of the offender's eight-year jail term for murder.⁵²² The court stated that:⁵²³

Restorative justice, properly considered and applied, may make a significant contribution in combating recidivism by encouraging offenders to take responsibility for their actions and assist the process of their ultimate reintegration into society thereby. In addition, restorative justice, seen in the context of an innovative approach to sentencing, may become an important tool in reconciling the victim and the offender, and the community and the offender. It may provide a whole range of supply alternatives to imprisonment. This would ease the burden on our overcrowded correctional institutions.

However, in the case of *Director of Public Prosecutions v Thabethe*,⁵²⁴ the SCA examined whether the High Court's completely suspended sentence for rape, which is punishable by law by a minimum of ten years in prison, was appropriate.⁵²⁵ The SCA determined that the High Court's sentence did not appropriately reflect society's natural outrage and revulsion at the crime of rape, even though the High Court had placed numerous, rather onerous conditions on the suspended sentence.⁵²⁶ The court also warned against the use of restorative justice for serious crimes. The court believed that the "ill-considered application" of restorative justice would "debase it and make it lose credibility as a viable sentencing option".⁵²⁷

5.6 Conclusion

Although restorative justice has enjoyed a wider application recently in South African criminal sentencing, it is still not a primary mode of sentencing. Rather it is reserved for less severe offences or only in special circumstances when in truth, modern

⁵²¹ *S v Maluleke* 2008 1 SACR 49 (T).

⁵²² *S v Maluleke* 2008 1 SACR 49 (T) para 22.

⁵²³ *S v Maluleke* 2008 1 SACR 49 (T) para 33-34.

⁵²⁴ *S v Thabethe* 2009 2 SACR 62 (T); *Director of Public Prosecutions v Thabethe* 2011 2 SACR 567 (SCA).

⁵²⁵ *S v Thabethe* 2009 2 SACR 62 (T); *Director of Public Prosecutions v Thabethe* 2011 2 SACR 567 (SCA).

⁵²⁶ *S v Thabethe* 2009 2 SACR 62 (T); *Director of Public Prosecutions v Thabethe* 2011 2 SACR 567 (SCA).

⁵²⁷ *S v Thabethe* 2009 2 SACR 62 (T); *Director of Public Prosecutions v Thabethe* 2011 2 SACR 567 (SCA).

systems of punishment have shown that it can be fully integrated into a modern criminal justice system. South Africa relies too heavily on the minimum sentences prescribed by the Amendment Act, and the community has a misunderstanding of the goal of restorative justice. It is not a "get out of jail free card" where someone can just pay to make their offence go away. It is a system of reformation which requires hard work, integrity and honest communication.

As mentioned previously, restorative justice can be an effective way of introducing African indigenous justice principles into South Africa's modern and formal law.⁵²⁸ The increasing importance of victim's rights and participation can also be compared to that of indigenous systems owing to the active involvement of the victim in the offender's "trial". Hon JH Jeffery spoke in the National Conference on the Integrated Criminal Justice System and the Review of the Criminal Procedure Act, 1977 about the need to acknowledge victims' rights, the balancing act of rehabilitating offenders while also catering to victims' rights, the need for the entire community to be involved in managing crime, and the need for the people to trust in the justice system again, but failed to notice that these things can all be met when looking at the criminal justice system from the indigenous justice perspective. When victim-offender mediation is done, the needs of the victims are dealt with, and a suitable compromise is reached whereby the offender can atone for their crimes. Victim-impact panels, circle sentencing, and community reparative boards involve the community in rehabilitating offenders and reaching consensus on punishments that do not ostracise the offender. All of these practices form part of restorative justice, and restorative justice is fundamentally linked to African traditions and principles such as *ubuntu*.⁵²⁹ Therefore, implementing these initiatives will allow South Africa to use restorative justice as a tool to decolonise punishment.

Restorative justice sentences may not be applicable as an independent sentence for all crimes, but as with most of the current sentencing structure, there is nothing that prevents its use as a concurrent sentence. Of course, it should be voluntary,

⁵²⁸ See Chapters 3 and 4.

