

# **Restorative justice in South Africa: An attitude survey among legal professionals**

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Submitted in fulfilment of the requirements in respect of the Master's Degree qualification  
MA(SIL705) in the Department of Psychology in the Faculty of Humanities at the University  
of the Free State

**February 2015**

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## **Acknowledgements**

I would like to thank Prof. Karel Esterhuysen for his invaluable assistance, guidance and practical support with the statistical analyses of this study. I gratefully acknowledge the generous support and advice by Prof. Paul Fouche in navigating my first foray into the field of qualitative research.

I also want to express my deepest gratitude to all the individuals who participated in this study for taking valuable time out of their day to complete the questionnaires and providing the crucial data on which the research was executed.

I am thankful for having Sandri and Theo van Wyk as incredible parents, and a wonderful sister Natasha van Wyk. Their unconditional love and moral support enabled me to stay grounded and sustained me throughout this challenging but exciting experience. I extend a special thank you to Jacques de la Harpe for his encouragement and for understanding and accepting the sacrifices I had to make in pursuit of my academic career.

Words cannot express my profound gratitude to my supervisor Prof. D.A. Louw. His leadership, guidance, and instruction have made an invaluable contribution to my career. His compassion, patience and encouragement has boosted the confidence I have in my abilities and potential achievements – in short, he inspired me to believe in myself. For this I will be eternally grateful to him. He is an extraordinary human being and an inspirational educator who is an exemplary role model to everyone he meets. I am privileged to know him and call him my mentor.

# **A quantitative study on the attitudes of South African legal professionals towards restorative justice**

## **Introduction**

Growing dissatisfaction with the formal criminal justice system in many countries has led to a mind shift regarding criminal justice; not only in the way it is conceptualised, but also in the way it operates. One of the most prominent concerns highlighted in literature is that alternative options to custodial sentences are not made available for offenders who are sentenced for less-serious offences. Some other current concerns and criticisms are that retribution as a primary motivation for punishment (which still plays a prominent role) is viewed to be unacceptable; there is a general disappointment in the efficacy of rehabilitation; the high costs of maintaining prisons are paid by the tax payer; the offender's family is also punished by the imprisonment; and the criminal justice systems in most countries are state and offender focused and only indirectly concerned about the needs of the victims (Batley, 2013; Petersilia & Reitz, 2012).

In response to the criticism against imprisonment as a main mode of punishment, alternative sentencing, which implies that all parties affected by a criminal act, i.e. the offender, the victim and the community, are brought together in their common attempts to restore the harm and disruption caused by the crime (Naude, Prinsloo, & Ladikos, 2003a). An approach that fits these ideals and criteria is restorative justice.

However, it is an open question to what extent restorative justice is supported and embraced by legal professionals in South Africa. Naude and Prinsloo (2005) explains that prosecutors and magistrates did not support restorative justice as sentencing options for many types of offences, and that a possible reason for this could be the perception of restorative justice as an alternative to the usual court process instead of providing alternative options for sentencing. When examining the implementation of restorative justice (or lack thereof), an important factor to consider is the perceptions and opinions legal professionals may have of it.

## **Literature Review**

**Restorative justice defined.** There are disagreements and different interpretations (as is usually the case in academic circles) of many fundamental concepts of restorative justice – both in the way they are defined and the way they are implemented and practiced. Doolin

(2007, p. 427) explains “while there are some generally agreed principles of restorative justice, there is much less agreement about the meanings to be associated with these principles”.

The main point of debate between proponents of restorative justice relates to whether the concept should be defined in a way that emphasises the process to be used, or rather the outcomes to be achieved (Doolin, 2007). In a process-based definition of restorative justice, a description of what the process entails is emphasised. An example of such a definition of restorative justice is offered by Marshall (1999, p. 5): “Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future”. This definition is endorsed by the Working Party on Restorative Justice (Gavrielides, 2011) and is the most frequently cited in restorative justice literature, however, it is often criticised by scholars in the field. Although it is conceded that this simple definition includes some of the core elements of restorative justice, many proponents believe it to be too vague because the importance of the aims and outcomes of the process is not emphasised. Many scholars in the field prefer a definition in which the outcomes to be achieved in a restorative justice process is emphasised. An example is Bazemore and Walgrave (1999, p. 48) who define restorative justice as: “every action that is primarily oriented toward doing justice by repairing the harm that has been caused by a crime”.

Despite the differences in the two definitions mentioned above, they should be considered complementary rather than irreconcilable, and in this regard, Johnston and Van Ness (2005, p. 23) offer a combination of a process-based and an outcome-based definition of restorative justice: “Restorative justice is the process in which the hurts and the needs of both the victim and the offender are addressed in such a way that both parties, as well as the community which they are part of, are healed”. The present author feels that a combined definition has the advantage of containing the core elements of both restorative justice definitions, while also eliminating the weak points of each. Therefore, this combined definition is preferred by this author, and will form the basis of the present study.

**The past and present of restorative justice.** Although the term restorative justice is relatively new, many scholars argue that the underlying philosophy has roots dating far back in history and spread over the world, and it has been argued that it has been the primary method employed for criminal justice in all human cultures throughout history (Braithwaite,

2003; Naude et al., 2003a; Skelton, 2007). These authors explain that in early human societies the practice of restitution took precedence over punishment. People in ancient, pre-state societies were very dependent on each other, and communities were tight-knit. Whenever a dispute or offence occurred, a resolution that would keep community peace was sought. Gavrielides (2011) argues that ancient societies focused on reparation to the victim (not the state) rather than to punish the offender, with the aim to maintain and enhance interpersonal relationships. He further explains that in these communities deviance was seen as a community problem, a community failure and not simply as a matter for the offender to repay or restore. Because of the nature of these societies the resolution of conflicts is a communal one, as everyone in the community is interdependent, and therefore harm to one is harm to all. Thus, the response to conflict and offences was aimed at restoring relationships, reconciliation between disputing parties, and reparation to injured parties (Neser, 2001). Many historical examples are provided to substantiate the history of restorative justice, including; the Babylonian Code of Hammurabi (1700 BC), the Sumerian Code of Ur-Nammi (2060 BC), the Roman Law of the Twelve Tables (449 BC), and the laws of Ethelbert (600 AD) (Gavrielides, 2011; Mulligan, 2009).

It is generally accepted that the decline of restorative justice began with the Normandy invasion of Britain in 1066 AD (Mulligan, 2009; Naude, Prinsloo, & Ladikos, 2003b). This event led to the evolution of sovereigns where single rulers wanted to establish their power. Taking over and solving disputes between citizens as well as meting out punishment for criminal behaviour was one way of demonstrating power and control. Justice as we know it today, developed from this idea of a centralised, hierarchical and all-powerful state that should be in charge of dealing with crime and imprisoning criminals to protect society. Because of the global centralisation of states which assumes central control of the justice system, restorative justice has been replaced by the governments' focus and preference for punitive measures (Braithwaite, 2003).

The revival of restorative justice began in the 1970s. It is generally acknowledged that Albert Eglash coined the term 'restorative justice' in 1977 (Gavrielides, 2011). In the same year two publications by Randy Barnett and Nils Christie provoked further interest in restorative justice. Barnett, Christie and Eglash were among the first to point out the inadequacy of criminal justice in providing satisfactory results in response to crime and in proposing an alternative paradigm to ultimately replace the punitive one (Gavrielides, 2011).

Zehr (2002) explains that the interest in alternative methods of dealing with crime and the people who commit crime was in reaction to dissatisfaction with the current modes of criminal justice responses. He claims that the main sources of dissatisfaction is the increasing complexity within the criminal justice system, the general feeling that community needs were not being met by the justice systems, and the perception that communities are better equipped to handle disputes than centralised state agencies (Neser, 2001).

Bianchi (1994) argued that restorative justice survived “openly or covertly” in many indigenous cultures. Indigenous justice practices have greatly influenced restorative justice. An outcry against over-representation of indigenous peoples in prisons (both in Canada and Australia) led to the re-examination of indigenous justice practices of these cultures. Batley and Maepa (2005) note that various countries have investigated and discovered that many practices of their indigenous peoples can be beneficial and has much to teach the modern criminal justice system.

There is a danger of thinking in ‘all or nothing’ terms, where if one accepts that the ancient ways of doing justice was ideal, then contemporary criminal justice should be abolished as it has nothing to offer. Accepting such a rosy outlook regarding the perfection of the historical prominence of restorative practices is a distortion of the truth. Braithwaite (2003, p. 58) points out “I have yet to discover a culture which does not have some deep-seated restorative traditions. Nor is there a culture without retributive traditions”.

**Restorative justice internationally.** Braithwaite (2004, pp. 58–59) argues that the values of restorative justice are cultural universals:

“All cultures value repair of damage to our persons and property, security, dignity, empowerment, deliberative democracy, harmony based on a sense of justice and social support. They are universals because they are all vital to our emotional survival as human beings and vital to the possibility of surviving without constant fear of violence.”

Restorative justice has become a global phenomenon. Roberts (2003, p. 115) claims that “cultural borrowing, cross-fertilisation of ideas and practices between jurisdictions and – more recently – explicitly supra-national initiatives are prominent characteristics of the restorative justice movement”. In Asia, juvenile justice has the primary focus of restorative justice. It has also guided peace-making efforts in societies in conflict and in regulating indigenous practices. In the Middle East, experimenting with restorative justice practices is

just beginning, and is focused on the use of traditional conflict resolution processes and juvenile justice issues. Restorative justice, with its roots in indigenous practices, is well established in the Pacific region. It is now being expanded to include not only responding to crime, but also discipline in schools and other sources of conflict. In a response to the need for justice reforms, restorative justice developed to deal with increasing crime rates while simultaneously trying to boost citizen confidence in the justice system. Restorative efforts are also aimed at national reconciliation in the aftermath of several years of civil war. In North America restorative justice is applied in various arenas, from school discipline, work-related disputes, to prison reforms. The development of restorative justice has arisen here from various sources, including the civil rights movement, the feminist movement, the prison abolition movement, the revival of indigenous practices of First Nations cultures, and the general dissatisfaction with the criminal justice system. In Europe both government and community agencies contribute to experimentation with restorative justice (Centre for Justice and Reconciliation, 2014).

**Restorative justice in Africa.** In Africa, restorative justice has been greatly influenced by the recovery of indigenous justice practices. It is mainly focused on developing more restorative approaches in dealing with prison over-crowding and addressing gross human rights violations (such as genocide, civil wars and Apartheid). The *gracaca* courts in Rwanda and the Truth and Reconciliation Commission in South Africa are examples of how restorative justice is used to address conflict on a greater scale.

In pre-colonial Africa, disagreements and disputes were settled in informal justice forums. However, during the colonial era, these methods were seen as obstacles to development, and the justice systems brought over with the colonisers were enforced. “In Africa, European colonisation repressed indigenous restorative justice in favour of a retributive justice philosophy that is hierarchical, adversarial, punitive and guided by codified laws and rules of procedure, which limit decision making to members of a small elite” (Naude et al., 2003a, p. 1).

However, despite enforced foreign justice practices, traditional modes of dispute resolution have remained relevant among Africans. There are several reasons for this, including; that most Africans have very limited access to the formal criminal justice system as many of them live in rural areas; due to a very limited infrastructure in most African countries, there are not sufficient resources to deal with all disputes; and the processes employed by the criminal

justice courts are often inappropriate for settling disputes between people living in close-knit communities in rural areas, where breaking social relationships may cause conflict in the whole community (Omale, 2006).

**Restorative justice in South Africa.** In the sphere of restorative justice, South Africa has made a name for itself and has gained a global reputation. The Truth and Reconciliation Commission is one of the most famous projects associated with the restorative justice movement. Despite being globally recognised as a country at the forefront of the restorative movement, this view may be inaccurate.

Widespread criminal behaviour and increasing crime rates is a great concern in South Africa (Skelton, 2007). In response to this and increasing public fear of crime, government emphasised a ‘tough on crime’ approach. Batley and Maepa (2005) explain, the response to crime by government has been to encourage more arrests and prosecutions, as well as increasing the amount and degree of punishment for people convicted of crime. These policies do not reflect the values and philosophy of restorative justice. Skelton (2007) argues that although the government wishes to investigate and explore new ideas regarding our response to crime, they are even more invested in keeping the citizens pacified by satisfying the general public’s preference for punitiveness.

Skelton (2007) postulates that South Africa’s indigenous knowledge and traditional justice practice is an advantage as it is easily translatable to restorative practices, and that the values and principles underlying restorative justice is familiar to South African citizens. However, she goes on to say that despite this “positive foundation”, restorative justice has not taken root in the formal criminal justice system. Although the concept of restorative justice has been gaining popularity in the South African context in recent years (Muntingh, 2005), it is still unclear whether legal practitioners display favourable attitudes regarding the implementations of restorative justice in appropriate cases.

## **Methodology**

In this section, the research methodology followed to collect and analyse data about legal professionals’ opinions about restorative justice will be discussed. In the discussion that follows, attention will be given to the research design, research objectives, data collection method, research sample, ethical considerations, measuring instruments and statistical analyses.

**Research Design.** In this study, non-experimental research was undertaken. Two research designs were employed. A criterion group design was used to compare the average scores of the groups, and a correlational design was employed to determine the relationship between variables.

**Research Objectives.** As mentioned in the Introduction the main objective of the study was to determine the attitudes of legal professionals toward restorative justice. More specifically the aim of the study was to determine (i) the possible differences of legal professionals' understanding of restorative justice (research objective 1), and (ii) the possible differences in opinions about restorative justice among legal professionals (research objective 2). To ascertain respondents' understanding of restorative justice, they were required to indicate true, false or uncertain to the statements provided. In this instance, the data is categorical in nature and the proportional differences between the various groups of legal professionals were investigated. To obtain the opinions of legal professionals, items were drawn up, and the respondents were required to provide an opinion according to a 5-point Likert-scale (strongly disagree to strongly agree). These measures were thus done on a continuous scale and average scores could therefore be compared.

**Sampling and Data Collection.** The data collection methods were different for the various sub-groups of our legal professional population. For the sub-groups 'lawyers' and 'advocates', a software programme called Evasys was used to collect the questionnaires. With this software, one generates the questionnaire on the programme and links this questionnaire electronically with a list of e-mail addresses. The programme then sends the questionnaire to the linked e-mail addresses, and when it is completed by the recipient, returns the results to the Evasys programme.

For the sub-group 'prosecutors', 'magistrates' and 'judges', the Evasys method of questionnaire distribution was not possible as e-mail addresses for the individuals in these groups are not readily available. For this reason the questionnaire was distributed in hard copy to the participants. They were required to complete the questionnaire and return it either via fax or e-mail.

The population from which our samples were drawn is collectively referred to here as 'legal professionals', but is comprised of five sub-groups namely, lawyers, advocates, prosecutors, magistrates and judges.

Quota sampling was employed whereby categories of people that need to be in the sample were first identified and then the required number (quotas) in these categories (Maree, 2013). Sampling is then done by any other sampling methods until the quotas have been reached. Our quotas were non-proportional, where “sampling is done until a certain minimum number of units in various sub-populations are reached, regardless of what the actual proportions in the population are” (Maree, 2013, p. 177). Our aim was to obtain at least 50 respondents for each sub-group.

Two different sampling methods were used for the different sub-groups. For the sub-groups ‘lawyers’ and ‘advocates’, convenience sampling was used. To compile our sample frame, the Hortors Legal Dictionary was consulted. “The Hortors Legal Dictionary/Directory consists of all the contact details for all attorneys and advocates in South Africa” (Hortors, 2014). A list of e-mail addresses of all the lawyers and advocates in this directory was compiled. Some e-mail addresses were excluded where it was specified that the particular legal practitioner specialises in areas which is not relevant to this research, such as conveyancers, aviation lawyers, company law attorneys, etc. The questionnaire was sent to approximately 800 e-mail addresses obtained from the Hortors directory, with the hopes of at least 50 being completed for each of the sub-groups.

