UNIVERSITY OF CAPE TOWN
SCHOOL FOR ADVANCED LEGAL STUDIES
FACULTY OF LAW
DEPARTMENT OF COMMERCIAL LAW

MEDIATION AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NEED FOR A VIABLE ALTERNATIVE TO COURT LITIGATION

EMMA KAPLAN
(KPLEMM001)

MASTER OF LAWS (LLM) SPECIALISING IN DISPUTE RESOLUTION

SUPERVISOR: MONIQUE CARELS

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LIST OF ACRONYMS AND ABBREVIATIONS

CJA - Child Justice Act

TRC - Truth and Reconciliation Commission

ADR - Alternative Dispute Resolution

VOM - Victim Offender Mediation

ACL - African Customary Law

FGC - Family Group Conferences

CC - Constitutional Court

SCA - Supreme Court of Appeal

HC - High Court

SAPS - South African Police Service

NPA - National Prosecuting Authority

DCS - Department of Correctional Services

CPA - Consumer Protection Act

NICRO - National Institute for Crime Prevention and the Reintegration of Offenders

PNUR - Promotion of National Unity and Reconciliation

KSS - Khulisa Social Solutio

ABSTRACT

An effective and efficient criminal justice system underpins the functioning of a country. The criminal justice system is premised on retributive justice and ensuring that offenders are punished. The primary method of dispute resolution in the South African criminal justice system is litigation. This process is characterised by a number of shortcomings, especially due to its adversarial nature. Further shortcomings include the highly complex, costly and time-consuming nature of litigation, overburdened court rolls, secondary victimisation, lack of victim participation, and ineffective purposes of punishment justifying long-term incarceration. These shortcomings infringe on the South African constitutional imperative of access to justice.

When exploring alternate forms of dispute resolution, mere negotiation can be seen as too informal of a process for justice to be administered. Contrastingly, arbitration can be described as an adversarial process since the point of the proceedings is for the truth to be revealed and reflected via a binding award ruled by the arbitrator, who acts like a judge. Thus, mediation offers a viable mix since it deals with disputes in a flexible, confidential manner with the possibility of written settlements becoming legally administered rulings.

South Africa is no stranger to restorative justice practices due to its unique and pluralistic legal system. The South African Constitution’s preamble aims to seek redress by recognising the injustices of the past and promoting restoration and the spirit of Ubuntu. Victim-offender Mediation and Family Group Conferences are forms of ADR, premised on restorative justice.

This dissertation aims to explore the incorporation of mediation as a formal part of the South African criminal justice system. It seeks to determine if pre-trial diversion to

mediation can be a viable alternative to achieving criminal justice as opposed to the default being adversarial criminal trials. A further aim of this paper is to entice individuals working within the criminal justice system, as well as the courts to actively view mediation as an alternative process of achieving fairness and access to justice within the criminal justice system allowing for eventual policy reform. This recognition will allow for strategies that can enhance the criminal justice system and improve societies as it will ease the burden placed on law enforcement, the courts and correction services.

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CHAPTER 1

INTRODUCTION

1.1. BACKGROUND TO THE RESEARCH

South Africa through its English common law influence[1] has inherited an adversarial system of law with litigation being the primary method of dispute resolution in both the civil and criminal law arena.[2] Resultingly a number of shortcomings have prevailed namely the highly complex, costly and time-consuming nature of the process.[3] Court rolls are overburdened which increases delays and postponements and henceforth adversely affects the timeous resolution of cases.[4] Victims are placed on the periphery resulting in their needs being marginalised.[5] Further, the grueling and adversarial nature of criminal trials may result in secondary victimisation.[6] Due to the mandatory minimum sentencing regime offenders are sentenced to long-term incarceration,[7] which causes more harm than good, as prison overcrowding defeats the stated aims of deterrence and rehabilitation of offenders.[8]

These flaws impact South African citizens from not only acquiring their constitutional right of access to justice,[9] but also from achieving meaningful justice which entails

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[1] English common law is adversarial/accusatorial. Meintjies-Van der Walt L, Singh P & Du Preez M *Introduction to South African Law* (2008) 135.
[2] Meintjies-VDW et al op cit note 1.
[3] Paleker M 'Court connected ADR in civil litigation: The key to access to justice in South Africa' (2003) 6 *ADR Bulletin* 48.
[4] Ibid.
[5] Clark, J N 'The Three R's: Retributive Justice, Restorative Justice, and Reconciliation' (2008) *Contemporary Justice Review* Vol 11:4 333.
[6] Ibid at 334.
[7] Enacted through Section 51 of the Criminal Law Amendment Act 105 of 1997 (hereinafter the Criminal Law Amendment Act).
[8] Cameron, E 'Crisis of Criminal Justice' (2020) *South African Law Journal* v137 n1.
[9] Ngcobo J states that: 'access to justice suffers when the costs of litigation are prohibitive; procedures and processes are unduly complicated or burdensome; and when delays are too long for the average person'. Thus, access to justice includes the right of access to courts (Section 34 of the Constitution) together with affordable, procedurally simple, and expedient methods of dispute resolution. CJ Ngcobo

closure, healing, and reparation.[10] The formal criminal justice system, with its familiar steps of arrest, trial and conviction is not the only recourse to criminal and social justice.[11] This dissertation explores more constructive ways to treat victims and offenders which will greater serve them and society at large.[12]

The uniquely African concept of Ubuntu[13] and the notion of restorative justice are not new to South Africa, they have been at the core of African dispute resolution for centuries.[14] Supporting legislation such as the Child Justice Act 75 of 2008,[15] is an exemplar for diversion away from the criminal justice system towards restorative justice measures, however the benefits of such mechanisms are limited to child offenders. South Africa's most engaging experience with restorative justice was through the Truth and Reconciliation Commission (TRC) which sought to unearth the truth about the politically motivated human rights violations during the apartheid era enabling the country to move into its future, having confronted the atrocities of its past.[16]

'Enhancing access to justice: The search for better justice' Access to Justice Conference 6 July 2011 19 available at https://constitutionallyspeaking.co.za/wp-content/uploads/2011/07/Speech-of-the-Chief-Justice-2011.pdf (accessed 24 September 2021).

[10] Platow, M et al *Retributive and Restorative Justice* (2008) Law and Human Behaviour Vol 32 376.

[11] Muntingh, L.M 'NICRO Diversion Options' (1993) National Institute for Crime Prevention and the Rehabilitation of Offenders 5.

[12] Ibid.

[13] A Nguni Bantu term defined as 'humanity' or 'I am because we are'. 'The spirit of Ubuntu suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights...' *(Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 517 (CC) para 37).'While Ubuntu envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation' (*S v Makwanyane* 1995 (3) SA 191 (CC) para 308).

[14] Skelton, A and Frank, C 'Conferencing in South Africa: Returning to Our Future' in Morris, A and Maxwell, G *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001) 103.

[15] The Child Justice Act 75 of 2008 (hereinafter the CJA).

[16] Skelton & Frank op cit note 14 at 107.

Restorative justice is seen as an alternative to retributive justice.[17] However, the two need not be mutually exclusive nor incompatible with one another.[18] The focus of this dissertation is to explore the possibility of a parallel yet interdependent track whereby a separate restorative justice path is created and linked to the formal criminal justice system.[19] Therefore, a restorative justice approach should complement rather than replace the current retributive justice system in South Africa.[20] This vision can be realised through pre-trial diversion to mediation programmes.[21]

The traditional practice of long-term incarceration and punishment have proven to be an expensive and ineffective way of administering justice.[22] Whilst mediation is not the cure-all for crime pervading South Africa, it does present a humane and personal alternative which provides healing and understanding to both victims and offenders.[23] Further, mediation is not a soft option for dealing with crime since it requires accountability and responsibility thus, it is neither too lenient nor too abstract to make an effective impact on offenders and society at large.[24]

1.2. RESEARCH QUESTION

This dissertation is based on the following research question:

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[17] Platow et al op cit note 10 at 375.
[18] Clark op cit note 5 at 340.
[19] Skelton, A 'Restorative Justice as a Framework for Juvenile Justice Reform - A South Africa Perspective' (2002) *Brit.J.Criminol*. 42 504.
[20] Beyond Retribution: Prospects for Restorative Justice in South Africa (2005) *ISS Monograph* No 111 19.
[21] See Chapter 4.
[22] Bakker, M 'Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System' (1994) *North Carolina Law Review* 72(6) 1525.
[23] Ibid.
[24] Ibid.

Is mediation a suitable Alternative Dispute Resolution (ADR)[25] process to implement in order to reduce the shortcomings within the South African criminal justice system enhancing access to justice for all?

The shortcomings of the criminal justice system identified in this dissertation emanate from the primary method of dispute resolution, being litigation, premised on retributive justice. However, the benefits and advantages of mediation appear to remedy some of these shortcomings.

1.3. RESEARCH OBJECTIVES

The overall aim of this dissertation is to establish whether mediation is a suitable ADR process to implement in South Africa, in order to make a substantial contribution to remedy the shortcomings of the criminal justice system.[26] To this end the secondary aims listed below follow.

An aim of this dissertation is to prove that despite the South African legal system being largely dominated by adversarial, litigation proceedings, it is no stranger to the concept of restorative justice and mediation. In addition, an aim is to assess the constitutionality and criticisms of criminal mediation, in view of proving that mediation is in line with the constitutional right of access to courts.[27] Furthermore, that even though this ADR

[25]ADR serves to substitute or complement traditional court litigation, such processes include but are not limited to arbitration, mediation, conciliation, and negotiation. The aims of ADR are to: relieve court congestion, prevent undue cost and delay; enhance community involvement in the dispute resolution process; and facilitate access to justice. ADR focuses on the private resolution of disputes, premised on the hypothesis that if parties can overcome their distrust, anger and frustration they will be able to communicate openly and voluntarily reach a fair settlement. Edwards, H. 'Hopes and Fears for Alternative Dispute Resolution' (1985) *Willamette Law Review* 21:3 429.

[26] Discussed in Chapter 3.

[27] Section 34 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

process does face valid criticism; the benefits outweigh the drawbacks and thus, it remains suitable and beneficial to introduce into South Africa's criminal justice system, as a pre-trial diversionary practice.

A further aim of this paper is to entice individuals working within the criminal justice system, and the courts to view mediation as an alternative process of achieving fairness and access to justice allowing for eventual policy reform. This recognition will make way for strategies that can enhance the criminal justice system and improve societies as it will ease the burden placed on law enforcement, the courts and correctional services.

1.4. RESEARCH METHODS

A descriptive research method will be conducted in this dissertation through interpretation and argumentation of the relevant sources of law. The research methodology is based on existing literature and entails a review of the literature published through secondary sources which includes articles in journals, books, newspaper articles, case studies, theses, and internet publications. Primary sources are also considered, such as applicable case law, policies, and legislation.

1.5. RESEARCH LIMITATIONS

This dissertation focuses on mediation however, the ADR movement includes but is not limited to other methods, such as arbitration, conciliation, and negotiation.[28] Negotiation may be seen as too informal of a process for justice to be administered, whereas arbitration is too similar to adversarial litigation procedures since the arbitrator may issue a final and binding award on the parties.[29] Thus, mediation offers a viable

[28] South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 2.1.
[29] Redfern and Hunter *International Arbitration* (2015) 6th edition 1.

mix between being an informal but also structured process with the possibility of written settlements becoming legally administered rulings.[30]

There is great depth of research on Victim-Offender Mediation (VOM), its origins in Canada and New Zealand and its global reach, especially through Victim-Offender Reconciliation Programmes which have been implemented in various states in the United States of America. However, this dissertation is focused purely on the implementation of such programmes into the South African criminal justice system, as conducting a comparative analysis between VOM in various jurisdictions is beyond the word limit and scope of this dissertation.

1.6. CHAPTER OUTLINE

This dissertation will be examined under six interrelated chapters.

Chapter one is the introductory chapter, guiding the reading of this dissertation. It provides an overview and general background of the research topic. The research questions and objectives are set out in this chapter, as well as the research methodology and its limitations.

The focus of chapter two is the South African legal landscape which commences with a brief historical overview of the development of South Africa's pluralistic legal system, touching on Roman-Dutch, English and African Customary Law. Thereafter, the structure and hierarchy of South African courts will be discussed in relation to their

[30] Boulle, L & Rycroft, A *Mediation: Principles, Process, Practice* (1997).

criminal jurisdictions. This will allow for an understanding of South Africa's legal background and how its adversarial system of law was inherited.

The third chapter will address the South African criminal justice system as it currently stands, including its components and traditional goals. An overview of criminal litigation procedure will be addressed, to understand the way in which the system works. This is in order to consider the notable shortcomings of the formal criminal justice system.

Chapter four will explore the concept of mediation, its role in South African law and how it may be practiced in the criminal justice arena. Thus, the concept of VOM and Family Group Conferences (FGC) will be discussed. Furthermore, the constitutionality of diversion to mediation will be considered.

Chapter five will first refer to African Customary Law (ACL) dispute resolution mechanisms and the legislative support for restorative justice in South Africa. Secondly, the Child Justice Act will be analysed as an exemplar for restorative justice and diversionary mechanisms currently in action. Thirdly, the TRC will be evaluated as a case study for the use of restorative and reconciliatory methods of achieving justice. Lastly, in order to expose the foundations of retributive versus restorative justice, the TRC will be contrasted with the Nuremberg Trials.

Chapter six discusses the benefits and advantages of introducing mediation into the criminal justice system. It also looks at the drawbacks and disadvantages of such introduction and the counterarguments thereto. The concluding chapter, which incorporates the findings and conclusions of this research, reveals the status of

mediation as a suitable tool for ameliorating some of the shortcomings associated with the South African criminal justice system.

CHAPTER 2

THE SOUTH AFRICAN LEGAL LANDSCAPE

2.1. INTRODUCTION

Chapter two commences with a discussion of South Africa's pluralistic legal system in order to extract the fundamental developments of the country's legal system that are relevant to the formation of the criminal justice system as it currently stands. Due to South Africa's unique background,[31] the history of the country's legal system can be divided into the eras of colonisation and South Africa's transition into a constitutional democracy.

2.2. A BRIEF HISTORY OF SOUTH AFRICA'S PLURALISTIC LEGAL SYSTEM

In 1652, the Dutch settlers established themselves in the Cape and introduced to South Africa Roman-Dutch substantive law.[32] The Dutch period was followed by the British colonial period where English legal principles gradually began to permeate the country's legal system resulting in a shift towards English law and institutions.[33] This English influence on the courts resulted in the replacement of lay Roman-Dutch officials with resident English magistrates.[34] Further influence included the implementation of English rules of criminal procedure and evidence as well as the jury

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[31] South Africa has a history of successive colonial governance by the Dutch and then the English, resulting in a hybrid common law comprised of Roman-Dutch civil law, English common law, and ACL. *Himonga et al, African Customary Law in South Africa. Post-Apartheid and Living Law Perspectives (*2014) 3 - 22.

[32] Van den Bergh R 'The remarkable survival of Roman-Dutch law in nineteeth-century South Africa' (2012) 18 *Fundamina: A Journal of Legal History* 71.

[33] Ibid at 74.

[34] Theophilopoulos C et al *Criminal Procedure in South Africa* (2020) 25.

system.[35] Nevertheless, substantive Roman-Dutch law remained largely intact,[36] and the customary law of South Africa's indigenous people continued to thrive.[37]

2.2.1. Roman-Dutch Law

Roman-Dutch law is founded on the European *ius commune*[38] originating from Roman academic institutional writers.[39] Such legal systems are codified, and their codes of civil procedure are inquisitorial in nature with no reference to judicial precedent,[40] only to commentaries on the code by legal writers.[41] In an inquisitorial system the presiding officer plays an active role in court proceedings and the fact-finding process.[42]

The early South African criminal justice system was based on Roman-Dutch inquisitorial criminal procedure which imposed brutal punishments for a wide range of infringements.[43] Criminal trials were held in private behind closed doors and often in the absence of the accused.[44] Additionally, the use of torture was permissible to extract criminal confessions.[45] However, these usages were repugnant to English criminal procedure and consequently abolished.[46]

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[35] A trial by jury is conducted where twelve members of the community are assembled to hear the evidence presented and unanimously decide whether a defendant is guilty of the crimes as charged. Criminal Jury Trials: How it Works 6 October 2021 available at https://www.shouselaw.com/ca/defense/process/jury-trial/ (accessed on 17 December 2021).
[36] Ibid.
[37] Davis DM & Klare K 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 502.
[38] Common Law.
[39] Schulze WG 'A conspectus of South African legal periodicals: Past to present' (2013) 19 *Fundamina: A Journal of Legal History* 62.
[40] The doctrine of precedent (*stare decisis)* holds that lower courts are bound by the decision of superior courts on the same matter.
[41] Meintjies-VDW et al op cit note 1.
[42] Ibid.
[43] The punishment for murder could be carried out by way of hanging, impaling, burning alive, strangling, or smothering. Theophilopoulos et al op cit note 34 at 27.
[44] Ibid.
[45] Ibid at 28.
[46] Botha, G 'The Early Influence of the English Law upon the Roman-Dutch Law in South Africa (1923) *The South African Law Journal* 40(4) 397.