⁵²⁹ See Chapter 4.

no one should force a victim to face their abuser if they are unwilling, but we should not deny offenders the chance to make emotional, relational, and societal amends when the victim is willing to partake in the process, regardless of the severity of the crime. We cannot say that we strive to incorporate the ideals of *ubuntu* while also saying that only some offenders and some offences warrant the application of *ubuntu* and restorative justice.

6 Chapter 6: Conclusion

Chapter 1 defined key concepts; decolonisation, decoloniality, and Africanisation, and outlined the research question: How can restorative justice contribute to decolonising the punishment aspect within the South African criminal justice system? It introduced the historical foundation of South Africa's legal system, tracing how colonial powers imposed Roman-Dutch and English law, marginalising African customary law that emphasised community harmony and reconciliation. It contextualised the modern justice system's overreliance on punitive approaches and presented restorative justice as a potential tool for decolonising punishment. The study adopted a literature review and legal-historical methodology and limited its scope to the sentencing aspect of criminal justice.

Chapter 2 critically examined the persistence of coloniality in South Africa's justice system. Despite constitutional provisions recognising customary law, Western legal traditions continue to dominate. The chapter explained epistemic injustice, showing how Western knowledge systems marginalised indigenous jurisprudence. It explored how courts have approached decolonisation through landmark cases such as *S v Makwanyane*, *Gongqose v Minister of Agriculture, Forestry and Fisheries*, and *Bhe v Magistrate Khayelitsha*, concluding that while courts acknowledge customary law, its application remains superficial and Westernised. The chapter calls for a genuine integration of indigenous values, particularly *ubuntu*, into South Africa's justice philosophy.

Chapter 3 surveyed major theories explaining why crime occurs and how punishment is justified. It explored classical, positivist, interactionist, and critical criminological theories, followed by the deterrent, retributive, preventive, and reformatory punishment theories. The chapter demonstrated that South Africa's sentencing system relies heavily on deterrence and retribution, which have failed to reduce crime or recidivism. It introduces restorative justice as an alternative model that promotes rehabilitation, reconciliation, and reintegration of offenders into society, principles resonant with African customary systems.

Through comparative analysis, Chapter 4 showed that restorative justice is not uniquely Western but universal in origin and practice. Western systems have evolved from punitive models to include restorative elements, especially in community sentencing and victim-offender mediation. Eastern traditions (Buddhism, Confucianism, and Hinduism) value harmony, empathy, and moral reform over punishment. African Indigenous Justice Systems (AIJS) embody restorative principles through consensus-building, compensation, and reconciliation rooted in *ubuntu*. Examples such as the *Kgotla* system in Botswana and traditional courts in South Africa show that African justice traditionally focused on restoring community balance. The chapter concludes that restorative justice is a culturally appropriate and globally recognised model that aligns with both constitutional and indigenous values.

Chapter 5 analysed the legislative framework governing sentencing, including the *Criminal Procedure Act* 51 of 1977, *Criminal Law Amendment Act* 105 of 1997, and relevant constitutional provisions. It showed that while restorative justice measures, such as victim-offender mediation, family group conferences, and circle sentencing, are recognised in policy, they remain marginal and inconsistently applied. The judiciary retains wide discretion, often defaulting to imprisonment. The chapter highlighted the overcrowding of prisons, high recidivism rates, and limited victim participation as evidence of the system's shortcomings. It concludes that embedding restorative justice within formal sentencing structures could promote rehabilitation, reduce incarceration rates, and embody decolonial justice.

The dissertation concludes that restorative justice provides a viable framework for decolonising South Africa's punitive justice system, through the use of restorative justice initiatives as mentioned above. Decolonisation requires not only recognising customary law but also allowing it to reshape legal philosophy and sentencing practices. Restorative justice, rooted in *ubuntu*, offers a human-centred, community-based alternative that restores dignity to victims, accountability to offenders, and harmony to society. While South Africa's Constitution acknowledges customary law, its practical implementation remains constrained by Western norms. True transformation requires epistemic decolonisation, accepting indigenous

knowledge systems as equally valid sources of legal wisdom. Restorative justice, therefore, is both a practical sentencing alternative and a symbolic act of decolonisation, reaffirming African values of compassion, interdependence, and collective responsibility.