For the sub-groups ‘prosecutors’, ‘magistrates’ and ‘judges’, snowball sampling was employed. As Maree (2013, p.177) explains “this method is often used in cases where the population is difficult to find or where the research interest is in an inter-connected group of people”. Both these criteria apply to the three sub-groups. The population is difficult to find because due to the nature of these groups’ occupations, ready access to their e-mail addresses is not available. Therefore we contacted a few individuals from each group to complete a questionnaire, and then also to forward a copy of the questionnaire to a colleague. Again, the hope was to receive at least 50 respondents from each group.

The total group of respondents we received consisted of 251 legal professionals, of which two did not indicate their occupation. The remaining 249 respondents were sub-divided according to occupation and are displayed in Table 1.

Table 1 *Sub-division of sample according to occupation*

Occupation	Frequency	%
Judge	4	1.6
Magistrate	39	15.7
Prosecutor	10	4
Advocate	60	24.1
Lawyer	136	54.6
Total	249	100.0

Due to the significant differences in the size of the sub-groups, we have decided to combine the ‘magistrates’ and ‘judges’ sub-groups as one group and to disregard the prosecutors (n=10) as they cannot be meaningfully combined with any of the other groups. Thus, the final group of respondents comprised of 239 legal professionals.

**Measuring Instruments.** In order to obtain a measurement of legal professionals’ opinions regarding restorative justice, a questionnaire was compiled. The questionnaire comprised of three sections. Section 1 dealt with biographical information where respondents were asked to provide their gender, age, legal occupation, language and province of residence. Section 2 included questions regarding what respondents understood restorative justice to be. Section 3 included questions on opinions respondents may have about restorative justice.

In Section 2, statements regarding restorative justice and its practices were made to which respondents could answer with either ‘true’, ‘false’ or ‘uncertain’. To construct these questions, comprehensive reading of literature relating to restorative justice was done. Specific attention was given to the various practices, principles and implementations of restorative justice. From the literature it was concluded that no single, universal concept of restorative justice exists, and therefore the questions in Section 2 were designed in such a manner as to determine the understanding legal professionals in South Africa have of it. This was done by making statements about the most common practices of restorative justice, and asking the participant to indicate whether they agree with the statement as being a component or being representative of restorative justice. The scale of these questions was categorical in nature.

Section 3 consisted of questions on a five point Likert-scale, the five points being ‘strongly disagree’, ‘disagree’, ‘uncertain’, ‘agree’ and ‘strongly agree’. Here again, literature on

restorative justice was consulted in compiling the questions. The aim of the questions in this section was to elicit opinions legal professionals may have about restorative justice.

**Ethical Considerations.** Permission was obtained from the Chief Justice's Office in Pretoria to distribute questionnaires. Complete anonymity and confidentiality was ensured, and no names or specific information that may identify any respondent is disclosed in any part of this study. Participants were not required to provide their names or any contact details. Participation in this study was completely voluntary.

**Statistical Procedures.** First the descriptive statistics on the biographical information in Section 1 will be displayed. To examine research objective 1, the chi-squared test for homogeneity (Howell, 2013) was used as all the variables were measured on a nominal level. Regarding research objective 2, the mean opinion statements of the various sub-groups was compared on each of the items. In this case the dependent variables have various items which have not been summed up to produce a total score. One-way MANOVAs was used to determine whether there are significant differences in the mean scores per item. If a significant *F*-score (according to the Hottelling-Lawley trace) was found, the analyses was followed up by employing one-way variance analysis in order to determine which items produced the most significant differences in means. The Scheffe post hoc t-test was used to determine between which of the three groups these differences occur (Howell, 2013).

In order to be able to comment on the meaningfulness of statistically significant results that could possibly be found with this study, we also looked at the practical significance of the results. As a measurement of practical significance, effect sizes (Steyn, 1999) were calculated. When more than two population parameters (of means) are compared (as with research objective 2), one-way variance analysis was employed, and in this instance the following guideline measures (*f*) was used: 0.1 = small effect; 0.25 = medium effect; 0.4 = large effect. In the case of the  $\chi^2$ - test (research objective 1), the effect size is indicated by *w* and the guideline measures as follows: 0,1 = small; 0,3 = medium; 0,5 = large.

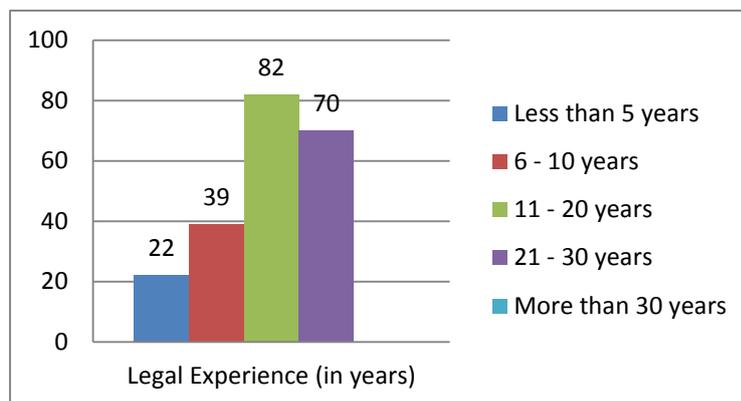
The software programme SPSS (SPSS Incorporated, 2014) was used to conduct the analyses. The 1% level of significance was used in this study.

## Results and Discussion

**Introduction.** First the descriptive statistics on the biographical data in Section 1 will be displayed. Secondly, the relationships between the three groups and their understanding of restorative justice will be investigated (research objective 1). Lastly, the descriptive statistics of the entire group of respondents' opinions on the Likert-scale for the 22 items will be presented and discussed. Thereafter the possible differences in mean scores on the 22 items of the three groups of legal professionals (judges and magistrates, advocates and lawyers) will be examined.

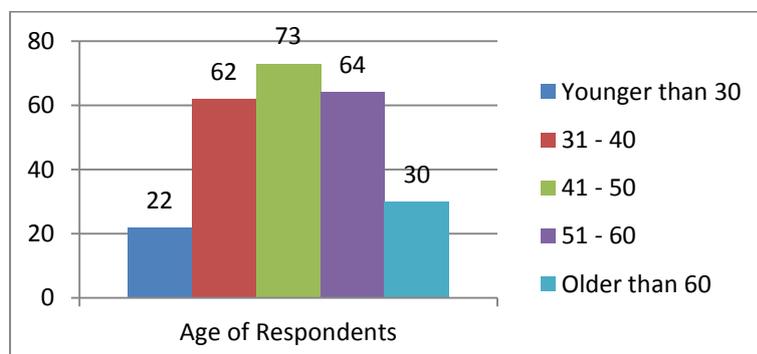
**Biographical descriptive statistics.** Summaries of the biographical data provided in Section 1 are provided in the following tables.

Figure 1 *Years of legal experience of the respondents.*



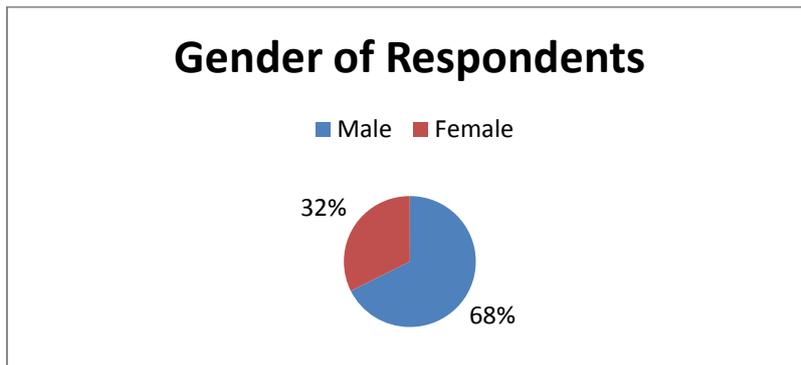
From Figure 1 it can be seen that most respondents had between 11 and 20 years of experience in their legal profession.

Figure 2 *Age of respondents.*



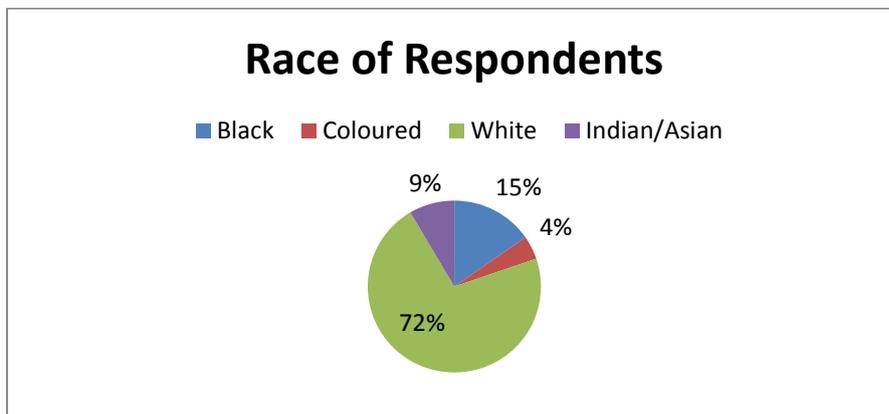
It can be seen from Figure 2 that most respondents were between the ages of 41 and 50, closely followed by respondents aged between 51 and 60, and then the ages 31 to 40.

Figure 3 Gender of respondents.



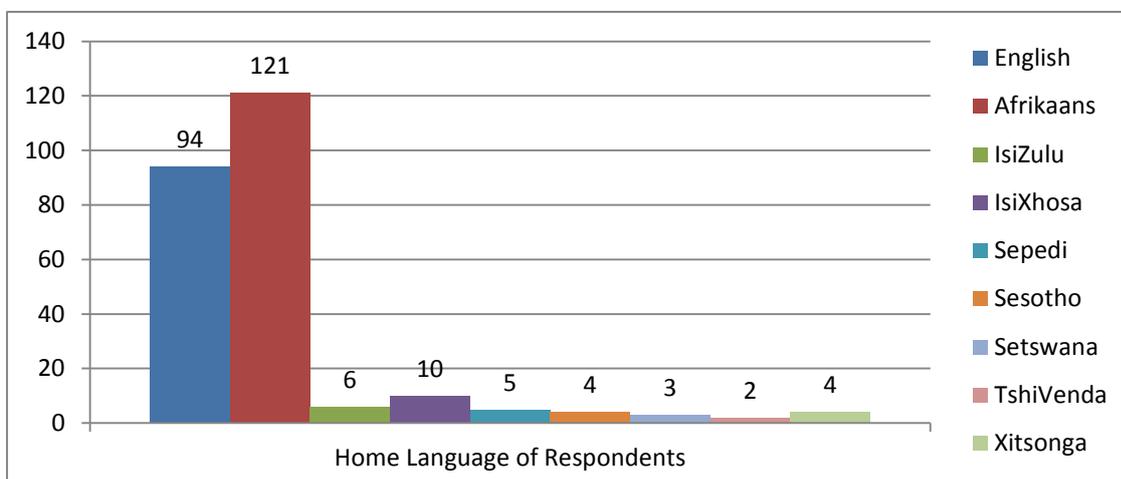
There were twice as many male respondents as female respondents.

Figure 4 Race of the respondents



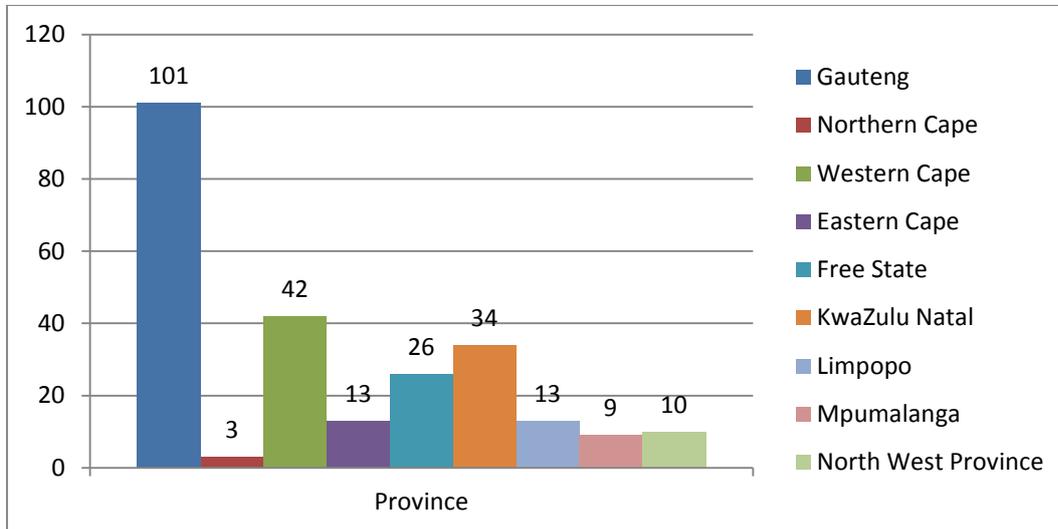
From Figure 4 it can be seen that by far the majority respondents were white. There is a significant interval between the majority respondent race category and the next biggest group which were Black.

Figure 5 Home language of respondents



Most of the respondents were Afrikaans, followed by English. Once again, there was a large interval between the two languages of the majority of respondents and the other languages.

Figure 6 *Province of respondents*



From Figure 6 it can be seen that the most respondents reside in the Gauteng province.

**Difference in proportions regarding legal professionals' understanding of restorative justice.** Concerning the understanding of restorative justice (research objective 1), the proportions of the various groups, as responded to per category from Items A to G, were compared with each other. The chi-squared test was employed and the results per item will be discussed below. As no other South African or international research data could be found for a basis of comparison, the present researcher had to rely heavily on the research by Prinsloo, Ladikos and Naude in this regard.

The relationship between Item A and the legal groups is presented in Table 2.

Table 2  *$\chi^2$ -results between three legal professional groups for Item A*

Item A: I am well acquainted with the principles and goals of restorative justice	Judge/magistrate		Advocate		Lawyer	
	F	%	F	%	F	%
True	37	86.0	27	45.0	48	35.6
False	3	7.0	10	16.7	27	20.0
Uncertain	3	7.0	23	38.3	60	44.4
Row total:	43		60		135	
$\chi^2 = 33.809$ $p = 0.000$ ( $w=0.38$ ) $v = 4$						

The chi-squared score indicate that on the 1% level of significance a significant difference occurred for the three groups (judges/magistrates, advocates, lawyers) regarding Item A. The corresponding effect size of 0.38 indicates that this result is of average practical interest. From Table 2 it can be seen that a much larger proportion judges/magistrates (86.0%) answered positively in response to Item A than advocates (45.0%) or lawyers (35.6%). In a study by Prinsloo, Ladikos and Naude (2003b) on judicial views on restorative justice, they found that a third of the respondents in their sample were satisfied with the extent of their knowledge on restorative justice matters, while nearly 51% indicated that they would like to learn more about it. This is in contrast to the responses of the majority judges and magistrates in the sample of this study. The reason for the discrepancy may be due to the 12 year interval between the two studies, in which members of the judiciary have had more opportunity to learn about restorative justice. It may also be a result of the increasing popularity of restorative justice in social and academic discourses. The difference between the proportions between the judges/magistrates group and the advocate and lawyer groups may be because, in order for judges and magistrates to be able to perform their duties, they have a responsibility to stay current on new developments in justice practices.

The relationship between Item B and the three legal groups is presented in Table 3.

