The contribution mediation can make in addressing economic crime in corporate and commercial relationships in South Africa

by

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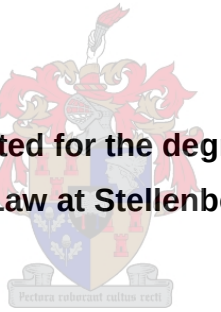

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ABSTRACT

Economic crime is complex and costly. It is costly because it harms victims, both directly and indirectly, as well as the broader economy. The cost is not only financial, but also to confidence and trust in corporate and commercial relationships in South Africa. Economic crime is complex because it includes offences from common-law fraud to statutory contraventions such as incorrect bookkeeping.

There are several mechanisms in the South African legal justice system to address economic crime. The conventional legal models include adversarial criminal prosecution of the offender and civil compensation claims, the model of inquisitorial administrative investigations and sanctions like penalties and compensation orders. In 2001 section 105A of the Criminal Procedure Act, namely plea and sentencing agreements, was added as a model of negotiated justice. This mechanism allows the prosecution and the offender to negotiate and enter into an agreement regarding the charges and the sanctions, subject to approval of the court that the plea of guilty is proper and that the proposed sanction is a just sentence.

This dissertation proposes that mediation be added to the existing alternative models to help combat economic crime. Mediation involves negotiated justice, as well as restorative justice. More specifically, mediation as a restorative justice process, constitutes a practical alternative to standard litigation as the affected parties themselves, with the facilitation of a third person, resolve the disputes between them. Mediation, a facilitative and flexible procedure, allows the voices of both the victim and the offender to be heard securely and meaningfully. Mediation is rehabilitative and allows for agreed restorative provisions for both the perpetrator and the victims of economic crime.

The outcome is a proposed amendment to the Criminal Procedure Act 51 of 1977, namely the insertion of section 105B, “Mediated Settlement Agreements”, that will provide for mediation and a mediated settlement agreement to be incorporated into and form part of the criminal justice processes. It is envisaged that an accredited mediator will mediate between the parties, including the public prosecutor, the perpetrator, the victim and possibly members of the community. The mediated settlement agreement will include both compensation for the victims and a proposed sentence for the perpetrator. This mediated settlement agreement will then be tabled before the court for adjudication and approval to serve as an effective court order.

The proposal is a logical legal development of section 105A of the Criminal Procedure Act on plea and sentencing agreements, as the process of mediation builds on the process of negotiation established in it. To put it bluntly, if a plea and sentence agreement can be negotiated between the prosecutor and the offender, a plea and sentence agreement can be *mediated* between the prosecutor, the offender and the victim.

Mediation can integrate and expand the constitutional principles of reparation and *ubuntu* and curb economic crime by providing an effective restorative and just response to it.

UITTREKSEL

Ekonomiese misdaad is kompleks en kom teen 'n prys. Hierdie prys is dikwels sowel direk as indirek, aangesien nie net die slagoffer nie, maar ook die breër ekonomie skade berokken word. Verliese is nie net finansieel van aard nie: ekonomiese misdaad skaad ook die vertroue in en die geloofwaardigheid van korporatiewe- en kommersiële verhoudings in Suid-Afrika. Ekonomiese misdaad is kompleks omrede dit oortredings, vanaf gemeenregtelike bedrog tot statutêre oortredings, soos byvoorbeeld foutiewe boekhouding, kan insluit.

Die Suid-Afrikaanse regstelsel beskik oor verskeie meganismes om ekonomiese misdaad aan te spreek. Konvensionele regsmodelle behels adversersatiewe strafregtelike vervolging van die oortreder en siviele skadevergoedingsaksies, 'n inkwisitoriese model van administratiewe ondersoek en sanksies in die vorm van boetes en skadevergoedingsbevele. In 2001 is pleit- en vonnisooreenkomste ingevolge artikel 105A van die Strafproseswet bygevoeg en is op die model van onderhandelde geregtigheid geskoei. Hierdie meganisme gee sowel die aanklaer as die oortreder die geleentheid om te onderhandel en 'n ooreenkoms te bereik rakende die aanklagte en die sanksie. So 'n ooreenkoms vereis die goedkeuring van die hof, wat moet vasstel of die pleit van skuldig juridies korrek en die voorgestelde vonnis regverdig is.

Hierdie verhandeling stel voor dat bemiddeling bygevoeg moet word tot die bestaande alternatiewe metodes vir die bekamping van ekonomiese misdaad. Bemiddeling behels sowel onderhandelde geregtigheid as herstellende geregtigheid. Bemiddeling is by uitstek 'n herstellende geregtigheidsproses en bied 'n praktiese alternatief tot standaard litigasie omrede die geaffekteerde partye self, met die fasilitering van 'n derde persoon, die geskille tussen hulle besleg. As 'n fasiliterende en buigsame prosedure laat bemiddeling toe dat die stemme van sowel die slagoffer as die oortreder met veiligheid en sinvol gehoor word. Bemiddeling rehabiliteer en bied ruimte vir ooreengekome herstellende bepalings vir sowel die oortreder as die slagoffers van ekonomiese misdaad.

Hierdie verhandeling stel voor dat die Strafproseswet 51 van 1977 gewysig word, deur die toevoeging van artikel 105B "Gemedieërde Skikkingsooreenkomste", wat voorsiening daarvoor sal maak dat bemiddeling en skikkingsooreenkomste wat as 'n resultaat van sodanige bemiddeling bereik is by die bestaande strafregtelike

prosedures toegevoeg word. Daar word voorgestel dat 'n geakkrediteerde bemiddelaar die geskille tussen die partye, insluitende die aanklaer, die oortreder, die slagoffer en moontlik lede van die gemeenskap, sal bemiddel. Sodanige skikkingsooreenkoms sal skadevergoeding vir die slagoffers asook 'n voorstel vir 'n geskikte vonnis vir die oortreder insluit. Die gemedieërde skikkingsooreenkoms sal vervolgens voor die hof dien vir oorweging en goedkeuring om as 'n effektiewe hofbevel te kan funksioneer.

Die voorstel is 'n logiese prosesregtelike ontwikkeling van pleit- en vonnisooreenkomste ingevolge artikel 105A van die Strafproseswet aangesien die proses van bemiddeling voortbou op die beginsel van onderhandelde geregtigheid wat reeds daarin vervat is. Eenvoudig gestel, indien 'n pleit- en vonnisooreenkoms onderhandel kan word tussen 'n aanklaer en 'n oortreder, kan 'n pleit- en vonnis ooreenkoms ook bemiddel word tussen die aanklaer, die oortreder en die slagoffer.

Bemiddeling kan die konstitusionele beginsels van regstelling en *ubuntu* integreer en verbreed, en terselfdertyd bydra om ekonomiese misdaad te bekamp deur die daarstelling van 'n doeltreffend herstellende en regverdige antwoord daarop.

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love and faith in me. Kais and Corrie Hoffman, amazing parents who loved unconditionally and selflessly moved boundaries to have me educated.

I dedicate this dissertation to them.

gratiā per ardua ad astra

ABBREVIATIONS AND ACRONYMS

ABA	American Bar Association
ACCORD	African Centre for the Constructive Resolution of Disputes
AC:SAJC	Acta Criminologica: South African Journal of Criminology
AHRLJ	African Human Rights Law Journal
AJCR	African Journal on Conflict Resolution
AJOL	African Journals on Line
ASIC	Australian Securities and Investment Commission
Chi Kent L Rev	Chicago Kent Law Review
CILSA	Comparative and International Law Journal of South Africa
CIPC	Companies and Intellectual Property Commission
CEPEJ	European Commission for the Efficiency of Justice
CJCR	Cardozo Journal of Conflict Resolution
CPA	Criminal Procedure Act 51 of 1977
CRQ	Conflict Resolution Quarterly
DCS	Department of Correctional Services
Disp Resol Mag	Dispute Resolution Magazine
DOJ	Department of Justice
DOJ&CD	Department of Justice and Constitutional Development
DR	De Rebus
DRJ	Dispute Resolution Journal
Fed Sent R	Federal Sentencing Reporter
Ga St U L Rev	Georgia State University Law Review
ICR	Idaho Court Rules
IIA SA	Institute of Internal Auditors of South Africa
IJBLR	International Journal of Business & Law Research
IoDSA	Institute of Directors in Southern Africa
Iowa L Rev	Iowa Law Review
ISS	Institute for Security Studies
JCLS	Journal of Corporate law Studies

J Crim L & Criminology	Journal of Criminal Law and Criminology
J Disp Resol	Journal of Dispute Resolution
JPAS	Journal of Pan African Studies
Okla L Rev	Oklahoma Law Review
OTE	Old Testament Essays
Law & Contemp Probs	Law and Contemporary Problems
LesA	Court of Appeal of Lesotho
LSSA	Law Society of South Africa
MQ	Mediation Quarterly
NCOP	National Council of Provinces
NCPS	National Crime Prevention Strategy
NDPP	National Director of Public Prosecutions
NML	New Mexico Law Review
NPA	National Prosecuting Authority
NYLJ	New York Law Journal
PELJ	Potchefstroom Electronic Law Journal
PMG	Parliamentary Monitoring Group
QUT	Queensland University of Technology
QUTLR	Queensland University of Technology Law Review
RJIJ	Restorative Justice: An International Journal
SACJ / SAJC / SAJCJ	South African Journal of Criminal Justice
SAJHR	South African Journal of Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SAPL	Southern African Public Law
SAPS	South African Police Services
SDPP	Special Director of Public Prosecutions
SCCU	Specialised Commercial Crime Unit
SFO	Serious Fraud Office
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal for Contemporary Roman-Dutch Law
U Qld LJ	University of Queensland Law Journal

US DOJ	United States Department of Justice
USSC	United States Sentencing Commission
US SEC	US Securities and Exchange Commission
VeE	Verbum et Ecclesia
VOM	Victim-Offender Mediation
VORP	Victim-Offender Restoration Programme
Wm & Mary L Rev	William and Mary Law Review
Yale LJ	Yale Law Journal

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CHAPTER 1 INTRODUCTION: THE PROBLEM OF ECONOMIC CRIME AND AN ADDITIONAL PROPOSAL TO HELP COMBAT IT

Chapter overview

1 1 Background and motivation for the study

"Obviously crime pays, or there'd be no crime."[1]

Economic crime does indeed seem to pay in South Africa, reportedly the country with the highest economic crime rate in the world.[2] Billions are lost by corporations every year due to economic crime, which understandably has an impact on economic growth and development in South Africa and on its wider commercial international relationships.[3] Economic crime is a composite concept and includes a number of crimes,[4] and common comparable terms often used in the public

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[1] G Gordon Liddy.BrainyQuote.com Xplore Inc (2017) https://www.brainyquote.com/quotes/quotes/g/ggordonli122397.html (accessed 25-01-2017).

[2] According to the *PWC Global Economic Crimes Survey 2018,* 77% of South African respondents confirmed that they have been victims of economic crime compared to a global rate of 49%. PWC "The Dawn of Proactivity: Countering Threats from Inside and Out" *Global Economic Crime Survey 2018* 8 *pwc* <https://www.pwc.co.za/en/assets/pdf/gecs-2018.pdf> (accessed 22-07-2019).

[3] P Shuma "Corruption Costs SA's GDP R27 Billion Annually" (29-06-2018) *SABCNewsOnline* <http://www.sabcnews.com/sabcnews/corruption-costs-sas-gdp-r27-billion-annually/> (accessed 22-07-2019); twenty-two percent of more than 6000 respondents in the 2016 PWC survey suffered losses between USD100,000 – USD1 Million, 14% losses over USD1 million and 1% losses over USD100 million. *PWC Global Economic Crimes* Survey (2016) 11. The South African Police Services reported 69,917 cases of commercial crime in the 2015/2016 period, an increase of 3,1% from the previous 2014/2015 period, whilst theft declined by 5,6% to 340,372 cases in the same period. See South African Police Services *Crime Statistics Report* 2015/2016 67-82.

[4] Without defining economic crime, the (PWC Global Economic Crimes Survey 2018 10) uses the following categories in its survey: asset misappropriation, fraud committed by

discourse are corruption and white-collar crime. The destructive and debilitating effects of corruption on the democratic values of a society have been acknowledged by the Constitutional Court.[5] Similarly, both national[6] and international legislatures[7] have recognised that specific statutes are necessary to curb economic crime. Corruption, part of economic crime, is not only a grave offence, but one that is "antithetical to the founding values of our constitutional order";[8] a harmful offence that undermines such constitutional order. It also weakens the values of democracy that promote the development of economic freedom and growth and that nurture ethical and moral values.

In addition to the direct monetary losses of economic crime, it has far-reaching effects in society. Twenty years ago Justice Heath summed these up starkly:

> "[B]esides these direct losses…, the state's plight is further compounded by the incalculable impact that economic crime has in the fields of macro-economics, social order morale of citizens and the general well-being of society. If the perception is created that the system is failing in its attempts to curb an avalanche of anti-social-behaviour, skilled people leave the country…, social values decline, society feels unsafe and the country stares civil disobedience in the face."[9]

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consumer, cybercrime, corruption and bribery, procurement fraud, accounting fraud, human resources fraud, money laundering, IP infringement, insider trading, tax fraud, mortgage fraud, competition/anti-trust law infringement and espionage. Also see Heath's discussion of the broad spectrum of economic crime and the perpetrators ranging from a single individual to organised groups in W Heath "The Plight of the State as a Victim of Economic Crime" in L De Koker, BAK Rider & JJ Henning *Victims of Economic Crime* (1999) 1 1-3.

[5] O'Regan ADCJ in *Shaik v S* 2008 2 SACR 165 (CC) para 72; Chaskalson P in *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) para 4.

[6] For example, the Prevention of Organised Crime Act 121 of 1998 (POCA).

[7] For example, the United Nations Convention Against Corruption, ratified by South Africa in 2004; and the African Union Convention on Preventing and Combating Corruption ratified by South Africa in 2005.

[8] O'Regan ADCJ in *Shaik v S* 2008 2 SACR 165 (CC) para 72.

[9] Heath J "The Plight of the State" in *Victims of Economic Crime* 3-4. Anonymous "Combating Corruption" *The World Bank.* Also see A Thomas ("A Reimagined Foreign Corrupted Practices Act: From Deterrence to Restoration and Beyond" (2016) 30 *Temp Int'l & Comp LJ)* 385 386-388.succinctly denoting that corruption has "a trickle-down effect of crippling the citizenry of a corrupt country".

Further indirect losses include the cost in time and resources, both for the state and a victim during a criminal investigation and the prosecution process.

Although white-collar crime and the combating of such crime were acknowledged as a priority more than twenty years ago by parliament and government,[10] white-collar crime seems to increase unabatedly, both in the number of instances and the value of losses. Moreover, it appears that many instances of economic crime go unreported.[11] The reasons for non-reporting them vary,[12] but include, particularly with regard to economic crime within companies, that it does not pay to report economic crime.[13]

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[10] National Crime Prevention Strategy ("NCPS") Department of Justice, Pretoria (May 1996) 30 and 36-37, para 5.7 and 5.7.3. White-collar crime is further identified as being one of the crimes that need organisational prioritisation that requires coordinated and "dedicated capacity" by the criminal justice process. See NCPS (1996) 52 para 8, in particular para 8.1.6 and 8.1.6.3. Furthermore, the *National Programme 2.4: Corruption and Commercial Crime* was approved by Parliament exclusively to reduce instances of "white-collar crime, commercial crime, large scale fraud and economic offences". See NCPS (1996) 72-73 para 22.

[11] Heath "The Plight of the State" in *Victims of Economic Crime* 1; PricewaterhouseCoopers *Economic Crime: People, Culture & Controls: The 4th Biennial Global Economic Crime Survey Engineering and Construction Industry Supplement* (2008) 6; D Barret "Frauds Worth £12bn Go Unreported, Says Report" *The Telegraph* (19-03-2015) <http://www.telegraph.co.uk/news/uknews/crime/11480715/Frauds-worth-12bn-go-unreported-says-report.html> (accessed 25-08-2017); T Reeve "Underreporting and User Error Key Problems in Combatting Cyber-fraud" (11-11-2016) *SC Media UK* <https://www.scmagazineuk.com/underreporting-and-user-error-key-problems-in-combatting-cyber-fraud/article/572613/> (accessed 25-08-2017); L Lancaster "Why are South Africans Underreporting on Crime?" (06-03-2017) *ISS* <https://issafrica.org/iss-today/why-are-south-africans-underreporting-on-crime> (accessed 25-08-2017).

[12] In an empirical study in Sao Paulo, Brazil, various factors, including the gender, age and wealth of a victim, as well as the violent nature of a crime (for example theft and robbery) in relation to underreporting of crime, including property crime, were investigated. M Justus & LG Scorzafave "Underreporting of Property Crimes: An Empirical Economic Analysis" (2014) 5 *EALR* 271-284.

[13] Adv M Govender (DDPP, Regional Head, SCCU, Western Cape) identified non-reporting of fraud and theft within companies to be one of the major problems existing between business and the prosecution with regard to economic crime. Interview with Adv M Govender (16-09-2016). The hypothesis of economic rationality, which holds that victims weigh up the risks in reporting crime, also prevent economic crime being reported. For example, if a bookkeeper steals R50,000 from an employer, the employer may weigh up and calculate

The main consequence of economic crime is that of costs.[14] The economy is influenced detrimentally as the cost of business increases and economic development and investment is hindered.[15] It is also considered to undermine the human rights of freedom of trade and economy and equality.[16] Economic crime thus is not only a crime against property, but also a crime against a person and a crime of significant public importance and import.

The problem of economic crime is irrefutable. Although attempts are being made to curb it, the problems of economic crime remain prevalent.[17] Subsequently, it is submitted in this dissertation that an additional impetus, an alternative model in the form of mediation, based on the principles of restorative justice, is needed to help the fight against economic crime.

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that the chance of getting a conviction and the cost of time and effort spent in assisting the police in the investigation and the prosecutor during the prosecution process exceeds the loss of the theft. Consequently the employer may not report the crime but may simply confront the employee and compel her or him to resign. See too D Barret "Frauds Worth £12bn Go Unreported, Says Report" *The Telegraph* (19-03-2015) <http://www.telegraph.co.uk/news/uknews/crime/11480715/Frauds-worth-12bn-go-unreported-says-report.html> (accessed 25-08-2017).

[14] CR Snyman *Criminal Law* (2014) 401 mentions several consequences of corruption, including loss of moral values and credibility of public authorities, undermining a free market economy and hindering economic development. See too J Burchell *Principles of Criminal Law* (2005) 891. This statement is omitted in the latest edition.

[15] Jeff Radebe, former Minister in the Presidency responsible for Planning, Monitoring and Evaluation as quoted by L Prince "Korrupsie Knou Diens, Vertroue en Beleggings" *Die Burger* (2015-09-21) 1.

[16] The National Anti-Corruption Forum brochure *Understanding the Prevention and Combating of Corrupt Activities Act* (2006/2009) 9; Henning "Corruption and Bribery in South Africa" in *Combating Economic Crime* 53.

[17] "Ons wen nie die oorlog nie." These are the words of Major-General P Arendse head Research & Analysis of the Hawks (Directorate of Priority Crime Investigation), whilst reporting on organised crime to the Parliamentary Portfolio Committee on 15 August 2017, as quoted by P Essop "'Ons Wen Nie Teen Misdaad,' sê Valke-hoë" (15-18-2017) *Netwerk24* <http://www.netwerk24.com/Nuus/Politiek/ons-wen-nie-teen-misdaad-se-valke-hoe-20170815> (accessed 16-08-1017).

1 2 Definition of economic crime

Economic crime is a comprehensive and complex phenomenon.[18] It comprises a number of criminal offences.[19] In creating a working definition of economic crime, attention is given to various forms of economic crime in the common law and legislation. A traditional characteristic is that economic crime involves a wrong against property as opposed to a person.

A common definition of economic crime is that it is a "crime of a financial nature, especially involving fraudulent activity."[20] It has also been definited as:

> "Economic crimes refer to illegal acts committed by an individual or a group of individuals to obtain a financial or professional advantage. In such crimes, the offender's principal motive is economic gain. Cyber crimes, tax evasion, robbery, selling of controlled substances, and abuses of economic aid are all examples of economic crimes."[21]

The first definition clearly includes fraud, but as the few examples in the second definition illustrate economic crime also includes tax evasion, various cyber-crimes, robbery and bribery.[22]

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[18] Compare G Kemp ("Alternative Measures to Reduce Trial cases, Private Autonomy and 'Public Interest': Some Observations with Specific Reference to Plea Bargaining and Economic Crimes" (2014) 2 *Stell LR* 425) who states that "it is not self-evident what is meant by economic crime". Compare N Schell-Busey, SS Simpson, M Rorie & M Alper "What Works? A Systematic Review of Corporate Crime Deterrence" (2016) 15 *Criminol Public Pol* 387 389.

[19] For example, the profile of economic crime in the mining sector in Southern Africa includes cheque fraud and theft, short delivery of bought goods, inferior quality of goods and inflated prices and fake spares regarding repair and maintenance contracts. See RL Robinson "Profile of Economic Crime in Southern Africa: Mining Industry" in JJ Henning (ed) *Economic Crime in Southern Africa* (1996) 16 17-19.

[20] *English Oxford Living Dictionaries* <https://en.oxforddictionaries.com/definition/economic_crime> (accessed 19-07-2017).

[21] USLegal Inc<https://definitions.uslegal.com/e/economic-crime/> (accessed 19-07-2017). See too Justice Heath's discussion of the broad spectrum of economic crime and the perpetrators ranging from a single individual to organised groups (Heath "The Plight of the State as a Victim of Economic Crime" *Victims of Economic Crime* (1999) 1); <http://www.cipce.org.ar/en/what-is-economic-crime> (accessed 19-07-2017).

[22] J Burchell *Principles of Criminal Law* 5 ed (2016) 805 fn 9 describes bribery in the corporate arena as occurring when a briber gives a bribe to another person involved in a

Commentators often use corruption[23] and white-collar crime[24] as synonyms for economic crime. It is submitted that these terms are not inter-changeable. Corruption is a form of economic crime, which although complex and broad itself, is only a type of economic crime. In South Africa, corruption appears in the daily media and is the topic of innumerable conversations every day. It has been labelled as an enemy and

commercial transaction, in order to gain an advantage over a competitor. Consequently the activities of a free market are compromised because the briber gets the deal due to the bribe and not due to competition or competitiveness.

[23] The English Oxford Living Dictionary defines corruption as "dishonest or fraudulent conduct by those in power, typically involving bribery" <https://en.oxforddictionaries.com/definition/corruption> (accessed 07-09-2017); and the Merriam-Webster Dictionary as "dishonest or illegal behavior especially by powerful people" <https://www.merriam-webster.com/dictionary/corruption> (accessed 07-09-2017). JJ Henning ("The Prevention and Detection of Corruption and Bribery in South Africa" in E Snyman & JJ Henning (eds) *Transactions 33 Combating Economic Crime* (2000)) 51 52 defines corruption as "the unlawful or immoral use of office in the public or private sector for personal enrichment". Corruption is defined broadly and extensively by the legislature in s 3 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 ("PCCA Act"). The general definition is very broad, and applies when someone gives (or offers to give) someone else something in order that the recipient use his or her power, illegally and unfairly, to get an advantage for the payer – or for anybody else. The acceptance of any such offer is also considered to be a corrupt activity. G Kemp (*Criminal Law in South Africa* (2015) 442 refers to corruption as an unbundled crime in terms of the PCCA Act as it is split into a general crime of corruption and several specific forms of corruption.

[24] Burchell (*Principles of Criminal law* (2016)) 803 describes white-collar crime as "involving the abuse of official or corporate office for dishonest exploitation of the opportunities for profit in modern business, commercial and industrial practices". The term white-collar crime was first coined by the sociologist Edwin Sutherland in 1939 who defined the term as "a crime committed by a person of respectability and high social status in the course of his occupation". A list of different crimes fall under "white-collar crime", including "antitrust violations, bankruptcy fraud, bribery, computer and internet fraud, counterfeiting, credit card fraud, economic espionage and trade secret theft, embezzlement, environmental law violations, financial institution fraud, government fraud, healthcare fraud, insider trading, insurance fraud, intellectual property theft/piracy, kickbacks, mail fraud, money laundering, securities fraud, tax evasion, phone and telemarketing fraud, and public corruption". See E Temchenko "White-collar Crime" *Cornell University Law School* (June 2016) <https://www.law.cornell.edu/wex/white-collar_crime> (accessed 27-01-2017).

the rhetoric constantly used "is to combat" or "to fight" corruption.[25] In this dissertation economic crime has a much wider application.[26]

Acquaah-Gaisle, describes "corporate crime" as a white-collar crime, and continues to qualify the terms by referring to corporate crime as being organisational, whilst white-collar crime is individualistic.[27] Although it is the understanding in this dissertation that economic crime occurs primarily in the field of commerce, it is submitted that the distinction made by Acquaah-Gaisle is not very helpful.[28] Also, in view of the terms blue-collar and white-collar being outdated, the term white-collar crime is also outdated and not used.

In reaching a definition of economic crime in view of the above discussion, Sjögren and Skogh's definition of economic crime is helpful: "Crime meant to gain profit within an otherwise legal business. The crime may damage private citizens, business and/or the public sector."[29] The authors add several forms of economic crime, including fraud and embezzlement.[30]

An overview of statutory offences, principally in statutes regulating commercial activities, can also contribute to a working definition of economic crime. Of particular relevance are the offences relating to insider trading, the wrongful use of undisclosed

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[25] "Corruption affects the lives of everyone in South Africa – it is our common enemy" as quoted from the National Anti-Corruption Forum brochure Understanding the Prevention and Combating of Corrupt Activities Act (2006/2009) 41. Henning ("Corruption and Bribery in South Africa" in *Combating Economic Crime* (2000)) 86 uses the word "cancer", depicting malignancy when referring to corruption.

[26] For example, although many instances of economic crime may share characteristics such as dishonesty and immorality with corruption. Other instances such as contraventions of health and safety regulations which constitute economic crime may only be reckless and not deceitful in nature.

[27] G Acquaah-Gaisie "Fighting Public Officer and Corporate Crimes" in E Snyman & JJ Henning (eds) *Transactions 33 Combating Economic Crime* (2000) 88 89.

[28] Compare R Paternoster ("Deterring Corporate Crime: Evidence and Outlook" (2016) 15 *Criminol Public Pol*) 383 385 who warns that the research into economic crime has struggled and will continue to struggle because of the confusion over the different terms and descriptions, including "corporate crime", "white-collar crime" and workplace crime. He argues further that if scholars wish to add an adjective to "crime" then the adjective needs to be substantiated.

[29] H Sjögren and G Skogh (eds) *New Perspectives on Economic Crime* (2004) 1.

[30] Sjögren and Skogh *New Perspectives on Economic Crime* 1-2.

information for private gain[31] in terms of the Financial Markets Act 19 of 2012 ("the Financial Markets Act")[32] which has been enacted to regulate the financial market sector to promote confidence and growth in the industry.

Market abuse is similar to "insider trading", and may include "insider trading". It occurs where some person has abused non-public information to trade and has consequently disadvantaged other investors. Market abuse includes instances of price fixing, market manipulation or misleading the market.[33]

The term economic crime has broad interpretation and application. In this research, the focus is on economic crime in the private sector, which may include offences such as corruption, theft, fraud, insider trading, and tenderpreneurship. Cases of economic crime that are being effectively dealt with by certain investigative bodies other than the courts are distinguished and discussed. For example, several cases relating to pyramid schemes have been dealt with by the Financial Advisory and Intermediate Services Ombudsman in terms of the Financial Advisory and Intermediate Services Act 37 of 2002.[34]

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[31] Defined as "the use of privileged information for the purpose of gain (or to avoid a loss) at the expense of others". Booklet JSE "*Insider Trading and Other Market Abuses (Including the effective management of price sensitive information"* (January 2015) available at *ttps://www.jse.co.za/content/.../Insider%20Trading%20Booklet.pdf*. Insider trading involves the trading in securities by someone who has and uses non-public information to buy or sell securities in order to make a profit. Also see JSE "*Insider trading and other market abuse* (2015) 6-7.

[32] Financial Markets Act s 78 makes provision for several offences, including insider trading for one's own account [s 78(1)(a)]; or insider trading on behalf of another person [s 78(2)(a)]; or dealing by a dealer who knowingly deals for an insider [s 78(3)(a)]; or an insider who knowingly discloses inside information [s 78(4)(a)]; or an insider who encourages or discourages another to trade [s 78(5)(a)].

[33] For example, an oil company misleads the public regarding the volume of its reserves, which has an impact on the market price of its shares. Also see the making of certain false, deceptive or misleading statements under s 81 of the Financial Markets Act. The making of such a statement is an offence (s 81(3)).

[34] Tenderpreneurship is a South African expression referring to persons who use their political connections to secure government contracts for their own benefit. The issue of the FAIS Ombud is discussed in para 4 2 3 193 below.

