A therapeutic approach to the prosecution and sentencing of “revenge sales”

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LLM: Procedural law

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1.1 Context of the Study:

1.1.1 "Revenge sales" as a form of theft

The prosecution and sentencing of theft cases is a daily occurrence in the South African criminal courts, however there is a niche grouping of theft cases which fall outside the scope of the conventional theft cases. These cases strike at the moral fibre of society as they challenge judges to deviate from the conventional approach of the application of the black and white letter of the law. These cases are known as "revenge sales" and constitute a unique form of theft in terms of which a person sells the property of another, in retaliation for a perceived wrongdoing, usually the property of a spouse or relative, in circumstances which may be described as "the heat of the moment" or in an emotionally charged situation. These types of crimes are a fairly new phenomenon to South African law, however such crimes have been well documented and debated in other foreign jurisdictions and are commonly known as crimes of passion, crimes committed under extreme emotional circumstances which could in some cases create a state of temporary insanity or situation where a person is not of sound mind and judgment.[1] In France, the law recognizes a *crime passionel* as a valid legal defence.[2] Although the *crime passionel* defence in France is mostly associated with the more serious crimes of murder and culpable homicide, the defense relates to any crime in which the accused claims that, due to being consumed by "the heat of passion", they lost their ability to control their actions.[3]

South African law recognizes the role which emotion can play in an accused psychological state and provides, for example, for a defense of provocation in this regard.[4] Although a court may find an accused not to have had a complete defense in

[1] Crimes of passion. Accessed at: Wisegeek.com/whatisacrimeofpassion.htm Accessed 6 June 2015.
[2] Reed, A.2011. *Loss of control and diminished responsibility*. Chapter 13: Provoking a range of responses: The provocation defence. Page 236.
[3] Appignanesi, L. *Trials of Passion: Crimes in the name of love and madness.* Chapter 2:Page 132
[4] The defense of provocation in South African law is probably the most closely related criminal defense but the defense has been mirred in controversy due to a lack of clarity on the precise nature of the defense. The decision of *S v Chretien 1981 (1) SA 1097 (A)* in 1981 had a significant impact on the development of the defense of provocation in South African law. In this case it was held that the pertinent question to be asked is now whether provocation could exclude the basic "elements" of criminal liability in the same way that the defense of intoxication can. A further case which shed light on the traditional approach to provocation was the case of *S v*

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respect of a particular criminal act, the accused's emotional state can still be a factor to be taken into account for purposes of mitigation of sentencing, in the form of a finding of diminished responsibility.[5] A revenge sale or selling goods of another, particularly goods of a spouse, raises an important moral issue, specifically with regards to sentencing, which can be related to other important areas of the law. “Revenge sales” quite aptly illustrate occasions when emotion, irrationality and impulsivity confront the law and as such a different approach to sentencing is often what is required.

This dissertation is based on a case that was discussed on a local radio station about a lady who had sold her husband’s motor vehicle after she discovered that he had been having an affair with her best friend. The husband then laid a charge of theft against the women who was later arrested and sentenced to a term of direct imprisonment. On a brief examination of the facts, it is obvious that a crime has been committed; however, seen within the context of the surrounding circumstances and from a moral perspective, a sentence of direct imprisonment is most certainly not appropriate, perhaps rather excessive. The often complex factual scenarios which

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Lesch 1983 (1) SA 814 (O), where a broader definition of provocation was enunciated to include not only the loss of self-control caused by provocative words or conduct but also some emotional disturbances such as emotional stress. The importance of these judgments is that both cases acknowledge stress or provocation as a relevant factor in assessing an accused’s criminal capacity. The case of *S v Arnold 1985 (3) SA*. 256 (C also considered circumstances under which an accused may lose his capacity to exercise control over his actions and should succeed with the defense of provocation. The aforementioned cases all deal with circumstances where an accused was considered temporarily incapacitated due to severe emotional stress and thus unable to appreciate the wrongfulness of his actions. It is, however, possible that the accused may not succeed with the defense of provocation but that the circumstances might give rise to a finding of diminished responsibility for the purposes of sentencing. Almost all cases of “revenge sales” are preceded by circumstances in which the accused is subjected to severe emotional stress and is temporarily unable to exercise control over his actions. The ultimate question that should be answered in all of these matters is thus whether these circumstances should succeed as a complete defense or should they play a role in a finding of reduced capacity for sentencing purposes. An additional issue in relation to sentencing, as pointed out below, is whether the well-being of the offender (and the complainant) should, in complementing the traditional approach, rather be the point of departure. This approach could be applied within a therapeutic jurisprudence and restorative justice framework and remains the central focus of this study.

[5] The court in *S v Mathe CC 69/2011) [2014] ZAKZDHC 15; 2014 (2) SACR 298 (KZD*) emphasized various considerations in an enquiry as to an accused possible diminished responsibility, amongst others, the pertinent question as to whether the particular circumstances reduced the powers of restraint and self-control of an offender. There is no clear cut line in our law between culpability and non-culpability and as such a broad spectrum of pathological and non-pathological factors may effect an offender’s mental/emotional state at the time of the commission of the offence. In light of the subjective nature of an enquiry as to an accused diminished responsibility the facts in each particular case will thus dictate to the varying degree of blameworthiness.

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surround “revenge sales” allow one to understand that the law is not a body of clear cut rules which can always be uniformly applied to all offences in a specific category.

1.1.2 The importance and function of prosecutorial discretion

The above factual scenario and the discussion on the radio also encourage a discussion on the notion of prosecution versus persecution. South Africa does not follow a compulsory prosecution system and a prosecutor is only obligated to prosecute when there is a prima facie case.[6] The director of public prosecutions has to decide as to whether to prosecute in every particular case and often cases are not prosecuted as it is undesirable to do so.[7] Examples of these particular occasions where there may be grounds not to prosecute include: the tragic personal circumstances of the accused, the advanced or young age of the accused, or a plea and sentence agreement in terms of section 105A of the Criminal Procedure Act.[8] The director of public prosecutions can examine the facts of a particular case and decide that there is no valid reason to prosecute and if criminal sanction were to follow the case would be one of the persecution of the victim as opposed to prosecution. The ultimate goal for the prosecution is not simply to secure a conviction but to ensure that justice is done in every particular case and that members of the public have confidence in the investigative process and judicial system. The decision to prosecute has been quite aptly described by a former DPP as

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[6] Joubert et al.2011. The Criminal procedure handbook: Chapter 3: The prosecution of a crime. Page 69

[7] There have been countless cases in our law where prosecutors have declined to prosecute on this basis. There have been many occasions where fathers have shot their sons or daughters accidentally mistaking them for burglars. The fathers in these cases have undergone enough emotional hardship and a subsequent prosecution would unlikely yield any benefit to the state or to the greater society. The lives of the fathers in these instances have essentially been ruined in a moment of haste and prosecutors would in most instances not pursue the prosecution of these people because it would amount to persecution. The most popular South African case in this regard is the case of “Vleis” Visagie who accidentally killed his daughter mistaking her for a car thief. Visagie was subsequently charged with murder but the charges were ultimately withdrawn. See Gifford, G. 2004. *Visagie can find some Peace* . Accessed at: http://www.iol.co.za/news/south-africa/visagie-can-find-some-peace-at-last-1.219358#.Vii51meKCM8. Accessed 10 September 2015. Joubert et al.2011. Chapter 3: The prosecution of a crime. Page 69.

[8] The purpose of a plea and sentence agreement is to ease the burden on the courts without having to sacrifice the demands of justice. See also The Criminal Procedure Act 51 of 1977.

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'a very valuable safeguard, because one has to take into account… what the consequences to [an accused] may be, apart from any penalty which a court might inflict. If in our view, the consequences are out of all proportions to the gravity of the offence committed, we are permitted to exercise our discretion and decline to prosecute'.[9]

These sentiments are given statutory support in paragraph 4(c) of the *Prosecution Policy* issued by the NDPP in terms of s21(1)(a) of Act 32 of 1998 which states that "once a prosecutor is satisfied that there is sufficient evidence to provide reasonable prospects of a conviction , a prosecution should normally follow, unless 'public interest' demands otherwise". [10]

1.1.3 A therapeutic dimension

A further dimension relevant to this study refers to the concepts of therapeutic jurisprudence and restorative justice. Therapeutic jurisprudence dictates that the operation of the law and its institutions have a significant impact on the wellbeing of all those affected by them.[11] Therapeutic jurisprudence focuses on how the law can or should accommodate crimes which affect the physiological and emotional wellbeing of an individual.[12] The emphasis of therapeutic jurisprudence is to understand how the law and the application thereof can be viewed within the context of the surrounding circumstances and behavioral science.[13]In the case of sentencing, it can often mean that criminal behavior should be viewed in the context of any underlying physiological,

[9] Yutar 1977 SACC 135. Page 136.
[10] NDPP Prosecution policy: Section 21(1) (a) of the Act 32 of 1998.
[11] King, M .2006. "*Therapeutic jurisprudence and the rise of emotionally intelligent justice*". Melbourne university law review. Page 17.
[12] Van der Merwe, I. A. 2010. 'Therapeutic Jurisprudence: judicial officers and victims' welfare – S v M 2007 2 SACR 60 (WLD) Vol 23(1) SACJ 98 - 106 (9)
[13] Nicholson, M. 2008. "*The Impact of Child Labor Legislation on Child-Headed Households in South Africa*". Thomas Jefferson Law Review. Page 407.