Table 3  $\chi^2$ -results between three legal professional groups for Item B

<b>Item B: Restorative justice means that all parties directly affected by an offence are given the opportunity to participate in decision-making about how to resolve the effects of the offence</b>	<b>Judge/magistrate</b>		<b>Advocate</b>		<b>Lawyer</b>	
	<i>F</i>	%	<i>F</i>	%	<i>F</i>	%
True	42	97.7	48	80.0	93	76.9
False	1	2.3	2	3.3	10	5.5
Uncertain	0	0.0	10	16.7	32	17.6
Row total:	43		60		135	
$\chi^2 = 16.250$ $p = 0.003$ ( $w=0.26$ ) $v = 4$						

The chi-squared value indicates that on the 1% level of significance, a significant difference in proportions occurred for the three groups (judges/magistrates, advocates, lawyers) regarding Item B. The corresponding effect size of 0.26 also indicates that this result is of average/medium practical interest. From Table 3 it can be seen that a much larger proportion judges/magistrates (97.7%) answered positively to Item B than advocates (80.0%) and

lawyers (76.9%). It is important to note however, that although a greater proportion judges/magistrates than advocates and lawyers responded ‘true’ on this item, all three groups of respondents answered highly positively on this item. The fact that most respondents (from all three groups) answered positively to this question indicates that the majority of respondents understood that collective decision making by all parties involved in the offence is an element of restorative justice. In the same study by Prinsloo, Ladikos and Naude (2003a) mentioned above, more than three quarters (76.8%) of their research group agreed that the victim, offender and the community should be involved in determining the response to the offence.

The relationship between Item C and the legal professional groups is presented in Table 4.

Table 4  $\chi^2$ -results between three legal professional groups for Item C

Item C: Restorative justice focuses more on the harm suffered by the victim and society rather than the fact that societal norms/laws have been violated	Judge/magistrate		Advocate		Lawyer	
	F	%	F	%	F	%
True	18	41.9	36	60.0	85	62.5
False	23	53.5	14	23.3	23	16.9
Uncertain	2	4.7	10	16.7	28	20.6
Row total:	43		60		135	
$\chi^2 = 24.908$ $p = 0.000$ ( $w=0.32$ ) $v = 4$						

The chi-squared value indicates that on the 1% level of significance, a significant difference in proportions regarding Item C occurred for the three groups (judges/magistrates, advocates, lawyers). The corresponding effect size of 0.32 indicates that this result is of average practical interest. From Table 4 it can be seen that a much greater proportion judges/magistrates (53.5%) indicated that they do not agree (false) with the statement in Item C than advocates (23.3%) or lawyers (16.9%). Furthermore, it can be seen from the table that a smaller proportion judges/magistrates (4.7%) than advocates (16.7%) and lawyers (20.6%) indicated ‘uncertain’ regarding Item C. Thus, more judges and magistrates than advocates and lawyers felt that a shift in focus from the violation of laws to a focus on the harms suffered by victims would not be an outcome of restorative justice practices. The fact that a much smaller proportion judges/magistrates responded ‘uncertain’ together with the large proportion who responded ‘false’ indicates that the majority judges/magistrates in the sample emphatically did not agree with this statement. Maybe this is because judges and magistrates

feel that the principal purpose and objective of their professional duty is to maintain and uphold societal laws and norms.

The relationship between Item D and the three legal groups is presented in Table 5.

Table 5  $\chi^2$ -results between three legal professional groups for Item D

<b>Item D: The application of restorative justice could result in a more victim-based criminal justice system as opposed to an offender-based approach</b>	<b>Judge/magistrate</b>		<b>Advocate</b>		<b>Lawyer</b>	
	<i>F</i>	%	<i>F</i>	%	<i>F</i>	%
True	34	79.1	42	71.2	99	73.3
False	9	20.9	6	10.2	11	8.1
Uncertain	0	0.0	11	18.6	25	18.5
Row total:	43		59		135	
$\chi^2 = 13.103$ $p = 0.011$ $v = 4$						

The chi-squared value indicates that on the 1% level of significance, no significant difference in the proportions of the three groups (judges/magistrates, advocates, lawyers) occurred regarding Item D. It is however, remarkable that in this case, most respondents in all three groups agree with the statement in Item D, namely “*The application of restorative justice could result in a more victim-based criminal justice system as opposed to an offender-based approach.*”

The relationship between Item E and the three legal professional groups is presented in Table 6.

Table 6  $\chi^2$ -results between three legal professional groups for Item E

<b>Item E: In practice, the justice and correctional system do not provide the necessary resources and structures to implement restorative justice efficiently</b>	<b>Judge/magistrate</b>		<b>Advocate</b>		<b>Lawyer</b>	
	<i>F</i>	%	<i>F</i>	%	<i>F</i>	%
True	36	83.7	51	85.0	104	77.0
False	4	9.3	2	3.3	8	5.9
Uncertain	3	7.0	7	11.7	23	17.0
Row total:	43		60		135	
$\chi^2 = 4.585$ $p = 0.333$ $v = 4$						

The chi-squared value indicates that on the 1% level of significance, no significant difference in the proportions of the three groups (judges/magistrates, advocates, lawyers) occurred regarding Item E. However, it is again remarkable that a large percentage of respondents in all three groups agree with the statement in Item E, namely *“In practice, the justice and correctional system do not provide the necessary resources and structures to implement restorative justice efficiently.”* In the study done by Prinsloo, Ladikos and Naude (2003b) more than half of the research group (66.7%) indicated a concern that inadequate community resources could render restorative justice applications ineffective. The finding of the study by Prinsloo et al. (2003) taken together with the finding of Item E in the current study suggests that over the 12 year period between the two studies, the lack of resources should be considered a significant barrier to the successful implementation of restorative justice.

The relationship between Item F and the three legal professional groups is presented in Table 7.

Table 7  $\chi^2$ -results between three legal professional groups for Item F

Item F: I have recommended restorative justice in appropriate cases	Judge/magistrate		Advocate		Lawyer	
	<i>F</i>	%	<i>F</i>	%	<i>F</i>	%
True	35	81.4	18	30.0	39	28.9
False	8	18.6	33	55.0	75	55.6
Uncertain	0	0.0	9	15.0	21	15.6
Row total:	43		60		135	
$\chi^2 = 41.221$ $p = 0.000$ ( $w=0.42$ ) $v = 4$						

The chi-squared value indicates that on the 1% level of significance, a significant difference in proportions occurred for the three groups (judges/magistrates, advocates, lawyers) regarding Item F. The corresponding effect size of 0.42 indicates that this result is of medium to large practical interest. From Table 7 it can be seen that a much larger proportion judges/magistrates (81.4%) than advocates (30.0%) or lawyers (28.9%) indicated that the statement in Item F is true. Furthermore, as can be seen from the table, a smaller proportion judges/magistrates (0.0%) indicated ‘uncertain’ than advocates (15.0%) and lawyers (15.6%) regarding Item F. In the study by Prinsloo, Ladikos and Naude (2003) explained that their findings suggest that at the time of the survey, prosecutors and magistrates did not support restorative justice as a sentencing option for many types of offences and offenders, and that this may largely be due to the fact that restorative justice was largely seen as an alternative to

the criminal justice process, rather than providing additional sentencing options. In contrast, the findings of the current study indicate that the majority judges and magistrates in the sample have recommended restorative justice before. The reason for this may be due to the gaining popularity and growing awareness of restorative justice in the intervening period between the two studies.

The relationship between Item G and the three legal professional groups is presented in Table 8.

Table 8  $\chi^2$ -results between three legal professional groups for Item G

Item G: How many cases have you referred to restorative justice alternatives	Judge/magistrate		Advocate		Lawyer	
	F	%	F	%	F	%
None	10	23.3	41	69.5	94	69.1
1-10	22	51.2	17	28.8	28	20.6
11-20	3	7.0	0	0.0	6	4.4
More than 20	8	18.6	1	1.7	8	5.9
Row total:	43		59		135	
$\chi^2 = 37.282$ $p = 0.000$ ( $w=0.40$ ) $v = 4$						

The chi-squared value indicates that on the 1% level of significance, a significant difference in proportions occurred for the three groups (judges/magistrates, advocates, lawyers) regarding Item G. The corresponding effect size of 0.4 indicates that this result is of medium to large practical interest. From Table 8 it can be seen that a much larger proportion advocates (69.5%) and lawyers (69.1%) than judges/magistrates (23.3%) have never recommended restorative justice as an alternative option. Furthermore, 33 (76.8%) judges/magistrates have recommended restorative justice, while only 18 (30.5%) advocates and 42 (31.1%) lawyers have recommended the use of restorative justice.

**Descriptive statistics.** First the descriptive statistics of the respondents (minimum and maximum scores, means, standard deviations, skewness and kurtosis) regarding the opinion statements on the 22 items was calculated. For the interpretation of the skewness and kurtosis indexes, the guidelines of Brown (2012) was utilised. According to Brown (2012), the following interpretation regarding the skewness index can be made:

When smaller than -1.0 or larger than +1.0, the distribution is significantly skewed.

When between -1.0 and -1/2 or between +1/2 and +1.0, the distribution is moderately skewed.

When between  $-\frac{1}{2}$  and  $+\frac{1}{2}$ , the distribution is moderately symmetrical.

If equal to 0, the distribution is normal.

In order to deliver a finding on the kurtosis index, it is important to determine the excess kurtosis (Kurtosis – 3). In other words, if a distribution is normal, the kurtosis value will be 3, so that  $(3 - 3 = 0)$  indicate that the excess kurtosis value is zero. If the excess kurtosis has a negative value, it indicates that the distribution is relatively flat (platykurtic). A positive kurtosis value, however, indicates that the distribution is relatively peaked (leptokurtic). In the following table, the excess kurtosis values are indicated, and thus means that if a value smaller than  $-2.0$  or larger than  $+2.0$  is obtained, the distribution is respectively very flat or very pointy. In Table 14, the descriptive statistics for the entire group is presented.

Table 9 *Descriptive statistics for the 22 items*

Item	Min	Max	$\bar{X}$	sa	Skewness	Kurtosis
1. In general, more alternative sentences should be implemented instead of prison sentences	1	5	3.63	1.16	-.749	-.362
2. In theory, the concept of restorative justice sounds promising	1	5	3.94	0.82	-.898	1.132
3. A restorative justice approach makes it possible for both indigenous law and Roman-Dutch law to be accommodated	1	5	3.69	0.86	-.487	.377
4. Restorative justice relates to the African concept of Ubuntu and would therefore be more acceptable to many South Africans citizens	1	5	3.50	0.88	-.269	-.064
5. Restorative justice includes and empowers communities	1	5	3.65	0.95	-.580	.101
6. Restorative justice is appropriate for first-time offenders only	1	5	3.04	1.15	.180	-1.071
7. Restorative justice is only appropriate when the offender and victim know each other.	1	5	2.36	0.89	.680	.100
8. Restorative justice is more appropriate for juvenile offenders than adult offenders	1	5	2.86	1.03	.218	-1.010
9. Restorative justice could contribute to offenders accepting responsibility for their criminal actions	1	5	3.79	0.90	-.671	.352
10. Offenders might see restorative justice as an “easy option” to avoid prison	1	5	3.50	1.08	-.683	-.195
11. Restorative justice could escalate conflict between the offender and the victim	1	5	2.95	0.97	-.142	-.382
12. Restorative justice could alleviate the vase-load within the justice and correctional system	1	5	3.66	1.03	-.636	-.082
13. South African victims are very oriented toward prison-based punishment and therefore are not interested in restorative justice	1	5	3.37	1.04	-.277	-.678
14. Restorative justice will reduce the prison population significantly	1	5	3.68	0.95	-.400	-.395
15. Restorative justice has a greater potential for misuse and exploitation compared to the structured justice process	1	5	3.39	1.07	-.337	-.625
16. In the majority of cases, imprisonment is an appropriate punishment for offenders	1	5	3.03	1.11	.094	-1.056
17. Legal practitioners should be educated in, and encouraged to recommend alternative practices instead of imprisonment	1	5	4.05	0.81	-1.182	2.412
18. My experience with restorative justice has largely been positive.	1	5	3.34	0.92	-.079	.363
19. Victims should be more involved in the justice process	1	5	4.02	0.93	-1.187	1.484
20. Rehabilitation in prison is effective	1	5	2.10	1.02	.586	-.444
21. It would be money and time well spend to create the necessary resources and structures to implement restorative justice efficiently	1	5	3.83	0.94	-.745	.536
22. I would recommend restorative justice more often if sufficient resources were available	1	5	3.86	0.86	-.587	.193

From Table 9 it is apparent that Item 17 (*Legal practitioners should be educated in and encouraged to recommend alternative practices instead of imprisonment*) has a kurtosis value greater than 2 and also a skewness index of -1.182. This item was therefore removed from the analysis as the distribution deviated too much from a normal distribution. The reason for this may be because the statement can be viewed as double-barrelled, meaning that two questions are actually being presented, and it is impossible to determine which part of the statement respondents actually responded on (i.e. do they agree or disagree that legal professionals should be educated on alternative practices, or whether they agree or disagree that legal professionals should be encouraged to recommend alternative practices instead of imprisonment). Although Item 19 (*Victims should be more involved in the justice process*) displays a relatively high skewness value (-1.187), it has been decided to retain this item as the kurtosis value is not greater than +2.0. Thus, the analysis has been conducted on the remaining 21 items.

The items on which the lowest means were scored (i.e. the items the most respondents disagreed with) are:

Item 7: *Restorative justice is only appropriate when the victim and offender know each other.* Most respondents in this study do not agree with this statement, indicating that a relationship between the victim and offender prior to the offence is not a requirement for restorative justice to be applied. A similar question was posed to respondents in a study by Naude and Prinsloo (2005). The findings of their study was, however, confusing; the majority of the respondents in their study indicated that restorative justice would not be an appropriate option for several types of crimes, including (among others): “offences in which the victim and offender are known to each other” and “offences where the victim and offender are strangers” (Naude & Prinsloo, 2005, p. 57). Their findings might suggest a very limited understanding of the principles of restorative justice among the participants at the time of the study, which could explain the contradictory responses they provided. Regarding the current study, the fact that the majority of respondents indicated that restorative justice is not only applicable when the victim and offender know each other (and thus by extension that restorative justice could be appropriate in situations where the victim and offender are strangers), suggests that the participants has a much better understanding of the principles of restorative justice now than they did in 2005.

Item 8: *Restorative justice is more appropriate for juvenile offenders than adult offenders.* From Table 9 it can be seen that the majority of respondents did not agree with this statement. In a study by Prinsloo, Ladikos and Naude (2003b), they found that their research group rejected the statement that restorative justice is a suitable sentencing option for adult offenders only, as well as for juvenile offenders only. This suggests that the respondents felt that restorative justice could be a suitable sentencing option for both adult and juvenile offenders. This finding is consistent with the findings in the current study.

Item 11: *Restorative justice could escalate conflict between the victim and the offender.* The fact that the majority of respondents did not agree with this statement indicates that they do not think that face-to-face encounters between victims and offenders (which is a central feature of most restorative justice practices) would result in exacerbating the conflict between them. This is in stark contrast to what Prinsloo, Ladikos and Naude (2003a) found in their study where the majority respondents suggested that meeting the offender would escalate the victim's level of fear and emotional distress.

Item 16: *In the majority of cases, imprisonment is an appropriate punishment for offenders.* As can be seen from Table 9, most respondents disagreed with this statement, which suggests that incarceration should not be the only response to offending behaviour, but that alternative options should also be considered. Alternative sentencing options should especially be considered for less serious offences.

