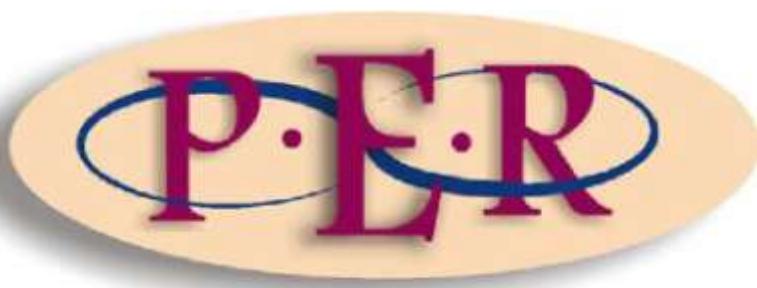


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THE RIGHT TO DIGNITY AND RESTORATIVE JUSTICE IN SCHOOLS

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THE RIGHT TO DIGNITY AND RESTORATIVE JUSTICE IN SCHOOLS**M Reyneke*****SUMMARY**

A retributive and punitive approach is normally adopted in dealing with misbehaviour in South African schools. Despite the legal abolition of corporal punishment, more than 50 percent of schools still administer it. Other forms of punishment generally applied are also punitive in nature. The right to dignity of all of the parties affected by misbehaviour in schools is considered in this analysis. The possibility of adopting restorative justice as an alternative disciplinary approach is examined as a way of protecting, promoting and restoring the dignity of the victims of such misbehaviour.

KEYWORDS: Restorative justice; education law; right to dignity

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THE RIGHT TO DIGNITY AND RESTORATIVE JUSTICE IN SCHOOLS

M Reyneke*

1 Introduction

Youth violence, crimes committed by juveniles, antisocial behaviour in schools and a decline in the appreciation of acceptable values are a worldwide phenomenon.¹ The lack of discipline and respect in education is an increasing problem throughout the world.² Educators and learners are now often the victims of intimidation, harassment, and verbal and physical assaults by educators, learners, parents or public officials of the Department of Education. Recent national and international reports on school-based violence paint a gloomy picture.³ Learners and educators are the transgressors with regard to, and the victims of, this unacceptable behaviour.

Unacceptable behaviour in schools undoubtedly constitutes an infringement of the constitutional rights of educators and learners alike. In South Africa, a retributive and punitive approach is normally adopted in dealing with misbehaviour in schools. Despite the abolition of corporal punishment, more than 50% of schools still administer it.⁴ Other methods of punishment are mainly exclusionary in nature and take the form of expulsions, suspensions and detention. These punitive measures undoubtedly infringe on the right to freedom and security of the person⁵ and on the right to education⁶ of the transgressor. Strict measures have rightly been put in place to protect these rights of the transgressors. The focus on the protection of the rights of the transgressor and of children's rights in general has, however, contributed to

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1 Fields 2003 *Youth Studies Australia* 44-51.

2 Drewery 2004 *JCASP* 332-344; Shaw 2007 *Conflict Resolution Quarterly* 127-135.

3 *Plan Learn Without Fear* 1-84; SAHRC 2008 edulibpretoria.files.wordpress.com 1-44; Burton *Merchants, Skollies and Stones* 1-92.

4 SAHRC 2008 edulibpretoria.files.wordpress.com 13.

5 Section 12 *Constitution of the Republic of South Africa*, 1996.

6 Section 29 *Constitution of the Republic of South Africa*, 1996.

the notion that educators are not entitled to any protection. In practice, no - or hardly any - explicit attention is given to the rights of the victims of the misbehaviour.

Misbehaviour in schools often constitutes an infringement of the right to dignity of the victims of transgressions. These victims can be either learners or educators. The right to dignity will therefore be explored in this article. Restorative justice will then be examined as a possible solution to protect, promote and restore the right to dignity of the victims of misbehaviour in schools.

2 Right to dignity

Dignity plays a very important part in the South African *Constitution*. Dignity is not only one of the founding values⁷ of the *Constitution*, but is also an enforceable right.⁸ Dignity as a value also plays an important role in the limitation of rights⁹ and in the interpretation of other rights and values¹⁰. The right to dignity forms the foundation of many of the other constitutional rights, since the fundamental rights in the *Constitution* are derived from the dignity inherent in every person.¹¹ Dignity is thus rightly regarded as the cornerstone of the South African *Constitution*.¹²

The consequences of not respecting the dignity of others in the past are well known in South African history. Dignity should therefore play an important part in informing and shaping our schools, and school discipline in particular.¹³

In applying the dignity concept, one will never be able to exhaust its content.¹⁴ The Constitutional Court, the high courts and commentaries, however, provide us with

7 Section 1, 7(1), 36(1) and 39(1) *Constitution of the Republic of South Africa*, 1996; Davis 1999 SALJ 398-399; Liebenberg 2005 SAJHR 1-31.

8 Section 10 *Constitution of the Republic of South Africa*, 1996.

9 Section 36 *Constitution of the Republic of South Africa*, 1996.

10 Section 39 *Constitution of the Republic of South Africa*, 1996; Cheadle, Davis and Haysom *Constitutional Law* 125; *Dawood v Minister of Home Affairs* 2000 8 BCLR 837 (CC) 860.

11 *S v Makwanyane* 1995 2 SACR 1 (CC) para 328; see also *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 32 which provides that dignity is at the heart of individual rights; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 92; Cheadle, Davis and Haysom *Constitutional Law* 125; Schacter 1983 AJIL 848-854.

12 Cheadle, Davis and Haysom *Constitutional Law* 125-127; Rautenbach and Malherbe *Constitutional Law* 332.

13 *Dawood v Minister of Home Affairs* 2000 8 BCLR 837 (CC) 860.

14 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 28; *Advance Mining Hydraulics v Botes* 2000 2 BCLR 119 (T) 127.

useful insights into the depth of the concept. A few facets of the concept are discussed below.

Although there is no hierarchical order to the different rights, the Constitutional Court has held that the "right to life and dignity are the most important of all human rights" and that "we are required to value these two rights above others".¹⁵

As one of the two most important rights, O'Regan J held in *S v Makwanyane*¹⁶ that dignity is "an acknowledgement of the intrinsic worth of human beings" and, therefore, that all "human beings are entitled to be treated as worthy of respect and concern". In addition, everyone is entitled to equal dignity and respects regardless of membership to a particular group.¹⁷ Everyone has inherent dignity and an inherent, priceless worth.¹⁸ Everyone should therefore be treated as an end, and never as a means to an end.¹⁹ This implies that people should never be objectified or discriminated against.²⁰ In *Bhe v President of the RSA*²¹ the court found that "[d]iscrimination conveys to the person who is discriminated against that the person is not of equal worth". Nobody should thus be merely the object of someone else's acts. In the school context nobody should thus merely be the object of misbehaviour, punishment or discriminated against, but should be acknowledged and respected for his or her inherent worth.

The Canadian court held in *Law v Canada (Minister of Employment and Immigration)*²² that dignity can be harmed on an individual basis, or as part of a group, if physical or psychological integrity is impaired. The court held:

15 *S v Makwanyane* 1995 2 SACR 1 (CC) para 328.

16 *S v Makwanyane* 1995 2 SACR 1 (CC) para 328.

17 *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 32; see also *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 92.

18 Liebenberg 2005 *SAJHR* 6; Schachter 1983 *AJIL* 853; Raath 2007 *Koers* 2007 159-191; Réaume 2003 *LA L Rev* 645-695; Ackerman "Menswaardigheid na tien jaar" 6.

19 *S v Dodo* 2001 1 SACR 594 para 38; *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 71.

20 *Advance Mining Hydraulics v Botes* 2000 2 BCLR 119 (T):127; *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 71; Ackerman "Menswaardigheid na tien jaar" 5.

21 *Bhe v President of the RSA* 2005 1 BCLR 1 (CC) para 187.

22 *Law v Canada (Minister of Employment and Immigration)* 1999 1 SCR 497;170 DLR (4th) 1 para 53.

Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individual and groups within society.

Dignity implies equal respect and equal concern²³ for the needs of educators, learners, the school community at large, transgressors and administrators in the education system. There are numerous vulnerable groups in schools who are subjected to marginalisation and discrimination in South African schools. Vulnerable groups include learners who are subjected to xenophobic attacks, gay and lesbian learners, victims of bullying and minority groups in schools who are discriminated against on grounds such as race, ethnic origin, social origin or religious grounds.²⁴ Learners from these groups are often the victims of misbehaviour and school-based violence. Victims in the school context can also be fellow learners who are subjected to the misbehaviour of an unruly learner who disrupts classes frequently. These disruptions have a negative impact on learners' right to education and development. Thus, to focus only on the transgressors and to ignore the school community at large and the victims of transgressions in particular are violations of the right to dignity.