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physical, social or economic circumstances dealt with by effective social intervention rather than harsher sentences.[14]

Therapeutic jurisprudence requires judges to look beyond the black and white letter of the law and to acknowledge the impact the legal process and its outcomes may have on all participants' lives and wellbeing.[15] Therapeutic jurisprudence, when applied in the case of sentencing, will allow the court to consider circumstances which are specifically relevant to the individual and rule out factors which would not serve the ultimate aims of sentencing in the judicial system. The case of *S v M*[16] illustrates how the court adopted a more therapeutic approach in assessing the appropriate sentence to impose on the primary caregiver of children. The court made reference to the concept of restorative justice and emphasised the advantages of this type of approach in sentencing in its ability to rehabilitate the offender without the negative impact of prison and the subsequent destruction of the family unit.[17] The court in *S v M* also referred to the South African Law Reform Commissions report[18] which suggested that South Africa incorporate a wider range of community based sentences, including victim-offender mediation and family conferencing, both being prominent forms of restorative justice. Sachs J in the M case also made reference to the suggestion in the South African Law Reform Commissions report that the flaws in South Africa's current

[14] Nicholson, M. 2008. "The Impact of Child Labor Legislation on Child-Headed Households in South Africa". Thomas Jefferson Law Review. Page 407

[15] Van der Merwe, I. A., 2010 'Therapeutic Jurisprudence: judicial officers and victims' welfare – S v M 2007 2 SACR 60 (WLD) Vol 23(1) SACJ 98 - 106 (9)

[16] *S v M (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC).*

[17] See too Pinnock, D. *What Kind of Justice?* University of Cape Town, Institute of Criminology Occasional Paper Series 4-95 (1995), http://web.uct.ac.za/depts/sjrp/publicat/whatknd.htm, accessed on 16 August 2007; Maepa (ed) Beyond Retribution: Prospects for Restorative justice in South Africa Institute for Security Studies Monograph No 111 (February 2005), http://www.iss.co.za/pubs/Monographs/No111/Chap2.htm at ch 2 where Batley points out that although there are a number of definitions of restorative justice, they all contain the following three principles: (1) crime is seen as something that causes injuries to victims, offenders and communities and it is in the spirit of Ubuntu that the criminal justice process should seek the healing of breaches, (2) the redressing of imbalances and the restoration of broken relationships; and (3) not only government, but victims, offenders and their communities should be actively involved in the criminal justice process at the earliest point and to the maximum extent possible; and in promoting justice, the government is responsible for preserving order and the community is responsible for establishing peace.

[18] South African Law Reform Commission. 2000. *A new sentencing framework.* Discussion Paper 82. Pretoria: Government Printer.

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sentencing system can partially be attributed to the imprisonment of offenders for less serious offences and for impracticably short periods.[19]

1.1.4 Basic sentencing framework

In the year 2000, the South African law reform commission issued a discussion paper on a new sentencing framework.[20] In this paper, a new framework for sentencing was proposed in terms of which specific attention would be given to compensation and restitution for victims of crimes. These measures were to give effect to the principles of restorative justice in the South African criminal justice system.[21] Progress to implement the proposals in the discussion paper have not been forthcoming but a recent study by Terblance sheds more light on the proposed sentencing framework with reference to the particular aims of sentencing in the South African Law reform commission's discussion paper.[22] The study by Terblanche, based on the sentencing guidelines issued by the South African Law Reform Commission, emphasises how the current sentencing system requires substantial reform and to a large extent lacks consistency where judges have an unfettered discretion when it comes to imposing sentences.[23]

1.1.5 Diversion and alternative approaches to doing justice

The diversion procedure as set out in the provisions of the Child Justice Act[24] has become a central theme in the sentencing of child offenders, however such diversion procedure could also apply to adults in the sentencing of "revenge sales" as this signifies the introduction of a restorative justice approach at an early stage of proceedings, with the withdrawal of the case against the accused upon successful

[19] *S v M (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC). Paragraph 59.*
[20] Skelton et al.2008. *'Restorative justice; A contemporary SA review'*. (21) Acta Criminologica. Page 37 -51.
[21] South African law reform commission, 2000: xxii-xxii
[22] Terblanche, S. 2013. The Child Justice Act: Procedural sentencing issues. Page 2.
[23] Terblanche, S. 2008. Research on the Sentencing Framework Bill. (2008) Cape Town: Open Society Foundation. Page 2.
[24] See specifically Chapters 6 and 8 in this respect.

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completion of the diversion programme. Diversion has been acknowledged as a key element in the shift from a retributive to a restorative justice system for child offenders and such an approach could likewise be applied in certain criminal cases for adults in realising therapeutic outcomes for victims.[25]

The concepts of restorative justice and therapeutic jurisprudence share close ties with the notion of procedural justice.[26] Procedural justice research suggests that citizens are more likely to accept the directions of legal authorities where they feel that the authorities' processes are fair and the processes which they follow are legitimate.[27] Furthermore the concepts of restorative justice and therapeutic jurisprudence share common ground by way of the fact that they both value active participation of all parties in the resolution of their case.[28] The concept of self-determination is thus central to both the approaches of restorative justice and therapeutic jurisprudence which value processes that empower participants to promote restoration.[29] A restorative justice approach to sentencing in cases of "revenge sales" would be more suited to all the parties and would be the most appropriate solution in finding a balance between restoring the rights of the victim, the protection of society and a crime free life for the offender.[30]

1.2 Research methodology:

This study will evaluate the approach taken by the DPP in its decision to prosecute and sentencing in cases of "revenge sales". Different sentencing options will be

[25] Mbambo, M. Beyond Retribution – Prospects for Restorative justice in South. Diversion: a central feature of the new child justice system. Chapter 7. Africa.
[26] King, M. 'What can mainstream courts learn from problem solving courts?' (2007) 32 *Alternative law journal.*
[27] King, M .2006."Therapeutic jurisprudence and the rise of emotionally intelligent justice". Melbourne university law review.
[28] King, M .2006."Therapeutic jurisprudence and the rise of emotionally intelligent justice". Melbourne university law review.
[29] Bruce, J. 'On Autonomy: legal and psychological perspectives' (1992) 37 Villanova Law review 1705, 1715-21; King, 'What can mainstream courts learn from problem solving courts?'Page92 and 146.
[30] Skelton et al.2008. 'Restorative justice; A contemporary SA review'. (21) Acta Criminologica. Page 38-50.

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investigated and suggested that may be less harmful to the accused and that would ultimately aim at healing relationships. The dissertation will examine the various aspects of sentencing in cases of “revenge sales” and will incorporate discussions on inter alia, therapeutic jurisprudence and restorative justice. The dissertation will be centered on journal articles, legislation, case law and various studies on “revenge sales” and their adjudication.

The study of therapeutic jurisprudence and restorative justice will mainly be based on journal articles and case law specifically with regards to their emergence and integration into South African law. The discussion on therapeutic jurisprudence and restorative justice will not be limited to South African law but will also be with reference to the role of these principles in other foreign jurisdictions.

The sentencing component of this dissertation will be discussed with reference to those statutory provisions governing sentencing and the traditional sentencing guidelines as enunciated in case law. The sentencing component will also consider opinions from learned authors who analyze the different sentencing options and the extent of judicial discretion in the sentencing process.

1.3 Purpose of the study:

The purpose of this study is to examine the legal systems approach to “revenge sales” in South Africa and to propose an alternative approach to prosecution and sentencing in these cases and other niche criminal matters. The study will investigate the nature of revenge sales, prosecutorial discretion and, in the event of a conviction, a therapeutic approach to sentencing within such a context.

The study in this thesis seeks to shed light on a relatively new area of the law and the complexities, considerations and approach to sentencing in such cases. The study challenges the reader to think outside the realm of the existing sentencing framework and to understand the consequences and impact that certain sentences will have on the life of the offender.

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1.4 Structure:

This mini dissertation will consist of five chapters, an introductory chapter, three chapters specifically dealing with the dissertation topic and a final concluding chapter. The first chapter sets the tone for the dissertation as a whole and gives a brief overview of the discussion as well as the aim of the dissertation.

The second chapter of this dissertation deals specifically with revenge sales. This chapter attempts to explain the concept of a "revenge sale" and why it is considered a form of theft. The chapter on "revenge sales" will discuss the contentious nature of "revenge sales" and the differing views across a broad spectrum of society. This chapter will also look at the moral dilemma surrounding "revenge sales", as well as the approach and adjudication of similar such cases in foreign jurisdictions.

