# RESTORATIVE JUSTICE – AN APPROACH TO REDUCE YOUTH CRIME IN SOUTH AFRICA

A Trans-National Perspective

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# ABSTRACT

Restorative justice is internationally a well debated concept that carries different perceptions. It seeks to understand the impact of crime rather than the cause, and indentifies the need of all parties affected by the crime; the offender, the victim and the community. The aim of the study is to examine three main research questions: What is restorative justice? What laws and policies support restorative justice? Can restorative justice prevent recidivism among young people? The study is qualitative and focuses on dept rather than width. Semi-structured interviews and observations were used to collect the qualitative data with respondents from organizations in a South African context. Qualitative findings together with relevant theoretical concepts are the source for discussion. The principle of restorative justice is that violation creates obligations, and the central obligation is to put right the wrongs. The concept has international support from United Nations conventions and principles. The key finding is that restorative justice prevent recidivism among young people through various interventions strategies, however the challenge is to prove its effectiveness.

Key words: Crime, Recidivism, Reintegration, Restorative justice, South Africa, Youth

## ACKNOWLEDGMENTS

## ABBREVIATIONS

| | |
|---|---|
| ADR | Alternative Dispute Resolution |
| CJA | Child Justice Act |
| CRC | Constitution on the Rights of the Child |
| DCS | Department of Correctional Services |
| DOJ&CD | Department of Justice and Constitutional Development |
| JCPS | Justice, Crime Prevention and Security |
| JJF | Juvenile Justice Form |
| NCS | Non-Custodial Sentencing |
| NGO | Non-Governmental Organization |
| NICRO | National Institute for Crime Prevention and the Reintegration of Offenders |
| OSF-SA | Open Society Foundation for South Africa |
| PAR | Participatory Action Research |
| RJ | Restorative Justice |
| RJC | Restorative Justice Centre |
| UNECA | United Nations Economic Commission for Africa |
| UNICEF | United Nations Children's Fund |
| UNODC | United Nations Office on Drugs and Crime |
| VOC | Victim Offender Conference |
| ZALC | South Africa Law Commission |

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# 1. INTRODUCTION

The paper examines an alternative approach to the current retributive criminal justice system. My interest for alternative ways in dealing with youth in conflict with the law or youth at risk came from my work experience as a social worker. This chapter describes the background of the topic and the objectives together with the research questions.

## 1.1 Background

Juvenile delinquency and youth's vulnerability to crime obtain various meanings and as a social problem within the society countries have different approaches with regards to prevention, rehabilitation and reintegration. Young people in conflict with the law are often referred to as the "unwanted children" (Moore & Mitchell, 2009). Restorative justice offers possibilities for rehabilitation represented by the Convention on the Rights of the Child (CRC) and UN Basic Principles on the use of Restorative Justice Programmes in Criminal Matters (2002), as moving towards preserving and improving their human rights. Due to my internship at United Nations Office on Drugs and Crime (UNODC, Pretoria, South Africa) at the time when conducting the paper, my study brings restorative justice into play in South Africa. As an approach to prevent recidivism and with the use of international standards along with human rights the study is inspired by a trans-national perspective.

From my previous experience working in prison settings in South Africa and Sweden as a social worker, I have seen a need of support in dealing with youth in conflict with the law to reduce further crime. With the overall high recidivism rate in South Africa as well as in Sweden my interest to examine an alternative approach to the current juvenile justice system developed. The interest of an alternative approach guided me to an internship at UNODC and to study this subject further. Restorative justice is a concept that carries many different perceptions, by using restorative approaches in criminal matters it supports democratic practices that are in compliance with international law and human rights, therefore I decided to write my paper on restorative justice.

The number of children deprived of liberty as a result of conflict with the law worldwide is estimated to be above 1.000.000 according to UNODC Manual for measurement (2006). The root causes of young people and their vulnerability to crime are various. The lack of capacity for managing diversion, after-care, and reintegration services as well as monitoring prevention interventions is current and governments frequently seem to fail, if existing. A referral approach to engaging juvenile offenders is theories through transdisciplinary thinking, thus by introducing restorative justice. Restorative justice is both an *idea* and a *movement.* As an idea, the concept carries many different understandings and as a movement it brings together disciples with many differing aims. In both senses, restorative justice is as yet vague and a number of authors have highlighted the need for more clarity. In order to achieve a paradigm with restorative justice in juvenile criminal

justice as crime prevention intervention strategies, more attempts to construct a consistent frame of the concept are needed that get beyond retributive views of justice.

## 1.2 Objectives

The study targets youth and their vulnerability to crime in South Africa. In combining a trans-national material and theories related to restorative justice in compliance with international standards, the objective is to investigate restorative justice in consideration to prevent recidivism among young people.

The aim of the paper is to study restorative justice as an approach to prevent recidivism among young people in South Africa.

## 1.3 Research Questions

The aim is to examine three main questions. The paper focuses on defining restorative justice and identifying laws and international policies that support the concept. An essential aim is to examine if restorative justice, as an alternative to the juvenile justice system may prevent recidivism. The study centre on the first two research questions from an empirical starting point while the third question has an underlying existence when analyzing the data conducted.

1. What is restorative justice?
2. What laws and policies support restorative justice?
3. Can restorative justice prevent recidivism among young people?

## 1.4 Delimitations

Around the world youth justice has contained concerns for rehabilitation and treatment of the offender, more than the criminal system for adults. Most countries have adjusted punishment for juveniles in a rehabilitative way (Walgrave, 2009). According to Walgrave the capitalist globalization has socio-economic uncertainty which causes an increased risk on fear for crime (Walgrave, 2009). Focusing on crime, problems may result in penal populism and youth is a part of this development. To target juvenile delinquency, my study is delimitated to the practice of young people in South African.

## 2. METHODOLOGY

This study is conducted on qualitative grounds focusing on depth of data rather than width. Qualitative research investigates in depth small, distinct groups and the concern lies in understanding the social phenomenon from the sample's perspective. The design is relevant since my ambition is to look deeper into what restorative justice is. A quantitative approach is therefore not suitable thus it seeks for projectable results to a larger population (Gilbert, 2011). Through

conversations we get to know people, learn about them and the world they live in. Qualitative research interviews attempt to understand the world from the subjects' point of view to clarify the meaning of their experience. The study follows Kvale's (2009) seven stages in designing and implementing an interview study. The seven stages are thematizing, designing, interviewing, transcribing, analyzing, verifying and reporting. The chapter elucidates sampling method and an ethical consideration where the researcher discusses reliability, validity and generalization as well as power relations. The study has a deductive nature when according to Gilbert (2011) it starts with theory and using it to explain particular observations. Deduction takes the data about a particular case and applies the general theory in order to deduce an explanation for the quantitative data collected. Empirical material from previous research and up to date interviews are combined with relevant theories on the topic, therefore the study has inspiration from an inductive method as a combination (Kvale, 2009).

Semi-structured interview methods were used, thus it depends on the researcher's judgment and tact on how closely to stick to the guide and how much follow up questions are required with regards to the interviewee's answers and the new directions the answers may open up. The aims with the observations were to keep the atmosphere as relaxed as possible while observing the interactions. The literature search took place in Pretoria, South Africa, as a desk top research from the office at UNODC. I also had a library card at the University of Pretoria and access to the law library to conduct relevant information on earlier research and theories for the paper. Through the sources that were used I explained restorative justice in a South African context using national law and examples of intervention programmes based on restorative justice.

## 2.1 Sampling Method

Given that the aim of the study was to identify restorative justice and examine if the approach may reduce recidivism, it was necessary to select stakeholders that run programmes on restorative justice and observe their clients. I used a complex sample design with selection methods in the use of clustering and stratification (Gilbert, 2011). According to Gilbert, clustering or multi-stage selection of sample units is almost always used on face to face interviews (Gilbert, 2011). I selected the samples in stages, individual sample units were kept nearby and samples that were available were used. The samples selected for the study were three non-government organisations (NGOs) as providers of restorative justice programmes. For the observations I used the organisations programmes to observe restorative justice interventions in practice. I used Gilberts (2011) stages on how to define and draw the samples for the study. I was both interested in the organisation as a provider of restorative justice and the organisations clients as a receiver of restorative justice. I defined the sample population for the study carefully. I started to draw a sampling frame as Gilbert (2011) explains as having an explicit and detailed description of the sampling population as important. I was based in Pretoria/Johannesburg, South Africa for the time of conducting the study therefore the samples were selected in that area, samples that uses restorative justice as a core for their programmes. My choices were consulted with social workers at UNODC (United Nation Office on Drugs and Crime).

## 2.1.1 Interviews

The three organizations interviewed are the core of the data collected. The interviews were held at the organization's offices and took approximately an hour each. The interview guide is presented in Appendix 1. The organizations interviewed are presented in more details in chapter 5.

- NICRO (National Institute for Crime Prevention and the reintegration of Offenders) Interview with Alida Boshoff the 31st of May 2012.
- RJC (Restorative Justice Centre) Interview with Mike Batley the 5th of June 2012.
- Khulisa, interview with Siegrid and Maxine 25th of June 2012.

Three organisations were interviewed for the study. Semi-structured interviews were used prepared according to Kvale's (2009) interview guide strategies. Semi-structured interviews include an outline of questions, with it being dependent on the interviewees' how closely to stick to the guide and how much to follow up the interviewees' answers and the new directions they may open up. Ethical issues were embedded according to Kvale's (2009) ethical guidelines. The interviews took approximately an hour, with my Iphone being used to tape the interviews. Each interviewee were asked for permission to record the interview. The interviews took place at the organisations offices. I contacted them through email where I explained the aim and the objectives of the study, asking them if I could come to their office for an interview. In the correspondence I mentioned the ethical guidelines for the study. Through email they invited me for interviews. Two interviews took place in Pretoria, with the third being in Johannesburg. Two interviews were held with one participating respondent and one interview was held with two respondents participating in one interview.

## 2.1.2 Observations

The observations were made through Restorative Justice Centre's and Khulisa's intervention programmes. I was invited to attend some of their programmes that I observed.

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|---|---|
| Observation 1: | Victim-Offender Conference (VOC), detained offender in court |
| Observation 2: | Mediation Session, Orange Farm, Community project |
| Observation 3: | Individual Session, Pretoria Central Prison, detained offender |
| Observation 4: | Individual Session, Pretoria Central Prison, detained offender |

Prior to the study I observed different forms of intervention programmes with youth in conflict/or at risk, with the law. Through the interviews with the organisations selected I proposed if I could participate in their programmes to observe restorative justice interventions. This request was granted. The first observation was a victim-offender conference (VOC), the second was a mediation session and the last two were individual sessions based on the elements of restorative justice. The aim of the observations was to keep the environment as

normal as possible while observing the interaction and gaining insight into the phenomenon. According to Denscombe (2000), the observations focused on depth rather than width. By using an open observation, I was able to detect the details and the complexities of the social context. My identity as a student and the aim of the study was known in the group therefore I could focus on examining the culture and the interaction in a very detailed way. I decided to observe restorative justice interventions instead of selecting interview samples in respect for the youth participating in the programmes. The options were discussed with the organizations as provider of restorative justice with the outcome to observe interventions instead of interviewing individual youth in programmes. As an outcome of the observations made, the data contributed to gain a deeper understanding of restorative justice interventions with fewer reflections in the discussion.