Dignity is further concerned with the "physical and psychological integrity and development of an individual or a group".²⁵ Dignity is about a person's right to be who he or she is and thus implies a right to autonomy, self-expression, self-identification, self-determination, self-fulfilment, self-respect and self-worth.²⁶ Everyone is therefore entitled to his or her own choices, preferences, ideas, beliefs, attitudes and feelings. Human beings have a right to develop their own humanness to its full potential and to realise their dreams, thus giving effect to their own sense of self-worth.²⁷ To experience self-worth, one should not only feel secure in one's own identity as an individual, but must also experience a sense of belonging to a

23 Réaume 2003 *LA L Rev* 663, 666.

24 SAHRC 2008 edulibpretoria.files.wordpress.com 6-10; see also *MEC for Education, KZN v Pillay (Governing Body Foundation (1st amicus curiae), Natal Tamil Vedic Society Trust (2nd amicus curiae), Freedom of Expression Institute (3rd amicus curiae))* 2008 JOL 20810 CC.

25 *Law v Canada (Minister of Employment and Immigration)* 1999 1 SCR 497; 170 DLR (4th) 1 para 53.

26 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28; Schachter 1983 *AJIL* 850; Raath 2007 *Koers* 173-176; Cowen 2001 *SAJHR* 34-58; Réaume 2003 *LA L Rev* 667, 673; Ackerman "Menswaardigheid na tien jaar" 5.

27 Schachter 1983 *AJIL* 850; Réaume 2003 *LA L Rev* 667, 673; see also *Ferreira v Levin* 1996 1 SA 984 (CC) 1013-1014.

particular community.²⁸

There is ample evidence of the devastating effects of school-based violence and bullying on the education, psychological functioning and sense of self-worth of the victims. Victims tend to become depressed and suicidal, they develop concentration problems and learning difficulties as a result of which their academic performance deteriorates, they experience a loss of self-esteem, and they feel shame, suffer anxiety, play truant, are unmotivated to succeed, and, ultimately, drop out of the system.²⁹ Educators who are exposed to the stress of dealing continuously with violence in schools are reported to suffer from post-traumatic stress, feel trapped, experience negative feelings towards their employment, lose interest, feel detached from learners, have reduced self-confidence and self-esteem, feel disempowered, experience depression and feelings of hopelessness, and often resort to alcohol and/or drugs.³⁰ These are but a few examples of the consequences of misbehaviour in schools, which ultimately impact negatively on the enjoyment of the right to dignity of educators and learners.

One's dignity is violated if one is subjected to conduct that is degrading and humiliating.³¹ Further, nobody should be treated as a nonhuman. With reference to punishment, the Constitutional Court has held that nobody should be treated "as objects to be toyed with and discarded".³² Although the way people feel about themselves and their sense of self-worth cannot be guaranteed, it is important to ensure that the way people are treated does not contribute to their diminished self-respect and self-worth.³³ Disciplinary policies in schools should thus not present an obstacle to learners in this regard.

28 Réaume 2003 *LA L Rev* 674-675; see also *MEC for Education: KwaZulu-Natal v Pillay* 2008 JOL 20810 (CC), where the Constitutional Court discusses in detail the relation between dignity and the right to belong to a religious group.

29 *Plan Learn Without Fear* 41; SAHRC 2008 edulibpretoria.files.wordpress.com/4; Burton *Merchants, Skollies and Stones* 5-6.

30 SAHRC *School-based violence* <http://edulibpretoria.files.wordpress.com/2008/03/sbvreportintro1.pdf> 14-15.

31 *Advance Mining Hydraulics v Botes* 2000 2 BCLR 119 (T) 127.

32 *S v Makwanyane* 1995 2 SACR 1 (CC) para 328.

33 Réaume 2003 *LA L Rev* 676.

Misbehaviour in schools leads to a conflict of interests. Whose rights should be upheld - the educational and personal security rights of the transgressor, or the educational rights of the other learners, and the right to dignity of the other learners and educators? The balancing of rights in these circumstances is inevitable, and dignity plays an important role in balancing the conflicting rights through the limitation clause.³⁴

3 The retributive and restitutive approach in dealing with misbehaviour

In dealing with misbehaviour and in balancing the rights of the different parties in schools one can make use either of a traditional, retributive and restitutive approach or of the new restorative justice approach. In the case of the former approach, retribution consists in the use of dominance, control and punishment to bring about behavioural change in learners. Restitution sometimes takes place in the traditional approach, which is normally ordered and enforced by those in authority.³⁵

Hopkins³⁶ describes the retributive justice approach in dealing with misbehaviour in schools as follows. In terms of the retributive justice approach, misbehaviour is seen as a breach of school rules or as letting the school down. This approach focuses on the past and the aim is to determine who should be blamed and what the person is guilty of. An adversarial relationship and process characterise the retributive approach, with an authoritarian figure, such as the educator or principal, in charge of the process and having the power to decide on the wrongdoer's guilt and punishment. If the transgressor is found guilty, he or she should be punished in order to ensure deterrence and to prevent future misconduct. This is done by causing him or her pain by meting out corporal punishment or making him/her suffer some other form of unpleasantness such as detention. Retributive forms of punishment tend to result in the exclusion of the transgressor. Consequently, one social injury is replaced by another. The importance of adhering to due process, that is, of being consistent and paying attention to rules, is further highlighted. The school community

34 Section 36 *Constitution of the Republic of South Africa*, 1996. See also Cheadle, Davis and Haysom *Constitutional Law* 132.

35 Morrison 2002 *TIC CJ* 2191-2196; Wearmouth, McKinny and Glynn 2007 *Educational Research* 37-49; Karp and Breslin 2001 *Youth and Society* 252-253; Fields 2003 *Youth Studies Australias* 46; Drewery 2004 *JCAS* 334.

36 Hopkins 2002 *SL* 144-149.

on the receiving end of the misconduct is uninvolves in the process and is mostly represented by an educator or the principal, who acts on behalf of the victims, resulting in the victims feeling powerless. Accountability is here defined in terms of the transgressor receiving punishment.

Retributive discipline is the form of discipline mostly frequently exercised in South African schools, with more than 50% of learners indicating that they are still subjected to corporal punishment despite its abolition. The majority of educators (58%) are in favour of the reinstatement of corporal punishment.³⁷ Although some educators refrain from using corporal punishment they generally revert to other retributive forms of discipline such as detention, additional homework, sarcasm, humiliating practices, exclusion from the group, suspensions and expulsions.³⁸ Research done by Rossouw³⁹ indicates that some schools employ punitive disciplinary measures only, and does not find proactive disciplinary measures being taken in any of the schools included in the study. This is indicative of the mindset of most educators, who prefer retributive forms of discipline.

Despite the use of punitive measures, maintaining discipline is becoming an increasing problem in South African schools. School-based violence is increasing and more educators are claiming that disciplinary problems are reaching crisis proportions.⁴⁰ It thus seems as though current punitive measures are largely ineffective. Resorting mostly to punishing the transgressor poses another question, namely does the punishment of the transgressor necessarily restore the dignity of the victim in the school and in the school community at large? This question can be illustrated by way of the following example. A male learner sexually harasses a female educator and is temporarily or even permanently suspended. Does the suspension of the learner restore the educator's dignity? A serious violation of her right to freedom and the security of her person has taken place, but does the expulsion or suspension restore this freedom and security? To what extent is it restored, if at all? How do the other learners see her, and how does she feel about

37 SAHRC 2008 edulibpretoria.files.wordpress.com 13.

38 Pienaar 2003 *EC* 261-274; Oosthuizen, Wolhuter and Du Toit 2003 *Koers* 457-479.

39 Rossouw 2003 *Koers* 413-435.

40 Rossouw 2003 *Koers* 416-417; De Wet 2003 *SAJE* 113-121; SAHRC 2008 edulibpretoria.files.wordpress.com; Wolhuter and Van Staden 2008 *TG* 389-398.

teaching the transgressor again? Do the transgressor's values and perception of the rights of others change as a result of his being suspended or expelled? Does the suspension or expulsion create a sense of security in the school, that victims' rights will be properly protected and promoted in future?

The fact that the protection of our dignity should inform our future was alluded to earlier. This is closely related to the provisions of section 7 of the *Constitution*, which provides that the "state must respect, protect, promote and fulfil the rights in the Bill of Rights". To "respect rights" means to take positive steps to prevent the infringement of these rights. To "fulfil rights" means to take steps to enable people to exercise their rights.⁴¹ It is thus submitted that this section also requires that purposeful attempts be made to restore rights in instances where an infringement has taken place.