Item 20: *Rehabilitation in prison is effective.* The majority respondents disagreed with this statement. This finding is echoed in the responses of the respondents in the study by Prinsloo, Ladikos and Naude (2003b). They argue that the "58% who believed that more than 80% of South African prisoners return to a life of crime within 5 years of their release from prison thereby knowingly or unknowingly questioned to a certain extent the accepted functional significance of imprisonment" (Prinsloo et al., 2003b, pp. 41–42). The dubiety of the functional results of incarceration by extension raises questions about the effectiveness of rehabilitation strategies in prison.

**Opinion differences between legal professionals' opinions about restorative justice.** To ascertain whether significant differences in the means of the 21 Item scores for the three legal professional groups (judges/magistrates, advocates, lawyers) occur, a one-way MANOVA was done. An  $F$ -value (according to the Hottelling-Lawley trace) of 2.942 ( $v$  42; 430) was obtained, which was significant on the 1% level of significance ( $p = 0,000$ ). In order to

determine on which of the dependent variables (the items) significant differences in means for the three groups occurred, one-way analyses was done. These results together with the calculated effect-sizes ( $f$ ) are presented in Table 10.

Table 10 Means, standard deviations and F-values of the one-way variance analysis to test for opinion differences on restorative justice between legal professional groups

Item	Judge/Magistrate		Advocate		Lawyer		F	p	f
	$\bar{X}$	sd	$\bar{X}$	sd	$\bar{X}$	sd			
Item 1	3.91	1.19	3.48	1.22	3.59	1.119	1.783	.170	
Item 2	4.37	0.53	3.80	0.81	3.87	0.815	8.283*	.000	0.26
Item 3	4.33	0.60	3.25	0.93	3.65	0.775	23.270*	.000	0.44
Item 4	3.65	0.87	3.23	0.87	3.50	0.878	3.185	.043	
Item 5	4.35	0.65	3.15	0.98	3.59	0.882	23.702*	.000	0.45
Item 6	2.49	1.00	3.08	1.09	3.26	1.167	7.669*	.001	0.25
Item 7	2.05	0.53	2.40	0.90	2.47	0.958	3.792	.024	
Item 8	2.33	0.86	3.08	1.03	3.01	1.018	9.067*	.000	0.28
Item 9	4.37	0.72	3.57	0.89	3.65	0.89	13.206*	.000	0.34
Item 10	3.30	1.10	3.77	0.96	3.53	1.05	2.543	.081	
Item 11	2.67	0.80	3.12	0.95	3.01	0.97	2.931	.055	
Item 12	4.19	0.93	3.40	0.97	3.53	1.05	8.647*	.000	0.27
Item 13	3.60	1.25	3.40	0.97	3.34	0.94	1.126	.326	
Item 14	4.12	1.05	3.43	0.87	3.60	0.91	7.273*	.001	0.25
Item 15	3.09	0.94	3.62	0.97	3.44	1.09	3.224	.042	
Item 16	2.72	1.07	3.12	1.04	3.17	1.11	2.804	.063	
Item 18	4.09	0.86	3.02	0.85	3.18	0.80	24.688*	.000	0.46
Item 19	4.53	0.50	3.90	1.00	3.88	0.93	9.383*	.000	0.28
Item 20	2.35	0.87	1.88	1.04	2.12	1.05	2.658	.072	
Item 21	4.37	0.72	3.55	0.87	3.71	0.95	11.649*	.000	0.31
Item 22	4.30	0.80	3.63	0.78	3.78	0.86	8.794*	.000	0.27

\*  $p \leq 0.01$

In 12 (Items 2, 3, 5, 6, 8, 9, 12, 14, 18, 19, 21, 22) of the items, significant differences on the 1% level of significance was found between the three groups. For three of these items, namely Items 3, 5, and 18, large effect-sizes were also found ( $f \geq 0.4$ ), while the remaining 9 items all indicate medium effect sizes.

Regarding Item 3 and 5, the Scheffe-results (scores) indicate that the means of all three groups differ significantly from each other. From Table 10 it can be clearly seen that in comparison with the advocates (3.25) and lawyers (3.65), the judges/magistrates have a significantly higher mean (4.33) on Item 3 (*A restorative justice approach makes it possible for both indigenous law and Roman-Dutch law to be accommodated*). The mean score for the lawyers is however, also significantly higher than that of the advocates. The higher mean for the judges/magistrates group indicates that they agree with the statement to a greater degree than the lawyer group, who in turn agree to a greater extent than the advocate group. Naude

and Prinsloo (2005) suggest that the finding in their study that more than a third of their research group doubted whether a restorative justice approach made it possible for indigenous law and Roman-Dutch law to co-exist probably reflect a lack of information and understanding regarding restorative justice at the time of the study. The fact that more judges and magistrates in the current study agreed with the statement in Item 3 could possibly relate back to the finding in Section 2 Item A, where the judges/magistrates group felt more confident about their knowledge on restorative justice.

Regarding Item 5 (*Restorative justice includes and empowers communities*), the judges/magistrates (4.35) again had a significantly higher mean score than the advocates (3.15) and lawyers (3.59). It is however, apparent that all three groups had relatively high mean scores and consequently it can be concluded that all three groups to a great extent agree with the statements (the only difference being one group agreeing more strongly than another group). This finding suggests that the respondents understand that one of the principal objectives of restorative justice is the inclusion of the community in the response to wrongdoing.

Regarding the remaining 10 items for which significant *F*-values were obtained (Items 2, 6, 8, 9, 12, 14, 18, 19, 21 and 22), the Scheffe-results (scores) indicate that in all 10 items, the judges/magistrates group's mean scores differ from both the advocates and lawyers, but that the latter two groups show no significant difference in means scores between each other. With the exception of Items 6 and 8, the judges/magistrates scored higher means than those of the other two groups. Regarding Items 6 and 8, the judges/magistrates obtained significantly lower means than the advocates and lawyers.

Item 6 (*Restorative justice is appropriate for first time offenders only*), the lower mean of the judges/magistrates group indicate that they did not agree with the statement to the same extent that the advocates and lawyers groups did. This may indicate that the judges and magistrates may feel that restorative justice could be appropriate for all offenders and not for first time offenders only.

The judges/magistrates group also agreed to a lesser extent than the advocates and lawyers to the statement in Item 8 (*Restorative justice is more appropriate for juvenile offenders than adult offenders*). Once again, this could indicate that restorative justice approaches could be appropriate for both adult and juvenile offenders, and not only for juvenile offenders. The findings for these two items (Item 6 and 8) could indicate that judges and magistrates

envisage the application of restorative justice for a wider range of offenders, and a more narrow view of the application of restorative justice by advocates and lawyers. Once again, this could be related to the finding in Section 2 Item A, where a greater proportion judges/magistrates indicated their familiarity with the principles and objectives of restorative justice.

## **Conclusions**

The judges and magistrates indicated that they are well acquainted with the principles and goals of restorative justice in a greater degree than the advocates and lawyers. A greater proportion judges and magistrates than advocates and lawyers understood that a primary objective of restorative justice is to involve all parties directly affected by an offence to collectively participate in decision making regarding how to resolve the effects of the offence. Even though a greater proportion judges/magistrates agreed with the collective and participatory nature of the restorative justice approach, it should be pointed out that the advocates and lawyers also indicated strong agreement with this understanding of restorative justice.

Considering the fact that the primary duty of judges and magistrates is to maintain and uphold the law, it is not surprising that a greater proportion judges/magistrates did not agree with the statement that restorative justice focuses more on the harms suffered by the victims and society rather than the fact that societal laws and norms have been violated.

Most respondents in all three groups (judges/magistrates, advocates, lawyers) agreed that the application of restorative justice could result in a more victim-based criminal justice system as opposed to an offender based approach. There were no significant differences between the groups, which indicates that most respondents understood that the victim has a more central role in restorative justice approaches than they do in the current criminal justice process which is more focused on the offender and his/her crime.

The effective implementation of restorative justice being hampered by a lack of resources is a view held by most respondents in all three groups (judges/magistrates, advocates, lawyers). No significant differences occurred between the three groups, indicating that the majority respondents in all the groups felt that in practice, the justice and correctional system does not provide the necessary resources and structures to implement restorative justice efficiently.

A much greater proportion judges/magistrates indicated that they have recommended the use of restorative justice in appropriate cases. This is in stark contrast to the much larger proportion advocates and lawyers who have never recommended restorative justice.

Five items can be distinguished on which most respondents most strongly disagreed with in Section 3. These are: “*Restorative justice is only appropriate when the victim and offender know each other*”; “*Restorative justice is more appropriate for juvenile offenders than adult offenders*”; “*Restorative justice could escalate conflict between the offender and the victim*”; “*In the majority of cases, imprisonment is an appropriate punishment for offenders*” and “*Rehabilitation in prison is effective*”. This indicates that most respondents understand that restorative justice applications are not only limited to situations where the victim and offender know each other, and that respondents do not foresee that face-to-face encounters between the victim and offender (which is a key component of restorative justice) would lead to an escalation of conflict or negative emotions. The findings also suggest that respondents accept that restorative justice is suitable for all types of offenders (and not only juvenile offenders), and that they recognise that incarceration is not always the only appropriate punishment for offenders, and thus that alternative sanctions (such as restorative justice) could be viable responses to criminal behaviour. The significant number of participants who disagreed with the statement that rehabilitation in prison is effective could signify misgivings about imprisonment as punishment, as one could question the purpose of sending offenders to prison if it does not contribute to offenders adopting a law-abiding lifestyle upon their release.

The fact that a greater proportion judges/magistrates than advocates and lawyers agreed that restorative justice could make it possible to accommodate both indigenous law and Roman-Dutch law, and that restorative justice includes and empowers communities, may be related to the fact that a greater proportion judges/magistrates indicated that they are well acquainted with the principles and goals of restorative justice than the other two groups.

Again, because a greater proportion judges/magistrates indicated their familiarity with restorative justice this might explain the greater proportion of this group recognise that restorative justice application need not be limited to first time offenders and juvenile offenders only. Thus they acknowledge a wider scope of situations in which restorative justice can be applied.

One of the limitations of this study was the poor response rate of the prosecutors, which led to this sub-group being omitted from the analysis. The opinions of prosecutors could have contributed to the value of this study as they can provide additional insights on restorative justice as they are most likely to encounter it during the course of their career. As Naude and Prinsloo (2005) suggest, the understanding and support of prosecutors is essential if they are to propose restorative justice options for offenders.

Considering the demographics of the sample for this study, they were not very representative of South African society. Most respondents were white and Afrikaans or English speaking. Only 15.32% respondents were black, while black citizens make up the largest part of the South African population. A more representative proportion of Black legal professionals could markedly alter the results of this study as literature suggests that the principles of restorative justice resonate well with traditional African mechanisms of justice. Although the sample may not be representative of the South African population in general, it may be representative of the demographic characteristics of professionals in the justice system.

Another limitation of the study was the fact that only three other studies could be found with comparable data (Naude & Prinsloo, 2005; Prinsloo et al., 2003a, 2003b). Moreover, all three studies were done by the same researchers. The comparisons made in this study may therefore be only a partial reflection and representation of the true opinions of legal representatives about restorative justice.

It is therefore clear that there is a significant lack of empirical research and data on restorative justice, particularly in the South African context. To counter the above limitation and to remedy the deficiency in empirical restorative justice data, it is suggested that research in this area should be encouraged and emphasised.

It may also be constructive for future restorative justice studies relating to legal professionals to analyse and compare data on other variables, for example, how opinions on restorative justice among legal professionals differ between different racial or language groups. The scope of research in this area is limitless and could be invaluable in yielding information regarding how restorative justice could contribute to the efficiency of the legal system in South Africa.

Despite the limitations mentioned above, the results of this study could be useful in determining areas where knowledge on restorative justice could be lacking, or any

misunderstandings or misconceptions about its practice and applicability which may exist. Understanding the opinions legal professionals have of restorative justice may also provide insight on why it is not utilised more frequently or alternatively how it can be adapted to suit the particular and unique context in South Africa. If the perception that restorative justice should be used in place of the current criminal justice system changes, to an understanding that it could rather be used in support and collaboration of the current system, opportunities for more effective and satisfactory justice would be infinite.

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**Abstract:** Growing dissatisfaction with the formal criminal justice system in many countries has led to exploring alternative approaches in responding to crime. The search for an alternative method of justice has resulted in the conception of restorative justice. Restorative justice is characterised by collective participation and resolution of conflicts arising from a criminal offence. Restorative justice is uniquely suited to the African and specifically the South African context as its principles and values resonate with traditional indigenous approaches to justice. The aim of this quantitative study is twofold; firstly to determine the possible differences of South African legal professionals' understanding of restorative justice, and secondly to determine the possible differences in opinions about restorative justice among legal professionals in South Africa. For the purposes of this study the population 'legal professionals' was subdivided into the following groups; judges, magistrates; prosecutors; advocates and lawyers. The data was collected by means of a questionnaire where the data for the first research objective (ascertaining legal professionals' understanding of restorative justice), was obtained from participants' responses on a categorical scale (i.e. true, false, uncertain). The data for the second research objective (ascertaining legal professionals' opinions about restorative justice) was obtained from participants' responses to statements on a 5-point Likert-scale (strongly disagree, disagree, uncertain, agree, and strongly agree). Overall judges and magistrates indicated that they are well acquainted with the principles of restorative justice to a greater extent than the advocates or lawyers did. This difference may explain some of the other significant differences that were found between the groups regarding both their perceptions on the appropriateness of restorative justice as well as its applications to certain cases and offences only. Despite a clear lack of empirical research and data on restorative justice in the South African context the current understanding of the opinions of South African legal professionals elicited by this study, provided insight regarding misunderstandings, misconceptions and possible applications of this practice in the current legal system. Therefore, if the perception that restorative justice should be used instead of the current criminal justice system changes, to an understanding that it could rather be used in support of and in collaboration with the current system, opportunities for more effective and satisfactory justice could be infinite.

*Toenemende ontevredenheid met die formele kriminele regstelsel in baie lande was 'n aanleidende oorsaak in die soeke na alternatiewe benaderings in reaksie op misdaad. Die soeke na 'n alternatiewe metode van geregtigheid het gelei tot die oorsprong van die konsep herstellende geregtigheid. Kenmerkend van herstellende geregtigheid is kollektiewe of*

*gemeenskapsdeelname aan konflik-oplossing na aanleiding van 'n kriminele oortreding. Herstellende geregtigheid is op 'n besondere wyse gepas in die Afrika- en meer spesifiek Suid-Afrikaanse konteks aangesien die onderliggende beginsels en waardes daarvan aanklank vind met die tradisioneel inheemse benaderings tot geregtigheid. Die doel van hierdie kwantitatiewe studie is tweeledig; eerstens om die moontlike verskille in die begrip of verstaan van herstellende geregtigheid te bepaal onder Suid-Afrikaanse regslui, en tweedens om die moontlike verskille in menings rakende herstellende geregtigheid onder Suid-Afrikaanse regslui te bepaal. Die regslui populasie bestaan uit die volgende groepe; regters, magistrate, staatsaanklaers, advokate en prokureurs. Data is versamel deur middel van 'n vraelys. Die data van die eerste navorsingsdoelwit (bepaling van hoe regslui herstellende geregtigheid verstaan) is verkry deur middel van deelnemers se reaksies op 'n kategoriese skaal (i.e. waar, vals, onseker). Die data vir die tweede navorsingsdoelwit (bepaling van regslui se menings rakende herstellende geregtigheid) is verkry deur middel van deelnemers se reaksies tot stellings op 'n vyf-punt Likert-skaal (i.e. stem glad nie saam nie; stem nie saam nie; onseker; stem saam; stem heeltemal saam). Regters en magistrate het aangedui dat die beginsels van herstellende geregtigheid goed aan hulle bekend is – tot 'n groter mate as wat advokate en prokureurs dit aangedui het. Hierdie onderskeid mag sommige van die ander beduidende verskille in sienings rakende beide die toepaslikheid van herstellende geregtigheid asook die toepassing daarvan slegs vir spesifieke gevalle en oortredings verklaar. Ten spyte van 'n duidelike tekort aan empiriese navorsingsdata oor herstellende geregtigheid in die Suid-Afrikaanse konteks, het hierdie studie insig verskaf nie net rakende bestaande misverstande en misopvattinge nie, maar ook ten opsigte van moontlike toekomstige toepassings van herstellende geregtigheid volgens menings van Suid-Afrikaanse regslui. Dus, die siening dat herstellende geregtigheid aanvullend tot, in plaas van in stede van, die huidige regstelsel toegepas moet word, lewer oneindige moontlikhede vir groter effektiwiteit en aanvaarbare geregtigheid in die Suid-Afrikaanse regstelsel.*

**Key words:** Restorative justice; quantitative research; opinions; judges; magistrates; prosecutors; advocates; lawyers; South Africa; Africa.