## 2.2 Ethical Discussion

Ethical issues were embedded throughout all stages of the interviews inspired by Kvale's (2009) ethical guidelines; informed consent, confidentiality, consequences and the role of the researcher. As a researcher I had responsibilities not only to the ideals of the pursuit of objective truth and search for knowledge, but also to the subjects of the study. Ethics say that while truth is good, respect for human dignity is better (Gilbert, 2011). The subjects were well informed about the overall purpose of the study as well as the possible risks and benefits from participation. They were informed that participation was voluntary, and that they had the rights to withdraw from the study at any time. They were also informed about the confidentiality of their participation, and their right to privacy. Names from the observation participants were not used to protect their confidentiality, while I was allowed to use real names from the interviews. The consequences were addressed with respect of possible harm to the participants in how I selected the subjects for the study. The role of the researcher where addressed when it comes to moral issues and actions by learning and be aware of ethical research behavior, as well as consider bias.

### 2.2.1 Reliability, Validity and Generalization

Trustworthiness and strength of knowledge are often discussed in qualitative research. Kvale (2009) discusses the question whether knowledge produced through interviews can be objective. With my reflection the trustworthiness in researching social science pushes to the furthest or as Kvale (2009:242) states; *..striving for objectivity about subjectivity.* Through the interviews and the observations I was striving for a reflexive objectivity, meaning that I attempted to gain insight into un-avoidable prejudices and to analyze them. Gilbert (2011) defines reliability as whether a measure works in a consistent way, and validity as whether the right concept is measured. Validity is often defined by asking if you are measuring what you think you are measuring (Kvale, 2009). According to Kvale, validity refers in ordinary language to the truth, the correctness, and the strength of statement. To asset validity and reliability in the research I analyzed the interpretations based on the source of invalidity. For an example, I avoided leading questions to influence the answers. Throughout the interviews I tried to

stay free from bias and prejudice. Another way to consider validity is to select a reliable theoretical framework without any generalizations or categorizations, as reflected in this study. According to Kvale (2009) a common objection to interview research is that there are too few respondents for the findings to be generalized. We generalize in everyday life more or less spontaneously. From one experience with one situation we anticipate new instances and form expectations of what will happen in other similar situations. Scientific knowledge is hypothetical to be generalizing with the aim of social science to produce laws of human behavior that could be generalized universally. On the contrast, the humanistic view implies that every situation is unique (Kvale, 2009). With inspiration from Kvale, generalization was used to deduce the data and from the qualitative samples I withheld from generalizations.

## 2.2.2 Power Relations

There is a power asymmetry between the researcher and the subject hence the researcher is in power to decide which answers to follow up for example. Through the use of few and open questions throughout the interview the subject felt that they were leading the conversation although I was the one who decided when follow up questions where required. According to Kvale (2009) there is a power asymmetry in qualitative research interviews and it is not an open and free dialogue. As a researcher it is important to take this into consideration and find ways to decrease the inferior-power relation towards an equal dialogue. To avoid possible power relations I observed interventions with selected youth where I could keep a low profile throughout the observations. It was more convenience than using interviews in relation to power asymmetry and according to the research questions. Gilbert (2011) discusses Participatory Action Research (PAR) where one main element is power. PAR seeks to empower the respondents through the process of undertaking the research. Their aim is not to see research participants as research "subjects", as this objectifies and further marginalizes them, but as equal partners in the process. Power relations are never static and can differ from one respondent to another and be based on age, gender, position etc. Bias can be regarded as either an issue for validity or reliability.

## 2.3 Method for Analysis

For the analysis I used mixed technical discourses with inspiration from Kvale's Bricolage method (Kvale, 2009). Bricolage is a method put together using whatever tools available. It adopts mixed techniques and move freely between different concepts. I read through the interviews repeatedly and analyzed the observation material to get an overall impression, and then went back to an eclectic form of meaning inspired from a multiplicity of ad hoc methods and conceptual approaches to analyse the data. To examine the aim of the study inspiration from Bricolage was suitable to understand the subjects, and with the mixed tools available I analyze the data to form common themes for the result and discussion section. I read through the transcripts over and over again and analyzed the stories and why and what purpose had the stories told. The analysis was categorical, meaning that I compared all references to the selected phenomenon. A categorical analysis was selected thus the study is concerned with an experience that is shared by the interviewee's. I reflected on specific themes of interest, not

following any methods but followed structures from the interview stories. According to Kvale (2009) in the last decades no systematic analytic techniques seem to have been used to analyze interviews.

## 2.4 Literature Search

For the literature search and the search for previous research on restorative justice I used a descriptive role. According to Kvale (2009), the reader seeks the truth beyond ideologies and false consciousness and in a realist reading there is a search for the native's point of view and for finding the text's essence and truth. Inspired by Kvale, I searched for literature at the law library at Pretoria University. I used the University of Gothenburg's online database to search for the latest data through relevant articles. Keywords I used for the search were: Crime, Recidivism, Reintegration, Restorative justice, South Africa, Youth.

# 3. YOUTH IN CONFLICT WITH THE LAW OR AT RISK

The number of children deprived of liberty as a result of conflict with the law worldwide is estimated to be above 1,000,000 (UNODC, Manual for Measurement, 2006). According to the latest World Prison Population Brief published in 2011, more than 10.1 million people are held in penal institutions throughout the world. This number includes young people who have been involved in crimes leading to incarceration. It is estimated that an average of 0.7 to5.6 per cent of young people are incarcerated in sub-Saharan Africa, and in many instances they are not separated from adults prisoners (ICPS, 2012).

In South Africa the estimated number of children who are charged each year in connection with various crimes is 100,000 (Muntingh & Ballard, 2012).

## 3.1 Youth in South Africa

According to statistics 44 percent of the South African population is under the age of twenty. The age group 15-25 accounts for 20.1 percent of the population. The high proportions of youth increases the responsibility required by the state, civil society institutions, communities and families to create an environment and pass on the legacy of moral and social worth. Nationwide it is estimated that youth account for two thirds of unemployment. Another concern with regards to youth is the extreme forms of violence they are exposed to. Reports show that of the 14 percent of persons who have witnessed a murder more than half were between the ages of 16-25 (Treptow, 2008).

According to UNECA (United Nations Economic Commission for Africa), the definition of children in South Africa is 0-17 years, from the Children's Act of 2005. Youth, as defined by the National Youth Commission Act of 1996, are between the ages of 14-25. 10.5 million children in South Africa live in an adverse condition of poverty (UNECA, 2012).

Numerous studies have been undertaken showing that the rates of youth in conflict with the law are high. For example, 36 percent of the prison population is under the age of 16 years, while 69 percent of people detained by the police are between the ages of 18-35 years. It is estimated that 15 percent of all criminal offences committed in South Africa are by children younger than 18 years. Further, there are strong indications that youth as perpetrators will increase according to UNECA (2012).

In South Africa, three in five children live in poor households and are exposed to public and domestic violence, malnutrition and inconsistent parenting and schooling. Poverty in childhood has significant short and long term negative implications, most key of which is that is denies a person key opportunities that will affect the rest of his/her life. Children are particularly vulnerable to exploitation and abuse and poor children often grow up in family and community structures with limited socio-cultural recourses to provide protection of the children's needs (Chronic Poverty Report, 2012).

According to a study published in Sunday Life, 9 million children in South Africa grow up without a father figure. Boys who don't know their fathers suffer more from anxiety and depression than those who do, and are more likely to become highly aggressive. Offenders in South Africa are generally between the ages of 25 and 35 years old, and many of them suffer from broken relationships (Sunday Life, 2012).

## 3.2 The Unwanted Children

Moore & Mitchell (2009) used the term 'Unwanted Children' when they described the juvenile justice system. According to them, CRC is not being realized to the young people who are in trouble with the law. They further state that out of all the major areas in the Convention, juvenile justice is the most neglected. They observed six dimensions of 'Unwantedness'. First, young people in trouble with the law do not acquire the same sympathy as other vulnerable young people in need of protection. When crime occurs the whole community is impacted, and the degrading of trust often produces fear. Politicians usually respond with a call for get-tough measures, and not an alternative approach such as diversion programmes. Secondly, juvenile justice is multi-systemic and in competition for resources with many child-focused services. Thirdly, a dominant ideology of childhood expressed through the CRC as innocent, vulnerable, helplessness and the victimization of children when juvenile offenders are not innocent. According to Moore & Mitchell (2009), discussion often focuses on younger children within the CRC while teenagers in contact with justice are often overlooked. Fourth, the traditional approaches to challenging juvenile justice are negative processes built on punishing and blaming. Further he states that the more a state works on realizing human rights, the more progress it will make in reducing juvenile offending. Fifth, CRC focuses mainly on juveniles taken into custody without seeing the needs and rights throughout the whole process of the justice system. Sixth, address the gender issue. According to Moore & Mitchell (2009) juvenile justice is mainly about boys and he states that this factor is relatively neglected within the juvenile justice discourse.

## 3.3 Criminal Thinking and Recidivism

Criminality is a lifestyle arising from primarily three influences: conditions, choice and cognitions. The main four risk factors are: history of antisocial behaviour, antisocial personality pattern, antisocial thinking pattern and antisocial associates. These risk factors are followed by family problems, school problems, leisure and recreation choices and substance abuse. Unwilling to accept responsibility and self defeating behaviour are distinctive cognitive errors of young criminals. A successful intervention approach will address the criminal's risk factors and needs to seek to enhance protective factors based on the elements of restorative justice. The retributive responses can control the risk factors through incarceration as an example which is a short term control, while more effective approaches would rather seek to reduce risk factors for a long term change. A combination of strategies is most effective in ensuring short-term control, as well as long-term change (Walters, 1995).

According to Zehr (1990) restorative justice is not meant to reduce recidivism, recidivism reduces as an expected outcome, but restorative justice is done first of all because it is the right thing to do. According to Open Society Foundation for South Africa (OSF-SA, 2010) levels of reoffending have explicitly been identified as the primary measurement of success of its rehabilitation efforts. In the absence of an agreed definition of reoffending and no baseline data it is difficult to measure success and to use data to improve programmes and service delivery. To reduce crime and increase safety in the long term a more textured understanding of levels of recidivism is critical (OSF-SA, 2010).

According to Maltz (1984) recidivism is when a person who has committed a crime does it again, however he states four problems in the measurement of recidivism: 1, understanding that recidivism is a process, not an event. 2, problems into identifying recidivists, 3, the complexity of using recidivism measures to address progress towards goals and 4, the assumption that recidivism is an accurate predictor of risk (Maltz, 1984).

Thinking about recidivism as a process rather than an event moves us away from the desire to define a recidivism rate. Overall, the recidivism rate would be a useful statistic to use, hence such rates are highly subjected to sampling parameters. Recidivism rate for people released from prison will be very different from a recidivism rate for people who stand convicted of a crime for the first time. A recidivism rate only means something compared to something else therefore, a low rate does not mean we are succeeding and a high rate does not mean we are failing. Recidivism is a function of the relation between what happened during imprisonment and what happens in mainstream society; the conditions, attitudes, expectations, opportunities and actual level of welcoming of ex-prisoners (Maltz, 1984).

# 4. RESTORATIVE JUSTICE

*Where we once saw an offense against society we now see an offense against an individual victim. In a way, it is a common sense view of crime. The armed robber did not rob society; he robbed the victim. His debt therefore, is not to society; it is to the victim* (Gabby, 1994:357).

The chapter examines Restorative Justice (RJ) and gives an overview of the background, international standards and alternative concepts. There is a growing acknowledgment of the criminal justice system's limits and failures. Offenders, victims and community members often feel that justice does not meet their needs. Zehr (1990) already mentioned this fact more than 20 years ago and expressed that justice professionals expressed a sense of frustration. The process of justice deepens societal wounds and conflicts rather than contributing to healing or peace (Zehr1990). The RJ approach defined is comprehensive however based on international standards with efforts to relate to policies and implementation strategies. The background material reflects on previous research and international laws and standards as a trans-national perspective.