4 The restorative justice approach

In *S v M*⁴², the Constitutional Court found that the *Constitution* has transformed the traditional aims of punishment and stressed the importance of restorative justice. A restorative justice approach to discipline will be examined below, to determine the usefulness of this approach in protecting, promoting and restoring dignity in schools.

4.1 Defining "restorative justice"

It is clear from the literature that there is no exact definition of "restorative justice" and that the focus on different programmes and outcomes and on different principles contributes to the vagueness of the concept.⁴³

According to the Suffolk University's Centre for Restorative Justice:⁴⁴

Restorative justice is a broad term which encompasses a growing social movement to institutionalise peaceful approaches to harm, problem-solving and violations of legal and human rights. These range from international peacemaking tribunals such

41 Rautenbach and Malherbe *Constitutional Law* 300.

42 *S v M* 2007 2 SACR 539 (CC) para 10, 55, 59, 61, 62, 72.

43 Bezuidenhout 2007 *Acta Criminologica* 43-60.

44 Wikipedia 2009 en.wikipedia.org.

as the South African Truth and Reconciliation Commission to innovations within the criminal justice system, schools, social services and communities. Rather than privileging the law, professionals and the state, restorative resolutions engage those who are harmed, wrongdoers and their affected communities in search of solutions that promote repair, reconciliation and the rebuilding of relationships. Restorative justice seeks to build partnerships to reestablish (*sic*) mutual responsibility for constructive responses to wrongdoing within our communities. Restorative approaches seek a balanced approach to the needs of the victim, wrongdoer and community through processes that preserve the safety and dignity of all.

Bosworth⁴⁵ states that:

In restorative justice models, victim needs are central, offenders are held accountable, and the government is a secondary player in the process of restoring victims, offenders and communities to a state of wholeness.

Morrison⁴⁶ says:

Restorative justice is about building communities of care around individuals while not condoning harmful behaviour; in other words, holding individuals accountable for their actions within systems of support.

"Restorative justice" is not a completely new concept in South Africa and forms part of the foundation of the new criminal justice system for juveniles. In terms of the *Child Justice Act*⁴⁷ "restorative justice means":

... the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child's parent, the child's family members, victims and communities.

Batley⁴⁸ from the Institute for Security Studies discussed the concept of restorative justice in the South African criminal justice environment and says:

Simply put, restorative justice is about addressing the hurts and needs of both victims and offenders in such a way that both parties, as well as the communities which they are part of, are healed.

He highlights the three important principles, namely:

45 Bosworth *Encyclopedia of Prisons* 846.

46 Morrison 2002 *TICCJ* 2.

47 75 of 2008.

48 Batley 2005 www.iss.co.za.

- Crime is seen as something that causes injuries to victim, offenders and communities. It is in the spirit of *ubuntu* that the criminal justice process should seek the healing of breeches, the redressing of imbalances and the restoration of broken relationships.
- Not only government, but victims, offenders and their communities should be actively involved in the criminal justice process at the earliest point and to the maximum extent possible.
- In promoting justice, the government is responsible for preserving order and the community is responsible for establishing peace.

This is in line with definitions provided by the South African Law Reform Commission and the Truth and Reconciliation Commission.⁴⁹

4.2 *Restorative justice principles and practices*

Despite the absence of one generally accepted definition, certain recurring principles can be identified from the definitions and literature. These principles include a victim-centred approach, offender accountability, community involvement, reconciliation, the restoration of relationships, restitution, the making of amends, repairing harm, problem solving, dialogue, negotiation, reintegration as opposed to stigmatisation, repentance and forgiveness.⁵⁰ These concepts will be discussed in more detail below.

4.2.1 *Misbehaviour is harm done to another*

The focus in the case of restorative justice is on the emotional and social disruption caused by misbehaviour. The focus is not on the misbehaviour itself, but rather on the consequences of the misbehaviour. The wrongdoing lies in the violation of people and interpersonal relationships and not in the breaking of the rules.⁵¹ Karp

49 Skelton and Bateley *Charting Progress* 5.

50 Bosworth *Encyclopedia of Prisons* 846, 849.

51 Drewery 2004 JCASP 334-335; Shaw 2007 *Conflict Resolution Quarterly* 128; Varnham 2005 *Education and the Law* 87-104; Hopkins 2002 *SL* 144-145; Karp and Breslin 2001 *Youth and Society* 252.

and Breslin⁵² emphasise that restorative justice is about disapproving of the transgression while valuing and supporting the transgressor's intrinsic worth.

4.2.2 *Victims' needs addressed*

The criminal justice system and society at large employ mainly an adversarial-retributive justice model. If a transgression takes place, this implies that somebody has broken a rule and should thus be punished. The focus is mainly on the wrongdoing and the perpetrator.⁵³ The impact of the misconduct on the victim and the community does not play a significant role at all, if any. This underestimation of the impact of misconduct on victims led to an outcry regarding the criminal justice system and the notion that offenders are the only ones with constitutional rights.⁵⁴ There is now a distinct move towards a victim-centred approach in the policies of the criminal justice system. In an effort to reduce the effect of this notion, and to give proper recognition to the rights of the victims of crime, the Victim's Charter came into force in December 2004. It affords the victims of crime seven distinctive rights, which are "the right to be treated with fairness and with respect for your dignity and privacy, the right to offer information, the right to receive information, the right to protection, the right to assistance, the right to compensation, and the right to restitution".⁵⁵ The move towards a victim-centred approach has been further strengthened by the introduction of victim-impact statements in the sentencing phase of a trial. The court no longer focuses just on the crime and the offender, but also shows concern for the wellbeing and needs of the victim.⁵⁶

Victim-impact statements are in line with the Victim's Charter's right to restitution and are also in line with international trends⁵⁷. Further, such statements recognise the dignity of the victim.

52 Karp and Breslin 2001 *Youth and Society* 265.

53 Drewery 2004 JCASP 334.

54 Müller and Van der Merwe 2006 SAJHR 647.

55 DOJCD *Victim's Charter*.

56 Müller and Van der Merwe 2006 SAJHR 647-649. A victim-impact statement is a written statement by the victim, or someone authorised in terms of the law to make a statement on behalf of the victim, which reflects the impact of the offence, including the physical, psychological, social and financial consequences of the offence for the victim. The victim is thus afforded the opportunity to take part in the sentencing process and can play a part in determining an appropriate sentence.

57 Fields 2003 *Youth Studies Australia* 45.

The same notion of overemphasising the rights of perpetrators exists in schools. In the process of dealing with misbehaving learners, educators and the school governing body are cautioned not to infringe on the perpetrator's rights to education and the right not to be punished in a cruel, inhumane and degrading way. Furthermore, due process must also be adhered to in order to ensure that the perpetrator receives a procedurally fair hearing. There is nothing wrong with this cautious approach. However, it carries the risk of focusing only on the perpetrator and not on the interests of victims and the school community at large.

In the case of the restorative justice process, however, the needs of the victim play an important role.⁵⁸ Fields⁵⁹ indicates that, in this approach, victim and community needs for "information, validation, vindication, testimony, restitution, safety and support are considered paramount". The victims therefore play an important role during the whole restoration process and are afforded ample time to tell their stories and to indicate what they feel, how they were hurt, what their needs are and what restoration they would like in respect of the damage caused.

It is submitted that the process affords the victim an opportunity to strengthen self-expression, self-identification, self-determination, self-fulfilment, self-respect and self-worth and that the inherent worth and value of the victim are acknowledged.

4.2.3 *Offender accountability*

In the case of the retributive approach, accountability is equated with guilt and punishment. The transgressor plays an inactive part, with no regard being had for the victim or community and with the authority figure actively measuring out the punishment. The transgressor thus becomes the object of punishment. In contrast, with the restorative justice approach, the transgressor is forced to participate actively in adjudicating the dispute. Accountability is therefore defined as understanding the impact of one's actions, taking responsibility for one's choices and suggesting ways

58 Bezuidenhout 2007 *Acta Criminologica* 47; Ashworth 2008 *RCY* 22-26; Fields 2003 *Youth Studies Australia* 48.

59 Fields 2003 *Youth Studies Australia* 48.

to repair the harm.⁶⁰ Since the transgressor's behaviour is seen as harm done to the victims, the transgressor and the community as a whole, the transgressor is obliged to repair the harm.⁶¹

Hopkins⁶² rightly emphasises that restorative justice is not a "no-blame" response to misbehaviour, but rather a "full accountability-damage repair" response. The transgressor's obligation is therefore to help to make things right. Although this obligation might be very difficult, and even painful, for the transgressor, the aim is not to punish or exclude the transgressor. The transgressor should develop the necessary insight into the consequences of his or her behaviour and find the means to repair the damaged relationship. The offender is thus guided toward taking on a more responsible role in future in society.⁶³

It is submitted that the restorative justice approach pays due regard to the transgressor's dignity and does not treat the transgressor as a nonhuman to be toyed with or discarded.