Attention is given to cases of economic crime where a company may be either the perpetrator[35] or the victim.[36] Economic crime involving state officials is beyond the scope of this dissertation which is limited to examining instances of economic crime related to private-sector companies.[37]

A working definition of economic crime is therefore:

> "a non-violent illegal act committed by a person to gain economic profit or benefit".

A person includes both a natural and a juristic person, including a company.[38] It also includes a representative of a company, or an officer or employee of a company. Therefore, the definition of economic crime includes crimes committed by a company and to a company. Economic crime can involve an individual or a group of persons, a single illegal act or a series of illegal acts. Economic crime may consequently include "organised crime" as defined under the Prevention of Organised Crime Act 121 of 1998 ("POCA").[39]

Economic crime is very serious. The persistent misconception that economic crime is not such a serious crime because it is non-violent and most often committed by an educated person of social standing[40] is simply wrong.[41] Economic crime may have direct or indirect costs to private persons and to the public and economy in general.[42] In view of these considerations, it is imperative to curb economic crime and the objective and motivation for this research is expounded in section 1 3 below.

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[35] For example, where a company, such as a bank, may be overcharging its customers interest.

[36] For example, where the Chief Financial Officer of a company may have defrauded the company of monies.

[37] Some state enterprises are registered as companies under the Companies Act 71 of 2008 ("Companies Act 2008") and are thus covered.

[38] The word "company" as defined by s 1 of the Companies Act 2008.

[39] The mechanism of asset forfeiture in terms of POCA is discussed in ch 4, para 1 4 3, 205ff below.

[40] The profile of persons mostly committing economic crime is that of an educated middle-aged male in middle to senior management. *PWC Global Economic Crimes Survey 2016* 12; A Crossman "White-collar Crime" *ThoughtCo* (02-03-2017) <https://www.thoughtco.com/white-collar-crime-definition-3026746> (accessed 22-07-2019).

[41] See *S v Sadler* 2000 1 SACR 331 (SCA) paras 11 & 12 per Marais JA.

[42] Compare Kemp (2014) *Stell LR* 425-426.

1 3 Objective and motivation for the research

The object of the research is to examine the suitability of mediation for resolving instances of economic crime. At present, there are several models within the civil and criminal justice systems of South Africa that deal with economic crime. The conventional process is that a complaint can be laid by a complainant, which is then investigated by the South African Police Services ("SAPS"). Thereafter, the so-called docket is handed over to the National Prosecuting Authority ("NPA"). The NPA decides whether a criminal charge can be laid in terms of common law or in terms of the provisions of various acts[43] and an accused may subsequently be prosecuted in terms of the Criminal Procedure Act 51 of 1977 ("CPA"). The primary objects and outcomes of the criminal prosecution process are punitive[44] as opposed to restorative. Only in a small number of cases is an opportunity given for reconciliation between the parties or restitution for the victim. The process is also adversarial and adjudicative. The offender and the prosecution are adversaries that battle it out before a presiding officer who delivers a verdict, guilty or not guilty. The focus is on the accused and the crime, with the objective of seeking the conviction of the accused for the offence, with minimal focus on and minimal assistance for the victim.[45] The criminal trial procedure is also a time consuming process and sometimes charges against an offender are dropped due to technical, not substantive reasons.[46] Moreover, the SAPS and NPA are under budgetary constraints and overburdened with cases and some staff lack the required skills and experience needed to investigate and prosecute crimes of an economic nature

[43] For example, corruption under the Prevention and Combating of Corrupt Activities Act 12 of 2004.

[44] Kemp *Criminal Law in SA* (2012) 13, 20 states that "the essential purpose of criminal law is to provide a mechanism for *punishing* the offender". Also see JM Burchell *South African Criminal Law and Procedure* (2011) 3; CR Snyman *Criminal Law* (2014) 13, 19.

[45] H Oosthuizen "Victims of Fraud" in L De Koker, BAK Rider & JJ Henning (eds) *Victims of Economic Crime* (1999) 58 64.

[46] For example, the accused person in the *Prophet* series of cases was acquitted of the initial charges of contravening the Drugs and Drug Trafficking Act 140 of 1992 in the Magistrate's Court due to a technicality regarding the evidence obtained via a search and seizure warrant. *Prophet v National Director of Public Prosecutions* ("*NDPP*") 2006 2 SACR 525 (CC) paras 6-7, 21, 39 & 66.

successfully.[47] A civil claim for restitution of losses due to economic crime is usually dealt with separately, as a subsequent claim in the civil justice system. This is yet another legal procedure that is adversarial in nature and also subject to the costs and lengthy time periods customary to court processes in justice systems.[48]

At present, there are also a number of administrative organs that are authorised to investigate, make determinations and issue penalties in instances of economic crime. For example, the Financial Advisory and Intermediary Services Ombud ("FAIS Ombud"), that operates in the financial services industry may investigate and make determinations relating to contraventions of the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS Act"), including fraud, a criminal offence.[49] Determinations of the FAIS Ombud may include restitution of monies to victims, and many of the Ombud's determinations have done so in practice. [50] However, the FAIS Ombud is not authorised to find a person guilty of a criminal offence. The offender

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[47] M Schönteich *Assessing the Crime Fighters* (1999) 1; Oosthuizen "Victims of Fraud" in *Victims of Economic Crime* (1999) 58; a recent Transparency International Report calls for more specialised training for investigators into foreign bribery. South Africa is one of the countries listed as having only limited enforcement. *Exporting Corruption: Progress Report* 2015: Assessing enforcement of OECD Anti-bribery Convention (Aug 2015) 8, 10 (available at <http://issuu.com/transparencyinternational/docs/2015_exportingcorruption_oecdprogre/1>); L De Koker "The Prosecution of Economic Crime in South Africa – Some Thoughts on Problems and Solutions" in L De Koker, BAK Rider & JJ Henning (eds) *Transactions 31 Victims of Economic Crime* (1999) 97 97; HC Nel "Why Enforce Commercial Laws?" in E Snyman & JJ Henning (eds) *Transactions 33 Combating Economic Crime* (2000) 30 30.

[48] Oosthuizen "Victims of Fraud" in *Victims of Economic Crime* (1999) 63; JH De Bruin "Enabling Victims of Economic Crime to Fight Back – A Class Action in South African Law" in *Victims of Economic Crime* (1999) 125 125. In general, it is argued that mediation is a more flexible and faster process and consequently parties benefit from indirect cost savings such as time of employees not spent in lengthy court hearings and also from the direct financial costs of litigation. See J Brand, F Steadman & C Todd *Commercial Mediation: A User's Guide to Court-Referred and Voluntary Mediation in South Africa* (2015 reprinted) 26-28 discussion on the different benefits of mediation.

[49] For example, fraudulently misrepresenting the returns on a company's shares.

[50] *GEJ Siegrist vs CJ Botha T/A CJ Botha Finansiële Dienste* FAIS 00039/11-12/GP 1; *MA Kapp vs Wanadoo 30 CC T/A Martin Holtzhausen Financial Services & MC Holtzhausen* FAIS 05639/10-11/WC 1; *PJ Wessels & JC Wessels vs CD Langley & Levator Wealth CC* FAIS 7434/10-11/KZN 1 and FAIS 7435/10-11/KZN 1; *J Bekker vs EA Carter-Smith* FAIS 06661/10-11/WC 1.

may of course be prosecuted for fraud or another offence in the criminal justice system, but there is usually a delay in the prosecution.[51] Moreover, in some instances, the victims, having received their monies and recovered their losses, may be unwilling to testify as witnesses in a criminal trial. In addition, in many instances it is the intermediary, the financial service provider, who is required by the FAIS Ombud to compensate the victim and not necessarily the main perpetrator of fraud.[52]

Consequently, it is submitted that the conventional legal models of criminal prosecution and a subsequent civil claim, or the model of administrative penalties, are not being fully effectual in combatting economic crime. It is submitted further that mediation offers a practical alternative to standard litigation as the issues in dispute are resolved between the affected parties themselves with the facilitation of a third person. Mediation is thus more of a facilitative and flexible procedure and is dynamic and fast. Mediation is rehabilitative and allows for restorative provisions for both the perpetrator and the victims of economic crime.

The concept of restorative justice, encompassing the responsibilities and interests of all the parties, including the perpetrators, the victims and the community, is important.[53] The state and commentators in South Africa have for several decades

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[51] For example, in the Sharemax scheme allegations of fraud and contraventions of the Banks Act were under investigation in 2012, and resuscitated in 2017, yet to date no person has been charged with any criminal offence. R Cokayne "Sharemax: Financial Adviser Fingers SA Reserve Bank" *Cape Times Business Report* (05-09-2017) 15; R van Niekerk "NPA Asks Hawks to Reopen Sharemax Investigation" (10-03-2017) *Moneyweb* <https://www.moneyweb.co.za/in-depth/investigations/hawks-asked-by-npa-to-reopen-sharemax-investigation/> (accessed 06-09-2017).

[52] For example in the Sharemax pyramid scheme (see fn 232) several cases involving the financial providers have been dealt with by the FAIS Ombud and she has ordered them to pay restitution to the victims. Yet the main role-players of the pyramid scheme, being the directors and officers of the companies involved, who are alleged to have committed several offences of economic crime, are yet to face criminal charges. See Van Niekerk "NPA Asks Hawks to Reopen Sharemax Investigation" (10-03-2017) *Moneyweb.*

[53] ZD Gabbay "Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-collar Crime" (2007) *Cardozo J Conflict Resol* 421 427 concludes "[i]n my opinion, restorative justice is a different approach to criminal justice. While the system today is offender-orientated and focuses on punishment, the restorative justice paradigm offers a more balanced view of the appropriate public response to crime. It maintains the public

endorsed the importance and promoted the integration of restorative justice into the criminal justice system.[54] It is recognised that the purpose of criminal law is primarily retributive, with a view to punishing the offender. However it will be proposed that restorative and reformative resolution of economic crime may be equally effective.[55] It is not proposed that mediation should take place outside of the criminal justice system, but be incorporated into it. Accordingly, the proposal is that any mediated settlement agreement be presented to a court for confirmation.

Mediation is also consensual and thus mostly amicable and allows for forgiveness and the retention of business relationships between the perpetrator and the victim.[56] In addition, it is submitted that it is a less expensive way of resolving issues arising from economic crimes than protracted and costly investigations and trials by the

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aspect of criminal law but introduces the victims' perspective and the reparation of the needs created by the offense as an inseparable aspect of justice."

[54]Minister Ronald Lamola in his recent address on 16 July 2019 to parliament indicated that the CPA is due to be amended to ensure that it is in line with the Integrated Criminal Justice System (ICJS) (2017), including the consideration of victims of crime and witnesses as being main beneficiaries of the system. See L Ensor "Justice Minister to Seek More Resources for Cash-strapped NPA" (16-07-2019) *Business Live* <https://www.businesslive.co.za/bd/national/2019-07-16-justice-minister-to-seek-more-resources-for-cash-strapped-npa/> (accessed 17-07-2019). The ICJS (2017) approved by cabinet on 29 March 2017 includes as focus areas the promotion of ADRM, including mediation in criminal matters and collaboration with the community. See DOJ&CD "Focus Areas Integrated Criminal Justice System (ICJS) *pmg* <https://pmg.org.za/files/170531focusareas.ppt> (accessed 19-07-2019). See also ch 3 2 above; South African Law Reform Commission *Issue Paper 7, Project 82, Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)* (1997); B Tshehla "The Restorative Justice Bug Bites the South African Criminal Justice System" (2004) *SACJ* 1, 14; A Skelton & M Batley "Restorative Justice: A Contemporary South African Review" (2008) 21 *AJ* 37 40 highlight the fact that the 2007 volume of *Acta Juridica*, which is dedicated to restorative justice, is a defining moment in the development of restorative justice in South Africa.

[55] Kemp *Criminal Law* (2012) 20-22 discusses different theories of punishment, including the so-called retributive, relative and combination theories of punishment. This research will join the conversation and lean towards the relative theory through negotiated justice and the use of alternative dispute resolution systems, such as mediation. See too CR Snyman *Criminal Law* (2014) 10-20.

[56] It costs less in time and money to search for and reach a settlement than to litigate: see B Mgayi "Why Leaders Must Forgive" *USB Agenda* (2013) 2 9; Brand et al *Commercial Mediation* (2015) 29.

state authorities, followed by similarly protracted and expensive civil suits. This may enhance access to justice for victims.

It should be emphasised that a model using mediation within the criminal justice system is not a replacement for the present civil and criminal procedures regarding economic crime, but that it presents a viable appropriate alternative mechanism that can contribute to combatting economic crime more effectively in some instances.

1 4 Research hypothesis: the value of mediation and restorative justice

The research proceeds from the hypothesis that mediation, incorporated into the criminal justice system, rather than the conventional adversarial criminal prosecutorial trial can be used to resolve some instances of economic crime more effectively. The hypothesis is based on the principles of restorative justice. Models of restorative justice are being used increasingly in the South African criminal justice system. This is illustrated by the use of diversion[57] in the Child Justice Act 75 of 2008.[58] However, it will be argued that restorative justice needs to be fully integrated into the system.[59] In addition, the extension of the use of ADR mechanisms, including mediation, in various fields of law, both criminal and civil, is important. Examples of such extension are the new possibilities and alternatives provided for in chapter 7 of the Companies Act 71 of 2008 and the expansion of the use of Alternative Dispute Resolution, including mediation, to contraventions of the Companies Act.[60] The application of mediation to economic crime and

[57] Diversion entails diverting a child away from the formal court procedures to other procedures prescribed in the Child Justice Act 75 of 2008 ("Child Justice Act"). The objectives of diversion provided in s 51 of the Child Justice Act echo restorative justice principles, and include ensuring that the child understands her or his accountability for the harm caused, which helps the child's reintegration into her or his family or community and promotes reconciliation between the victim and child perpetrator. Examples of diversion options include: "a compulsory school attendance order" in s 53(1)(a) of the Child Justice Act and "a supervision and guidance order" in s 53(1)(f) of the Child Justice Act.

[58] Ch 8, including the processes of family group conferences in s 61 and victim-offender mediation in s 62 of the Child Justice Act.

[59] See fn 53.

[60] See Companies Act 2008, specifically s 166 read with s 156.

contraventions of the Companies Act has to date received little attention.[61] This research will show that mediation is a possible complementary alternative that may offer realistic and practical possibilities in combating economic crime.[62]

Mediation is chosen as the most appropriate ADR process primarily because it is based on and driven by the interests of the parties as opposed to their rights. In addition, mediation is based on restorative justice as opposed to punitive justice. It is submitted that this approach not only encourages a change of behaviour by the perpetrators of economic crime but also grants a voice and possible pecuniary compensation to victims, whose only usual role in conventional criminal prosecutions is that of witness.[63] The restorative approach focuses more on the potential rehabilitation of the perpetrator and the perpetrator's responsibility to right the wrong against the victims. It is submitted that this better serves not only the interests of the victim and offender, but also the interests of justice and the public interest. It is acknowledged that the public interest needs to be protected in cases of economic crime, which is a crime against the public welfare. Consequently, it is proposed that the mediated settlement agreement[64] be made an order of the court. This will ensure that the public not only has knowledge of it, but also that the mediated settlement agreement in the form of a court order will serve as a general and individual

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[61] In the SALRC Discussion Papers 94 and 100 plea negotiation agreements and out of court settlements in criminal matters were respectively discussed. SALRC *Issue Paper 8, Project 94 Alternative Dispute Resolution* (1997); SALRC *Discussion Paper 100, Project 73, Simplification of Criminal Procedure (Out-of-Court Settlements in Criminal Cases)* (2001). However, no specific reference has been made to the use of formal mediation in instances of economic crime or with regard to contraventions of the Companies Act 2008.

[62] Recognition is given to the concerns raised by Kemp that benefits such as pragmatism and time and cost saving issues should not determine the process to be followed, but rather that the overriding element of justice should prevail. G Kemp "Alternative Measures to Reduce Trial cases, Private Autonomy and 'Public Interest': Some Observations with Specific Reference to Plea Bargaining and Economic Crimes" (2014) 2 *Stell LR* 425-436.

[63] It must, however, be noted that the CPA s 105A(1)(a)(ii)(dd), read with s 300, makes provision for a compensation order to be made by the court to a victim who has suffered economic loss as part of a plea and sentencing agreement.

[64] The term "mediation agreement" is best used to refer to the agreement entered by the parties *before* mediation setting out the terms and conditions for the process of mediation. In this dissertation the term "mediated settlement agreement" is used for the agreement agreed and settled between the parties *after* mediation.

deterrence. It is submitted that the proposal will not only uphold the so-called *Zinn* triad factors which need to be considered when imposing a sentence, namely the crime, the offender and the interests of society,[65] but also give more consideration to the interests of the victim.[66]

It is predicted that the research will result in proposing an integrated model. In this model various forms of mediation will be incorporated into the existing judicial system. It is envisaged that an accredited mediator[67] will mediate between the parties, including the public prosecutor, the perpetrator, the victim and possibly members of the community. It is further envisaged that the mediated settlement agreement will entail provisions regarding both compensation for the victims and a proposed sentence for the perpetrator. Subsequently this mediated settlement agreement will be tabled before a magistrate or a judge for adjudication and approval,[68] to serve as an effective court order. The hypothesis entails the integration and expansion of existing principles and statutory provisions in the criminal justice system, namely the further integration of restorative justice and ADR mechanisms with the insertion of section 105B into the CPA, with the heading "Mediated Settlement Agreements". It is submitted that the proposal is a logical legal development of section 105A of the CPA, as the process of mediation builds upon the process of negotiation already established in section 105A. Frankly put, if a plea and sentence agreement can be negotiated between the prosecutor and the offender, a plea and sentence agreement can be *mediated* between the prosecutor, the offender and the victim!

It is foreseen that the mediation model will be a mixed model, incorporating both voluntary and court-directed mediation. The mediation will also be court-annexed,

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[65] *S v Zinn* 1969 2 SA 537 (A) 540. Also see the discussion by CR Snyman, *Criminal Law Casebook* (2013) 1.

[66] Burchell *Criminal Law and Procedure* (2011) 4, 6 supports the development that the rights and interests of the victim are gaining more attention and the increased recognition of restorative justice. Also see KD Müller and IA van der Merwe "Squaring the Triad: The Story of the Victim in Sentencing" (2004) 6 *Sexual Offences Bull* 17-24.

[67] Either a private mediator or a court-connected mediator.

[68] Similar to the provision in s 105A(7) of the CPA in plea and sentence agreements where the judge is obliged to assess that the sentence in terms of the sentence agreement is just and appropriate.

meaning that the process will be attached to the judicial system, thereby ensuring the protection of the public interest in criminal matters. Public interest remains a matter of paramount importance in cases of serious economic crime. Therefore, although the mediation process would have proceeded in private as opposed to in an open court, the final settlement agreement needs to be made public. This will ensure that the settlement agreement will adhere to the principles of a just legal system and protect the interests of the public.[69]

The projected outcome will be a proposed amendment to the CPA that will provide for mediation and a consequent mediated settlement agreement to be incorporated into and form part of the criminal court processes.[70] A possible further outcome is to expand the scope of court-annexed mediation to both mandatory court ordered mediation and voluntary mediation in instances of economic crime.

1 5 Overview of the discussion

The discussion in the dissertation comprises five chapters. A brief outline of the succeeding chapters is now given.

In view of the context of the problem of economic crime and the underscoring of restorative justice, the proposed ADR mechanism, namely mediation, is described in chapter two. Attention is given to various definitions of mediation and a working definition is proposed. There is no generally accepted definition of ADR[71] or of mediation. Indeed, the definitions themselves are dynamic and ever evolving as is

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[69] At present, ADRM agreements do not form part of court proceedings; and charges are withdrawn if an agreement is reached. ADRM, a diversion mechanism is discussed in ch 2, para 2 4 1. Also see fn 61.

[70] The proposed amendment is described in ch 5, para 5 3, 356ff below. For example, in the case of the bookkeeper stealing R50,000 from her employer, the company may now choose to opt for mediation. A possible mediation settlement could include restitution for the company and a suspended sentence for the bookkeeper. This would be a more effective outcome than the company opting not to report the economic crime.

[71] C Wallgren defines ADR as “processes aimed at resolution of a difference or a dispute through a voluntary settlement agreement reached with the assistance of (a) third person(s)”. See C Wallgren “ADR and Business” in Goldsmith J-C, Ingen-Housz A & Pointon GH (eds) *ADR in Business Practice and Issues Across Countries and Cultures* (2006) 6 3-19.

the process.[72] Accordingly, the characteristics of mediation, including its flexibility and informality, confidentiality and voluntariness, are discussed. The role of the mediator as mediator and the requirements of impartiality and neutrality are also addressed. To promote the understanding of mediation as a process it is helpful to examine the different styles of mediation and these will be discussed based on the Mediation Meta-Model of Alexander.[73]

Mediation is a voluntary process that involves the parties in dispute agreeing to mediate in an attempt to resolve the dispute. In the context of commercial and corporate disputes relating to economic crime the perpetrators and victims of the economic crime will be the parties in voluntary mediation, and may include court officials in instances of mandatory court-ordered mediation. The process is thus participatory and consensual and it is argued that the participatory and consensual nature of the process is more likely to change behaviour and result in a more satisfactory outcome than a criminal or civil case that is adversarial and adjudicative, imposing a decision upon the parties concerned. It may in some instances be necessary for the mediator not only to take the interests of the parties in the dispute into account but also those of the other persons affected and even those of the community.[74]

It is important to show that mediation is not a new concept but can be traced back to ancient ways of resolving disputes in Africa and other cultures. Accordingly, attention is also briefly given to the origin, development and rebirth of contemporary

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[72] Some contend that ADR is outdated and opt for EDR "Early Dispute Resolution". See E Villareal "ADR in the United States – A Practical Guide" in Goldsmith J-C, Ingen-Housz A & Pointon GH (eds) *ADR in Business Practice and Issues Across Countries and Cultures* (2006) 145 137-146. In England certain commentators consider ADR to be synonymous with mediation. See M Kallipetis and S Ruttle "Better Dispute Resolution – The Development and Practice of Mediation in the United Kingdom Between 1995 and 2005" (2006) in Goldsmith J-C, Ingen-Housz A & Pointon GH (eds) *ADR in Business Practice and Issues Across Countries and Cultures* (2006)191 191-248.

[73] N Alexander "The Mediation Meta-Model – the Realities of Mediation Practice" (09-2011) 12 no 6 Article 5 *ADR Bulletin* <http://epublications.bond.edu.au/adr/vol12/iss6/5> (accessed 13-07-2019).

[74] See M Palmer & S Roberts *Dispute Processes ADR* (1998) 110ff. An example of such an instance would be the bursar of a nursery school in a small town defrauding the school of monies paid as school fees by the parents. The interests of the whole community are affected.

mediation in South Africa. Roebuck[75] shows that mediation is not as modern or new as generally understood in more formal justice systems in Europe. The twin-track development of mediation in South Africa is sketched with particular focus on the significance of the development of another alternative dispute resolution model in contrast to the adversarial formal court mechanism. The development of contemporary mediation in South Africa is clearly linked to the political and socio-economic history of South Africa. Brief reference is also made to the recognition of mediation by the legislature and the courts.

The discussion in chapter two describes the development of mediation into various fields of law, especially in criminal law. The contribution mediation can make to the criminal justice system will be examined, including benefits such as promoting the rehabilitation of the offender and the restoration of the victim. Reference is made to informal mediation in the criminal justice system in South Africa. Some problems encountered with such informal mediation such as lack of transparency and the risks of privatisation of criminal matters and of inconsistent sentences are highlighted.[76]

Chapter two concludes with the proposal that mediation, as a formal mechanism, be introduced into the criminal justice system in South Africa to use in some instances of economic crime.

A core principle of this dissertation is the restorative nature of mediation. The overlap and inter-linking of the characteristics of mediation and restorative justice are introduced in chapter two, and explored in more detail in chapter three. Mediation allows the inclusion of the victims or representatives of the victims and brings about a "restorative justice intervention".[77] It enables the offender and victims to meet, to face one another, to share the consequences of the criminal activity and to participate in resolving the dispute, while respecting the public interest in a dispute involving criminal liability.[78] Restorative justice also emphasises values of

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[75] D Roebuck "The Myth of Modern Mediation" (2007) *Arbitration* 105 105-116.

[76] A Anderson "Disposal of Criminal Disputes by Informal Mediation: A Critical Analysis" (2017) 30 *SAJCJ* 162 170-172.

[77] Gabbay (2007) *Cardozo J Conflict Resol* 421. Hiemstra C*riminal Procedure* 28-28(1) states that retributive justice looks back, whilst restorative justice looks forward and emphasises reconciliation, restitution and responsibility.

[78] Gabbay (2007) *Cardozo J Conflict Resol* 427 concludes "In my opinion, restorative justice is a different approach to criminal justice. While the system today is offender-orientated and

restoration, including compensation, restitution and community work. In her mediation meta-model, Alexander[79] finds that transformative and tradition-based mediation, which follow a style of dialogue- based mediation, tend to be restorative.

Chapter 3 explores the principles of restorative justice. The Truth and Reconciliation Commission recognised the values of restorative justice and laid the foundations for the integration of restorative justice into the formal criminal justice system in South Africa. It is submitted that the application and integration of restorative justice in South Africa cannot be fully appreciated without recognising the connexion between restorative justice and *ubuntu*. For this reason this connexion is briefly referred to.[80] The difficulty in defining restorative justice, itself a rather porous concept, is touched upon. The working description used describes restorative *justice* as a set of values, principles and practices to be used in response to crime.[81]

Characteristics of restorative justice are examined, with an emphasis on the elements of responsibility, restoration and reintegration.[82] The roles and nature of the participation of different stakeholders in an integrated restorative justice system, namely the state, the offender, the victim and the community, are discussed next. The characteristic of responsibility includes the need for the offender to acknowledge accountability, and consequently also touches upon the reformation of the offender, which in turn leads to the prevention of further criminal activity by the perpetrator.[83] Restoration, includes not only possible monetary restitution of the loss suffered as a result of economic crime, but also the restoration of relationships, including possible reconciliation between parties. This is linked to the element of reintegration of both the perpetrator and the victim back into the community. The significance of the role

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focuses on punishment, the restorative justice paradigm offers a more balanced view of the appropriate public response to crime. It maintains the public aspect of criminal law but introduces the victims' perspective and the reparation of the needs created by the offense as an inseparable aspect of justice."

[79] Alexander "The Mediation Meta-Model" *ADR Bulletin* (2011) 127,129-130.

[80] *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 114; *Van Vuren v Minister of Correctional Services* 2012 1 SACR 103 (CC) para 51.

[81] FF Rosenblatt *The Role of Community in Restorative Justice* (2015) 11.

[82] D Mekonnen "Indigenous Legal Tradition as a Supplement to African Transitional Justice Initiatives" (2010) 3 *Afr Jnl on Conflict Resolution* 5.

[83] And, of course, more general prevention as well, as the value of prevention learned by an individual will impact upon others too.

of the community is also explored, as no crime occurs in isolation, and instances of economic crime necessarily have an impact on the community.[84] Consequently it is also necessary to define the community and the public voice. Restorative justice is victim-orientated[85] and this characteristic is heavily relied on to emphasise not only possible restitution to the victim, but also the importance of the victim's voice in instances of economic crime. A victim-orientated approach is compatible with the process of mediation and will inevitably impact upon the sentencing process.

The reception of restorative justice in South Africa, particularly by the courts is illustrated by referring to the voice of the judiciary in a number of cases.[86] An exploration of a number of criminal cases in which restorative justice was explicitly mentioned is made to illustrate the development and recognition of restorative justice in the South African formal criminal justice system.[87] Special attention is paid to the call to integrate restorative justice fully into the criminal justice system and not merely to refer to it as if it were an alternative to the more formal, well known adversarial system of prosecution or a sentencing option.

Chapter three concludes by drawing together the lines that overlap and inter-link mediation and restorative justice to promote a restorative and participatory criminal justice system. The mainstreaming and greater integration of restorative justice into the criminal justice system in South Africa is underscored.

Chapter four will comprises three major parts, and attention will be given to existing models used in both civil and criminal justice systems in South Africa and

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[84] The second pillar of the National Crime Prevention Strategy ("NCPS") focuses on community participation and education to help prevent crime. Department of Justice *National Crime Prevention Strategy* (May 1996); available at <http://www.gov.za/documents/national-CRIME-prevention-strategy-summary> (accessed 26-08-2017).

[85] The NCPS highlights the status of the victim throughout the document, particularly in para 4.10 and specifically in para 17 which states: "In particular, an emphasis on a *state centred* system should give way to a greater emphasis on a *victim centred, restorative justice* system." SALRC *Issue Paper 7, Project 82, Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)* (1997).

[86] For example, *S v Makwanyane* 1995 3 SA 391 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA).