Although Roman-Dutch law remained the basis of the South African legal system, due to the English common law influence, the justice system became predominantly adversarial in nature.[47]

2.2.2. English Common Law

English common law developed through the arguments used by English practitioners during court proceedings and the judgments made by presiding officers.[48] Therefore, the English legal system is founded on judicial precedent and is uncodified.[49] Distinctive features of the English common law include the fundamental importance of the courts, judicial precedent, and the adversarial nature of litigation. [50]

The traditional adversarial legal system views court processes as a battle between two parties, with the presiding officer acting as a passive referee.[51] Legal practitioners conduct court proceedings in a confrontational or hostile manner,[52] before the judicial officer, who then determines the winning and losing party.[53] In addition, court proceedings are conducted via complex and rigid court rules and procedures.[54] These formalistic and compulsory pre-litigation procedures are time-consuming and detailed which usually require lay people to seek legal assistance.[55]

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[47] VDB op cit note 32 at 84.
[48] Meintjies-VDW et al op cit note 1 at 26.
[49] Davis & Klare op cit note 37 at 404.
[50] Hurter E 'Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 2 242.
[51] Meintjies-VDW et al op cit note 1 at 26
[52] Campbell-Tiech A 'Woolf, the adversarial system and the concept of blame' (2001) 113 *British Journal of Haematology* 263.
[53]Jolowicz JA 'Adversarial and inquisitorial models of civil procedure' (2003) 52 *International and Comparative Law Quarterly* 281.
[54] Campbell-Tiech op cit note 52.
[55] Ibid.

Presently South Africa's legal system remains uncodified as many sources of law contribute to its functioning.[56] Primary sources of South Africa's legal system include the common law, comprised of Roman-Dutch, English and African Customary Law, statutes, judicial precedent and, fundamentally, the Constitution.[57]

South Africa may comprise various sources of law; however, its justice system is strongly influenced by English common law.[58] As seen through South Africa's emphasis on judicial precedent and litigation as the primary method of dispute resolution, as well as through the South African court structure.[59]

2.2.3. African Customary Law (ACL)

When the Dutch arrived at the Cape there was no evidence that they took into account the customs of the indigenous people.[60] Instead, Roman-Dutch law was applied and all other systems of law were overlooked.[61] However, during the British colonial period, under a practice of indirect rule, a policy of non-interference with ACL was adopted as long as it was not considered repugnant to the English conception of public policy and natural justice.[62] Thus, ACL was neither abolished nor supported under British rule, causing a hierarchy to form whereby ACL was seen as an inferior source of law.[63]

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[56] Meintjies-VDW et al op cit note 1.
[57] VDB op cit note 32.
[58] Meintjies-VDW et al op cit note 1 at 7.
[59] Section 2 of the Constitution.
[60] Himonga et al op cit note 31. The Khoisan people consisted of the San (who the Dutch referred to as the Bushmen) who travelled across Southern Africa hunting game and the Khoi-Khoi (who the Dutch referred to as the Hottentots) who were found in areas with water and enough grazing to preserve their livestock. Giliomee, H. & Mbenga, B., 2007, *New history of South Africa* 19.
[61] Specifically ACL practised by the native people.
[62] Himonga et al op cit note 31.
[63] Ibid.

There was no clear distinction between the colonial and apartheid periods with regard to the role of ACL.[64] The apartheid regime continued with the system of indirect rule, giving effect to ACL by formally legislating for the segregation and separation of the colonised majority into tribalised minorities.[65] Whilst traditional African leaders were given various powers these were subject to the control of the government, therefore, no real recognition was given to ACL perpetuating the colonially inherited hierarchy.[66]

2.2.4. The Constitutional Era

South Africa was governed by the apartheid legal regime from 1948,[67] which was premised on inequality and injustice, resulting in the legal segregation of individuals into racial groups.[68] After much violence and hostility, South Africa's first democratic elections were held in 1994 putting an end to the apartheid era and later promulgating the final Constitution.

During the constitutional era ACL was finally given the recognition and protection it deserved.[69] Customary law is regarded as having equal status to common law and at the party's election, courts can apply either law.[70] The Constitution recognises the role of traditional leaders[71] and systems of indigenous law and thereby seeks to ensure

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[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Meintjies-VDW et al op cit note 1 at 7.
[68] The Apartheid regime legally classified citizens into racial groups and provided separate rights with respect to each group. Legislation enforcing segregation included the Population Registration Act 30 of 1950, the Group Areas Act 41 of 1950, the Black Homeland Citizenship Act 26 of 1970 and the Immorality Act 5 of 1927. Meintjies-VDW et al op cit note 1 at 7-8.
[69] Section 30, 31 and 211 of the Constitution.
[70] Supra Section 211(3) - courts must apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law.
[71] Section 8 of the Traditional Leadership and Governance Framework Act 41 of 2003 sets out the hierarchy of traditional leadership, with the King/Queen at the apex thereafter, is the principal traditional leader/chief, followed by the senior traditional leaders and lastly headmen or headwomen.

that ACL develops alongside modern democratic values.[72] Further, the concept of public policy[73] is now influenced by African values, such as Ubuntu.[74]

The Constitution, designed against the backdrop of colonisation and apartheid, was premised as a transformative tool which would help move the country towards restoration and unity.[75] The Constitution is the supreme law in South Africa with section two expressly stating that any law or conduct inconsistent with it is invalid.[76] Furthermore, the Constitution contains the Bill of Rights, which forms the cornerstone of democracy in the country, as it enshrines the rights of all persons and affirms the democratic values of equality, human dignity and freedom.[77]

2.3. SOUTH AFRICAN COURTS AND THEIR CRIMINAL JURISDICTIONS

South African courts are independent and subject only to the Constitution and the law, which must be applied impartially and without fear, favour, or prejudice.[78] Section 166 of the Constitution describes the hierarchy of courts in the Republic, designed to uphold the doctrine of precedent which is premised on legal certainty, uniformity and equality in the application of legal principles.[79]

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[72] Section 211(1) of the Constitution – the institution, status, and role of traditional leadership are recognised subject to the constitution. Dissel, A 'Restoring Harmony: Piloting Victim-Offender Conferencing in South Africa' (2002) Paper presented at the Effective Restorative Justice Conference, Du Montfort University, Leicester.
[73] The legal convictions of the community ie the unwritten principles on which social laws are based.
[74] Op cit note 13.
[75] As encapsulated by its Preamble which states that the Constitution seeks to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.
[76] Supra Section 2.
[77] Supra Section 9, 10 and 12 respectively.
[78] Supra Section 165(2).
[79] Van Niekerk JP 'An introduction to South African law reports and reporters, 1828 to 1910' (2013) 19 *Fundamina: A Journal of Legal History* at 106.

Criminal jurisdiction of the courts is based on the common-law doctrine of effectiveness.[80] Jurisdiction refers to the authority vested in a court to adjudicate over a perpetrator who has committed an offence within their territorial area.[81] Jurisdiction is also influenced by the type and seriousness of the offence, for example the High Court enjoys original jurisdiction and may adjudicate on all criminal offences whereas, Magistrates' Courts can only adjudicate on the offences listed under section 89 of the Magistrates' Court Act 32 of 1944.[82] The same reasoning applies to sentencing jurisdiction, since lower courts are creatures of statute their jurisdiction is more limited therefore, only superior courts enjoy appeal and review jurisdiction.[83]

The South African court structure and duties, as set out in the Constitution, are briefly discussed below.

2.3.1. The Constitutional Court (CC)

Together with its power to develop to common law,[84] the CC is the highest judicial authority in South Africa for all civil and criminal disputes.[85] The CC alone has the power to render an Act of Parliament or provincial legislature null and void.[86] In addition to constitutional matters this court may hear an appeal, if leave is granted,[87] 'on the grounds that the matter raises an arguable point of law of public importance which ought to be considered by that court'.[88]

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[80] A court will only assume jurisdiction over an accused, and an offence, when it is able to give an effective and meaningful judgment. Theophilopoulos et al op cit note 34 at 83.
[81] Ibid.
[82] Magistrates' Court Act 32 of 1944 (hereinafter, the Magistrates' Court Act).
[83] Section 19 and 21(1)(a) and (b) of the Superior Courts Act 10 of 2013 (hereinafter, the Superior Courts Act).
[84] Section 173 of the Constitution.
[85] Supra Section 167.
[86] Du Bois, F (ed) *Wille's Principles of South African Law* 9th ed.122.
[87] Leave of appeal requires asking permission of the court a quo to appeal to a higher court.
[88] Section 167 of the Constitution.

In exercising their power to develop the common law, courts have always sought to keep the law in tune with changing societal conditions and values.[89] This is done by modifying, abolishing, extending, and supplementing common law principles,[90] and is exercised through the doctrine of precedent.[91]

2.3.2. The Supreme Court of Appeal (SCA)

The SCA is not a court of first instance, thus all matters before it must come on appeal from a lower court after having sought leave. [92] The SCA may decide appeals in any matter arising from the High Court or a court of similar status, 'except in respect of labour or competition matters to such an extent as may be determined by an Act of Parliament'.[93]

The SCA has general jurisdiction, hearing appeals against decisions on questions of both fact and law.[94] The SCA may confirm, amend, or set aside a conviction or sentence imposed by a *court a quo*.[95] Furthermore, this court has the power to develop the common law through its decisions.[96] The jurisdiction of the SCA extends throughout South Africa and its appeal or review decisions have effect in every division of the High Court.[97]

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[89] Du Bois op cit note 86 at 93.
[90] Ibid.
[91] *Ministry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) para 3 and *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC) para 9. Each case that is decided adds to the body of South African law and establishes principles relevant to the decision of cases which may arise in the future.
[92] Theophilopoulos et al op cit note 34 at 76.
[93] Section 168(3)(a) of the Constitution.
[94] Du Bois op cit note 86.
[95] Theophilopoulos et al op cit note 34 at 76. In *S v Mzizi* 1990 (1) SACR 503 (N) at 508 held that an irregularly imposed conviction may be substituted for a correct conviction. In *S v Viljoen* 1989 (3) SA 965 (T) at 975 the court stated that an incorrect conviction may be altered to a correct conviction of a more serious offence.
[96] Section 173 of the Constitution. By setting aside or upholding appeals, the SCA can actively change outdated or unjust rulings that the court a quo may have erred in deciding.
[97] Theophilopoulos et al op cit note 34 at 76.

2.3.3. The High Court (HC)

The HC presides over any matter not assigned to another court by statute.[98] By virtue of its inherent jurisdiction, any HC can hear any matter and make any order, subject to the express exclusion of jurisdiction to confirm orders of statutory invalidity.[99] Thus, HCs are courts of general jurisdiction, staffed by generalised judges capable of adjudicating civil, criminal, administrative and constitutional disputes. Further, the HC may be a court of first instance[100] but also an appeal[101] and review[102] court for matters from Magistrates' Court's within its geographical jurisdiction.[103] The HC also has the power to develop the common law.[104]

Section 6(1) of the Superior Courts Act 10 of 2013 establishes a single HC of South Africa territorially divided along provisional boundaries into several provincial[105] and local divisions.[106] Each local seat exercises concurrent jurisdiction[107] with a particular main seat of a provincial division.[108] Thus, enhancing the notion of access to justice as citizens are able to access a HC within their geographical location.

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[98] Section 169(1)(b) of the Constitution.
[99] Du Bois op cit note 86 at 124.
[100] Also referred to as a *court a quo,* it is the court in which legal proceedings are instituted or first heard.
[101] An appeal involves a higher court looking at the merits in respect of a judgment made by a lower court. Theophilopoulos et al op cit note 34 at 67. Also see section 3.3.3.2. below for a discussion on appeal and review.
[102] Review to a higher court regarding the conduct of court proceedings of a lower court. Du Bois op cit note 86 at 125.
[103] Section 21(1) and 22 of the Superior Courts Act.
[104] Section 173 of the Constitution.
[105] Eastern Cape Division (main seat Grahamstown), Free State Division (main seat Bloemfontein), KwaZulu-Natal Division (main seat Pietermaritzburg), Gauteng Division (main seat Pretoria), Limpopo Division (main seat Polokwane), Mpumalanga Division (main seat Mbombela), Northern Cape Division (main seat Kimberly), North West division (main seat Mahikeng) and Western Cape Division (main seat Cape Town).
[106] Bisho, Mthatha and Port Elizabeth are local seats to the High Court in the Eastern Cape Division, Thohoyandou is a local seat to High Court in Limpopo, Durban is a local seat to the KwaZulu-Natal Division, Johannesburg is a local seat to the Gauteng Division.
[107] Two or more courts have concurrent jurisdiction over a case if all the courts have the power to hear the matter. In such circumstances, the party instituting the claim may deliberately pick the forum which is most favourable to them.
[108] Section 6(4)(a) of the Superior Courts Act.

2.3.4. The Magistrates' Court

The Magistrates' Courts gain their authority from section 166 and 170 of the Constitution. Furthermore, the Regional and District Magistrates' Courts follow the operations and procedures provided for in the Magistrates' Court Act.[109]

Magistrates' Courts may only adjudicate on criminal offences specifically set out in section 89 of the Magistrates' Courts Act, which provides that Regional Magistrates' Courts have jurisdiction over all offences except treason whereas, District Courts have a more limited jurisdiction and cannot preside over offences such as rape, murder and treason.[110] Jurisdiction with regards to sentences imposed by District Courts is limited to a period of not more than three years imprisonment or a fine not exceeding R100 000.[111] Whereas, Regional Courts may impose a sentence of not more than 20 years imprisonment or a fine not exceeding R300 000.[112]

2.3.5. Specialised Courts

A number of specialised higher and lower courts have been created through statute,[113] the purpose of which is to provide a forum for the enforcement of rights and responsibilities within the ambit of that specific legislation.[114] The jurisdiction of these courts is delimited by their founding statutes and is restricted to the subject-matter provided for therein.[115] The motivation behind their establishment is the aim that they

[109] As amended by the Jurisdiction of Regional Courts Amendment Act 31 of 2008, together with the Magistrates' Courts Rules of 2010.
[110] Theophilopoulos et al op cit note 34 at 83.
[111] Section 92 Magistrates' Court Act.
[112] Supra.
[113] Eg the Labour Court, Land Claims Court, Competition Appeal Court.
[114] Du Bois op cit note 86 at 116.
[115] Ibid at 126.

will facilitate the efficiency and administration of justice and ease the burden on the High and Magistrates' Courts.[116]

The specialised court relevant to this dissertation is the courts of traditional leaders which came to exist in terms of the Black Administration Act 38 of 1927[117] authorising a chief or headman to determine certain civil claims and to punish criminal offences, according to indigenous law.[118] Parties have the right to choose whether to institute an action in a Traditional or Magistrates' Court.[119] The criminal jurisdiction of these courts cover offences under common law or indigenous law to the exclusion of certain serious offences such as assault with grievous bodily harm, rape, murder, treason.[120] Such courts are to be governed by the Traditional Courts Bill B1 of 2017[121] when enacted.

Traditional Courts can be traced back to the colonial system of indirect rule and the racially segregated system of courts implemented under apartheid rule.[122] However, despite their unfortunate history these courts have been retained because they enjoy considerable legitimacy in rural areas where they are often the most significant and accessible dispute resolution institutions.[123]

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[116] Ibid at 116.
[117] The Black Administration Act 38 of 1927.
[118] Supra Section 12.
[119] Du Bois op cit note 86 at 129.
[120] Schedule 2 of the Traditional Courts Bill outlines matters which traditional courts are competent to deal with including theft and malicious damage to property where the amount involved does not exceed R5000.00, assault where grievous bodily harm is not inflicte, breaking or entering any premises with intent to commit an offence either at common law or in contravention of any statute, receiving stolen property knowing it to be stolen where the amount involved does not exceed R5 000-00, crimen injuria, advice relating to ACL practices such as ukuThwala; initiation; customary law marriages; custody and guardianship of minor or dependent children; succession and inheritance; and customary law benefits, any matter arising out of customary law and custom where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette and different amounts may be determined in respect of different categories of disputes, and altercations between members of the community.
[121] Traditional Courts Bill B1 of 2017 (hereinafter the Traditional Courts Bill).
[122] Du Bois op cit note 86 at 130.
[123] Ibid.

2.4. CONCLUSION

As a result of its English inheritance, South Africa's primary method of dispute resolution is litigation which is adversarial in nature.[124] However, ACL and institutions such as Traditional Courts which are more inquisitorial in nature continue to exist.

This chapter provided an overview of South Africa's legal landscape in order to conceptualise South Africa's adversarial history and the role of South African courts. This is in order to understand the way in which the criminal justice system works and its associated flaws, which is discussed in the following chapter.

CHAPTER 3

THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

3.1. INTRODUCTION

Criminal law developed based on the desire for vengeance.[125] An 'eye for an eye' retributive approach to justice accounts for the instinctive human desire to seek revenge against those who cause us harm or loss.[126] As a consequence of consecutive colonisation,[127] the indigenous African practice of private administration of justice via restorative methods shifted towards public adjudication before the courts, which is still

[124] VDB op cit note 32. An accusatorial or adversarial legal system stems from English law and is characterised by conflict and opposition where each party presents their case before an impartial adjudicator. Contrastingly, an inquisitorial legal system, rooted in Continental Roman law, places greater emphasis on the court, or judge, in investigating the facts of the case. Whilst both systems have the common goal of combatting crime, the approaches to evidence, administration of the criminal trial and role of the State and defence differ.
[125] Snyman, C.R *Snyman's Criminal Law'*7th ed (2021) 11.
[126] Ibid.
[127] See Chapter 2.

the dominant method of dispute resolution in South Africa.[128] Criminal trials are retributive in nature with punishment being a fundamental feature.[129]

This chapter commences with an explanation of the various role players and their functions within the criminal justice system. Thereafter, the goals of the criminal justice system are analysed, followed by an overview of the criminal litigation procedure in South Africa. The aforementioned are discussed to create a comprehensive understanding of the way in which the criminal justice system works in order to evaluate its flaws.