4.2.4 Community involvement

The community's needs are also addressed during this process. In the school context, the school community is entitled to sustain a safe learning culture.⁶⁴ Respect for all affected by the misbehaviour is central to the restorative justice process. The transgressor, victims and their parents, together with those affected from the school community, are involved in the restoration process. Those who are affected are thus taken into consideration and are empowered. A community of care is formed around both the offender and the victim.⁶⁵ This approach is in line with the finding in *Law v Canada (Minister of Employment and Immigration)*⁶⁶ that a group, too, is entitled to the protection of its physical and psychological integrity and dignity.

60 Hopkins 2002 *SL* 145; Varnham 2005 *Education and the Law* 92; Karp and Breslin 2001 *Youth and Society* 264.

61 Shaw 2007 *Conflict Resolution Quarterly* 128; Varnham 2005 *Education and the Law* 95.

62 Hopkins 2009 www.transformingconflict.org.

63 Fields 2003 *Youth Studies Australia* 48.

64 Karp and Breslin 2001 *Youth and Society* 252.

65 Hopkins 2002 *SL* 145; Drewery 2004 *JCASp* 335-336.

66 *Law v Canada (Minister of Employment and Immigration)* 1999 1 SCR 497;170 DLR (4th) 1 para 53.

4.2.5 *Restitution, reparation of relationships and reconciliation*

Fields⁶⁷ states that restitution has been used informally for many years by parents and educators in theft and property-damage cases. Restitution is now playing an increasingly large part in the criminal justice system. He holds that restitution can be broadly defined:

...as an act that seeks to correct an error or to make amends to an injured person and in some cases to a community that has suffered in some way.

Gossen, in Fields⁶⁸, states that "restitution ... assists people in making an internal evaluation of what they can do to repair their mistakes". Restitution thus seeks to ensure that offenders become more aware of the consequences of their actions, that they take responsibility for such consequences, and that victims are compensated for the injustices that have occurred. The criteria of good restitution, according to Gossen, include the following: the wrongdoer should devote notable time and effort to the planning and implementation of restitution; the victim should gain a sense of satisfaction from the process and the outcome; there should be a logical relationship between the misbehaviour and the choice and type of restitution; the transgressor's ability to behave in an acceptable way in future should be strengthened; and the process should be in line with the values and goals of the particular community. Restitution is thus seen as a means of restoring the situation in respect of both parties, the goal being reconciliation and acknowledging responsibility for choices.⁶⁹

One cannot dismiss any one of these criteria as being unnecessary or of no value. Unfortunately, the application of the criteria in practice gives rise to the idea that restitution is used as another form of retribution, because the act of restitution is imposed upon the transgressor and forms part of the punishment meted out by the authority figure. It is also often used as a way of compensating the victim for the injuries and harm suffered as result of the transgression.

67 Fields 2003 *Youth Studies Australia* 44-45.

68 Fields 2003 *Youth Studies Australia* 46.

69 Hopkins 2002 *SL* 145.

In the school context, the transgressor is often obliged, for instance, to apologise, to clean up or to make repayment for the harm done, as part of detention or another form of punishment. These measures are not the transgressor's idea and he or she might simply do them because they are part of the punishment. Often it is the parents who have to make good the damages, with there being no real consequences for the transgressing learner, who actually caused the damage. The question remains if real insight is developed by the transgressor in such instances, and if the apology, for instance, is sincere. Furthermore, how does the victim perceive an imposed apology?

Although the restorative justice approach encompasses the above, the point of departure is that the restitution must benefit both the transgressor and the victim and should not be imposed upon them. The active participation of all parties – and of the transgressor in particular – in the process of "fixing what has been broken" is vital. In the school context, the focus should be on "making things better for others, myself and the school". The learners are guided in learning from their mistakes and in thus preventing future harm to others. The transgressor is given the opportunity to make amends "in ways that do not objectify or oppress any of the parties", which is clearly in line with the right to dignity.⁷⁰ The parties may also agree on some form of punishment, but Drewrey⁷¹ argues that it is unlikely that punishment will be the only outcome of the process.

4.2.6 Problem solving

To fix the harm and pain, the transgressor and the victim must obtain insight into what really happened, and a strategy must be developed as to how to repair the harm and damaged relationships.⁷² Restorative justice is in essence about healing, instead of hurting, through punishment.⁷³

70 Ashworth *et al* 2008 *RCY* 23-24; Drewery 2004 *JCASP* 336; Fields 2003 *Youth Studies Australia* 47; Wearmouth, Mckinny and Glynn 2007 *Educational Research* 39.

71 Drewery 2004 *JCASP* 335; see also Varnham 2005 *Education and the Law* 92.

72 Ashworth *et al* 2008 *RCY* 23-24.

73 Shaw 2007 *Conflict Resolution Quarterly* 127.

Offenders have to contribute to the drafting of a restoration plan. They have to come up with an acceptable plan or suggestions to restore the relationships damaged by their unacceptable behaviour, and they must repair the damage caused to others. A binding agreement is then drafted to keep the transgressor accountable.⁷⁴

Possible solutions to problems in schools and to determining what restoration should be made for the harm caused are making posters to warn others against the inappropriate behaviour, making cards containing an apology, or making friendship bracelets and origami figures. The transgressor is often restored by making a reminder bracelet or card. If something has been vandalised, he or she must indicate how the damaged property will be replaced, cleaned or repaired. The offender may also have to commit to acceptable future behaviour in certain circumstances and/or apologise for unacceptable behaviour in the past.⁷⁵

Learners thus get the opportunity to practise solving problems and fixing relationships, and to discover what is acceptable future behaviour, in a safe environment, with the necessary guidance from adults. This is in sharp contrast to the situation involving the retributive approach, where it is implied that "when we punish a person for behaving badly, we leave it up to him to learn how to behave well".⁷⁶ By being part of the problem-solving process, the transgressor is unlikely to be subjected to punishment that he or she perceives to be degrading treatment.

4.2.7 *Dialogue and negotiation*

To develop the insight necessary to arriving at mutually acceptable solutions to the problem concerned requires proper dialogue and negotiation. Everyone who is affected by the misbehaviour is involved in the process. To develop the necessary insight, participants are encouraged to indicate how they contributed to the harm and to the damaged relationship. Everyone gets an opportunity to express his or her feelings and needs. They embark on a process of exploring how to meet these needs in the future. During the process of reflecting on the past, discussing present

74 Shaw 2007 *Conflict Resolution Quarterly* 130.

75 Fields 2003 *Youth Studies Aus* 48; Ashworth *et al* 2008 *RCY* 26.

76 Drewery 2004 *JCASP* 332.

feelings and needs and envisaging what should happen in future allows the participants to move from conflict to cooperation and mutually acceptable solutions. Respect for one another is restored and reintegration into the school community is achieved through constructive and respectful dialogue and negotiation.⁷⁷

Since insight into the needs of all involved is developed through dialogue, effect is given to the advice of the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,⁷⁸ where the court held that:

[t]o understand the "other" one must try, as far as humanly possible, to place oneself in the position of the "other".

4.2.8 *Reintegration as opposed to stigmatisation*

Since the healing of relationships and the repair of harm done play a significant role in restorative justice, the reintegration of the transgressor into the school community follows more easily. Everyone has an inherent desire to belong somewhere. Stigmatisation is a natural outcome of a retributive system. The restorative justice process emphasises the reintegration of the transgressor and accords with the right to dignity, which encompasses human beings' need to be part of a community.⁷⁹

4.3 *Restorative justice programmes and interventions*

The principles of restorative justice are used in different programmes and interventions, such as the Responsible Citizen Programme in Australia⁸⁰, the Restorative Practices in School Pilot Project in New Zealand,⁸¹ the Pilot Community Conferencing and Restorative Practices Programme,⁸² the Healthy Schools Programme⁸³ and the SaferSanerSchools Programme.⁸⁴

77 Ashworth et al 2008 *RCY* 24-25; Drewery 2004 *JCASP* 335, 339; Fields 2003 *Youth Studies Australia* 47; Shaw 2007 *Conflict Resolution Quarterly* 128.

78 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 *BCLR* 1517 (CC) para 22.