[87] For example, S *v Matyiti* 2011 1 SACR 40 (SCA); *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 2 SACR 567 (SCA); *S v Seedat* 2017 1 SACR 141 (SCA).

other countries to combat economic crime. Reference is also made to a hybrid model, comprising principles from both civil and criminal law, namely asset forfeiture. The structure to frame the discussion of the different mechanisms across the civil and criminal justice systems in chapter four is an adapted model of Ayres and Braithwaite's pyramid of responsive regulation[88] and resolution.

In the first part covering mechanisms in the civil justice system, the influential model for corporate self-governance, the King Codes of Good Governance, is discussed.[89] Reference is made to King III promoting the use of ADR[90] and the emphasis of stakeholder inter-dependency based on *ubuntu* in King IV.[91]

The de-criminalisation of the Companies Act 71 of 2008 ("Companies Act 2008")[92] is referred to, with an emphasis on the development of alternative dispute mechanisms under chapter 7 of the Companies Act 2008. Reference is also made to the current version of section 166 within Chapter 7 of the Companies Act 2008. Particular attention is given to the mechanism of a public compliance and enforcement regulator, namely the Companies and Intellectual Property Commission ("CIPC").[93]

In addition, the mechanism of an ombud office is briefly discussed as illustrated through the office the Financial Advisory and Intermediary Services ("FAIS") Ombud.[94] This is because of the influential role which the FAIS Ombud plays in the

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[88] The concept responsive regulation originates from a work by Ayres and Braithwaite in the early 1990s and has since been refined and expanded by Braithwaite. See I Ayres & J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (1992).

[89] Codes introduced by the Institute of Directors in Southern Africa ("IoDSA") since 1994.

[90] *King III* (revised) 2012 13-14.

[91] *King IV* 2016 6.

[92] D Davis (ed) *Companies and Other Business Structures in South* Africa (2013) 291ff. JJ Henning & S Du Toit "Corporate Law Reform in South Africa: Empowering the Victims of Economic Crime" in L De Koker, BAK Rider & JJ Henning *Victims of Economic Crime* (1999) 134 145 & 149.

[93] An independent administrative body created in terms of s 185(1) of the Companies Act 2008 which replaces the Registrar of Companies under the Companies Act 1973.

[94] The FAIS Ombud was established in terms of s 20 of the Financial Advisory and Intermediary Services Act 37 of 2002.

financial sector in South Africa, especially as an entity that addresses financial wrongdoing.[95]

In the second part of chapter four, a hybrid mechanism, namely asset forfeiture, is discussed. This shows that various jurisdictions have had to create special mechanisms in their fight against crime, including asset forfeiture.[96] Asset forfeiture is a particularly powerful and intrusive, yet indisputably necessary, instrument in the hands of a state to address serious crime.[97] In this dissertation, the importance of asset forfeiture is the opportunity it presents for restitution to victims of economic crime. The inference is that assets that have been forfeited could be a matter to discuss during the mediation, and the realisation of such assets could go towards compensating the victims for their loss arising from the economic crime.

It is submitted that the constitutional principles that have crystallised out of a number of cases arising from the practice of asset forfeiture will assist in the composition of the mediation model in the criminal justice system.[98] It is important to note that the forfeiture of assets in terms of chapter 6 of POCA does not require a criminal conviction[99] and this could be an influential factor in the mediation process. The possibility of restitution from the forfeiture of assets is emphasised.[100] The

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[95] The South African Rand value of cases settled or determined by the FAIS Ombud at the end of the 2016/2017 year exceeded R58 million. See FAIS Ombud *Annual Report* 2016/2017 18.

[96] The South African legislature passed the Prevention of Organised Crime Act 121 of 1998 ("POCA) making provision for confiscation orders under ch 5 and forfeiture orders under ch 6.

[97] In *Prophet v National Director of Public Prosecutions* ("*NDPP*") 2006 2 SACR 525 (CC) para 46 Nkabinde J held: "Asset forfeiture orders as envisaged under Chapter 6 of the POCA are inherently intrusive in that they may carry dire consequences for the owners or possessors of properties particularly residential properties."

[98] For example, the constitutionality of asset forfeiture and the judicial development of the "proportionality test" in *Prophet v NDPP* 2006 2 SACR 525 (CC); *Mohunram* v *NDPP* 2007 4 SA 222 (CC); that asset forfeiture is applicable to individual crimes as the provisions of POCA stretch beyond "organised crime" as decided in *Mohunram* v *NDPP* 2007 4 SA 222 (CC) paras 21-34, 56.

[99] *Prophet v NDPP* 2006 2 SACR 525 (CC) para 42.

[100] R94,4 million specifically related to commercial crime in the 2015/2016 year, and R51,3 million in the previous year. The total amount of assets forfeited in terms of POCA was

philosophy of sentencing and whether the confiscation or forfeiture under POCA is deemed to be penal or not is also important. Primarily, it has been held that the purpose of the confiscation and forfeiture under POCA is to prevent persons from benefiting from the proceeds of crime, though such confiscation or forfeiture could have penal consequences.[101]

In the third part of chapter four, various models currently used as alternatives to the usual adversarial trial in the criminal justice system of South Africa and other jurisdictions are examined. The evolution of the use of Deferred Prosecution Agreements ("DPAs") in the United States and England are discussed. It is another innovative mechanism especially designed to deal with instances of serious and complex corporate crime. The mechanism illustrates that instances of economic crime can be investigated and a resolution negotiated outside the parameters of a public court room. However, the risks accompanying such an external mechanism, such as possible abuse of power by either the prosecutor or the corporate entity are matters of concern, as is the alleged overreach of the prosecutor into the private corporate governance of a company. The lack of transparency of the process is also a matter of concern. These issues and other ancillary issues are discussed in light of the distinctive use of DPAs in the United States and the more formally and specifically regulated use of DPAs in England. The purpose is not only to illustrate the development of additional mechanisms within or close to the criminal justice system, but also to portray the complexity of the nature of economic crime and of such processes. DPAs also demonstrate the need to recognise risks that arise from deviating from the formal adversarial and adjudicative criminal trial process.

Critical to the development of the proposal in this dissertation is the nature of plea and sentencing agreements. As plea and sentencing agreements are the primary mechanism through which crime is dealt with in the United States, pertinent issues of plea and sentencing agreements encountered in the United States are discussed. Section 105A of the Criminal Procedure Act 51 of 1977 introduced plea and

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R444,2 million of which R390,2 million was paid to victims. See the NDPP *Annual Report* 2015/2016 22 51 and the NPA *Annual Report* 2014/2015 71.

[101] *Shaik v S* 2008 2 SACR 165 (CC) paras 51 and 57. The Asset Forfeiture Unit's (AFU's) motto is "taking the profit out of crime".

sentencing agreements into the South African criminal justice system.[102] Significantly, plea and sentencing agreements are based on negotiation, a concept that may appear strange to advocates accustomed to criminal trials. However, it will be submitted that the attainment of justice is not compromised through such alternative dispute resolution processes and that like plea and sentencing agreements, mediation is also based upon a negotiation model.

Special reference will be made to the waiver of rights by the offender during the plea and sentencing agreement process.[103] The authority and extraordinary power of the public prosecutor will be highlighted.[104] The sentencing of economic crime will be discussed, as well as the disparities arising in sentencing persons that elect to enter into a plea and sentencing agreement, as opposed to those who opt to proceed to trial.[105] Particular attention will be given to the opportunities that arise from the use of section 105A plea and sentencing agreements, together with section 297 and section 300 of the CPA, as these reflect important restorative justice solutions.[106]

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[102] Incorporated on 14 December 2001 by s 2 of the Criminal Procedure Second Amendment Act 62 of 2001.

[103] For example, the waiver of the constitutional right to remain silent and the constitutional right to be presumed innocent until proven guilty beyond a reasonable doubt. S 35(3) of the Constitution grants an accused a right to a fair trial; *S v De Goede* WCC (30-12-2012) case no. 121151; ME Bennun "Negotiated Pleas: Policy and Purposes" (2007) 20 *SAJCJ* 17-45.

[104] The public prosecutor remains *dominus litus*, but has special responsibilities in plea and sentencing agreements. The public prosecutor also has much power, as she or he can decide with whom to enter into plea and sentencing agreements, what charges to bring or to drop and what sentences to propose. See LE Dervan "Plea Bargaining's Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post-Enron World" (2007) 60 *Okla L Rev* 451-489.

[105] For example, the Dynegy scandal and the different sentences imposed for the same charges upon the persons who entered into plea and sentencing agreements, in comparison to Jamie Olis who chose to go to trial. Olis' final sentence was six years, compared to the other offenders, who received 15 months and 30 days respectively. See Podgor ES "White Collar Innocence: Irrelevant in the High Stakes Risk Game" (2010) 85 *Chicago-Kent L Rev* 77-88 (accessed 24-05-2017).

[106] For example in *S v Sassin* 2003 4 All SA 506 (NC) (paras 15.11 and 15.12) where the first accused entered into a plea and sentencing agreement in terms of s 105A. The first accused ran a financial pyramid scheme and pleaded guilty, inter alia, to 1,527 counts of fraud involving more than R29 million. Most of the assets were recovered through the AFU

Chapter four concludes by summarising the principles drawn from the various models discussed, as these are used as the building blocks for the proposed additional model of mediation. These principles will include the increased use of alternative dispute resolution in both civil and criminal law processes, the integration of restorative justice into the criminal justice system, particularly with regard to the role and rights of the victim, and the sentencing of the offender.

In chapter five, the mechanism of mediation, as an evolution of a section 105A plea and sentencing agreement, is described. Gabbay proposed that mediation be introduced to address white-collar crime in the United States.[107] Reference is particularly made to white-collar crime by top executives of companies. The use of mediation to address serious white-collar crime has also received academic support in South Africa.[108] This proposal is explored and will be developed from the provisions of section 105A of the CPA relating to plea and sentencing agreements.[109] It is suggested that expanding the negotiation process beyond two parties to include other parties, including victims of economic crime, will present an effective alternative for resolving disputes regarding economic crime.[110] It is foreseen that the mediated settlement agreement will have to be affirmed by a court order,

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and through agreements and consequently most of the investors would recover some of their losses.

[107] Gabbay (2007) *Cardozo J Conflict Resol* 475ff. The preamble to Recommendation No R (99) 19 concerning mediation in penal matters adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies is most persuasive and emphasises the role mediation can play in allowing the participation of the voices of the victim, the offender and the community; as well as acknowledging the enhanced rehabilitation possibilities in focusing on the offender's responsibilities and those of the community in which the offender may be rehabilitated.

[108] D Butler, unpublished paper *The Potential of ADR, Particularly Mediation, for Resolving Issues of Illegality Relating to Corporate White-collar Crime: A South African Perspective* delivered at the 9th International Arbitration and ADR in Africa Workshop in Addis Ababa, Ethiopia (2012)(copy on file with the writer).

[109] In terms of s 105A the prosecutor and a represented accused may, before the accused pleads to the charge, enter into an agreement in respect of a plea of guilty by the accused to the offence charged or to an offence of which she or he may be convicted in the charge and with respect to an appropriate sentence.

[110] See Butler *The Potential of ADR*.

thereby sustaining one of the pillars of justice, namely accountability in the public interest.

The mediation model is envisaged as a mixed model, incorporating both voluntary (or private) mediation and court-directed or court-assisted mediation. The mediation will be court-annexed, meaning that the process will be attached to the judicial system, thereby ensuring the protection of the public interest in criminal matters. The public interest in cases of serious economic crime remains paramount and thus, although the mediation process would have proceeded privately as opposed to in open court, the final settlement agreement needs to be judicially approved and made public.

Special attention is given to the role of the public prosecutor in the proposed model as the role of the public prosecutor as *dominus litis* is pivotal. In addition, it is submitted that collaboration with public and civil organisations is important to ensure that the model succeeds.[111]

This research concludes with Annexure A, the provisions of the proposed section 105B of the CPA. This serves to illustrate the submission of this dissertation: that mediation, as an alternative appropriate dispute resolution mechanism, be formally introduced into the criminal justice system to address instances of economic crime and so contribute to combating economic crime.

[111] For example, that mediators be specially trained to act as mediators in cases of economic crime and that prosecutors also receive special training on the issues. The training and accreditation cannot be the responsibility of the state alone and collaboration with the private sector and mediation organisations is vital.

CHAPTER 2
MEDIATION

Chapter overview

2 1 Introduction

> "Litigation could never end a suit; only compromise could."[1]

Litigation has become the conventional way in which to resolve disputes. However, as far back as medieval times disputants were granted an opportunity to resolve their disputes by themselves, with the assistance of a third party, rather than litigating their dispute and having it adjudicated by a third party and a decision imposed upon them. Mediation is thus not modern or a process introduced in a post-litigation era. Legal historians show that the process, commonly known today as mediation, was the preferred and encouraged manner to resolve disputes in earlier times. This is illustrated by the practice of lovedays which were first recorded in England in the Anglo-Saxon era.[2] In short, a loveday (*dies amoris)* was a period in

[1] C Carpenter (ed) *The Armburgh Papers: The Brokholes Inheritance in Warwickshire, Hertfordshire and Essex c1417-c1453* (1998) 51.

[2] For examples and detailed discussion of the practice of lovedays see D Roebuck *Mediation and Arbitration in the Middle Ages: England 1154 to 1558* (2013) 29-52. Laws emphasising

which disputants were given an opportunity to negotiate and settle a matter between themselves, with or without the assistance of a third party, but usually with the assistance of a third party who acted as a mediator. Lovedays could be before or during litigation. They could be at the parties' own request, at the request of friends or at the request of the courts.[3] Lovedays is thus not only a charming reference to an old practice but also a reminder of an old dispute resolution practice, similar to what today is known as mediation. Significantly, lovedays were integrated into the early legal systems, both civil and criminal.[4]

In this chapter the characteristics of mediation, as well as its development and integration as a dispute resolution process into contemporary civil and criminal justice systems are discussed.

Reference is made to the definition of contemporary mediation and to different styles of mediation. The two different historical roots of the practice of mediation in South Africa are briefly described, as are recent developments regarding the integration of mediation into the court systems. The aim is to illustrate that mediation is a dispute resolution process with merit and credibility that should be more fully integrated into the judicial systems in South Africa, and specifically into the criminal justice system. The focus is on characteristics of mediation that highlight principles of restorative justice. Whilst mediation is the proposed additional dispute resolution mechanism through which to address economic crime, restorative justice is one of the primary building blocks of this proposal. Consequently, the close links between and overlaps of the characteristics of mediation and restorative justice are critical to this dissertation.[5]

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love, encompassing compromise and reconciliation in contrast to law, were highlighted. For example, a c1008 law of Aethelstan provided: "At the holy festivals, as is right, there shall be conciliation and reconciliation, *som* and *sib*, for all Christian men, and every dispute settled." Another example from 1277, regarding a debt: "At the request of the parties a date was set for a loveday, *dies amoris*, between Isaac Bishop, claimant, and Margery of St Martin." Roebuck *Mediation and Arbitration in the Middle Ages* 30, 32.

[3] Roebuck *Mediation and Arbitration in the Middle Ages* 39.

[4] Lovedays remind us of the contemporary temporal practices of a "mediation week" or "settlement week" in various jurisdictions that grant litigants an opportunity to resolve their differences through mediation.

[5] In this dissertation mediation is specifically defined as a process that promotes restorative justice. Mediation is a distinct process, but characteristics of mediation echo and are akin to

In the third part of this chapter specific attention will be given to the application of mediation in conventional court processes, with particular attention to criminal-court matters, so-called "criminal mediation".[6] This part will constitute one of the primary building blocks of the proposal of section 105B, namely mediation settlement agreements, being introduced into the CPA. The origin and development of the phenomenon of mediation in court processes will be briefly discussed, including the practice of judicial mediation, or the multi-tasking judge.

The chapter concludes by summarising the benefits and concerns of formally introducing mediation, alongside plea and sentencing negotiation, as another alternative mechanism to the formal adversarial trial for resolving instances of economic crime.

2 2 Definition and description of mediation

2 2 1 Definition of mediation

Mediation is an Alternative Dispute Resolution ("ADR")[7] process. There is no generally accepted definition of ADR, which commonly refers to mechanisms and

characteristics of restorative justice. As mediation encompasses and integrates characteristics of restorative justice, for the purposes of this dissertation, mediation is also described as a restorative justice process. The close links between and overlaps of characteristics of restorative justice and mediation are discussed independently in ch 3 para 3 5 at 120 below.

[6] Although this is the term which is commonly used to discuss mediation in criminal matters, the phrase "mediation in the criminal justice system" will be preferred, to avoid any negative connotations that may arise, as with the term "plea bargaining" referred to below in ch 4 para 4 4 2 fn 700.

[7] Some academics and jurists who aim to normalise the use of mediation, prefer the acronym ADR to mean "Appropriate Dispute Resolution" or "Another Dispute Resolution"; whilst those who claim the originality and authenticity of mediation prefer "Authentic Dispute Resolution". Others aver that ADR is outdated and opt for the acronym EDR, for "Early Dispute Resolution". See E Villareal "ADR in the United States – A Practical Guide" in Goldsmith J-C, Ingen-Housz A & Pointon GH (eds) *ADR in Business Practice and Issues Across Countries and Cultures* (2006) 145 137-146; WLR de Vos & T Broodryk "Managerial Judging and Alternative Dispute Resolution in Australia: An Example for South Africa to Emulate? (Part 1)" (2017) 4 *TSAR* 683 702.

practices that focus on resolving legal disputes outside the formal courts.[8] ADR is a generic term which includes a number of different processes, including conciliation, facilitation, evaluation and mediation. These terms are closely related to one another and often used interchangeably.[9] None of these processes has an entrenched delineation, they are all species of ADR.[10] In addition, the term conciliation overlaps

[8] G Cox "The Appropriate Arena for ADA Disputes: Arbitration or Mediation" (1995) 10 *St. John's J Legal Comment* 591 591 fn 1. ("ADA" is the acronym for Americans with Disabilities Act.) Notably, the SA Rules Board for Courts of Law recognises the development of ADR and its consequent connection to courts in the amendments to the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN R183 in *GG* 37448 of 18 March 2014, which added a new chapter 2 on court-annexed mediation. The new R 73 defines ADR as: "a process, in which an independent and impartial person assists parties to attempt to resolve the dispute before them, either before or after commencement of litigation". See also, the definition of C Wallgren in "ADR and Business" in Goldsmith J-C, Ingen-Housz A & Pointon GH (eds) *ADR in Business Practice and Issues Across Countries and Cultures* (2006) 6 3-19 whose definition does not include a requirement of independence or impartiality with regard to the third party: "processes aimed at resolution of a difference or a dispute through a voluntary settlement agreement reached with the assistance of (a) third person(s)".

[9] Compare Alexander, who refers to UNCITRAL's Working Group on the Model Law on International Commercial Conciliation (MLICC) in 2002 choosing conciliation as a generic term including mediation, but who distinguishes mediation from negotiation and arbitration. See N Alexander *International and Comparative Mediation Legal Perspectives* (2009) 16-17, 25-38. Notably, in revising its 2002 model law on conciliation in 2018, UNCITRAL switched to the term *mediation* in preference to *conciliation,* but states that the two terms are interchangeable*. See the* UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 ("UNCITRAL Model Law on International Commercial Mediation 2018") which was previously known as the Model Law on International Commercial Conciliation, 2002. The texts of the model laws and an explanatory note are available at <https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation> (accessed 01-6-2019). Arbitration, conciliation and mediation are listed separately in s 166 of the Companies Act 2008 indicating that each is considered to be a distinct process. However, there is no clear distinction between conciliation and mediation.

[10] Whilst in England ADR is considered to be synonymous with mediation. See M Kallipetis and S Ruttle "Better Dispute Resolution – The Development and Practice of Mediation in the United Kingdom Between 1995 and 2005" (2006) in Goldsmith J-C, Ingen-Housz A & Pointon GH (eds) *ADR in Business Practice and Issues Across Countries and Cultures* (2006)191 191-248.

with the definition of mediation.[11] For the purposes of this dissertation, no clear distinction will be made between mediation, conciliation or facilitation and reference to mediation may include any of these processes. Consequently, "mediation" is used as a generic term.[12]

Although arbitration is often excluded from a definition of ADR, it is also sometimes identified as an ADR process, as it is an alternative process to formal litigation in the courts. Arbitration, however, is distinct from mediation.[13] A helpful distinction, illustrating the core difference between arbitration and mediation and conciliation is given by Fisher J:

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[11] The conventional difference between a conciliator and a mediator for some commentators is that a conciliator plays a more direct and purposeful role in conciliation and is primarily responsible for proposing solutions and directing the parties into a solution. In contrast, a conventional mediator maintains a neutral stance and is responsible for managing a process whilst the parties participate more actively and directly in the process and in finding a solution. See Sgubini et al "Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective" *mediate.com* (accessed 29-05-2019). Roebuck identifies conciliation as a synonym for mediation but does add that conciliation is sometimes distinguished from mediation in the sense that a conciliator is asked to give an opinion or recommendation regarding the merits. A Connerty in "The Role of ADR in the Resolution of International Disputes" (1996) 12 *Arb Int'l* 47 50 distinguishes mediation from conciliation and says the opposite namely that it is a mediator who may play a more directive role. Notably, in s 1 of the International Arbitration Act 15 of 2017, conciliation is simply stated to include mediation and further reference is made in ss 12 and 13 to the possibility of agreeing to a conciliation process under the UNCITRAL Conciliation Rules in Schedule 2.

[12] It is appreciated that others believe that these processes are best understood if kept distinct. However as will be described below, attention will be given to different styles of mediation, such as "facilitative mediation" and "evaluative mediation". See LP Love & KK Kovach "ADR: An Eclectic Array of Processes, Rather than One Eclectic Process" (2000) *J Disp Resol* 295 298-299, 306. R Birke "Evaluation and Facilitation: Moving Past Either/Or" (2000) *J Disp Resol* 309 314-315, 318-319 on the other hand calls for the dichotomous debate to end regarding mediation of legal disputes, and emphasises that mediation is both evaluative and facilitative.

[13] Simply, the core difference between arbitration and mediation is that in arbitration the arbitrator adjudicates and makes a final and binding determination, while in mediation the outcome is determined by the parties themselves and not a third party. The third party assists the parties and facilitates the process. A mediator can evaluate and articulate but does not adjudicate. See Sgubini et al "Arbitration, Mediation and Conciliation: Differences and Similarities from an International and Italian Business Perspective" *mediate.com*.

> "At their heart, mediation and conciliation are designed to facilitate agreement without any associated power for the neutral third party to impose a solution on the parties. Arbitration, on the other hand, is the resolution of a difference or dispute by a neutral third party who makes a binding determination after considering the relevant evidence and argument."[14]

It is beyond the scope of this dissertation to discuss arbitration. Arbitration is consequently distinguished from mediation in this dissertation. A clear distinction between certain ADR processes, such as negotiation, arbitration, mediation and litigation is made by Cox:

> "In negotiation, the *parties* control the process and the outcome. In *mediation*, the *mediator* controls the process, the *parties* control the outcome. In arbitration, the *parties* control the design of the process and the *arbitrator* controls the outcome. In litigation, the *court* controls the process and the outcome." [15]

It is acknowledged that contemporary ADR includes processes like med-arb[16] and arb-med[17] but it is beyond the scope of this dissertation to discuss any such combinations. Accordingly, mediation is presented as a distinct process.[18]

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[14] *Acorn Farms Limited v Schnuriger* [2003] 3 NZLR 121 para 17. This is supported by the definition of mediation in the UNCITRAL Model Law on International Commercial Mediation 2018 in art 1.3, which specifically states that "the mediator does not have the authority to impose upon the parties a solution to the dispute". The same definition of mediation is in art 1.2 of the Draft UNCITRAL Mediation Rules (2019). Also see Connerty "ADR as a "Filter" Mechanism: The Use of ADR in the Context of International Disputes" (2013) 79 *Arb* 120 121, 123.

[15] G Cox (1995) *St. John's J Legal Comment* 593-595. For a discussion on and diagram of the different dispute resolution processes see Brand et al *Commercial Mediation* (2015) 19-21.

[16] Abbreviation for mediation-arbitration. This is a process, agreed to in advance by the parties, which commences as mediation, but in the absence of a settlement by the parties the third party makes a binding decision. The point is that the same person fulfils both roles, if resort is made to arbitration. It is commonly referred to as "mediation with muscle" or "mediation with a bite", as the parties agree that should mediation fail a final binding resolution will be made by the mediator/arbitrator. See *USLegal.com* <https://definitions.uslegal.com/m/med-arb/> (accessed 15-12-2017); DJ Maclean & S-P Wilson "Compelling Mediation in the Context of Med-arb Agreements" (2008) 63 *DRJ* 1 2 (reprinted at <http://www.cedires.be/index_files/McLean_and_Wilson_Med-Arb_Dispute%20Resolution%20Journal.pdf> (accessed 15-12-2017). However, the med-arb process can raise several thorny issues should the same person act as both "mediator" and

Neither is there a uniform definition of mediation. Indeed, the definitions of mediation are dynamic and ever evolving.[19] Consequently, a standard definition of mediation is elusive and different definitions have been developed in recent years. As mediation has also grown to encompass more fields of law the understanding of the nature of mediation has broadened. In South Africa, mediation in labour disputes became common towards the end of the twentieth century.[20] Subsequently, its use was extended to private commercial disputes, as well as in public community and political disputes.[21] Mediation also plays a significant role in international commercial

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"arbitrator", particularly with regard to due process matters. For example, confidential information may be given to the person in a caucus session during the mediation process which may influence the arbitration decision. In a New Zealand case *Acorn Farms Limited v Schnuriger* [2003] 3 NZLR 121, the court sets out precautions to be taken, particularly with regard to disclosure of information during the mediation process and the need to explain the possible consequences to the parties should the matter proceed to arbitration. Also, Australia has introduced legislation dealing with med-arb and the manner in which the process should proceed. For example, s 27D of the New South Wales Commercial Arbitration Act 61 of 2010. For general discussion on these issues see R Hindle "Is med/arb an Oxymoron?" (2013) *International trade/adr in the South Pacific* 225-235 available at <https://www.victoria.ac.nz/__data/assets/pdf_file/0019/920116/Hindle.pdf> (accessed 01-06-2019). Comparable too, is the con-arb process under s 191(5) of the (South African) Labour Relations Act ("LRA") 66 of 1995. For a discussion on con-arb under the LRA see Vettori (2015) *SAHRJ* 370-372.

[17] Abbreviation for arbitration-mediation. This process starts with arbitration but the arbitrator does not disclose the award. She or he continues to assist the parties as mediator to resolve the dispute, but if this is unsuccessful, the arbitral award is published and is final and binding. See DW Butler & E Finsen *Arbitration in South Africa: Law and Practice* (1993) 203.

[18] Connerty (2013) *Arb* 120-123, 133 identifies mediation as a distinct process that can be mixed with either litigation or arbitration, and further identifies mediation as a filter mechanism through which issues in dispute can be filtered and to only resort to adjudicative processes, such as litigation or arbitration, in the event of failure of settlement through mediation.

[19] This is illustrated in the recent publication of draft R 41A of the Uniform Rules of Superior Courts, South Africa, that has more than one definition of both mediation and mediator.

[20] This was probably with the establishment of Independent Mediation Service of South Africa ("IMSSA") in 1984. Nupen (2013) *AJOL* 88-89; Brand et al *Commercial Mediation* (2015) 2-3. Also see the discussion below in para 2 2.

[21] Birke (2000) *J Disp Resol* 309 310-312. Compare too Brand et al *Commercial Mediation* (2015) 2-3 regarding the development of mediation in South Africa.

matters.[22] In exploring mediation, reference will be made to some statutory definitions, as well as to some definitions offered by academia. Particular attention is given to the core characteristics of mediation.

At present, there is no general or generic statute regulating mediation in South Africa.[23] Provision is, however, made for the process of mediation in certain statutes;[24] of which the Commission for Conciliation Mediation and Arbitration ("CCMA") established in terms of the Labour Relations Act[25] is probably the best known. Arguably, the most significant definition of mediation in South Africa is that of the recent Magistrates' Courts Rules:[26]

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[22] Brand et al *Commercial Mediation* (2015) 4-6. See also the website of UNCITRAL and specifically the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 available at www.uncitral.org.

[23] Unlike arbitration that has for the past fifty years been governed in South Africa by uniform national legislation through the Arbitration Act 42 of 1965 and subsequently the International Arbitration Act 15 of 2017. South Africa also lags behind several foreign jurisdictions. In the United States, the Uniform Mediation Act, 2001 (revised 2003) by the Uniform Law Commission and the American Bar Association's Section on Dispute Resolution has been adopted by several states. See the Uniform Law Commission's website: <http://www.uniformlaws.org/> (accessed 01-06-2019). The Mediation Act 1 of 2017 of Singapore came into operation on 1 November 2017. See Government of Singapore "Mediation Act to Commence 1 November 2017" (01-11-2017) *Ministry of Law* <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/mediation-act-to-commence-from-1-november-2017.html> (accessed 19-12-2017).