3.2. THE GOALS AND FUNCTIONS OF THE CRIMINAL JUSTICE SYSTEM

The overarching purpose of the law is to provide justice for all.[130] The criminal justice system is tasked with enforcing the law, tackling, preventing and reducing crime rates and criminal law violations.[131] The objectives of criminal law are manifest in social interests which call for the maintenance of an orderly society, protection of citizens from crime, loss and unjustified harm, the reformation of lawbreakers and the maintenance of basic human rights.[132]

The South African criminal justice system comprises of several distinct, yet interrelated parts. The South African Police Service (SAPS) is the first point of contact with the criminal justice system. SAPS is tasked with preventing crime and any other action

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[128] Brand, J, Steadman F, & Todd C *Commercial Mediation in SA: a user's guide to court-referred and voluntary mediation in South Africa* (2012) 2.
[129] Snyman op cit note 125.
[130] Op cit note 9.
[131] Anggraeni, A 'Penal Mediation as Alternative Dispute Resolution: A Criminal Reform in Indonesia' (2020) Journal of Law and Legal Reform 1(2) 372.
[132] Ibid.

which may threaten the safety and security of citizens,[133] investigating criminal conduct and apprehending suspects.[134] Chapter 11 of the Constitution and The South African Police Service Act 68 of 1995,[135] outline the responsibilities of SAPS the main of which are to maintain public order, protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.[136]

Thereafter, the National Prosecuting Authority (NPA) has the discretion to decide whether to prosecute the alleged criminal.[137] The prosecutor may also opt to divert offenders to alternative mechanisms.[138] The decision to prosecute depends on the breadth of evidence available to prove the accused's guilt, which is determined by the police investigation, and the severity of the alleged criminal offence.[139] Section 179(2) of the Constitution empowers the NPA to institute criminal proceedings on behalf of the State and to carry out any incidental, necessary functions.[140]

If the NPA decides to prosecute, the criminal jurisdiction of the relevant court will determine where the matter will be heard.[141] The presiding officer will hear the case, which requires listening to the evidence presented by both the prosecution and the

[133]South African Police Service Website available at https://www.saps.gov.za/about/about.php (accessed on 17 December 2021).
[134] 'How does the criminal justice system work? Available at 'https://www.gov.za/faq/justice-and-crime-prevention/how-does-criminal-justice-system-work (accessed on 17 December 2021).
[135] The South African Police Service Act 68 of 1995.
[136] Chapter 11 and Section 205(3) of the Constitution.
[137] Supra.
[138] Core Prosecution Work at the NPA available at https://www.npa.gov.za/about-npa (accessed on 17 December 2021).
[139] Ibid.
[140] Section 179(5) of the Constitution outlines the responsibilities of the NPA and the National Prosecuting Authority Act 32 of 1998 sets out its structure and endorses the NPA as South Africa's sole prosecuting authority.
[141] See 2.3 for the outline of the South African court system and their criminal jurisdictions.

defence.[142] The court will then decide if the accused is found innocent or guilty.[143] If the latter is determined the sentencing phase commences, where the court will hand down a sentence tailored to the offender, depending on the severity of the crime and in line with South Africa's mandatory minimum sentencing regime.[144]

The South African prison system is run by the Department of Correctional Services (DCS), whose main function is to ensure that the sentences of convicted criminals are carried out fully and that criminals are rehabilitated in their care.[145] The DCS states their mission as contributing to a just, peaceful and safer South Africa through effective and humane incarceration of inmates and the rehabilitation and social reintegration of offenders.[146] Sadly, due to prison overcrowding and corruption such mission is not currently being achieved.[147] A fundamental value to the DCS is the concept of Ubuntu which they believe entails serving with kindness and humanity.[148] As well as the concept of justice for all which entails fair treatment and equality before the law.[149]

The last component in the system are probation officers[150] and social workers who deal with victims of crime, their families, and communities.[151] The function of social work services is to provide needs-based programmes and services to offenders in

[142] Core Prosecution work op cit note 138.
[143] Ibid.
[144] Section 51 and 52 of the Criminal Law Amendment Act.
[145] Department of Correctional Services Website available at http://www.dcs.gov.za/?page_id=174 (accessed on 18 December 2021).
[146] Ibid.
[147] Edwin Cameron 'Imprisoning the Nation: Minimum Sentences in South Africa' University of the Western Cape, Faculty of Law, Dean's Distinguished Lecture 19 October 2017.
[148] Op cit note 145.
[149] Ibid.
[150] Probation Officers are appointed by the Minister of Social Development and are officers of every Magistrate's Court in South Africa.
[151] Op cit note 145 via 'Social Work Services'.

order to enhance their adjustment, social functioning and reintegration into the community.[152] Programmes include life skills, anger management, family and marriage enrichment, sexual offender treatment and various youth programmes.[153]

An effectual and powerful criminal justice system underpins a well-functioning State. Unfortunately, this is not the case in South Africa as its flawed current system is failing its citizens.

3.3. SOUTH AFRICAN CRIMINAL LITIGATION PROCEDURE

The South African court system plays a pivotal role in the administration of justice, as Section 34 of the Constitution provides the right of access to courts.

The Constitution and the Criminal Procedure Act 51 of 1977[154] endow various due process[155] and fair trial[156] rights on individuals. It is vital that these rights and procedural formalities are protected as guilty defendants may avoid conviction due to a procedural technicality.[157] By way of example, evidence obtained through an illegal

[152] Ibid.
[153] Ibid.
[154] Criminal Procedure Act 51 of 1977 (hereinafter the CPA).
[155] Due process places the procedural rights set out in the Bill of Rights at the center of all criminal justice proceedings. Such constitutional rights include the substantive right to privacy (Section 14), dignity (Section 10) and more. Theophilopoulos et al op cit note 34 at 9.
[156] Section 35 of the Constitution enshrines numerous fail trial rights, including the right to the presumption of innocence, the right to legal advice and the right to silence.
[157] Rice, P 'Mediation and Arbitration as a Civil Alternative to the Criminal Justice System – an Overview and Legal Analysis' (1979) *American University Law Review* Vol 29(1) 18.

search and seizure, or statements obtained from the defendant in violation of their 'Miranda Rights'[158] are inadmissible.[159]

In the following section, an overview of South Africa's criminal procedures will be discussed.

3.3.1. Pre-Trial Procedure

There are two primary ways of ensuring that an accused arrives at court to stand trial; the first is by way of summons[160] or written notice and the second is by way of arrest.[161]

If an accused is arrested, he is entitled to apply to be released on bail.[162] Once the accused duly appears in court to stand trial he is entitled to a refund of the bail money.[163] However, if the accused does not appear, the money is forfeited to the State and a warrant is issued for his re-arrest.[164] In determining whether an accused should be afforded bail the court will apply the 'interests of justice test'.[165] Where the accused

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[158] The term is gleaned from the case of Miranda *v Arizona* 384 U.S. 436 (1966) used in the USA to refer to the verbal warning and notification given by police to suspects in custody advising them of certain rights. The warning is: you have the right to remain silent; anything you say can and will be used against you in a court of law, you have the right to an attorney; if you cannot afford an attorney, one will be provided for you. The arresting officer needs to make sure that the arrestee is fully informed of these rights. While not specifically referred to as Miranda rights, the judgment influenced other countries including South Africa, which now require interrogators to advise suspects of the abovementioned rights. Failure to be informed of such rights results in the prohibition of using ensuing statements as evidence in a criminal trial. Theophilopoulos et al op cit note 34 at 23.

[159] S35(o) of the Constitution, evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of such evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

[160] A summons is the first official document in the court process. A summons in a criminal matter is a legal document issued by the court informing an individual to appear in court.

[161] Walker et al *Criminal Law in South Africa* (2018) 3rd ed Oxford University Press Southern Africa 35.

[162] Ibid.

[163] Ibid.

[164] Ibid.

[165] Section 60 of the CPA looks at various factors to determine whether the interests of justice may be prejudiced if the accused is granted or refused bail. For example whether the accused is a risk to public safety (Section 60(5)), whether the accused is likely to evade trial (Section 60(6)) etc. section 60(9) lists personal factors which are considered such as the period for which the accused has already been in custody since the arrest, the probably period of detention until conclusion of the trial etc.

is charged with a less serious offence[166] and there is little risk of him absconding, the court may release the accused on a warning, such as children commonly being released into the custody of their parents.[167]

Prior to commencement of the criminal trial, the accused has the broad protection of the *writ of habeas corpus*.[168] An accused is entitled to be given sufficient information by the State to enable him to prepare properly for his trial.[169] In order to adequately prepare legal representatives must be able to examine the charge sheet, obtain photocopies of the police docket and all other relevant documentation, including witness statements and statements made by the accused to the police.[170] During the pre-trial period the accused and their legal team begin planning a defence strategy for the trial.[171]

3.3.2. Criminal Trial Procedure

The actual hearing is conducted in open courts,[172] accessible to the public and the media.[173] At the beginning of the trial, the State puts the charge or charges to the accused.[174] The accused is then pleads 'guilty' or 'not guilty'.[175]

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[166] An offence not listed in schedule five or six of the CPA.
[167] Walker et al op cit note 160.
[168] In Latin directly translated to 'Show me the body'. Habeas corpus is a fundamental right that protects one against unlawful and indefinite imprisonment, safeguarding individual freedom against arbitrary executive power. Every arrest is prima facie unlawful and must be justified in court by the arresting authority if called upon to do so. Kentridge, S 'The Pathology of a Legal System: Criminal Justice in South Africa' (1980) *University of Pennsylvania Law Review* Vol 128(3) 606.
[169] Walker et al op cit note 165 at 36.
[170] Section 1 and 335 1 of the CPA.
[171] Theophilopoulos et al op cit note 34 at 62.
[172] Section 34 and 35(3)(c) of the Constitution which states that the accused has a right to a fair public, open trial in an ordinary court before a magistrate or judge.
[173] Section 32 of Superior Courts Act and Section 5 of the Magistrates' Court Act. However, this is subject to the proper administration of justice, concerning sensitivity of the case or prejudice towards the witness.
[174]Walker et al op cit note 160 at 36.
[175] Theophilopoulos et al op cit note 34 at 37.

Once the accused pleads to the charges put to him, the trial commences.[176] A criminal trial is governed by several key principles namely:

- The right to a fair trial; [177]
- The principle of legality; [178]
- Judicial impartiality;[179] and
- Equality of arms.[180]

During adversarial trial proceedings, the State bears the onus of beginning and leading the process.[181] The criminal law standard of proof, beyond a reasonable doubt,[182] is higher than the civil standard, on balance of probabilities.[183]

The State will make their opening address and explain the charge and evidence that will be used to prove the charge.[184] The State may use direct as well as circumstantial evidence.[185] The accused then has the opportunity to make any formal admissions, followed by the State, which may be admitted as evidence.[186] Thereafter, the State proceeds to present evidence in examination in chief, which entails questioning witnesses.[187] The defence may cross-examine the State's witnesses.[188] The State may then re-examine their witnesses in order to clarify certain statements, without

[176] Ibid.
[177] Enshrined in Section 35 of the Constitution. This right entails fairness towards the accused and society at large.
[178] The law must be consistently and clearly applied, and the correct procedures must be followed to ensure both procedural and substantive fairness throughout the process.
[179] Judges must approach their adjudicative task with an open and unbiased mind.
[180] There must be a fair balance between the opportunities afforded to the parties involved in litigation. Everyone charged with an offence must have an equal opportunity to defend himself.
[181] Theophilopoulos et al op cit note 34 at 104.
[182] This is a fixed standard which requires the prosecution to convince the judge that there is no other reasonable explanation that can come from the evidence presented at trial.
[183] The scenario presented is more probable than not. Theophilopoulos et al op cit note 34 at 104.
[184] Section 150(1) of the CPA.
[185] Walker et al op cit note 165 at 35.
[186] Section 150(2)(a) and 220 of the CPA.
[187] Supra Section (2)(a).
[188] Supra Section 166(3).

adducing new evidence.[189] Once all the evidence has been presented, the State will close its case.

The defence may then present evidence supporting their case however, since the onus rests with the State, there is no requirement for the accused to rebut its case.[190] Therefore, if the State has not succeeded in presenting sufficient evidence to sustain a conviction, the accused may apply for a discharge.[191]

If the defence decides to make a case, they will lead examination in chief, the State is thereafter allowed to cross-examine the witnesses,[192] the defence may re-examine the witnesses and then close its case. Both sides will have the opportunity to make closing statements, with the State beginning.[193] After closing arguments the court will generally adjourn to determine its judgement.[194]

3.3.3. Post-Trial Procedure

The judge himself is the trier of fact, as the jury system no longer exists in South Africa.[195] Once the court has heard argument for both sides, it will deliver its judgment.[196] This requires the court to apply its mind to the evidence and make a decision about the guilt or innocence of the accused.[197] At the end of its judgment, the court will pronounce its verdict, 'guilty' or 'not guilty'.[198] A verdict must be handed down

[189] Theophilopoulos et al op cit note 34 at 65.
[190] Walker et al op cit note 160 at 39.
[191] Section 174 of the CPA allows for the defence to apply to the presiding officer for the accused's acquittal if the prosecution has failed to establish a *prima facie* case.
[192] Section 166(1) of the CPA.
[193] Supra Section 175(1).
[194] Theophilopoulos et al op cit note 34 at 66.
[195] Kentridge op cit note 167 at 604.
[196] Judgment is the courts findings of fact and its decision on any points of law raised at the trial. Walker et al op cit note 164 at 40.
[197] Section 106(4) of the CPA states the accused is entitled to be acquitted or convicted after trial.
[198] Walker et al op cit note 160 at 40.

within reasonable time and the presiding officer must give reasons for their decision.[199] Where the accused is found guilty and consequently convicted of the offence, the sentencing stage will commence. [200] Where the accused is found innocent he or she is acquitted.[201]

3.3.3.1. Sentencing

Once the accused is convicted of a crime, whether on a plea of guilty or after trial, the sentencing phase begins.[202] Both parties may lead evidence in relation to the sentence, if they wish.[203] Evidence includes whether the accused has had any previous convictions and various mitigating or aggravating factors.[204]

The approach to sentencing is encapsulated in the *Zinn* triad,[205] which balances the type of crime, its nature and severity; the accused's circumstances and life experiences; and the interests of society at large.[206] In *S v Rabie,*[207] the court stated that punishment should fit the criminal and the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.

Section 276 of the CPA lists the types of sentences that can be imposed including; imprisonment, committal to a treatment centre, imposition of a monetary fine, caution and discharge. Section 51 and 52 of the Criminal Law Amendment Act make provision for the imposition of minimum sentences in respect of serious offences, listed in

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[199] Section 146 of the CPA.
[200] Theophilopoulos et al op cit note 34 at 66.
[201] Ibid.
[202] Walker et al op cit note 160 at 41.
[203] Ibid.
[204] Ibid at 42.
[205] S v Zinn 1969 (2) SA 537 (A).
[206] This triad is the starting point in every sentencing of a case, if there is a balance between the three factors the sentence will be just and appropriate.
[207] 1975 (4) SA 855 (A) at 861.

Schedule two. Judges may only depart from the minimum mandatories if the court 'is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence'.[208] Under such circumstances, sentencing is an insensitive ritual in which the same penalty is given to defendants convicted of the same offense unless the prosecution recommends otherwise.[209]

3.3.3.2. Appeal and Review

Once sentence has been delivered, the case is finalised and the accused, may have recourse to his fair trial rights to challenge the decision by way of appeal or review.[210]

Appeals constitute a re-hearing of the facts or the law based on the trial record.[211] An accused who wishes to appeal against a conviction and or sentence must apply to the trial court for leave to appeal.[212] The general rule when considering leave, is whether there is reasonable prospect that another court will reach a different decision.[213] An appeal does not constitute a second trial since argument is restricted to the grounds of appeal and proceedings are bound by the trial court record.[214]

Review is used where one party feels there was an irregularity or illegality in the manner by which a judicial officer in the *court a quo* has conducted criminal

[208]Section 51 of the Criminal Law Amendment Act and Roth, S, M. (2008). 'South African Minimum Mandatory Sentences: Reform Required'. 17 MINN. 5. International Law. 155 162.
[209] Rice op cit note 157 at 19.
[210] Section 35(3)(o) of the Constitution and Walker et al op cit note 165 at 42.
[211] Ibid.
[212] This application must be made within 14 days after passing sentence or within an extended time if good cause is shown (s309B(1)(b) of the CPA).
[213] In *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) para 21 , the SCA defined an appeal as a complete rehearing without the leading of evidence, whereby a trial court's conclusions on both the facts and law may be challenged in a higher court through an analysis of the evidence in the record.
[214] Theophilopoulos et al op cit note 34 at 69.

proceedings.[215] Review does not refer to the result but rather the methods of the trial, such as high-handed or mistaken action which has prevented the aggrieved party from having their case fully and fairly determined.[216] One can institute review and appeal proceedings where one wants to challenge both the process and the substantive outcome.[217]

Sentencing is primarily a matter of discretion for the trial court and the power to interfere is limited.[218] However, a higher court may substitute its discretion if there was a clear misdirection.[219] In *S v Tshabalala*[220] it was held that courts should not interfere in unterminated criminal proceedings unless injustice will arise. However, in *S v Schoombee*[221] the court held that it is an established principle that an accused's right to a fair trial encompasses the right to appeal. In *S v Mokoena*[222] it was held that a review court should not hesitate to reduce a sentence, but it is not good practice to impose a more severe sentence as it may offend the principle of justice. Further, in *S v Mbokazi*[223] it was held that a review court may replace a trial court's irregularly imposed sentence with the correct sentence.