79 Fields 2003 *Youth Studies Australia* 47.

80 Morrison 2002 *T/ICCJ* 2; Hopkins 2009 www.transformingconflict.org.

81 Fields 2003 *Youth Studies Australia* 49.

82 Shaw 2007 *Conflict Resolution Quarterly* 127.

83 Hopkins 2002 *SL* 144.

84 Mirsky 2007 *RCY* 5-12.

It might be argued that the process and programmes would not work in the South African context because the contexts of the abovementioned countries differ vastly from the South African context. Yet these programmes are often implemented in contexts very similar to the South African context, with high levels of school violence which include bullying, high suspension and expulsion rates, high truancy rates, juvenile delinquency, drug abuse, uninvolved parents, poor socio-economic environments, multiculturalism, persistent disruptions of classes and limited resources.⁸⁵

Different methods or interventions are used in different programmes in order to implement these principles. The intervention also depends on existing programmes and on the behavioural management systems in schools.⁸⁶ Some of the methods include circles, victim-offender mediation, reconciliation programmes, victim-impact panels, victim-awareness programmes, community reparative boards, diversionary conferences, family conferences, community accountability conferences, circle sentencing and juvenile justice teams. It is important to note that the content and presentation of the programmes differ in the different jurisdictions, yet the underlying restorative justice principles applied are the same.⁸⁷

Conferencing and circles are the most common methods used. Conferencing entails allowing as many people as possible to take part in the process. This would include

85 SAHRC 2008 [edulibpretoria.files.wordpress.com 16-22](http://edulibpretoria.files.wordpress.com/16-22); Burton *Merchants, Skollies and Stones* 51-89; Badenhorst, Steyn and Beukes 2007 *TG* 310-316; De Wet 2003 *SAJE* 113-121; Rossouw 2003 *Koers* 423-426; Bloch *Toxic Mix* 75-87; compare with the international position: Drewery 2004 *JCASP* 332-334 (New Zealand - high suspension and expulsion rates, especially Maori learners, males and learners from low ranking schools, high truancy rates, unfavourable socio-economic environment); Fields 2003 *Youth Studies Australia* 44, 46, 48 (Australia - school based violence, damage to property, theft, persistent disruption of classes, bullying, truancy, drug abuse, gang violence, New South Wales - bullying, Canberra - alcohol abuse, Queensland - withdrawal of funding); Hopkins 2002 *SL* 146 (UK - bullying), Karp and Berlin 2001 *Youth and Society* (USA - drug and alcohol abuse - 32% of students reported that drugs were made available on the school grounds and 51% of students indicated that they consumed alcohol in the 30 days prior to the survey); Mirsky 2007 *RCY* 5 (USA - rising truancy and drop-out rates, increasing disciplinary problems, violence and even mass murders); Varnham 2005 *Education and the Law* 87 (New Zealand - bullying, harassment, anti-social behaviour, drug abuse); Boyes-Watson *Peacemaking Circles* 17-19 (USA Chelsea multiculturalism, illiteracy, poverty with 42% living under the poverty line, single parent households, high dropout rates, high teenage pregnancy rates, high drug abuse rates).

86 Shaw 2007 *Conflict Resolution Quarterly* 130; Karp and Breslin 2001 *Youth and Society* 266-267.

87 Fields 2003 *Youth Studies Australia* 47; Hopkins 2002 *SL* 144.

those who feel that they are directly affected by particular misbehaviour or conflict. Everyone at the conference has an opportunity to relate how the incident affected them, to indicate how they feel at the moment, to explain what harm they have suffered, and to point out what can be done to repair the harm.

Once a solution has been found for repairing the harm, an agreement can be drafted.⁸⁸

In some instances it would not be desirable for the victim and the perpetrator to meet because it would be harmful or too hurtful for the victim to meet the perpetrator, as in cases of sexual abuse. If one of the parties is not willing to attend a conference, or is not interested in attending, a circle can be arranged. Circles normally involve a large and diverse group of people brought together to deal with a problem. These people can include other similarly affected victims, perpetrators, family members, community members and facilitators. The group members are arranged in a circle and everyone has an opportunity to voice his or her opinions.⁸⁹ If the process will harm the particular victim other victims of similar transgressions will then tell the group what the effect of a specific act is. Thus, the real victim does not have to face the transgressor.

Restorative justice principles can also be used to prevent misbehaviour, with poster-making, role-playing or the production of a video being some of the methods used to introduce primary-school learners to such principles.⁹⁰

Cultural values and practices play an important role in the restorative process. The Maoris, who have played a significant role in developing the restorative justice approach, emphasise "an individual's autonomy, integrity, self-esteem and standing in the group".⁹¹ Likewise, *ubuntu* plays an important role in the South African context. It is submitted that these key concepts, which are clearly linked to our understanding of the right to dignity, should inform any programme or intervention claiming to use

88 Hopkins 2002 *SL* 146; Shaw 2007 *Conflict Resolution Quarterly* 128; Karp and Breslin 2001 *Youth and Society* 260.

89 Bosworth *Encyclopedia of Prisons* 847.

90 Morrison 2002 *TICCCJ* 4.

91 Wearmouth, Mckinny and Glynn 2007 *Educational Research* 43.

the principles of restorative justice.

4.4 Advantages of restorative justice

Restorative justice is practised in a number of primary and secondary schools in Canada,⁹² Australia,⁹³ New Zealand,⁹⁴ the United Kingdom⁹⁵ and the United States of America.⁹⁶ Some of the projects are regarded as pilot projects, while others have been running for quite some time.

Some advantages, challenges and criticisms of implementing restorative justice have evolved from the literature and will be linked to the content of the right to dignity in order to determine whether or not a restorative justice approach can contribute to the promotion, protection and restoration of the right to dignity in schools.

4.4.1 Restorative justice leads to victim satisfaction with the process

Restorative justice has been found to be one of the most important factors contributing to victim satisfaction. The victim is satisfied with the process, because financial and relational harm can be repaired. Further, the victim is given an opportunity to take part in the process, to voice his or her pain and frustrations and to have a say in his or her own future. The victim experiences a sense of justice, because the offender acknowledges the wrong and has to take responsibility for it.⁹⁷

These advantages relate with what is understood by the concept of dignity. The victim-centred process shows concern and respect for the victim and acknowledges the infringements that have taken place. Active steps are taken to restore the infringed rights.

92 Varnham 2005 *Education and the Law* 98-99.

93 Morrison 2002 *TICCCJ* 6; Fields 2003 *Youth Studies Australia* 44-51; Shaw 2007 *Conflict Resolution Quarterly* 127-135.

94 Drewery 2004 *JCASP* 334-344; Varnham 2005 *Education and the Law* 87-104; Wearmouth, McKinny and Glynn 2007 *Educational Research* 39-48.

95 Varnham 2005 *Education and the Law* 98-99; Hopkins 2002 *SL* 146-149.

96 Ashworth *et al* 2008 *RCY* 22-26; Mirsky 2007 *RCY* 5-12; Karp and Breslin 2001 *Youth and Society* 249-272.

97 Fields 2003 *Youth Studies Australia* 46; Hopkins 2002 *SL* 146.

4.4.2 Advantages for the offender

The process offers a number of advantages for the offender. The offender is afforded the opportunity of openly acknowledging liability and of showing remorse for the misbehaviour. The process can be less stigmatising, can contribute to the offender's sense of self-worth, and can facilitate the reintegration of the offender into the community.⁹⁸ The offender is involved in the process of developing a plan to repair the harm done. The restoration plan is thus not imposed on the offender but is developed by the offender. It is thus not enforced on the offender, or done to him or her, as a result of which the plan proves to be more effective.⁹⁹ Since it is an inclusive process the socio-economic realities of everyone concerned can be considered in the proposals to repair the harm. Mirsky¹⁰⁰ emphasises that this approach entails doing things with people rather than to them or for them. The provision of support plays a very important part, as well as keeping learners accountable during the process.

This approach shows concern for the needs and interests of the offender and avoids objectifying the offender, but still holds him or her accountable.

4.4.3 Restoration of relationships

Those who have participated in the restorative justice process report high levels of satisfaction with the process. Moreover, pilot projects have indicated that this approach could be effective in dealing with misbehaviour in schools.¹⁰¹

In the *Makwanyane*¹⁰² case, the court held that "even the vilest criminal remains a human being possessed of common human dignity". It is submitted that, since this approach focuses on the restoration of human relationships, it will contribute to the restoration of dignity. It acknowledges that, despite the misbehaviour, the offender is still important and worth having a relationship with.

98 Varnham 2005 *Education and the Law* 96.

99 Fields 2003 *Youth Studies Australia* 46-47; Shaw 2007 *Conflict Resolution Quarterly* 130, 132.

100 Mirsky 2007 *RCY* 5-6.

101 Fields 2003 *Youth Studies Australia* 49; Shaw 2007 *Conflict Resolution Quarterly* 129; Varnham 2005 *Education and the Law* 95, 97; Hopkins 2002 *SL* 146.

102 *S v Makwanyane* 1995 2 SACR 1 (CC) para 328.