## 4.1 Background

The first use of the term *restorative justice* was used by Albert Eglash in 1958, in which he suggested three types of criminal justice. *Retributive* centring on punishment, *distributive* centring on therapeutic treatment and *restorative* centring on restitution. The punishment and treatment models focus on the offender and deny participation of victims. Restorative justice on the other hand focuses on the harmful effects of the offender's actions and actively involves the victim in the process of reparation and rehabilitation (Van Ness, 2010).

Since this time researchers have spent time trying to define restorative justice. Although research is ongoing, there is no consensus amongst scholars regarding the meaning of restorative justice (Bezuidenhout, 2007). The literature is unclear whether restorative justice should be a conventional actor within criminal justice, whether it should replace current retributive system, and whether restorative solutions should be used for all crimes or for certain crimes. According to Bezuidenhout (2007) it is also unclear where the mandate for restorative justice intervention should lie.

According to Crook (Van Ness, 2010) restorative justice is over-searched and the most under-used criminal justice innovation. Hoyle (2002) identified four programmes within the field of restorative justice. Victim-offender Conference, sentencing or peacemaking circles, family group conferencing and reparative probation or boards. Bezuidenhout (2007) urges that restorative justice is a philosophical paradigm for responding to crime as well as an effort to repair the damage caused by a wrongdoing. The effort is an attempt to give the victim an opportunity to express feelings and to afford the offenders the opportunity to explain their actions and to repair the damage they caused. Furthermore he explains (Bezuidenhout, 2007) that the process brings closure to all the parties and

it aims to repair the relations between the victim and the offender. Thus if this intervention prevents future crime it is supplementary to the outcome of restorative justice. Braithwaite (2003) states that restorative justice with its rehabilitation mechanisms is the missing link in the justice system. He argues that restorative justice would be more effective in preventing repetitive offending when there is rehabilitative ethos added within the retribution system. Zehr (1990) states that the key objective is to address harm and that restorative justice appears to be an alternative to the formal criminal justice system.

Restorative justice programmes focuses to understand the impact of crime and centre on the individual rather than the society. Restorative justice seeks to repair the relationship between offender, victim and community. It responds to crime in ways that strengthen personal responsibility and accountability. Intervention programmes in general, tend to be related to the need of the offender, in contrary restorative justice takes societal needs to denounce crime and confront the offender, provide real or symbolic consequences and the most important, it centres on the nature of harm caused to victims and the community, as human beings. Restorative justice provides a balanced approach within values that recognizes crime as harm done to victims and community and prioritizes restoration (Zehr, 1990).

A research from Australia (Braithwaite, 2007) showed that some victims of crime are worse off as a result of going into a restorative justice approach, particularly in terms of being re-victimized. However, the same research showed that the reduction of victim's fear or re-victimization appeared to be twice as common.

South African Law Commission (ZALC, 2012) highlights the prosecutors' ability to assess decision making of a legislative framework for diversion. Indications show diversion as ineffective since prosecutors are not specialized or trained for this type of assessment. Furthermore, there is a need to ensure that diversion decisions are correct and appropriate for juveniles. Referrals to diversion programmes should take place as soon as possible and in this case there have been straits of how legislation should be framed.

The biggest challenge in assessing restorative justice's effectiveness is the poor research and assumptions based on micro level, non–representative homogeneous group and philosophical speculations that been used to drive the restorative justice movement. According to Braithwaite (2007) it could be too early to make the determination about the overall effectiveness of restorative justice in reducing recidivism based on a handful of studies limited primarily to one intervention. Thus a change in thinking and practice needs to occur in order to develop the potential for restorative values and principles in current treatment and rehabilitation approaches (Braithwaite, 2007).

## 4.2 International Laws and Standards

The Convention on the Rights of the Child (CRC, 1990) is one of the most ratified of all human rights instruments but it is also the most violated (Moore & Mitchell, 2009). Article 40 (CRC, 1990) actively discourages retributive responses while focusing on the need to avoid deprivation of liberty. To implement CRC and the Basic Principles on Restorative Justice (2002) would include the "unwanted" children in the justice system. The Basic principles were developed by The Economic and Social Council, in response to an emerging discourse within legal systems around the world with the aim to protect human rights of victims and affected parties in the process of crime (Moore & Mitchell, 2009). It was adopted in 2002 as a guide to encourage member states to implement restorative justice in their domestic juvenile criminal justice systems. In contrast to the CRC this resolution has only moral dynamics and developed as a framework to guide a worldwide criminal justice reform. The Basic Principles emphasize the need for a common perceptive of restorative processes with the aim to increase its effectiveness. The purpose was not to make restorative justice initiatives mandatory but to assist member states with guidelines for implementation. According to the General Assembly Resolution in 2005 The Criminal Justice Reform Unit contributes towards the mandate of UNODC by assisting developing countries. Countries emerging from conflict, and countries with economies in transition were assisted in building the capacity of their justice systems to operate more effectively within the framework of the rule of law. Particular attention was given to vulnerable groups such as women and *children*. This included the Basic principles on the use of restorative justice programmes in criminal matters (General Assembly Resolution, 59/159 of 3 February 2005). In 2006 UNODC provided a handbook on restorative justice. The handbook offers an overview of key considerations in the implementation stage of participatory responses to crime based on a restorative justice approach. It also encourages the development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and other parties. The handbook covers definitions of key concepts, a summary of the main types of interventions, legislation, rules and guidelines for practitioners, and programme operation as well as monitoring and evaluation tools. It is meant as a guide for policymakers, legislators and practitioners as well as international- and non-governmental organizations (UNODC, Handbook, 2006).

According to the UN basic principles (2002), restorative justice is an approach to solve problems that involve the victim, the offender, their networks, justice agencies and the community. Its programmes are defined on the fundamental principle that criminal behaviour not only violates the society (the law) but also injures victims and community members. Restorative justice refers to the process of resolving criminal actions by focus on redressing the harm done to the victims and holds the offender accountable for their actions. Restorative justice approaches also engage the community in the resolution of the conflict.

UNODC's manual for measurement of juvenile justice (2006) describes restorative justice programme as; *"...any programme that uses restorative processes and seeks to achieve restorative outcomes"*. (2006:7): Thus a restorative justice process as; **"...any process in which the victim and the offender**

*and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator".* (2006:7)

The objectives of restorative justice according to UNODC's Handbook (2006) are;

- *Supporting victims, giving them a voice, encouraging them to express their needs, enabling them to participate in the resolution process and offering them assistance.*
- *Repairing the relationships damaged by the crime, in part by arriving at a consensus on how best to respond to it.*
- *Denouncing criminal behaviour as unacceptable and reaffirming community values.*
- *Encouraging responsibility taking by all concerned parties, particularly by offenders.*
- *Identifying restorative, forward-looking outcomes.*
- *Reducing recidivism by encouraging change in individual offenders and facilitating their reintegration into the community.*
- *Identifying factors that lead to crime and informing authorities responsible for crime reduction strategy.*

Member States shall endeavor to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she/he is most susceptible to deviant behavior, will foster a process of personal development and education that is as free from crime and delinquency as possible (Beijing Rules, article 1.2, 1985).

According to Moore & Mitchell (2009) both restorative justice and human rights principles are structured using basic terminology with the aim to avoid recidivism and facilitate reintegration of all affected parties within the community. However by integrating restorative justice and young people's human rights through this approach, practitioners are encouraged to hear the voices of victims, young offenders and community members. Scration (1997) states that restorative justice offers an appropriate framework for a greater appreciation of adult-child power relations. Adult power is endured by children and dominates their personality and social lives, it is a power that is systematically abused. It is a dangerous power that can stunt the personal development of the most resilient children. It is not a crisis of childhood but one of adultism, and to focus on a context supported by a positive rights agenda, these power obstacles will enable young people to experience more effective participation, Scration continues (1997).

## Alternative Concepts

Certain alternative concepts have become part of the child and juvenile justice system subscribing to the rights and principles contained in the CRC, such as; diversion, alternative sentencing and reintegration.

## 4.2.1 Diversion

In practice, restorative justice involves prevention of children and young people coming into conflict with the law. Diversion of offenders is one practice that takes away the young offender from the formal criminal justice system: e.g. victim-offender mediation, family group conferencing, referral to a NGO or other community or social programme, including substance abuse programmes, family reunification, community services, police warnings, behaviour contracts, conditional or unconditional release (UNICEF, 2009). Through diversion youth that are accused of committing crime are given the opportunity to take responsibility for their conduct and make good for the wrongful action. Practical implementation of diversion in the context of specific programmatic responses in Africa was first developed in South Africa. Once the child or the young offender arrives at the police station, they must be separated from adults. The registration process is done by police officers who divide the children into three categories: those in need of care and protection, those in need of protection but requiring discipline and those who have committed offences. Once the police officer has determined that a child falls into a particular category, the district diversion coordinator must be informed. South Africa began offering diversion programmes early in the 1990s by the National Institute for Crime Prevention and Reintegration of Offenders (NICRO). The Namibian model has similarities to the South African experience and is seen as a good practice. In 1999 almost every Namibian region had its own Juvenile Justice Forum (JJF). The JJF model is a pre-trial diversion programme (Sloth-Nielsen & Gallinette, 2004). In Botswana the Children's Act came into effect in 2009 and includes diversion, assessment for youth in conflict with the law and arrangements and measures to benefit youth and reintegrate the offender back into the community (Child Justice Alliance, Article 40, 2012).

There is a distinction to be made between formal programmes and informal diversion options. A youth might be diverted by being referred to a restorative justice practice such as family group conference. This is not a formal diversion programme but rather a meeting between the child, his or her family, the victim and the community in order to achieve an outcome acceptable to all parties and restore harmony between them. A part of the outcome might include informal activity to be undertaken by the child and or by others participating in the family group conference. There are many benefits to diversion. Through diversion a child may gain insight into the consequences of his or her actions, take responsibility for them and make good the harm caused. Diversion ensures that the child does not obtain a criminal record, thereby granting him/her the opportunity to build a path in life, unburdened by the stigma of a criminal conviction. Diversion also allows for the victim to participate where appropriated (Child Justice Alliance, 2012).

According to UNICEF (2009) there are also certain potential dangers of diversion. These have to do with the accused person's right to a fair trial and due process. Diversion involves the referral of cases away from the criminal justice system where suitable evidence for prosecution exists. It is therefore urgent that children are not diverted to a programme or other informal diversion option alternatively of the possibility of prosecution. If the state does not have sufficient evidence to

prosecute a matter, it cannot resort to diverting the child as "second prize". The state cannot absolve itself of the obligation of proving the guilt of an accused beyond a reasonable doubt by making use of diversion to achieve a result it would otherwise not obtain. Hence, this would constitute a serious invasion of the accused person's right to be presumed innocent until proven guilty. Diversion should be preceded by the child's accepting responsibility for his/her actions. There is a danger that a child could be improperly influenced into accepting responsibility for an offence at the expense of his/her right to remain silent. According to UNICEF (2009) diversion should be excluded where:

- The child indicates that he/she intends to plead not guilty to the charge
- The child has not understood his/her right to remain silent and/or has been unduly influenced in acknowledging responsibility
- There is insufficient evidence to prosecute
- The child and his/her parents do not consent to diversion or the diversion option

## 4.2.2 Alternative Sentencing

Restorative justice in practice is an alternative to detention: e.g. care, guidance and supervision orders, probation, community service orders, financial penalties, compensations and restitution, intermediate treatment and other treatment orders, orders to participate in group counselling and other similar activities, orders concerning foster care, living communities or other educational settings (UNICEF, 2009).