3.4. FLAWS WITHIN SOUTH AFRICA'S CRIMINAL JUSTICE SYSTEM

The criminal justice system is seen as cumbersome, myopic, and frustrating to those who work within it and inadequate for those who are served by it.[224] Victim

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[215] Ibid at 68.
[216] Ibid at 398.
[217] Ibid at 397.
[218] Ibid at 360.
[219] Which might include undue emphasis upon the possible effects of the crime or placing insufficient weight on the accused's personal circumstances. Walker et al op cit note 160 at 40.
[220] 2002 (1) SACR 605 (W) headnote.
[221] 2017 (2) SACR 1 (CC) para 19.
[222] 1984 (1) SA 2697 (O) para 265.
[223] 1998 (1) SACR 438 (N) para 443.
[224] Rice op cit note 157 at 17.

dissatisfaction with the justice system results in a negative attitude towards law enforcement in general, and a reduced willingness to report future crimes,[225] which undermines the efficient functioning of the criminal justice system.

The following sections will delve into some of the fundamental flaws of the criminal justice system, which may potentially be remedied by ADR mechanisms premised on restorative justice such as pre-trial diversion to mediation.

3.4.1. Secondary Victimisation

In the aftermath of a violent crime, victims are often left with persistent emotional and mental health issues, which in some cases manifest as diagnosable psychiatric disorders.[226] Certain studies have linked violent victimisation with posttraumatic stress disorder.[227] Whilst other studies have found a connection between victimisation and depression, substance abuse, anxiety disorders, and suicide with other non-clinical symptoms including sleeplessness and loss of confidence and self-esteem. [228]

It is evident that the criminal justice system affects the mental health of crime victims to varying extents.[229] Criminal justice agencies are poorly equipped to address the psychological needs of victims and police and court officials rarely receive training to recognise or deal with mental health issues.[230]

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[225] Hanks, M 'Perspectives on Mandatory Mediation' (2012) UNSW Law Journal Vol 35(3) 930.
[226] Parsons, J and Bergin, T 'The Impact of Criminal Justice Involvement on Victims' Mental Health' (2010*) Journal of Traumatic Stress*, Vol 23 No. 2 182.
[227] Ibid.
[228] Ibid.
[229] Ibid. 'Exposure to violent crime is taking a toll on SA's mental health, say experts' available at https://www.timeslive.co.za/news/south-africa/2020-01-03-exposure-to-violent-crime-is-taking-its-toll-on-sas-mental-health-say-experts/ (accessed on 16 December 2021), studies have shown that women who are victims of physical or sexual violence usually at the hands of their partners are likely to go through clinical depression and are at a greater risk of attempting suicide.
[230] Parsons & Bergin op cit note 225.

Secondary victimisation occurs when crime victims feel blamed for inviting the incident or experience judgemental and unsympathetic societal reactions and attitudes because of their initial victimisation.[231] There are numerous and varying definitions of secondary victimisation, however, a common theme is that victims are initially injured by the crime and then they are reinjured by the criminal justice system and its authorities.[232] As quoted by Rice 'the victims and witnesses of crime become the victims of the criminal justice system itself'.[233]

Ultimately, it is the justice system's response to crime victims that makes the difference between the process being cathartic and healing or a process that exacerbates the original trauma.[234] When victims are treated with respect, care and empathy the system can aid recovery.[235] Contrastingly, if victims are treated insensitively, met with refusals to help, or given inadequate information then the system may compound the harms that have already been committed, magnify feelings of anger, frustration, guilt and powerlessness and exacerbate symptoms of mental-health illnesses.[236]

Features inherent to the criminal justice system that may add to the victims' suffering include the impact of law enforcement practices, the adversarial nature of trials, the lack of information available to victims and the lack of participation in courtroom proceedings.[237]

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[231] Wemmers, J 'Victims' Experiences in the Criminal Justice System and their Recovery from Crime' (2013) *International Review of Victimology* 19(3) at 222.
[232] Ibid.
[233] Rice op cit note 157 at 19.
[234] Parsons & Bergin op cit note 225.
[235] Ibid.
[236] Ibid.
[237] Ibid at 183.

3.4.2. Lack of Victim Participation

Crime is considered injurious to the public interest,[238] consequently discretion to prosecute lies with the NPA, as an agent of the State, and not with the victim.[239] Criminal trials are cast as a battle between the State prosecution and defendant, with little emphasis placed on the victim and victim involvement limited to acting as a potential witness.[240] Hence, victims are often considered the forgotten party in the criminal justice system.[241]

If the State refuses to prosecute, victims can bring private prosecutions, however these are extremely rare and merely a safety net.[242] There is also the possibility of instituting a delictual action against the perpetrator for patrimonial damages or damages for pain and suffering however, the civil route tends to be an ineffective means of relief for victims.[243] Civil trials are generally hollow and emotionless thus, an inappropriate forum for serving the responsive needs of the victim.[244]

It is premised that victims should have no influence on adjudication since the offender's liability and punishment depends on his blameworthiness and the seriousness of the offence and not on his luck as to whether the victim is forgiving or vindictive in nature.[245] It is believed that the values of community stability, general peacekeeping

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[238] Snyman op cit note 125 at 1.
[239] Ibid.
[240] O'Hara, E 'Victim Participation in the Criminal Process' (2005) *Journal of Law and Policy* 13(1) 229.
[241] Wemmers, J and Cyrs, K 'What Fairness Means to Crime Victims: Psychological Perspective on Victim-Offender Mediation' (2006) Applied *Psychology in Criminal Justice* 2(2) 102.
[242] Snyman op cit note 129 at 4.
[243]Delict is a private wrong, whereas a crime is a public wrong. The essential purpose of the law of delict is to provide compensation to the victim, whereas the essential purpose of criminal law is to punish the offender. Therefore, victims are left without retribution and the feeling like the perpetrator got away with the crime. Theophilopoulos et al op cit note 34 at 14 – 16.
[244] O'Hara op cit note 239 at 234.
[245] Ibid at 231-232.

and proportional punishment for defendants are enhanced when the State monopolises power over vengeance, since public prosecutors are neutral and emotionally detached when exercising their discretion compared to victims and their families.[246]

Since the State assumes responsibility for criminal justice, they are seen as the victim while the actual victims are displaced from any meaningful role in the justice process.[247] Victims and offenders do not have the opportunity to present their side of the story, express their feelings, or ask and answer important questions.[248] Thus, victims who are seeking a genuine apology from their perpetrator or the opportunity to discuss their ordeal may be frustrated by cases which do not offer any opportunity for participation[249] or are settled quickly through a plea bargain.[250] Research shows that active involvement in the trial can help victims come to terms with their experience and increase their sense of control and self-determination.[251] Thus, there is a dire need for alternate processes such as mediation programmes which allow for greater victim participation.

[246] Ibid at 237.
[247] Monograph op cit note 20.
[248] Platow et al op cit note 10 at 376- 377.
[249] Victims can participate by explaining how the crime has affected their lives, asking the offender questions about the crime to try and understand their motive, and provide suggestions for punishment or methods of reparation. Parsons & Bergin op cit note 232 at 184.
[250] A plea bargain is an arrangement between the defendant and prosecutor, whereby the defendant pleads guilty to a lesser charge in exchange for a more lenient sentence or an agreement to drop other charges against them.
[251] Ibid.

3.4.3. Procedural Fairness Concerns

Both procedural[252] and distributive[253] justice play a role in victims' perceptions of fairness within the criminal justice system.[254] Typically participants receive procedural information before they know the outcome of the case, thus procedural fairness is fundamental to the efficacy of the criminal justice system.[255]

Procedural justice is influenced by quality interactions which refers to how victims are treated when dealing with law enforcement, court staff and legal representatives. Quality procedures reflects the fairness of formal rules and the neutrality of the decision maker.[256]

Fair process norms enhance public confidence in the justice system.[257] This is because 'individual perceptions of legitimacy are importantly connected to compliance with the law'.[258] The public is more likely to support and participate in the criminal justice process, observe the law and support those officials who run it when they believe that the process is fair.[259] Contrastingly, diminished public support for the criminal justice system results in diminished respect for and less compliance with the law in general.[260]

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[252] Procedural justice is concerned with the way in which decisions are reached, rather than the outcome of such decisions.
[253] Parsons & Bergin op cit note 225 at 185.
[254] Wemmers op cit note 230 at 223.
[255] Ibid.
[256] Ibid.
[257] Meares, T 'Everything old is new again: Fundamental Fairness and the Legitimacy of Criminal Justice' (2005) *Ohio State Journal of Criminal Law* Vol 3(1) 108.
[258] Ibid at 110.
[259] Ibid.
[260] Ibid.

Therefore, participants should always be treated fairly and with respect despite the variable outcome of the case.[261] As when victims are treated fairly, they feel validated and supported causing the criminal justice process to be more therapeutic.[262] However, if the justice system is viewed as biased, discriminatory or unjust individuals are less likely to trust in the process and believe that the authorities will act fairly in the future.[263]

3.4.4. Mandatory Minimum Sentences and the Purposes of Punishment

The formal criminal justice system is premised on retributive justice and consequent punishment for wrongdoing.[264] Committing a crime is an infringement of the State or someone else's rights, thus punishment constitutes a justifiable limitation of the offender's human rights.[265] Such limitations are warranted based on the purposes of punishment.[266]

Minimum mandatory sentencing legislation was passed in 1997,[267] with the aim of reducing serious and violent crimes, achieving sentencing consistency and satisfying public concerns regarding sentencing leniency due to the abolition of the death penalty in the famous case of *S v Makwanyane*.[268] However, Cameron J famously argues that the imposition of long-term sentences cannot be justified with recourse to any of the

[261] Wemmers op cit note 230 at 230.
[262] Ibid.
[263] Meares op cit note 256 at 109.
[264] Snyman op cit note 125 at 9.
[265] Such as the right of freedom and security of person (Section 12), the right to privacy (Section 14) and the right to freedom of movement and residence (Section 21).
[266] Muntingh op cit note 11 at 6.
[267] Section 51 and 52 of the Criminal Law Amendment Act.
[268] 1995 (2) SACR 1 (CC) and Sloth-Nielsen, J and Ehlers, L. (2005) 'Assessing the Impact: Mandatory and Minimum sentences in South Africa'. *South African Crime Quarterly* no 14 at 15.

purposes of punishment and thus imprisonment in compliance with the mandatory minimums should not be the first resort for punishing offenders.[269]

A brief discussion of the flawed rationale behind the purposes of punishment is made below, to contextualise the inefficacy of the regime as a guideline for punishment in the South African criminal justice system.

3.4.4.1 Deterrence

Deterrence is premised on the notion that the threat and fear of punishment will discourage individuals from committing crime.[270] This concept is drawn from the rational choice theory where it is presumed that offenders assess both the severity of punishment and likelihood of getting caught before they commit a crime.[271] However, deterrence is personality dependent and certain offenders may have risk taking optimism which warps their perception.[272] Further, individuals may not assess the consequences of their actions in the heat of the moment or with crimes of passion.[273] For example in *S v Eadie*[274] where in the heat of the moment during a road rage incident Mr Eadie beat an individual to death with a hockey stick.

There is also the misconception that the effectiveness of general deterrence depends on the severity of punishment, rather it depends on the certainty of punishment.[275] In

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[269] Cameron op cit note 147.
[270] Snyman op cit note 125 at 14.
[271] Cameron op cit note 147.
[272] Ibid.
[273] Most crimes of passion involve intimate relationships. In this case the accused murdered his partner of 12 years after finding out she was unfaithful.'10 years 'crime of passion' murder (26 November 2015) by Benida Phillips available at https://www.iol.co.za/news/south-africa/northern-cape/10-years-crime-of-passion-murder-1951368 (accessed on 5 Jan 2022).
[274] 2002 (SCA) 24.
[275] Edwin Cameron's fight for humane prisons (2019) The Daily Maverick by Carlos Amato available at https://www.dailymaverick.co.za/article/2019-12-02-edwin-camerons-fight-for-humane-prisons/ (accessed on 24 December 2021).

other words how probable it is that the offender will be caught, convicted, and serve out his sentence.[276] This requires effective tracking and tracing by the police, prosecution of the crime in court resulting in a conviction and incarceration without early parole or escape.[277] As a consequence of the inefficiencies within the branches of the criminal justice system, offenders will risk committing a crime since the likelihood of being brought to justice is slim.[278]

3.4.4.2. Prevention

Prevention incapacitates the individual offender making it physically impossible for them to reoffend.[279] Prevention is accomplished through long-term imprisonment which removes individuals who are prone to commit crimes from society for a specific period.[280] However, there is no guarantee that after incarceration offenders desist from committing crimes. In reality, prisons tend to afford a high level of education about criminal activity and provide social networks for criminality.[281] Further, it has been highlighted that 'prisons serve as graduate schools or training camps' for vulnerable youth to learn about more serious crimes or become involved with gangs.[282] In South Africa, the brutality of prison life is toxic to society as a whole, because it filters out via the number gangs inside the jails and organised crime on the streets.[283]

[276] Snyman op cit note 125 at 14.
[277] Ibid.
[278] Ibid.
[279] Ibid at 13.
[280] Cameron op cit note 147.
[281] Reisman, L. (2006) 'Breaking the Vicious Cycles: Responding to Central USA Gang Violence'. SAIS Review of International Affairs. Vol 26, no 2. 81.
[282] Ibid.
[283] Cameron op cit note 274.

3.4.4.3. Rehabilitation

One of the purposes of the correctional system is to rehabilitate offenders,[284] which constitutes training and re-educating the offender to learn new skills and change their attitudes.[285] By reforming the individual offender to become a law-abiding citizen, it is believed that he will not go on to reoffend.[286]

However, prison overcrowding makes rehabilitative and educational programmes impractical, furthermore, there is a lack of resources, facilities, and personnel to effectively implement such programmes in South Africa.[287] In addition the lack of support provided to ex-convicts in helping them re-enter society, prove that the stated aims of rehabilitation and reintegration are not currently being achieved.[288]

3.4.4.5. Retribution

The modern concept of retribution does not equate to vengeance but rather proportionality. Hence, the degree of punishment must be proportional to the degree of harm caused.[289] Retribution is backward looking, a crime has occurred thus, punishment is appropriate because it is the individual's just desert.[290] Retribution aims to restore the legal balance that has been disturbed by the commission of the crime, and punishment is considered the payment which, because of the commission of the crime, the individual owes to society.[291]

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[284] Section 2 of the Correctional Services Act 111 of 1998.
[285] Platow et al op cit note 10 at 378.
[286] Ibid.
[287] Cameron op cit note 147.
[288] Cameron op cit note 8.
[289] Cameron op cit note 147.
[290] Snyman op cit note 125 at 15.
[291] Ibid.

3.4.5. Court Backlogs and Delays

Litigation brings with it general efficiency concerns relating to lengthy delays and extreme court backlogs due to successive postponements.[292] Sequential postponements are often secured through collusive agreements as a delay tactic, for example the accused will fire their lawyer causing a postponement.[293]

Burgeoning caseloads coupled with procedural delays have resulted in prosecutorial policies wherein efficiency is the predominating factor.[294] Therefore, prosecutorial decisions are often guided by factors unrelated to the circumstances of the case or the needs of victims, rather decisions are guided by the need to meet performance targets and deadlines.[295] These unofficial concerns result in contentious cases being dropped and redirected to plea bargains to avoid lengthy litigation proceedings.[296] As a result, the underlying objectives of the criminal justice system are lost in a mechanistic and perfunctory process.[297]

The judiciary is subject to the same caseload pressures, especially when it comes to sentencing.[298] With little time and inadequate information, judges tend to resort to methods that are designed to cope with the caseload rather than to correct individual offenders.[299]

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[292] Cameron op cit note 274. Retributive justice will be discussed in greater detail in chapter five.
[293] Ibid.
[294] Rice op cit note 157 at 19.
[295] Ibid.
[296] Parsons & Bergin op cit note 225 at 184.
[297] Rice op cit note 157 at 19.
[298] Ibid.
[299] Ibid.