The restoration of relationships is one of the key features of restorative justice and has a number of advantages. In the school setting this model provides a golden opportunity to restore relationships. Since respect and trust are often lost in relationships owing to unacceptable behaviour, it is submitted that both can be restored through a restorative justice process.

It is further submitted that dialogue and the development of understanding are of the utmost importance in a very diverse society such as that existing in South Africa. Diversity is often the root cause for conflict and effective mechanisms are necessary to deal with this reality. Dialogue and negotiations are not foreign to the South African context and are in line with traditional customs where people will sit in a circle under trees and discuss an issue until everyone agrees. Thus, fierce debates are often necessary to arrive at a valid and acceptable decision. This is one of the important aspects of *ubuntu*.¹⁰³ Restorative justice practices provide a suitable vehicle for engaging in facilitation relating to conflict in schools, especially in schools comprising diverse groups. Relationship would thus be fostered and healed where necessary.

4.4.4 *The compliance rate is high*

According to Fields¹⁰⁴, transgressors in schools who are part of restoration agreements comply satisfactorily with these agreements. The compliance rate is actually reported to be high.¹⁰⁵

Ashworth *et al*¹⁰⁶ report that many students who make things such as posters and apology cards to make good the harm done actually "find a sense of joy and pride in their work". This is in line with important concepts embedded in dignity, such as self-worth, self-respect, self-identification and self-expression.

¹⁰³ Broodryk *Ubuntu* 54. The work of the Truth and Reconciliation committee and the negotiations regarding the writing of the SA *Constitution* provide additional proof of the ability of South Africans to solve problems through dialogue.

¹⁰⁴ Fields 2003 *Youth Studies Australia* 48.

¹⁰⁵ Varnham 2005 *Education and the Law* 96.

¹⁰⁶ Ashworth *et al* 2008 *RCY* 26.

4.4.5 *The victim is empowered*

Victims report feeling empowered because they feel safer at school and are more confident about handling similar situations in future.¹⁰⁷ In one school, the reporting of minor incidents involving harassment increased after the restorative justice programme had been running for some time. This was attributed to the fact that learners started to feel safe about reporting misconduct and knew that their complaints would be dealt with. They were thus empowered to come forward in order to enforce their rights.¹⁰⁸ Victims also reported that their sense of rejection and displacement decreased significantly after they had participated in a proactive restorative justice programme.¹⁰⁹

Since victims are part of the process, they are afforded the opportunity of relating their stories of hurt and pain. Morrison¹¹⁰ states that listening to someone's story "is a way of empowering them and of validating their intrinsic worth as a human being". She argues that feeling respected and connected is inherent in one's sense of self-worth and is a basic human need.

4.4.6 *Applicability is very high*

Reports by schools participating in pilot projects have indicated that restorative justice practices show promise and contribute to the effective management of misbehaviour in schools.¹¹¹ The principles of restorative justice can be used for a wide range of offences, from minor offences to very serious offences. The principles can also be applied informally in a classroom situation or during a formal process where serious transgressions warrant a formal hearing. In some schools the successful application of the principles has led to learners now asking to be permitted to solve problems themselves through conferencing. Furthermore,

107 Fields 2003 *Youth Studies Australia* 48; Morrison 2002 *T/ICCJ* 4-5; Varnham 2005 *Education and the Law* 96.

108 Mirsky 2007 *RCY* 8.

109 Morrison 2002 *T/ICCJ* 5; Morrison "Building safe and healthy school communities" 105-106.

110 Morrison "Building safe and healthy school communities" 99-100; see also Ashworth *et al* 2008 *RCY* 23-24.

111 Shaw 2007 *Conflict Resolution Quarterly* 129, 131.

educators have used this approach to solve conflicts amongst themselves.¹¹²

4.4.7 *Family involvement*

Parents of both victims and offenders perceive the process and its outcomes to be positive.¹¹³ It is submitted that another advantage of this approach is that parents are also held accountable for taking responsibility for their children and for complying with their constitutional duty to act as primary caregivers for their children.

The lack of parental involvement is one of the main concerns for educators in dealing with discipline in South African schools.¹¹⁴ Restorative justice processes can be followed even if parents are unwilling to take part. Sport coaches, teachers, pastors, neighbours, community members or anyone else with an interest can take part in the process and support the victim or transgressor.

4.4.8 *Reinforcement of positive values*

It is argued that "it is values that distinguish restorative justice from other justice systems".¹¹⁵ The values of "respect, openness, empowerment, inclusion, tolerance, integrity and congruence" are fundamental to the restorative justice approach and should be adhered to by the whole school.¹¹⁶

The principals of schools where restorative justice is practised have in particular stressed the positive effect of the reinforcement of positive values through this process.¹¹⁷ The restorative values include "respect, inclusion and empowerment and the belief that those with the problems are those most likely to find and embrace the solution".¹¹⁸

112 Hopkins 2002 *SL* 146-147; Shaw 2007 *Conflict Resolution Quarterly* 130.

113 Fields 2003 *Youth Studies Australia* 48; Varnham 2005 *Education and the Law* 97.

114 Badenhorst, Steyn and Beukes 2007 *TG* 310.

115 Shaw 2007 *Conflict Resolution Quarterly* 128.

116 Hopkins 2002 *SL* 145.

117 Fields 2003 *Youth Studies Australia* 48; Varnham 2005 *Education and the Law* 97.

118 Hopkins 2002 *SL* 148.

Shaw¹¹⁹ furthermore rightly indicates that restorative justice practices align very well with important educational issues such as order, justice, social relationships, educational inclusion and the whole aim of education. The restorative justice approach actually challenges existing, punitive disciplinary measures and highlights the different values underpinning the different approaches.

4.4.9 *Community involvement*

Drewery¹²⁰ indicates that community conferencing ensures community involvement and that the community is heard in matters affecting it. The notion often exists that the transgressors are the only ones who receive attention and have rights.¹²¹ The restorative justice approach contributes to the sense of belonging and to upholding the rights of innocent members of the school community who suffer owing to the unacceptable behaviour of a few transgressors.¹²² However, all of the participants must be respected during the restorative justice process. Their dignity must be protected during the process of solving the problem.¹²³

4.4.10 *Changed attitudes to managing problems of antisocial behaviour*

A changed attitude to the management of antisocial behaviour is to be witnessed at schools using restorative justice practices.¹²⁴ It is argued that punishment "instils a narrow, selfish way of thinking; the focus is on oneself rather than on others".¹²⁵ Furthermore, it makes people resentful and not reflective, and the transgressor does not really have to face up to all the people affected directly or indirectly by the misconduct.¹²⁶ Hopkins¹²⁷ argues that "punishment can be dangerous and ineffective, and could well be reinforcing the very values and behaviours we seek to discourage and denounce".

119 Shaw 2007 *Conflict Resolution Quarterly* 128, 130, 132; see also Karp and Breslin 2001 *Youth and Society* 260.

120 Drewery 2004 JCASP 336; see also Varnham 2005 *Education and the Law* 94.

121 Momberg *Sunday Independent* 2; Bateman *Pretoria News* 1.

122 Morrison 2006 *Journal for Social Issues* 371-392; Varnham 2005 *Education and the Law* 92.

123 Wearmouth, McKinny and Glynn 2007 *Educational Research* 39.

124 Fields 2003 *Youth Studies Australia* 48; Varnham 2005 *Education and the Law* 97.

125 Morrison 2002 *TICCJ* 6.

126 Hopkins 2009 www.transformingconflict.org.

127 Hopkins 2009 www.transformingconflict.org.

The literature indicates that the emphasis on punishment in the past has been replaced by an attitude of solving problems, by an attitude of treating all learners with respect, by the restoration of relationships and by healing. Learners are encouraged to understand the consequences of their actions for themselves and others, rational thinking is developed, and understanding is elevated to a collective level.¹²⁸

The whole idea of healing is also in line with the preamble of the *Constitution*, which provides that the *Constitution* was adopted, among other things, to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

4.4.11 Reduction in suspensions and disciplinary referrals

Schools that have introduced restorative justice programmes have reported a significant reduction in suspensions since the inception of these programmes.¹²⁹ There has also been an overall decrease in disciplinary referrals and discipline has improved significantly.¹³⁰

4.4.12 Improved academic performance

Improved academic performance has been reported in schools using restorative justice practices. The underlying reason for this is given by a principal, who states:

You cannot separate behaviour from academics. When students feel good and safe and have solid relationships with teachers, their academic performance improves.

Discipline in classrooms has thus improved and instruction is therefore more constructive.¹³¹

128 Morrison 2002 *TICCCJ* 6; Shaw 2007 *Conflict Resolution Quarterly* 131.

129 Fields 2003 *Youth Studies Australia* 49; Wearmouth, McKinny and Glynn 2007 *Educational Research* 40; Karp and Breslin 2001 *Youth and Society* 257.