Alternative or non-custodial sentencing has its origin in the realization that imprisonment is not suitable for all offenders, and that it can have a range of damaging affects when punishment is imposed. Alternative sentencing offers greater potential for a successful reintegration of the offender, it reduces the prison population, and the offender's family is not victimized by the imprisonment. Alternative sentencing is generally less costly than sanctions involving imprisonment (UNICEF, 2009).

In Southern Africa, the age of criminal capacity ranges from as young as seven years to sixteen years. This indicates the uncertainty and lack of agreement on children's capacity to construct the intention to commit a crime and comprehend the consequences of their actions. In the absence of clarity on children's ability to commit crimes, the best interest of the child should be considered. Non-custodial sentencing options hold far more potential to realize these interests than custodial options (Sloth-Nielsen & Gallinette, 2004).

The UN Standard Minimum Rules for Non-custodial Measures, article 8 (1990) convey as follows:

The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate. According to UN Standard Minimum Rules

for non-custodial Measures (1990) sentencing authorities may dispose of cases in the following ways:

- Verbal sanctions, such as admonition, reprimand and warning
- Conditional discharge
- Status penalties
- Economic sanctions and monetary penalties, such as fines and day-fines
- Confiscation or an expropriation order
- Restitution to the victim or a compensation order
- Suspended or deferred sentence
- Probation and judicial supervision
- A community service order
- Referral to an attendance centre
- House arrest
- Any other mode of non-institutional treatment
- Some combination of the measures listed above.

## 4.2.3 Reintegration

In South Africa as an example, there were a total number of 54,717 incarcerated young people from the ages of 14-25, awaiting trial and sentenced, in 2011 (DCS, 2012). Most of them will be released and return to the cities and communities from which they originate. The majority of these young people will continue to live on the periphery of society and will not have access to the services and care that most children enjoy. They will continue to be marginalized, and will likely find themselves in conflict with the law once again. According to Skelton & Batley the recidivism rate in South Africa is approximately 94 percent (Skelton & Batley, 2008).

One objective of restorative justice is reducing recidivism by encouraging change in individual offenders and facilitating their reintegration into the community (UNODC, Manual for the Measurement of Juvenile Justice, 2006). Reintegration services are not reserved only for children and young people who are released from prison or institutions. These services will be required for most children who have come into conflict with the law, or who indicate a risk of doing so, children or young people who are diverted away from the criminal justice process and into structured programmes. Reintegration programmes should not be seen as an add-on after punishment has been distributed, but as the overall purpose of a justice system. Successful reintegration refers to development of the ability to deal with risk factors so as to function successfully in society, thereby improving the quality of life of the person and the community. According to UNODC (Manual for the Measurement of Juvenile Justice, 2006) risk factors are regarded as those conditions or characteristics that may contribute to or result in re-offending, such as:

- Social and economical environment
- Individual skills and characteristics
- Relationships with individuals and the community
- Stigmatisation

- Institutionalisation and socialisation in prison
- Physical environment

Restorative justice is dealing with the consequences of the offence and is forward-looking in the sense that it is a process that looks at the implications for the future. This introduces a reintegration process, with an effort made to identify how future incidents may be avoided. The standard criminal justice strategy is forward-looking, with the aim to harm the offender as a strategy to avoid future crime, in most cases through imprisonment. This approach aims to reintegrate through instilling fear in others unconnected with the crime, hoping that by dealing harshly with one offender a lesson is learned by others that will cause them to avoid committing crimes. A restorative justice approach instead, tends to look at those with a stake in the crime, and looks at implications of that crime for the future, meaning that those who are personally and directly involved can formulate targeted strategies to avoid further incidents and successfully integrate back into the society (UNODC, Manual for the Measurement of Juvenile Justice, 2006).

# 5. RESTORATIVE JUSTICE IN A SOUTH AFRICAN CONTEXT

This section highlights the concept of restorative justice within the South African context. It starts with an overview and a background explanation of how the concept took place within national law and standards. The Child Justice Act, which came into effect in 2010, has played a major role in the context of youth in conflict with the law and restorative justice, and therefore addressed in this section. Further, three organizations are presented, namely: NICRO, RJC and Khulisa, as providers of intervention programmes based on the elements of restorative justice to illustrate the use of the concept.

## 5.1 Short Overview

Restorative Justice has moved its practical restrictions to take its place as a subject of serious academic debate in criminal justice (Skelton & Batley, 2008). Local developments featured a promising jurisprudence that is emerging from the country's superior courts. The jurisprudence promotes the application of restorative justice across all stages of the criminal justice system. Skelton & Batley (2008) mention rehabilitation and the loss of credibility that still predominates large on the South African criminal justice landscape. Thus restorative justice offers an alternative approach of how to reduce crime among young people. According to Skelton and Batley (2008) the South African criminal justice practitioners and researchers are encouraged to participate in the discovery of realistic community centred models. The concept of restorative justice in policy documents of government came early in the Welfare White Paper (1996), the National Crime Prevention Strategy (1996). South African legislature has twice defined restorative justice. First time was in Probation Services Act (1991) as:

> *"The promotion of reconciliation, restitution and responsibility through the involvement of a child, and the child's parents, family members, victims and communities concerned"* (Probation Service Act, no 116, 1991, p3).

The second time in the Child Justice Bill (2002) as:

> *"An approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation"* (Child Justice Bill, B49B, 2002, p9).

According to Skelton & Batley (2008) a network of civil society organizations has developed standards to guide the implementation of restorative justice programmes and processes related to the criminal justice system. The standards were developed from a review of international literature in the field of restorative justice within consultations with stakeholders in South Africa. Skelton & Batley (2008) argued that the completion of these standards testifies to the fact that the definition of restorative justice is clear.

Restorative justice interventions exists in all parts of the country, Skelton & Bayley (2008) point out that the concept has not gone unnoticed by the judiciary and the jurisprudence is promising. The former judge on the Constitutional Court Justice Sachs, focused on a restorative justice approach and made the point that dignity could not be restored through unbalanced punitive monetary claims, but that apology is a far more powerful tool. He further stated that restorative justice is in keeping with the African notions of Ubuntu and the constitutional commitment to dignity. The key elements of restorative justice, according to him are: restorative justice identified as an encounter, reparation, reintegration and participation (Skelton & Batley, 2008).

Andersson (2002) describes South Africa as a multicultural society where indigenous structures exist together with modern structures and procedures. Ubuntu is a united world-view of African societies based on respect and understanding between people and means: a person is a person because of other people, and a person can only be a person through others. Andersson states that the view consists of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity. It can be grounded on morality that formulates basic respect and compassion for others. The expression is not a criminal justice term, but rather, as Andersson mentions, it is a determining factor in the formation that influences social society. The positive values of Ubuntu have influenced the development of South Africa's legal institutions and procedures with values that are related to restorative justice values. Andersson continues to state that if restorative justice is a specific type of response to crime, Ubuntu is much more than that. Both however, centre on restoring an imbalance created by someone's behaviour and to build peace within communities (Andersson, 2002).

South African Law Commission (ZALC) explains restorative justice as diversion according to the Child Justice Bill as to empower victims and to deal with young people in the context of their communities and families. The Child Justice Document states that all diversion programmes and services provided within the criminal justice system must reflect on community protection, accountability and competency development as objectives of the service. Within such an approach, children at risk or in conflict with the law should focus in restoring societal harmony and putting wrongs right as well as ensuring public safety. According to the document the individual should be held accountable for his or her actions and when possible make amends to the victim. (Child Justice Act, 2008). Moreover, the Child Justice Bill mentions indigenous traditional methods of conflict resolution that incarnate restorative justice values and principles. Currently diversion programmes in South Africa are run by NICRO, including life skills training programmes, pre-trial community service, family group conferencing and the journey programme. According to ZALC (2012) these are the most common programmes. Other examples of diversion programmes are referral to traditional structures or street committees. ZALC (2012) has also identified a need for programmes for youth charged with sexual offences. Furthermore, ZALC (2012) describes diversion in terms of three levels. Level one is the withdrawal of cases with a possible concern, level two is diversion to a programme, and level three is diversion that incorporates a formal diversion programme and involves more intensive intervention. The policy document seeks to improve services to children in conflict the law by recognizing diversion programmes in line with legislative mandates. Furthermore, it seeks to raise the confidence of other key stakeholders in the Child Justice System. The process will encourage parental and community participation in shaping the behaviour of young people. The long-term objective is to reduce re-offending behaviour according to the Child Justice Act (2008).

When it comes to international policies South Africa has ratified to the Convention on the Rights of the Child (1990). CRC raise diversion to a legal norm which is binding for the member states. Article 40 of the Convention provides as follows:

> *"State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected"* (CRC, 1990, Article 40,3,b)

The JCPS (Justice Crime Prevention and Security) cluster has agreed to adopt a framework to promote a restorative justice approach. The need for a framework developed from the fact that Government is looking to deal with crime in a more focused and co-ordinated manner. There is a need to increase community participation in the criminal justice system, both to provide better support for victims and to support offenders in reintegrating back into society. Restorative

justice is regarded as helpful and supportive of these broad aims (JCPS, National Policy Framework, 2012).

## 5.2 Child Justice Act 2010 (CJA)

The Child Justice Act (CJA) 75 of 2008 was signed into law in May 2009 and became operational on 1 April 2010. The Act includes innovative provisions to establish a separate criminal justice process for children accused of committing offences. The system established by the Act has the potential to provide greater protection to these children and to promote a restorative justice approach to these cases (Child Justice Alliance, 2012). The aim of the CJA was to create a separate criminal justice and procedural system for children; a system that is focused on restorative justice principles and the promotion of crime prevention initiatives. The key objectives are to protect children by using restorative justice values, and to involve the parents and the community in interventions so as to ensure adequate integration of a child. The child justice court can only impose a sentence of imprisonment on a child who is over the age of 14 years and only as a measure of last resort (Child Justice Alliance, 2012).

## 5.3 National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)

NICRO (National Institute for Crime prevention and the reintegration of Offenders) is an organisation that was established in the early 1900s, and is at the forefront of South Africa's search for effective and lasting solutions to combating crime and the creation of a safe, healthy and crime-free South Africa. NICRO works at many levels to fight crime, such as:

- Preventing impressionable and vulnerable young people from becoming entangled in the downward spiral of crime
- Successfully diverting offenders away from the formal criminal justice system
- Providing constructive and effective alternatives to imprisonment
- Facilitating transformation and personal development for prisoners and former offenders, assisting with their successful return to their families and communities after prison
- Helping families and communities to support prisoners and released offenders who are eager to turn their lives around and make amends

### 5.3.1 Non-custodial Sentencing (NCS)

Based on the elements of restorative justice NICRO uses the definition of Restorative Justice from the UN Handbook (2006) in their restorative justice programmes. With NCS the root causes of the criminal behaviour can be addressed and offenders are afforded the opportunity to turn their lives around. Attending therapeutic services and programmes are part of NCS where change in the offender's behaviour can occur. To make therapeutic services available at magistrates' courts, NICRO seeks to encourage the court to sentence suitable offenders to NCS, where the offenders' sentences are carried out in the

community rather than in prison. NCS are sentences served outside of prison. NICRO believes that prison is not the best option for many offenders, and that in some cases, sending an offender to prison simply makes the problem of crime worse. Certain offenders can be sentenced to therapeutic programmes and services designed to address their behaviour, and these sentences can be carried out in the community (NICRO, 2012).