# **A qualitative study on the attitudes of South African legal professionals towards restorative justice**

## **Introduction**

In the past thirty years there has been a trend to look for alternative ways to respond to crime and how crime is dealt with globally. Zehr (1990) suggests three main reasons for this search for alternative methods of dealing with crime. Firstly, the criminal justice system has become too complex. Secondly, the needs of the community are not being met by the current criminal justice system. Lastly, his belief that resolving disputes is achieved more effectively in the community than in centralised state institutions.

Pillay (2005) argues that another reason for looking for alternative methods of justice stems from the concern that current criminal justice systems have a Western bias. He goes on to explain that race and cultural identity could be considered reasons for several cultural groups feeling alienated from the criminal justice system. It is therefore not surprising that alternatives to current justice system models have been suggested by indigenous, cultural and ethnic groups. This has inspired investigations and a revisit of cultural traditions with respect to dispute resolution and reactions to crime. The search for alternative reactions to crime and resurrection of traditional indigenous justice practices has led to experimentation with restorative justice.

## **Literature Review**

The search for an alternative method of justice has resulted in the conception of restorative justice. The definition generally agreed on by most restorative justice advocates is provided by Marshall (1999, p. 5): “restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future”. Advocates of restorative justice claim that this approach to justice satisfies the sources of dissatisfaction found in the conventional criminal justice system (Clark, 2012; Hargovan, 2011).

Neser (2001) points out that the principles of restorative justice have emerged from the firmly established traditions of non-western societies. Skelton (2007) claims it is ‘widely acknowledged’ that the theory and practice of contemporary restorative justice has been influenced by learning from traditional indigenous justice practices. She further claims that

this willingness to learn stems from the recognition that indigenous and cultural practices can educate, inform and remind Western society about principles that have been forgotten or lost through westernisation.

**Indigenous roots of restorative justice.** Indigenous societies have a common history of colonial domination which has significantly altered and affected every aspect of their existence (Hand, Hankes, & House, 2012). The enforced changes brought about by colonisation have had profound consequences in the application of justice. “In Africa, Australia, New Zealand and Canada, European colonisation repressed indigenous restorative justice in favour of a retributive justice philosophy that is hierarchical, punitive and guided by codified laws and rules of procedure, which limit decision making to members of a small elite” (Naude et al., 2003b, p. 1).

Before European colonisation, the social structure of indigenous cultures was communitarian. People lived in close proximity to one another and a community was characterised by close interpersonal relationships. Community members relied on each other for survival as cultivating produce, hunting, child-rearing and community safety were dependent on all members of the community working together. This way of life influenced and directed the way these communities responded to crime and disputes between members. Skelton (2007) postulates that reconciliation and effective resolution of disputes is essential in communities where people live in close proximity and where daily interaction is characterised by personal relationships.

It has been argued that traditional indigenous justice practices and restorative justice have many factors in common, and this is especially true for traditional African justice. Sherman and Strang (2009, p. 4) argues that: “in the contemporary world, restorative justice often resonates best in communities with the strongest modern links to their traditional restorative customs”. A study by Roche (2002) found confirmation in anthropological studies that reconciliation and reparation are crucial characteristics of customary African law.

**Restorative justice in the African context.** Despite the influence of colonisation, traditional methods of dispute resolution have remained relevant and active in African communities. This could be related to many Africans still living in rural villages where tradition and cultural values continue to be practiced. Omale (2006) suggested several reasons for the preference to resort to traditional African methods of justice, such as; limited access to the formal criminal justice system by people living in rural areas; inadequate justice methods

offered by the formal criminal justice system to resolve disputes between individuals where close relationships and interactions characterise the relations between rural community members; minor disputes in rural communities not being accommodated due to limited resources of the criminal justice systems in most African countries; the tendency among rural community members to avoid the involvement of ‘outsiders’ (such as the urban police and criminal justice officials) in disputes in the community; and lastly, reluctance of rural communities to rely on the formal justice system could be related to the mistrust of ‘settlers’ or colonial justice.

It has been asserted by African scholars that the traditional African method of doing justice is very similar (if not exactly the same) as restorative justice (Kgosimore, 2002; Tshehla, 2004; Tutu, 1999). In confirmation of this claim, Skelton (2007) highlights several factors common in both traditional African justice and restorative justice: both processes aim for reconciliation and restoring peace in the community; both approaches promote social norms which emphasise community duty as well as individual rights; dignity and respect are considered to be central values; both processes share the view that a crime is a harm done to the individual and the broader community; simplicity and informality of procedure is a common feature of each of the two approaches; the law of precedent does not apply to the outcomes of either process; community participation is actively encouraged in both processes; and restitution and compensation are highly valued by both traditional African justice and restorative justice.

According to Geyke (1996), the experience of living in a community is the principal source from which African moral values are derived as they are informed by community members’ understanding of appropriate behaviour in interactions and relationships. This outlook on life is characteristic of the African philosophy of *Ubuntu*. *Ubuntu* can be described as the philosophy in which “each individual’s humanity is ideally expressed through his or her relationship with others and theirs in turn through a recognition of the individual’s humanity – it acknowledges both the rights and the responsibilities of every citizen in promoting individual and societal well-being” (South African Government, 1997, p. 12). Described as such, it is clear that the concept of restorative justice resonates with the philosophy of *Ubuntu*.

Mokgoro (1997) argues that *Ubuntu*, which is central to African custom and tradition has the potential to influence and shape African, and more specifically, South African jurisprudence.

The reflection of restorative justice in traditional African justice and the philosophy of *Ubuntu* reveal the unique position of African countries to adopt or incorporate restorative justice into their criminal justice systems.

**Restorative justice in the South African context.** Skelton (2007) argues that South Africa's indigenous basis of knowledge of traditional justice practices is an enormous advantage in explaining and promoting restorative justice in South Africa. Most South Africans are familiar with the principles underlying restorative justice, even if they do not consciously link this with the relatively new and novel concept coined as 'restorative justice'. Because the principles of restorative justice is not new (it is simply the reference to these principles as 'restorative justice' that is new), one can argue that the restorative justice movement is simply a recent return to traditional African justice methods. Despite the traditional heritage of restorative justice, and the wide familiarity with its principles, it has however not yet taken root in the criminal justice system of South Africa.

According to Ovens (2003), the criminal justice system in South Africa is based on Western criminological theories. Bianchi (1994) postulates that scholars with a Western frame of reference find it difficult to contemplate the successful and effective use of alternative models of justice instead of the retributive model which the current criminal justice system is based on. It could be argued that Western practices are far removed from the African experience, and therefore it should not be the basis on which African (and more specifically, South African) justice practices are built. The question here arises whether justice wouldn't be more relevant and accessible if it was based on South African experiences, traditions and values. Ovens (2003, p. 67) argues "any theorist striving to explore, understand and explain a criminal phenomenon must take the value system, which is normally associated, if not based upon the individual's traditional belief system, into account".

As traditional African conflict resolution is still practiced in South African communities, it may be indicative of openness by communities for alternative ways of doing justice. Moreover, it demonstrates the willingness of communities to participate in the process of justice. Thus, as several of the central principles of restorative justice is consistent with the African world-view, it seems that it is ideally suited to the African context (Ovens, 2003). Restorative justice should therefore be considered as an alternative method to the criminal justice system as it is more relatable and accessible to the South African people.

Growing crime rates (especially violent crime) is a great concern in South Africa. The post-apartheid government's response to crime is characterised by a 'tough on crime' approach. The practical application of this approach is primarily evident in the focus on more arrests and prosecutions on the one hand, and harsh sentences for individuals convicted of crimes on the other (Batley & Maepa, 2005). Despite these strategies crime remains a problem, leading to an increasing awareness and realisation that the current methods of responding to crime are not effective.

## **Methodology**

**Research objective.** The primary objective in employing a qualitative methodology in this study was to gain a more in-depth understanding of the opinions held by legal professionals in South Africa regarding restorative justice. Specific questions relating to particular aspects of restorative justice were used to obtain these opinions, with the aim to allow for a more elaborate and nuanced insight into participants' thoughts on the subject.

**Ethical Considerations.** Permission was obtained from the Chief Justice's Office in Pretoria to distribute questionnaires to individuals selected to participate in this study. No names or specific information that may identify any respondent is disclosed in any part of this study in order to ensure complete anonymity and confidentiality. Participants were not required to provide their names or any contact details. Participation in this study was completely voluntary.

**Sampling and data collection.** The population of respondents is collectively known as 'legal professionals' and was sub-divided into five groups, namely judges, magistrates, prosecutors, advocates and lawyers. The aim was to obtain 5 participants for each of the five groups. However, for two of the groups (prosecutors and magistrates) only 4 participants were obtained. Thus, only 23 participants were included in this study.

A convenience sampling methodology was applied to identify participants for this study, with accessibility as one of the main principles. According to Maree (2013), this type of sampling is useful in exploratory research where a quick and inexpensive approximation of the truth is sought. This study is exploratory in that it aimed to gain a deeper and qualitative understanding of how restorative justice is perceived by legal professionals in South Africa, rather than to draw empirical conclusions.

The questions included in the questionnaire reflected those aspects of restorative justice which would elicit a more in-depth and rich understanding of the opinions and views held by legal professionals in South Africa. There were 10 questions included in the questionnaire.

Although the ideal would have been to obtain data by means of face-to-face interviews, practical and logistical constraints of which time during normal working hours for participants deemed this impossible the alternative approach of using an electronic survey was followed on request of the participants. Participants were requested to complete the survey and return them via e-mail. Where requested, surveys were sent to participants in hard copy, and returned via fax.

Completed surveys were received in different formats (completed by hand and faxed; Word format and pdf format emailed) which prompted a process to standardise the format of the replies. The process entailed constructing a table with two columns in a Word document of which the first column contained the question (marked in bold) followed by the respondent's answer and the second column to number each line that was produced in column 1. The numbering of each line was done to make it quick and easy to locate specific phrases or words within the survey. This process was done for each question, with each question and corresponding answer following on the previous one. Each participant's completed survey was transcribed in this manner, resulting in 23 separate documents in exactly the same format.

Following this process, the responses of each participant was read and re-read to gain a greater understanding of each participant's holistic response. Next, the responses of all the participants per question were reviewed and preliminary notes and observations were made.

For ease of analysis of the data, a separate document was created for each question and the responses of all the participants were captured per question. This process produced 10 documents which each contained all participant responses to a specific question.

Each question was analysed separately to extract themes related to that specific question based on the responses of the participants. This process is called thematic analysis which Braun and Clarke (2006, p. 79) describe as a procedure of identifying, analysing and reporting patterns and themes within data: "it minimally organises and describes your data set in (rich) detail". The thematic method of analysis was appropriate, as the questions posed to the respondents were straightforward and simply required a yes or no answer with a short

motivation. The thematic analyses allowed for sifting out commonalities in the answers of the respondents and collecting these as themes that emerged from the collected data.

## **Results and Discussion**

The exposition of the analysis is arranged in the following manner: each question is dealt with individually and presented as a separate heading, with the analysed themes that emerged from each question explored under this heading; the themes that emerged from the data are discussed with excerpts from participants' responses that corroborate each theme together with the identifying code included in italic font. In order to preserve anonymity, each participant had an identifying code assigned to them. These codes were constructed by applying the following logic: first respondents were categorised according to the sub-group they belonged to with a capital letter. These sub-groups were as follows: Judges = J; Magistrates = M; Prosecutors = P; Advocates = A; and Lawyers = L. To distinguish between each participant from each group, each participant was assigned a number. Thus, the 5 participants in the sub-group 'Lawyers' were assigned the identifying codes L1, L2, L3, L4, and L5. This method was applied to all the sub-groups. As this study followed a qualitative methodology, the findings were not explored in terms of quantities or statistical averages. The focus was on exploring the themes that emerged and trends observed from the data. Thus, findings are discussed in terms of 'the most', 'the majority' or 'the least', but no numerical or statistical references are made. The discussion of each question now follows.

### **Question 1: Do you think restorative justice is suitable in the South African context?**

**Theme 1:** The majority of respondents were of the opinion that restorative justice is indeed suitable in the South African context. In fact, two of the respondents suggested that not only is restorative justice suitable, but necessary in South Africa: *"Restorative justice principles are not only suitable in South Africa, but it is absolutely imperative that these principles be applied in the South African justice landscape" (L1); "Restorative justice is not only suitable and part and parcel of the South African context, but urgently needed" (M3).*

**Theme 2:** Most respondents who answered yes to this question supported their view by stating that there is undue emphasis on retribution in the current South African justice system, and therefore restorative justice could contribute to provide a more balanced approach. *"Undue emphasis is placed on retribution" (A1); "To turn society's mind from retribution to restoration" (L3).* Skelton (2007) states that the early years of democracy in South Africa

was characterised by restorative justice values such as reconciliation and reintegration (the primary example of this is the Truth and Reconciliation Commission). However, the increasing crime rate and corresponding reactions of fear and distrust in the system to protect the average citizen, derailed the restorative approach over time in South Africa. The government response to the rapid increase in crime and the consequent public fear of crime resulted in the adoption of a ‘tough on crime’ approach (Batley, 2013). Thus, one could argue that the current method of responding to crime should not change to a new totally new approach, but rather return to an approach that is innate to the new democracy of South Africa.

**Theme 3:** The emphasis placed on retribution in the South African justice system is evident in the practice of imprisonment as the ‘go-to’ option for dealing with offenders, despite the availability of alternative options. Quite a few respondents mentioned this factor: *“Too long it has been customary to simply imprison offenders despite the availability of viable, practical and less damaging option of restorative justice” (L1); “Often people are sent to jail with dire consequences where restorative justice could have been used instead” (L2); “If restorative justice was applied, jail could have been avoided and the victim more satisfied” (P3)*. The argument by Batley (2005) that the routine passing of short terms of incarceration is not meaningful, in the context of the finding by Naude and Prinsloo (2005) that more than 80% of the prison population in South Africa at that time were serving a sentence of less than five years, is of specific relevance to this theme. One could question the value in imposing prison sentences only when other options are available. The Executive Summary of Discussion Paper 82 on a new sentencing framework (South African Law Reform Commission, 2000, p. xxix) points out that “imaginative South African restorative alternatives are not being provided for offenders that are being sent to prison for less serious offences”. It also mentions the fact that sentenced perpetrators are being released from prison too readily due to the extensive overcrowding problem in South African correctional facilities. It seems that both these problems could be resolved by applying restorative justice. Employing ‘imaginative’ restorative alternative sentencing options could result in less custodial sentences, which in turn could alleviate the overcrowding problem.