3.4.6. The Complexity and Cost of Litigation

Litigation and court procedures are of such a technical and complex nature that they are often perplexing or non-understandable to participants.[300] Therefore, assistance of a legal practitioner is a practical necessity. In this regard, disputants may feel excluded from their matters and like they have no control over the resolution of their own disputes.[301]

Furthermore, the cost of litigation is prohibitive.[302] The unpredictability of the final outcome as well as the legal costs involved may add to the frustration and anxiety of the disputants.[303] On the basis of high costs and complexity, the justice system is titled against the middle-class to poorer communities in South Africa from acquiring access to justice.[304] Since disparities of wealth and resources allow economically stronger parties to gain advantages through the use of better legal representation and delay tactics to defend their rights and advance their interests.[305]

3.5. CONCLUSION

A range of shortcomings associated with the adversarial and retributive nature of the criminal justice system have transcended the country's colonial history and its

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[300] Due to court rules and timelines, procedural rules of evidence and legal jargon. Hurter op cit note 50 at 248.
[301] SALC Paper op cit note 28 at 5.
[302] Ibid. Costs are determined according to a fixed tariff schedule set out in the respective Rules of Court. The costs for Magistrate's Courts fall into one of four categories, Scale A allows the lowest proportion of legal costs to be recovered (up to R7000) , while Scale D allows the highest (up to R200 000). See the Court tariff sheets for 2020 available at https://www.ghostpractice.co.za/code/documents/Court%20Tariff%20Sheet%20-%20Sep%202020.pdf (accessed on 31 December 2021).
[303] Paleker op cit note 3.
[304] Joubert J 'Embedding Mediation in South African Justice' available at http://www.jacques-joubert.co.za/articles (accessed 17 September 2021).
[305] Nkabinde J believes the challenge in South Africa is that its adversarial justice system is dominated by those whose services are not equally available to all segments of society. 'Despite South Africa's glorified Constitution, certain interest groups have easier access to use litigation to defend their rights and advance their interests, while others cannot', as quoted by Sedutla M 'Launch of court- based mediation pilot project' (2012) 516 *De Rebus* 8 and Edwards op cit note 25 at 428-429.

transition into a constitutional democracy. The abovementioned shortcomings of the highly complex, costly, and time-consuming nature of litigation, infringe on the constitutional imperative of access to justice for all.[306] As emphasised by the famous quote: 'justice delayed is justice denied'.[307]

Therefore, litigation as South Africa's primary method of criminal justice deserves reform, in order to remedy the transcending shortcomings of the system as a whole. Furthermore, given South Africa's unique history, an alternative method of criminal dispute resolution needs to be suited to a nation striving towards unity in its diversity, healing the divisions of its past, improving the quality of life for all citizens and building a 'united and democratic' nation for all. [308]

In the following chapter, the concept and role of criminal mediation, along with its constitutionality will be discussed, as a potential alternative to achieving criminal justice in South Africa.

CHAPTER 4

MEDIATION AND THE CRIMINAL JUSTICE SYSTEM

4.1. INTRODUCTION

Litigation is the primary method of dispute resolution in South Africa's civil and criminal justice system.[309] However, mediation has a long and rich pedigree in South Africa from its roots in traditional African society to the TRC peace process.[310]

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[306] Ibid.
[307] Muvangua N & Cornell D *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) 184.
[308] Preamble to the Constitution.
[309] See Chapter 2.
[310] Brand et al op cit note 128 at 11.

Incorporating mediation into the criminal justice system can take various forms. The entire justice system can be 'civilised' which entails replacing the current adversarial system with a more reminiscent of traditional restorative justice dispute resolution systems where ideas of guilt and punishment are replaced by responsibility and restitution.[311] An alternate option is to create a parallel track whereby an established restorative justice system can run alongside, but independent of, the mainstream criminal justice system.[312] Thus, once a the decision has been made to divert the matter there are no sanctions linking it back to the criminal justice system.[313] The focus of this dissertation is pre-trial diversion to mediation programmes exploring the possibility a separate restorative justice path that is still linked to the formal criminal justice system.[314] This approach is encapsulated by the aims of the CJA which seeks to divert offenders away from the formal criminal justice system towards restorative justice programmes.[315]

The aim of this chapter is to investigate the concept of mediation and more specifically criminal mediation which can be affected through VOM and FGC. Thereafter, the constitutionality of diversion to private, non-court processes will be evaluated.

4.2. MEDIATION DEFINED

There are differing definitions of mediation, however apparent in all is the idea that mediation is a process in which the parties endeavour to reach a settlement through

[311] Skelton op cit note 19 at 504.
[312] Ibid.
[313] Ibid.
[314] Ibid.
[315] Supra Section 1.

negotiations facilitated by an independent third party ('the mediator').[316] Through negotiations, the mediator assists the parties in identifying the issues in dispute and to develop options allowing for a mutually acceptable agreement to be reached.[317] Unlike judges or magistrates, mediators cannot make binding decisions.[318] Additionally, in contrast to litigation, there is no winning or losing party, either the parties agree on a mutually beneficial outcome, or there is no result.[319] However, if mediation is unsuccessful, disputants may still resort to formal litigation proceedings.[320]

Mediation sessions are conducted in private and are without prejudice, which is essential to the confidential nature of the process.[321] Furthermore, mediation is generally speedy, flexible, informal, and cost-saving.[322] Mediation is characterized by its reconciliatory nature particularly in instances where personal or business relationships have broken down thus, it is a flourishing practice in family, labour and commercial law.[323] Mediation bridges poor communication and mistrust between disputants, re-orientating the parties towards each other and the goal of achieving a mutually beneficial agreement.[324]

ADR is said to produce better results and settlements that are superior to court judgments, because the participants are free to go beyond the legal definition of the

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[316] Also known as the 'neutral', the mediator should be an independent, mutually acceptable third party who will listen to both sides of the dispute and make proposals or recommendations for resolution. Brand et al op cit note 128 at 20.
[317] Ibid at 11.
[318] Ibid at 136.
[319] Ramsden P *The Law of Arbitration: South African and International Arbitration* (2009) 3.
[320] Parties have nothing to lose in first trying to resolve their dispute through mediation. Meintjies-VDW et al op cit note 1 at 205.
[321] Boulle & Rycroft op cit note 30.
[322] Brand et al op cit note 128 at 20.
[323] Alexander N *International and Comparative Mediation: Legal Perspectives* (2009) 12.
[324] Edwards op cit note 25 at 442.

scope of their dispute and can search for creative solutions to the problem.[325] Furthermore, disputing parties can select the mediator based on their specific expertise with regards to the process or subject-matter of the dispute and are thus, saved the cost and time of educating the fact-finder. [326]

4.3. DIVERSION TO CRIMINAL MEDIATION

Diversion is the channeling of *prima facie* cases from the formal criminal justice system on certain conditions[327] to extra-judicial programmes, at the discretion of the prosecution.[328] Diversionary options do not intend on making offenders less accountable nor less responsible for their actions, but rather seek to provide offenders with the opportunity for rehabilitation without suffering the stigmatising and brutalising effects of the criminal justice system.[329] Such programmes are established to divert offenders into less costly, less time-consuming and less severe options, which can be achieved through VOM and FGC.[330]

4.3.1. Victim-Offender Mediation (VOM)

VOM is a growing restorative justice movement that originated in Kitchener, Canada in 1974 and has consequently begun to take hold in various jurisdictions.[331] The 'Kitchener Experiment' brought two teenage criminals who went on a vandalism spree

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[325] Lieberman, J and Henry, J 'Lessons from the Alternative Dispute Resolution Movement' (1986) The *University of Chicago Law Review* Vol. 53 429.
[326] Ibid at 431.
[327] Specified by the legislation governing each programme, for example some programmes may only deal with youth offenders, others may be limited to specific types of crime.
[328] Terblanche, S 'The Child Justice Act: A Detailed Consideration of Section 68 as a Point of Departure with Respect to the Sentencing of Young Offenders' (2012) *ISSN* Vol 15 No 5 446.
[329] Monograph op cit note 21 at 76.
[330] Umbreit, et al 'Victim-Offender Mediation: Three Decades of Practice and Research' (2004) *Conflict Resolution Quarterly* 22 No. 1 291.
[331] Umbreit et al op cit note 329 at 279.

to meet face-to-face with their victims, converse with them, apologise and come to an agreement for restitution.[332] Thus, highlighting the transformative and reconciliatory nature of VOM.[333]

While many other types of mediation are settlement driven, VOM is primarily dialogue driven, with emphasis on victim healing, offender accountability and making amends through the restoration of losses.[334] For VOM to work the parties must be willing to participate, there must be something to negotiate about and feelings to be dealt with.[335] Dialogue between the parties is vital as it addresses the emotional and informational needs of victims, and is crucial to healing and development of victim empathy in the offender.[336]

Mediation programmes vary in their structure and types of disputes but generally follow the same procedure.[337] The process can broadly be split into four phases, the first involves screening, intake, and assignment to a mediator.[338] If the case is considered suitable for mediation and the parties are fully informed about diversion, the programme, its aims and requirements then the offender is considered a suitable candidate and approval from the prosecutor is required.[339] Thereafter, a mediator is assigned to the case and prosecution is deferred pending attempts to resolve the matter.[340]

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[332] Morris, A and Maxwell, G *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001) 43.
[333]Ibid.
[334] Ibid at 280.
[335] Muntingh op cit note 11 at 34.
[336] Ibid.
[337] Rice op cit note 157 at 22.
[338] Muntingh op cit note 11 at 35.
[339] Ibid.
[340] Ibid.

The mediator then holds separate preliminary meetings with the victim and offender to obtain consent for the joint meeting, to introduce and explain the programme and its processes and to briefly listen to each side's story to confirm whether the case is suitable for mediation.[341]

The third phase, involves the mediation meeting between victim and offender, during which the mediator explores the ground rules, procedure and roles of each participant.[342] Each side gives their version of the facts, the victim states their emotional experiences and how the crime has impacted them, each party can share information and ask the other questions about the crime.[343] At the end of the process the victim should understand why the offender committed the crime and the offender should understand the impact of crime on the victim.[344] Thus, allowing for a mutually beneficial agreement to be reached which offers restitution to the victim, holding the offender accountable for the losses incurred.[345]

The last phase involves reporting, monitoring, and following up.[346] If an agreement is reached and signed by parties, the mediator will write a comprehensive report which is given to the prosecutor and presiding officer.[347] The agreement should thereafter be monitored to ensure the offender's compliance and to keep a record in case they reoffend.[348] If mediation is successful the charges are dismissed.[349] However, if it is unsuccessful an investigation into the circumstances surrounding the failure will be

[341] Ibid at 36.
[342] Ibid.
[343] Ibid at 37.
[344] Which may include physical loss, fear, anxiety, mistrust, suspicion, anger, secondary victimisation by the judicial system. Ibid at 36.
[345] Morris & Maxwell op cit note 331 at 41.
[346] Muntingh op cit note 11 at 37.
[347] Ibid.
[348] Ibid.
[349] Rice op cit note 157 at 22.

held and if it is due to wilfulness on the offender's part, the matter is referred back to the criminal justice system and the charges are reinstated.[350]

There have been many attempts at VOM projects in South Africa, with some successful programmes being carried out.[351] However, there exists no large-scale funding and support from practitioners and the government for diversion to mediation programmes as this does not fit in with the retributive paradigm. An example of a successful mediation project is discussed below.

4.3.1.1. Victim-Offender Conferencing (VOC) Pilot Project

The VOC pilot project was established in 1999 and operative until 2003, it sought to build on restorative justice experiences in line with African customary values.[352] It was conceived as a community based initiative for dealing with crime through face-to-face mediated interactions between victims, offenders and members of their support networks.[353] It aimed to empower the communities to work in partnership with the formal criminal justice system and was intended as a diversionary process to relieve the workload of the formal justice system.[354] It therefore sought to work in close cooperation with the police and justice sectors, primarily officials based at the Magistrate's Courts.[355]

[350] Skelton op cit note 19.
[351] Lowe, C Victim Offender Mediation Pilot Project in the Boksburg Correctional Facility August 2014 Khulisa Social Solutions 2.
[352] Dissel op cit note 72.
[353] Ibid.
[354] Ibid and monograph op cit note 20 at 89.
[355] Dissel op cit note 72.

The project was established in three areas within Gauteng, South Africa, where it partnered with local community-based organisations experienced in dealing with the criminal justice system and mediation or conflict resolution.[356] A project manager was appointed and volunteer mediators who had received training on restorative justice and VOM were appointed at each site.[357] Most cases were referred to the VOC project by prosecutors after assessing the merits and seriousness of the case.[358] Criminal prosecution was suspended pending completion of the VOC process.[359] Rather than targeting young offenders exclusively, the VOC project was open to all age groups and types of offenders.[360]

The VOC project focused on allowing the victims to express their needs and feelings, and to create an environment for the offender to understand the consequences of his or her actions.[361] This approach allows for the facts and emotions of the offence to be dealt with in a safe environment, encouraging the parties to move towards reconciliation, redress, and restitution.[362] Fundamental restorative justice principles underpinned the project, whereby the offender had to acknowledge the injustice, take responsibility for the offence, confront the consequences of their actions and view the victim as a person with real feelings and needs.[363]

For the process to be successful, participation from both victim and offender was required.[364] Thus, if either one of the parties refused, mediation was stopped, and the

[356] Ibid.
[357] Ibid.
[358] Ibid.
[359] Lowe op cit note 350 and Monograph op cit note 20 at 89.
[360] Ibid.
[361] Lowe op cit note 350 at 3.
[362] Dissel op cit note 72.
[363] Monograph op cit note 20 at 90.
[364] Ibid.

matter was referred back to formal court proceedings.[365] The VOC project was framed to recognise that the victim and offender are not the only parties affected by the offence.[366] It assumed that the secondary victims such as family members, friends and others involved in the parties' lives may be able to assist in the resolution of the dispute since they play a role in supporting and caring for the parties.[367] Unfortunately the actual role of support persons was limited in the VOC project.[368]

The sites monitored the agreements and assisted the victim to withdraw charges against the offender if the settled conditions were fulfilled.[369] However, the prosecutor bore the ultimate decision as to whether the agreement was sufficient, or whether the case should proceed to trial. [370]Therefore, even if an agreement was reached during mediation, it was not always a guarantee that the case would be withdrawn.[371]

However, this project ceased in 2003 and despite the advances made and the existence of many other successful pilots and mediation programmes, VOM in South Africa remains a haphazard effort often undertaken in isolation by organs of state or non-governmental organisations without consistent funding and an organised structured.[372]

Another method of mediating criminal disputes is via FGC which seeks to include all stakeholders in the process, not just the direct victims.[373]

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[365] Ibid at 91.
[366] Ibid.
[367] Lowe op cit note 350 at 3.
[368] Dissel op cit note 72.
[369] Monograph op cit note 20 at 97. An example of a condition may include the requirement for monetary compensation to the victim by the offender.
[370] Ibid.
[371] Ibid at 98.
[372] Lowe op cit note 350 at 3.
[373] Ibid at 4.

4.3.2. Family Group Conferences (FGC)

FGC are a restorative justice process which brings together the victim, offender, and their families to explore ways to correct the wrong and make plans to prevent re-offending.[374] 'Family' is defined in the broadest sense and apart from including direct kin,[375] it includes secondary victims such as family members, friends, community members and other supporters of the victim and offender.[376]

FGC are based on the notion that traditionally families and communities have dealt with offending therefore, they know best how to deal with such behaviour. [377] The facilitator is tasked outlining the general legal procedures, what will happen if the conference is successful or if it fails as well as outlining what the family feels comfortable with in terms of the process as this assists in making the practice culturally appropriate.[378]

The FGC process should allow the story of the offence to be told from the perspective of all concerned and aim to correct the wrong thereby restoring balance in the community.[379] FGC allow the victim to speak and express his or her feelings.[380] Thereafter, the offender and the family can then discuss the facts and their feelings.[381] The family then discuses restoration and plans to prevent re-offending and once a decision has been made, it is read aloud and everyone has the opportunity to provide

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[374] Branken, N and Pretoria N 'An Introduction to Family Group Conferences' in Muntingh, L.M *NICRO Diversion Options* (1993) National Institute for Crime Prevention and the Rehabilitation of Offenders 41.
[375] Ibid.
[376] Morris & Maxwell op cit note 331 at 7.
[377] Branken & Pretoria op cit note 373.
[378] Ibid.
[379] Ibid at 43.
[380] Ibid.
[381] Ibid at 46. If the parties are not present at the actual conference, they may express their views through letters and digital recordings.

comments and suggestions.[382] If the participants agree with the decision, it is written up. However, if there is disagreement the matter is referred to the criminal justice system where the prosecutor can decide to re-convene the conference or accept the family's decisions.[383]

Since mediation is a private and confidential process the constitutionality of diversion to such practices needs to be addressed.

4.4. THE CONSTITUTIONALITY OF DIVERSION TO MEDIATION

Mediation may aid in facilitating the constitutional goal of restoring the injustices of South Africa's past through encouraging reconciliation and compromise between disputants in the face of adversity.[384] Moreover, allowing disputants the opportunity to discuss their differences with the aim of reaching a harmonious solution, would unite South Africans, promote social and restorative justice, and ensure that each party's human dignity, equality and freedom are exercised. Therefore, mediation can be said to give effect to the preamble of the Constitution.