130 Mirsky 2007 *RCY* 6; Shaw 2007 *Conflict Resolution Quarterly* 131; Hopkins 2002 *SL* 146. See *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T) on the state's obligation to uphold the child's dignity when removed from the family to a reform school or a school of industries.

131 Mirsky 2007 *RCY* 6, 9.

Hopkins¹³² summarises this by stating that, as a result of working in an environment where harm to relationships is repaired, "people are more likely to want to work, more likely to achieve and less likely to be or feel excluded".

Improved academic performance also contributes to the enjoyment of the right to dignity, since everyone is allowed to develop his or her unique talents and to develop his or her full potential.

4.4.13 Solving problems

The suspension and expulsion of difficult learners are seen by many as the only effective way to deal with such learners. It is argued, however, that in reality the removal of the transgressor does not remove the problem but simply relocates it in time and place, often exacerbating the problem.¹³³ Principals using the restorative justice principles indicate that they are now solving problems and not merely postponing or moving the problems in their schools.¹³⁴ Educators now have the confidence to address the learner's emotional needs and to become involved in problem-solving conversations with learners.¹³⁵

4.4.14 Fostering a sense of belonging

Human beings have an inherent and fundamental need to feel that they belong somewhere and are part of a group.¹³⁶ The restorative justice approach fosters the sense of belonging of both the victim and transgressor. The victim is afforded the opportunity to tell his or her story to a group of people who have an interest in him or her and the school community. The group takes note of his or her hurt and needs and helps him or her to satisfy these needs and to repair the harm. On the other hand, the same group listens to the transgressor and helps him or her to come up

132 Hopkins 2002 *SL* 148.

133 Varnham 2005 *Education and the Law* 95.

134 Mirsky 2007 *RCY* 9.

135 Shaw 2007 *Conflict Resolution Quarterly* 131.

136 Wearmouth, Mckinny and Glynn 2007 *Educational Research* 38.

with solutions to the problem. The transgressor is not stigmatised but is reintegrated into the group.

The right to dignity recognises a human being's needs to be part of a community.¹³⁷ It is submitted that the restorative justice approach gives effect to fostering the victim's and the transgressor's needs to belong to the school community.

4.5 *Challenges and criticisms facing restorative justice*

4.5.1 *Restorative justice is an evolving concept*

Although restorative justice was introduced into the criminal justice system in New Zealand and other countries in the 1970s, it is still evolving. Fields¹³⁸ rightly indicates that the "concept is ill-defined and there is no consensus on how it should be applied". Its application in schools is still in its infancy, with pilot studies being conducted in a number of countries. Restorative justice cannot therefore be regarded as generally accepted in schools.¹³⁹ Research on its application is still needed and the theoretical framework still evokes a lot of debate. Further research on the sustainability and impact of the process, on what constitutes healing and on community involvement is also required.¹⁴⁰

4.5.2 *Restorative justice should not cause secondary victimisation*

There are reports, in schools as well as the criminal justice system, of the restorative justice process causing secondary victimisation. Some victims have stated that they felt worse after the restorative conference, that professional support was not available during the process, that the process was imposed on unwilling participants, that the participants were threatened by the facilitators, and that the facilitators imposed their views on the participants.¹⁴¹

137 Réaume 2003 *LA L Rev* 674-675.

138 Fields 2003 *Youth Studies Australia* 50.

139 Varnham 2005 *Education and the Law* 98.

140 Hopkins 2002 *SL* 146; Bezuidenhout 2007 *Acta Criminologica* 45, 57; Ashworth *et al* 2008 *RCY* 26; Drewery 2004 *JCASP* 334; Shaw 2007 *Conflict Resolution Quarterly* 129, 133-134.

141 Bezuidenhout 2007 *Acta Criminologica* 48-49; Hopkins 2002 *SL* 148.

Restorative justice has been used successfully in cases of assault, bullying, property damage, theft, drugs, behaviour harmful to the reputation of the school, truancy, verbal abuse, serious victimisation and persistent disruption in class.¹⁴² Cases involving serious misconduct such as rape and sexual harassment, however, are usually not suitable for restorative justice interventions, since the victims feel intimidated and exposed.

Therefore, the whole restorative process should be facilitated by well-trained facilitators or mediators in order to ensure that secondary victimisation does not occur, which would further traumatised and humiliate the victim.¹⁴³ Educators, youth workers, parents or other interested members of the community can be trained as facilitators or mediators.

4.5.3 *Recidivism not conclusively proven*

Although some authors are convinced that restorative justice has contributed significantly to the reduction in recidivism figures,¹⁴⁴ there are others who are not convinced that restorative justice contributes significantly to the reduction of recidivism.

It is submitted, however, that there is sufficient evidence to indicate that restorative justice does contribute to the reduction of recidivism. It should nevertheless be kept in mind that the primary focus of restorative justice is not to prevent recidivism but to provide the victim of misconduct with an opportunity to be heard, to empower him or her in the process, and to repair relationships. There has been no indication that recidivism figures have escalated after a restorative process has been used. The recidivism rates are, at the very least, the same as where no restorative justice process is employed.¹⁴⁵

142 Fields 2003 *Youth Studies Australia* 48; Hopkins 2002 *SL* 146; Varnham 2005 *Education and the Law* 96.

143 Bosworth *Encyclopedia of Prisons* 849.

144 Fields 2003 *Youth Studies Australia* 46, 48; Varnham 2005 *Education and the Law* 94, 96.

145 Fields 2003 *Youth Studies Australia* 46, 48; Varnham 2005 *Education and the Law* 94, 96.

It is therefore submitted that if the victim's dignity is restored to a satisfactory level and if the offender is held accountable for the misconduct the process will be successful, with reduced recidivism being seen only as an added bonus.¹⁴⁶

4.5.4 *Cultural differences*

Culture is mentioned as a possible obstacle to successful restorative justice processes, the reason being that different cultural groups might have a different perception of restoration.¹⁴⁷ Cultural differences, and other challenges such as race and language differences can be overcome with the proper training and development of the facilitators.¹⁴⁸

Mirsky¹⁴⁹ also alludes to another challenge namely changes in the demography of schools, especially in schools where streetwise children start to enter in large numbers, for instance where township learners start to attend suburban or inner-city schools. In such situations there is a real risk that the school's culture can change dramatically. However, in schools where restorative justice practices are used, the newcomers have adapted quickly and a positive culture has been maintained or has been created where it did not exist previously.

4.5.5 *A multidisciplinary approach is necessary*

A multidisciplinary approach has been proved to be successful in effectively managing and preventing youth crime.¹⁵⁰ It is thus submitted that more professionals should become involved in dealing with learners with serious antisocial behaviour and that a holistic approach should be adopted.¹⁵¹ More social workers and psychologists should be involved in schools in order to deal with the causes of antisocial behaviour. Social workers and psychologists can, for instance, help to train volunteers to act as mediators and facilitators. Facilitators can then identify children with serious antisocial behavioural problems and refer them for professional help.

146 Bezuidenhout 2007 *Acta Criminologica* 57-58.

147 Bosworth *Encyclopedia of Prisons* 849.

148 Ashworth *et al* 2008 *RCY* 23.

149 Mirsky 2007 *RCY* 10.

150 Fields 2003 *Youth Studies Aus* 44.

151 Hopkins 2002 *SL* 147.

Furthermore, there should be better coordination between the Department of Social Development and the Department of Education. The police¹⁵² can also be involved in actively undertaking crime-prevention programmes, and religious leaders should also become involved with the youth. Community involvement has also been stressed, and parents and community leaders should therefore take on the challenge of dealing with antisocial behaviour in schools. A multidisciplinary approach, however, is costly and time-consuming and requires proper coordination. Hopkins¹⁵³ nevertheless indicates that, although the process is time-consuming at first, it saves a lot of time in the long run, as a restorative culture evolves in a school.

4.5.6 *Restoration perceived to be too lenient*

In a society where retribution and visible punitive measures are still demanded, restoration can be seen as too lenient, with transgressors getting away with what they have done simply by saying "sorry". The huge divide with regard to people's thoughts on what constitutes justice should therefore be kept in mind.¹⁵⁴

It should also be kept in mind that to face one's victims and to acknowledge the harm one has caused is a difficult and often painful experience for the transgressor. This does not exempt the transgressor from being punished for the transgression. The victim plays an important part in the process in order to arrive at a solution to the problem. If the victim needs some form of punishment to be meted out to the transgressor in order to feel satisfied that sufficient restoration has taken place, this need should be part of the dialogue and negotiations. It is highly unlikely, however, that punishment will be the only outcome of the process.¹⁵⁵ The importance of arriving at a mutually acceptable solution should therefore be highlighted.