[24] Brand et al *Commercial Mediation* (2015) 22-23 and Appendix A identify 49 South African statutes that provide for mediation as an ADR process to be used. See also A Rycroft "Settlement and the Law" 2013 *SALJ* 187 197 fn 51.

[25] Labour Relations Act 66 of 1995 Chapter 7, s 112. Interestingly, mediation is not defined in the Labour Relations Act, although it is incorporated into the name of the CCMA. The Labour Relations Act uses the word conciliation throughout the Act. Mediation is only referred to in the title of the commission, in the preamble of the act and in s 135. S 135(2) prescribes that a commissioner of the CCMA must attempt to resolve a dispute through conciliation within a certain time period; whilst 135(3)(a) prescribes a commissioner must prescribe a process through which the dispute may be resolved, which may include "mediating the dispute". However, the process of conciliation is also not defined. It is beyond the scope of this dissertation to discuss the operations of the Labour Relations Act and the CCMA. See further the CCMA's website at <www.ccma.org.za> (accessed 01-06-2019).

[26] Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South as amended by R183 *GG* 37448 of 18-03-2014 ("Magistrates' Court Rules (2014)"). Subsequently, mediation was introduced in pilot projects as a court-affiliated process into the

> "[T]he process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute."[27]

This definition illustrates the role of the mediator and potential outcome of the mediation process. Another recent definition in South African legislation is given in the Regulations on Mediation Rules in terms of the Protection of Investment Act 22 of 2015. In this act, mediation means a "process in which parties to a dispute, with the assistance of a neutral third party ('the mediator') identify the issue or issues in dispute, develop options, consider alternatives and endeavour to reach an agreement."[28] This definition, although brief, goes further than simply describing the process, but also emphasises the spirit of mediation, in highlighting the parties' endeavour to attempt to end the dispute, find solutions and reach agreement. The definition in the United States' Uniform Mediation Act simply states that mediation means a "process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[29]

South African court system. See also GN 508 in *GG* 42344 of 28-03-2019 for the designation of additional courts with effect from 1 July 2019.

[27] Rule 73. This definition is very similar to the longer definition in the draft R 41(A)(1) of the SA Uniform Rules of Court, which however includes the requirement that a mediator is "a neutral and independent person". It is also similar to the descriptive definition in s 3(1) of the Mediation Act 1 of 2017 of Singapore in which mediation "means a process comprising one or more sessions in which one or more mediators assist the parties to a dispute to do *all or any* of the following with a view to facilitating the resolution of the whole or part of the dispute: (a) identify the issues in dispute; (b) explore and generate options; (c) communicate with one another; (d) voluntarily reach an agreement" (writer's emphasis). Interestingly this definition breaks down the mediation process into sessions [a term comprehensively defined in the Act in s 3(2), including a meeting held by electronic means] and also recognises that mediation may be any one or all of the stages in the mediation process. For example, simply the stage of facilitating communication between the parties falls under the definition of mediation. Securing an agreement is thus not necessary for the process to fall within the definition of mediation.

[28] Regulations on Mediation Rules reg 1 promulgated in *GG* 41767 of 13-07-2018.

[29] United States, Uniform Mediation Act s 2. A similar definition is found in the Idaho Supreme Court Rules of Evidence R 507 available at <https://isc.idaho.gov/ire507> (accessed 01-06-2019).

The Centre for Effective Dispute Resolution's ("CEDR") current definition portrays the basic characteristics of mediation: "mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution."[30]

Interestingly, definitions given by academics and experts in ADR, for example Boulle,[31] have changed over the years. In an earlier work in 1997, Boulle and Rycroft[32] identified the core features of mediation as follows: "Mediation is a decision-making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them can assent."[33] However, almost two decades later Boulle, in another work with a different co-author, declines to attempt to define mediation.[34]

It is apparent from the above that defining mediation is not a simple exercise and there is little commonality.[35] Consequently, considering the above, a simple and concise working definition will be given, followed by a discussion of the nature and characteristics of mediation. For the purposes of this dissertation "mediation" will be defined as:

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[30] The definition was adopted at the end of 2004. CEDR News "CEDR Revises Definition of Mediation" (01-11-2004) *cedr* (accessed 31-05-2019). See also E Carroll & K Mackie *International Mediation – the Art of Business Diplomacy* (2006) 3; Brand et al *Commercial Mediation* (2015) 19.

[31] Laurence Boulle is an eminent ADR and mediation expert, currently professor in law, Australian Catholic University, Sydney, Australia.

[32] L Boulle & A Rycroft *Mediation: Principles Process Practice* (1997) 4ff. Boulle's co-author, Alan Rycroft, until his recent retirement, held the chair in commercial law at the University of Cape Town. They also examine the many dimensions of mediation and state that it can be described descriptively by defining the philosophy behind mediation or conceptually defining the operational aspects within mediation.

[33] Boulle & Rycroft *Mediation* (1997) 1, 7. Boulle & Rycroft *Mediation* (1997) 10 also offer a very helpful mediation abacus that illustrates the flexible and dynamic character of mediation.

[34] L Boulle & M Nesic *Mediator Skills and Techniques: Triangle of Influence* (2010) *Mediation: Principles Process Practice* (2010) 8.

[35] MC Laubscher *Confidentiality in Mediation: A Legal Analysis* Masters of Law Dissertation, North West University (2018) 5.

> "a process in which parties to a dispute, with the assistance of a mediator,[36] who facilitates communication and negotiation between the parties, endeavour to reach a voluntary resolution regarding their dispute."[37]

This working definition intentionally excludes any specific reference to the nature and characteristics of mediation, including voluntariness, flexibility, informality, confidentiality and the impartiality and neutrality of the mediator. This is not because these characteristics are unimportant but because of the consequent ever-growing jurisprudence regarding such characteristics.[38] Also the dynamic development of mediation into different legal fields can affect the relevance of some of these characteristics in a particular field.[39] Hence, some of these usual characteristics are not appropriate for a working definition to be used in this dissertation where the focus is on the use of mediation as a mechanism for resolving economic crime.[40] In view of these considerations, it is submitted that a concise definition which highlights mediation as a dispute resolving process that includes a third party who assists the disputants to reach a resolution, but does not impose a resolution, is preferable.

The terms "mediation agreement" and "mediated settlement agreement" used in this dissertation also need clarification. The term "mediation agreement" refers to the agreement entered into by the disputants *before* the mediation process that sets out the parties' choice of mediation as their dispute resolution process and usually commits them to initial participation in the process.[41] A further agreement, also

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[36] "Mediator" includes a "co-mediator" and means an individual or two individuals who conduct a mediation or a co-mediation.

[37] This definition is strongly influenced by the short definition in Idaho Rules of Evidence Rule 507, together with the definition in the Protection of Investment Act 2015, which captures the spirit of commitment to compromise. See ch 2 fns 28 & 29 above.

[38] These characteristics are discussed in para 2 2 2, 40ff.

[39] See the discussion of mediation in criminal law in para 2 4 below, in which there may be procedural requirements affecting the informality of the process. See also ch 5, Annex B.

[40] For example, in both investment disputes and disputes regarding economic crime, the public interest trumps the parties' interest in confidentiality regarding the outcome. See the discussion below in paras 2 2 2 and 2 4.

[41] Compare the very comprehensive definition of a mediation agreement in s 4(1) read with s 1 of the (Singapore) Mediation Act 1 of 2017: "In this Act, 'mediation agreement' means an agreement by two or more persons to refer the whole or part of a dispute which has arisen, or which may arise, between them for mediation. (2) A mediation agreement may be in the form of a clause in a contract or in the form of a separate agreement. (3) A mediation

generally referred to as a "mediation agreement" is also usually entered into by the parties setting out the terms of the actual process.[42] The mediator is usually a party to this agreement.[43] Yet another agreement, is the "mediated settlement agreement" which refers to the agreement[44] reached by the parties in the mediation.[45]

Having provided a working definition of mediation, it is helpful to highlight certain core characteristics and different styles of mediation to better describe the mechanism. Accordingly, in the two next sections some characteristics and styles of mediation are discussed.

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agreement must be in writing. (4) A mediation agreement is in writing if its content is recorded in any form, whether or not the mediation agreement has been concluded orally, by conduct or by other means. (5) A reference in a contract to any document containing a mediation clause constitutes a mediation agreement in writing if the reference is such as to make that clause part of the contract. (6) A reference in a bill of lading to a charterparty or any other document containing a mediation clause constitutes a mediation agreement in writing if the reference is such as to make that clause part of the bill of lading." Interestingly this definition of "mediation agreement" is very similar in content to that of an "arbitration agreement" in s 2A of the (Singapore) International Arbitration Act (chapter 143A), formerly Act 23 of 1994, as amended, with "mediation" substituted for "arbitration".

[42] These terms can be provided by the mediator or by the relevant legislation. For example, (SA) Magistrates' Courts Rules, Form MED-6 Agreement to Mediate, including details required by R 77(4).

[43] Also known as a "mediator's contract", analogous to an "arbitrator's contract". See GB Born *International Commercial Arbitration* 2ed (2014) 1975.

[44] This may include the mediator's report. The (South African) Magistrates' Courts Rules, in R 82 distinguish between a "settlement agreement" and a "mediator's report" in the event of there being no settlement, both of which need to be filed at the court. R 82(1) prescribes that a mediator has to assist the parties in drafting the settlement agreement.

[45] The definition of a "mediated settlement agreement" in the (Singapore) Mediation Act 1 of 2017, s 1 provides that a mediated settlement agreement, in relation to a mediation, means "an agreement by some or all of the parties to the mediation settling the whole or part of the dispute to which the mediation relates". The UNCITRAL Model Law on International Commercial Mediation 2018, in art 16 contains an elaborate definition of an "international settlement agreement" for purposes of the enforcement and reliance on a settlement agreement of a cross-border commercial dispute achieved through mediation for purposes of Sec 3 of the Model Law. A discussion of these definitions is beyond the scope of this dissertation.

2 2 2 Characteristics of mediation

Mediation is a process which has the attraction of being dynamic in nature. The dynamic and informal nature of mediation also allows for innovative and creative resolutions to disputes. Mediation is a process conducted by a third party and is flexible, unlike a court process which operates under fixed rules of procedure and evidence.[46] This informality and flexibility of mediation allow disputes between parties to be identified, clarified and discussed with the intention of reaching agreement in a less impersonal and detached environment. Mediation allows the issues, which the parties may not necessarily have been aware of before the process commenced to be identified.[47] The role of the mediator is consequently pivotal and this is apparent in the discussion below concerning the characteristics and styles of mediation.

Mediation is primarily voluntary in nature and involves the parties in dispute agreeing to participate in mediation in an attempt to resolve the dispute. As both mediation and other non-adversarial practices to dispute resolution have developed, the use of mediation may be compulsory in terms of a contract existing between the parties. Moreover, parties agreeing to enter into mediation, usually do so in terms of a mediation agreement and this agreement also imposes contractual obligations upon the parties.[48] It is beyond the scope of this dissertation to discuss the

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[46] A Woolford & RS Ratner *Informal Reckonings: Conflict Resolution in Mediation, Restorative Justice and Reparations* (2008) 8-9; 39-65 caution that the dichotomy between formal and informal cannot be over-emphasised, as the informal has become corrupt. With the development of mediation as an ADR mechanism it has grown far beyond the community based mediations run by lay persons to a highly professional dispute resolution process, often court-connected under procedural rules.

[47] Mediation enables parties to enquire deeper into the surface issues. For example, the reluctance of a party in a divorce matter to agree to give the other party property may be due to a fear of that party enjoying the property with someone else, not because she or he cannot afford to give such property.

[48] South Africa, Magistrates' Courts Rules (2014), Form MED-6, the "Agreement to Mediate" is an example of such a mediation agreement. The pro-forma mediation agreement provides for agreement on the appointment of an identified mediator (cl 3), joint and several liability for the mediator's fees (cl 4), the nature of mediation (cls 7 & 8), mediator impartiality (cl 9) and indemnity (cl 10), disclosure of information and documents (cl 11) and confidentiality (cl 12), and to refrain from litigation, unless necessary (cl 13).

contractual obligations and the remedies that may arise in terms of the law of contract and delict in the event of a breach of either the original contract or the mediation agreement between the parties.[49]

The voluntary nature of mediation is ostensibly challenged when mediation is mandated by legislation or a court ruling.[50]. Mandatory mediation legislation may also include opt-out provisions that enable a party to apply to the court for exemption from mediation, and is consequently also discretionary.[51] The voluntary nature of mediation may also be said to be compromised if the courts take into account whether mediation has been attempted in the settlement of a dispute between litigants or when the failure to mediate may influence a ruling[52] or a costs order.[53]

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[49] South Africa Magistrates' Courts Rules (2014), Form MED-6, cl 16 is a model breach of agreement clause.

[50] D Quek "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program" (2010) 11 *CJCR* 479 480-481 differentiates between "categorical" and "discretionary" forms of mandatory mediation. Categorical mediation refers to mediation prescribed in legislation, whilst discretionary mediation includes mediation which grants a court the discretion to order mediation or not.

[51] For examples of different mandatory mediation schemes, see Quek (2010) *CJCR* 500-507.

[52] For example, in the *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) ("*Port Elizabeth Municipality")* paras 47 & 61, Sachs J stated that a factor to be taken into account to determine if it would be just and equitable for an eviction order to be granted or not, may be whether the parties have attempted mediation. See also Vettori (2015) *AHRLJ* 359.

[53] In South Africa, the case *MB v NB* 2010 3 SA 220 (SGJ) paras 59-60 clearly shows the intolerance of the court for parties who intransigently persist in litigation despite the costs of such litigation being disproportionate to the nature and value of the issues in dispute. In England, the Court of Appeal, in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 gave guidance to the objective in the Civil Procedure Rules to encourage ADR and provide for cost sanctions against persons who unreasonably refuse to participate in ADR. The importance of ADR, particularly mediation, is underscored in the *Halsey* judgment (paras 6-8) and judges may "robustly" encourage ADR (para 11), yet compelling unwilling parties would be an "unacceptable obstruction to the right of access to the court" under Art 6 of the European Convention on Human Rights (paras 9-10). Notably, the judge Lord Dyson in a lecture: "A Word on *Halsey v Milton Keynes*" (2011) 77 *Arb* 337 338, subsequently confirmed that parties may be cajoled and encouraged by a court to mediate, but not compelled. But Lord Dyson added he does not believe that an order by a court to mediate would be an infringement of their rights under art 6 of the European Convention. The court in

Mandatory mediation has been said to be an oxymoron,[54] an antithesis, as compelling a party to participate in a process runs counter to the essence of mediation, which entails voluntary participation and voluntary settlement.[55] This contention is based on the premise that settlement is the primary focus of mediation, and that the primary focus of court procedures is to attain justice.[56] However, it is submitted that this interpretation of the purpose and nature of mediation and litigation is too narrow as the nature and focus of both mediation and litigation are broader than attaining settlement and justice, respectively. Each are complex mechanisms through which resolution of a dispute can be sought. Each can succeed or fail in attaining resolution or justice.

Quek gives helpful insight to the complexity of mandatory mediation, suggesting that there is a continuum of mandatoriness.[57] On the one end mandatory mediation may be either discretionary or categorical, but refusal or failure to participate in

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Halsey v Milton Keynes (para 16) also outlined some factors to be taken into consideration when determining if a party had unreasonably refused or was uncooperative, including the nature of the dispute, the merits of the case, other attempted settlement methods, disproportionately high costs of mediation, delays and whether mediation would have had a reasonable prospect of success. For discussion on this case and associated issues see Quek (2010) *CJCR* 502-504; A Rycroft "What Should the Consequences be of an Unreasonable Refusal to Participate in ADR?" (2014) *SALJ* 778-786; WLR de Vos & T Broodryk "Managerial Judging and Alternative Dispute Resolution in Australia: An Example for South Africa to Emulate? (Part 2)" (2018) 1 *TSAR* 18 22-23. The new South African High Court Uniform R 37A (16) GN R842 in *GG* 42497 of 31-05-2019, and which took effect on 1 July 2019, makes provision for an adverse costs order in the event of failure to comply with R 37A relating to judicial case management, which includes the consideration of mediation.

[54] Quek (2010) *CJCR* 479-509 discusses this issue in detail. See also S Vettori "Mandatory Mediation: An Obstacle to Access to Justice?" (2015) 15 *AHRLJ* 355 357.

[55] Vettori (2015) *AHRLJ* 356-357. A primary characteristic of mediation is voluntariness, and compelling a party to participate in mediation may compromise such a process. However, the high costs or time delay in court proceedings may coerce a party into a settlement she or he may not want, or a settlement that is not just. In short, the arguments raised about mediation are likewise applicable to the court litigation process. Compare De Vos & Broodryk (2018) *TSAR* 22-23 who argue for voluntary mediation, but against mandatory mediation, averring that a party may only have sufficient funds for one process, and a party has a fundamental right to choose her or his own dispute resolution process.

[56] Vettori (2015) *AHRLJ* 356-357, 360.

[57] For a graphic presentation and discussion of the continuum see Quek (2010) CJCR 488-490.

mediation has no consequential sanctions; whilst on the opposite end failure or refusal incurs sanctions. The latter end is consequently more coercive and less voluntary than the former. The voluntariness of mediation is thus challenged by the degree of coercion or compulsion, which in turn is determined by the severity of sanctions for non-compliance. Quek argues, it is submitted correctly, that any sanction should be appropriate and proportionate,[58] and suggests further that any sanctions should be limited to mainly monetary sanctions.[59]

It has been stated that although the requirement to enter into mediation may be mandatory, the process and the outcome of the process remain consensual, and either party may at any time elect to withdraw from the mediation.[60] Others have, however, argued that in light of the complexity of the process of mediation, making a distinction between coercion *into* mediation and coercion *within* mediation is unfounded.[61] It is submitted that the debate regarding the voluntariness of mediation being compromised by the compulsion to enter the process is complex. Inevitably, some parties may need to be encouraged to participate in mediation and may subsequently benefit from the ADR mechanism, but categorical compulsion, without any opportunity to opt out, may result in an unjustifiable delay or denial of access to the court. As aptly put by the Court of Appeal in England: "The court's role is to encourage, not to compel".[62] It is further submitted that Quek's proposal that mandatory mediation be temporary and discretionary and that any obligatory provisions should be clear and allow parties autonomy as far as possible[63] with an opt-out opportunity.[64] In addition, consequential sanctions for non-compliance should not destroy or reduce the voluntary nature of a settlement through mediation, but only strongly encourage participation in the mediation process.

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[58] Quek (2010) *CJDR* 496-497.

[59] Quek (2010) *CJDR* 497.

[60] The court in *Port Elizabeth Municipality* para 40 recognised the tension in compulsory mediation, yet emphasised that the settlement of the dispute remains in the control of the parties.

[61] Quek (2010) *CJDR* 486-498 discusses this issue in detail.

[62] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 para 11.

[63] For example, the right to choose the mediator and if applicable, private or court-annexed mediation.

[64] See Quek's (2010) *CJDR* 479-480 recommendations for mandatory mediation.

The possibility of satellite litigation arising from the obligation to mediate is also a matter of concern.[65] Notably, the (Singapore) Mediation Act 1 of 2017 specifically provides that a party to a mediation agreement may apply to a court to stay legal proceedings should another party breach the agreement by commencing litigation without first resorting to mediation.[66] In addition, parties may resort to litigation to appeal or review a sanction order by the courts for non-compliance.[67]

Once the parties have concluded a mediation agreement, it will usually impose an obligation on the parties to be honest and to disclose all relevant information and documents.[68] It can be noted, that in South Africa the Magistrates' Courts Rules

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[65] This may arise between the parties themselves, or if the court seeks to impose sanctions on a party for failure to comply with an obligation to mediate. See also C Sim "The International Reach of the Singapore Mediation Act) (17-12-2017) *Kluwer Mediation Blog* <http://mediationblog.kluwerarbitration.com/2017/12/17/international-reach-singapore-mediation-act/> (accessed 19-12-2017); C To "Singapore's New Mediation Act – Raising the Bar to New Heights in the Dispute Resolution Arena" (07-06-2017) *CIArb News* <http://www.ciarb.org/news/ciarb-news/news-detail/features/2017/06/07/singapore-s-new-mediation-act-raising-the-bar-to-new-heights-in-the-dispute-resolution-arena> (accessed 19-12-2017). See also L Love & E Waldman "The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation" (2016) 31 *Ohio St J on Disp Resol* 123 142-143 referring to the concern of growing litigation about mediation, mostly based on fraud, coercion, mistake and duress. See also, K Kovach "Good Faith in Mediation – Requested, Recommended or Required – A New Ethic (1997) 38 *S Tex L Rev* 575 603-605 and I Roper "Mediate: Good Faith, Bad faith" (2015) 40 *Alt LJ* 50-52 discussing litigation arising from the principle of good faith in mediation.

[66] S 8. Compare the UK Civil Procedure Rules R 26.4(1) which provides that a litigant may apply to have proceedings stayed while parties try to settle through ADR.

[67] As was the case in *Halsey v Milton Keyes* [2004] EWCA (Civ) 576. See also Quek (2010) *CJCR* 499.

[68] In addition to disclosure by the parties participating in mediation, there is the issue of disclosure by their legal representatives. In Australia an attorney and advocate were each found guilty of professional misconduct by their regulating bodies, who after an inquiry found that the omission to disclose certain information during a mediation process constituted misconduct by the legal representatives. Both cases involved the same mediation, which involved their client, Mr White, claiming damages for being rendered a quadriplegic arising in a motor vehicle accident. Part of the documents disclosed were medical reports relating to the life expectancy of Mr White. Neither Mr White nor his legal representatives disclosed during the mediation that Mr White had since been diagnosed with cancer shorty before the mediation, but after the reports were written. The cancer was likely to significantly reduce his life expectancy. For a discussion on this issue see S De la Harpe (2016) *Full Disclosure in*

grant discretionary authority to the mediator to decide what is relevant or not to a mediation.[69] The provision stipulates that parties are to disclose all relevant information as requested by the mediator or determined to be relevant to the mediation by the mediator, if requested by the other party. This provision grants power to the mediator who is consequently placed in an adjudicatory role, which in turn challenges party autonomy and the voluntary nature of mediation.[70] Such adjudicative authority is also contrary to the facilitative, non-adjudicative nature of mediation.[71]

The importance placed on full disclosure by the parties is probably because of the understanding that mediation is based on the principles of good faith.[72] However, it is difficult to define or interpret good faith.[73] A helpful description is that good faith "simply requires that the parties make a genuine push towards a solution".[74] Mediation asks for collaboration, creativity and cooperation.[75] Core elements of good

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Mediation 1-9; *Legal Services Commissioner v Mullins* (2006) LPT 012; *Legal Services Commissioner v Garrett* (2009) LPT 12.

[69] Magistrates' Courts Rules, Form Med-6, Agreement to Mediate, cl 11 reads "(e)ach of the Parties agrees to fully and honestly disclose all relevant information and documents, *as requested by the mediator*, and all information requested by any other party to the mediation, *if the mediator determines* that the disclosure is relevant to the mediation discussions" (writer's emphasis). For a discussion on this issue see De la Harpe *Full Disclosure in Mediation* (2016) 1-11.

[70] It appears self-evident: if a party does not want to disclose a certain document or information, she or he can simply terminate the mediation process. The immediate question which then arises is whether she or he will be in breach of the mediation agreement? For example, if a party in a dispute involving fraud is requested to furnish certain documents can the party refuse, and if she or he refuses, will this amount to breach of the mediation agreement?

[71] De la Harpe (2016) *Full Disclosure in Mediation* 6.

[72] Compare UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 art 2.1 which reads: "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application *and the observance of good faith*" (writer's emphasis).

[73] Compare Roper (2015) 40 *Alt LJ* 50.

[74] Kovach *S Tex L Rev* 622. Compare Jafta J in *Makate v Vodacom Ltd* 2016 4 SA 121 (CC) para 102 which stated that although it is undesirable to lay down an objective standard of good faith, "both sides must enter into negotiations with serious intent to reach consensus."

[75] K Kovach (1997) *S Tex L Rev* 580.

faith are attendance and disclosure and exchange of information.[76] In *Aiton Australia Pty Ltd v Transfield Pty Ltd*[77] the court found *g*ood faith has to be considered with regard to the *conduct* of the parties.[78] After reviewing many definitions of good faith it concluded that good faith with regard to negotiation or mediation meant one had to have an *open mind* and be willing to consider options proposed by the other party and to be willing to make proposals oneself.[79] Good faith was initially presumed to be present in mediation, but it may also be requested, recommended or required.[80] It is critical to inform and educate participants about the characteristic of good faith as it cannot be presumed.[81] Participants need to understand the nature of mediation as a process that takes the participants on an empowering journey to seek their own resolution to their dispute.

A further characteristic of mediation is that the third party who facilitates the mediation is neutral or independent and impartial. Although it has been argued that a totally impartial or neutral mediator is rare,[82] the role of the third party or parties is

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[76] Kovach (1997) *S Tex L Rev* 583ff continues to discuss a number of issues that can be considered to be part of good faith, including self-determination, fairness as well as discussing what would amount to bad faith such as coercion by either party or the mediator. Kovach 622-623 also proposes a model rule for good-faith participation in the mediation process.

[77] 153 FLR 236 ("*Aiton Australia"*).

[78] *Aiton Australia* para 92.

[79] *Aiton Australia* para 156. The court nevertheless held that good faith does not mean that a party had to act for and on behalf of the other party. Compare Roper *Alt LJ* 50 who comments that the court's definition, is "unworkably vague and lacking in legal certainty".

[80] Kovach (1997) *S Tex L Rev* 596ff discusses these issues and suggests that a request can be made by either party, or a mediator and is usually done at the beginning and forms part of the mediation agreement. A recommendation is in stronger terms and may originate from a court, whilst a requirement would probably be in the form of a legal rule for regulated court-annexed mediation, or an express obligation imposed by a mediation agreement. See ch 2 fns 41 & 42 above.

[81] Kovach (1997) *S Tex L Rev* 619.

[82] The frequently quoted description by Richard Fisher that a neutral mediator is a "eunuch from Mars, totally powerless (and totally neutral)" illustrates the unlikely existence of a neutral mediator. See H Hung "Neutrality and Impartiality in Mediation" (2002) 5 *ADR Bulletin* 45 45; S De la Harpe *Impartiality in the Mediation of Commercial Disputes* (2016) 9.

non-partisan.[83] Mediators originate from different professions, generally from legal, mental health or counselling professions and thus the professional make-up of a mediator may strongly influence the role of the mediator and her or his intervention in the process, including the degree of evaluation and direction she or he may give or be able to give in the process. Nevertheless, a mediator is obliged to remain neutral and not to take sides with either party.[84] Notably, a distinction in South Africa is drawn between the norms of impartiality under modern Western based mediation and those applying to traditional indigenous based mediation.[85] It is contended that the former is based on the principles of impartiality and independence which are founded upon the entrenched laws of impartiality and independence under adjudicative procedural law which in turn are heavily influenced by English procedural laws.[86] This approach is echoed in the South-African Magistrates' Courts Rules (2014) that describe ADR as a process, in which "an *independent and impartial* person assists parties to attempt to resolve the dispute between them, either before or after commencement of litigation" (writer's emphasis).[87]

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[83] See M Palmer & S Roberts *Dispute Processes ADR and the Primary Forms of Decision Making* (1998) 107-108, 110. Also see J Bercovitch *Studies in International Mediation* (2002) 6-7. A Rycroft "The Mediation of Human Rights Disputes" (2002) *SACHR* 287 288-289 includes the following factors under neutrality: no direct interest in the outcome of the dispute, no prior knowledge or involvement in the dispute or with the parties, not to be judgmental or biased and an assurance of even-handed treatment. See also Feehily (2015) *SALJ* 389-392 who distinguishes between impartiality and neutrality, and contends that impartiality is indispensable, whilst neutrality is not. He describes impartiality as a mediator being open to any outcome, and not focusing on a preconceived or particular outcome. Neutrality concerns the possible bias of a mediator, for example a material personal or professional relationship with any one or both the parties.

[84] Expert mediators are also common in the construction and medical professions.

[85] De la Harpe *Impartiality in Mediation* (2016) 4-5.

[86] De la Harpe *Impartiality in Mediation* (2016) 4.