NICRO states that the effectiveness of imprisonment as a sanction has always been the subject of debate. Whilst imprisonment should, in theory, bring about behavioural changes as well as improved education and training, this does not occur on the scale required. Contrary, persons often leave prison with no improvement to their behaviour, or to their ability to resolve the committed crime. It appears that imprisonment often decreases an offender's future prospects as many prisoners leave prison ill-equipped to lead a constructive life in society and are frequently at a disadvantage because they have been in prison. Stigmatisation and marginalization leading to social exclusion often follows imprisonment, resulting in conditions that soon lead to re-offending (NICRO, 2012).

South African legislation provides for a wide range of NCS, for example: fines, suspended sentences, postponed sentences, community service, probation, supervision and attendance of treatment and educational programmes. All these can be imposed with conditions pertaining to reparation and restoration. According to NICRO (2012) alternatives to imprisonment provide greater opportunities and possibilities for; modifying behaviour, making amends, allowing community participation and reparation.

NICRO (2012) sees potential for growth and opportunities to contribute to a reduction in crime, in particular through programmes that are aimed at perpetrators of domestic crimes, addressing poor parenting skills, assisting young people to understand their behaviour, problem-solving programmes and victim-offender mediation.

According to NICRO (2012) juvenile offenders are required to have a pre-sentence report and they must be dealt with in conjunction with a probation officer, according to CJA. The magistrate will refer the offender to the probation officer for an investigation. The details will form part of the pre-sentence report, with the magister being able to order that a suitable assessment be conducted to determine whether the young offender is suitable for NCS. The assessment is undertake only by a NICRO social worker and is forwarded to the probation officer. The suitability assessment is attached to the pre-sentence report, which is handed to the magistrate, who reads the report when considering sentencing. According to NICRO (2012) benefits of NCS are;

- The option offers interventions of a rehabilitative nature, which facilitate and support successful reintegration
- Encourages offenders to take responsibility for their actions and make amends, affording them significant life skills development and personal empowerment opportunities, and a real chance of turning their lives around and steering clear of further criminal activities

- Offenders who are afforded the opportunity of benefiting from NCS will also be in a position to continue their education or work, and not become an additional burden on society
- Heads of households/breadwinners will be in a position to continue supporting their dependants
- Young and impressionable offenders will avoid exposure to hardened criminal elements in prison, a highly significant preventative factor in curbing the spiralling cycle of crime
- The greater utilisation of more appropriate sentencing methods will result in significant reduction in the workload of the formal justice system and result in concomitant cost savings to the state

## 5.4 Restorative Justice Centre (RJC)

Restorative Justice Centre is a civil society organization that promotes restorative justice and provides services to victims of crime as well as offenders. The organization was founded in 1998 (RJC, 2012). The Victim Offender Conference is one of RJC's programmes as described below:

### 5.4.1 Victim Offender Conference (VOC)

VOC programmes were among the earliest restorative justice initiatives. These programmes are designed to address the needs of crime victims while insuring that offenders are held accountable for their offending. The programmes can be operated by both governmental agencies and non-governmental organizations, such as RJC, and are generally restricted to cases involving less serious offences. Referrals may come from the police, prosecutors, the courts and probation officers. The programmes can operate at the pre-charge, the post-charge/pre-trial and post-charge stages, and involve the willing participation of the victim and the offender. The programmes can also offer a pre-sentencing process leading to sentencing recommendations. When the process takes place before sentencing, the outcome of the conference usually is brought back to the attention of the prosecution or the judge for consideration. The victim-offender conference process can also be used successfully during the offender's incarceration and can become part of his or her rehabilitation process even in the case of offenders serving long sentences. According to earlier research, the positive impact on recidivism is higher when restorative justice is used for serious offences than for less serious crime (Walgrave, 2009).

## 5.5 Khulisa

Khulisa is an international non-governmental organization established in 2007 with a range of different programmes inspired by the principles of restorative justice. They have a vision of a safer, healthier and more prosperous South Africa, where all people, especially youth, have access to the information, skills and opportunities they need to contribute to development. They use the elements of restorative justice that combines their community development and reintegration programmes with peacemaking and conflict resolution (Khulisa, 2012).

### 5.5.1 Community Development and rehabilitation programme

The programme has dealt with mainly serious crime and, pre and post release offenders. Facilitated dialogue brought together victims and offenders, offenders and their families, victim's families and offender's families, offenders and their communities and numerous other combinations. Conflict resolution is an element of restorative justice that creates a safer space for people to address misunderstandings and differences in a productive non-adversarial manner. Khulisa uses community mediation and negotiation, as the most commonly used processes of conflict resolution. Their programmes are located in Orange Farm, south of Johannesburg, and in Mitchell's Plain, outside Cape Town (Khulisa, 2012).

## 5.6 Alternative Dispute Resolution (ADR)

ADR and restorative justice have been introduced in many jurisdictions over the past decades with a view to deal more effectively and efficiently with growing caseloads in the justice system, and to improve citizens' access to justice. While the possibilities for restorative justice under national laws and procedures remain limited, many States have introduced systems for ADR according to international standards with considerable success (UNODC, Training Manual on ADR and RJ, 2007). In South Africa the Department of Justice and Constitutional Development (the DOJ&CD) defines ADR as the disposal of disputes outside of formal court proceedings, and the approach does not necessary include elements of restorative justice.

## 6. THEORETICAL CONCEPTS

To enhance a wider transnational perspective I chose a theoretical framework based on a new way of thinking around crime and criminality. To study young people in conflict with the law from a restorative justice approach it is persuasive to use theories explaining "what causes crime", however the study search to understand the impact of crime rather than the cause. The dominant crime theories that often are used to explain the cause of crime are Social Control, Social Learning and Stain theory. Although, the importance of explaining the cause of crime should not be dismissed, however in the alternative approach to the criminal justice system I decided to use the following theoretical framework; Braithwaite's Reintegrative Shaming Theory, with the essential argument that the precise ways in which society, communities and families sanction deviance affect the extent to which their members engage in predatory criminal behaviour, with the key variable of shaming. The second relevant theory when examine restorative justice is the Empowerment Model. It is based on unified and critical philosophy of conflict resolution that makes empowerment central. It determines the respond to criminal acts rather than explain what causes it. The chapter begins with Zehr's (the developer of the phrase "restorative justice") theoretical concept of restorative justice.

## 6.1 Zehr's Concept on Restorative Justice

In 1990 Zehr minted the phrase "Restorative Justice" to detain the essence of the non-comprehensive justice practice. According to Zehr, crime is a violation of people and relationships. It creates obligations to make things right. Thus, justice involves the victim, the offender and the community, in a search for solutions which promote repair, reconciliation and reassurance. The restorative justice movement began as an effort to rethink the needs and roles implicit in crimes. There was a concern that the needs were not being met in the usual justice process. Also a concern that the understanding of legitimate participants or 'stakeholders' in the justice process were too restricted. Zehr explains the movement of RJ as expanding the circle of stakeholders, beyond the government and the offender to also include victims and community members. The needs from victims are often: *Information*, they need answers about the offence and why it happened. They need 'real' information and not speculations, often this stage requires direct or indirect contact with the offender. *Truth-telling*, an element of healing the experience of crime is to tell their story of what happened. It is often important to tell the story to the ones who caused this harm and to have them understand the impact of their actions. *Empowerment*, victims can feel that control has been taken away from them, over their property, their body, their emotions or their dreams. To be involved within the justice process can be important in gain or return a sense of empowerment. *Restitution*, by the offender is often important to the victim as a symbolic statement implied. When the offender make the effort to make right the harm it is a way to take responsibility. It also includes the basic need of vindication when we are treated unjustly. The needs for the offender are often: *Accountability*, which encourages empathy and responsibility, addresses the resulting harms and transform shame. *Encouragement and support for integration into the community*, includes opportunities for treatment for addictions and/or other problems. To be able to heal the harms that contributed to the offending behaviour and also enhancement of personal competencies. *Encouragement and support for integration into the community and temporary restraint.* Community need from justice: *Attention to their concerns as victims.* The opportunity to build a community with mutual accountabilities. *Encouragement* to take on the their obligations for the welfare of their members, including victims and offenders, and for the conditions that promote healthy communities. Community often want *assurance* of not to repeat the same and preventative actions. Criminal justice system focus around making sure offenders get what they deserve while RJ is more focused on needs, the needs of victims, the need of communities, the needs of offenders (Zehr, 1990).

The principles of RJ are based on traditional understanding of wrongdoing that crime is a violation of people and of interpersonal relationships. That violation creates obligations and the central obligation is to put right the wrongs. Underlying is an assumption of the society as we are all interconnected. Many traditions have said that the harm of one is the harm of all. However, wrongdoing is oftentimes a symptom of that something is out of balance in the society (Zehr, 1990).

*"When things are out of balance, fear an insecurity results. The community needs the restoration of peace and security and preventative measures for the future" (Zehr, 1990:18).*

To translate RJ into criminal justice system terms for the understanding of crime there are different approaches. In criminal justice the views are: Crime is a violation of the law and the state, violations create guilt, justice requires the state to determine blame (guilt) and impose pain (punishment) and the central focus are offenders getting what they deserve. In RJ the views are: Crime is a violation of people, violations create obligations, justice involves victims, offenders and community members in an effort to put things right. The central focus is victims needs and offenders responsibilities for repairing harm. According to Zehr the different approaches come down to three central questions in the criminal justice system; What laws have been broken? Who did it? What do they deserve? In the restorative justice system the three central questions are: Who has been hurt? What are their needs? What obligations are these? According to Zehr (1990) there are five principles that are essential for restorative justice;

1. Focus on harms and consequent needs (victim, communities and offenders);
2. Addresses obligations resulting from those harms (offenders, families, communities and society);
3. Uses inclusive collaborative processes;
4. Involves those with a legitimate stake in the situation (victims, offenders, families, community members, society); and
5. Seeks to put right the wrongs.

The key elements of restorative justice are to put solutions into hands of those most affected by crime. Make justice more healing and ideally, more transformative to reduce the likelihood of future offence (Zehr, 1990).

## 6.2 Shaming Theory

In Braithwaite's book, Crime, Shame and Reintegration from 1989, he argued that disapproval or shaming is carried out in a reintegrative manner. As opposed to stigmatization can decrease offending behaviour basically because of its superior moralizing qualities. The theory's main argument is that the communication of disapproval is of importance to understand the effect that criminal justice actions have on the later offender behaviour of individuals. Braithwaite distinguishes among two forms of disapproval that is stigmatic in nature. Disapproval that is reintegrative in nature is carried out in a respectful and healing manner. Disapproval of an act is communicated with respect with special effort given to labelling and to expiring disapproval with rituals and forgiveness or reconciliation. He further predicts that reintegrative forms of shaming will result in less reoffending (Murphy & Harris, 2007). This prevents the shamed individual from adopting deviant behaviour and is accomplice when shaming. Hay (2001) explains bonds of love or respect between the person being shamed and the person doing the shaming and that it is rather the evil of the act than the evil of the person. She further explains that in a context of general social approval it is

terminated with gestures of forgiveness. Disapproval that are stigmatic on the other hand involves communicating disapproval of a person with disrespect, in which offenders are labelled with outcaste identities, with no rituals to determinate disapproval. The theory predicts that this type of shaming results in greater levels of reoffending (Murphy & Harris, 2007). Hay (2001) mentions that little or no effort is made to forgive offenders or affirm the basic goodness of their character. She further states that stigmatization threats offenders as outcasts and provokes a rebellious and criminal reaction from them. Braithwaite mentions that this makes criminal subcultures more attractive because these are in some sense subcultures which reject the rejectors (Hay, 2001).