Given South Africa's unjust and unequal past, access to justice is considered 'an inalienable constitutional right following from its constitutional democracy'.[385] The fundamental benefits and advantages that mediation provides for disputants includes the less costly and less complex ways of resolving criminal disputes, increased participation and reconciliation and the benefit of alleviating the burden on the

[382] Ibid.
[383] Ibid.
[384] Preamble to the Constitution.
[385] Radebe J *Challenges Facing Access to Justice in S.A* The Department of Justice and Correctional Development 16 October 2012.

courts.[386] These beneficial aspects would fundamentally aid in promoting access to justice in South Africa.

Section 34 entitled 'Access to Courts' states that:

> 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

The purpose of this section is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by way of the law.[387] Mediation is not conducted in a public forum nor tribunal and is in fact a private and confidential process.[388] Therefore, if disputants were compelled to partake in mediation, a private process not provided for in Section 34, this may be construed as unconstitutional. Furthermore, a mediator cannot decide on the law nor arrive at a final judgment on the behalf of the parties, as a court or arbitral tribunal does.[389] However, there is no compulsion on disputants to settle their matter through mediation and no barrier preventing disputants from reverting to normal court proceedings. Therefore, a party's right of access to courts cannot be infringed since it remains intact and available throughout the alternate process.

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[386] Ibid.
[387] *Lesapo v North West Agricultural Bank and Another* 1999 (12) BCLR 1420 (CC) 8. The rule of law may f be understood as an obligation placed upon the state 'to provide the necessary mechanisms for citizens to resolve disputes that arise between them', with 'its corollary in the right or entitlement of every person to have access to courts' or similar independent forums, provided by the state for the settlement of their disputes.
[388] Umbreit et al op cit note 329 at 291.
[389] Ibid.

4.5. CONCLUSION

It has been established that the nature of the South African justice system is adversarial.[390] However, it is clear that mediation is effective in meeting the felt needs of the victims and offenders who participate, it tends to have a positive impact on restitution and recidivism, it can serve as a diversion mechanism from court proceedings, and it shows potential for reducing the costs and court load of criminal trials.[391] Further, diversion to mediation does not pose any constitutional barriers.

CHAPTER 5

A CASE FOR MEDIATION WITHIN THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM: RESTORATIVE JUSTICE AND THE TRUTH AND RECONCILIATION COMISSION AS A BLUEPRINT

5.1. INTRODUCTION

Restorative justice is inherently orientated towards transformation, which is exactly what South Africa needs due to the decades of human rights abuses and oppression suffered under colonial and apartheid rule.[392] However, even in South Africa's constitutional and democratic state the ongoing human rights violations and subjugation endures under its current government.[393] There is a lack of justice and the South African criminal justice system in its current form is disserving the fundamental purposes it aims to achieve, namely rehabilitation of offenders, reduction of crime rates and reconciliation of the nation.[394]

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[390] See Chapter 2.
[391] Umbreit et al op cit note 329 at 297.
[392] Llewellyn, J and Howse R 'Institutions for Restorative Justice: the South African Truth and Reconciliation Commission' (1999) *The University of Toronto Law Journal* Vol. 49, No. 3 379.
[393] There is a growing distrust in the democratic government because of its governance failures and continued misuse of public funds and corruption. See News24 'Archbishop Thabo Makgoba warns of distrust in the South African government' available at https://www.news24.com/news24/southafrica/news/archbishop-thabo-makgoba-warns-of-distrust-in-the-south-african-government-20211225 (accessed on 25 December 2021).
[394] See Chapter 3 for the purposes and flaws of the criminal justice system.

This chapter will explore the notion of restorative justice and its roots in South Africa by examining ACL dispute resolution mechanisms. Thereafter, the legislative background and influential statutes, such as the CJA which support the influence of restorative justice in South Africa will be analysed to demonstrate the potential acceptability of such interventions into the South African criminal justice system. What follows is a discussion of the TRC which is used as a case study to highlight the reconciliatory and restorative approach taken by the South African government in response to the gross human rights violations suffered during the apartheid era.[395] Thereafter, the TRC process will be contrasted with the retributively motivated Nuremberg Trials which took place following the atrocities of World War II.

5.2. CUSTOMARY LAW DISPUTE RESOLUTION

For as far back as oral history can take us, African communities have seen justice through a restorative lens.[396] Traditional conflict resolution methods and customs are deeply rooted in South Africa's history, they form part of time-proven social systems in which the objective extends past merely settling a case.[397] At heart of African adjudication are the concepts of reconciliation, restoration, and harmony.[398]

The traditional model of restorative justice currently practiced in rural areas of South Africa is similar to the indigenous traditions in countries like New Zealand and Canada.[399] These aboriginal traditions involve elders who preside over the resolution of issues experienced by members of the community, that cannot be resolved at the

[395]Skelton & Frank op cit note 14 at 107.
[396] Ibid.
[397] Choudree, R *Traditions of Conflict Resolution in South Africa* (1996) L.L.M dissertation, University of Durban-Westville 10.
[398] Skelton & Frank op cit note 14 at 104.
[399] Skelton op cit note 19 at 499.

family level.[400] These structures listen to the parties stories and then make collective decisions regarding the outcomes, which aim to heal relationships and often include reparation.[401] To indicate that the crime has been expiated, sometimes an animal is sacrificed or a meal is shared between the parties, which allows for reintegration of the offender into the community, showcasing the desire to avoid segregating or marginalising the offender into a sub-community of social rejects.[402]

One of the most important features distinguishing Western and African processes of dispute settlement is the manner in which the social relationships between the parties involved are treated.[403] Restorative justice sees crime as a violation of people and relationships.[404] Whereas, retributive justice sees crime as a violation of the law which deserves punishment.[405] Restorative justice focuses on reconciling the parties and restoring harmonious relations with the community, which is achieved by ensuring that all stakeholders are fully involved in the process, by attending the conferencing or court proceedings, asking questions throughout and providing support to the parties.[406]

Traditional Courts[407] in South Africa mirror the mechanisms of governance and conflict resolution that have served traditional African societies for centuries.[408] Thus, they are viewed as more informal and less intimidating to the people who use them.[409] The

[400] Ibid.
[401] Ibid.
[402] Monograph op cit note 20 at 17. Social rejects are considered less desirable by society because they have previously committed a crime. Thus, such individuals are deliberately excluded from social relationships and interactions.
[403] Ibid at 11.
[404] Skelton and Frank op cit note 14.
[405] Ibid.
[406] Ibid at 16.
[407] See 2.3.5 above.
[408] Skelton & Frank op cit note 14 at 105.
[409] Choudree op cit note 396 at 13.

headman or chiefs who preside over traditional courts are generally familiar with the populace that use the courts and are revered to an extent that judges are not.[410] Contrastingly, Western-orientated courts are mired in adversarial procedures and processes that do not lend themselves to activism on the part of the presiding officers.[411] The ethos of Traditional Courts is to deter such intervention by judicial officers trained in different schools of precedents, rules of court, statutory interpretation and similar devices designed to attempt justice between man and man.[412]

Sachs J affirms the nature of African customary dispute resolution stating that:

> 'in traditional African society every man was his own lawyer, and his neighbours too, in the sense that litigation involved whole communities, and all the local men could and did take part in forensic debate'.[413]

In my opinion, a restorative approach to dispute settlement truly achieves what justice ought to, as it involves rehabilitation and reintegration of offenders back into the community after they have made amends. The stigma of being an ex-convict or having a criminal record prevents one from obtaining honest work and deems one a social outcast. It is vital in a country such as South Africa, which is entrenched with racial and economic inequality, that individuals are able to settle their disputes man-to-man and come to a resolution mutually agreed upon.

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[410] Ibid.
[411] Ibid at 14.
[412] Ibid.
[413] Sachs, A *Justice in South Africa* (1973).

5.3. LEGISLATIVE SUPPORT FOR RESTORATIVE JUSTICE

Restorative justice as an alternative was first promoted in 1992, when the National Institute for Crime Prevention and Reintegration of Offenders (NICRO) framed its diversion programme.[414] A set of policy proposals for the establishment of a separate juvenile justice system in South Africa was developed, with the centrepiece being FGC.[415] A concept which has importantly been incorporated into the CJA.[416]

The 1996 National Crime Prevention Strategy recognised the above proposals, indicating a shift away from a State-centered approach to justice.[417] It was recognised that diversion programmes assist the offender to build personal resources and self-esteem,[418] and serve to strengthen the restorative component of the criminal justice system by mobilising family and community resources in problem-solving.[419]

In the South African Law Commission's Discussion Paper of Community Dispute Resolution Structures in 1999 it was stated that 'because community-based dispute resolution structures serve a useful purpose in meeting the needs of a majority of the

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[414] NICRO offers five diversionary options, Victim-Offender Mediation Programmes, Pre-trial community service in lieu of prosecution, a Youth Empowerment Scheme, The Journey Programme and Family Group Conferencing. To explore more of the work NICRO does see their website available at https://www.nicro.org.za/index.php/nicro-services/interventions-we-offer (accessed on 27 December 2021).

[415] Ibid.

[416] The CJA includes detailed procedures for setting up and running family group conferences in Section 61. Also see 4.3.2. above.

[417] Monograph op cit note 20 at 17.

[418] 'Following a criminal charge of theft (shoplifting), Bandile was referred to NICRO. He was carefully assessed and found suitable to participate in NICRO's adult life skills programme, which he completed successfully. A year later Bandile was shortlisted for a job at Nedbank and called in for an interview. Bandile reported that he openly discussed his previous conflict with the law and the intervention that he had received from NICRO at the interview. He explained that at the time of committing the offence he had "given up on life" and was strongly considering dropping out of school in Grade 11 but that NICRO gave him the chance to look at life "from a different perspective". He was not ashamed to admit to his wrongdoings and eagerly shared that NICRO had taught him essential life skills which resulted in his refraining from committing antisocial and other criminal acts. Bandile was then employed by Nedbank. He expressed his deep appreciation for all that NICRO had done for him and expressed the opinion that he would never have had the chance of securing a job, had it not been for NICRO.' See more NICRO testimonials available through their website at https://www.nicro.org.za/index.php/nicro-services/testimonials#nicro-was-the-right-decision (accessed on 26 December 2021).

[419] Dissel op cit note 72 and Skelton op cit note 19 at 501.

South African population for accessible justice, these structures must be recognised and supported by law'.[420] Additionally, legislation should ensure that community structures remain informal, flexible in their procedures and inexpensive in their operations, they must be non-alienating, accessible and responsive to the needs of the communities in which they operate.[421]

In its 2000 Justice Vision paper, the Department of Justice outlined its aim to harmonise the different courts and community structures, and to provide opportunities which enable people to choose appropriate ways of resolving their disputes by making different kinds of courts and dispute resolution mechanisms available.[422] Traditional Courts continue to exist and parties are free to select which forum they would like their dispute to be handled in.[423] However, there are geographical jurisdictional limitations as well as restrictions on the type of criminal offences that Traditional Courts can hear.[424] Thus, the above vision has not been cast as Traditional Courts continue to be seen in an inferior light with governing legislation not accurately reflecting the voluntary and consensual nature of ACL and its practices.[425]

[420] Skelton & Frank op cit note 14 at 106.
[421] Ibid.
[422] Dissel op cit note 72.
[423] See part 2.3.5. above where the nature of traditional courts are discussed.
[424] Traditional Courts Bill supra note 120.
[425]Removal of the opt-out clause in the Traditional Courts Bill means that people in rural communities are forced to hear their matters in traditional courts within their geographical location, thus entrenching the tribal boundaries of the former Bantustans, established during apartheid rule. This infringes on the right to equality, as it creates a separate system of law that distinguishes people based on their culture and race. 'The Traditional Courts Bill Ignores the Constitutional Rights of the Communities it is Meant to Protect' 18 March 2021 The Daily Maverick available at https://www.dailymaverick.co.za/article/2021-03-18-traditional-courts-bill-ignores-the-constitutional-rights-of-the-rural-communities-it-is-meant-to-protect/ (accessed 5 January 2022).

In 2012 South Africa adopted a National Policy Framework wherein the South African government recognised the value of restorative justice in building safer communities.[426]

These abovementioned approaches opened the door for a number of community based organisations to initiate alternative justice models.[427] A VOC Pilot Project was initiated by a collective of non-governmental organisations[428] in 1999 which was operative until 2003.[429] Another, VOM Project designed to facilitate dialogue between victims and offenders in matters involving serious violent crime, such as rape and murder, was implemented by Khulisa Social Solutions (KSS) in collaboration with the Boksburg DCS in 2014.[430]

However, the CJA is a piece of legislation that is the clearest manifestation of these policy developments.[431]

5.3.3. The Child Justice Act (CJA)

Diversion is an embodiment of and vehicle for restorative justice, which has taken root in South Africa through the CJA operating in conjunction with the CPA.[432] A distinct criminal justice system has been established for minors based on the principles of restorative justice with the aim of diverting child offenders away from the mainstream criminal justice system.[433] This is done in order to break the cycle of crime which the

[426] Radebe op cit note 384.
[427] Dissel op cit note 72.
[428] These NGOs were Wilgerspruit Fellowship Centre, Community Dispute Resolution Trust, and Centre for the Study of Violence and Reconciliation. In the second two years the VOC project was run by the Restorative Justice Initiative.
[429] See 4.3.1.1. above. Monograph op cit note 20 at 89.
[430] Lowe op cit note 350.
[431] Monograph op cit note 20 at 17.
[432] Ibid.
[433] Section 51 read with Section 1 of the CJA.

child may be involved in and to prevent exposure to the adverse effects of the formal criminal courts.[434]

The CJA promotes the spirit of Ubuntu by fostering the child's sense of dignity and self-worth, reinforcing their respect for human rights and fundamental freedoms by holding children accountable and safeguarding the interests of victims through a restorative justice response, supporting reconciliation, and involving families, victims and communities.[435]

Procedures in terms of the CJA are informal and inquisitorial,[436] unlike criminal trials. Moreover, the sentencing provisions reflect a restorative justice approach,[437] as highlighted in *S v Maluleke*[438] where it was held that restorative justice emphasises the need for reparation, healing, and rehabilitation rather than harsh sentences and long periods of imprisonment which add to jail overcrowding and greater risks of recidivism. Further, in *S v CKM*[439] the court stated that the CJA replaces the traditional pillars of punishment, retribution, and deterrence by the need to understand a child offender in order to correct errant behaviour and re-integrate the child into the community.

Diversion is a core component of the CJA and must include a restorative element which seeks to ensure that the child understands the impact of his behaviour on

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[434] Theophilopoulos et al op cit note 34 at 546.
[435] Dissel op cit note 72.
[436] Section 1 and 2 of the CJA.
[437] Supra Section 69– the principal objective of sentencing in a child justice court is to encourage the child to acknowledge accountability for the harm caused by his or her criminal conduct. Section 73 allows for restorative justice and community-based sentences such as referral to FGC, VOM or any other restorative process.
[438] 2008 (1) SACR 49 (T) para 26
[439] 2013 (2) SACR 303 GNP para 7.

others.[440] Diversion is offered at three levels,[441] level one includes programmes which are not particularly invasive and are of short duration.[442] The second and third levels,[443] contain programmes of increasing intensity, which can be set for longer periods of time. The intention behind this is to show that diversion can work in a range of situations, even for serious offences.[444]

However, diversion in South Africa operates in a legislative vacuum, through the sole discretion of the prosecutor.[445] It tends to be carried out on an ad hoc basis, with much reliance on positive working relationships between prosecutors and probation officers.[446] Prosecutors are not legally bound to provide reasons to the parties for their refusal to divert however, such reasons must be properly recorded in the police docket.[447] While the CJA gives discretion to prosecutors and judicial officers to defer to restorative justice options, often children are not diverted and rather taken through the formal court system.[448]

The CJA is an exemplar of what the South African criminal justice system needs more of. As seen above, numerous cases have affirmed the benefits of diverting offenders away from the formal criminal justice system towards restorative justice mechanisms. However, this benefit is currently only afforded to children. I believe that such

[440] Monograph op cit note 20 at 78.
[441] Section 53 of the CJA.
[442] Supra Section 53(3).
[443] Supra Section 53(4).
[444] Skelton & Frank op cit note 14 at 114.
[445] Chapter 6 of the CJA is titled 'Diversion by Prosecutor in respect of minor offences. Section 41 provides certain guidelines and factors for the prosecutor to consider when deciding whether to divert the matter.
[446] Skelton op cit note 19 at 502.
[447] Theophilopoulos et al op cit note 34 at 550.
[448] Skelton op cit note 19.

opportunity should be extended along with the benefits of rehabilitation and restorative justice.

Further, since discretion to divert lies with the prosecutor. South Africa needs a paradigm shift away from retributive and towards more restorative mechanisms of achieving criminal justice. Due to the high levels of crime in our country and its tumultuous past, law officials and prosecutors are trained to take a 'tough on crime' approach that seeks to punish criminal offenders by incarcerating them for long periods.[449] However, there are more effective methods of achieving justice outside of the formal criminal justice system and its retributive standard as highlighted by the TRC process.