[87] R 73. Also paras 7(a) and 9.4 and 9.8 of Magistrates' Courts Rules, Schedule 2 in terms of R 86 published in GN 854 in *GG* 38163 of 31-10-2014. This is similar to the definition of mediation in the draft (South African) High Court Uniform R 41A which refers to an "impartial third person". Compare too arts 6.4 and 6.5 of the UNCITRAL Model Law on International Commercial Mediation, 2018 that provide for the appointment of an independent and impartial mediator and for the requirement that any nominated mediator disclose any circumstance that may cast doubt on her or his impartiality or independence. Notably, independence or impartiality is not an absolute requirement, but art 6.5 requires that parties

On the other hand traditional mediation, usually conducted by elders in a social context with a focus on the restoration of social equilibrium in a spirit of *ubuntu* and social cohesion, does not require independence and impartiality as understood by the western adjudicative system.[88] A fair outcome is dependent upon the mediator and her or his wisdom and experience.[89] In addition, family members, more likely to be biased, assist the elder in reaching a consensual outcome.[90] This approach resonates with the medieval system of mediation where neutrality was not a requirement and mediators were often friends of the disputants and knew something of the dispute.[91] In resolving disputes undergoing traditional mediation, reconciliation and maintenance of relationships remain important.[92] Consequently, it is natural that in some instances it may be necessary for the mediator to take not only the interests of the parties to the dispute into account, but also those of other persons directly affected and even those of the community.[93]

A more developed analysis of the impartiality and neutrality of mediation entails the following characteristics: non-partisan fairness, the degree of mediator intervention, role limitation and objectivity.[94] Non-partisan fairness entails impartiality

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need to be able to make an informed decision regarding the independence and impartiality of the mediator. Nevertheless, under art 6.4, an institution recommending or appointing a mediator must have regard to considerations relating to the independence and impartiality of the mediator. However, there is no provision for challenging the appointment of a mediator, unlike arts 12 & 13 of UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended). Also see De la Harpe *Impartiality in Mediation* (2016) 5.

[88] De la Harpe *Impartiality in Mediation* (2016) 4.

[89] De la Harpe *Impartiality in Mediation* (2016) 4; A Aiyedun & A Ordor "Integrating the Traditional with the Contemporary in Dispute Resolution in Africa" (2016) 20 *LDD* 154 157.

[90] De la Harpe *Impartiality in Mediation* (2016) 4; Aiyedun & Ordor (2016) *LDD* 157.

[91] Mediators could also be the local councillor or royal representative.

[92] Roebuck (2013) *Mediation and Arbitration in the Middle Ages* 394-395.

[93] See M Palmer & S Roberts *Dispute Processes ADR* (1998) 110ff. An example of such an instance would be the bursar of a nursery school in a small town defrauding the school of monies paid as school fees by the parents. The interests of the broader community are affected, as the parents experience an indirect loss of their fees and uncertainty regarding the school, whilst the school suffers a direct pecuniary loss of the paid fees as well as possible damage to its reputation and this has an impact upon the public and town.

[94] Hung (2002) *ADR Bulletin* 45. De la Harpe *Impartiality in Mediation* (2016) 6-7 discusses the issue of impartiality under different, yet sometimes overlapping captions, namely,

but not indifference. The mediator needs to be unbiased, not uncaring.[95] Bias may occur if the mediator has any interest in the outcome of the mediation, knows either one or both the parties, or is more drawn to one party than another during mediation.[96] It is important that a party should not feel that a mediator is being partial or biased. It is essential that each of the parties feels they are able to trust the mediator.[97] A further characteristic of impartiality is that of equality or even-handedness, the need to treat the parties equally.[98] Significantly, equal treatment of the parties may not result in an equal outcome. On the contrary, equal treatment of parties may culminate in an unequal outcome. Parties entering the mediation may be in an unequal relationship. The imbalance could be due to education, cultural or religious beliefs, personalities, money or education.[99] This raises the issue of the degree of the mediator's intervention and the role limitation. There is no agreement amongst mediators whether mediators should in such instances treat the parties equally, or try and even out the imbalance by empowering the weaker party, thus in effect treating the parties unequally. Some mediators emphasise party self-autonomy, even if the outcome is deemed by the mediator to be unfair.[100]

Yet another alternative is for the mediator to terminate the mediation and inform the parties that she or he believes the mediation process to be tainted by the

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impartiality, even-handedness, impartiality as to the content and outcome, and party self-determination.

[95] Hung (2002) *ADR Bulletin* 45-46; De la Harpe *Impartiality in Mediation* (2016) 6.

[96] De la Harpe *Impartiality in Mediation* (2016) 6.

[97] Rycroft (2002) *SAJHR* 289.

[98] Compare the obligation of mediators under the (South African) Magistrates' Courts Rules (2014) Schedule 2, para 7(b) to conduct themselves in a manner that is "fair to all the parties and must not be swayed by fear, favour or self-interest"; and para 9.2 that "every mediator must respect the right to equality before the law and the right of equal protection and benefit of the law".

[99] De la Harpe *Impartiality in Mediation* (2016) 6.

[100] Rycroft (2002) *SAJHR* 292-292 suggests that the principles of *ubuntu* and restorative justice, and particularly the need for compliance with constitutional values, place a responsibility upon all the parties and the mediator to ensure that a resolution at least meets the requirements of the Constitution, failing which the settlement will in any event be subject to review.

imbalance between the parties or that the outcome is unfair.[101] It is submitted in the proposed model that the mediated settlement will need to be fair and at least meet the requirements of the Constitution, as not only will it be subject to the approval of the criminal court but also subject to review under the values of the Constitution. In order to achieve such an outcome it may be necessary for the mediator to treat the parties differently.[102]

A further element of the characteristic of impartiality is the role of the mediator with regard to the control of the mediation process. The mediator's task is to elicit information, facilitate dialogue and maintain a safe and respected space. The very nature of mediation, being a process between various parties, including the mediator, means that the mediator necessarily has an influence not only on the process, but also on the direction of the discussion, on the other parties, and ultimately on the outcome. The extent of such influence, directly or indirectly, depends upon many factors including the nature of the dispute, the personality of the mediator and the skills and expertise of the mediator.[103] The variance in these characteristics of impartiality illustrate the complexity of the process and the need for caution when calling for independent and impartial mediation. Several practices have been identified to help curb partiality and ensure neutrality, namely self-awareness, openness, valuing and evaluating, maximising party control and the overarching principle of justice and fairness.[104] Mediators need to be aware of their own ethical values and sensitive to the ethical values of the parties. In addition, the role of a mediator needs to be limited in instances of a possible conflict of interests.[105]

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[101] See the discussion by Hung (2002) *ADR Bulletin* 45-45 about the different approaches of various rules of conduct in different fields and jurisdictions, some limiting intervention whilst others allowing intervention by the mediator.

[102] For example, a mediator may advise either the accused or the prosecutor in a side-meeting of the risks involved in continuing with the prosecution: the accused may risk receiving a heavier sentence, or the prosecutor may risk a non-conviction regarding the offence.

[103] The dynamics between the parties are discussed below in para 2 2 3 in the discussion of different mediation styles. Also see De la Harpe *Impartiality in Mediation* (2016) 6-7.

[104] De la Harpe *Impartiality in Mediation* (2016) 7-8.

[105] For example, a person acting as a mediator while simultaneously acting as a legal representative of one of the parties to the mediation in an unrelated matter.

A further characteristic of mediation is that the process is private and confidential.[106] This is an important characteristic and is inter-linked with the characteristics of flexibility and informality of mediation. It is submitted that privacy and confidentiality allow persons to participate more freely, spontaneously and innovatively than the more rigid and formal rules of procedure and evidence in a court process permit. Consequently, it is important that the process of mediation remain private and confidential.[107] However, it will be submitted in this dissertation that the outcome of the successful mediation of economic crime, namely the mediated settlement agreement must be made an order of the court, unusual as

[106] Feehily discusses the complexities of mediation confidentiality and privilege in the light of the case law in different jurisdictions in two articles: R Feehily "Confidentiality in Commercial Mediation: A Fine Balance (Part 1)" (2015) *TSAR* 516-536 and R Feehily "Confidentiality in Commercial Mediation: A Fine Balance (Part 2)"(2015) *TSAR* 719-737. Feehily (2015) *TSAR* 734 concludes: "Clearly, the law on confidentiality in mediation is complex, partially unclear and seemingly incomplete." Feehily (2015) *TSAR* 518 identifies three types of confidentiality: side-meeting confidentiality; mediation process confidentiality imposing an obligation upon all parties not to disclose any information obtained during the mediation and thirdly the duty/right not to disclose any information in subsequent proceedings. A distinction also needs to be made between mediation confidentiality and mediation privilege. A further distinction is the duty of confidentiality attributed to various persons, including the actual parties to the disputes, the mediator, experts, and third parties. The source of confidentiality and privilege are also important, including common law, statutory law, contract and professional institutional rules. It is beyond the scope of this dissertation to discuss the complexity of mediation confidentiality and privilege. For a detailed discussion of confidentiality in SA, with comparative discussion of the positions in California, and Australia see the thesis of Laubscher *Confidentiality in Mediation* 19-160.

[107] This principle is, however, compromised in various ways, particularly if one party turns to the court and claims duress, breach of the mediation agreement, mistake or misrepresentation. In such instances the court is tasked with finding out what happened during the mediation process. Also, the principle of full disclosure could be in tension with the principle of confidentiality. See Feehily (2015) *TSAR* 516-536 and 719-737 for a discussion of these issues. Compare too (South African) Draft Uniform R 41A(6) which reads: "Except as provided by law, discoverable in terms of the rules or agreed between the parties, all communications and disclosures, whether oral or written, made at mediation proceedings shall be confidential and inadmissible in evidence." Compare too the UNCITRAL Model Law on International Commercial Mediation, 2018 arts 10 and 11 that respectively make provision for the confidentiality of mediation proceedings and inadmissibility of evidence in other proceedings.

such a requirement may be in mediation.[108] This is necessary due to the criminal nature of the offence and the public interest in the issues connected to economic crime. Notably, too the characteristic of confidentiality may be affected by statutory obligatory reporting, like provisions under the South African Financial Intelligence Centre Act 38 of 2001 ("FICA").[109] As will be shown below in chapter 4, transparency is an important and integral concept in plea and sentencing agreements and DPAs.[110] This is equally true of the proposed mechanism of mediation. Moreover, the court will retain the discretion to protect information which it deems necessary to protect.[111]

An order of the court is subject to public scrutiny and comment. It is submitted that public scrutiny and comment of mediated settlements relating to criminal offences is required to ensure credibility and validation of the mediation process. An order of court also contributes to legal certainty through the precedent system, which

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[108] Notably, the (Singapore) Mediation Act 1 of 2017 makes provision in s 12 for the mediated settlement agreement to be made an order of the court subject to certain conditions. In addition, the authority of the court is maintained as s 12(4) sets out grounds upon which the court may refuse to make such an order. Ss 9-11 contain detailed provisions regarding the disclosure of any information relating to a mediation under the Act. See too Sim "The International Reach of the Singapore Mediation Act" *Kluwer Mediation Blog*; To "Singapore's New Mediation Act – Raising the Bar to New Heights in the Dispute Resolution Arena" *CIArb News*. Compare too UNCITRAL Model Law on International Commercial Mediation, 2018 art 19 regarding the grounds on which a court may refuse to permit a party to rely on an international settlement agreement. See also Laubscher (*Confidentiality in Mediation* 6-9), who whilst endorsing the critical element of confidentiality in mediation that builds trust and promotes disclosure of information, also points out that confidentiality is not absolute and there may be occasions that it is necessary for information to be made public. See, for example, the draft UNCITRAL Mediation Rules, 2019 art 8.2, which provides that a settlement agreement, may upon signature, be used as evidence that it resulted from mediation.

[109] Ss 29 prescribes reporting duties upon persons who suspect or have knowledge of unlawful activities as prescribed in FICA. The purpose of the act is to establish the Financial Intelligence Centre with the aim to identify unlawful and money laundering activities and respond appropriately. Such a statutory obligation may compromise the confidentiality of the mediation process. See also Feehily (2015) *TSAR* 531-532.

[110] See below chs 4 4 1 and 4 4 2.

[111] See fn 108 above relating to provisions in the Singapore Mediation Act 1 of 2017; and the discussion in ch 4 para 4 4 1 below relating to DPAs, in particular the *Tesco*-matter.

reinforces public norms and values.[112] In addition, a public order of court underscores the courts being institutes of governance and enables the continuing expansion of the common law through the reception and application of court judgments by succeeding courts and commentators.[113] In addition, providing that a mediated settlement agreement must be made an order of the court will ensure that the court retains supervision of the terms of the mediated settlement agreement.[114]

The essentially restorative nature of mediation also needs to be emphasised. During mediation, opposing parties meet in a structured process and with the assistance of a third party learn to see issues anew and to find creative solutions. Restoring and sustaining relationships is one of the natural benefits of mediation. This is illustrated too in the traditional African mediation built upon the principles of *ubuntu*, and the underlying values of reciprocal human dignity and respect that focus more on restoration of the balance of relationships that have gone askew than on redress and retribution.[115]

A principle that is emphasised in this dissertation is the African principle of *ubuntu.*[116] *Ubuntu* was and remains a strong underlying factor of dispute resolution under customary law, and the values of the humanist *ubuntu* form the basis of traditional African mediation.[117] *Ubuntu* is recognised as a core principle of indigenous knowledge systems and indigenous legal traditions that value communality and inter-dependence. The rights of the individual are interpreted

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[112] Vettori (2015) *AHRLJ* 360.

[113] De Vos & Broodryk (2017) *TSAR* 703.

[114] Such a provision would also be in line with provisions regarding plea and sentence agreements and DPA agreements that need to be confirmed by the court. These issues are discussed in ch 4, paras 4 4 1, 245ff and 4 4 2, 293ff.

[115] D Mekonnen “Indigenous Legal Tradition as a Supplement to African Transitional Justice Initiatives” (2010) 3 *AJCR* 1 6.

[116] *Ubuntu* is understood in the expression *umuntu ngumuntu ngabantu* and can be loosely translated as “a human being is a human being through other human beings”. In a single word it may be translated as “humaneness” and encompasses both the personhood and morality of humaneness. It reflects group solidarity and consequently underscores interrelatedness and harmony. See Malan (1997) *Conflict Resolution: Wisdom from Africa* 88. The principle of *Ubuntu* has been recognised by the courts. Also see *S v Makwanyane* 1995 3 SA 391 (CC) discussed in ch 3, para 3 2 2, 105ff.

[117] Aiyedun & Ordor (2016) 157; De la Harpe (2016) *Mediation in South Africa* 2; Brand *Commercial Mediation* (2015) 1-2.

against the broader context of reciprocal enjoyment of rights of all persons and cooperation of each member of the community.[118] Indigenous legal traditions make provision for "mechanisms for acknowledgement, truth-telling, accountability, healing and reparation"[119] within the broader society to promote the social cohesion of the group.

In addition, mediation allows the inclusion of the victims or representatives of the victims and brings about a "restorative justice intervention".[120] It enables the offender and victims to meet, to face one another, to discuss the consequences of the offence and to participate in resolving the dispute, while respecting the public interest in a dispute involving criminal liability.[121] Consequently, on the basis of the characteristics discussed above, mediation in this dissertation is considered to be a restorative justice process.[122]

Some characteristics of mediation have been discussed to emphasise the nature of mediation as a dispute resolution process. The description of mediation is clearly complex. To better understand the process and dynamics of mediation, a number of mediation styles have been identified that reflect the interaction between the role of the mediator, party autonomy and the nature of the dispute.

2 2 3 Styles of mediation

As mediation is such a dynamic process, involving mediators from different professional backgrounds and used in various fields, a number of mediation styles

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[118] Mekonnen (2010) *AJCR* 4.

[119] Mekonnen (2010) *AJCR* 5.

[120] Gabbay (2007) *CJRC* 421ff. Hiemstra states that retributive justice looks back, whilst restorative justice looks forward and emphasises reconciliation, restitution and responsibility. *Hiemstra's Criminal Procedure* 28-28(1).

[121] Gabbay (2007) *CJRC* 427 concludes "In my opinion, restorative justice is a different approach to criminal justice. While the system today is offender-orientated and focuses on punishment, the restorative justice paradigm offers a more balanced view of the appropriate public response to crime. It maintains the public aspect of criminal law but introduces the victims' perspective and the reparation of the needs created by the offense as an inseparable aspect of justice."

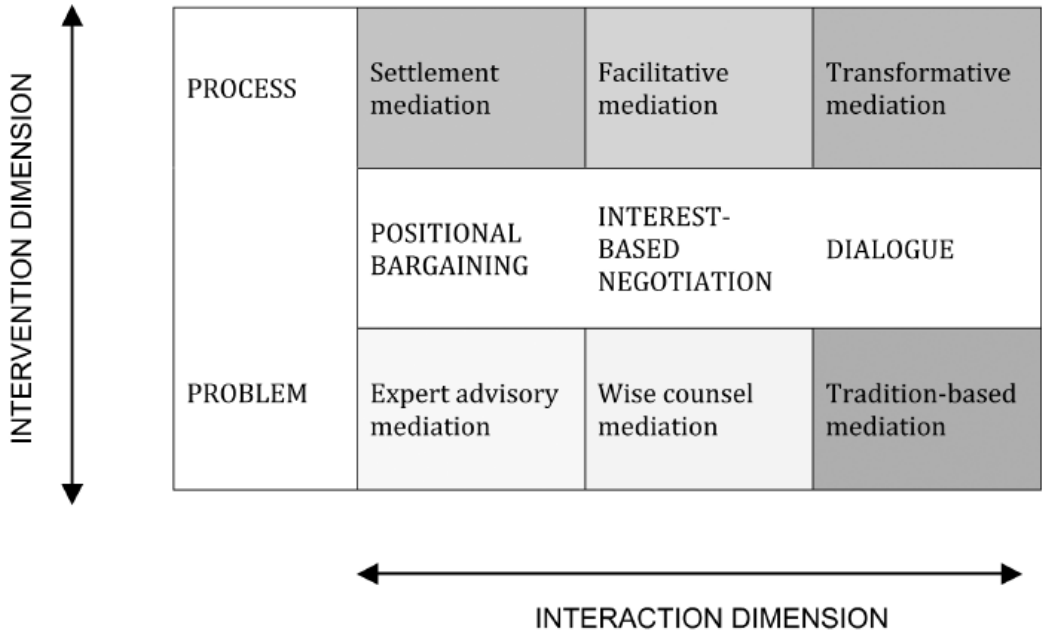
[122] This aspect is further motivated in ch 3, para 3 5, 146ff2.

have emerged. Alexander[123] developed a helpful matrix, the Mediation Meta-Model, which incorporates the overlapping of the different styles along the horizontal interaction and vertical intervention axes.[124]

[123] N Alexander "The Mediation Meta-Model – the Realities of Mediation Practice" (2011) 12 no 6 Article 5 *ADR Bulletin* 126 127 (available at <http://epublications.bond.edu.au/adr/vol12/iss6/5>)(accessed 09-01-2017).

[124] Another influential model is the Riskin grid. It was first proposed by Professor Riskin in 1996 and has greatly influenced and shaped the discussion and understanding of mediation in the United States. The original Riskin grid had two axes: the horizontal grid was the problem-definition axis and moved from narrow to broad, west to east. The vertical axis focused on the role of the mediator and moved south to north, from facilitative to evaluative. The lower, south-side, referred to higher party autonomy, whilst an evaluative approach referred to a more directive approach by the mediator. The terms and design of the Riskin grid led to much discussion and particularly the terms facilitative and evaluative were criticised. This led to Prof Riskin reviewing the grid and renaming the point at the bottom of the vertical grid "elicitive", formerly "facilitative"; and the top point "directive" instead of "evaluative". (He named the modified grid the "new old grid"). At the same time, recognising the difficulty in constructing a model for a dynamic and complex process with many variables, Prof Riskin developed a new model (the "new new grid"), encompassing a series of grids, based on the types of decision making: "*substantive decisionmaking*, *procedural decisionmaking"* and "*meta-procedural decisionmaking"*. Substantive decision making focuses on defining the substantive issues, and incorporates the standard problem-definition process. Procedural decision making embraces the dynamic procedural complexities of the mediation process, including the interplay between the different participants, namely the mediator, the parties and their legal representatives. Procedural decision making thus includes the decision on what procedures will be adopted to resolve the substantive issues. The meta-procedural decision making refers to subsequent procedural decisions. The horizontal axis represents a particular issue, whilst the vertical axis illustrates the influence and participation of the different participants with the mediator plotted at the top of the axis and the parties and their lawyers at the bottom. Simply put, a more northern position represents the traditional evaluative or directive style of mediation; whilst a position towards the bottom of the vertical axis would represent a more facilitative or elicitive style of mediation, meaning increased participation by and autonomy for the parties themselves. For a detailed description of the Riskin grids, see LL Riskin "Decisionmaking in Mediation: The New Old Grid and the New New Grid System" 79 (2003) *Notre Dame L Rev* 1-53.

Figure 1 The Mediation Meta-Model



Although none of the styles are concretely defined, the matrix helps the recognition of different styles of mediation. The vertical axis illustrates the approach and role of the mediator and her or his level of intervention; whilst the horizontal dimension portrays the extent of interactions of the parties between each other in the process. The different models portray which communication style is used during the mediation process and whether the mediator and parties are focused more on solving the problem or concentrating on the interests of the parties.

Expert advisory mediation positioned at the bottom left corner of the matrix has a high level of mediator intervention on the vertical intervention dimension and a high interaction between the parties. Expert advisory mediation is focused on the problem and on solving it quickly, fairly and justly. Emphasis is on the parties' rights and positions, and therefore the horizontal interaction dimension leans towards positional bargaining. The parties interact from their individual positions and focus on their rights, while broader issues and parties' interests may not necessarily be addressed or raised. Evaluative or directive mediation is a form of expert advisory mediation, in which the mediator plays a more direct participatory role in the mediation process. The mediator may weigh up and evaluate each party's case, and give advice or an

expert opinion.[125] As this style of mediation focuses more on a party's legal rights and the risks of continuing with the dispute, the mediator usually meets with each party separately to discuss the issues.[126] Evaluative mediation may be used in disputes that are highly technical[127] and parties need expert advice regarding the issues and their rights and obligations. In South Africa, this style of mediation is applied widely in the building and construction industry.[128] It is also an appropriate style in mediation if matters are imbalanced[129] or when mediation is mandatory,[130] and it is necessary for the mediator to use a high level of intervention to help balance the power between the parties or to motivate the parties to interact with the purpose of reaching a settlement.

Alongside the expert advisory mediation style on the horizontal interaction continuum is wise counsel mediation.[131] This style involves mediators assisting the parties in identifying and exploring their interests, whist keeping their rights in mind, and the parties focus on negotiating the issues in dispute. Consequently, along the vertical axis, the intervention and participation of the mediator remains strong and the mediator may give strong suggestions regarding draft proposals of settlement, although the final settlement remains in the control of the parties. Wise counsel mediation is usually used in instances where parties are reluctant to propose and engage actively in finding settlements.[132] It is also used in cases where there are

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[125] L Love & E Waldman "The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation" (2016) 31 *Ohio St J on Disp Resol* 123 137-138 are very critical of evaluative mediation and contend that the Riskin grid blurred the essential distinctions between different ADR processes and that core characteristics of mediation such as party self-autonomy and self-determination have been reduced. Love & Waldman (2016) *Ohio St J on Disp Resol* 143-144 are equally critical of mediation in separate parallel sessions (caucusing) and support the movement for saving the joint session.

[126] Commonly known as caucusing or side-meetings. See Brand et al (2015) *Commercial Mediation* 38, 39.

[127] For example, dispute relating to medical negligence.

[128] Brand *Commercial Mediation* (2015) 22.

[129] For example, one party may have legal representation and the other not.

[130] For example, in terms of a contract or court order.

[131] Alexander (2011) *ADR Bulletin* 129.

[132] For example, the Chief Operating Officer of an organisation may want to save face in a dispute with an employee that went awry.

compound issues that need resolution and mediators were appointed on the basis of their expertise and reputation for fairness and understanding.[133]

Tradition-based mediation also has a high intervention level from the mediator and as the name suggests, originates from communities that acknowledge strong traditional leaders.[134] This occurs where disputes in the community are referred to the leader, and the interests of the community weigh heavily and consequently the mediation may be multi-party and involve the voice of the community. Consequently, the confidentiality of the mediation may be compromised,[135] but any communication is in the interest of the broader public. In this style of mediation the rights of the individual may be out-weighed by the interests of the community. An accentuated factor of tradition-based mediation is restorative justice and the restoration of harmony in the community, in light of the values and norms of the community.[136] The communication style is that of dialogue, and yet more dialogue, with the mediators encouraging open-dialogue between the parties and in the presence of the community. The process may also contain certain rituals.[137] The mediation process is important as it incorporates both a high level of intervention from the mediators and a high level of interaction between all the parties, including possible representatives of the community. Traditional mediation echoes the characteristics of traditional dispute resolution. It also underscores the core principle of lovedays in the middle-ages and echoes the common phrase recorded in medieval dispute resolutions: “by the mediation of their friends amicably intervening between them.”[138]

Transformative mediation focuses on the relationship between the parties, with the purpose of transforming, reconciling, improving or at least sustaining a

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[133] For example, in a complex divorce situation where there are multiple assets or multi-cultural parties.

[134] For example, chiefs and elders in a rural social group or elders in a religious group.

[135] Alexander (2011) *ADR Bulletin* 129 and 130.

[136] Alexander (2011) *ADR Bulletin* 130.

[137] For example, in a religious dispute the mediation may involve the parties participating in a cleansing ritual, or taking communion together.

[138] The community interests and involvement both originated from and evolved into the involvement of the king presiding over disputes. The king was subsequently represented by a royal representative, such as a lord or knight, and later a council, parliament, or chamber representative and today law courts. Roebuck (2013) *Mediation and Arbitration in the Middle Ages* 49, 140-161.

relationship between the disputants.[139] The mediator focuses on communication and uses various skills to persuade the parties to communicate with one another and consequently transform perspectives and promote recognition and understanding of the other party's position. The parties remain in control of any solution that may be reached, and, in addition to retaining control of the outcome, they also control the process to a greater extent.[140] This style of mediation emphasises the process and the mediator's role is to create a safe space within which the parties can communicate and also to empower the parties to communicate. Transformative mediation is thus on the upper vertical axis, emphasising the process and not the problem.[141] On the horizontal axis, the emphasis is on dialogue and communication, and the mediator's role is to assist the parties to understand one another.[142] Transformative mediation is used in victim and offender programmes[143] and also in cases where the relationship between the parties needs to be restored. Narrative mediation is akin to transformative mediation, in that the mediator focuses on creating a new narrative, through which understanding and a sustainable outcome may be achieved between the parties. Therapeutic mediation is also a style of transformative mediation[144] and emphasises the healing of the parties, notwithstanding whether there may be reconciliation or not, although focus is also given to the reconciliation and restoration of the relationships. In her mediation meta-model, Alexander[145] finds that transformative and tradition-based mediation, which follow a style of dialogue-based mediation, tend to be more restorative than expert advisory or settlement mediation which, in contrast, is more focused on finding settlements from the perspective of strong positional bargaining.

Facilitative mediation is the more classic form of mediation and focuses on the process: the mediator concentrates on asking questions, validating each party's

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[139] Brand *Commercial Mediation* (2015) 21-22.

[140] Z Zumeta "Styles of Mediation: Facilitative, Evaluative and Transformative Mediation" (14-07-2015) *mediate.com* <www.mediate.com/arteicles/zumeta/cfm (accessed 06-01-2017).

[141] Alexander (2011) *ADR Bulletin* 130.

[142] For example, a rape victim may want to know why the offender raped her or him.

[143] In sexual offences it may be years before transformative mediation may be appropriate as it may take time before the victim may be ready to talk to the offender.

[144] Alexander (2011) *ADR Bulletin* 130.

[145] Alexander (2011) *ADR Bulletin* 127,129-130.

responses and facilitating discussion, whilst control of the solution is maintained by the parties.[146] Focus is on the parties' interests as opposed to concentrating strictly on their rights. The mediator controls the mediation process, whilst the parties retain control of the outcome.[147]

Settlement mediation focuses on the need to reach a solution and parties are encouraged to settle. In settlement mediation, the mediator focuses on the process and encourages the parties to seek a solution quickly and justly. Like expert advisory mediation, the negotiation is strongly based on parties' rights and positions and thus the communication style is positional bargaining. Settlement mediation often involves shuttle mediation,[148] which occurs when the mediator separates the parties and shuttles between them, discussing settlement offers and counter-offers.[149] The separate meetings enable the mediator and each party to be frank with one another and play their cards so to speak. The mediator only shares such information that she or he has been authorised by the one party to share with the other party. The mediator is often an expert in the field and can thus also give an expert opinion on each party's rights.[150] In settlement mediation the parties usually have legal representation and thus proposals and final settlements can be evaluated and validated and confirmed during the mediation process.

Most mediators use one or more styles and this is sometimes referred to as a toolbox approach[151] or roaming the Riskin grid.[152] None of the styles are strongly

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[146] The process of facilitation needs to be distinguished from facilitative mediation. Facilitation is a term commonly used by FAMAC and the courts in South Africa and usually refers to post-divorce dispute resolution. For example, parties may have a dispute regarding the increase of maintenance or visitation rights referred to facilitation. Often reference to facilitation is part of a divorce order by the court. The major difference is that a facilitator may give directives regarding the issues, and thus acts more as an adjudicator, than as an archetypal mediator. See Anonymous "Facilitation" *FAMAC* <http://www.famac.co.za/facilitation> (accessed 15-12-2017).