The third chapter of this dissertation discusses the decision to prosecute under South African law. Since South Africa does not follow a compulsory prosecution system, the DPP exercises a discretion in every particular case as to whether there is a reasonable and probable cause to proceed with the prosecution.[31] This chapter will detail the considerations of the DPP in deciding not to prosecute and his or her evaluation of the statutory guidelines which direct that prosecution should not ordinarily follow.[32]

The fourth chapter of this dissertation focuses on the principles of restorative justice and therapeutic jurisprudence. The dissertation will demonstrate how therapeutic jurisprudence forms the basis for the application of principles of restorative justice. The chapter evaluates how these two concepts have been incorporated into our law, specifically with reference to case law examples. The application of the principles of restorative justice and therapeutic jurisprudence in South African criminal courts needs to be carefully examined as the use of these principles in criminal cases will not always

[31] Joubert et al.2011. The Criminal procedure handbook: Chapter 3: The prosecution of a crime. Page 69.
[32] NDPP Prosecution policy: Section 21(1)(a) of the Act 32 of 1998.

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be appropriate.[33] The fourth chapter of this dissertation also briefly discusses the criticism which has been leveled against these concepts as well as their limitations in the criminal justice system. Further, the principles applicable to sentencing in cases of "revenge sales" are integrated with the concepts of therapeutic jurisprudence and restorative justice. This chapter also considers the appropriateness of therapeutic jurisprudence in the context of sentencing in "revenge sales", as well as suggestions as to how to approach the sentencing of these cases. The focus is on the benefits for all role players through the adoption of a more therapeutic approach to sentencing in cases of "revenge sales" where the emphasis is on healing and reconciliation between the parties, an approach reinforced by principles of restorative justice. This type of outcome has been mentioned in the Child Justice Act as an envisaged outcome of diversion programmes and is a reoccurring theme within the Act.[34] This chapter investigates whether an approach to sentencing in cases of revenge sales, based on therapeutic jurisprudence, will more adequately serve the modern aims of sentencing, by promoting reconciliation and healing between the parties.

The final chapter of this dissertation will be a conclusion which integrates the various aspects of the discussion and will critically analyse the effectiveness of the incorporation of therapeutic jurisprudence and restorative justice in our criminal courts.

[33] Bekker, A. 2004. Restorative Justice: A Viable Option for the Regional Court? Sabinet Online. Accessed at: http:www.sabinet.co.za. Accessed 15 July 2015.
Online. Retrieved on August 18, 2008 from http:www.sabinet.co.za.
[34] The Child Justice Act 75 of 2008.

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Chapter 2: The "revenge sale" scenario

2.1 An analysis of a "revenge sale"

A "revenge sale" is the sale of goods belonging to another whilst the goods are lawfully in one's own possession, in retaliation to a perceived wrongdoing by a spouse, partner, family member etc. A "revenge sale" scenario would typically arise when a husband/wife sells their spouses property/assets in a fit of anger, rage or jealously. This form of theft is known as embezzlement and has been well documented in our law but is a crime of even greater significance in other foreign jurisdictions where it is recognized as a crime on its own.[35] In the United States, the crime of embezzlement is a statutory offence, thus the definition of the crime of embezzlement varies according to the given statute.[36] The crime of embezzlement is most commonly encountered during financial fraud whereby funds are "embezzled" from trust accounts, however, tangible corporeal property can indeed form the subject matter of this type of crime.[37] This crime can best be understood with reference to the example of the theft of trust fund money. In such a case, the money or assets are lawfully in the possession or control of the person responsible for administering the trust but belong to another.[38]

The position under American matrimonial law with regard to the legal relationship between a husband and wife in relation to theft closely resembles the "revenge sale" discussion in this dissertation. In America, under the common law a husband became the owner of his wife's property upon marriage[39], neither spouse could sue the other for torts committed against person or property, and neither could be convicted for crimes against the property of the other. Essentially a husband/wife could appropriate

[35] Snyman, CR. Criminal law 5ed. Chapter 18. Page 486
[36] Federal Embezzlment laws. Steiner, M. http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-offense/federal-embezzlement-laws.htm. Access 10 July 2015.
[37] Find law. The crime of embezzlement. Accessed at. http://criminal.findlaw.com/criminal-charges/embezzlement.html. Accessed 11 July 2015.
[38] Snyman, CR. Criminal law 5ed. Chapter 18. Page 486
[39] By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated into that of the husband. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties and disabilities, that either of them acquire by the marriage.

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their spouse's property and have complete criminal immunity from prosecution.[40] This principle also applied under English matrimonial law where a wife could not be found guilty of the theft of her husband's property even though she was an adulteress.[41] The rationale for this rule was that in contemplation of law, husband and wife were seen as one. In most American states this position has changed, specifically in New York under the married women's enabling acts where a married women may sue or be sued in contract or in tort in her own name[42] and may sue her husband in tort for personal injuries or injuries to her property. The position was the same for the husband and he too could sue in his own name against his wife. These recent developments in New York state law could be seen as a tendency to divest marriage of many of its old attributes and to place both husband and wife in a position of independence as to their respective legal personalities.[43]

A "revenge sale", or the crime of embezzlement may well seem like any other ordinary crime and indeed it is but there are elements of this crime which are unique and which make for an interesting discussion. The circumstances under which these crimes are committed especially when they involve tangible corporeal property can most closely be described as "heated". Husbands or wives who have everyday access to their spouse's assets would often seldom consider selling this property, but under circumstances of extreme emotional distress the temptation would often be much greater. The perpetrators of crimes of "revenge sales" often end up regretting their decisions immediately after these crimes have been committed, once the initial surge of rage induced adrenalin has worn off. There are thus two considerations which law enforcement officials need to be aware of when dealing with crimes of this nature, the first being, the interests of the victim in ensuring the return of his/her property or alternatively for the victim to be sufficiently compensated, on the other hand, the

[40] Walker, C. 1955. Theft between spouses in Louisiana. Volume 15. Number 4. 10-15.
[41] The case of *Reg. v. Kenny, 2 Q. B. D. 307, 3 Am. Cr. Rep. 448 (1877).*
[42] Graham, A. Criminal Liability of Spouse for Theft of the Other Spouse's Property. St Johns law review. Volume 16. Article 3. 5-15
[43] Graham,A. Criminal Liability of Spouse for Theft of the Other Spouse's Property. St Johns law review. Volume 16. Article 3. 5-15

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circumstances of the offender, who is often overcome with remorse and is willing to take responsibility for his/her actions.

The process of orchestrating a “revenge sale” is fairly straightforward, with the person wishing to sell the property/assets approaching another person or institution to sell the goods in question. The people selling the goods/property in this situation would in most circumstances be willing to give up such goods for just about any price as their aim is simply to distribute such goods. There are a number of websites and institutions which promise to facilitate the sale of "revenge goods" in circumstances where people want to sell the goods of another without their permission. One of these such websites offer to buy goods from people in the process of a “revenge sale”.[44] These people are thus essentially facilitating the commission of a crime by buying goods which they reasonably ought to know are being sold by people other than the true owners. The establishment of these businesses is centered on the exploitation of a particular individual to give up the goods/property of another for a price often substantially below market value.

2.2 The impact of a spouse’s Matrimonial Property regime on a “revenge sale”

The matrimonial property regime of spouses may also be significant when considering a “revenge sale”. Spouses who are married in community of property are co-owners of common property in equal and indivisible shares and cannot commit theft unless they have the express intention of depriving their spouses of the lawful possession and benefit of their property.[45] In this regard it is important to distinguish between marriages entered into before 1 November 1984 and those entered into thereafter.[46] In respect of marriages entered into before 1 November 1984, a husband could not be found guilty of the theft of those portions of the joint property which would generally be regarded as belonging to his wife. [47] Since the enactment of the Matrimonial Property

[44] See: Revenge sales: Accessed at http://revengesales.com.au. Accessed 15 February 2015.
[45] Milton, JRL.1996. South African Criminal Law and Criminal Procedure. Page 200-210.
[46] The Matrimonial Property Act 88 of 1984
[47] Milton, JRL.1996. South African Criminal Law and Criminal Procedure. Page 200-205.