**Theme 4:** Many respondents commented that the use of alternative sentencing options (such as restorative justice) could produce more beneficial results than simply imprisoning an offender. *“Victims gain nothing from the sentence and is still out of pocket whereas, if restorative justice was applied, prison could be avoided and the victim compensated” (L2);*

*“Making restitution to the victim would serve the objects of punishment to a more advanced degree” (J5); “Restorative justice keeps suitable candidates out of prison, thus encouraging rehabilitation within society and less family disruptions” (J4); “Restorative justice advances the rehabilitation process of offenders – it lessens the danger of recidivism and it facilitates the reintegration of the offender back into society” (J2); “Restorative justice effectively discourages ‘self-help’ as the victim and society benefit directly from it” (A4); “Restorative justice promote society’s confidence in the administration of justice and people will identify more with the criminal justice system” (M2).* The Department of Justice and Constitutional Development (2011) suggests that the use of restorative justice may benefit criminal justice agencies by reducing case back logs and delays in court cases. It also mentions that restorative justice could prevent recidivism: *“Research indicates that offenders who experience restorative justice interventions are less likely to re-commit further offences than similar offenders who are subject to more conventional interventions”* (Department of Justice and Constitutional Development, 2011, p. 10).

**Theme 5:** Restorative justice should only be used in suitable circumstances as emphasised by a number of respondents: *“Provided it is applied in appropriate cases” (A2); “Only in appropriate cases, the punishment should still fit the crime” (M2); “Depending on the nature of the charges, restorative justice may be applied in South Africa – there are cases where, due to the seriousness of the crimes charged, emphasis is to be placed on retribution” (P3); “Restorative justice could be a suitable option for serious crime, but the field of application should be limited to exceptional and deserving circumstances” (P2).* The concept ‘appropriate cases’ is difficult to define as it could mean different things to different people depending on the specific circumstances and hence should be explored for clarity.

## **Question 2: Do you think rehabilitation in prison is effective?**

**Theme 1:** Most respondents did not think that rehabilitation in prison is effective. Specific responses included: *“No, it is a dismal failure” (L4); “Not even remotely” (P1); “Definitely not” (L2); “No, statistics prove this” (L5); “There is a wealth of material and cases which lend support to the view that rehabilitation in prison is a figment of the imagination” (A5).*

**Theme 2:** Many respondents substantiated their view of the ineffectiveness of rehabilitation in prison by referring to the high incidence of recidivism. *“Recidivism remains high” (J4); “The number of re-offenders is a clear proof of this fact, what is also disturbing is the fact that all too significant numbers of violent offenders re-offend” (P1); “Very often accused*

*persons in court have previous convictions and history of previous custodial sentences – this would create the impression that rehabilitation is not always achieved in prison” (J1).*

**Theme 3:** A couple of respondents mentioned that in their opinion, few people who are sent to prison display improvement in adaptive and socially acceptable behaviour upon their release. *“Very few people who go to prison come out better people” (M4); “Most people come out worse people than they went in” (J4).* Some respondents attributes this to the fact that when offenders are sent to prison, they come into contact with hardened criminals, who may have a negative influence on them and their future behaviour. *“People in jail come into contact with hardened criminals and come out worse than they went in” (L2); “First-time offenders come into contact with hardened criminals who introduce them to new criminal tricks” (J4); “Prison leads to exposure to criminal behaviour in concentrated forms” (M3).* These views are in alignment with the suggestion by Braithwaite (1999) that offenders might have stopped with criminal activities had they not been sent to prison where they came in daily contact with other criminals to learn new criminal skills from. In addition, demeaning experiences in prison could therefore engender defiance and anger which could result in further criminal acts upon release in retaliation. This raises the question to which extent the prison environment provokes criminal behaviour more than it curbs it.

**Theme 4:** Regarding the prison environment, a few respondents mentioned that prison facilities are incapable of addressing the issue of rehabilitation. *“A prison is an unnatural environment where rehabilitation cannot be practiced and applied” (M3); “The prison environment is not conducive to rehabilitation” (P2).* Batley (2005, p. 27) shares this view in a statement: *“conditions in the average prison are far more detrimental to rehabilitation than any good served by therapeutic programmes”.*

**Theme 5:** Overcrowding is mentioned by most respondents as the main reason for the failure of rehabilitation in prison. *“Prisons are overcrowded” (A4); “Prison numbers are overwhelming” (M3); “The prison population keeps climbing” (L3); “In many instances, largely due to overcrowding, prison has an adverse rather than a positive impact on an inmate” (J5); “Effective rehabilitation is hindered by the high prison population” (P2); “Overcrowding – which is endemic in South African prisons – may hamper effective rehabilitation” (P4).* Muntingh (2005) points out that restorative justice options could alleviate the overcrowding problem by decreasing the prison population. He adds that this

would facilitate effective administration of correctional facilities and proper (and more effective) correctional treatment of offenders who are incarcerated.

**Theme 6:** A second factor related to overcrowding of prison facilities which stood out from participants' responses as a possible contributor to ineffective rehabilitation, is the lack of resources. *"There are not sufficient/adequate facilities available" (A3); "It is doubtful if rehabilitation resulting from prison programmes is completely effective due to the scarcity of resources" (P3); "From experience I found that the people who are responsible for the rehabilitation part of the sentence are absent/little in numbers or not properly trained/lack experience" (L2); "Lack of sufficient qualified personnel" (A2); "There is not sufficient professional service providers to cater to the needs of offenders" (A5).* As argued in Theme 5, a reduction in the prison population may however result in more resources available to manage prison facilities more effectively.

**Theme 7:** One participant suggested that rehabilitation may not be effective because: *"sometimes it is better for offenders in prison than outside" (L5).* If this statement refers to the socio-economic circumstances of offenders, it would imply that basic living needs (such as food and shelter) is better provided in prisons than on the streets. This relates to the socio-economic circumstances of many individuals in South Africa which suggests a vicious cycle – people commit crime because of a lack of resources due to unemployment, which result in being sent to prison. Upon release from prison such individuals return to a life of crime since a criminal record dramatically reduces their chances of being gainfully employed. A study by Prinsloo, Ladikos and Naude (2003b) which explored reasons for the high rate of recidivism in South Africa revealed adverse socio-economic factors of offenders as a main contributing factor. Specifically unemployment, poverty and low levels of education were raised as reasons for the high recidivism rate, and one of their respondents suggested: *"culprits return to the same bleak, jobless, crime-ridden, self-centred society" (Prinsloo, Ladikos, & Naude, 2003, p .44).*

**Theme 8:** One respondent suggested that offenders might feign rehabilitation. *"Offenders undergo rehabilitation programmes and pretend to be rehabilitated when they are not in order to be released on parole – they know that they will not be granted parole without having undergone all the programmes in their sentence plan" (A5).* There is no research to support this view, but it could be an interesting topic for further research. Although most

respondents expressed the view that rehabilitation in prison facilities is a dismal failure, this might not be true for all offenders.

**Theme 9:** Some respondents pointed out that the effectiveness of rehabilitation lies within the individual himself. *“It predominantly depends on the individual offender whether she or he takes the opportunity provided by the programmes run by the Department of Correctional Services” (P4); “Despite prisons being understaffed and under-resourced, some offenders take the rehabilitation programmes seriously and do not return to a life of crime upon their release” (A5).*

**Theme 10:** A few respondents, however, felt that rehabilitation may be effective to a certain degree. *“Rehabilitation programmes undertaken in the prison system, if performed efficiently, may help rehabilitate offenders” (P3); “Only in circumstances where constructive crime rehabilitation programmes and skills development programmes exist” (J5).* This suggests that the effectiveness of rehabilitation programmes depend on the necessary resources being available.

**Theme 11:** A minority of the respondents did however express the view that rehabilitation in prison is effective. *“Yes, a diversity of social programmes and psychological services are available to offenders, plus opportunities to advance their academic and practical skills” (J3).* Another respondent who affirmed the effectiveness of rehabilitation programmes stated: *“I think the majority of offenders do not do crime again after their release. In my experience, I deal with first-time offenders most of the time” (J4).* It is worth mentioning that the participants who felt that rehabilitation is effective were judges. One can only speculate that this may be related to the fact that, if judges did not believe that the prison system is effective in rehabilitating offenders, what would be the point of them handing down prison sentences?

### **Question 3: Should alternative and creative sentencing be used more?**

**Theme 1:** Most respondents felt that alternative sentencing should be utilised more often. They emphasised that there are many ways of imposing punishment without resorting to custodial sentences, and that the most important purpose of punishment should be to try to restore the damage that has been caused by an offence. *“There are many ways of effectively punishing without jailing” (A4); “Custodial sentences are not always the only appropriate option” (A2); “The main purpose of the sentence is to restore the imbalance caused by the crime” (M3); “The aim of the sentence should be to extract the most good out of a bad*

situation” (L1); “Punishment should repair/mend the wrong” (L2); “Offenders should pay back society for the wrong they did by compulsory community service” (J4); “Innovative sentencing can allow/compel the offender to make good for his crime” (L1); “Community service and compensation by the offender is not used enough” (A1); “Effective punishment means the victim gets real and proper justice” (A4). Muntingh (2005) suggests that the interest in alternative and non-custodial sentencing may stem from the realisation that imprisonment have severely detrimental effects on offenders.

**Theme 2:** Many respondents mentioned that the use of alternative sentences could lead to various benefits, particularly relating to prison overcrowding. “Problems in correctional facilities is exacerbated by overcrowding, not to mention that the real costs of custodial sentences are astronomical – alternative sentencing could alleviate this situation” (J3); “Alternative sentences could alleviate the chronic overcrowding in prisons” (J5); “It could reduce the prison population and alleviate the accommodation problem” (J1); “Community service has proved an effective deterrent against crime” (J2). This theme corresponds with Question 2 Theme 5.

**Theme 3:** Some respondents pointed out that at the moment, the community is very discouraged by the high crime rate and thus they want increasingly harsher punishments for offenders. This may result in reluctance by the community to accept alternative methods of punishment. “The South African community is much too violent and the tolerance levels for crime are at its lowest ever in my view. The community is – to put it bluntly – so sick and tired of crime they want increasingly harsher sentences. Also, the community all too often take the law into their own hands and severely ‘punish’ and even kill alleged perpetrators because they have little or no confidence in the police and the legal system” (P1); “For restorative justice to be accepted by the community, it is important that measures be put in place to ensure compliance” (A1). Given the high incidence of crime (especially violent crime), Leggett (2005) suggests that restorative justice alternatives could be perceived as being ‘soft on criminals’. However, he also concludes that South African victims of crime may not be as vindictive and retributively-focused as one would expect, and South Africans in general may be more receptive to restorative methods of resolving criminal incidents. In contradiction to the view of society’s vengeful reaction to crime, another respondent felt that alternative sentences may be welcomed by the community: “Alternative sentences are more ‘visible’ to the community – the community does not witness punishment when the offender is

*in prison, but they will see him if, for instance, he washes cars in a public place as part of his community service” (L2).*

**Theme 4:** An interesting observation was that although almost all respondents felt that alternative sentencing should be used more, they also emphasised that these alternatives should only be considered for less serious offences and appropriate cases. *“Especially for less serious offences, non-custodial sentences and programmes to effect rehabilitation should seriously be considered” (P3); “Especially in non-violent matters” (P2); “Especially for less serious offences” (J2); “Yes, alternative sentences should be used more, but only for certain categories of crime” (P1); “In appropriate cases, imprisonment should not be considered the ‘be all and end all’” (J5); “I think that in suitable cases rehabilitation can be better achieved with alternative sentences” (M3); “Only in appropriate cases, but the option must be available to the presiding officers to consider” (M2).*

**Theme 5:** A couple of respondents pointed out however, that for some crimes, imprisonment should be the only option. *“For serious offences (for example rape and murder) imprisonment is the only option” (L2); “There are exceptions where the court believes there is only one kind of sentence and where alternative/creative sentencing has no place” (L1).*

**Question 4: Do you believe victims should play a more active part in the justice process? How could they contribute?**

**Theme 1:** Almost all the participants responded that the victim should indeed play a more active role in the justice process. A few even pointed out that in the current criminal justice system the victim has very little involvement, if at all. *“Often the victim is not very well represented in court” (M2); “Victims are mostly forgotten during the whole legal process, especially thereafter” (P1); “Victims are seldom heard and the consequences of crimes are not properly brought to the attention of the court” (M4); “At the moment the victim is divorced from the judicial process – this makes the process impersonal and hugely unsatisfactory for the victim. The victim should feel his rights were vindicated in the course of prosecution” (L4).* Victim participation is foundational to restorative justice. The United Nations Handbook on Restorative Programmes (United Nations, 2006, p. 9) specifically describes one of the objectives of restorative justice as: “supporting victims, giving them a voice, encouraging them to express their needs, enabling them to participate in the resolution process and offering them assistance”. Thus, in order for restorative justice to be seriously

considered by legal professionals in the South African justice system, it is important for them to understand the importance of victim participation in the process.

**Theme 2:** Many respondents felt that the victim should have an opportunity to confront the offender. *“Victims should have an opportunity to face the offender, confront him with the consequences of the offence and be made to feel to have a place in the process” (L4); “The victim should be allowed to vent out their anger in a controlled environment so that offenders can appreciate the damage of their actions” (J4); “Victims are owed an apology and hearing the offender apologise may go a long way towards healing” (A5); “Victims should be allowed the opportunity to know more about the offender and understand the underlying factors causing the behaviour of offenders” (P2); “If they want, let the victims meet the offenders before sentencing” (J3).* The benefit of restorative justice in this regard is that it provides a safe environment in which victims can express their anger (and any other emotions related to their experience of the crime) in a constructive way, which is generally not available in the current criminal justice system (Batley, 2005).

**Theme 3:** One participant suggested that victim involvement in the criminal justice system could ‘humanise’ the process *“They can humanise the process, so that the term ‘complainant’ or ‘victim’ can have a face and a voice” (M1)*, while another participant felt that victim participation *“will sensitise judicial officers and prosecutors” (L4).*

**Theme 4:** Most respondents indicated the sentencing process as the area in which the victim can make the greatest contribution to the justice process. *“Hearing victims’ views on sentencing may assist in determining an appropriate sentence” (J4); “The views of victims should be taken into account for sentencing” (A4); “Victims can contribute a great deal to sentencing by testifying” (M4); “Victims can contribute by testifying before sentence is passed and explaining how she or he was affected by the crime” (A2); “It is important practice for prosecutors to use evidence of victims to determine appropriate sentences” (A1); “Victims can contribute by giving victim impact statements, testifying in court how the crime has affected them and providing an opinion about what they feel an appropriate sentence could be” (P3); “Victims should play a more active part in that proper victim impact statements should be prepared, setting out their trauma and feelings as well as possible views on sentencing” (P2); “Victim input should be part of the information available to the presiding officer when considering sentencing” (J1).* Another participant responded: *“I usually invite the victim to say something to the court before sentencing” (J3).*

**Theme 5:** Another area respondents indicated where victims should be more involved, is when offenders are considered for parole. *“Communities and especially victims are dissatisfied and disappointed with the parole process, therefore victims should play a far more important role in this process” (P1); “If an offence has been committed against a person, that person should have a say when the perpetrator is considered for parole” (A5); “Victims’ views must be part of the record and they must be involved in parole decisions” (M2); “The victim should be heard in sentencing and the parole process” (J2).*

**Theme 6:** However, some respondents did highlight some cautionary aspects to be taken in consideration related to participation. *“Yes, victims should be allowed a more active part, but regulated and controlled” (M3); “One should bear in mind that victims often only want revenge – if their input could be monitored by objective standards it would be very useful” (L2); “Although the victim is the one whose rights were abused, one should still recognise that it is the state that prosecutes” (L4).*

This suggests a need to compose procedural guidelines and a framework for practical application of restorative justice options regarding victim involvement in the sentencing procedure and parole process. Such guidelines could assist in making restorative justice practices more legitimate in the eyes of legal professionals as well as inform victims of the various options available to them should they be willing to participate in the justice process.