[147] Zumeta "Styles of Mediation: Facilitative, Evaluative and Transformative Mediation" *mediate.com*; Alexander (2011) *ADR Bulletin* 127.

[148] Also known as caucusing mediation.

[149] Alexander (2011) *ADR Bulletin* 128.

[150] For example, in a dispute over water rights between a farmer and a miner, the mediator, an expert on water rights jurisprudence, can be frank regarding each party's rights with regard to complex water rights.

[151] Also see Feehily (2015) *SALJ 378* who refers to a "mixed process".

delineated and thus it is more appropriate to refer to a continuum of mediation styles, and any style or blend of styles that may be followed is dependent upon not only the mediator, but also upon the parties and the nature of the dispute.[153] Indeed, as Riskin emphasised, various models simply serve to draw attention to the different styles and interplay between participants involved in a complex process, covering diverse issues.[154] Models create awareness and an enhanced understanding of the dynamics of the multifaceted process known as mediation, but different styles of mediation cannot and should not be cast in stone. It is helpful to summarise the different styles with reference to the so-called "big three" namely "evaluative mediation", "facilitative mediation" and "transformative mediation".[155] This categorisation reflects the two poles of the original Riskin grid, evaluative mediation involving a strong directory role played by the mediator assessing the issues and making predictions of the outcomes, whilst facilitative mediation illustrates the more conventional style of the mediator facilitating the process, encouraging communication and settlement between the parties. Transformative mediation was added as a third dominant style, arising from the more recent developments in mediation where a mediator leads the parties to empowerment and recognition.[156]

Boulle reckons that mediation has developed to such an extent that it is no longer possible to speak of classical or facilitative mediation and that there is no single

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[152] M Keet "Informed Decision-Making in Judicial Mediation and the Assessment of Litigation Risk" (2018) 33 *Ohio St J on Disp Resol* 65 78-80 (including footnote 45).

[153] See Birke (2000) *J Disp Resol* 315. Also see too (2015) *SALJ* 375 who states: "Since every dispute is different, and every mediator is different, every mediation is to some extent different from another mediation."

[154] Riskin (2003) *Notre Dame L* Rev 47, 51-53 uses the metaphor of a journey. The mediator is the guide and although the travellers (the participants) may have thought they were embarking on an agreed package tour, events and developments along the way, such as bad weather, could result in a detour being taken. In other words the discovery of different insights during the mediation process could lead to new issues and paths being explored. See too Feehily (2015) *SALJ 378* who likens the mediator to a mid-wife. Although she will not herself produce a child, the creative solution, she will "nevertheless take every care to bring about its birth".

[155] R Rubinson "Of Grids and Gatekeepers: The Socioeconomics of Mediation" (2016) 17 *Cardozo J Conflict Resol* 873. Feehily (2015) *SALJ* 374 adds a fourth, settlement mediation.

[156] Rubinson (2016) *Cardozo J Conflict Resol* 878-881.

analytical model to describe mediation.[157] Boulle holds that the development of non-adversarial justice has changed the traditional role of the law courts. The courts have moved from being primarily adversarial with opposing litigants, to forums encompassing a number of dispute resolution mechanisms, including court-annexed mediation.[158] In addition, as referred to above, mediation is evolving to include med-arb and arb-med and these mechanisms are becoming increasingly more relevant and consequently combinations of the processes of mediation and arbitration are becoming more prevalent. Notwithstanding these developments, it is submitted that mediation, including mediation across a continuum or matrix of different styles remains a distinct process in which a third person assists disputants to resolve disputes between them.

The contextualisation of mediation is important.[159] Accordingly, the location and type of mediation is important. In particular, a distinction needs to be made between private mediation and court-annexed mediation.[160] The costs of mediation are also important as they sometimes determine the type of mediation. For example, in the United States, the costs of court-annexed mediation are borne by the state.[161] This

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[157] L Boulle "*From Mediation to Non-adversarial Justice*" unpublished presentation presented at a conference on *Court-Annexed Mediation* hosted by the Mandela Institute, at the University of Witwatersrand ("Wits"), Johannesburg 2016 (copy on file with author); Feehily (2015) *SALJ* 375.

[158] For example, pre-trial evaluation of a case by a judge, improved case management, fewer adversarial trials, and even judicial dispute resolution other than by adjudication. Judges are thus likely to become more multi-tasked and their roles will become more diverse in managing courts as dispute resolution sites. Boulle (2016) *From Mediation to Non-adversarial Justice*.

[159] Rubinson (2016) *CJCR* 907.

[160] Brand et al *Commercial Mediation* (2015) 44. For a discussion of the distinction between private and court-annexed mediation in the United States, see Rubinson (2016) *CJCR* 882-873.

[161] The assumption is that private mediation is mediation that is available to parties that can afford it and is very much the typical text-book description of mediation. In contrast, court-annexed mediation is a process also available to litigants who are unable to afford private mediation. See Rubinson (2016) *CJCR* 882-873. With regard to court-annexed mediation in South Africa, the Magistrates' Courts Rules (2014) Rule 84 provides that the fees of the mediator are to be borne equally by the parties and that the prescribed tariff for mediator fees has been published by the state. See GN 854 in *GG* 38163 of 31-10-2014. See also Brand et al *Commercial Mediation* (2015) 46.

impacts upon the style of mediation. Court-annexed mediation, administered and operated by the courts, is likely to be restricted by time, limited resources and inexperienced mediators. Consequently, the latter context may reduce mediation to a mere docket clearing exercise.[162]

Notwithstanding these developments and the expansion of classical mediation it is submitted that mediation, with its fluid and dynamic form and nature, remains a highly effective dispute resolution mechanism. It is submitted further that mediation can be used effectively in the criminal justice system. The proposed hypothesis is that mediation can be used to resolve instances of economic crime. The underlying assumption is that it is not the style of mediation that is important, but the characteristics of mediation. In particular restoration, regarding both relationships and restitution, including compensation, is essential in the proposal. Transformative and therapeutic narratives and the opportunity to be heard and to be able to tell one's side of the story are fundamental, as they contribute to the rehabilitation of the offender and the complainant. It is envisioned that a *sui generis* style of mediation will be necessary to deal with instances of economic crime, incorporating strong strands of expert and settlement styles, meaning that the mediator will need to be an expert in criminal law and economic crime as well as directive in conducting a mediation focused on reaching a settlement.[163] Equally so, elements of facilitative and transformative mediation will be important to ensure that the stories of the offender and victim are told and heard. It is also important for the offender to have the opportunity to express regret and make restitution, and the victim to have a chance to accept these and to convey forgiveness should she or he wish to do so. When appropriate, an opportunity for the community's voice to be heard is also important. It is suggested that co-mediators, at least one of which is an expert in the field of economic crime, will best serve the proposed *sui generis* style of mediation for criminal matters and so achieve the envisaged restorative resolutions.

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[162] Rubinson (2016) *CJCR* 884, 886-887.

[163] See by way of comparison Rycroft's (2002) *SAJHR* 296-297 proposal for an appropriate *sui generis* model of mediation to resolve human rights disputes. The model will need to account for the principles of criminal law and restorative justice. Rycroft (2002) *SAJHR* 295 also provides helpful factors in determining when a matter may be appropriate for mediation or rather an adversarial process.

2 3 The development of mediation in South Africa

The roots of mediation can not only be found in medieval processes such as lovedays, but also in traditional or customary law.[164] This is particularly true of South Africa where traditional dispute resolution has existed for a long time.[165] Mediation in South Africa may consequently be said to have a two-track history that has ran parallel for many years in line with the political history of the country.[166] The one track is traditional dispute resolution which resolves disputes through a type of group mediation within the community. Disputes in the traditional African culture were and still are considered and resolved from a community perspective. This would involve the direct parties to the dispute and other persons indirectly involved in the dispute, like family members, elders of the community and members of the community. The objectives are restoration of relationships and the social equilibrium and, at times,

[164] In this paragraph "customary law" is used as a general term. The term "traditional dispute resolution" is preferred to "customary dispute resolution". It is beyond the scope of this dissertation to discuss the origin and development of traditional dispute resolution in South Africa. The premise is that the existence, past and present, of traditional dispute resolution has been validated. See, for example, Aiyedun & Ordor (2016) *LDD* 154 154-155.

[165] R Feehily "The Role of the Commercial Mediator in the Mediation Process: A Critical Analysis of the Legal and Regulatory Issues" (2015) *SALJ* 372.

[166] The modern legal history of South Africa is interwoven with its modern political history. The Dutch settlement in the mid-seventeenth century established Roman-Dutch law, followed by the partial introduction of English law in the beginning of the nineteenth century with British colonial rule and the coming of British settlers in 1820. When the Union of South Africa came into being in 1910, South African law was built on a strong foundation of integrated Roman-Dutch and English law. The rise of Afrikaner nationalism in the mid-twentieth century brought apartheid and the legislation of apartheid laws. In the following fifty years, the growing divisions between the people of South Africa, particularly between white and black, led to a mistrust in the legal system and the courts by many; particularly persons seeking equal justice for all South Africans. During these 300 years, the Western legal system based on adjudication was primarily used to resolve disputes in the formal justice system. In 1994, the new Republic of South Africa with free national elections was celebrated and the Constitution of the Republic of South Africa (1996) was published on 18 December 1996 as a welcome national gift. Since then alternative dispute resolution methods such as conciliation and mediation have been increasingly used, both formally and informally, throughout South Africa. See too Aiyedun & Ordor (2016) *LDD* 155-159 who describe legal pluralism in Africa and the development of traditional laws alongside Western laws of colonial origin. See also Laubscher *Confidentiality in Mediation* 11.

restitution for injury. The issue of a dispute and its resolution is a social event in a society which values each person's humanness, the inter-relatedness of human relations[167] and the sustenance of harmony. A dispute disrupts social harmony and accordingly the resolution of the dispute is aimed at restoring harmony and the social equilibrium. Consequently, African dispute resolution can be called a harmony model.[168] The focus is thus on restoration as opposed to retribution or punishment.[169] In the light of the emphasis on restoration of relationships, traditional mediation practices are future-orientated.[170] The wrong is acknowledged, yet the future and communal relationships weigh heavily in the mediation process and in reaching a resolution.

The other track of mediation evolved within the so-called Western legal system based on adversarial and adjudicative forms of dispute resolution. In this system, the common way of resolving disputes was adjudicative, primarily through the courts or sometimes through arbitration. The resolving of disputes concentrated on the rights of the parties and what was legally right or wrong. Civil law and the adjudicative courts created winners and losers with little attention given to the interests of parties and the maintenance of relationships. In turn, the criminal law was focused on the crime and the offender and subsequently upon punishment and retribution; as opposed to focusing on the victim and restoration of the victim or rehabilitation of the offender. Mediation is thus seen as an alternative way to resolve disputes, a way in contrast to the conventional adjudicative and adversarial way.

Yet, it is submitted that contemporary South Africa's legal and political systems are built on strong mediation principles. In the last quarter of the twentieth century, because of the political climate, the formal courts were not trusted by all role players. This led to the formation of the Independent Mediation Service of South Africa ("IMSSA") in 1984 by various concerned persons, including lawyers, academics and

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[167] Malan (1997) *Conflict Resolution* 87 uses the metaphor of being interwoven, describing persons in conflict are like criss-cross threads that although they run in different directions create the same piece of woven cloth.

[168] R Choudree "Traditions of Conflict Resolution in South Africa" (1999) *AJCR* 1, 2-3.

[169] De la Harpe *Mediation in SA* 3; Choudree (1999) 1 *AJCR* 1, 2.

[170] De la Harpe *Mediation in SA* 2.

labour representatives.[171] IMSSA initially served to resolve labour disputes through mediation and arbitration between companies and unions. Together with IMSSA, the establishment of the National Peace Accord made an immeasurable contribution to a culture of ADR in South Africa.[172] The work and broad exposure and effectiveness of IMSSA contributed to mediation being acknowledged beyond the formal court system and the recognition of traditional African dispute settlement processes, as being an effective alternative way in which to resolve disputes.[173] As politics and law were closely interwoven in this tumultuous period, the multi-party negotiation forum further presented a link in the chain of the developing national ethos of alternative dispute resolution through consensual facilitation and mediation.[174] In addition, the mediatory role played by the Truth and Reconciliation Commission, in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995, between victims and perpetrators of the former political regime, cannot be ignored. Indeed, in a sense contemporary South Africa was born through alternative dispute resolution,

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[171] Nupen (2013) *AJOL* 88-89; Brand et al *Commercial Mediation* (2015) 2-3.

[172] The National Peace Accord ("NP Accord") established in 1991 primarily consisted of five working groups, and though it was finally signed by 27 different organisations, the working groups mainly had representatives from the African National Congress (ANC), the National Party (NP), the Inkatha Freedom Party (IFP) and included business and religious leaders. IMSSA and the NP Accord mediated diverse and numerous disputes in communities, including labour, political and socio-economic disputes. Nupen (2013) *AJOL* 93-94.

[173] Nupen (2013) *AJOL* 93-94; AA Okharedia *The Emergence of Alternative Dispute Resolution in South Africa: A Lesson for Other African Countries* (2011) an unpublished paper presented at a conference on *Emerging Trends in Employment Relations in Africa: National and International Perspectives* hosted by the 6th IIRA African Regional Congress of Industrial Relations, Lagos Nigeria 24-28-01-2011 (copy on file with the writer) 5.

[174] The NP Accord was strongly supported by the Consultative Business Movement (CBM). In 1993, it rekindled the 1992 negotiations of the Convention for a Democratic South Africa (CODESA) and worked together to draft various agreements that formed the basis of new draft laws. The most significant of these was the draft interim constitution for the new political structure for South Africa. The process also included mediation by the Kenyan mediator, Prof Washington Okumu, to mediate the agreement for reconciliation and peace between the IFP, the ANC and the NP. For further details, see T Eloff "Multi-party Negotiation Process Leading to Constitution" (09-01-1994) *Nelson Mandela Centre of Memory* <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02046/05lv02097/06lv02099.htm> (accessed 01-07-2019).

particularly facilitation and mediation, and consequently it is submitted that ADR forms part of the DNA of the justice systems in South Africa.

On the eve of the new era of constitutionalism and a reformed jurisprudence, mediation was recognised as a dispute resolution mechanism by both traditional African and Western legal traditions. In addition, although traditional African mediation continues to be practised, the respective parallel histories of mediation, began to run closer together and merge in the new legal era. This can particularly be seen in the legislation that has been passed in South Africa since 1994 and in the interpretation and development of the law in the Constitutional Court.

The prominent role mediation had already played in labour disputes was formalised in the Labour Relations Act 66 of 1995 which established the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The CCMA has over the past quarter of a century become an international frontrunner in the resolution of labour disputes through mediation.[175] Mediation also became a statutory alternative in family law disputes with the promulgation of Mediation in Certain Divorce Matters Act 24 of 1977 and subsequently the Children's Act 38 of 2005. At present, there are at least fifty statutes in South Africa that make provision for mediation.[176]

Significantly, court-annexed mediation was introduced into the civil procedure system in South Africa in 2014 with the promulgation of the amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa[177] ("Magistrates' Court Rules, 2014"). The Magistrates' Court Rules, 2014 were promulgated as a consequence of a national *Access to Justice Conference* held in mid-2011,[178] and a pilot scheme was introduced in certain magisterial

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[175] Notably, the LRA uses the term "conciliation" in preference to "mediation". See discussion in ch 2, para 2 2 1, 30ff regarding the use of these terms.

[176] For a list see Brand, et al *Commercial Mediation* (2015), Appendix A 97-103; Rycroft 2-13 *SALJ* 197 fn 51.

[177] GN R 183 in *GG* 37448 of 18-03-2014. It is beyond the scope of this dissertation to discuss these rules in detail. For a discussion on these rules see Brand et al *Commercial Mediation* (2015) 45-48.

[178] From 8-10 July 2011, a large conference titled *Towards Delivering Accessible and Quality Justice for All,* was initiated by the Chief Justice, Sandile Ngcobo, with a view to fundamentally review the access and effectiveness of the South African judicial system. Notably, all three arms of government, the judiciary, the executive and the legislature were invited, as were national and international legal experts and policy makers, to confer on the

districts.[179] Several calls have since been made throughout South Africa the past number of years to extend these rules to the High Court as well.[180]

Recent developments include the publication of proposed rules for voluntary mediation in the High Court.[181] These propose rules are not intended to be court-annexed or pre-litigation mediation.[182] It is doubted that the draft Rule 41A in its

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access to and administration of justice. ADR processes, such as court-annexed mediation were specifically on the agenda and discussed. Office of the Chief Justice Media Statement. <www.justice.gov.za/m_statements/2011/20110701-media-statement-ajc.pdf> (accessed 26-12-2016). Also see R 70(2) of the Magistrate Court Rules.

[179] It was officially launched in Mahikeng on 16 February 2015. Manyathi-Jele N "Court-annexed Mediation Officially Launched" (2015) Issue 551 *DR* 11 11. The project was further extended in 2018 to regional courts in Gauteng, Mpumalanga, Limpopo and North-West. The scheme is to be extended to a substantial number of magistrates' courts in the other provinces from 1 July 2019 (see GN 508 in *GG* 42344 of 28-03-2019). Compare De Vos & Broodryk (2018) *TSAR* 34 who aver that voluntary court-annexed mediation is now entrenched in lower court practice in South Africa. It is submitted that the reality and the recent extension of the court-annexed mediation does not demonstrate such an entrenchment.

[180] Brand et al *Commercial Mediation* 45; J Brand *A Critique of the South African Court Annexed Mediation Rules: What are the Successes of the Rules and What Could We Do Better in the Future?* unpublished presentation presented at conference on *Court Annexed Mediation: Successes, Challenges and Possibilities* hosted by the Mandela Institute at Wits University, 20-21 July 2016 <http://www.conflictdynamics.co.za/Resources/Library?sort=Title)> (accessed 11-01-2017).

[181] The Rules Board published a proposed Uniform Rule 41A: Mediation as a Dispute Resolution Mechanism for comment in December 2018.

[182] The Rules Board Covering Letter (18-12-2018). R 41A(2)(a) proposes that a plaintiff deliver, together with a summons, a notice indicating whether the plaintiff agrees or opposes referral of the dispute to mediation; and in terms of R 41A(2)(b) the defendant shall do likewise with the delivery of a plea or defence. However, draft R 41A does not provide for a defendant to consent to mediation without filing a plea and is silent as to the consequences in the event of a plaintiff or the defendant failing to submit the notice regarding the mediation. Neither does the draft rule contain procedural provisions, like the appointment of mediators, the conclusion of a mediation agreement or the commencement of the process. For comment on the operation and shortcomings of R 41A see J Joubert "Mediation Alternatives and Rule 41A" (2019) *Legalbrief* 1-2. Notably, there are other existing Uniform Rules for litigants to consider settlements or offer settlement. For example, R 34 provides that a party may lodge a without prejudice settlement offer with the court which may only be made known to the court after judgment. Such an offer illustrates that a party had considered settlement and that may have an influence on the order of costs. R 37(6)(c) also requires

present form will encourage prospective litigants to consent to mediation and accordingly Joubert calls for a stronger mechanism, being a pre-mediation meeting controlled by a mediation judge or a mediator appointed by the mediation judge.[183] This proposal is in line with the provisions of the recently published Rule 37A, Judicial Case Management of the Uniform Rules of Court.[184] The possibility of mediation is now directly accommodated under Rule 37A(11)(a) of the Uniform Rules.[185] This is not mandatory mediation, but can possibly be seen as coercive mediation as the possibility of adverse cost orders against a party may coerce a litigant into voluntary mediation.[186] It is beyond the scope of this dissertation to discuss these rules in detail.[187] However, the paradoxes and concerns that emerge from these developments in civil procedure are significant. The further evolution of the role of a judge from a passive adjudicator to an engaged participant with powers to control and direct the trial process leads to less litigant autonomy. It also impacts on the fundamental rights of parties to conduct their cases before a court as they

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that parties at a pre-trial conference minute that "every party claiming relief" has requested the opposing party to make a settlement and that the opponent has reacted. Implied in these provisions is that parties considered settlement and offered it to the opposing party. See Brand et al *Commercial Mediation* (2015) 44; De Vos & Broodryk (2018) *TSAR* 24, 32.

[183] Joubert *Legalbrief* (2019) 1-2.

[184] See R 842 in *GG* 42497 of 31-05-2019 scheduled to have come into operation on 1 July 2019. Its forerunner was the previous R 37A which was applied as a pilot project in the Cape High Court. It became effective 1 December 1997 through GN R1352 of 10-10-1997 and was repealed by GN 373 of 30-04-2001. For a discussion on this mechanism, known as differentiated case management, see H Erasmus "Case Management Moves Ahead: New r 37A in Force in Cape High Court" (1998) *DR* 27-29; B Griesel "The Next Step Towards Differential Case Management: The New Cape Rule 37 A" (1998) *Consultus* 47-48; De Vos & Broodryk (2018) *TSAR* 25.

[185] R 37A(11) reads: "Without limiting the scope of judicial engagement at a case management conference, the case management judge *shall*- (a) explore settlement, on all or some of the issues, including, if appropriate, enquiring whether the parties have considered *voluntary mediation*" (writer's emphasis).

[186] R 37A(16) makes provision for adverse costs orders in the case of non-adherence to the principles and requirements of R 37A.

[187] The purpose of the reform in civil procedure is to address the high cost, delays and complexity of cases which led to the court rolls becoming overburdened and litigants experiencing costs and delays disproportionate to the disputes. See De Vos & Broodryk (2017) 4 *TSAR* 683ff and De Vos & Broodryk (2018) *TSAR* 26-31 discussing practice directives which regulated the pilot project of case management in South Africa.

would freely choose to do.[188] At the same time, parallel to the changing role of the judge, was the emerging role of ADR, and the potential of particularly mediation to resolve disputes. This led to managing judges in Australia referring matters to mediation and the advent of mandatory or coercive mediation.[189] Ironically, mediation is described as a process that gives the control back to the parties who can settle the dispute on their own terms, yet an order to mediate and not litigate removes the parties control with regard to their choice of resolution process. This creates a paradox with regard to the autonomy of disputants.

Another concern is the public nature of courts and court judgments. It is agreed that not only the parties have an interest in bringing their dispute before the courts, but the public do as well, and especially so if parties abuse the courts.[190] The valuable role that judgments play in the evolution of jurisprudence is also important. The concern is that the more matters are referred to mediation and consequently resolved through private resolution, the less expansion and evolution of the law will occur through court judgments.[191] The broader public interest is an important concern. Consequently, this dissertation's proposal is that the mediated settlement agreement must be presented before the court to ensure the continuing evolution of the common law through public debate and academic commentary on judgments. In addition, such public judgments confirm consistency in sanctioning economic crime.

The objective of the Magistrates' Court Rules, 2014 is the introduction of ADR mechanisms into the court-system to promote accessibility and quality justice for all in South Africa.[192] Rule 71 sets forth the purposes of mediation: primarily to promote

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[188] De Vos & Broodryk (2017) *TSAR* 684, 693; De Vos & Broodryk (2018) *TSAR* 18-20, 23-24.

[189] Consequently, it can be said that the issues of case management and ADR are intertwined. See De Vos & Broodryk (2017) *TSAR* 694-702. See also TF Bathurst "The Role of the Courts in the Changing Dispute Resolution Landscape (2012) 35 *UNSWLJ* 870 873-879.

[190] Litigants should not be permitted to unduly and disproportionately inflate and delay trials at the expense of other litigants and the general public. See De Vos & Broodryk (2017) *TSAR* 693-694.

[191] De Vos & Broodryk (2017) *TSAR* 684, 702-703 argue that the court is an important institution of governance and that this identity needs to be protected to ensure the continuing development of the law.

[192] See R 70(1) and (2) of the Magistrates' Court Rules, 2014.

access to justice[193] and to promote restorative justice.[194] The preservation of the relationship between parties is also specifically mentioned[195] and this echoes the core value and purpose of traditional African mediation and resorts under the ambit and the spirit of *ubuntu*.

Several challenges, however, remain regarding the introduction of mediation in the court system. Although, the use of the Magistrates' Court Rule 14 has now been extended to other magisterial districts throughout South Africa, the new procedure is still in its infancy.[196] In other African countries, Namibia and Uganda, court-annexed mediation was first introduced in the higher courts.[197] The introduction of ADR in the higher courts, and subsequent expansion to other courts, is strongly supported by the judiciary and has been robustly implemented by the office of the Chief Justice in several African countries.[198] The new draft Rule 41A falls well short of this.[199]

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[193] R 71(a) of the Magistrates' Court Rules, 2014.

[194] R 71(b) of the Magistrates' Court Rules, 2014. A number of more utilitarian reasons, including expeditious and cost effective resolution of disputes (R 71(d)), and evaluation of the strength of a party's case are also enumerated (R 71(e)).

[195] R 71(c) of the Magistrates' Court Rules (2014).

[196] Compare De Vos & Broodryk (2018) *TSAR* 34 who aver that voluntary court-annexed mediation is now entrenched in lower court practice in South Africa. It is submitted that the reality and the recent extension of the court-annexed mediation beyond the pilot project does not demonstrate such an entrenchment.

[197] Rules of the High Court of Namibia: High Court Act 1990 GN 5392 (17-01-2014) which came into effect on 16 April 2014. Mediation was first introduced in Uganda in the Commercial Court Division in 2007 in terms of the Judicature (Commercial Court Division)(Mediation) Rules 2007 Statutory Instrument 2007 No 55.

[198] PT Damaseb, Deputy CJ & JP of the High Court of Namibia "The Introduction of Court-connected Mediation in the High Court of Namibia: Successes and Challenges" unpublished presentation presented at conference on *Court Annexed Mediation: Successes, Challenges and Possibilities* hosted by the Mandela Institute at Wits University, 20-21 July 2016 (copy on file with author); Justice Geoffrey Kiryabwire, Court of Appeal and Constitutional Court of Uganda "The Ugandan Mediation Model" unpublished presentation presented at conference on *Court Annexed Mediation: Successes, Challenges and Possibilities* hosted by the Mandela Institute at WITS University, 20-21 July 2016 (copy on file with author); Press release by The Judiciary, The Republic of Uganda, "Mediation Rolled Out to All Courts" (18-03-2015) <http://www.judiciary.go.ug/data/news/164/3671/Mediation%20Rolled%20Out%20to%20All%20Courts.html> (accessed 11-01-2017).

Another concern which has been raised is whether mediation may contravene a defendant's rights under section 35 of the Constitution of South Africa.[200]

Rule 72 of the Magistrates' Court Rules (2014) specifically provides that the rules are only applicable to "voluntary submission" by the parties themselves to mediation before certain courts; before[201] or after[202] the commencement of litigation; but before judgment of a matter.[203] A judicial officer is limited simply to an inquiry into the possibility of mediation before judgment and may not order it;[204] except after a request by one or all the parties after the commencement of litigation, in which case mediation is mandatory.[205] This is different from other jurisdictions, such as Namibia,[206] where courts may order the parties to mediate, by using so-called court-

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[199] Joubert (2019) *Legalbrief* 2 observes that in its present form, the draft R 41A does not even get the parties through the front door of mediation, unless they are coerced through an adverse costs order. Joubert contends that mediation leadership is necessary and proposes that judges be trained in mediation and appointed as Mediation Judges and that R 41A be reformed to provide for pre-mediation meetings before Mediation Judges.

[200] S 35 of the Constitution of South Africa makes provision for the rights of arrested, detained and accused persons, including the right to remain silent. See the discussion above under para 2 2 2, especially fn 53 regarding voluntariness and the discussion under para 4 4 2 at regarding a defendant's waiver of rights under plea negotiation.

[201] R 74(1)(a) and 75(1)(a) of the Magistrates' Court Rules, 2014.

[202] R 74(1)(b) and 75(1)(b) of the Magistrates' Court Rules, 2014.

[203] See too R 74 and R 75 of the Magistrates' Court Rules, 2014. The reading of R 78(2) and R 78(3) together is not clear. These rules provide that after the commencement of a trial any *one* of the parties may apply to the court for an order to refer the matter for mediation. The inference is that the referral to mediation becomes an issue for the discretion of the court and no longer a voluntary decision for *each* party. However, such a reading is not in accord with the purpose of the rules of voluntariness in R 72, or, for example, with the wording of R 83.

[204] R 75(2) and R 79(1) of the Magistrates' Court Rules (2014).

[205] R 78(2) and 79(2) of the Magistrates' Court Rules (2014).

[206] R 38(1) of the Rules of the High Court of Namibia provides that "[t]he managing judge may, at any time in terms of practice directions issued by the Judge President, *either of his or her own initiative* or at the request of a party refer any part of the proceeding or any issue to an to an alternative dispute resolution (ADR) process" (writer's emphasis). Rs 8, 9 and 10 of the Commercial Court Division Mediation Rules of Uganda operate on the premise of mandatory mediation and that parties consequently have to apply to court to be exempted from the mediation process. The possibility of introducing mandatory mediation with regard to claims against the state was mentioned by the DOJ at the conference *Court Annexed*

mandatory mediation without the conditions imposed by Rule 78 of the South African Magistrates' Court Rules.