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Act[48], the position has changed and a husband no longer has any marital powers over the property of his wife.[49] Following the removal of this immunity from liability which existed in pre-1984 marriages, the removal of this power should therefore necessarily remove any immunity and should render the husband liable to a charge of theft.[50] However, a wife, whether married before or after 1 November 1984 can steal the common property but will more than likely not have the requisite intent, particularly if the property was usually regarded as specifically pertaining to herself.[51]

If spouses are married in community of property certain legal acts[52] cannot be performed without the consent of both parties.[53] An example of this would be where a spouse wanted to enter into a credit agreement where the National Credit Act[54] (NCA) applies or in cases concerning the alienation of immovable property within the joint estate. In both of these cases, spouses would need the consent of the other before entering into such an agreement.[55] If either spouse were to decline to consent or if consent were not forthcoming, the agreement would be void.[56] Furthermore, the Matrimonial Property Act makes provision for the ratification of certain acts entered into without the consent of both parties, the entering into of a credit agreement is an example of one such act where a spouse may ratify the actions of the other thus making it binding and enforceable.[57]

If a spouse married in community of property enters into an agreement with a third party without the requisite consent of the other and the third party did not know or could not reasonably have known that the transaction was being entered into without spousal consent, the transaction will be deemed to have been entered into with the

[48] The Matrimonial Property Act 88 of 1984.
[49] Section 11. Matrimonial Property Act 88 of 1984.
[50] *S v Tlhoaele 1979 (2) SA 328 (BS*)
[51] Milton, JRL.1996. South African Criminal Law and Criminal Procedure. Page 200-205.
[52] See *Sishuba v Skweyiya (842/2007) [2008] ZAECHC 25 (6 March 2008).*
[53] Upset that Husband buys car without consent. Accessed at : http://www.fin24.com/Money/Money-Clinic/Vehicle-Finance/Upset-that-husband-buys-car-without-consent-20150202. Accessed 1 November 2015.
[54] 34 of 2005
[55] Section 15(2) of the Matrimonial Property Act 88 of 1948 lists a number of the acts which a spouses married in community of property must consent to.
[56] Upset that Husband buys car without consent. Accessed at : http://www.fin24.com/Money/Money-Clinic/Vehicle-Finance/Upset-that-husband-buys-car-without-consent-20150202. Accessed 1 November 2015.
[57] Section 15(4) of the Matrimonial Property Act 88 of 1948.

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requisite consent, thus making the transaction enforceable.[58] These provisions are thus particularly applicable in the case of a "revenge sale" by spouses married in community of property who sell their spouses goods by passing them off as their own and representing to the third party as having the requisite spousal consent.[59] A third party has a duty to enquire whether there is consent and cannot rely "*upon a bold assurance by another party regarding his or her marital status"* as held in the case of *Visser v Hull and Another*.[60]

2.3 The contentious nature of a "revenge sale"

A "revenge sale" and the circumstances in which they often arise have the ability to trigger strong views and opinions across a broad spectrum of society because of their extraordinarily contentious nature. The circumstances in which these crimes more often than not arise allow one to understand the different ways in which the law can be applied. If we follow a purely mechanical type approach to the application of law in these cases, the offenders, if found guilty, will be sentenced accordingly and will often be subjected to a term of direct imprisonment. If, however, we follow a more balanced approach and give due regard to the interests of the offender, the outcome with regards to the type of sentence imposed would often be a lot different.

A marriage can be seen as a union between two persons and as such, more often than not, spouses would consider things as "ours" as opposed to "mine" and "yours", but not necessarily, the law does make provision for cases where spouses choose to have their property held in separate estates. For example, although a husband/wife may be the registered owner of a particular motor vehicle they would allow their spouse to drive that car and the car would for all intents and purposes be considered theirs. Thus

[58] *Visser v Hull & others [2009] JOL 23670 (WCC)*. See also. Section 15(9) of the Matrimonial Property Act 88 of 1948.
[59] See *Sishuba v Skweyiya* (842/2007) [2008] ZAECHC 25 (6 March 2008) where the court had to apply section 15(9) of the Matrimonial Property Act after a spouse sold his wife's immovable property without her consent. See also: Upset that Husband buys car without consent. Accessed at: http://www.fin24.com/Money/Money-Clinic/Vehicle-Finance/Upset-that-husband-buys-car-without-consent-20150202. Accessed 1 November 2015.
[60] 2009 JOL 23670 WCC page 11.

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in the case where a husband or wife sells the property of their spouse, the approach to these types of crimes needs to be slightly different when compared to ordinary theft and the unlawful appropriation of another's property. The reason being is that there is a much closer connection between the person and the property as well as between victim and offender as opposed to ordinary cases of theft.

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Chapter 3: The decision to prosecute and prosecutorial discretion

3.1 Introduction

Prosecutors are essentially the "gate keepers" of the criminal justice system and to a large extent have the sole discretion as to whether to institute a prosecution against a particular person and the specific charges to bring against that person.[61] Prosecutors and the prosecutorial bodies they represent fulfill a fundamentally important role in our society in ensuring the effective administration of justice against the suspected perpetrators of crime. Contrary to what many people may think, the role of a prosecutor, as an officer of the court, is to seek justice and not merely to secure a conviction against an accused.[62] The prosecutor must govern impartially and must refrain from all improper methods to produce a conviction and when he/she becomes aware of inadequacies in the substantive or procedural law, he/she should direct their efforts towards remedial action.[63] These sentiments are echoed in section 32 of the National Prosecuting Authority Act[64] which provides that the prosecutor "shall serve impartially and exercise, carry out or perform his or her duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law".[65]

The importance of the role of a prosecutor can be seen by the way in which a prosecutor has to balance various inherent contradictions in his job such as:[66]

- Prosecutors have a duty to seek justice but operate in an adversarial rather than truth-seeking system;

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[61] Schönteich, M. 2004. Strengthening prosecutorial accountability in South Africa. The Institute for security studies. https://www.issafrica.org/uploads/paper255.pdf. Accessed 12 July 2015.
[62] De Villiers, W.2010. Notes on the investigatory powers of the prosecution. (73) THRHR. Page 124.
[63] Criminal Justice. The Function of the Prosecutor. Available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blkold.html. Accessed. 2 August 2015
[64] National Prosecuting Authority Act 32 of 1998.
[65] National Prosecuting Authority Act 32 of 1998. Section 32
[66] Green, B. 1998. Why Should Prosecutors "Seek Justice"? Fordham Urban Law Journal. Volume 26, Issue 3. Page 3.

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- Prosecutors have very wide discretionary powers in most critical matters they must consider, yet they are held to very high ethical standards.

3.2 The South African prosecutorial system:

South Africa does not follow a compulsory prosecutorial system and prosecutors, together with the Director of Public Prosecutions can decide whether or not to institute prosecution in every particular case.[67] This type of system vests prosecutors with significant powers and is susceptible to abuse, however there are clearly defined guidelines which South African prosecutors need to follow when considering whether or not to prosecute.[68] The decision to proceed with a prosecution will always result in a court adjudicating the dispute and thus the court can acquit a person who has been unfairly prosecuted. However, in the case where a prosecutor declines to prosecute a certain matter, the matter is usually finalized with this decision with the courts seldom willingly to intervene and review a prosecutorial decision not to prosecute.[69]

As a general rule under South Africa law, once a prosecutor is satisfied that there is a reasonable prospect of a conviction, prosecution should normally follow unless public interest demands otherwise.[70] The South African National Prosecuting Authority has issued directives in respect of factors to be taken into account by a prosecutor in determining whether or not to prosecute.[71] These practice directives give prosecutors practical guidelines to follow in order for them to accurately assess whether a particular prosecution would be warranted and is within the public interest. The prosecution policy issued by the National Prosecuting Authority details factors to be considered

[67] Joubert et al.2011. The Criminal procedure handbook: Chapter 3: The prosecution of a crime. Page 70.
[68] National Prosecuting authority. National prosecution policy. 2013. Accessed at http://www.unrol.org/files/Guidelines%20on%20the%20Role%20of%20Prosecutors%20.pdf. Accessed 1 August 2015.
[69] Newham,G. The Tatane case raises hard questions for South Africa's National Prosecuting Authority, all Africa. Html: llafrica.com/stories/201304111160. Accessed 11 July 2015.
[70] National Prosecuting authority. National prosecution policy. 2013. Accessed at http://www.unrol.org/files/Guidelines%20on%20the%20Role%20of%20Prosecutors%20.pdf. Accessed 1 August 2015.
[71] National Prosecuting authority. National prosecution policy. 2013. Accessed at http://www.unrol.org/files/Guidelines%20on%20the%20Role%20of%20Prosecutors%20.pdf. Accessed 2 August 2015.

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when considering whether or not it will be in the public interest to prosecute such as, the interests of the victim and the broader community, the nature and seriousness of the offence and the circumstances of the offender. These factors are to be assessed in totality and the circumstances of each case will dictate the weight which should be attached to either of these factors.[72]

In the consideration of the circumstances of the offender there are a number of interesting guidelines for prosecutors to follow when weighing up this particular aspect, such as whether or not the accused person has admitted guilt, shown repentance, made an apology and whether the objectives of criminal justice would be best served by implementing non-criminal alternatives to prosecution.[73] These considerations demonstrate that there is a need for prosecutors to consider circumstances which are personal to the offender as well as alternatives to prosecution. This notion is supported in the *United Nations Guidelines on the role of prosecutors* which states that "*prosecutors shall give due consideration to waiving prosecution and states should fully explore adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the possible adverse effects of imprisonment."*[74] The extent to which these recommendations are enforced in practice is however of importance, with very few if any checks and balances to ensure that prosecutors exhaust various alternatives to prosecution when the facts dictate to such a solution.