**Theme 7:** Only one respondent felt that victims should not have a more active part in the justice process, stating: *“I am of the opinion that the justice system should remain in the hands of experts because they are the experts” (L5).*

**Question 5: Do you think the wider community should have a more active role in the justice process? What should that role be?**

**Theme 1:** Approximately half of the respondents felt that the community should have some role in the justice process. Those respondents who emphatically replied yes to this question indicated that because the community is also affected by crime (and not only the victim), they should also be allowed to be involved in the process. *“Crimes affect communities directly, therefore the community should be involved in the administration of justice” (J4); “In matters that affect the community – such as crime – they should be involved” (A5); “Communities also suffer, crime affects everyone, therefore they should all take part” (L4); “Different sectors of the community are subject to different types of crime, therefore their*

*concerns should be presented to the police, prosecution, and chief magistrates regularly” (M1).*

As mentioned in the literature review, the South African society is traditionally communitarian by nature and thus Batley (2008) argues that the collective nature of South African society (in contrast to the individualistic character of Western society) may indicate restorative justice as a more suitable response to crime.

**Theme 2:** One participant felt that: *“such a role is in line with the spirit of our constitutional democracy, which is participatory” (J4).* While another participant indicated that community participation could be a force that drives change: *“In my view, the community and organisations within it can create the necessary pressure to effect change” (P1).*

**Theme 3:** Respondents mentioned that the first step the community can take towards making a contribution to the justice process would be to report crime and to cooperate with the police. *“Police complain that crime is not being reported because the community looks the other way” (L4); “Often crimes stay unsolved because the people with the relevant information are reluctant to provide it to the police” (P4); “The community should be involved in consultation and cooperation with the police” (A3).* It seems then that if the community indicates the need to be more involved in the justice process, they should take the first step by assisting the police in crime detection.

**Theme 4:** Many respondents indicated that the community could be very useful in providing insights into the impact of a crime on a particular community. *“In appropriate circumstances, a relevant community member can testify to relate insight on how crime has affected the community” (P3); “Yes, the community can express their feelings about the crime” (J3); “In respect to violent crime, members of the community are better placed to relate the impact of the crime to the court” (A2).*

**Theme 5:** It has also been suggested that the community share their views on the suitability of an offender as a candidate for community service in their neighbourhood. The community could also provide insights through their view of what an appropriate sentence may be. *“The community should express their opinion on whether an offender is suitable to be allowed to do community service in their neighbourhood” (J3); “There should be meetings held to hear what the community’s views are regarding how offenders should be dealt with and what sentences should be imposed” (A5); “They can make sentencing suggestions” (P2); “They*

could provide insight in how a sentence can benefit the particular community affected by the crime” (L3).

Insights on how the community has been affected by a crime, could therefore also provide suggestions for actions by an offender to atone for his offence. For example, if vandalism is a problem in a given community, they may suggest community service in the form of having the vandal wash off graffiti, or having the vandal repair the damage he/she has caused.

**Theme 6:** Many respondents pointed out that the community can play a vital role in the reintegration of the offender. *“Community participation is essential in improving the relationship between the offender and the public in general” (J4); “The affected community should play an active role and be encouraged to facilitate reintegration of the offender”(J2); “The community should take responsibility for wrongdoers” (L4); “The community can also help rehabilitation in offenders by being involved in the administration and implementation of community service” (M4).* Batley (2005) argues that restorative practices resulting in greater community involvement will lead to improved social integration of an offender and a reduction in criminal behaviour.

**Theme 7:** Some respondents provided a tentative yes to community involvement in the justice system, but indicated that this participation should be to a limited degree. *“In a limited way only because the wider community is clueless about our legal system” (A4); “As long as the intention of their involvement is not to revert to traditional or ‘bush courts’” (J2); “Not a jury system, our community members are not educated and many carry too much prejudice based on colour” (M1); “But to a limited extent only, in appropriate cases (particularly in minor offences that affect the community directly) a report on their views might be helpful” (J5).* This concern may be related to the perception of respondents regarding the anger and fear of communities towards offenders and subsequent request for harsher punishments.

**Theme 8:** Those respondents who felt that the community should not have a more active role in the justice process reasoned that: *“No, their views will be from the one extreme to the other – it is impossible to satisfy everyone” (M2); “The opinion of the masses does not always reflect what the public opinion is” (L2); “The wider community should be limited to that of the victim” (A3).*

**Theme 9:** A few respondents indicated that they cannot see any practical way in which the community can play a more active part in the justice system, and therefore their answer to

this question is no. *“I cannot think of any way the community could in practice play a more meaningful and active role” (J1); “It is difficult to perceive how community participation can be achieved on a practical level” (A1).*

**Theme 10:** Other reasons mentioned for not agreeing that the community should have a more active role in the justice process: *“Community sentiments are already expressed in the media” (J1).* One respondent stated: *“presiding officers (as part of the community themselves) should already be able to understand the needs and perceptions of the community and so let that be a balanced and rational factor in the consideration of a sentence” (M3).* Another respondent took a similar view: *“I am of the opinion that a properly trained judiciary should take the opinion of the community into consideration – and that should be the extent of their involvement” (L5).* One individual expressed that the sentencing process is already difficult and that community involvement would only complicate matters: *“Involving the community will only make sentencing harder than it already is” (M2).*

The community would thus have to be educated and informed about the criminal justice system and any alternative options in order for them to contribute more actively in the criminal justice process.

**Question 6: Do you think restorative justice is more suitable for certain types of offences than for others? Please specify which type of offences you think would be suitable for restorative justice.**

**Theme 1:** Most respondents indicated that restorative justice would be more suitable for ‘less serious’ offences, meaning crimes related to property such as theft and fraud. *“Restorative justice is more suitable for minor offences” (J5); “Serious offences are less suitable for restorative justice” (J1); “Restorative justice is mostly suitable for less serious offences, specifically for crimes where the damage caused can be cured or mitigated, for example theft, fraud, and crimes related to property” (P3); “Minor offences and non-violent crimes are more suitable” (P2); “Petty crimes (e.g. theft) and where the offender can repay/compensate stolen goods are more suitable for restorative justice” (J3); “Restorative justice is more suitable for offences where reimbursement is a possibility” (L2); “It is suitable for loss of property, in which case the replacement of the property would suffice as part of the sentence and not as a replacement of sentence” (A5); “Any offence where there is an option for a fine is suitable for restorative justice” (A2); “Theft, where the value of the property stolen is not substantial would be more suitable for restorative justice” (P1); “Restorative justice may be*

*more suitable for economic offences, where the damage can be determined more accurately” (M4); “Restorative justice is a concept generally more applicable to commercial crime such as theft, etc.” (L1); “Crimes of a commercial nature may be more suitable” (A1). These responses support Batley’s (2005) concern that restorative justice will be perceived as appropriate only for less serious offences as well founded. The inverse of this viewpoint (i.e. that restorative justice is not suitable for serious crime) is the basis of the next theme.*

**Theme 2:** Many respondents felt that restorative justice is unsuitable for crimes involving violence. *“Generally, restorative justice is wholly unsuitable for violent crimes” (J5); “I am not convinced that it is applicable to violent crimes where society demands the removal and isolation of a perpetrator such as rape and murder” (L1); “Restorative justice should cover all types of offences, except ultra-serious violent offences” (A4); “It is not so easy to apply restorative justice for crimes where serious violence is involved, especially since victims, in my opinion, are not supported sufficiently” (M4); “Restorative justice is not suitable for rape and murder” (A5); “Crimes that may not be suitable for restorative justice include rape, murder, robbery and serious assault” (J2).*

**Theme 3:** A few respondents indicated that due to the nature of restorative justice (i.e. face-to-face encounters between the victim and offender), it would be more suitable for ‘personal crimes’. *“Restorative justice is more suitable for crimes where the victim is able to participate” (M1); “Restorative justice is more suitable for offences affecting people in their personal capacities and against bodily integrity but which does not carry a prescribed minimum sentence” (J4); “Obviously crimes against a person are more suitable than ‘impersonal’ crimes such as cable-theft and running a red light” (L4); “Where a victim can be identified, restorative justice can be applied” (L3). In total contrast to the above views, one respondent felt that restorative justice would be more suitable for crimes that do not affect an individual directly: “Crimes not affecting individual persons directly should be more suitable for restorative justice, such as ‘white-collar’ crime for example” (J2).*

**Theme 4:** Some respondents felt that restorative justice should be suitable for any and every type of offence; however, they did state that the application should depend on the circumstances of the particular case. *“No, restorative justice should be an option and available for any crime, the facts of the matter must dictate” (M2); “All types of offences/crimes are suitable, however, the specific circumstances of each case should rather indicate if restorative justice is appropriate or not” (A2); “Restorative justice can be*

*achieved in any crime, it is just easier in some crimes – each case must be considered on its own merits” (M3); “It should be applied if the perpetrator’s profile suits restorative justice” (L3).*

**Theme 5:** One respondent indicated that he would be reluctant to recommend restorative justice for repeat or habitual offenders: *“I would not recommend restorative justice in a case of a second or habitual offender” (M4)*, while another respondent felt that sometimes retribution is more important: *“There are crimes that call for more emphasis on retribution” (P3)*. This aspect relates to theme 2 where respondents indicated that restorative justice is not suitable for serious and violent crimes, in that if restorative or alternative justice options are not appropriate, the only option left would be imprisonment.

**Question 7: Would restorative justice be easy to implement in the current justice system? Or should things have to change drastically in order for it to be implemented?**

**Theme 1:** Those respondents who felt that it would be relatively easy for restorative justice to be implemented in the current criminal justice system suggested that the only change required would be a shift in mind-set, particularly for the role players in the legal system like prosecutors, magistrates and judges. *“I think it could be fairly easy, we just require a mind-shift with all those who are involved” (L2); “It can be effectively implemented in the current justice system, it does not require such a drastic change of the system – perhaps it only requires a change of mind-set for prosecutors and other role players within the justice system” (P4); “No change in the system is needed, rather a change is needed in the habit of thought” (A2); “Yes it can, but there needs to be a mind-shift by magistrates and judges” (L3); “I think it would require a change in mind-set more than a change in procedures” (L4); “Presiding officers in the Magistrate’s court and High court should be aware of restorative justice as this entails a mind-shift from other known sentencing options” (P2)*. These viewpoints suggest that for restorative justice to be accepted and implemented it would not require a drastic new reformulation of the criminal justice system, but rather require a change in the way legal professionals think about how justice objectives should be approached.

**Theme 2:** A few participants mentioned that if victims and the community were to be informed of and educated about restorative justice, it would be easier for them to accept it, and thus also easier to implement. *“Awareness, awareness, awareness – only when the perception that non-custodial sentences are lenient/soft/ inappropriate changes, then our society will start to see the benefits of restorative justice” (L1); “Victims and the community*

at large will have to be galvanised to participate – it should be part of the wider endeavour by society to rid us of crime” (L4). These views tie in with Theme 10 in Question 5, suggesting that the creation of awareness and provision of information about restorative justice practices as well as alternative options which could be provided by restorative justice are crucial in the implementation and acceptance of it in the current justice system.

**Theme 3:** Some respondents pointed out that some restorative justice principles are already being implemented to some degree. *“Restorative justice is already implemented in the Department of Correctional Services” (J2); “The Criminal Procedure Act already caters for the involvement of victims of aggressive crimes when the offender is considered for parole, and diversion from prison is also catered for” (A5).* Batley (2013) explains that although there is no South African policy that explicitly addresses restorative justice issues, there has been several policy initiatives that pertain to restorative justice since the emergence of the new democratic South Africa in 1994. These include; the Probation Services Amendment Act (Act 35 of 2002); the Child Justice Act (Act 75 of 2008); the Executive Summary of Discussion Paper 82 on a new sentencing framework; the Discussion Paper 94 on community dispute resolution structures and the National Policy Framework for Restorative Justice which was approved by the directors-general of the justice, crime prevention and security cluster in 2011.

**Theme 4:** A few suggestions have been made regarding how restorative justice could be implemented within the current justice system without too much difficulty. *“It can be implemented within the existing system, it can be used as part of diversion programmes or during sentencing as mitigating” (M1); “It should not be difficult, correctional supervisors can be used to monitor it” (M2); “It would not be too difficult to implement, if we can make use of models from foreign jurisdictions and local tribal/traditional courts” (J5); “It could possibly be achieved through conditions made applicable to suspended sentences” (J1); “Yes it can and the system is ripe for this, the NICRO system and correctional supervision sentences are effective, but on a small scale, maybe there should be statutory prescriptions to consider restorative justice?” (M3).* It would be useful to investigate those areas within the current criminal justice system where restorative justice could be implemented fairly easily in conjunction with the current practices which are in place, such as diversion programmes and community service orders.

**Theme 5:** Some respondents indicated that training in restorative justice principles and practices for presiding officers would be essential for successful implementation thereof. *“It can be implemented in the current system with the prosecution and police having the necessary authority and power – relevant authorities need to be trained and aware of victims’ rights and victim interests in crimes affecting them” (J4); “It can be implemented in the current system, provided that the judge is trained” (L5); “For successful implementation we need professionals trained in restorative justice and its implementation” (P3).* Naude and Prinsloo (2005) share this view and argue that the understanding and support of legal professionals are essential if they are to propose restorative justice options for offenders.

**Theme 6:** On the other hand, a few respondents felt that it would indeed be difficult for restorative justice to be implemented within the current criminal justice system. *“It won’t be easy” (J3); “Lack of resources in the current infrastructure would make restorative justice difficult to implement” (P3); “The current system cannot cater for restorative justice – we need a drastic new approach” (A3); “Restorative justice will not be easy to implement – it will be a time-consuming process, requiring skilled and capable professional people to guide the process, which is not currently available” (M4); “Restorative justice will require more input than is presently available” (L5); “It would prove difficult for certain categories of crime – serious and violent crimes have reached such alarming levels, that I can say from experience that the community is beyond ‘restoration’” (P1).* These views suggest that many of the obstacles faced in the current justice system (such as a lack of resources) would hinder the implementation of restorative justice, and that problems in the current criminal justice system should first be resolved before one should therefore attempt to tackle restorative justice.

**Question 8: Do you think the implementation of restorative justice would have a significant influence on crime rates?**

**Theme 1:** Quite a few respondents felt that due to social and economic factors in South Africa, restorative justice would not have a significant impact on crime rates. *“Not in South Africa, due to social and economic constraints” (L5); “Given the present social and economic circumstances in South Africa, I am not so sure that restorative justice would drastically reduce the crime rates” (M4); “It is difficult to conclude that there is a link between the lack of emphasis on restorative justice and the high crime rate – but there may be an argument to support the link between the high crime rate and the social challenges the*

country faces” (P3); “It might affect the crime rate, however, this view may be overly optimistic as restorative justice does not necessarily address the underlying causes of crime” (P4).

**Theme 2:** Several other reasons why restorative justice would not significantly influence the crime rate were provided: “Not at this early stage, there are a number of factors against it, especially the high crime rates (serious and violent crime), and the attitude of the community towards perpetrators and the attitude of perpetrators towards the system” (P1); “Foreign crime elements are complicating the equation everyday” (J3); “I do not think so, people would commit crime knowing that they could negotiate with the victim” (A5); “In the case of hardened criminals, no matter what you do in terms of correcting their behaviour, they still pursue criminal activities” (P4); “There is a risk that restorative justice would be seen as a ‘light’ sentence and would therefore not deter prospective offenders” (J1).