Braithwaite describes shaming as affecting offenders' subsequent tendency to reoffend because it is a deterrent has moralizing qualities that build the offenders own sense of conscience which involves shame-related emotions. Shame-related emotions play an effect of reintegration or stigmatization on subsequent compliance (Murphy & Harris, 2007). However, individuals respond or manage shame differently and the way in which the emotion is managed has important implications for future behaviour. One way of managing shame is through acknowledgement of the emotion thus this respond is associated with empathy for victims including less anger and less objectification of blame. Because it is more likely to promote acknowledgment of shame by offenders, Braithwaite suggests that reintegrative shaming results in lower offending (Murphy & Harris, 2007).

Murphy & Harris (2007) discuss in contrast that it is argued that stigmatic shaming is less likely to evoke acknowledgement of shame in an offender because it serves to humiliate an individual. Individuals are more likely to externalize blame for what has happened and are more likely to direct anger towards the entity expressing disapproval. Braithwaite argues that those feelings of hostility increase noncompliance exhibited by the offender in the future.

Shaming has proven to an effective way in dealing with changing behaviour, Braithwaite refers to a growing number of empirical studies to address a variety of contexts. It was found that high levels of disapproval coupled with high levels of forgiveness and respect produced greater increases in compliance. The relationship between reintegrative shaming and compliance, feelings of shame were found to have a large deterrent effect on intention to offend in the future. Another interesting founding that Braithwaite mentions is that the perception of having been stigmatized by the court process was strongly associated with feelings of shame and humiliation. These feelings of shame had often implications for the individuals' sense of identity and were transformed into feelings of rage and hostility. With this consistent, Braithwaite theory has shown that there is a relationship between stigmatization, unresolved shame and anger. However, stigmatizing forms of disapproval increase recidivism while reintegrative forms of disapproval reduce recidivism (Murphy & Harris, 2007). Therefore it is a negative relationship between the use of reintegrative shaming and the level of criminal behaviour. Individuals who are exposed to reintegrative shaming should commit fewer crimes which mean that communities with high levels of reintegrative shaming should have low crime rates (Hay, 2001).

Societies with structural conditions that weaken communitarianism and in which stigmatizing shaming of deviance is practiced, provides an ideal breeding ground for deviant subcultures and high levels of predatory crime. On the other hand,

societies benefiting from structural conditions that support reintegrative shaming are expected to reduce these two outcomes (Schaible & Hughes, 2011).

## 6.3 Empowerment Model Theory

Empowerment is a context that links individual strengths and proactive behaviours to social policy and social change. The theory links individual well-being with the larger social and political environment. The construct connects mental health to mutual help and the struggle to create a responsive community. Empowerment suggests that participation with others to achieve goals and the efforts to gain access to resources and critical understandings of the socio-political environment are basic components of its construct (Perkins & Zimmerman, 1995). Furthermore, Perkins & Zimmerman (1995) urge that theories of empowerment include both processes and outcomes. Actions, activities and structures can be empowering and the outcome of such processes result in a level of being empowered. However they mention the distinction between empowering processes and outcomes as critical in order to clarify the concept. Empowering processes for individuals may include participation in community activities. At the level of organizations, empowering processes may include collective decision making and shared leadership. At a community level, empowerment processes can include collective actions to access government resources, as an illustration. Hence empowered outcomes for individuals can include specific perceived control and resources of mobilization skills. Organizational outcomes on the other hand can include development of organizational networks, growth and policy acquirements (Perkins & Zimmerman, 1995).

Burton (2000) articulates that the fundamental difference between conventional and restorative justice determining the just and fair response to crime is empowerment. To empower the key stakeholders when crime has occurred contribute to resolve the matter in ways that are right and meaningful for them.

Accoring to Hur (2006) empowerment is multidimensional in the sense that it occurs within sociological, psychological, economic, political dimensions and at individual, group, and community levels. Empowerment is a social process since it occurs in relation to others Hur (2006) continues. Empowerment has been a critical issue in social work. Usually disempowered groups gain influence when power relates to economic development. Poverty should be seen not purely in material terms, but as social, political, and psychological powerlessness. Empowerment has two terms; first mobilizing the poor and then transforming their social power to political power. According to Hur (2006), people in need can alleviate their poverty by mobilizing themselves for political participation on a broader scale; poverty is seen here as a form of social, political, psychological disempowerment (Hur, 2006).

Individual disturbances and/or social disturbances induced by powerlessness can cause social disturbances surrounded by psychological and social pathologies, such as disadvantages, oppression, alienation, and stratification. One stage of empowerment according to Hur (2006) is the process of *conscientizing*, meaning that people have to gain an awareness of their limited power and the potential to change the circumstance. Conscientizing is a process to rise awareness of how

social and political structures affect individual and group experiences and how this contribute to personal or/and group powerlessness. Within the process, Hur (2006) continues, people in general understand the social stratification and oppression and strengthen their power by develop necessary knowledge for change. However stratification relates to the way in which human groups in society are differentiated from one another and are placed in a hierarchical order. Powerlessness relates to the inability to manage emotions, skills, knowledge, and material resources in a way that will lead to effective performance of valued social roles and personal gratification. Empowerment can reach a point when people feel able to utilize their confidence, desires, and abilities to bring about "real change." Maximized human empowerment can be practiced at the final stage to overcome social oppression and achieve social justice (Hur, 2006).

# 7. RESULT AND ANALYSIS WITH DISCUSSION

The qualitative data was organized by using different category themes to make sense of the data. Throughout the analysis some common themes were identified related to the research questions for the study: Benefits and risks of restorative justice (interventions, cultural relevance, and effectiveness) Youth in conflict with the law (recidivism and reintegration of offenders) and a trans-national perspective (international laws and standards and national laws and standards). In this chapter result and analysis of the data are teamed together with the discussion for an enhanced overview.

## 7.1 Benefits and Risks of Restorative Justice

In the introduction of the paper restorative justice was explained as yet vague and the need for more clarity was sought after. According to Skelton & Batley (2008) a network of civil society organizations implemented guidelines of restorative justice programmes in South Africa in relation to the criminal justice system with standards developed from international literature wherefrom the definition of restorative justice is clear. Bezuidenhout (2007) stated that despite the ongoing research there is no consensus amongst scholars regarding the meaning of restorative justice. There were, however no doubts of the definition recognised by NICRO and Khulisa (Interviews, 2012), they are using international standards to define the concept within their organizations. With regards to the definition of restorative justice RJC (Interview, 2012) expressed:

> *"I think that the definition itself is quite technical, so I think for me the definition is less important. Obviously it is important, but for me it is more about the understanding of restorative justice"*

Three important aspects of restorative justice according to RJC (Interview, 2012) are:

First-  *"RJ is an approach; a philosophy and a way to think about justice and crime."*

Second-  *"RJ processes is to bring parties affected by the crime together."*

Third-  *"Interventions that contain restorative justice elements are based on the philosophy and do not necessary have to bring the parties together however it can still include restorative justice. There are different programmes that cover different elements of restorative justice. In certain cases you might not bring the victim and the offender together, however, in those cases you talk about the victim in the process."*

For those supportive of restorative justice various advantages are raised that originate from the direct involvement of the victim and the offender in the process. The organisations interviewed mentioned high levels of victim satisfaction through meeting the offender. NICRO (Interview, 2012) highlighted that the criminal justice system is more focused on the offender and not the victim. The study showed that through a restorative justice approach the satisfaction for the victim increases. There have been arguments of the risk of a victim getting re-traumatized after meeting the offender. According to Braithwaite's (2007), some victims of crime are worse off and are re-victimized when going through a restorative justice intervention. The same research showed, however that the reduction of victim's fear of re-victimization appeared to be twice as common. The organisations interviewed mentioned the importance of preparing the victim for the process. NICRO (Interview, 2012) went on to clarify that the process is not for the offender, it is all about the victim's participation. It is significant that the victim's participation in the process is voluntary, and without the victim's participation there is no true restorative justice process taken. Rehabilitation is seen as offender focused, the organisations clarified that in a restorative justice process, the victim is at the centre of the process and the offender must ultimately be held accountable. Both the victim and the offender need to be prepared for the process. It is accepted that the offender in certain cases needs assistance to take responsibility through therapeutic approaches or group interventions. Even if the process of restorative justice reduces victim's fear more than it gains, it seems like the whole procedure need to offer more comprehensive support to victims. According to NICRO (Interview, 2012), two significant mechanisms regards to restorative justice are:

*"You need to have the victim educated on restorative justice and you have to educate the perpetrator who is in conflict with the law."*

Many victims may think of meeting the offender as threatening, and may not feel able to face them directly. The current court process with its formality and courtroom rituals may be foreign to them, however it may be a more comfortable environment for victims who require distance from the offender and the desire of minimal involvement in the criminal justice system. According to Zehr (1990), victims' needs in a justice process are often associated with empowerment. As a result of the crime committed victims may feel that control has been taken away from them, over their property, over their body, their emotions or their dreams. To be involved in a justice process can be an important step to gain or return a sense

of empowerment (Zehr, 1990). The empowerment model states that to strengthen an individual's power the individual needs to develop necessary knowledge for healing to occur (Hur, 2006). A restorative justice process supports the victim to develop necessary knowledge to achieve social justice.

## 7.1.1 Interventions

Restorative justice is both backward looking and forward looking. Backward looking, as it searches the cause of the conflict. According to RJC (Interview, 2012), it is importance to look at what caused the crime in the first place, and then addresses those factors before sentencing. Restorative justice is forward looking as it seeks to understand the implicit elements of the crime with the aim of preventing re-offence and promoting reintegration of offenders. RJC is convinced of the advantages of using restorative processes at a pre-trial, pre-sentencing or post-sentencing stage. According to RJC (Interview), restorative justice is not only an alternative to the juvenile justice system, but also useful in informing the sentencing and the pre-release stages. Khulisa (Interview, 2012) mentioned their mediation programmes as pre-stage interventions; focusing on solving conflicts or disputes at schools through elements of restorative justice.

Alternative Dispute Resolution (ADR) and restorative justice have been introduced in many jurisdictions over the past decades with a view to deal more effectively and efficiently with growing caseloads in the justice system, and to improve citizens' access to justice. While the possibilities for restorative justice under domestic laws and procedures remain limited, many States have introduced systems for ADR according to international standards with considerable success (UNODC, Training Manual on ADR and RJ, 2007). According to RJC (Interview, 2012) there is an ongoing debate about the definitions of restorative justice and ADR and whether there are differences between the two approaches. The concepts came from different times of departure. RJC (Interview, 2012) explained that restorative justice can be understood as a more philosophical approach, a particular understanding instead of simply a process of resolving conflicts. ADR came from a different history, from conflict resolution with aims to resolve conflicts from court through mediation. According to RJC (Interview, 2012), the use of ADR in resolving particular cases is common, thus it is seen as restorative justice. The South African national policy framework (DoJ&CP, 2012) has tried to clarify and identify the differences with the outcome that restorative justice is a process used when crime has been committed. ADR on the other hand is a conflict resolution and, often used before the crime is committed. According to RJC (Interview, 2012), this is one way to look at it however not necessarily the only way. Khulisa, (Observation, 2012) with great experience in restorative justice and ADR in practice explained the differences in a way that ADR is a "quick fix", when the offender pays a fine, etc, while restorative justice takes into consideration the needs of all stakeholders in the process.

Restorative processes benefit the community by resolving relationships between individuals and directing the control of crime within the community. According to Zehr (1990) the community needs encouragement to take on their obligations for their members. NICRO and Khulisa (Interviews, 2012) have community programmes that educate community members on restorative justice principles. A

large number of individuals, however, cannot be actively involved in the process, and decisions about who should participate in addition to the offender and the victim have to be taken. A concern with the process of restorative justice is if the family and the community have contributed to the offending problem.