[72] Schönteich,M. The Institute for Security Studies: Strengthening prosecutorial accountability in South Africa. Accessed at: https://www.issafrica.org/uploads/paper255.pdf. Accessed 30 July 2015.
[73] National Prosecuting authority. National prosecution policy. 2013. Accessed at http://www.unrol.org/files/Guidelines%20on%20the%20Role%20of%20Prosecutors%20.pdf. Accessed 1 August 2015.
[74] United Nations Guidelines on the role of prosecutors. Section 19-Alternatives to prosecution. Accessed at http://www.unrol.org/files/Guidelines%20on%20the%20Role%20of%20Prosecutors%20.pdf. Accessed 1 August 2015.

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3.3 The discretionary powers of a prosecutor

The following quote quite aptly illustrates that there are many occasions when it would be undesirable to prosecute a particular individual and that a subsequent prosecution would unfairly punish the offender:

"In some cases, the application of the criminal laws to a particular individual, though supported by probable cause, is unwarranted in light of the individual's lack of culpability. The prosecutor must recognize when the circumstances of a person's situation are such that prosecution would "do more harm than good."[75]

There are varying degrees of prosecutorial powers when it comes to the decision to prosecute across various jurisdictions across the world. In the United States for example, prosecutors have an almost absolute discretion in respect of the initiation of a prosecution and what charges to bring in cases where the evidence would justify charges.[76] These broad discretionary powers to prosecute could possibly be inherently linked to the adversarial system of justice whereby the courts are seen as the appropriate institutions to consider evidence presented before them but are not expected to investigate any further and remain aloof from the proceedings.[77] The broadly defined prosecutorial powers in American law are so deeply entrenched that it is often said that prosecutorial discretion is inevitable, to the contrary however, many countries in Europe follow a "mandatory prosecution" system, whereby prosecutors have a duty to prosecute if there are reasonable grounds, supported by credible evidence, upon which to institute a prosecution.[78]

[75] Harry,S.et al. Federal criminal practice: prosecution and defense. 242-243
[76] Prosecution: Prosecutorial Discretion - Varieties Of Discretion, Subjects Of Prosecutorial Discretion, Standards Of Prosecutorial Judgment, Controlling Prosecutorial Discretion. Accessed at http://law.jrank.org/pages/1870/Prosecution-Prosecutorial-Discretion.html#ixzz3kOdeB5Ag. Accessed 10 July 2015.
[77] Lynch, G. Prosecution: Prosecutorial Discretion - Varieties Of Discretion, Subjects Of Prosecutorial Discretion, Standards Of Prosecutorial Judgment, Controlling Prosecutorial Discretion. JRank Articles.: Accessed at: http://law.jrank.org/pages/1870/Prosecution-Prosecutorial-Discretion.html#ixzz3igv8hWWn. Accessed 11 July 2015.
[78] Lynch, G. Prosecution: Prosecutorial Discretion - Varieties Of Discretion, Subjects Of Prosecutorial Discretion, Standards Of Prosecutorial Judgment, Controlling Prosecutorial Discretion. JRank Articles.: Accessed at: http://law.jrank.org/pages/1870/Prosecution-Prosecutorial-Discretion.html#ixzz3igv8hWWn. Accessed 11 July 2015.

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As with all discretionary powers, the prosecutorial discretion is vulnerable to abuse with the independence of the national prosecutorial body being particularly important in guarding against malicious or unwarranted prosecution.[79] Prosecutors must guard against reckless prosecution and must refrain from being considered "persecutors" by balancing the interests of the state, in effectively administering justice and prosecuting those persons reasonably suspected of having committed an offence and the personal interests or circumstances of an accused. *The United Nations guidelines on the role of prosecutors* states in section 19 that in countries where prosecutors are vested with discretionary functions, state law should be enacted to provide guidelines to enhance fairness and consistency in taking decisions in the prosecution process.[80] The decision to prosecute should be taken with care because it may have dire consequences for victims, witnesses, accused persons and their families and may well undermine society's confidence in our criminal justice system as a whole. [81] This notion is given support in the *Standards of professional responsibility and statement of the essential duties and rights of prosecutor adopted by the International Association of Prosecutors* which states that the exercise of prosecutorial discretion is a grave and serious responsibility.[82] Prosecutorial discretion is not unlimited, but rather is constrained by "norms of equality and rationality that are difficult to enforce in the courts".[83]

[79]The Independence of the South African National Prosecution Authority has recently been called into question with various allegations of political interference. See: Dysfunctional NPA does not serve justice at http://mg.co.za/article/2015-05-21-dysfunctional-npa-does-not-serve-justice. De Villiers,W. Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models. 2011 (74) THRHR.
Daniel D.2001. Prosecutorial discretion before national courts and international tribunals. The University of Botswana. Accessed at: http://www.isrcl.org/Papers/Nsereko.pdf. Accessed 20 July 2015.

[80] United Nations Guidelines on the role of prosecutors. Section 19-Alternatives to prosecution. Accessed at http://www.unrol.org/files/Guidelines%20on%20the%20Role%20of%20Prosecutors%20.pdf. Accessed 1 August 2015.

[81] National Prosecuting authority. National prosecution policy. 2013. Accessed at http://www.unrol.org/files/Guidelines%20on%20the%20Role%20of%20Prosecutors%20.pdf. Accessed 1 August 2015.

[82] Standards of professional responsibility and statement of the essential duties and rights of prosecutor. 1999. International association of prosecutors. Paragraph 3.

[83] Ely,A. 2004. Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to Seek Justice. Volume 90. Article 5. 5.

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3.4 The decision to prosecute in the context of a “revenge sale”

The decision on whether to prosecute the offender of a “revenge sale” would more than likely require a prosecutor to consider the circumstances of the offender, his or her attitude towards the crime and his/her willingness to pursue an amicable solution between themselves and the victim. The prosecutor would also carefully need to consider the wishes of the victim and the use of a victim impact statement at this stage of the trial already.[84] The prosecutor will need to consider the surrounding circumstances in which the theft occurred, the accused’s previous criminal history, if any, and the likelihood of the accused reoffending in the future.[85] These factors are almost always used in the consideration of the appropriate criminal sanction to impose on a convicted offender, but factors such as the circumstances in which the theft occurred as well as the personal circumstances of the offender are particularly important in crimes such as “revenge sales” due to the highly personal nature of the crime and subsequent close connection between victim and offender. Prosecutors who encounter crimes of “revenge sales” have the opportunity to carefully consider the facts of these cases and can consider alternatives to prosecution when it would be appropriate. When examining the relevant factors and deciding whether or not to prosecute, prosecutors must understand that their role is not to persecute but to seek justice and to uphold the repute of the criminal justice system by aligning their decisions with the objectives of the criminal justice system.[86]

[84] S v Matyityi 2011 (1) SACR 40 (SCA).
[85] Burchell, J and Milton,JRL. Principles of Criminal Law 2nd ed (1997). Page 239.
[86] Criminal Justice. Prosecution Function. Accessed at: http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blkold.html. Accessed 10 August 2015.

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Chapter 4: A more therapeutic approach

4.1 The development of therapeutic jurisprudence and restorative justice processes

Therapeutic Jurisprudence is a relatively new concept to our law and provides a broad framework for the recognition and implementation of restorative justice initiatives and programmes.[87] Although these concepts may be new to our law, they have recently grown in stature and have received recognition and approval in the Constitutional Court, as well as in several key policy documents such as the Restorative Justice National Policy Framework (RJNPF) and the Policy Directives of the National Prosecuting Authority.[88] The concept of restorative justice has also been given statutory recognition through its inclusion in the Child Justice Act[89], as an underlying philosophy of the act and more specifically in section 73 thereof, which provides an alternative approach to the sentencing of child offenders.[90] A number of explanations of the concept of restorative justice have recently developed but the most recent definition has been enunciated in the preamble to the Child Justice Act[91] and clearly defines the concept in the context of crime.[92]

The notion of therapeutic jurisprudence and restorative justice also share close ties with the underlying concept of Ubuntu[93] which is deeply rooted in our society and which has been used as a central theme underlying various sentencing aims in our new Constitutional democracy. The advancement of Ubuntu[94] is envisaged through the

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[87] King, M. 2006. "Therapeutic jurisprudence and the rise of emotionally intelligent justice". Melbourne university law review. Vol 32. 1116.

[88] See Batley M.2014. "Call for agents of change: Guidelines for the use of RJ in sentencing". Page 3. See also D*ikoko v Mokhatla 2006 (B) SA 235 (CC), S V M (Centre for Child law as Amicus Curiae) 2008 (3) SA 232 (CC), The Citizen 1978 (PTY) Ltd v McBride (Johannesburg and Others, Amici Curiae) 2011 (4) SA 191 (CC).*

[89] 38 of 2008

[90] Section 73 provides that a Child Justice Court may refer a matter to victim offender mediation, to a family group conference or to any other restorative justice process.

[91] 38 of 2008.