5.4. THE TRC: A RESTORATIVE APPROACH

The apartheid regime was maintained by acts of manipulation, coercion and violence.[450] The result was a country premised on lies, secrecy and the abuse of basic human rights.[451] Consequently, the transition from a past of mass human rights violations to a future of democracy and respect for human rights could not merely be affected by a change in government.[452]

The transitional period was crucial for promoting reconciliation in South Africa.[453] Post-apartheid the Promotion of National Unity and Reconciliation Act 34 of 1995[454] was enacted to provide comprehensive legislation for the investigation, rehabilitation and compensation for the human rights violations committed between March 1960 and 10

[449] In line with South Africa's mandatory minimum sentencing legislative regime. See 3.4.4. above.
[450] Skelton op cit note 19 at 498.
[451] Llewellyn & Howse op cit note 391 at 365.
[452] Ibid at 366.
[453] Dissel op cit note 72.
[454] Promotion of National Unity and Reconciliation Act 34 of 1995 (hereinafter the PNUR Act).

May 1994.[455] The PNUR Act formally established the TRC,[456] which was charged with establishing as complete a picture as possible of the causes, nature and extent of the human rights violations.[457] The purpose of the TRC was not focused on vengeance and punishment, but rather on determining what happened and why.[458] Through its process victims were afforded the opportunity to tell their stories, to be heard, acknowledged and compensated.[459] Perpetrators were held accountable[460] for their actions and given the opportunity to acknowledge their responsibility and contribute to the creation of a new South African society.[461]

The TRC consisted of three committees with differing responsibilities.[462] The Human Rights Violation Committee was responsible for conferring victim status on those individuals who qualified under the PNUR Act and came forward to make a statement.[463] The Amnesty Committee was responsible for fulfilling the imperative enshrined in the Interim Constitution[464] that 'amnesty shall be granted in respect of

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[455] Supra preamble.
[456] Supra Section 2(1) and Monograph op cit note 21 at 66.
[457] Section 1 (1) (ix) of the PNUR Act defines gross violations of human rights as: the violation of human rights through the killing, abduction, torture or severe ill-treatment of any person; or any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from the conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive.
[458] Llewellyn & Howse op cit note 391at 356.
[459] Skelton op cit note 19 at 498.
[460] By having to confess their guilt and make a full disclosure of all the relevant facts relating to the act, including motive and context. O'Brien, K 'Truth and Reconciliation in South Africa: Confronting the Past, Building the Future?' (2000) International Relations Vol XV (2) 9.
[461] Skelton op cit note 19 at 498.
[462] Llewellyn & Howse op cit note 391 at 367.
[463] Section 1(xix) of the PNUR Act defines victim to include persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights as a result of a gross violation of human rights; or as a result of an act associated with a political objective for which amnesty has been granted; persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in paragraph (a) who were in distress or to prevent victimization as may be prescribed; Such relatives or dependants of victims as may be prescribed.
[464] Constitution of the Republic of South Africa Act 200 of 1994 (hereinafter the interim Constitution).

acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past'.[465] Individuals had to apply for amnesty[466] in respect of specific acts and if certain conditions[467] outlined in the PNUR Act were met it was granted.[468] Amnesty was provided in exchange for the truth.[469] Lastly, the Reparation and Rehabilitation Committee was mandated to make recommendations to the government regarding the provision of reparations and rehabilitation to victims[470] as well as recommendations concerning the prevention of future abuses and the steps necessary to create a culture of human rights respectfulness in South Africa.[471]

Desmond Tutu, TRC Chairman, affirmed that the TRC's work was based on the concept of restorative justice compatible with an African view of justice.[472] Further, Deputy Chairperson, Alex Boraine, described the process as:

> 'holding the tension of the political realities of a country struggling through a transition founded on negotiation and an ancient African philosophy, Ubuntu, which seeks for unity and reconciliation rather than revenge and punishment'.[473]

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[465] Supra.
[466] Amnesty applications were based on the testimony from the applicant. Full amnesty was granted to perpetrators who fully confessed to their crimes and if that crime had a political origin. O'Brien op cit note 459 at 7.
[467] Such acts must have been committed in pursuit of a political objective, must have occurred before the cut-off date in the PNUR Act, application must have been made before the deadline, and individuals were required to make full disclosure to the Commission. Llewellyn & House op cit note 391 at 367.
[468] Mamdani, M *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa* (2002) Diacritics Vol 32. 33.
[469] Llewellyn & Howse op cit note 391 at 368.
[470] Such recommendations included individual reparation grants for victims and their families, symbolic measures such as monuments, memorial days, and the establishment of museums, community rehabilitation which may include health care in order to deal with the psychological and physical needs of victims.
[471] Llewellyn & Howse op cit note 391.
[472] Ibid.
[473] Ibid at 362.

It is clear how the TRC attempted a restorative approach to dealing with South Africa's tumultuous past. The TRC's slogan was 'truth the road to reconciliation'.[474] This purpose is summed up by Mahomed J in *Azanian People's Organisation v President of the Republic of South Africa*:[475]

> 'Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling…The Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible'.

Truth, like justice, is a disputed concept.[476] Criminal trials are seen as a means of establishing the truth however, each side merely puts forward their best argument therefore the whole truth is not always uncovered.[477] In order for reconciliation to occur, an exchange of truths is required. Each side must be able to present and have its truth heard and acknowledged.[478] Therefore, mediation which promotes dialogue between the parties is an effective way of uncovering the truth, leading to closure, and healing.

Restorative aspects of the TRC included the involvement of society at large, victim-centrality in the process, and the forward-looking nature of the process motivated by the goal of nation building and reconciliation of communities.[479] Unlike the criminal

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[474] Ibid.
[475] 1996 8 BCLR 1015 CC para 17.
[476] Clark op cit note 5 at 335.
[477] Ibid.
[478] Ibid.
[479] Llewellyn & Howse op cit note 391 at 368

justice system which focuses on individual responsibility,[480] the TRC emphasised the social and institutional context with an entire chapter of its report dedicated to understanding the perpetrator's motives and perspectives.[481]

The reconciliatory objectives of the TRC were highlighted in the case of Amy Biehl, an American anti-apartheid activist, who was stabbed and stoned to death by a mob of black South African men while shouting anti-white slurs.[482] Four men were convicted of her murder and sentenced to eighteen years imprisonment, however, they were pardoned by the TRC as their actions were deemed politically motivated.[483] Biehl's family supported their release after serving only four years in prison. Her father even shook their hands and stated that:

> 'the most important vehicle of reconciliation is open and honest dialogue, we are here to reconcile a human life that was taken without an opportunity for dialogue. When we are finished with this process we must move forward with linked arm.'[484]

The TRC was a bold model of restorative justice.[485] However, not everyone was in support of the process. It was argued that granting amnesty to offenders, robs victims of their right to seek justice through criminal or civil court proceedings.[486] This argument was the subject of challenge in the case of *AZAPO v President of the Republic of South Africa*[487] however, the CC held that the Constitution allowed for the

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[480] The individual has committed the crime and thus to restore balance in society, the individual should be punished proportionally.
[481] Llewellyn & Howse op cit note 391 at 367.
[482] Statement By the TRC on Amnesty Arising From Killing of Amy Biel available at https://web.archive.org/web/20131024072234/http://www.info.gov.za/speeches/1998/98729_0w0699810056.htm (accessed on 20 December 2021).
[483] Ibid.
[484] Peacemaker Hero: Amy Biehl available at https://myhero.com/a_biehl (accessed on 20 December 2021).
[485] Monograph op cit note 20 at 74-75.
[486] Llewellyn & Howse op cit note 391 at 369.
[487] *AZAPO* supra note 474.

limitation of the right to have disputes settled by a court of law[488] in the interest of national unity and reconciliation.[489] Furthermore, the option to prosecute was still available for acts in which amnesty was denied or not sought, [490] as seen with the infamous 'Cradock Four' case.[491]

For most victims, an apology from their offender can lead to true healing. Moreover, according to the tenets of restorative justice it is the perpetrator's duty to make reparation for their crime.[492] Therefore, many victims were frustrated by the fact that few perpetrators directly apologised and offered restitution to survivors and their families.[493] However, these features were not made a requirement of the process since the government assumed responsibility for the reparations.[494]

Justice is often thought to necessitate punishment, rather than acknowledgement and dialogue.[495] Thus, the TRC was perceived as lacking justice and ultimately seen as an uneasy compromise with retributive justice.[496] However, the TRC embodied a different kind of justice, namely a political restorative justice, which aimed to address the legitimate concerns of the victims and survivors whilst seeking to reintegrate perpetrators into the community.[497] The TRC demonstrated that punitive criminal

[488] Section 22 of the Interim Constitution.
[489] Supra expressed in the epilogue.
[490] Clark op cit note 5 at 333.
[491] The TRC denied amnesty for the six security officers involved in the murders of four anti-apartheid activists who were from the town of Cradock, Eastern Cape. The four were abducted and murdered by South African security police in 1985. Corliss, C 'Truth Commissions and the Limits of Restorative Justice: Lessons Learnt from South Africa's Cradock Four' (2013) *Michigan State Law Review* 273.
[492] Platow et al op cit note 10 at 375.
[493] Ibid.
[494] Monograph op cit note 20 at 74-75.
[495] Llewellyn & Howse op cit note 391 at 356.
[496] Since perpetrators were not punished, but instead provided amnesty. Skelton op cit note 19 at 498.
[497] Ibid.

justice models are not well suited to addressing the reparative needs of victims.[498] Although some still believe prosecution was the answer, I believe victims had more to gain from the process of telling their stories, obtaining the truth and receiving reparations, than they would following complex, lengthy, and grueling criminal trial proceedings.[499]

The TRC's emphasis on reconciliation and restorative justice was in sharp contrast to the approach taken by the Nuremberg Trials which were premised on retribution and punishment.[500]

5.5. THE NUREMBERG TRIALS: A RETRIBUTIVE APPROACH

The Nuremberg trials consisted of a series of criminal trials held in Germany between 1945 and 1946 in which former Nazi leaders were indicted[501] and tried as war criminals by an International Military Tribunal.[502] In total 209 defendants were indicted with 161 defendants convicted.[503] Most defendants were convicted of complicity in murders, atrocities, and violations of the rules of warfare.[504]

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[498] Ibid. Majority of victims only desired information on where their husband, son, sister, or mother was buried. They were concerned about the truth for closure rather than punishment of the perpetrator. O'Brien op cit note 459 at 10.
[499] Ibid.
[500] Crocker, D 'Retribution and Reconciliation' (2000) *Report from the Institute for Philosophy and Public Policy* Vol 20(1) 5.
[501] An indictment is a formal written accusation of a crime affirmed by the grand jury and presented to a court for trial of the accused.
[502] The Tribunal's authority to conduct the Trials came from the London Agreement of 1945 which was initially agreed to by representatives from Great Britain, The United States and the Soviet Union, however later 19 other nations accepted the agreement allowing the Tribunal to conduct trials of major war criminals whose offences had no particular geographic location. Britannica, The Editors of Encyclopaedia. "Nürnberg trials". *Encyclopedia Britannica*, 30 Nov. 2021, https://www.britannica.com/event/Nurnberg-trials. (accessed 7 January 2022).
[503] Taylor, T 'The Nuremberg Trials' (1955) *Columbia Law Review* Vol 55(4) 518.
[504] Ibid.

The Tribunal had the authority to find any individual guilty of the commission of war crimes and to declare any group or organisation criminal in character.[505] If found as such, the prosecution could prosecute individuals for having been members of the group.[506] In line with general criminal trial procedures, the defendant was entitled to a copy of the indictment, to offer an explanation for the charges brought against him, to be represented by counsel and to confront and cross-examine the witnesses.[507]

The retributive theory believes that wrongdoers deserve punishment proportional to the harm done.[508] Thus, perpetrators should get no more than their 'just deserts'.[509] In accordance with this concept, the Nuremberg trials found guilty and punished Nazi leaders, some to a greater degree than others, and acquitted those whom it found not guilty.[510] When the Tribunal pronounced its judgment twelve of the defendants were sentenced to death, seven were sentenced to imprisonment for terms ranging from ten years to life and three defendants were acquitted.[511]

Retribution differs from vengeance, since there is some constraint to retribution, but revenge is unlimited.[512] The Nuremberg trials had an ambiguous legacy because they intended to seek revenge through the infliction of capital punishment. [513]

[505] Ibid.
[506] For example, groups such as the Gestapo (the Nazi secret police), the Schutzstaff/SS (parliamentary organisation under the Nazi party) were charged with being criminal in character.
[507] Britannica op cit note 501.
[508] Crocker op cit note 499 at 2.
[509] Ibid at 3.
[510] Ibid at 5.
[511] Taylor op cit note 502 at 510.
[512] Ibid at 3.
[513] Ibid.

It is argued that criminal trials have the aim of vindicating the rights of victims and generating the truth about the past.[514] However, because the Germans kept detailed records of their actions, the trials mainly relied on documentary evidence thus, silencing the nature and meaning of the survivors' Holocaust experiences as there was no emphasis on victim testimony.[515] Consequently, the trials missed a healing opportunity for survivors.[516] The evidence used during the Nuremberg Trials was collected to accuse perpetrators but the full scope of what happened to humanity and the Jewish people was not exposed.[517] As corroborated by Frederick Terna, a holocaust survivor, who stated that:

> 'The Nuremberg trials were seen as a necessary action. War crimes needed to be defined and punished, but the trials did not have an impact on us as survivors. There was only a vague understanding about the extent of the destruction of Jewish communities throughout Europe…Justice was a far-away concept. It certainly was not available on a personal or local level. The Nuremberg trials were a distant happening, important for the abstract concept of international law, but did not touch us personally then.'[518]

The Nuremberg Trials led to the establishment of further international war tribunals which sought to impose punishment on criminals for the violations of laws or customs of war, genocide and crimes against humanity. Examples of which include the International Criminal Tribunal for Rwanda which was established in 1994 by the United Nations Security Council[519] in order to judge individuals responsible for the

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[514] Crocker op cit note 499 at 2.
[515] Danieli, Y 'Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law' (2006) *Cardozo Law Review*, 27(4) 1642.
[516] Ibid at 1640.
[517] Ibid at 1644.
[518] Ibid at 1643.
[519] Security Council Resolution 955.

Rwandan genocide and other serious violations of international law in Rwanda or by Rwandan citizens.[520] At the end of the proceedings the court convicted 85 criminals.[521] The International Criminal Tribunal for the former Yugoslavia also dealt with war crimes that took place during conflicts with the Balkans in the 1990's, where during the Tribunal's mandate 90 criminals were sentenced.[522]

Deeper discussion regarding the impact of these tribunals is beyond the scope of this dissertation, reference was made merely to contrast the reconciliatory approach taken by South Africa after the numerous violations of international humanitarian law inflicted under the apartheid regime. South Africa choose the unique position of looking forward and towards reconciliation and restoration of national unity. As highlighted by Desmond Tutu trials are expensive, time-consuming, and labour intensive. Conducting criminal trials would have diverted valuable resources from areas that needed attention especially after the dismantling of the apartheid regime, such as poverty alleviation and educational reform.[523] Furthermore, the TRC process provided victims with the truth allowing for closure and healing.

5.6. CONCLUSION

The period of transition from a system of historical oppression to a Constitutional democracy was a window of opportunity for legal reformism in South Africa.[524] However, instead of placing greater emphasis on traditional African values and ADR

[520]The United Nations International Residual Mechanism for Criminal Tribunals available at https://unictr.irmct.org/ (accessed on 7 January 2022).
[521] Ibid.
[522] The United Nations Criminal Tribunal for the Former Yugoslavia available at https://www.icty.org/ (accessed on 7 January 2022).
[523] Crocker op cit note 499.
[524] Brand et al op cit at 128 at 1.

premised in restorative justice, the colonially inherited practice of adversarial litigation was retained as the primary method of dispute resolution.

When exploring alternatives, it is important to develop a system that is compatible with South African values and identity. As depicted through legislation like the CJA and the TRC process, mediating criminal matters reflects traditional African values rooted in restorative justice which emphasize a communal approach to dealing with conflict, and see the law not as a tool for personal defence, but for the protection of common interests.[525]

South Africa needs to turn to reintegrative measures that rebuild social bonds rather than measures such as imprisonment that isolate and alienate the perpetrator from society.[526] As expressed above, although the South African government supports the idea of restorative justice, it just needs to be backed up by concrete assistance, through both funding, and the creation of structural linkages to community justice processes.

CHAPTER 6

CONCLUSION

6.1. INTRODUCTION

This concluding chapter seeks to investigate the advantages and benefits of mediation as a tool for resolving criminal disputes, reducing court backlog, and achieving justice. Thereafter, the disadvantages and drawbacks of introducing mediation into the criminal justice system will be assessed, followed by counterarguments thereto.

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[525] Dissel op cit note 72.
[526] Llewellyn & Howse op cit note 391 at 357.