The real challenge lies in balancing the rights and needs of the victim, of the transgressor and of the community. Restorative justice practices must enhance the reintegration of the offender, but at the same time the rights of the victim and

152 Hopkins 2002 *SL* 147. The police are involved in promoting restorative justice approaches in a number of schools in the United Kingdom.

153 Hopkins 2002 *SL* 147-148.

154 Fields 2003 *Youth Studies Australia* 46, 48; Batley 2005 www.iss.co.za.

155 Drewery 2004 *JCASP* 335.

community to a safe and secure learning environment should be upheld.¹⁵⁶ This is particularly important in instances of violent behaviour and bullying.

People's attitudes and perceptions concerning the value of punishment will not change overnight. The slow uptake of restorative justice practices in schools underlines the ingrained preference for punishment.¹⁵⁷ To implement restorative justice practices successfully, the whole school community and the community at large should buy into and understand the process, and should realise the advantages of this approach.

4.5.7 Communities are not ready for restorative justice processes

The anger levels of the South African community are rated as being very high and it is therefore argued that the community at large is not ready for and susceptible to restorative processes. It is further argued that South Africans prefer retribution and desire quick fixes for solving problems. Batley,¹⁵⁸ however, argues that the successes of the Truth and Reconciliation Commission are an indication of the capacity of many South Africans to effectively take part in and benefit from restorative processes. He rightly warns against overgeneralisations and an unrealistic expectation that restorative justice can "mean all things to all people".

Furthermore, restorative justice is a creative process, and different individuals have different expectations in respect of the process and its outcomes. Some might prefer direct compensation and punishment, while others, and learners in particular, might be unable to conceptualise their need to have their dignity respected and restored. It is submitted that the restorative justice process can cater for the different needs of individuals if a proper process is followed. Creative solutions might, however, be necessary to meet the expectations of everyone involved in the process. Batley¹⁵⁹ thus argues that "[a]ny shortcoming in creativity says more about the preparation and facilitation of an individual process than about the general process and principles of restorative justice".

156 Varnham 2005 *Education and the Law* 96.

157 Fields 2003 *Youth Studies Australia* 50.

158 Batley 2005 www.iss.co.za.

159 Batley 2005 www.iss.co.za.

To treat victims and offenders with dignity and respect is inherent in the restorative justice process. The restorative justice processes provide an ideal opportunity for expressing anger in a safe place and in a constructive way.¹⁶⁰

4.5.8 *Restorative justice is a time-consuming process*

Unlike traditional punitive measures such as corporal punishment and detention, restorative justice processes are time-consuming and require effort to implement.¹⁶¹ Despite the positive results achieved, the uptake for the implementation of restorative justice processes remains slow.¹⁶² Ashworth *et al*¹⁶³ report that, in a particular case, educators were initially willing to volunteer their services at the restorative justice centre linked to a school's detention programme, but that, owing to other commitments and demands they could not continue to render such services. To continue with the project, college students, some of whom are paid and others who act as volunteers, now run the centre together with two paid educators. Shaw¹⁶⁴ also alludes to the difficulties overstretched educators experience in balancing their increased responsibilities in respect of learner's wellbeing, namely of retaining learners in the education system for a longer time, of carrying out their educational responsibilities and of maintaining discipline and order in schools. The administrative burden of the process also poses a challenge.

Hopkins¹⁶⁵ agrees that restorative justice can be a time-consuming process, but emphasises that, once implemented properly, the time spent on dealing with disciplinary issues is largely reduced. She also suggests that learners can be taught to use restorative justice principles and peer-mediation techniques. This can reduce the time educators spend on restorative justice and disciplinary issues.

Taking into account that there are staff shortages in schools and that educators are working under enormous pressure in South African schools, creative measures

160 Batley 2005 www.iss.co.za.

161 Ashworth *et al* 2008 *RCY* 23; Karp and Breslin 2001 *Youth and Society* 269.

162 Varnham 2005 *Education and the Law* 96.

163 Ashworth *et al* 2008 *RCY* 26.

164 Shaw 2007 *Conflict Resolution Quarterly* 130; Varnham 2005 *Education and the Law* 95.

165 Hopkins 2002 *SL* 148.

should be developed to assist educators in implementing restorative justice programmes in schools.

4.5.9 The impact on the school's culture is not visible at first

Some of the pilot studies indicate that there is not yet a visible change in school culture but schools that have used restorative justice principles for three to four years indicate that there is definitely a positive change in school culture.¹⁶⁶ Mirsky¹⁶⁷ reports an increased "culture of support among staff members" and that restorative practices have created a more positive relationship between staff and learners. Relationships between administrators and educators have also improved and are more collaborative. The schools are reported to have a friendly and helpful atmosphere.

4.5.10 Lack of communication skills

Being able to tell your story is an important part of a successful restorative justice process. Unfortunately children do not always have the necessary verbal skills to tell their stories promptly and clearly. Furthermore they can misperceive, misrepresent and misstate what has happened. This can be overcome by way of asking appropriate questions, by giving sufficient support, by interacting with children and through using creative ways of stimulating communication, such as using art, singing and role-plays.¹⁶⁸ Educators and other volunteers will, however, have to be trained properly in order to acquire the skills necessary to enhance effective communication before implementation.

4.5.11 Failure to comply with a restorative justice ethos

It is also important that facilitators be familiar with the restorative justice concept so as to ensure that the principles and ethos of restorative justice are upheld at all times. Facilitators should always bear in mind that the participation of victims and

166 Mirsky 2007 *RCY* 6; Hopkins 2002 *SL* 147.

167 Mirsky 2007 *RCY* 6.

168 Ashworth *et al* 2008 *RCY* 23-24.

offenders is voluntary, that participants must not be threatened and that impartiality is important. If facilitators do not adhere to these principles, re-victimisation is a real threat and no reparation will take place. The process can also end up being a public retribution session instead of promoting dialogue and facilitating reparation.¹⁶⁹

4.5.12 Unwilling administrators and policy makers and an unwilling school community

Despite the positive results achieved in the early trials, many education administrators and policy makers are not willing to accept restorative justice as an alternative for dealing with disciplinary problems. This unwillingness stems from their being "uncomfortable with the shift from control and punishment as the primary approaches to discipline to one of building and sustaining positive relations in school communities".¹⁷⁰ This is further fuelled by perceptions held by parents and educators that punishment, including corporal punishment, is the appropriate response to disruptive behaviour.

Not all educators are comfortable with the application of restorative justice principles. Thorsborne¹⁷¹, for instance, indicates that since the abolition of corporal punishment the debate regarding discipline has chiefly to do with the question of which control mechanism should replace corporal punishment. The focus thus remains on control and the power relationship, while restorative justice principles require a whole new focus, namely the restoration of relationships and not the punishment of certain acts.

Unless the majority of the school community buys into the process, the programme will not be successful. Thus, a concerted effort must be made to consult and to explain the process and its advantages before implementation.¹⁷²

169 Hopkins 2002 *SL* 148; Drewery 2004 *JCASP* 336.

170 Fields 2003 *Youth Studies Australia* 49; Ashworth *et al* 2008 *RCY* 26; Shaw 2007 *Conflict Resolution Quarterly* 132; Karp and Breslin 2001 *Youth and Society* 261.

171 Fields 2003 *Youth Studies Australia* 49; see also Shaw 2007 *Conflict Resolution Quarterly* 131-132.

172 Hopkins 2002 *SL* 148.

5 Conclusion

High expulsion and exclusion rates¹⁷³, and recent reports on violence in schools are a clear indication that schools are becoming increasingly unsafe places where the violation of one's right to dignity is a real threat, despite punitive measures being in place. Furthermore, educators and administrators are often confronted with the unenviable task of balancing the educational rights of an individual transgressor and the right to dignity of the larger school community.¹⁷⁴

It is submitted that restorative justice provides a welcome alternative to a power-based authoritarian and zero-tolerance approach to discipline, with the additional benefit of providing an opportunity and an environment that protects not only the educational rights of transgressors, but also the right to dignity of the victims of transgressions. In particular, restorative justice holds the key not only to protecting different rights, but also to the restoration of the dignity of the victim, the transgressor and the school community.

173 Varnham 2005 *Education and the Law* 99.

174 Wearmouth, Mckinny and Glynn 2007 *Educational Research* 37.

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List of abbreviations

AJIL	American Journal of International Law
DOJCD	Department of Justice and Constitutional Development
EC	Educare
JCASP	Journal of Community and Applied Social Psychology
LA L Rev	Los Angeles Law Review
RCY	Reclaiming Children and Youth
SAHRC	South African Human Rights Commission
SAJE	South African Journal of Education
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SL	Support for Learning
TG	Tydskrif vir Geesteswetenskappe
TICCCJ	Trends and Issues in Crime and Criminal Justice