[92] Skelton, A. 2010 . "Face to Face: Sachs on restorative Justice". Accessed at: http://repository.up.ac.za/bitstream/handle/2263/16137/Skelton_Face(2010).pdf?sequence=1. Accessed 10 October 2015.

[93] In the recent unreported case of David Dikoko v Tuphi Zacharia Mokhatla the concept of Ubuntu was linked to Restorative justice with the notion of restorative justice being discussed as an fundamental part of our sentencing jurisprudence.

[94] Judge Albie Sachs draws extensive comparisons between the concepts of Ubuntu and Restorative justice and in the case of Port Elizabeth Municipality 2005 1 SA 217 (CC) describes how Ubuntu is deeply ingrained in the

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implementation of restorative justice procedures available to victims which promote reconciliation and restoration.[95] These concepts have their own separate identities but share similarities in the sense that they have been developed in accordance with a worldwide emphasis on a system of justice based on reparative rather than purely punitive principles.[96]

Therapeutic jurisprudence is directed at integrating various aspects of the legal system, understanding the impact that the law has on every role player in the system and acknowledging the potential conflict between the values in the criminal justice system.[97] Therapeutic jurisprudence and restorative justice processes empower and encourage the relevant participants to evaluate possible therapeutic outcomes to their problems by emphasising the importance of well-being and the application of the law in the least harmful manner.[98] Therapeutic jurisprudence encourages the various role players in the system to pursue an outcome which reflects emotional intelligence, is balanced and which caters for possibly divergent views. Ponnan JA, in the case of *S v Matyityi*[99], quite fittingly defined the concept of restorative justice, by suggesting that it is a concept which "*seeks to emphasize that crime is more than the breaking of the law or offending against the State-It is an injury or wrong done to another person*".

Similar sentiments were expressed by Sachs J in the case of *S v M*[100] when Sachs J suggested that a fundamental component of restorative justice is the face-to-face acknowledgement of wrongdoing, where the offender can look the victim in the eye and accept responsibility for his actions.[101] Sachs J expresses these views in the

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cultural heritage of the majority of the population. Judge Sachs elaborated on how Ubuntu is in line with a global shift to develop Restorative systems of Justice.

[95] Van der Merwe, A. "A new role for Victims? An evaluation of restorative justice procedures in the Child Justice Act 2008" De Jure (2013) 1022-1038.

[96] See *Dikoko v Mokhatla 2006 (B) SA 235 (CC), 58*.

[97] Jones, MD. 2012. "Mainstreaming Therapeutic Jurisprudence into the Traditional courts: suggestions for judges and practitioners' Phoenix Law Review. 753.

[98] King, M. 2006. "Therapeutic jurisprudence and the rise of emotionally intelligent justice". Melbourne university law review. Vol 32. 1116.

[99] 2011 1 SACR 40 (SCA).

[100] 2007 (12) BCLR 1312 (CC).

[101] Skelton, A. 2010 . "Face to Face: Sachs on restorative Justice". Accessed at: http://repository.up.ac.za/bitstream/handle/2263/16137/Skelton_Face(2010).pdf?sequence=1. Accessed 10 October 2015.

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context of his own experiences after being injured by a bomb which exploded in 1988. In the judgment in *S v M*, Sachs J elaborates on a number of facets central to the notion of restorative justice and emphasizes the humanly connection between the victim and the offender and the need for an open and transparent reconciliation, such that would eradicate the "silent brand of criminality".[102]

Traditionally the concept of restorative justice has been most closely associated with criminal cases; however, our courts have made reference to and applied principles of restorative justice in civil cases as well, such as in *Dikoko v Mokhathla*[103] which dealt with a claim for damages for defamation. Two concurring minority judgements in this case by Justices Mokgoro and Sachs respectively, emphasise the importance of a solution based on restorative justice, whereby an apology would be a more powerful tool as opposed to any disproportionate monetary award for damages. Sachs J reiterated that a person's reputation should not be treated as a commodity and emphasised that the ultimate solution for injury to reputation should be "vindication by the court" of the person's reputation in the community.[104] Sachs J enunciated several key elements of restorative justice in this case, namely, reparation, participation, encounter and reintegration.[105] These key elements form the basis for the use of an extensive discretion in sentencing alternatives and are still in the process of development through case law.

4.2 The application of restorative justice processes and its criticism

There are strictly speaking no restrictions as to the types of offences which can be resolved through a restorative justice initiative; however the application of a more therapeutic approach to sentencing needs to be carefully considered. The willingness

[102] Skelton, A. 2010 . "Face to Face: Sachs on restorative Justice". Accessed at: http://repository.up.ac.za/bitstream/handle/2263/16137/Skelton_Face(2010).pdf?sequence=1. Accessed 10 October 2015.
[103] 2006 (6) SA 235 (CC)
[104] See *Dikoko v Mokhatla 2006 (B) SA 235 (CC), par 113*.
[105] Skelton A and Batley M. 2008. "Restorative Justice: A contemporary South African review" 21(3). Acta Criminologica. Page 37-51.

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of the both the victim and the offender to participate is one of the main factors to be considered.[106] The use of restorative justice in very serious cases will in most circumstances be inappropriate and would not support one of the key ingredients to a balanced sentence, i.e that it should correctly reflect the seriousness of the offence and society's indignation and distaste for serious offences which strike at the heart of the moral fibre of our society.[107] It is trite that judicial officers should seek to impose sentences which are proportionate to the crime and which take into account the personal circumstances of the offender, but in serious cases have a duty to impose sentences which reflect the natural outrage and revulsion felt by law abiding members of society.[108]

Du Toit and others are however of a different opinion and suggest that restorative justice is not just limited to "minor cases" and that the Criminal Procedure Act, 1977, more specifically the sections of 297 and 300, can be used as a base to pursue restorative justice outcomes.[109] They are also of the opinion that restorative justice can be used to address a variety of problems facing our criminal justice system including the overcrowding of prisons and the need to have offenders accept responsibility for their actions. This perspective is given further support through the proposals of the SALRC[110], which are also recognized and supported by Terblanche. The proposals put forward by the SALRC suggest that the current aims of sentencing, namely retribution, prevention, deterrence and reformation, should be removed and replaced with principles based on an approach which seeks to create a balance between the protection of society, the rights of the victim and a crime-free life for the offender.[111]

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[106] Batley M.2014. "Call for agents of change: Guidelines for the use of RJ in sentencing". Page 5.
[107] *DPP V Thabethe 2011 (2) SACR 567 (SCA).*
[108] *DPP V Thabethe 2011 (2) SACR 567 (SCA).*
[109] Batley M.2014. "Call for agents of change: Guidelines for the use of RJ in sentencing". Page 6.
[110] South African Law Reform Commission. 2000. A new sentencing framework. Discussion Paper 82. Pretoria: Government Printer.
[111] Terblanche, S. 2008. Research on the sentencing framework bill. Cape Town, Open Society Foundation of South Africa. Page 2.

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The case of *DPP v Thabethe*[112] quite aptly illustrates an occasion where a more therapeutic approach to sentencing could have been adopted in light of the extraordinary circumstances of the case and the substantial and compelling circumstances justifying a departure from the prescribed minimum sentence.[113] However, the court in *DPP V Thabethe* held that a sentence based solely on restorative justice would not be appropriate and JA Bosielo cautioned against its "ill considered" application. JA Bosielo went further to emphasise that a sentence should have the effect of deterring like-minded people from committing the same offence and failure to impose these kinds of sentences would have the effect of eroding the public's confidence in the criminal justice system.[114] JA Bosielo ultimately relied on the seriousness of the offence and the interests of society in question to reject an outright restorative justice approach to sentencing. JA Bosielo highlighted that the crime of rape[115] is extraordinary in the sense that it threatens to erode every value which underpins our democratic society and flies in the face of our constitutional values of human dignity, equality and various human rights and freedoms.[116]

Although it can be argued that a restorative justice approach may have been appropriate in this case in light of the considerable number of substantial and compelling circumstances, presiding officers ultimately need to perform a balancing act, by giving due regard to the interests of the community, the seriousness of the offence and the personal circumstances of the accused (the "ZINN" Triad).[117] In a crime such as rape, the seriousness of the offence and the interests of society in ensuring further deterrence would in the most instances far outweigh the personal circumstances of the accused. Although mercy may be a core element to an approach based on restorative approach, the concept of mercy has been extensively examined by our courts and its role should not be overstated in serious crimes. The element of

[112] 2011 ZASCO 186
[113] The Criminal Law Amendment Act 105 of 1997.
[114] *DPP V Thabethe 2011 (2) SACR 567 (SCA).*
[115] The seriousness of the crime of rape cannot be under stated and has been extensively discussed in our case law. In the case of S v Chapman 1997 (2) SACR 3 (SCA), the Supreme Court of Appeal stated the following:
Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim".
[116] *DPP V Thabethe 2011 (2) SACR 567 (SCA).*
[117] *S v Zinn 1969 (2) SA 537 (A).*

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mercy must ultimately not lead to the "condemnation or minimization of serious crimes" as was stated in the case of *S v Van der Westhuizen*.[118]