Mediation in South Africa has also received support from the judiciary in several cases, notably with regard to eviction proceedings. In *Port Elizabeth Municipality v Various Occupiers*[207] Sachs J discussed the issue of mediation and some of the objectives and advantages of mediation.[208] It is significant that he noted that in managing litigation the courts should "encourage and require"[209] parties to seek alternative dispute resolution, namely mediation, and order it in "appropriate circumstances".[210] Moreover, Sachs J declared that mediation "promotes respect for human dignity and underlines the fact that we all live in a shared society";[211] and that mediation can promote good neighbourliness and contribute to bring hostile parties closer to one another.[212]

Regarding mandatory court-ordered mediation, Sachs J emphasised "that the compulsion lies in participating in the process, not in reaching a settlement."[213] Importantly, Sachs J found that the factual question whether mediation has been attempted by parties involved in an eviction dispute would be an important factor to consider in determining whether it is just and equitable to grant an eviction order.[214] A number of academics[215] and practitioners[216] also believe that mandatory mediation

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Mediation: Successes, Challenges and Possibilities hosted by the Mandela Institute at Wits University, 20-21 July 2016. See too Brand et al *Commercial Mediation* (2015) 47 regarding challenges of court-mandated mediation.

[207] 2005 1 SA 217 (CC) ("*Port Elizabeth Municipality*").

[208] *Port Elizabeth Municipality* paras 39-47. Some advantages mentioned are the reduction of litigation costs, the avoidance of aggravating tension between parties and finding solutions to impasses and moving forward (para 42).

[209] *Port Elizabeth Municipality* para 39.

[210] *Port Elizabeth Municipality* para 45.

[211] *Port Elizabeth Municipality* para 42.

[212] *Port Elizabeth Municipality* para 43.

[213] *Port Elizabeth Municipality* para 40.

[214] *Port Elizabeth Municipality* paras 47 and 61.

[215] MA Chicktay in his presentation *Court Annexed Mediation: What We Have Learnt* (unpublished presentation made at the conference on *Court Annexed Mediation: Successes, Challenges and Possibilities* hosted by the Mandela Institute at WITS University, 20-21 July 2016 [copy on file with author]) summarises Laurence Boulle's viewpoints on the constitutionality of mandatory mediation.

is not a threat to section 34 of the Constitution and will not affect the constitutional rights of a party ordered to participate in an ADR process.

Particularly pertinent are the comments made by Brassey AJ[217] in recognising the unique ability of mediation to resolve disputes: "Mediation can produce remarkable results in the most unpropitious of circumstances." The court also emphasised the benefits mediation gives to parties, including more speedy and less costly resolution of matters and bringing an air of reality to negotiations facilitated by a third party, benefits which are usually absent between sparring opponents.[218]

In this part it has been shown that although mediation in South Africa has two parallel histories, the development of the two tracks have nevertheless been brought closer together since the promulgation of the Constitution and the change in political order during the last decade of the twentieth century. Recent legislation does not expressly differentiate between the two tracks, although practitioners of and participants in the two types may have different interpretations and understandings of mediation.

Primarily, the differences between the two tracks of mediation are that African dispute resolution aims to reconcile and maintain social relationships; and in this process group mediation is generally used with the participation of various persons in the social group. This results in mediation in traditional African cultures having a dominant public nature. Western mediation, in contrast, is more focused on individuals reaching a solution and on mediation being private and confidential. On the basis of this parallelism and overlap, calls for a better linkage and integration between the so-called traditional and modern systems have been made.[219] Points of intersection between the two dispute resolution systems include the aim of

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[216] Brand et al *Commercial Mediation* 2 ed (2016) 46-47; Brand *A Critique of the South African Court Annexed Mediation Rules: What are the Successes of the Rules and What Could We Do Better in the Future?*

[217] *MB v NB* 2010 3 SA 220 (GSJ) ("*MB v NB*") para 50.

[218] *MB v NB* para 51.

[219] Aiyedun & Ordor (2016) *LDD* 154, 155 & 172; A Skelton "Tapping Indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and the Denunciation of Crime in South Africa" (2007) *AJ* 228 229-231.

reconciliation and restoration of peace and harmony.[220] The communitarian approach built upon dialogue and negotiation between the offender, the victim, their families and friends and representatives from the community is another shared characteristic.[221] This endorses the value of the voice of the public and the concept of community participation, which is a strong principle in the criminal mediation model proposed in this dissertation.

The procedures of traditional and modern mediation are similar in that they are flexible and informal, and parties are given an opportunity to tell their stories and to seek and reach creative and innovative solutions.[222] The process also empowers the parties. This results in the parties taking ownership of the outcome, but essentially also in taking responsibility for the consequences of their acts, past and future.[223] Accordingly, both processes may play a transformative role.[224]

Moreover, links exist not only between traditional and modern mediation, but also between these basically restorative dispute resolution processes and the Western more adversarial trial process. At present, South Africa and other African countries have multiple legal systems that operate alongside one another and subsequently create a landscape of procedural pluralism.[225] This pluralism includes two seemingly divergent procedures, namely mediation and the formal adjudicative court procedure. As explained below, it is submitted that the differences in procedures tend to be over-emphasised and that certain shared characteristics between the procedures illustrate a convergence of legal processes. Furthermore, Skelton contends that this pluralism leads to communities in South Africa more readily accepting alternative ways of doing justice and leads to greater enthusiasm for community participation in the processes.[226]

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[220] Skelton (2007) *AJ* 231 adds that although "community" is more difficult to define in urban areas than in traditional rural communities, the reality is that persons are relational beings and micro-communities do exist in urban areas.

[221] Skelton (2007) *AJ* 232-233.

[222] Skelton (2007) *AJ* 234.

[223] Skelton (2007) *AJ* 235-236.

[224] Skelton (2007) *AJ* 236.

[225] Aiyedun & Ordor (2016) *LDD* 159.

[226] Skelton (2007) *AJ* 230.

In particular, the voice of the public, representing an integral part of the participation by the community in traditional mediation, is echoed by the voice of *amicus curiae* in formal court proceedings.[227] Accordingly, the voice of concerned public representatives can be heard in both procedures, thus endorsing the communitarian approach discussed above. It also underscores the values of *ubuntu* and our inter-dependence upon one another.[228] In addition, the emphasis on consensual settlement, found in both traditional and Western mediation,[229] and recognised in the plea and sentencing negotiation process of section 105A of the CPA, is another value that can be developed and further integrated into the formal adversarial winner/loser court system. An agreed outcome is a core characteristic of the proposed criminal mediation model.

Another commonality, which appears in both systems, is the opportunity for each party to state their case and tell their story.[230] The opportunity to tell one's story and to be heard relatively unconstrained is important to the proposed model of mediation in the criminal justice system. In addition, the constitutional values of dignity and respect for the other participants are integral to both dispute resolution systems. These values are concretised in the validation of the victim's position and her or his narrative.[231] Equally the story of the offender is heard with respect and dignity.[232] The issue of restitution is also shared by the different dispute resolution processes. Restoration, including compensation, is a fundamental principle in both traditional and Western mediation systems where harm has occurred. Restitution has,

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[227] Aiyedun & Ordor (2016) *LDD* 171-172.

[228] Skelton (2007) *AJ* 231-232.

[229] Aiyedun & Ordor (2016) *LDD* 172-173.

[230] Aiyedun & Ordor (2016) *LDD* 172-173; Simms (2007) *Ohio St J on Disp Resol* 820. It is suggested, that the giving of evidence in a formal adversarial system is more constrained compared to a more informal mediation process.

[231] Skelton (2007) *AJ* 233. It is recognised that the validation of a person's dignity and respect is not readily realised in an adversarial trial court with the accused questioned harshly and the victim reduced to a witness, answering questions put by strangers; but this should not necessarily be the case. Also, the validation and role of the victim in the more formal criminal court procedure has been statutorily endorsed in recent amendments such as s 105A(1)(b)(iii) of the CPA. This is discussed in ch 4, para 4 4 2 2, 327ff .

[232] The presumption is that the offender has waived her or his right to remain silent.

however, also long been provided for in the adversarial criminal trial system through, for example, sections 297 and 300 of the CPA.[233]

The commonality and intersection of values and principles in the different dispute resolution mechanisms illustrate that much is in fact shared between them. It is further submitted that this recognition of multi-faceted procedures now needs to be affirmed and further integrated into both the civil and criminal justice systems. A cohesive integrated system endorses the right of disputants to choose an appropriate resolution process to resolve any dispute, civil or criminal, in a fair hearing, whether it be a before a court, or where appropriate another independent and impartial tribunal or forum.[234] It is also submitted that mediation, as the predominant non-adjudicative dispute resolution mechanism, should be included and integrated into the justice systems.

In the next section these and other characteristics of mediation in the criminal justice system are discussed to illustrate that mediation already plays a significant role in the resolution of criminal offences.[235] Reference is made to the model of informal mediation in the South African criminal justice system. This chapter concludes with the submission in paragraph 2 4 2 2 below for the integration of formal mediation into the South African criminal justice system.

2 4 Mediation in the criminal justice system

2 4 1 Introduction

> "Establishing mediation as an integral part of our system of criminal justice has benefits for all participants in the criminal justice process."[236]

Mediation in the criminal justice system has been mooted for several decades and has been introduced in various ways into several national systems. Palmer,[237]

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[233] Also see CPA s 105A(1)(a)(ii)(cc)-(dd). These sections are discussed in ch 4, para 4 4 3, 346ff.

[234] In accordance with ss 34 and 35 of the South African Constitution.

[235] For example, the Child Justice Act 75 of 2008, s 62 which provides for victim-offender mediation.

[236] R Palmer "Justice in Whose Interests? A Proposal for Institutionalized Mediation in the Criminal Justice System" (1997) 10 *SACJ* 33 44.

Macnab and Khan[238] called for mediation to be an integral part of the South African criminal justice system several decades ago, whilst Rice proposed this in the United States half a century ago.[239] Although the criminal justice system is generally known to be an adversarial system, governed by rules of procedure and evidence, forms of mediation have been part of the criminal justice system for some time. However, recently these mediation practices are now being formally identified, described and in some instances prescribed. In this section, the development of mediation in the criminal justice system over the past 50 years is traced and the formal incorporation of this ADR mechanism into the criminal justice system discussed.

Laflin identifies two models of mediation in the criminal justice system, namely the restorative justice model and the case management model.[240] The restorative justice model includes a number of restorative dispute resolution practices. The first is mediation programmes between the victim and offender.[241] These programmes were

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[237] Palmer (1997) *SACJ* 34 44. Robin Palmer was an advocate of the Supreme Court of South Africa with significant experience regarding the criminal justice system in Durban, Kwazulu-Natal as a special prosecutor with the NPA; and also as a professor in criminal law at the University of Kwazulu-Natal (formerly the University of Natal) and the University of Canterbury, Christchurch, New Zealand. <https://www.linkedin.com/in/robin-palmer-29a101b/> (accessed 06-7-2017).

[238] D Scott-Macnab & MS Khan "Mediation and Arbitration as Forms of Dispute Settlement in the South African Criminal Law" (1985) 9 *SACC* 103-128 called for arbitration and mediation to be established in the South African criminal justice system. It is acknowledged that the proposal was for minor offences and the decriminalisation of such offences. In addition a primary reason for the proposal was the decongestion of the courts' caseloads. Nevertheless, the recognition of the difficulties experienced in the adversarial court based criminal system and the call to address these through alternative dispute mechanisms, such as mediation is endorsed in this dissertation.

[239] P Rice "Mediation and Arbitration as a Civil Alternative to the Criminal Justice System" (1979) 29 *Am UL Rev* 17.

[240] ME Laflin "Remarks on Case-management Criminal Mediation" (2004) 40 *Idaho L Rev* 571 579-580. The case-management model is also referred to as voluntary settlement conferencing. Compare too L Simms "Criminal Mediation is the BASF of the Criminal Justice System: Not Replacing Traditional Criminal Adjudication, Just Making It Better" (2007) 22 *Ohio St Jnl on Disp Resol* 797 798 who distinguishes between "party autonomy and judicial autonomy" which categorisation entails similar features of differentiation.

[241] For example, VOM (Victim-Offender-Mediation) or VORP (Victim-Offender-Restoration-Programme) in the United States. See MW Bakker "Repairing the Breach and Reconciling

initiated, and are still being run by church organisations, community-based organisations or the local prosecution offices.[242] Similarly, community dispute resolution practices involve the resolution of disputes outside the traditional adversarial criminal justice system. The former focuses on the needs of the victim and the offender, the facilitation of a face to face mediation meeting between them with the purpose of understanding and healing through their respective narratives, consequent restoration, the possibility of restitution, including compensation for the victim and possible reconciliation. Community dispute settlement centres arose from the dissatisfaction with the adversarial court processes and the need for community-centred problems to be resolved by the community in a more informal manner.[243] In addition, these mediation systems are run alongside conventional criminal justice systems, sometimes in close liaison with or complementary to the judicial process.[244]

The use of mediation in criminal processes is believed to have its origins in a number of causes, namely, a response to disillusionment with the formal criminal justice system and the concern for overcrowded prisons, a growing awareness of the neglected position of the victim and the need for restitution within the criminal justice system.[245] These concerns developed into the victims' rights movement and the

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the Discordant: Mediation in the Criminal Justice System" (1994) 72 *NCL Rev* 1479 1483-1485; Laflin (2004) *Idaho L Rev* 580-585.

[242] In South Africa, mention can be made of the instrumental role played by the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), a non-profit organisation that has for more than a century assisted with the reintegration of former prisoners, victim-offender dispute resolution and reconciliation. NICRO also contributed to the reformation of the criminal justice system with the introduction of correctional and restorative justice practices, like probation, diversion and community service. For more information, see <https://www.nicro.org.za/>; A Skelton & M Batley *Charting Progress, Mapping the Future: Restorative Justice in South Africa* (2006) 109-111; S Maimane *Restorative Justice for Adult Offenders in South Africa*: *A Comparative Study with Canada, New Zealand, England and Wales* LLM thesis, University of Pretoria (2017) 7-11.

[243] For example, landlord and tenant problems that may have resulted in offences such as damage to property. See Bakker (1994) *NCL Rev* 1486-1487.

[244] The mediation sessions can take place at different stages of the criminal trial process. For example, as part of pre-trial diversion programmes or as part of sentencing procedures. Bakker (1994) *NCL Rev* 1485.

[245] Bakker (1994) *NCL Rev* 1500. Compare Hanan (2016) *NML Rev* 138-144) who attributes the development of restorative programmes, like mediation, in the criminal justice system to

reparation movement, which together with the incarceration reform movement resulted in a number of models of mediation being developed alongside or within the criminal justice system.[246] The significance of these developments echo the development of restorative justice and the increased focus on the victim and restoration, including both the rehabilitation of the offender and restitution for the victim. These issues, victim-orientation and restoration are fundamental principles for this dissertation, as demonstrated in chapter 3. In addition, the importance of participation by the public is underscored by the public interest in serious economic crime and the role sectors of the public can play as stakeholders to combat economic crime in collaboration with the state.[247]

The second model, case-management mediation, developed organically from the interventions of a neutral third party, usually a judge, in the negotiations between the prosecutor and the defendant when plea negotiations failed.[248] The model focuses on reaching settlement between the prosecutor and the defendant, with little attention given to the victim and is said to be still primarily based on retributive values, in contrast to the restorative model which emphasises restoration and healing.[249] This model was driven by the need to address the explosion of cases and the burden upon the courts.[250] Judges play a central role in this model as it concerns case-management and clearing dockets.[251]

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the therapeutic response to harm arising from a crime which is based on assumption of guilt and acceptance of the offence by the offender; and secondly the need for out-of-court settlements for such harm through informal dispute resolution mechanisms.

[246] For example, victim-offender-mediation ("VOM"), circle conferencing, Victim Offender Reconciliation Programme ("VORP"), and community-based mediation programmess. It is beyond the scope of this dissertation to discuss the different mediation programmes available in different jurisdictions. For the United States, see Bakker (1994) *NCL Rev* 1491-500; Hanan (2016) *NML Rev* 138-144; and in South Africa Maimane *Restorative Justice* 11-13. It is acknowledged that the number of models of mediation that are used in these jurisdictions are diverse. Accordingly, it is difficult to make specific conclusions. However, it is submitted that certain conclusions regarding the nature and benefits of mediation as a restorative justice practice are proven and common across these diverse models.

[247] See ch 3 para 3 3 4 at 98 below and the proposals in ch 5 3 at 328 below.

[248] Laflin (2004) *Idaho L Rev* 594, 595.

[249] Laflin (2004) *Idaho L Rev* 587.

[250] Laflin (2004) *Idaho L Rev* 586. See also the discussion by LP Love "From the Chair" (2008) *Disp Resol Mag* 2-8, 29 on the development of mediation in the criminal justice

Although judges are usually described as being adjudicators, there is no doubt that in reality judges sometimes act as dispute resolvers and as mediators. In criminal courts comparatively few cases are determined by trial. In several jurisdictions, like the United States, and increasingly in South Africa criminal matters are resolved by plea and sentence agreements, negotiated by the parties. Recent research has highlighted the evolving role of judges in the resolution of criminal cases, outside of the classic trial court context, especially where plea and sentencing negotiations have reached an impasse.[252] Brief reference will be made to the role of the multi-tasking judge, as well as to some of the concerns and benefits related to judicial involvement in the negotiation and settlement of disputes.[253]

Rule 11(c)(1) of the Federal Rules of Criminal Procedure of the United States prohibits the participation of the court in plea negotiation discussions.[254] However, a survey of the 50 states in the United States shows another reality. The survey indicates that some states allow judicial participation in plea negotiations in differing degrees.[255] The pertinent fact is that statutory rules,[256] case law[257] and practices[258]

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system in the United States, particularly the Mediation in Criminal Matters Enterprise Project in 2008 and the program in Maricopa County, Arizona. Compare RN Koman "Balancing the Force in Criminal Mediation" (2016) 7 *Beijing L Rev* 171-172 describing a similar judicial case-management process which focuses on reducing caseloads in Singapore and aptly calling the outcome based model "judicial economy". See too fn 240 above for reference where Simms uses the same term.

[251] Laflin (2004) *Idaho L Rev* 587; Simms (2007) *Ohio St Jnl on Disp Resol* 809-812.

[252] See also fn 255 below. Compare too the discussion by M Alberstein & N Zimmerman "Constructive Plea Bargaining: Towards Judicial Conflict Resolution" (2017) 32 *Ohio St Jnl on Disp Resol* 279 288-292 discussing the role of judges in the plea and sentencing negotiations. They contend that judges can by being more active, in contrast to being passive, play a more constructive role in the plea negotiation process. They call this judicial role: judicial conflict resolution, otherwise known as criminal mediation in Israel.

[253] M Alberstein "Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice" (2014) 16 *CJCR* 879 895-896 prefers the term "conflict" contending that it is broader and more nuanced than dispute. Alberstein also works on the correct premise that legal conflicts are always complex, multi-dimensional and polycentric.

[254] CPA s 105A(3) has a similar prohibition.

[255] RR Batra "Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective (2015) 76 *Ohio St L J* 565 572-579 undertook a study of the participation of judges in the plea negotiation process in all the states by examining the procedural rules and judgments.

allow and even encourage judicial participation in plea negotiation and settlement of criminal proceedings.

Consequently, judges have become multi-taskers, and their roles have developed to include the management of cases, involvement in the settlement of cases, and evaluation of cases. Unfortunately, this has led to ambiguity in the description of the tasks judges perform and has added to skewed perceptions and expectations of disputants and their lawyers. A managerial judge is said to be involved in managing case development, advising disputants what appropriate dispute processes to follow, and encouraging and participating in the settlement of issues.[259] Long recognised too, is the role that judges play in the settling of cases at the court threshold, often at a pre-trial conference or in chambers. This practice is referred to as an evaluation, settlement or circle conference. In some jurisdictions these functions of a judge have been formalised, to a greater or lesser extent.[260] Another reality is that dispute resolution in a courtroom is a hybrid, a combination of judicial authority and

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Batra categorises the participation from it being expressly disallowed by statute to participation being procedurally allowed and encouraged by the courts.

[256] For example, Arizona Rules of Criminal Procedure 17.4 (a)(2): *"Judicial Participation.* At either party's request or on its own, a court may order counsel with settlement authority to participate in good faith discussions to resolve the case in a manner that serves the interests of justice. The assigned trial judge may participate in this discussion only if the parties consent. In all other cases, the discussion must be before another judge. If settlement discussions do not result in an agreement, the case must be returned to the trial judge." For a full list see Batra (2015) *Ohio St L J* 578-579, particularly fns 92-98.

[257] For example, *McMahon v Hodges* 382 F 3d 284 (2d Cir 2004), particularly para 25 and fn 5. Also see Batra (2015) *Ohio St L J* 578-579, particularly fns 92-98.

[258] New York state has a flexible system and leaves the procedure to the discretion of the judge. See too Batra (2015) *Ohio St L J* 578-579, particularly fn 92; *McMahon v Hodges* 382 F 3d 284 (2d Cir 2004) fn 5. Also see fn 250 above.

[259] Alberstein (2014) *CJCR* 879 884; Deason (2017) 79-89. In this dissertation it is contended that the term "managerial" and "managing" are unfortunate as they detract from a judge's core office of being a member of the judiciary, one of the pillars of a democracy. However, it cannot be denied that a judge is necessarily involved in the administration and supervision of cases and caseloads and the managerial role enables them to perform their core function more efficiently. For example, R 37A, headed "Judicial Case Management", of the Uniform Rules of the High Court of South Africa, introduced by GN R 842 in *GG* 42497 of 31-05-2019 which came into operation 1 July 2019. See discussion above in para 2 3, 64ff.

[260] Detailed analysis of relevant federal and state rules is provided by EE Deason "Beyond Managerial Judges: Appropriates Roles in Settlement" (2017) 78 *Ohio St L J* 73-144.

consensual practices.[261] This means that agreements are made under the shadow of judicial authority and are necessarily in tension with it.[262] More emphasis has recently been given to the role of judges in these processes and judges are identified as not only being adjudicators, but also negotiators, arbitrators, mediators and agents of therapeutic and restorative justice.[263] Subsequently, the indisputable fact is that judges are not only impartial and non-participative adjudicators in a dispute resolution process, but also act as mediators, sometimes knowingly, sometimes unconsciously.[264]

There have been some concerns about these undefined, even invisible roles of judges and the diminishment of the role of the adjudicative neutral in the criminal justice system, particularly with regard to plea negotiation. Concerns primarily relate to the coercive nature and procedural correctness of such judicial involvement in the dispute resolution process.[265]

Coercion is a major concern regarding the practice of judges acting as mediators.[266] This encompasses the inherently coercive nature of the office of a judge. Some commentators argue that the coercion implied in the authority of the position diminishes the autonomy of the parties.[267] Moreover, the coercion is increased in the event that the same judge is assigned to preside over the subsequent trial.[268] However, it is submitted that party autonomy in criminal matters

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[261] Alberstein (2014) *CJCR* 881.

[262] Alberstein (2014) *CJCR* 881.

[263] Alberstein (2014) *CJCR* 879 881, 882, 886,905-907 advocates a new jurisprudence in Judicial Conflict Resolution (JCR) as is evident from the title of his article (see fn 294).

[264] Deason (2017) *Ohio St L J* 97 contends this could happen when mediation training which judges may undergo subtly influences their manner of presiding over a particular case.

[265] Laflin (2004) *Idaho L Rev* 606-608.

[266] Compare the discussion on the power of prosecutors in ch 4, para 4 4 2, 268ff and 324ff and ch 5, para 5 2, 3370ff.

[267] Deason (2017) *Ohio St L J* 76, 108-109.

[268] Deason (2017) *Ohio St L J* 7 109-110. This would be in the event of the case not being settled, or only partly settled. Some rules make provision for another judge, other than the case management judge, to further preside over the matter. For example, South Africa Uniform Rules of the High Court R 37A(15).

is in any event diminished because of the greater emphasis on the public interest in criminal matters.[269]

A further critique concerns procedural issues. Primarily it concerns the status and nature of information. The nature of information shared by parties during mediation is different to that divulged during a trial, which is generally more limited through rules of evidence and procedure.[270] Mediators, in comparison, hear personal information, inadmissible information, privileged information, and in the case of caucusing, private information. This is important, as a judge may become privy to information that may influence her or him and it could be argued that the judge may lose impartiality if assigned to preside over a subsequent trial.[271] It is agreed that procedural protection should thus be given in cases where mediation fails. Any succeeding trial or other process needs to be before another judge.[272] Also, the protection of privilege needs to be granted to information obtained during mediation which would usually be inadmissible in a criminal trial.[273]

A further consideration regarding the nature of information is the change in direction of the flow of information. Commonly, during settlement conferences or evaluation proceedings a judge passes information down, regarding the merits or weaknesses of a case; whilst during mediation the information flows up from the

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[269] CA Ogbuabor, EO Nwosu & EO Ezike "Mainstreaming ADR in Nigeria's Criminal Justice System" (2014) 45 *Eur J Soc Sci* 32 34 identify four usual distinctions between the context of civil and criminal mediation: In the civil context the dispute involves the parties only, whilst in the criminal context the state and public are also involved; there is no public blame apportioned in the civil context, whilst blame is usually attributed to the offender; civil disputes involve only private interests, whilst criminal disputes involve public interests; and no admission of guilt is required in civil disputes whilst an admission or assumption of wrongdoing is required in the criminal context.

[270] This issue is touched upon elswhere in this dissertation where reference is made to different kinds of truth, Ch 3 para 3 3 5, 131ff.

[271] Deason (2017) *Ohio St LJ* 112-118; 121-126 speaks of "mental contamination". See Deason.

[272] See for example, the (South African) Uniform Rules of the High Court R 37A(15). Compare CPA ss 105A(6)(c) and 105A(9)(d) with regard to plea and sentencing agreements. See too Deason (2017) *Ohio St LJ* 128. Such a process would be similar to med-arb or con-arb as practiced by the CCMA in LRA s 191(5) referred to in fn 16 above.

[273] Provision is made for this in the context of plea and sentencing agreements, like CPA, s 105A(10); and in judicial case management rules, such as the (South African) Uniform Rules of the High Court R 37A(13).

parties.[274] Because of its authoritative nature, the former carries a great deal of weight and is likely to influence parties in their decision-making. Hence the participation of a presiding officer in a mediation needs to be done with due caution and any possible prejudice avoided by careful phrasing by the judge during a settlement conference.[275] On the other hand it can be argued that a judge can validate the information and clarify the advice given to the offender and victim, who may not necessarily understand the legal process, the consequences or the information given by their legal representatives.[276]

Accordingly, it is submitted that any participation by a presiding officer in the mediation process should be formalised. In clarifying the role of a presiding officer, and establishing procedural safeguards, the benefits of presiding officers acting as mediators can be fully obtained. Such procedural safeguards could include prohibiting a judge who acts as a mediator from presiding over a subsequent trial regarding that matter.[277] Also, only the litigants should be able to waive such prescribed prohibition and consent to the judge, who acted as mediator, also presiding over the trial.[278] In addition to prescribed safeguards, a party to a mediation should be cautioned that participating in mediation amounts to a waiver of a number of rights, and this may include a limited waiver of confidentiality.[279] This is similar to the waiver of rights by a defendant in the case of plea and sentencing negotiations and agreements.[280]

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[274] Deason (2017) *Ohio St LJ* 114-116;

[275] Judge Fogel speaks of judicial mindfulness and a judge needing to be mindful of their role and what they are doing and saying. J Fogel & SI Strong "Judicial Education, Dispute Resolution and the Life of a Judge: A Conversation with Judge Jeremy Fogel, Director of the Federal Judicial Center" (2016) *J Disp Resol* 259 275 and 279.

[276] Batra (2015) *Ohio St LJ* 595-596.

[277] Batra (2015) *Ohio St LJ* 587-588 s 105A(6)(c) and the proposed s 105B(7) of the CPA.

[278] These safeguards are present in plea and sentencing agreements under ss 105A(6)(c) and 105A(9)(d) of the CPA. See fn 272 above. Also IRE 507 (2)(b)(3). This would in effect be a form of med-arb. Compare the practice of the CCMA under LRA s 191(5).

[279] In this dissertation it is proposed that this should happen at the pre-mediation meeting. See Ch 5, Annexure B, Principle 3.

[280] See the discussion on waiver of rights in ch 4 para 4 3 2. Also see Hanan (2016) *NML Rev* 165; Laflin (2004) *Idaho L Rev* 608-612.