The prosecutors' ability to assess decision making of a legislative framework for alternative sentencing can be a risk. The South African Law Commission (ZALC, 2012) highlights diversion as ineffective since the prosecutors' are not specialized for this type of assessment. According to RJC (Interview, 2012), one of RJC's most important roles is to assess and support the court by advising the court about sentencing. A discontent with restorative justice seemed to be the lack of information. According to RJC, South Africa has a good framework for restorative justice although the problem lies in the implementation stage. The challenge is to ensure that practitioners' including police, court personnel, and those dealing with youth offenders in particular, are trained to recognize the value of restorative justice and make use of the available options (RJC, Interview, 2012). Although some restorative applications, like diversion, are implemented in the South African court system, communities and practitioners still need education on its use. The lack of training and information were illustrated from the qualitative data, both in the justice system, and by the receivers of restorative justice interventions. According to NICRO (Interview, 2012) the process of restorative justice intervention is a rich process and the need for professional manpower significant.

## 7.1.2 Cultural Relevance

Restorative justice brings back a piece of power to the people in democratic forms. Former South African Judge, Justice Sachs, stated that the approach keeps up with the African notion of Ubuntu (ZALC, 2012). Ubuntu is based on respect and understanding between people. The expression is not a criminal justice term, but rather a determining factor in the formation that influences social society. The positive values of Ubuntu have influenced the development of South African legal institutions and procedures with values in relation to restorative justice values. If restorative justice is a specific type of response to crime, Ubuntu is much more. Both centres on restoring an imbalance created by someone's behaviour and to build peace in communities. The notion of Ubuntu is related to a restorative approach on wrongdoing. Zehr (1990) discussed the fundamental assumptions of principles and argued that conflicts can be a constructive experience of mutual needs, therefore satisfaction is reached by increasing the capacity of individuals, groups and nations to meet the needs of self and others. The elements of restorative justice are similar, despite religion, culture or traditional beliefs, offences involves harm and harms imply obligations, thus justice processes should seek to "put things right" by addressing hams and causes of crime. This process includes all stakeholders affected by the crime. The fact that restorative justice is based on fundamental and democratic grounds makes it possible to implement in all societies and in all cultures. Restorative justice has roots in the world's religious traditions. In the world today, religion is often seen as a source of conflict. Religion, however, offers the promise and practice of peace through their teachings.

Restorative justice is promising as it draws upon traditional and cultural values with the possibility to build a far more accountable, understanding and healing criminal justice system. Its initiatives strengthen communities through active victim and citizen participation. Programmes have enhanced victim satisfaction, in a process that was rather unsatisfactory. Without all stakeholders participating in the process, however, restitution cannot occur. To encourage offenders to take responsibility for their actions and to repair the harm they have caused is of utmost importance for restorative justice to be effective. During observation (1) the significance of professional facilitators was noticed. These facilitators, encouraged restitution throughout the progress of disputes. The specific case observed resulted in restitution, since the facilitators were extremely professional.

## 7.1.3 Effectiveness

Another discussion brought up in the paper is in what type of crime the effectiveness of restorative justice intervention is most explicit. Some researchers stated within less serious crimes, and others in serious crimes. According to Walgrave (2009), positive impact on recidivism is higher for serious offences. The interviews illustrated that restorative justice programmes can be used in all forms of crime, however, the best effect is within serious crimes, such as; murder, rape and armed robbery. NICRO stated that the most difficult cases are within domestic violence. Less serious crimes as stealing and shoplifting can also be difficult to deal with as there is not "one" victim, and the "victim" may be a shop. In those cases the elements of restorative justice encourages the offender to take responsibility for his actions and to assist towards restitution, for example in the form of handing over a letter of apology (NICRO, Interview, 2012). NICRO stated that most of the cases they receive from the court are around less serious crimes when the use of alternative concepts are relevant, such as; diversion to a programme or non-custodial sentencing, as common interventions. To be critical of recidivism, however, is of significance in measuring the effectiveness of restorative justice. According to Zehr (1990), restorative justice is not meant to reduce recidivism, recidivism reduces as an expected outcome. OSF-SA (2010) reported on an absence of an agreed definition of reoffending and the difficulties into measuring success, they argued that clarification of the term "recidivism" is needed.

Restorative justice is well developed in South Africa, however, the government has a national framework policy to take the movement further and increase its role in the justice system. RJC (Interview, 2012) mentioned the positive development of restorative justice, but expressed implementation as the main problem. The high crime rate in South Africa and the high number of young people committing crimes, and exposed to crimes, has had an impact on the transformation of restorative justice in South Africa.

Restorative justice obtains various meanings. Some definitions centre on the elements of restorative justice and some with the idea that crime causes harm and justice therefore should promote healing. According to Van Ness (2010), the term is positive and the process encouraging, regardless of how the term is used. According to international standards, restorative justice is necessary to promote human rights for young people in conflict with the law. The movement of

restorative justice seemed to be in practice much ahead of theory. The movement began from the concern that the needs were not being met in the usual justice process, with the concern that the stakeholders in process were to restrict (Zehr, 1990).

## 7.2 Youth in Conflict with the Law

The discussion in this section illustrates findings on youth in conflict with the law, youth and recidivism and discussion of reintegration of offenders.

According to Zehr (1990), wrongdoing is often a symptom of something that is out of balance in the society. Youth are more vulnerable to end up in conflict with the law as presented in the study, and more at risk for a criminal behaviour. The data explicitly showed that restorative justice has grown in juvenile justice. The philosophy has spread outside the criminal justice system, and according to the interviews there are existing programmes in schools, in communities and in correctional facilities with elements of restorative justice. The organizations interviewed expressed the knowledge of restorative justice as significant, not only with regards to the offender and the victim, but to educate the community of its effects. From the organizations community interventions the responses are positive regards to restorative justice. Community members received support from trained mediators in solving domestic issues in a pre-trial stage. Observations showed that mediators dealt with serious crime cases to minor disputes such as; parents to child/youth, peer to peer or neighbor disputes.

While collecting the data in South Africa, this study came across literature focusing on the problematic phenomenon of street children. Government tend to ignore the issue rather than engaging with the causes and the needs for solutions. Street children are often targeted in connection with crimes in the region, and those that do commit crimes are the forgotten souls of the criminal justice system. According to Sloth-Nielsen & Gallinette (2004), a pilot project in Kenya diverted 61 children, none of these children were offenders, but they were homeless and victims of neglect. As a result, 46 children were reunited with their parents, 10 children were sent to government rehabilitation schools and 5 children were sent to a NGO actively involved in the rehabilitation of children living on the street. The interesting part about the project is that diversion is used mainly to support the child welfare system, rather than the criminal justice system. Many children, who are seen as being in conflict with the law are in fact children in need of care.

The organizations interviewed had ongoing restorative justice programmes targeting youth in conflict with the law or at risk to get in conflict with the law. Khulisa (Interview, 2012) mentioned their work accordingly to the Child Justice Act as:

> *"We divert them out of the criminal system so they don't land up in the criminal system and get a criminal record, according to the act"*

NICRO also had programmes targeting youth with special needs, such as sex-offender programmes. Through observation (3-4) one important finding was the lack of knowledge among the participants. One impression was that, in three out

of four of the observed programmes the participants (clients) did not understand the wrongdoing or the crime they were charged with. The facilitator therefore explained the crime they were charged with before a restorative justice intervention could even begin. Restorative justice needs to be implemented throughout the system in practice as a new way of thinking, in order for restorative justice interventions to function. NICRO (Interview, 2012) expressed their everyday work as an intention to raise awareness of restorative justice, as necessary for its movement.

The data from youth in conflict with the law expressed the number of children deprived of liberty in South Africa and the rest of the world as high. According to international standards, incarceration should be the last resort for young people. CRC actively discourages retributive responses while focusing on the need to avoid deprivation of liberty. Still a large number of youth end up in imprisonment. The movement of restorative justice promotes a new way of implementing justice, as an alternative to the criminal justice system. The empirical data clarified that penal justice does not achieve its claims. The aim with restorative processes is to restore the quality of people's lives and not to enforce public order. According to international standards, restorative justice has enormous potential to reintegrate young offenders back into society.

As a reflection, imprisonment as a response to crime is used as a short-term control, however to integrate restorative justice as an alternative approach leads to ensuring both short-term control and long-term control. The use of both strategies might be the most effective way in dealing with justice. Sending offenders to prison for a period of time, however, does little, if anything, but to understand the impact of crime is significant to meet the needs of those affected in the process.

It is a common result that an offender leaves imprisonment in worse condition than they entered it. Many are exposed to more dangerous and experienced criminals, and the likelihood for rehabilitation and to change behaviour is limited (OSF-SA, 2010). NICRO explained a case when a first time youth offender was put into a restorative justice programme instead of imprisonment (Interview, 2012):

> *"He is a first time offender/.../don't sentence him and give him a criminal record/.../you know what is going to happen with a child with a criminal record? They cannot go overseas, they cannot find jobs and every time they have to write that they have a criminal offence/.../let us look at alternatives."*

### 7.2.1 Recidivism

Recidivism is simply when a person who has committed a crime does it again. Restorative justice introduces elements of crime prevention with efforts to identify how to avoid future incidents. The standard criminal justice approach aims to disenable and punish the offender as a strategy to avoid future crime through imprisonment. Restorative justice presents an alternative approach to the punitive system, meaning that stakeholders in the crime look at implications for the future

and are supported to address strategies to avoid further incidents. The biggest challenge with restorative justice has been to assess its effectiveness. Empirical data presented by Braithwaite (2007) discussed if it could be too early to make the determination about restorative justice's overall effectiveness, regarding crime reduction. The discussion, however, raised the new way of thinking around justice is important for the development of restorative values and principles in current treatment and rehabilitation approaches.

According to Braithwaite's Shaming Theory from 1989 (Murphy & Harris, 2007), disapproval or shaming is carried out in a reintegrative manner, and as opposed to stigmatization, can decrease offending behaviour basically because of its superior moralizing qualities. Individuals respond to shame differently, and the way they manage emotions differs, and therefore this has important implications for future behaviour. One way of managing shame is through acknowledgement of emotions, this response is associated with empathy for victims including less anger and less objectification of blame. As a result of being more likely to promote acknowledgment of shame by offenders, Braithwaite stated that reintegrative shaming results in lower offending. According to Braithwaite, shaming has proven to be an effective way in dealing with changing behaviour. It was found that high levels of disapproval coupled with high levels of forgiveness and respect produced greater increases in compliance. The relationship between reintegrative shaming and compliance, feelings of shame were found to have a large deterrent effect on intention to offend in the future. As Braithwaite explained, there might be a relationship between stigmatization, unresolved shame and anger. If stigma increases recidivism, reintegrative forms of disapproval reduce recidivism.

According to the Empowerment Model (Perkins & Zimmerman, 1995) participation with others is necessary to achieve the goals of society. Actions and activities can be empowering while the outcome of such processes results in being empowered. Empowered outcomes for individuals therefore include control and resources of social skills in participating with others. If restorative justice processes are empowered in society it would be possible to reduce crime. All stakeholders in the process, however, must be educated for a restorative justice process to be successful.

Hur (2006) explained the empowerment model as individual and social disturbance induced by powerlessness, and can cause social disturbances influenced by psychological and social pathologies as stigmatization, alienation and stratification. People have to gain awareness of their limited power to be able to change the circumstances. Powerless people must therefore develop necessary knowledge that may help them to strengthen their power for a change to occur. Empowerment can reach a point when people feel able to utilize their confidence and abilities to bring about real change. Restorative justice can empower people to change their behaviour and take responsibility for their actions and make the wrongs right by involving the offender, the victim and the community in the process of justice.