One of the many criticisms leveled against therapeutic jurisprudence and restorative justice is that it places unnecessary attention on the "therapy" of those involved whilst losing sight of the recognised sentencing goals.[119] It has been argued that legal practitioners aren't therapists and that the role of the judiciary is to determine the facts and apply the law, whilst the wellbeing of those affected is a matter for other professional people.[120] Many of the advocates of restorative justice jurisprudence believe that this type of criticism is misdirected and is based on certain misunderstandings and misconceptions regarding the true purpose of restorative justice initiatives and programmes. While this type of criticism may exist it is less prevalent amongst legal practitioner's today in light of the advent of diversion programmes, problem solving courts and other alternative dispute resolution forums.[121]

A therapeutic approach to sentencing through a restorative justice initiative or programme will undoubtedly always have its place in our criminal justice system but needs to be guarded against carefully for its susceptibility to abuse. Courts should give due consideration to the application of these concepts, showing particular caution in serious cases so as not to send the wrong message to society and to the perpetrators of heinous crimes. The absence of proper guidelines for judicial officers to follow in the application of restorative justice processes during the sentencing phase further fuels these concerns.[122] Although restorative justice may promote a new way of doing justice, our courts ultimately have a duty to impose sentences which are balanced.[123]

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[118] 1974 (4) SA 64 (CPD) AT 66.
[119] King, M. 2006. "*Therapeutic jurisprudence and the rise of emotionally intelligent justice".* Melbourne university law review. Vol 32. Page 1116.
[120] Stubbs. 2007. "*Beyond apology? Domestic Violence and critical questions for restorative justice:* Criminology and Criminal Justice. Page 169
[121] King, M. 2006. "*Therapeutic jurisprudence and the rise of emotionally intelligent justice".* Melbourne university law review. Vol 32. 1116.
[122] Batley M.2014. "Call for agents of change: Guidelines for the use of RJ in sentencing". Page 6.
[123] Van der Merwe, A. "A new role for Victims? An evaluation of restorative justice procedures in the Child Justice Act 2008" De Jure. (2013). Page 1022-1038.

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4.3 A more therapeutic approach during various stages of the trial process:

A more therapeutic approach to criminal justice can be considered at various stages of the trial process, namely during the pleading stage, pre-sentence, sentencing and post sentencing phase.[124] The RJNPF, together with the Policy Directives of the National Prosecuting Authority pave the way for a shared understanding of restorative justice and the exercise of a prosecutor's discretion at a pre-trial level.[125] Restorative justice procedures have been associated with crimes involving children, as prescribed in the Child Justice Act,[126] but are also used in cases involving adults, particularly in light of the National Prosecuting Authorities Strategy 2020.[127] A recent report[128] by the National Prosecuting Authority details how pre-trial restorative justice processes are being implemented in the areas of Phoenix, Atteridgeville and Mitchells Plain respectively. The prosecutors in these areas identify cases which they believe may be resolved by way of a restorative justice procedure and both the victim and the offender are informed accordingly. The matter is then postponed but the matter is kept on the role for this period. The matter is then referred to an appropriate person who is employed by the Department of Social Development or who is a probation office. These persons will then assess the suitability of a restorative process in the particular

[124] Skelton A and Batley M. "Restorative Justice: A contemporary South African review" 21(3) 2008. Acta Criminologica. Page 37-51.
[125] Batley M.2014. "Call for agents of change: Guidelines for the use of RJ in sentencing". Page 5.
[126] Various Restorative justice procedures are prescribed in terms of section 32 of the Act, such as victim-offender mediation and various diversion programmes.
[127] The strategy by the National Prosecuting Authority is in line with its commitment to aligning itself with crime and recent prosecutorial trends as well as the demands of society. The Prosecuting Authority considered the broader environment, growing international prosecutorial trends as well as the escalating crime rate in South Africa when formulating this strategy. The 2020 strategy will look to set the National Prosecuting Authorities goals in motion through contributing to the development of our society, reducing crime and building confidence in the criminal justice system. The National Prosecuting Authority of South Africa. Accessed at: https://www.npa.gov.za/content/strategy-2020. Accessed: 1 October 2015.
[128] The report is based on a research project titled *the Restorative Justice Project (RJP)* and was initiated as a means of assessing the effectiveness of restorative justice as a means of achieving justice. The study confirmed that while there are common restorative justice traits and values there is currently no standardized restorative justice practice both nationally and internationally. This remains a major obstacle and requires the co-operation of a number of role players including service providers who are willing to facilitate mediation and decision programmes. see National Prosecution Authority South Africa: Submission to the executive authority. Accessed at: http://www.gov.za/sites/www.gov.za/files/npa-annual-rpt0708.pdf. Accessed: 10 October 2015.

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instance and will make a finding and recommendation.[129] If the probation officer or other suitable person is of the opinion that the particular case is a suitable one, he/she will compile a report which will be tabled in court on the date on which the matter was postponed.

This pre-trial restorative justice process will take the place of a trial and the accused is left with no criminal record as the charge against the accused is withdrawn. This type of process allows for the expedited resolution of the dispute and the prosecutor essentially facilitates restoration through encouraging the acknowledgement of responsibility on the part of the offender.[130]

A therapeutic approach to a criminal trial can also be adopted during the sentencing phase of proceedings, whereby the magistrate may request any information which he/she may deem relevant in the determination of an appropriate sentence.[131] Section 274 of the Criminal Procedure Act[132] empowers the magistrate in this respect and paves the way for the introduction of a restorative justice procedure to be implemented or for the imposition of a condition for the postponement or suspension of a sentence.[133] A victim offender conference at this stage of proceedings could also be a catalyst in promoting healing and restitution between the parties and in addressing the needs of the offender through a referral to some form of assistance programme.[134]

4.4 A more therapeutic approach to sentencing in the context of a “revenge sale”.

A more therapeutic approach to sentencing would involve balancing the interests of the offender, the victim and the needs of society, whilst upholding the rule of law and

[129] Skelton A and Batley M.2008. “Restorative Justice: A contemporary South African review” 21(3). Acta Criminologica. Page 37-51.
[130] Skelton A and Batley M.2008. “Restorative Justice: A contemporary South African review” 21(3). Acta Criminologica. Page 37-51.
[131] Skelton A and Batley M.2008. “Restorative Justice: A contemporary South African review” 21(3). Acta Criminologica. Page 37-51.
[132] 51 of 1977.
[133] Section 297 of the Criminal Procedure Act .
[134] Van der Merwe, A. 2008.*“A new role for Victims? An evaluation of restorative justice procedures in the Child Justice Act ”.* Page 1022-1038.

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justice.[135] The situation where one spouse sells the property of another in a moment of impulsivity could be distinguished from other forms of theft in our law in light of the particular relationship between victim and the offender and the potential for restoration and rehabilitation. These 'revenge sale" scenarios are cases in which there may be an opportunity for reconciliation between the parties where a more therapeutic approach to sentencing would best serve the interests of society and the needs of both victim and offender.[136] This type of integrated approach to sentencing would accord with constitutionally entrenched principles[137] and could provide a balanced approach for achieving the variety of needs of sanctioning.[138] The imposition of a non-custodial sentence in cases of "revenge sales" would in most cases be more a effective way of achieving justice and will assist offenders in "making good" the wrongs which they have caused.[139]

The concept of denunciation has become an important concept as part of our sentencing discourse in South Africa. This concept was recently discussed in the case of *Minister of Home Affairs v National Institute for Crime Prevention and Reintegration of Offenders (NICRO) and Others.*[140] Chaskalson CJ emphasised the importance of the denunciation of crime starting at a policy formation level of government, but went on to explain that the right to punish and to denounce, however important, is constitutionally constrained.[141]

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[135] Sinclair, I and Du Plessis, A. "Domestic violence adjudication in South Africa: a view on therapeutic jurisprudence and human rights protection of the female victim". Accessed at http://www.aija.org.au/TherapJurisp06/Monograph%20Papers/2%20Sinclair&DuPlessis.pdf. Accessed 12 November 2015.

[136] *S v Makwanyane and Another 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); S v Joyce Maluleke and Others, TPD 83/04, 13 June 2006; and S v Shilubane [2005] JOL 15671 (T); David Dikoko v Tuphi Zacharia Mokhatla, unreported case, CCT 62/05.*

[137] Section 9, the Right to Equality would be one of the rights which would be applicable as well as the underlying concept of Ubuntu.

[138] Sinclair, I and Du Plessis, A. "*Domestic violence adjudication in South Africa: a view on therapeutic jurisprudence and human rights protection of the female victim".* Accessed at http://www.aija.org.au/TherapJurisp06/Monograph%20Papers/2%20Sinclair&DuPlessis.pdf. Accessed 12 November 2015

[139] Van der Merwe A. 2010 *Therapeutic Jurisprudence: judicial officers and victims' welfare* – S v M 2007 2 SACR 60 (W) SACJ 2010(1)

[140] 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC).

[141] At par [57].