**Theme 3:** Some respondents felt that, although restorative justice may not influence the crime rate, its implementation could however result in other benefits. “Restorative justice would not necessarily impact crime rates, but at least there will be some satisfaction on the part of the victim” (A2); “I doubt it very much as the Minimum Sentence Act and Correctional Supervision has had little effect on crime rates, but at least restorative justice will be another tool available to presiding officers” (M2); “It remains to be seen, but restoring the wrong done to victims would benefit victims and the offender doesn’t just walk away without compensating the victim” (L2).

**Theme 4:** Those respondents who felt that the crime rate would be significantly reduced, suggested restorative justice as a preventative mechanism for recidivism as a primary contributing factor. They argued that if an offender is confronted with the consequences of his/her crimes, this would result in change and a reduction of their criminal behaviour. “No doubt that monitoring and programmes resulting from certain forms of restorative justice may have a positive impact on preventing recidivism” (P3); “Restorative justice will certainly have a positive effect on the recidivism percentage” (J2); “Through interaction with victims, offenders will learn the consequences of their actions and acknowledge the effects of their crimes, which may induce a change in them” (J4); “Restorative justice would certainly have an impact, one simply need to look at the statistics to see how many inmates are repeat offenders” (L1); “The more offenders are taught to take responsibility for their actions in a less hostile environment, the easier it will be to reintegrate them into society”

(M2); *“Rehabilitation will be encouraged with society being more accepting and tolerant towards repentant offenders”* (J5).

It appears that the general opinion of the respondents is that although restorative justice may not influence the crime rate in terms of crime prevention for potential first time offenders, it might affect the occurrence of recidivism, which could then impact the crime rate.

**Question 9: Do you think restorative justice could have a significant impact on the prison population?**

**Theme 1:** The majority respondents felt that restorative justice could significantly impact the prison population. The reason most participants provided in support of this view was that if non-custodial sentences resulting from restorative justice approaches were handed down, it is rather obvious that less people would be sent to prison. *“It would most definitely, because implementation of restorative justice would mean that non-custodial means of punishment are explored”* (P4); *“It speaks for itself, if done properly it can definitely have a significant impact”* (L2); *“Without a doubt, so many people are in prison for petty offences who could be contributing usefully outside prison walls”* (A4); *“No doubt, non-custodial sentences would reduce the prison population significantly”* (P3); *“It would, instead of prison sentences being handed out, alternative sentences would be considered”* (A5); *“Yes it would, too many people are incarcerated unnecessarily when restorative justice could have been used instead”* (L1); *“Non-custodial sentences keeps offenders out of prison”* (M3).

**Theme 2:** A few respondents mentioned that the use of restorative justice could prevent recidivism, and thus reduce the number of people who are sent to prison. *“Restorative justice prevents crime and recidivism”* (M3); *“Restorative justice would definitely have a positive effect on the recidivism percentage”* (J2); *“If less people are introduced to prison life and hardened criminals, recidivism would be controlled and reduced”* (J4).

**Theme 3:** However, some respondents felt that restorative justice would only impact the prison population to a limited degree. *“To some extent, for offenders serving sentences for petty offences”* (P1); *“To a limited extent, yes”* (J5); *“It would help, but to what degree would be speculation”* (M2); *“I think the impact will be limited because I don’t foresee it being applied on a broad spectrum”* (P2); *“Maybe in the long run but not at first – my concern is that it could result in bulldozing victims and offenders through the process just to empty the prisons”* (M4).

One can therefore infer that the impact restorative justice may potentially have on the prison population depends primarily on how extensively it would be applied.

**Question 10: What do you think is the biggest challenge the South African justice system is facing at the moment?**

**Theme 1:** The biggest challenge mentioned by most respondents was the lack of quality justice due to the appointment of legal professionals who are not properly trained and who lack experience. Another factor is that nepotism plays a role in judicial appointments.

*“Incompetent and people not properly qualified are employed instead of qualified and competent people” (A5); “Incompetence” (M4); “Inexperienced prosecutors, legal representation and judges leads to the lack of quality justice” (M2);*

*“Incompetent/inexperienced prosecutors, judicial personnel and correctional services” (A3);*

*“No quality justice due to inexperience” (L3); “Not employing properly qualified people in the right positions” (L2); “Corruption and nepotism playing a role in appointing positions” (P2);*

*“People are appointed to the bench for their political views” (A4); “Qualified people are being trained but not appointed” (L1); “Inefficiency and incompetence of police, prosecutors and magistrates” (A1);*

*“An inability to weed out under-performers” (L4);*

*“Mediocrity is condoned and passed off as excellence in sensitive and critical positions” (J4).*

**Theme 2:** Detecting crime and poor investigations were also seen as a big problem. *“Crime detection” (P4); “Poor investigations by the police” (J5); “Investigative capacity” (L3); “Lack of proper investigations by the police” (L2); “Incompetent and inexperienced people in the SAPS investigating crimes” (A3).*

**Theme 3:** Quite a few respondents mentioned other problematic factors related to the South African Police Service. *“Police cannot tackle crime because they are not equipped, not properly trained and not motivated enough” (P1); “Lack of resources and manpower to curb crime” (J2); “Police are not properly trained and they ‘see colour’” (L2); “The police are ill-equipped to perform their duties and overloaded with work and unable to manage” (L1).*

**Theme 4:** Organised crime and corruption related to the police force were also mentioned as problematic issues. *“Police corruption” (A1); “Wealthy criminals corrupt law enforcement agents” (J3); “Lots of people in authority (especially police) are obsessed with money – organised crime with its influence on authorities and officials is thriving because of ruthless*

*materialism which is consuming our moral fibre” (J4); “Foreign criminals pose a very serious threat to the safety and security of our justice system” (A2).*

**Theme 5:** However, all the blame cannot be laid at the feet of the police, as some respondents mentioned that the ability of the police to investigate crime is hampered by the fact that the community does not report crime. *“People turn a blind eye to crime” (J4); “Society is afraid to report crime and to appear and testify in courts” (L1).* The reason for this perceived apathy of society towards crime may be related to the lack of faith the community has in the criminal justice system. *“Previously disadvantaged people often resort to public violence and self-help instead of enforcing their rights and taking their issues to the courts because they have no confidence in the justice system” (J4); “The community has lost faith in the legal system” (P1).*

**Theme 6:** A factor that may play a role in the community’s lack of confidence in the justice system is slow and drawn-out court processes. *“Lack of human and physical resources result in the backlog of finalisation of cases which in turn results in the lack of confidence in the justice system” (A5); “Long trial processes leading to the awaiting-trial prisoners spending a lot of time in prison” (P2); “Overcrowded court rolls in the Magistrate’s court” (J5); “Court processes are very slow, which also undermines confidence in the system” (P1).*

**Theme 7:** The increasing crime rate was also a concern for respondents. *“The prevalence of crime (especially violence)” (J1).* Many respondents related the increasing crime rate to overcrowding in prisons. *“Overcrowding in prisons” (J5); “Over-population of prisons” (J2).*

**Theme 8:** The lack of resources in the justice system and training of practitioners in the justice system were also raised as concerns by respondents. *“Skills development and relevant training” (M3); “Lack of supervision and training” (A1); “A lack of capacity” (L4); “Social and economic constraints” (L5); “Lack of resources, especially human capital” (P3).*

## **Conclusion**

It should be pointed out that these views are only the personal opinions of the respondents who participated in this study. However, as they are involved in the justice system on a daily basis, they are in the best position to provide insights regarding the problems they encounter and experience in the course of their career in the legal environment. This suggests that there are quite a few obstacles in the South African criminal justice system to be overcome. On the

one hand restorative justice may address some of these concerns, such as strengthening the community's faith and confidence in the justice system. On the other hand, some of these problems (such as lack of resources and inexperienced and incompetent legal practitioners) need to be addressed first before one can begin to introduce restorative justice on a wider scale.

From the findings of this study, it was concluded that restorative justice is accepted as suitable in the South African context by legal practitioners. Respondents indicated that undue emphasis is placed on retribution and the extensive use of imprisonment in the current justice system, despite the availability of restorative options. It was however emphasised by respondents that the application of restorative justice should be limited to suitable and deserving cases.

Most respondents unequivocally expressed the view that rehabilitation in prison facilities is not effective and referred to the high recidivism rate to substantiate this view. Contact with hardened criminals in prison and acquisition of new criminal skills were attributed as factors contributing to recidivism. It was suggested that overcrowding and a lack of resources may be instrumental in the inability of prison facilities to address effective rehabilitation. The current adverse socio-economic circumstances which prompt offenders to embrace a criminal lifestyle and the inability of prison facilities to address or ameliorate this was presented as another factor contributing to recidivism by respondents. In light of the issues raised by respondents, one could question the continued practice of handing down prison sentences in the present South African justice system.

Respondents agreed that alternative sentencing should be utilised more often. It was suggested that various means of imposing punishment without resorting to custodial sentences are available and that the utilisation of alternative options could relieve overcrowding in correctional facilities. Participants however expressed the view that the use of alternative sentences could be challenged by communities reluctant to accept alternative modes of punishment, considering their frustration with the high crime rate and the corresponding desire for harsher sentences. The application of alternative sentences for appropriate cases exclusively however, might heighten its acceptance by the community.

Most respondents indicated that victims should indeed play a more active role in the justice process, especially considering the very limited involvement they have in the current criminal justice system. Participants expressed the view that victims should have an opportunity to

confront the offender. The sentencing process and parole considerations for offenders were suggested as the areas where victims could make the greatest contribution in the justice process. Some respondents did however emphasise that caution should be taken regarding victim involvement, as victims are not constrained by objective standards. Thus, in order to facilitate active victim participation in the justice process, proper procedural guidelines should be composed.

Approximately half of the respondents indicated that the community should have some role in the justice process. The fact that the community is also affected by crime was raised in respondents' support for community involvement. Participants suggested that the community can contribute by reporting crime, providing insights on the impact of a crime on a particular community, and by sharing their views on appropriate sentences for offenders. Those respondents who were ambivalent about greater community involvement in the justice process provided a tentative yes, but recommended that this participation should be to a limited degree. A few respondents indicated that they could not envision any practical way in which the community could play a more active part in the justice process.

Most respondents expressed the view that restorative justice would be more suitable for 'less serious' offences (such as crimes relating to property), and wholly unsuitable for violent crimes. Those respondents who indicated that restorative justice could be suitable for any type of offence did however emphasise that the application should depend on the circumstances of the particular case.

A number of respondents suggested that it would be relatively easy to implement restorative justice in the current justice system and would only require a mind-shift in legal professionals. Some participants emphasised that educating victims and the community on restorative justice could assist in it being accepted by the general population and thus would make it easier to implement. On the other hand, a few respondents expressed the view that a lack of resources would make it difficult for restorative justice to be applied and implemented in the criminal justice system.

A few respondents expressed the view that due to social and economic factors in South Africa at the moment, restorative justice would not impact crime rates significantly. Some participants posit that although restorative justice may not influence the crime rate, it may result in other benefits, such as greater victim satisfaction. Those respondents who expressed

a belief that restorative justice would have a positive impact on the crime rate indicated that this would be primarily due to a reduction in recidivism.

Most respondents were of the opinion that restorative justice would significantly impact the prison population. Non-custodial sentences and a reduction in recidivism resulting from restorative justice were suggested as the primary reason for reducing the prison population.

The lack of quality justice due to the appointment of legal professionals who are not properly trained and who lack experience was expressed by most respondents as a serious problem. Problematic factors relating to the police (such as the lack of resources and manpower) as well as poor quality investigations were also raised as concerns by participants. Respondents indicated that increasing crime rates and citizens not reporting crime may be contributing factors to the lack of confidence by the community in the justice system. Further concerns raised by respondents were the lack of resources in the criminal justice system and inadequate training of legal professionals. These factors seem to seriously compromise the ability of the justice system to operate effectively and immediate measures should be taken to address these concerns.

The aim of this study was to gain an in-depth understanding of the opinions held by legal professionals about restorative justice and therefore the quality of the data relied heavily on the quality of responses by participants. There were instances where participants responded simply with single-word answers such as yes or no. Because the data was not collected via face-to-face interviews, it was not possible to ask participants to elaborate on their answers (especially in instances where single-word answers were provided) or to ask follow-up questions.

The study did produce valuable insights on various challenges faced in the current criminal justice system in South Africa. It is recommended that these issues should first be addressed before an active endeavour to implement restorative justice is made.

For restorative justice to be utilised and recommended more extensively it is further imperative that legal professionals be trained and educated in its principles and applications. It will also be beneficial to clarify which types of offences could or should be referred to restorative justice and to develop a framework of guidelines to direct the practices and implementation thereof.

It is suggested that victim and community involvement in the justice process should be guided and regulated by objective standards and procedures in order to avoid vindictive and vengeful reactions and to protect the legal and emotional concerns of all parties.

It is encouraging that restorative justice is viewed favourably by most respondents. These positive perceptions may indicate the willingness of legal professionals to apply restorative justice more extensively. Therefore it is important that the proper measures and infrastructure be in place to accommodate the application of restorative justice in the South African legal system.

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**Abstract:** The search for alternative reactions to crime and resurrection of traditional indigenous justice practices has led to experimentation with restorative justice globally. Traditional indigenous African approaches to justice have many principles and values in common with restorative justice which makes it uniquely suited to the African and more specifically the South African context. However, restorative justice is not currently utilised to its fullest potential extent in South Africa. A possible explanation for the limited application was investigated by exploring the perceptions and opinions legal professionals hold about restorative justice. In order to obtain an in-depth understanding of the opinions held by South African legal professionals, a qualitative research methodology was employed. Twenty-five participants (5 individuals from each of the 5 subgroups, namely; judges, magistrates, prosecutors, advocates and lawyers) were approached to respond to 10 questions which simply required a yes or no answer with a short motivation. Thematic analysis was used to identify emerging themes from the data, which revealed a generally positive disposition by South African legal professionals towards restorative justice. Some cautionary conditions for application of restorative justice in the current justice system however, were highlighted.

*'n Soeke na alternatiewe metodes om op misdaad te reageer en die herlewing van inheemse regspraktyke, het wêreldwyd aanleiding gegee tot eksperimente met herstellende geregtigheid. Tradisioneel inheemse benaderings tot regstoepassing het heelparty waardes en beginsels in gemeen met herstellende geregtigheid. Dit maak herstellende geregtigheid op 'n unieke wyse toepaslik in die Afrika- en meer spesifiek, Suid-Afrikaanse konteks. Die huidige beperkte toepassing van herstellende geregtigheid kan moontlik verklaar word vanuit die verskeidenheid menings en opvattings daarvoor onder Suid-Afrikaanse regslui. Om 'n diepere begrip van die sienings daarvan onder Suid-Afrikaanse regslui te verkry, is 'n studie onderneem gebaseer op 'n kwalitatiewe metodiek. Vyf en twintig deelnemers (insluitend regters, magistrate, staatsaanklaers, advokate en prokureurs) is genader om tien vrae te beantwoord met 'n keuse van ja of nee, tesame met 'n kort motivering vir die keuse. 'n Tematiese analise van die menings is gevolg om die vernaamste temas onderliggend aan die data uit te lig. Die belangrikste bevinding was dat herstellende geregtigheid deurlopend positief beskou is deur Suid-Afrikaanse regslui. Die toepassing daarvan in die huidige Suid-Afrikaanse regstelsel is egter onderhewig aan sekere voorwaardes en dit word eweneens beklemtoon.*

**Keywords:** Restorative justice; qualitative research; thematic analysis; judges; magistrates; prosecutors; advocates; lawyers; South Africa; opinions.