6.2. THE ADVANTAGES AND BENEFITS OF INTRODUCING MEDIATION INTO THE CRIMINAL JUSTICE SYSTEM

6.2.1. Benefits to the Victim

A fundamental benefit of mediation is that the parties are able to play a more active role in the resolution of their disputes.[527] Mediation transforms the criminal justice paradigm by placing victims at the center, rather than on the periphery of the criminal process.[528] Additionally, mediation would dispense with the complex and rigid litigation procedures and rules of evidence therefore, if the mediator is competent in the field and able to explain the process in a clear and concise manner, parties would be able to represent themselves.[529] Resulting in greater access to justice for those who cannot afford legal representation and increased party participation in the process.[530]

Restorative justice seeks to heal what is broken, what the victim requires in order to heal, recover and regain a sense of safety varies from case to case.[531] Some victims may want information, reparation or the possibility to vent and express anger towards the offender.[532] Through mediation victims can receive restitution, in the form of money, labour or return of stolen goods.[533] When offenders are fined as a form of punishment, payment is made to the State and not the victim.[534] Whilst, section 300 of the CPA allows for compensation orders, these are extremely rare.[535] Furthermore, for

[527] Brown, J *The Use of Mediation to Resolve Criminal Cases: a Procedural Critique* (1994) Emory Law Journal 43(4) 1249.
[528] Ibid.
[529] Rice op cit note 157 at 59.
[530] Ibid.
[531] Morris & Maxwell op cit note 331 at 6.
[532] Ibid.
[533] Muntingh op cit note 11 at 38.
[534] Ibid at 5.
[535] Ibid.

victims that do not have the resources to file a civil suit, this may be a viable forum to recover their losses as a result of the crime.[536]

Victims are often left frustrated and anxious because they do not know why the crime was committed against them, especially if they know their perpetrator.[537] In a mediation meeting victims have the opportunity to confront their offenders, voice their feelings and ask questions about the offence in order to try and understand the causes and complexities of the crime.[538] Victims may also feel marginalised by the criminal justice system because they are not informed of the progress of their case.[539] However, mediation programmes are more tailored therefore, the mediator assigned to the case can provide the victim with the updates and information required to heal.[540]

Mediation allows for treatment of the underlying issues which led to the crime being committed.[541] In situations where the offence is part of on-going conflict, the structures of criminal law only allow for courts to address the conduct giving rise to the cause of action. Thus, any prior acts culminating in the criminal conduct are irrelevant to the inquiry into legal culpability,[542] exacerbating an already volatile situation.[543] Hence, mediation's emphasis on restoration of relationships is beneficial in instances where

[536] Bakker op cit note 22 at 1497.
[537] Muntingh op cit note 11 at 38.
[538] Ibid.
[539] Ibid.
[540] Ibid.
[541] Monograph op cit note 20 at 35.
[542] Whether the accused is found innocent or guilty.
[543] Rice op cit note 157 at 22.

the victim and offender are in repeated contact, for example domestic violence cases where the parents have a child.[544]

6.2.2. Benefits to the Offender

Mediation is viewed as a way of humanising the justice system. The human element of crime is often ignored during criminal trials, as the State stands in for the victim, therefore the offender seldom notices that his actions impact real people.[545] Personalising the consequences of crime enhances satisfaction levels with the entire justice process.[546] Mediation provides an opportunity for victim empathy, as the offender can gain insight into the impact of their crime and the consequences of victimising another person.[547]

Offenders too may need healing and release from guilt or fear by attempting to resolve the underlying conflicts that led to the crime and the opportunity to make amends.[548] Restitution may be therapeutic for offenders since their self-esteem is increased due to active participation in their sanction instead of passively receiving punishment.[549] Mediated settlements give the offender a role in determining their future instead of merely following decisions made by criminal justice officials and legal professionals.[550] In the KSS Project,[551] one of the offenders indicated that they had spent years not sleeping properly prior to the mediation session as they suffered from extreme guilt, but for the first time after the joint session they felt at peace and could sleep well.[552]

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[544] Ibid.
[545] Umbreit et al op cit note 329 at 287.
[546] Ibid.
[547] Muntingh op cit note 11 at 38.
[548] Morris & Maxwell op cit note 331 at 6.
[549] Bakker op cit note 22 at 1499.
[550] Muntingh op cit note 11 at 39.
[551] Lowe op cit note 350 at 4.
[552] Ibid at 6.

Restitution and apology may lead to forgiveness of offenders who have repented and made amends.[553] Thus, allowing for the offender to be reconciled with his community.[554] Criminal trials take months of preparation, during which the accused generally spends imprisoned awaiting a trial date, suffering the adverse effects of incarceration and ostracisation without yet being determined guilty and sentenced thereto. [555] The right to a fair and speedy trial[556] is illusive in South Africa, whereas, the nature of mediation is more expedient.

6.2.3. Benefits to South Africa as a Nation

Diversion to mediation is more cost effective than holding a criminal trial and consequent imprisonment.[557] Furthermore, the offender can make a useful contribution to society for example through community-service orders.[558] Mediation is more cost effective, as the parties involved would pay a set mediation tariff fee, program administration fee and split the costs of the process, thereby avoiding huge litigation costs and legal fees for trial preparation.[559]

Diversion of certain cases will result in a reduced workload of court officials allowing for more time and care to be devoted to those cases which remain to be adjudicated in court.[560]

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[553] Muntingh op cit note 11 at at 38.
[554] Ibid at 39.
[555] Sympathy for the Prisoner: How years 'awaiting trial' takes its toll on the incarcerated (2018) Nkaeko Mabasa available at https://www.dailymaverick.co.za/article/2018-03-05-sympathy-for-the-prisoner-how-years-awaiting-trial-takes-its-toll-on-the-incarcerated/ (accessed on 14 January 2022).
[556] Section 35(3) of the Constitution.
[557] Muntingh op cit note 11 at 39.
[558] Ibid.
[559] Depending on the severity and complexity of the case, the cost of mediator and attorney's fees, venue fees and other practicalities, mediation may be equally as costly as litigation. Joubert op cit note 303.
[560] Bakker op cit note 22 at 1504 and Muntingh op cit note 11 at 40.

It is proven that mediation programmes reduce recidivism rates, as offenders are able to avoid the damaging and alienating effect of a criminal trial and imprisonment which leads to gang involvement and further criminality.[561] If offenders are able to truly understand the impact of their offence and express remorse this tends to act as a deterrent for further crime.[562]

An objective of mediation is to preserve the relationship between disputing parties, encourage peace, reconciliation, and restoration.[563] This is opposed to fighting matters through the adversarial justice system. Therefore, mediation importantly promotes the spirit of Ubuntu, which is an ideal strived for in South Africa to assist in healing the racial and economic inequality and systemic injustices as a result of our divided past.[564]

6.3. THE DISADVANTAGES AND DRAWBACKS OF SUCH INTRODUCTION

A number of criticisms and concerns regarding diversion to mediation have been raised. These are discussed below, followed by possible counterarguments thereto.

6.3.1. Due Process Concerns

The criminal justice system is based on individual rights, which requires an accessible legal system for their protection.[565] Restorative justice practices may erode certain due process rights enshrined in section 35 of the Constitution. Additionally, rules of

[561] See para 3.4.4.2 above.
[562] Muntingh op cit note 11 at 39.
[563] Dissel op cit note 72.
[563] 34 of 1995.
[564] Skelton op cit note 19 at 506.
[565] Bakker op cit note 22 at 1506

evidence require certain information to be excluded from proceedings.[566] Such rules are designed to promote reliability, fairness, and quality in the presentation of documents and oral testimony to courts.[567]

Since there are no procedural rules of evidence during the mediation process there exists the potential to coerce offenders into admitting their guilt to be considered applicable for diversion. [568] Thereby widening the net as offenders are referred to mediation and drawn into the justice system in situations where they would otherwise not have been prosecuted due to a paucity of evidence or because the case was deemed too petty to prosecute.[569]

Countering this argument, compliance in mediation is completely voluntary the worst that would happen to a defendant who is subjected to unfair procedures is that no settlement will be reached.[570] Gaining the offender's consent to mediation by exploiting fear and uncertainty is inconsistent with voluntariness therefore, if the parties receive full and accurate information prior to consenting to mediate, voluntariness can be enhanced.[571] This can be achieved by the prosecutor ensuring and establishing on record that the accused has been advised of their rights and that they knowingly waive those rights.[572]

[566] Brown op cit note 526 at 1288.
[567] Brand et al op cit note 128 at 280.
[568] Skelton op cit note 19 at 506.
[569] Ibid.
[570] Rice op cit note 157 at 50.
[571] Brown op cit note 526 at 1307.
[572] Ibid at 1271.

Whilst protection of Constitutional rights is imperative, every right in the Bill of Rights may be justifiably limited.[573] Furthermore, restorative justice approaches strive for formalistic protection which aims for behavioural change, the prevention of reoffending and ultimately the balancing of both the victim and offender's needs, which may be achieved through a mutually beneficial agreement.[574] Therefore, mediation stresses substantive outcomes rather than procedural regularity.[575] Ultimately, it is a difficult task to ensure that the rights of offenders are protected whilst at the same time ensuring that an overly protectionist approach to rights does not hinder the opportunity for the offender to understand his responsibilities.[576]

6.3.2. Public Interest

It is argued that without publicity, all other checks are insufficient.[577] Since mediated settlements are conducted in private and often have confidentiality and non-prejudice clauses attached to them, others will not learn about wrongs committed by defendants, and information which otherwise would be discoverable is shielded from public view.[578] Thus, by diverting cases society loses the benefit of court sanctioned judgments and the making of precedent.[579]

Conversely, the doctrine of precedent has perpetuated the ignorance of prejudiced individuals, especially in the South African climate where certain precedents

[573] Section 36 of the Constitution.
[574] Skelton op cit note 19 at 506.
[575] Brown op cit note 526 at 1288.
[576] Skelton op cit note 19 at 506.
[577] Brown op cit note 526 at 1287.
[578] Menkel-Meadow, C *Mediation, Arbitration and Alternative Dispute Resolution* (2015) University of California, Irvine, Legal Studies Research Paper No. 59.
[579] Lieberman & Henry op cit note 324 at 432.

recognised race or ethnic background as a factor that should be considered for harsher punishment.[580]

A further issue is that settlement may not be based on legal criteria and legal rules therefore, threatening compliance with the rule of law and its enforcement.[581] This argument neglects an individual's right to self-determination. If the affected parties are content with their agreement and feel as though justice has been achieved, there is no need for societal input. In fact, public input taints the process and is dangerous for the presumption of innocence which cannot be upheld,[582] if the media and society has already labelled the accused as guilty.

6.3.3. Secondary Victimisation and Inequalities of Bargaining Power

It is argued that the process asks more of the victims than it does of offenders.[583] Given the emotional issues at stake for most victims, mediation may harm victims recovering from crime.[584] However, if the programme is specialised and the mediator is adequately trained in psychology, mediation, and criminal law such issues may be avoided.[585]

When crimes are resolved through mediation and some form of compensation, outsiders may view this as condescending towards the victim and trivialising of their experience. [586] However, the beauty of mediation is that settlement is designed by the

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[580] Ibid.
[581] Menkel-Meadow op cit note 577.
[582] Unless proven guilty by a court of law an accused is presumed to be innocent of their charges. Enshrined in Section 35(3)(h) of the Constitution.
[583] For the victim that has been violated by the crime coming face-to-face with the person who has violated them is extremely difficult. Brown op cit note 526 at 1281.
[584] Ibid at 1273.
[585] Lowe op cit note 350 at 4.
[586] Skelton op cit note 19 at 506.

parties therefore, whatever solution is generated however ridiculous it looks to others, should not be judged since the affected parties directly are satisfied.

Power imbalances may be created at the bargaining table.[587] For example, first-time or juvenile offenders often lack experience and knowledge of the criminal justice system that might increase their bargaining strength. An offender who has greater experience with the criminal justice system might know when the State's evidence against him is weak or when for various substantive and procedural reasons, the State may not proceed with the prosecution. If an offender lacks such experience, he could be more easily threatened and persuaded to participate in mediation or to agree to the victim's demands.[588] Additionally, there are no consistent rules about requiring legal counsel to be present at the mediation, thus inequality of bargaining power will exist if one party is represented and the other is not.[589]

This issue can easily be resolved, perhaps if the mediator makes a rule that legal representation is only allowed if both parties are represented. Therefore, if the mediator is properly trained and able to recognise the power imbalances with respect to the parties' age, maturity, or intellectual capacity,[590] there are tactics that can be used to restore the balance. The mediator can enforce guidelines such as no interruption or intimidation, ensure equality of speaking time or use separate meetings to ensure fairness.[591]

[587] Brown op cit note 526 at 1271.
[588] Ibid.
[589] Ibid at 1289.
[590] Morris & Maxwell op cit note 331 at 14.
[591] Boulle & Rycroft op cit note 30.

6.3.4. Remedies and Enforcement

A mediated agreement is meaningless if parties refuse to carry it out. Non-compliance is an issue since it reduces the party's and society's confidence in the programme.[592] Where enforcement procedures for non-compliance are unavailable, a situation is created where the parties seeking relief are required to relitigate their dispute in the formal justice system.[593] Therefore, it has been said that 'mediation programs are pursuing justice without a remedy'.[594] However, in my opinion the remedy is the closure and healing provided to parties.

Refusal of a party to comply with the mediation agreement may reflect failure to have reached an equitable solution. Thus, when non-compliance is alleged, the award should be reviewed to ensure that it is fair, [595] as when there is confidence in the fairness of the award there should be no hesitation to enforce it.[596] Further, there is the possibility of renegotiating the agreement after non-compliance, which is appropriate for parties who want to continue working on their problems.[597]

6.3.5. Restorative Justice is 'soft on crime'

It is argued that restorative justice is a soft option which ignores the need for punishment and minimises the seriousness of the crime.[598] However, applying harsher punishment has shown to have little success in preventing crime.[599] A basic tenant of restorative justice is that crime prevention is more likely to be achieved through social

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[592] Rice op cit note 157 at 26.
[593] Ibid.
[594] Ibid at 27.
[595] The prosecutor should review the agreement followed by the judge or magistrate who confirms the agreement and sets aside the criminal charge in order to determine its fairness.
[596] Rice op cit note 157 at 28.
[597] Ibid at 26.
[598] Monograph op cit note 21 at 24.
[599] Ibid at 16.

reintegration rather than ostracism and punishment.[600] The process of taking accountability and accepting responsibility for ones actions means that restorative justice is not easy on offenders, facing a victim can be tougher and more meaningful than other sanctions.[601] Through personal relationships with the participants and empathy with other persons, offenders are brought to feel intensely a mixture of emotions like shame, guilt, remorse, embarrassment and humiliations and these feelings have an enduring impact of the offender's future life.[602] As greatly summed up by Duff:

> 'restorative justice interventions are not alternatives to punishment but alternative punishments'.[603]

Furthermore, both restorative and retributive theories are concerned with the restoration of equilibrium that has been disturbed by a wrongful act.[604] Therefore, mediation can allow for the imposition of various remedies and sanctions.[605] A pre-mediation agreement can be reached stipulating the range of sanctions which are acceptable to the parties and the mediator, enhancing society's interest for punishment.[606]

Criminal trials respond to a powerful moral institution, especially that of outside spectators, that the 'monster's' responsible for the acts in question must be

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[600] Ibid.
[601] Ibid at 30.
[602] Ibid.
[603] Duff, A Punishing the Young" (Paper presented at the Symposium "Punishing Children", Utrecht, 8–9 June 2000).
[604] Llewellyn & Howse op cit note 391 at 373.
[605] Such as correctional supervision, sentences served outside of prison include monitoring, community service, house arrest, placement in employment, performance of a service, payment of compensation to the victim and rehabilitation. Muntingh op cit note 11 at 19.
[606] Ibid.

punished.[607] However, it is time that our society moves on from harsh punishment in order to prove a point and placate societies desire for justice being seen to be done. There needs to be a shift away from the default perception of justice as retribution towards a more restorative approach, which ensures those directly affected by the crime, the parties and other stakeholders, are satisfied with the outcome and that their perceptions of justice have been met.

6.4. CONCLUSION

Attempting to fit a many-sided dispute into the two-sided contour of the adversarial system often leads to unjust results.[608] In reality, more flexible processes are necessary to bring matters to a successful and equitable resolution.[609]

This chapter assessed the advantages and benefits as well as the drawbacks of mediating criminal disputes. It is acknowledged that mediation is not free from criticism nor is it a panacea for the issues plaguing the criminal justice system. However, this does not detract from the overall beneficial impact that mediation may have on the participants, South Africa and its criminal justice system as a whole. On balance, the legal problems that might arise by using mediation as an alternative means of resolving disputes are insignificant in light of the potential benefits offered by the programmes.[610]

The benefits of mediation have been proven and can especially be welcomed in South Africa due to the country's historic African traditional roots in ADR and restorative

[607] Llewellyn & Howse op cit note 391 at 358.
[608] Lieberman & Henry note 324 at 438.
[609] Ibid.
[610] Rice op cit note 157 at 81.

justice.[611] Therefore, systemic efforts should be made to encourage the growth of mediation centers in South Africa and the State should provide workable incentives for the inception and growth of such projects.[612]

Obviously, the intricacies of such a shift in procedure, though beyond the scope of this dissertation engender many questions. However, at the very least, the government should adopt a resolution that mediation within the criminal justice system is a positive response to crime and this should be explored and encouraged by criminal courts and their personnel. With the current levels of crime in the nation reaching prodigious levels, the time may be ripe for change in the way the criminal justice system deals with criminality.[613]

[611] Bakker op cit note 22 at 1520.
[612] Ibid at 1522.
[613] SAPS recorded crime statistics for the Republic of South Africa, first quarter of 2021/2022 financial year (April to June 2021) available at https://www.saps.gov.za/services/downloads/april_june_2021_22_quarter1_presentation.pdf (accessed on 12 January 2022).

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