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The imposition of a sentence punishing the offender would most likely provide very little benefit, if at all, in rehabilitating the offender and providing a platform for him/her to reintegrate themselves back into society. The imposition of lengthy terms of direct imprisonment has proven an ineffective deterrent to crime, with Cilliers and Smit suggesting that the rate at which people released from prison reoffend may be as high as 94%.[142] The introduction of Minimum Sentencing legislation, as a primary response to the alarmingly high crime rate in South Africa has also proven ineffective with many authors suggesting that 'minimum sentencing has no deterrent effect and that any short term deterrent effects tend to wither away quickly over-time'.[143]

Whilst the parties to "revenge sales" may be ideal candidates to participate in restorative justice processes, the facts of each particular case and the attitudes of both victim and offender will guide judicial officers in deciding an appropriate course of action. The case of *S v M* illustrates how a more therapeutic approach to sentencing can be applied where family relationships are involved and encourages judicial officers to do more than just adjudication but to understand the impact that a crime may have on all the parties involved.[144] The extraordinary circumstances surrounding "revenge sales" more often than not provide judicial officers with an ideal opportunity to pursue a therapeutic outcome for all parties involved by using the law as a healing tool as opposed to a purely penal mechanism. The challenge is to move away from a system which views punishment as the only way of denouncing an act and to direct our efforts towards more creative alternatives to sentencing.[145]

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[142] Cilliers C & Smit J 2007. 'Offender rehabilitation in the South African Correctional System: Myth or reality? ' Acta Criminologica 20(2).

[143] Batley M.2014. "*Call for agents of change: Guidelines for the use of RJ in sentencing".* Page 4.See also Terblanche, S. 2008. Research on the sentencing framework bill. Cape Town, Open Society Foundation of South Africa. Page 5. See also Van Zyl Smit, D. 2004. Swimming against the tide: controlling the size of the prision population in SA in Dixon, B. &van der Spuy, E (eds) Justice gained? Crime and Crime Control in South Africa's transition. Cape Town: UCT Press.

[144] Van der Merwe A 2010. *Therapeutic Jurisprudence: judicial officers and victims' welfare – S v M 2007 2 SACR 60 (W) SACJ 2010(1)*

[145] Batley M.2014. "Call for agents of change: Guidelines for the use of RJ in sentencing". See also Terblanche, S. 2008.Page 5.

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Chapter 5: Conclusion

5.1 Introduction

The fact that a crime may have been committed under circumstances of extreme emotional distress or whilst an accused acted on impulse cannot be a factor completely absolving him/her from liability. However, it is submitted that it should either play a role during the decision to formally prosecute or should nonetheless be a mitigating element to be considered in the sentencing process.

5.2 Exercising prosecutorial discretion

In the initial stages of the criminal trial process, alternatives to prosecution can be considered, such as a diversion programme whereby an accused can avoid the traditional court process whilst still being held responsible for his/her actions.[146] Certain "revenge sale" cases, depending on the particular facts may present ideal candidates to undergo a diversion programme which would ultimately be more beneficial to both society and to the needs of the offender. Whilst the Child Justice Act[147] may provide for the diversion of certain child cases away from the formal court system, it is submitted that the same protection could equally be afforded to adults by means of legislative intervention.

A prosecutor, once handed the docket from police, has a decision to make as to whether to proceed with prosecution. Many "revenge sale" cases may also be disposed of at this stage already as it may be undesirable to prosecute based on the strong possibility of reconciliation between the parties and in the interests of society in

[146] Nicro are one of the organizations which have made a significant contribution to crime reduction and prevention through their Diversion programmes. Nicro are also responsible for facilitating offender rehabilitation and re-integration through various services which they offer. Nicro is just one of the many organizations which could facilitate a diversion programme with many already having being offenders having been succefully rehabilitated through their courses. See also Smit, A.2011. Research report: Cases diverted to Nicro: a Quantitative Statistical presentation of cases diverted to Nicro programmes by courts in South Africa from June 2009 to May 2010. Accessed at: http://www.nicro.org.za/wp-content/uploads/2011/07/2011-NICRO-FHR-Research.pdf. Accessed 1 November 2015.

[147] See Chapters 6 and 8 of the Child Justice Act 75 of 2008 which provide for the diversion of certain matters at various stages of the pre-trial process.

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not having to separate families unnecessarily.[148] The interests of the children of spouses party to a "revenge sale" also comes into play and is of paramount importance, especially in light of the decision in *S v M*. The case of *S v M* is illustrative of how courts approach the sentencing of cases involving minor children with caution and their commitment to serving the best interests of the child principle as entrenched in our Constitution and in other International law instruments.[149]

Whilst there will always be a need for consistency and fairness with regards to a prosecutors decisions to prosecute, prosecutors need to uphold certain constitutional values, such as the right to equality and the right of all citizens to be treated fairly. The role of a prosecutor is not to persecute offenders of crime but is to best serve the interests of the community, which in some cases may require them to look beyond the black and white application of the law.[150]

5.3 A more therapeutic approach to sentencing

A more therapeutic approach to the sentencing of "revenge sales" can be applied in the appropriate circumstances through the imposition of a non-custodial sentence with a restorative element to it.[151] This type of sentence would be of more benefit to an offender who acknowledges responsibility for his actions and is sincerely remorsefully and would be more in tune with the concept of social justice and Ubuntu.[152]In *S v M*,

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[148] Standards of professional responsibility and statement of the essential duties and rights of prosecutor adopted by the International Association of Prosecutors on the twenty third day of April 1999.

[149] The United Nations Convention on the Rights of the Child has had a significant influence on the protection afforded to children under the South African Constitution. Section 28 of the South African Constitution has its origins in the international instruments of the United Nations. See also. Skelton, A. 2010 . "*Face to Face: Sachs on restorative Justice"*. Accessed at: http://repository.up.ac.za/bitstream/handle/2263/16137/Skelton_Face(2010).pdf?sequence=1. Accessed 10 October 2015.

[150] NDPP Prosecution policy: Section 21 of the Act 32 of 1998.

[151] Skelton, A. & Batley, M. 2008. *"Restorative justice: a contemporary South African Review".* Acta Criminologica 21(3) pp 37-51.

[152] See Brunk, CG. Restorative justice and the philosophical theories of criminal punishment in Hadley, M. 2001. The spiritual roots of restorative justice. New York: New York University Press. See also South African Law Reform Commission. 2000. A new sentencing framework. Discussion Paper 82. Pretoria: Government Printer *Dikoko v Mokhatla 2006 (B) SA 235 (CC),* where Sachs J drew a comparison between the concepts of restorative justice and Ubuntu and held that "Ubuntu-botho is highly consonant with rapidly evolving international trends on restorative

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Sachs J, held that to sentence the accused to a term of imprisonment '*would be to indicate that community resources are incapable of dealing with her moral failures*' and he did not believe that this would be correct.[153] Sachs J went further to suggest that society cannot be seen to be preoccupied with revenge and that members of society are not uninterested "in the moral and social recuperation of one of its members'.

Whilst there is a need to effectively deter and denounce crime, especially in a country with a distressingly high crime rate, the denouncement of crime is constitutionally constrained and there is undoubtedly a need to move away from a predominantly penal based system to one which is more flexible and compatible with the values society seeks to affirm.[154] The process of involving all those affected by a particular crime, including the community, families and victims of crime has proven an effective means of facilitating behavior and attitudinal changes with offenders.[155] It is submitted that an approach to the sentencing of "revenge sales" based on restorative justice would create the most appropriate framework for denouncing this niche crime in South Africa and would create broader discretionary powers in sentencing without compromising the demands of justice.[156]

Word count: [13 317]

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justice. Deeply rooted in our society, it links up with world-wide striving to develop restorative justice systems of justice based on reparative rather than purely punitive systems".

[153] Skelton, A. 2010 . *"Face to Face: Sachs on restorative Justice".* Accessed at: http://repository.up.ac.za/bitstream/handle/2263/16137/Skelton_Face(2010).pdf?sequence=1. Accessed 10 October 2015.

[154] Batley M.2014. "*Call for agents of change: Guidelines for the use of RJ in sentencing".* See also Terblanche, S. 2008. Research on the sentencing framework bill. Cape Town, Open Society Foundation of South Africa. Page 4. See also Van Zyl Smit, D. 2004. Swimming against the tide: controlling the size of the prision population in SA in Dixon,B

[155] Nicro, an NGO which is responsible for facilitating diversion programmes has had tremendous success and has provide a unique service to the criminal justice system. More details of the Research report can be found at: Smit, A.2011. Research report: Cases diverted to Nicro: a Quantitative Statistical presentation of cases diverted to Nicro programmes by courts in South Africa from June 2009 to May 2010. Accessed at: http://www.nicro.org.za/wp-content/uploads/2011/07/2011-NICRO-FHR-Research.pdf. Accessed 1 November 2015.

[156] Batley M.2014. *"Call for agents of change: Guidelines for the use of RJ in sentencing".* Page 5

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