The following recommendations are thus made: Victim empowerment should be acknowledged as necessary when sentencing offenders. Restorative justice can be applied to sentencing by allowing victim-offender mediations; victims have the opportunity to face the offender to explain the damage they caused, and offenders have the opportunity to acknowledge the effect of their actions, express remorse, and take responsibility. Victim-offender mediation is available in South Africa but to a limited extent. It should be offered as an option to all victims and offenders regardless of the severity of the crime and should be applied in all instances where both parties consent, regardless of the likely sentence upon conviction. Its purpose should not merely be to soften sentencing but to foster empathy and better relationships between offenders and the community.

The *Criminal Procedure Act* should be reformed using the *Child Justice Act* as a model. The *CJA* already focuses on the reform and rehabilitation of offenders over their punishment. Sentencing should more widely include restitution agreements where offenders compensate victims financially or through other meaningful actions. Reparations can extend to community service or other acts that repair harm caused to the community as a whole. This can be applied especially in cases of theft or vandalism, where the incarceration of the offender does nothing to restore the damage caused to the victim.

Community participation should be encouraged where possible. Community conferencing can contribute to the DOJ&CD's objective of getting the whole of society involved in deterring crime. It engages all affected parties—victims, offenders, families, and community members—in structured dialogues to determine an appropriate sentence. The community plays an active role in deciding what justice looks like and ensures the offender's actions align with the community's

values. Community conferencing is a wonderful practice but should be strictly monitored to prevent the occurrence of "mob justice".

Where possible, policy harmonisation should occur to align restorative justice policies with the *Traditional Courts Act*, ensuring that indigenous dispute-resolution mechanisms inform formal legal structures. Sentencing circles are borrowed from indigenous practices and bring together victims, offenders, judges or magistrates, lawyers, and community members to collaboratively decide on a fair and restorative sentence. This approach fosters understanding, accountability, and collective healing. In the case of small offences this can be an effective tool used to determine an appropriate sentence which affords the victim recognition through participation and community cohesion through its active participation.

Establishing Restorative Justice Units within the Department of Justice and Correctional Services to coordinate mediation, victim-offender dialogues, and community reintegration programmes could help ensure the application of restorative justice. Sentencing can include components focused on providing solutions to the root causes of offending, such as substance abuse treatment, mental health support, education, or skills training. This helps offenders reintegrate into society and reduces the likelihood of reoffending. South African courts can and do include these types of orders, but it can be applied more widely.⁵³⁰ These programmes are available to all offenders, but in the cases of offenders who receive a sentence that is not life imprisonment, these conditions should be mandatory. Not all offenders will respond to it positively as it does involve a measure of willingness to improve on their part, but it has a higher chance of success if it is applied more consistently and broadly.

Restorative justice during sentencing benefits the victim, the offender, and the community.⁵³¹ It empowers victims, addresses their needs and provides closure. It encourages accountability, personal growth, and reintegration into society for the offender. It strengthens social cohesion, reduces recidivism, and fosters collective

⁵³⁰ See chapter 5 above.

⁵³¹ See chapter 3 above.

healing within the community. By applying restorative principles to sentencing, the justice system can move beyond retribution, creating opportunities for meaningful change and more just outcomes for all parties involved.

All of these restorative justice practices can be linked to African indigenous practices and customary law. The involvement of victims and the community, the goal of achieving collective healing, and the reintegration of offenders into society all form part of the African tradition.⁵³² Applying restorative justice can decolonise the punishment aspect of the South African criminal justice system in so far as it relates and is based on the principles found in traditional African legal systems.

Restorative justice is not merely an alternative to punishment; it is a pathway to justice that reflects Africa's legal and moral identity. By incorporating restorative principles into South Africa's criminal justice system, the country can move beyond colonial legacies and build a justice model that truly serves the people—a system that restores rather than punishes, heals rather than harms, and unites rather than divides.

⁵³² See chapters 2, 3, and 5 above.

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