NICRO and RJC (Interviews, 2012) verbally validated that restorative justice programmes prevent further crimes. Khulisa shared proof of statistics indicating

positive effects of restorative justice programmes. From their evaluation, more than 80 percent of the mediation interventions were solved. The organizations stated, however, that it is extremely difficult to evaluate and prove. Both organizations agreed that, especially difficult is to evaluate domestic violent crimes.

## 7.2.2 Reintegration of Offenders

Crime in South Africa is exacerbated by the reality that the correctional system generally fails to adequately prepare prisoners for a crime-free life when they are released.  Repeat offending by ex offenders thus contributes substantially to the high crime rate in the country (Skelton & Batley, 2008).  Offender reintegration is a necessary component of crime prevention. It seeks to support offenders while they are incarcerated and after release in becoming productive, law abiding citizens. Offender reintegration should, commence from the moment an offender is sentenced to imprisonment, and imprisonment should be understood by the state and society as serving to not only punish an offender for his crime, but also to provide him with opportunities to integrate appropriately into society (reintegrate).  Failure to accept these as the purposes of imprisonment may have profound negative implications for community safety.

One alternative concept subscribing to the rights and principles contained in the CRC is reintegration. In Braithwaite's Shaming Theory from 1989 (Murphy & Harris) the victim and the community share a responsibility to support the offender in the reintegration process. At various levels offender rehabilitation and their reintegration back into the community form an essential aspect of restorative justice. To be able to reduce recidivism an integration process that supports the offender must occur. According to the Manual for Measurement of Juvenile Justice (UNODC, 2006) one of the objectives of restorative justice is to facilitate offender reintegration. Crime causes injuries and is a violation of people and of interpersonal relationships (Zehr, 1990). Braithwaite's shaming theory states that the victim and the offender can experience stigmatization. As a result it would seem that according to restorative justice all parts affected by the crime become whole. Therefore reintegration transpires when the victim and the offender can become productive parts of their communities. Reintegration is an important part of restorative justice, RJC (Interview, 2012) stated:

> *"Our general focus is to promote RJ as an offender reintegration intervention."*

The interviews showed that the organizations actively work within the communities to educate and teach community members about restorative justice. Here, the aim is to promote successful reintegration as an important stage in restorative justice. The restorative responses to crime seek to mobilize persons and the communities concerned around the offender to promote resolution and restitution as a process of reintegration. Therefore restorative justice responses to crime attempts to break the cycle of crime, heal broken relationships, and offers a holistic approach for peacemaking in communities.

## 7.3 Trans-National Perspective

The movement of restorative justice brings together disciplines and views from around the globe, and occur through many different models and practices. As a major social movement it has achieved great strides in a relatively short period of time. The philosophy of restorative justice cannot only be adapted into another country or society. It is through common moral and values the core of restorative justice can occur with the aim of ensuring effective reintegration and prevent further crimes. Zehr (1990) stated that restorative practices can be used in all types of conflicts, national as international. The United Nations is one of the largest and most politically reliable organizations promoting the restorative justice movement internationally. CRC stresses the importance of incorporating a rights consciousness into juvenile justice. In 2002 the UN (UNODC, 2002) formulated the basic universal principles of restorative justice and many jurisdictions worldwide have now begun to experiment with restorative justice. The organizations interviewed stated that the restorative justice definition they use was identified in international standards. According to Skelton & Batley (2008) a network of civil society organizations in South Africa developed standards to guide the implementation of the restorative justice process through the review of international literature.

### 7.3.1 International Laws and Standards

One of the aims with the study was to examine what international laws and standards currently exist to support restorative justice. CRC (1990, article 40) actively discourages retributive responses and views deprivation of liberty as a last response to crime. The United Nations Basic Principles on Restorative Justice Programmes in Criminal Matters was developed by the Economic and Social Council to protect the human rights of victims and affected parties in of crime. The purpose was not to make the initiatives mandatory, but rather to assist member states in the process of crime and increase the effectiveness of restorative justice. In 2006 UNODC provided a Handbook on Restorative Justice Programmes to support member states in the implementation stage. Even as far back as 1985, the Beijing Rules (article 1.2) actively advocated for member states to develop alternative strategies for juveniles with deviant behaviors.

The integration of an international legal framework is offered as a bridge over the obstacles faced by practitioners on a national level. Integrating restorative justice and young people's human rights through a trans-national approach based on international laws and standards encourages practitioners on national and international levels. These standards, however, should not lose flexibility so that they can be appropriately adopted to local realities.

### 7.3.2 National Laws and Standards

South Africa has developed a National framework on Restorative Justice. The interviews showed that the concept is defined through international standards and implemented in the South African juvenile system. As the paper showed the South African legislature has defined restorative justice twice before; the first time was in the Probation Service Act in 1991, and the second time in the Child Justice Bill

that was sign into law as the Child Justice Act in 2009, and came into force in 2010. The cluster of Justice, Crime Prevention and Security has agreed to adopt a framework to promote restorative justice approaches as a result of the fact that the state is looking to dealing with crime in a more coordinated manner.

Although South Africa has a national framework on restorative justice, the problem lies in the implementation stage. RJC (Interview, 2012) explained:

> *"There is a real opportunity that we actually have a National Framework, but the problem is to implementation it. We don't have an implementation plan for the framework yet."*

Against a well documented framework of international experience and analysis, restorative justice has emerged visibly in South Africa. This emergence has been both in practice and in jurisprudence. With regards to sentencing, the concept offers new insight and has received recognition in the courtrooms of South Africa.


# 8. CONCLUSION

In a general criminal justice system, when a crime is committed, two primary questions are asked: 1, who was the perpetrator? 2, what justice measures should be imposed on the perpetrator? Restorative justice offers an alternative way to understand the impact of crime and the needs of the parties affected; the victims, the offenders and the communities' needs. One reason the movement of restorative justice has had such recognition in various parts of the world is that it empowers all parties involved in crime. Regardless ethnical or cultural relevance, the principles of restorative justice are that violation creates obligations, with the central obligation being to put right the wrongs. For change to occur individuals need to seek knowledge to become aware of their actions and what harm those actions caused other people. Restorative justice interventions support people affected by crime by empowering the victim, reintegrating the offender and educating the community. Restorative justice puts the victim at the centre of the process, and endeavours to make the offender take accountability. It was said earlier in the paper that restorative justice carries many different perceptions, however, South Africa demonstrated its clarity on the concept by defining the term in its National Framework Policy based on international standards. The UN Basic Principles on Restorative Justice was developed with the aim to protect the human rights of victims and affected parties in the process of crime. UNODC developed a Handbook on restorative justice and clearly defined its programmes and its processes. These international standards are not mandatory, however, rather guidelines for the implementation of restorative justice interventions. International standards encourage the movement of restorative justice. According to international law, imprisonment should be the last resort for children and juveniles in conflict with the law. CRC actively promotes alternative concepts for ensuring justice.

How society should respond to wrongdoing is debatable. The policy of criminal justice, however, must move away from a dimensional approach to promote

fundamental human rights that encourage reparation, rebuilding and reintegration, as well as endeavour to emphasise the needs of the victim, the offender and the community. For best practice, restorative justice should therefore complement rather than be an alternative to the juvenile criminal justice system. Restorative justice does promote a new way of doing justice, it is not only implicated as a programme, however, the discussion has demonstrated its effectiveness utilised at all stages of the justice system as an alternative to the juvenile justice system. Restorative justice alongside the justice system offers useful approaches and new insights that have received recognition in a South African context.

One key finding of this paper is that, for offenders participating in a restorative justice process, the risk to commit further crimes reduces. This study also highlighted that the victims' satisfaction increases through a restorative justice process. The risk to implement restorative justice throughout the juvenile justice system, however, is that the process cannot be forced upon a person. Restorative justice must therefore be voluntary to be successful and effective. Without the central role of the victim there is no restorative justice process taken. The movement of restorative justice is therefore in this stage seen as an alternative approach to the current criminal justice system. To follow international standards, elements of restorative justice can offer a compass to adjust the juvenile justice reforms in this direction, and it can facilitate community-based implementations to improve the situation for young people.

The approach to rehabilitation of offenders should at some point confront social service bureaucracies that centre on exclusion, and in the attempt to provide support, actually reduce the prospect for building broken relationships. In regard to this a new intervention paradigm is needed that seeks to discover or reinvent ways for communities to begin to take back the responsibility for youth socialization and offender rehabilitation. Restorative justice seeks to provide more general interventions with possible substantial crime reductions, less stress for victims and lead to more offences brought to justice. The risk, however, is if the family or the community have contributed to the offending problem. If community members and practitioners are not educated in the elements of restorative justice, the risks are that its interventions become ineffective.

Restorative justice does not have to eliminate the traditional justice system but rather seek to reformulate the priority of these goals. The values of restorative justice can exist alongside the traditional goals of the juvenile justice system. Restorative justice would in practice, however, challenge the traditional retributive system that reinforces punishment.

The aims of the study are achieved with the conclusion drawn in respect to restorative justice practices in South Africa. The comparison with international standards likely created reasonably and representative qualitative samples. Indeed, the analysis and the experiences during the study opened up new doors of interest related to restorative justice. Strategies that are used in South Africa do not necessarily exist in Europe and vice versa. Along with international principles and human rights, an interest would be to further discover the impact and the possibilities of restorative justice in practice on an international level. Exchanging experiences can lead to improvement and development of an international

framework for restorative justice, and make it possible for a restorative justice movement to occur.

## *Future outlook*

The challenge with restorative justice lies in the area of implementation. More research is needed for restorative justice to be implemented not only as an alternative approach to juvenile justice, but as an introduction to transform the juvenile justice system. One main challenge is to achieve better understanding of the effectiveness of restorative justice and to claim its effects as a response to the criminal behaviour. In this study, the findings from the qualitative data showed the lack of educated manpower in the process, from community members to prosecutors. Empirical research needs to prove its effectiveness and more definitely claim restorative justice as an effective response to criminal behaviour. Information and proof of good practice is crucial for monitoring restorative justice. The question of whether restorative justice is compatible with human rights is largely dependent on the implementation stage. Besides qualitative research, it is important to invest in quantitative research to build up capacity for comparative methods that make it possible to match with data on reintegration and recidivism to measure the features of restorative justice.

Further suggestions for the development of restorative justice are:


- Theoretical- and evidence-based research is needed to enhance the effectiveness.
- Awareness-raising and information campaigns to target, not only the parties in the crime, but various practitioners such as: social workers, NGOs, judicial authorities and law enforcement authorities.

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# APPENDIX 1

**Interview Guide**

1. Explain the definition of RJ?

2. How does the organization work with RJ?

3. How is RJ implemented in the Juvenile criminal justice?

4. What laws and polices support RJ?

5. What are the challenges with RJ?

6. Is RJ and recidivism related?

7. How is restorative justice effective?

8. What types of crimes are most common to use RJ Programmes on?

9. Does RJ programmes reduce victims fear of being re-victimized?

10. How does the organization ensure equal access to RJ programmes?

11. Who are the young people in conflict with the law or at risk in South Africa?

12. What impact has RJ on the community (Ubuntu)?

13. How can RJ support reintegration of young offenders?

14. RJ for the future, what do you think need to be done?

15. Do you think there is a need for further law and policy development?

16. What is the need for a successful RJ movement?

17. What are your views on RJ and crime prevention?