Another matter that complicates the issue of the role of judges is the nomenclature, and the different understanding and different meanings attributed to words such as case management, judgment, adjudication, ADR, and mediation.[281] Lawyers and their clients have varying expectations of a court and a judge, depending on their own understanding and their own experience. This is true for judges too, who understand and enact their roles differently.[282] In addition, the hybridity of the processes and integrated activities of judges compound the issue.[283] There is no objection to the more holistic and evolving role of judges and it is submitted that this role could be promoted and integrated further.[284] However, it is also necessary to clarify the roles played by judges, as well as to identify and name the processes judges are involved in; and, where necessary, to formally prescribe procedural protection.

There are benefits to be gained from judges participating in the resolution of disputes, in contrast to simply adjudicating between two adversaries. An evident benefit is the experience and expertise of a presiding officer involved in the resolution process.[285] It is submitted such experience and expertise could contribute to the efficacy of the process and ensure a just settlement. Also, the involvement of a judge could help counter any imbalances caused by excessive prosecutorial power or an inadequately represented defendant.[286]

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[281] For example, the A in ADR is an acronym for “alternative”, “appropriate”, or “additional”. Some prefer “conflict” to “dispute” as conflict is said to be broader, and includes interests and rights. See Alberstein (2014) *Cardozo J Conflict Resol* 889-890.

[282] Judge Fogel refers to the confusion amongst judges, both in terminology and activity. Fogel & Strong (2016) *J Disp Resol* 259 264.

[283] Deason (2017) *Ohio St LJ* 74-104 discusses the evolution of the conflation of judicial activities in the United States by describing the activities of judges under Rule 16 of the Federal Rules of Civil Procedure, which allows for various options including case management, settlement and mediation. Moreover, the comingling is aggravated by the Alternative Dispute Resolution Act of 1998 which runs parallel to Rule 16. For example, a judge conducting a settlement conference and directing parties towards a certain settlement is considered by some to be a form of ADR or “muscle mediation”, whilst others deem it wrong and anything but mediation. Also see Fogel & Strong (2016) *J Disp Resol* 264.

[284] Fogel & Strong (2016) *J Disp Resol* 264-266.

[285] Laflin (2004) *Idaho L Rev* 604.

[286] Laflin (2004) *Idaho L Rev* 614-615. Batra (2015) *Ohio St JL* 568-572 contends that defence counsel are under great pressure and consequently sometimes unprepared, and

The contemporary role of a judge is undoubtedly hybrid and complex. It is submitted that there is no need to deny or unduly confine this reality. Proper recognition and identification, together with prudent formalisation of the roles that judges could play, should protect the parties and enhance the development of the present legal culture regarding dispute resolution under the shadow of the court.[287] Consequently, it is submitted in this dissertation that the court, and judges may be involved in the mediation of instances of economic crime as proposed in chapter 5. It is further submitted that such participation may help to curb the largely unfettered discretion of the public prosecutor in the plea and sentence negotiation of the mediated settlement agreement.[288]

It has been shown that mediation in the criminal justice system entails a number of different forms, each of which may have lesser or greater restorative or retributive characteristics. The two basic models, namely the restorative justice model and the case management model, are acknowledged: such categorisation helps to understand the different characteristics found in each. The proposal in this dissertation proposes to build on both and incorporate characteristics from each of the models. Accordingly, it is submitted that it is more correct to speak of a continuum of mediation in the criminal justice system that stretches from restorative to retributive justice.[289]

It has also been shown that mediation in the criminal justice system in a number of jurisdictions has developed beyond minor misdemeanours to cover instances of

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that in plea negotiations the defendants are usually absent. Consequently, these negotiations take place between the prosecutor and an inadequately prepared defence counsel.

[287] Batra (2015) *Ohio St LJ* 587 makes the following recommendations to ensure procedural safeguards in judicial participation in the plea process, which it is submitted are equally applicable to a mediation process: (a) different judges to manage the mediation; (b) a record of the proceedings to be kept; (c) a facilitative as opposed to a directive style; (d) inclusion of the defendant; (e) an informal setting. Also see the proposal in Ch 5 and Annexure A. For a discussion on the different styles, see para 2 2 3 at 28 above and the conclusion reached that co-mediation with an expert in economic crime and a facilitative style would be best suited for the proposal in this dissertation.

[288] Batra (2015) Ohio St LJ 568-571.

[289] Laflin (2004) Idaho L Rev 580.

serious crime which affect life and liberty.[290] A number of the benefits and concerns attributed to using mediation in the criminal justice system have also been discussed above and the following are underscored.

Mediation, as a restorative justice process,[291] deals with a criminal offence in a constructive manner and offers "a starting point for ushering in a new paradigm of criminal justice".[292] Mediation creates an opportunity for the victim and offender to meet one another in a space less threatening than a stark and impersonal courtroom, but in a setting that is less formal and intimidating and under the control of a professional independent and impartial mediator.[293] In addition, the nature of the meeting is more personal and opportunity is granted for the parties to express themselves under the guidance of a professional facilitator.[294] The integration of the philosophy and principles of restorative justice through mediation into the criminal justice system brings significant benefits. These include benefits for all the role players and stakeholders: the offender, the victim, the state and the public.

Mediation can or should positively influence the attitude of offenders both with regard to their wrongdoing and the justice system.[295] In mediation, offenders are

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[290] Laflin (2004) Idaho L Rev 586; L Simms "Criminal Mediation is the BASF of the Criminal Justice System: Not Replacing Traditional Criminal Adjudication, Just Making It Better" (2007) 22 *Ohio St J on Disp Resol* 797 798-799. Also see the ABA, Criminal Justice Section's Report to the House of Delegates 101B (2008) recommending the expansion of the use of mediation in various programmes in the criminal justice system.

[291] Bakker (1994) NCL Rev 1500, 1519 refers to "mediation programs as tangible examples of restorative justice in action"; and further to a natural development of stepping from restitution programmes to mediation programmes in the light of the benefits of restitution which is a core element of restorative justice. This is a comprehensive view of restorative justice. Although Hanan (2016) NML Rev 138-149 contrasts restorative justice to mediation, the submission in this dissertation remains that mediation is a restorative justice process. See ch 3, para 3 5, 146ff.

[292] Bakker (1994) *NCL Rev* 1483, 1500. In short, mediation serves to empower the victim, compensate the victim, impress upon the offender the consequences of her or his actions and consequently to promote accountability. In addition, the utilitarian benefits include reducing backlogs and bringing relief for overburdened human resources in court systems.

[293] Laflin (2004) *Idaho L Rev* 582; Love (2008) *Disp Res Mag* 5.

[294] The victim can ask questions, receive answers, express hurt and anger. Equally an offender can explain, express remorse and regret. See Bakker (1994) *NCL Rev* 1500-1501.

[295] For discussion and illustration of research on benefits of mediation for an offender see Bakker (1994) *NCL Rev* 1502-1503; Hanan (2016) *NML Rev* 136-137.

empowered: they are not simply relegated to the role of the accused and the subject of criminal prosecution, but are enabled to directly participate in the resolution of the issues arising from the criminal matter. Offenders are said to acknowledge accountability more readily through mediation. Consequently, the sense of responsibility with regard to restitution for the victim is higher and directly linked to the offence.[296] Restitution by an offender may also be therapeutic to the offender as her or his self-esteem is boosted by active involvement in the determining and execution of appropriate sanctions, instead of simply passively receiving her or his punishment.[297] Research has also shown that cases which have been mediated reduce recidivism.[298] The participation of the offenders in community based restorative programmes have also had positive effects. Mediation as a restorative justice process consequently contributes constructively to the restoration of the offender personally, as well as her or his re-integration into the community.

Mediation is particularly beneficial for the victim.[299] Mediation grants an opportunity for victims to confront the offender, ask questions, receive answers. This supports their personal healing. In addition, victims are granted an opportunity to participate in the criminal justice process, particularly with regard to restitution of their loss, including the possibility of compensation by the offender. Such participation increases the victims' understanding of the criminal justice process and positively influences their perceptions of the justice system.[300]

It is submitted throughout this dissertation that serious economic crime affects the community. A community needs to be responsive, express their condemnation of crime, but also to acknowledge their co-responsibility in combating it. Mediation creates an opportunity for a community to not only demand justice, but to participate in the exercise of justice. This could be through a number of educational and correctional programmes operated in the community.[301] Likewise, participation in the

[296] Bakker (1994) *NCL Rev* 1498.

[297] Bakker (1994) *NCL Rev* 1499.

[298] Bakker (1994) *NCL Rev* 1498 and fn 144.

[299] For discussion and illustration of research on effects of mediation on a victim, see Bakker (1994) *NCL Rev* 1500-1502; Hanan (2016) *NML Rev* 136.

[300] Bakker (1994) *NCL Rev* 1500.

[301] For example, education programmes could include accounting courses; while correctional programmes could include appropriate community service.

criminal justice process increases the understanding and experience of the community of the criminal justice system as being fair, which leads to increased trust in and support of the system.[302]

The state also benefits from mediation.[303] The utilitarian benefits of cost-saving outcomes, in time, money, human and physical resources are generally accepted. The need for the state under the criminal justice system to intervene and combat crime is not denied, but it is submitted that the duration and nature of the contact with the formal institutional structures can be respectively reduced and improved.[304] Restorative justice practices, like mediation are more likely to result in sentences with reduced incarceration time and this would lessen the burden on prisons and the correctional services.[305] As mentioned, the direct and constructive participation of the

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[302] Bakker (1994) *NCL Rev* 1503.

[303] For discussion and illustration of research on benefits of mediation for the state see Bakker (1994) *NCL Rev* 1503-1504;

[304] For example, the number of postponements of a case and duration of a trial with the formal structures of a criminal trial will be reduced if the matter, of part of it, is mediated. In addition, the nature of the contact of the offender and the victim with the court and court official will be more positive as the contact in the formal court will comprise the court approval of a mediated settlement agreement, in contrast to hostile questioning and cross-examination. Consequently, the offender and the victim feel more satisfied with their experiences of formal court structures.

[305] The cost of imprisonment is infamously high, reaching R133, 805 per prisoner for a year in South Africa in 2016/2017. See G Makou, I Skosana & R Hopkins "Fact Sheet: The State of South Africa's prisons" (18-07-2017*)* *Daily Maverick* <https://www.dailymaverick.co.za/article/2017-07-18-fact-sheet-the-state-of-south-africas-prisons/> (accessed 03-06-2019). Otherwise put, in 2015/2016 it cost the state R350 per day for each incarcerated prisoner and R167 per day, less than half, to have a prisoner released with a monitoring device. News24 "How much each prisoner costs SA taxpayers to stay behind bars" (19-11-2015) *Businesstech* <https://businesstech.co.za/news/general/104579/how-much-each-prisoner-costs-sa-taxpayers-every-day/> (accessed 03-06-2019). In addition, the Department of Correctional Services ("DCS"), SA faces several challenges, including budget deficits and cuts. For more detail see PMG NCOP Security & Justice "Correctional Services and Judicial Inspectorate: Deputy Minister Policy overview" (13-06-2018) *pmg* <pmg.org.za/committee-meeting/26647/> (accessed 03-06-2019). Overcrowding in South African prisons remains a serious problem, with the recent DCS Annual Report 2017/2018 27 showing that the average number of inmates was 160,583 whilst the approved bed space was 118,723, an

offender, the victim and public in the criminal justice process validates the criminal justice system and consequently contributes to the prevention of crime and ultimately a more just society.

There are a number of concerns regarding the use of mediation in the criminal justice system, including coercion, rhetoric, and formalisation. It has been argued that mediation, particularly mandatory mediation, is coercive as it forces persons to not only enter and participate in a process, but also to negotiate and accept an outcome they may not want.[306] Similarly, criminal mediation is said to be coercive, as the threat of prosecution in the event of failed mediation may coerce an offender to admit an offence she or he may not have committed. Likewise, mediation can be coercive towards a victim, who may be forced into facing an offender she or he does not wish to see. Also, in victim-offender mediation, based upon restorative and therapeutic principles, the premise is the guilt of the offender, and the goals are accountability and rehabilitation of the offender, and restitution for and reconciliation with the victim, none of which may be appropriate in a particular case.[307] Even the terms "victim" and "offender" can be perceived coercive in themselves and jeopardise the integrity of the mediation process; and more neutral terms such as "complainant" and "defendant" have been suggested.[308]

2 4 2 Mediation in the criminal justice system in South Africa

> "What has been will be again, what has been done will be done again; there is nothing new under the sun."[309]

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overcrowding of 35%. Remand sections are, however, known to be overcrowded by 150% or more. *R Hopkins* "Why Government Should Focus More on Keeping People Out of Prison" (07-05-2018) *City Press* <https://city-press.news24.com/News/why-government-should-focus-more-on-keeping-people-out-of-prison-20180507> (accessed 03-06-2019).

[306] Vettori (2015) *AHRLJ* 358.

[307] Hanan (2016) *NML Rev* 145-146 raises these concerns with regard to restorative justice practices, in contrast to mediation, but in light of the definition of mediation in this dissertation as a restorative justice practice these concerns may also be applicable to mediation.

[308] Hanan (2016) *NML Rev* 158.

[309] Ecclesiastes 1:9 *New International Version.*

Mediation is irrevocably part of civil and criminal procedural law. The ambience lies in the formal recognition, nomenclature and formal regulation of mediation as a procedure. Roebuck's research has shown that the phenomena of processes, now known as mediation and arbitration, were an integral part of the resolution of disputes in the middle ages. At that time there was a symbiosis between mediation, arbitration and litigation; and mediation and arbitration were not considered to be alternatives, but rather preferred processes.[310] The court or forum to which the dispute was brought, first attempted mediation prior to adjudication.[311] Accordingly, instances of resolving criminal matters, including fraud, through mediation and arbitration, have been recorded since the middle ages.[312]

In this dissertation it is submitted that adversarial and adjudicative processes, in comparison to ADR processes, are not mutually exclusive. In reality they are ancillary to one another, and co-exist alongside one another. Indeed, preference is given to more prudent distinction and improved integration with each another. In the criminal justice system numerous processes exist, each with its own emphasis and the challenge is to select the most *appropriate* for any given situation. In this dissertation, it is submitted that mediation should be integrated into the criminal justice system as an additional procedure available for the resolution of economic crime.

Acknowledgment needs to be given to the principles of traditional dispute resolution and the principles of *ubuntu*, but they do not trump the so-called Western model of justice. Principles in both systems are important and care needs to be taken in the description and appropriation of such principles. Again, it is submitted in this dissertation that efforts need to be made to prudently define, expand and integrate the different procedural mechanisms available in the criminal justice system. The Constitution not only grants the opportunity to do so, but also compels that this be done.[313]

In the light of the discussion and submissions in this chapter regarding the use of mediation, especially in the criminal justice system, it is proposed that mediation be

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[310] Roebuck (2013) *Mediation and Arbitration in the Middle Ages* 52, 350-351, 394.
[311] Roebuck (2013) *Mediation and Arbitration in the Middle Ages* 159-161, 395.
[312] Roebuck (2013) *Mediation and Arbitration in the Middle Ages* 96-103.
[313] Constitution ss 8(3), 39(2) and 211(3).

formally introduced through legislation into the South African criminal justice system. At present, mediation already exists in the South African criminal justice system through the model of out-of-court, informal mediation. This practice will now be briefly discussed, with an emphasis on the concerns raised about such an informal, off the radar, process.

2 4 2 1 Informal mediation in the criminal justice system in South Africa

Diversion was introduced as one of the national programmes in the National Crime Prevention Strategy ("NCPS") in 1996.[314] The NCPS attempted to introduce a new way to approach crime, to shift from crime control to crime prevention.[315] It acknowledged that the crime levels in South Africa were abnormally high and needed exceptional action. The NCPS emphasised that crime is not only an issue for the state and police and prosecution, but called on broader society to participate in the prevention of crime.[316] Diversion had until the promulgation of the Child Justice Act 75 of 2008,[317] which specifically provides for diversion for minors in certain circumstances, been done without formal regulation.[318] However, apart from numeric statistics it is difficult to trace any further details regarding cases of pre-trial diversion, especially adult pre-trial diversion.[319] Cautious deductions that can be made are that

[314] National Crime Prevention Strategy (NCPS) Department of Justice, Pretoria (May 1996) para 14 NCPS (1996) 60-62.

[315] NCPS (1996) 5; A Singh "'Changing the Soul of the Nation'? South Africa's National Crime Prevention Strategy" (1999) The British Criminology Conferences: Selected Proceedings. Vol 2. Papers from the British Criminology Conference, Queens University, Belfast, (15-19 July 1997) 5.

[316] NCPS (1996) 6; Singh (1999) 6.

[317] The Child Justice Act 75 of 2008 came into operation on 1 April 2010.

[318] Matters were diverted by the prosecutors within their power to prosecute an accused or withdraw the charges against her or him as guided by prosecutorial policies and directives. See C Wood *Diversion in South Africa: A Review of Policy and Practices 1990-2003* ISS Paper 79 (2003) 1-2; Maimane *Restorative Justice* 3-4; 43.

[319] Recent statistics by the DOJ & CD state that 166, 942 cases were resolved by ADRM in the 2015/2016 reporting year; of which 2% were in the regional courts and 98% in the district courts. Of these 37,516 cases were diverted after enrolment and 5,528 before enrolment in terms of the Child Justice Act, whilst the bulk 74% (123,908) were resolved through informal mediation. Of the 5,528 diverted in terms of the CJA, 2,593 were diverted from the criminal

prosecutors are applying Alternate Dispute Resolution Mechanisms ("ADRM") in cases before the courts.[320] Indeed, 32% of criminal cases were resolved through ADRM in 2017/2018, of which 108,562 cases were finalised through informal mediation.[321] The simple statistics show that 22% of cases were finalised through informal mediation. This is both significant and concerning. It is significant as it confirms that alternative mechanisms, beyond the conventional adversarial trial mechanism, are necessary to resolve criminal disputes.[322] It is, however, also concerning for a number of reasons.[323]

A criminal matter brings various stakeholders' interests into relationship with one another. [324] As a crime is a public wrong, the state acting as the representative of the public secures and protects the public interest. So too, the interest of the offender

courts. See Department of Justice and Constitutional Development *Annual Report for 2015/16 Financial Year* 21 9, 17 & 96-97.

[320] ADRM is a category used by the DPP and forms part of its annual reporting obligations. It is not entirely certain what different forms of ADRM there are but they primarily comprise of informal mediation and diversion. The NDPP reports in the *Annual Report for* 2017/18 44 that the ADRM system is being refined and that draft legislation is being looked at to further regulate the ADRM process. Informal mediation is reported as one of the forms of ADRM. For example, cases finalised by regional courts show that out of the 2409 cases resolved through ADRM, 2176 were finalised through informal mediation and the balance of 233 through diversion.

[321] NDPP *Annual Report* 2017/2018 65-66, 67. This is less than the 115,986 cases resolved through informal mediation in the 2016/2017 year. Cases resolved by informal mediation represent 68% of the 159,654 cases resolved through ADRM, and a significant 22% of the total number of 494,815 criminal cases resolved by the NDPP in the period. See also A Anderson "Disposal of Criminal Disputes by Informal Mediation: A Critical Analysis" (2017) 30 *SACJ* 162 163.

[322] Anderson (2017*) SACJ* 163. Additional mechanisms in South Africa include the system of admission of guilt fines, diversion programmes and plea and sentencing agreements. See also, SALRC (Project 73) 6th and Final Report on Simplification of Criminal Procedure (Out-of-court Settlements in Criminal Cases) (2002) 5-17.

[323] Anderson (2017) *SACJ* 170-172 discusses a number of pertinent concerns. These include: the secrecy of the process, the compromised position of the prosecutor, the risk of coercion and abuse by the prosecutor, the elevated position of the victim and the risk of revenge-seeking victims, the privatisation of punishment, the risk of inconsistency of sentences, the risk of power imbalances, the risk of the unpresented accused, the absence of court supervision and the absence of public validation.

[324] Anderson (2017) *SACJ* 162-163, 165. Also see ch 3, para 3 3, 112ff on restorative justice.

has long been recognised and acknowledged. In addition, as submitted in this dissertation, the interests of the victim also need to be central. It is a matter of concern that there is no provision for the mechanism of informal mediation in the CPA and that the operation of this system is not general public knowledge.[325] Moreover, although the discretion of the public prosecutor is acknowledged, informal mediation outside the court room, seemingly a form of diversion, decriminalises the offence.[326] Consequently, although it is the primary submission of this dissertation that mediation be integrated into the criminal justice system, the proposal is that it should be integrated through formal legislation. It is submitted that formal regulated mediation will address a number of concerns, including those raised by Anderson, with regard to informal mediation.[327]

2 4 2 2 Introducing formal mediation into the criminal justice system in South Africa

The main submission of this dissertation concerns the incorporation of mediation as an ADR mechanism to address instances of economic crime. The proposal is to modify the dispute resolution design of the criminal justice system, to include mediation. In addition to the adversarial trial option, a guilty plea under section 112 of the CPA, plea and sentencing agreements under section 105A of the CPA are another alternative,[328] a mediated settlement agreement could be included. This process is similar to, yet distinct from the process of informal mediation as an ADRM process as the proposal is for a regulated process with procedural safeguards. The design of mediation as a dispute resolution mechanism is discussed in chapter 5.

[325] Anderson (2017) *SACJ* 165 fn 21, 178 points out that the Prosecution Policy Directive of 2014, section F of part 7 is not publicly available and the NPA avers that informal mediation is confidential. Anderson further correctly cautions that the Prosecution Policy Directive is substituting legislation; and it is submitted this is untenable.

[326] Out-of-court procedures that divert charges before a charge is formally made before a court in effect decriminalise the offence. See Hanan (2016) *NML Rev* 129-131.

[327] As illustrated above in fn 323.

[328] The term “alternative” does not necessarily mean in contrast to or in substitution of, but in addition to, as an alternate or ancillary process.

Significantly, mediation has statutorily and formally been incorporated into some criminal justice systems.[329] The scope of application of Idaho Supreme Court's Rules, for example, is very broad, providing for mediation to take place in "*any* criminal proceeding"[330] (writer's emphasis). The primary qualification is that mediation "is voluntary and will take place only on agreement of the parties."[331] Mediation may be requested by any party or suggested by the court itself.[332] Restrictions are placed upon the mediator: the mediator does not have the authority to make decisions, or accept a plea or sentence any defendant.[333] Positive prescriptions are that the mediator is to facilitate a voluntary settlement between the parties, to assist the parties in identifying issues, to reduce misunderstandings, and to explore options and areas of agreement that could expedite the trial or resolution of a case.[334] This may include the possibility of reduced charges,[335] entering plea or sentencing agreements,[336] restitution terms[337] and reconciliation.[338] The rule also prescribes the scope of the communication between the mediator and the court providing that the mediator may have no contact or communication with the court except to report that the parties are at an impasse, or have reached an agreement or that meaningful mediation is continuing, or that the mediator is withdrawing.[339] Mediators, generally senior or sitting judges, may not preside over a future aspect of

[329] For example, in Idaho in terms of the Supreme Court of Idaho Court Rules ("ICR") effective 1 July 2017.

[330] ICR 18.1. The nature of criminal proceedings is further prescribed in para (b) as "*all* misdemeanour and felony cases" (writer's emphasis).

[331] ICR 18.1 read with paras (a) and (e). Parties primarily comprise the prosecuting attorney and the defendant, but may include more persons, as may be determined by the attorneys and the mediator. Interestingly, not all defendants in a multi-defendant case need participate in the mediation for it to be valid.

[332] ICR 18.1.

[333] ICR 18.1 read with para (d).

[334] ICR 18.1 read with para (d). This may also include the admissibility of evidence and any issue that will facilitate the resolution of the case.

[335] ICR 18.1 read with para (b)(1).

[336] ICR 18.1 read with para (b)(2).

[337] ICR 18.1 read with para (b)(3).

[338] ICR 18.1 read with para (b)(4), which refers to a "continuing relationship with any victim".

[339] ICR 18.1 read with para (h).

a particular case.[340] Mediator privilege is prescribed in terms of the Idaho Supreme Court Rules of Evidence.[341]

The mediation proceedings are confidential and may not be recorded or reported.[342] The mediation settlement agreement may be reduced to writing signed by the parties and presented to the court for approval.[343]

It is submitted that South Africa should follow jurisdictions such as Idaho and formally integrate mediation into the criminal justice system and a proposal for this is set out in chapter 5 below.

> "[C]riminal mediation does not replace traditional adjudication within the criminal justice system, it just makes the criminal justice system better."[344]

[340] ICR 18.1 read with para (c). The court keeps a roster of mediators, who are generally judges that have undergone a minimum of 12 hours of criminal mediation training.

[341] ICR 18.1 read with para (g) must be read together with the Idaho Rules of Evidence ("IRE") 507 that prescribe the Conduct of Mediations in the justice system.

[342] ICR 18.1 read with para (f). The only exception is prescribed disclosure of child abuse under the Child Protection Act Idaho Code 16-1605.

[343] ICR 18.1 read with para (h)(2).

[344] Simms (2007) *Ohio St J on Disp Resol* 797 fn 1.

CHAPTER 3
RESTORATIVE JUSTICE

Chapter overview

3 1 Introduction

> "These can now be addressed on the basis that there is
> a need for understanding but not for vengeance,
> a need for reparation but not for retaliation,
> a need for ubuntu but not for victimisation."[1]

The Truth and Reconciliation Commission (TRC)[2] was a watershed moment in restorative justice in South Africa. Firmly entrenched in the retributive and penal practices of Roman-Dutch law, the approach of a commission to hear both the stories of the crimes from perpetrators and the stories of victims, often face to face, was a strange, yet significant happening in South Africa's legal history. The TRC

[1] Epilogue of the Interim Constitution of South Africa, Act 200 of 1993, para 50, with reference to the atrocities of the past.

[2] Established in terms of The Promotion of National Unity and Reconciliation Act 34 of 1995.

highlighted the possibility of and the need for focusing on the victim's experience and not only on the crime and the perpetrator. Moving beyond a solely retributive justice system, the opportunities for reparation and restoration that a more participatory and reconciliatory approach such as the TRC introduced contributed to the initiatives to transform the South African justice system. Accountability was also underscored by the TRC. Perpetrators who participated in the TRC came forward and identified themselves and revealed the atrocities they had committed, had been involved in, or knew of and so taking responsibility for the role they had played.[3] Importantly, truths and stories were heard which may have remained unknown had it not been for the voluntary disclosure by the perpetrators, albeit that they did so to strengthen the possibility of being granted amnesty.[4] Such truths also brought the possibility of restoration and reconciliation which led to the fulfilling of the objectives of the Interim Constitution: helping to cross the bridge from an unjust and divided past to the pursuit of a unified and more just future; seeking reparation rather than retribution; achieving *ubuntu* and not victimisation. As these objectives are essential characteristics of restorative justice, it is submitted that the TRC in a sense served, and still serves as a foundation for restorative justice in the constitutional era in South Africa.[5]

The purpose of this chapter is to establish restorative justice as one of the pillars on which to build the proposal to introduce mediation more comprehensively into the criminal justice system in South Africa. Accordingly, the characteristics of restorative justice with the focus on the role of the various stakeholders, the state, the offender, the victim and the community are discussed. Particular attention is given to the relationship between restorative justice and traditional justice, especially with regard to *ubuntu*. Also, the reception of restoration justice by the courts and the intersection between restorative justice and sentencing are discussed with an emphasis on the position of the victim and restitution. Finally, the links and overlaps between the

[3] Many persons and organisations also took responsibility for their omissions and failure to take any action during the period of oppression.

[4] Amnesty was not automatic, but subject to the discretion of a commission of the TRC. Epilogue of Interim Constitution of South Africa, para 55.

[5] A Skelton ("Face to Face: Sachs on Restorative Justice" [2010] 25 *SAPL* 94 96) states that although the TRC may have been "an imperfect model of restorative justice" it nevertheless "represents restorative justice 'writ large'".

principles of restorative justice and mediation introduced in chapter 2 are re-affirmed to demonstrate that mediation can be construed as a restorative justice process.

3 2 Description and development of restorative justice

Restorative justice is defined and described in various ways. In South Africa a widely used definition is that it is a particular approach to justice that "aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation."[6] The definition includes participation by the affected parties and the elements of accountability, restitution, prevention and reconciliation.[7]

A helpful judicial description of restorative justice, borrowed from Canada, is:

> "Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by the crime – victim (s), offender and community - to identify and address their needs in the aftermath of the crime, and seek a resolution *that affords healing, reparation and reintegration, and prevents further harm*" (writer's emphasis).[8]

Restorative justice defies finite definition and remains a porous concept.[9] However, it is evident that the elements of "encounter, reparation, reintegration and

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[6] Child Justice Act 75 of 2008 s 1. For a discussion of this definition see A van der Merwe "A New Role for Crime Victims? An Evaluation of Restorative Justice Procedures in the Child Justice Act 2008" (2013) *DJ* 1022 1023. This definition is very similar to the definition of restorative justice used by the Department of Justice and Constitutional Development (DOJ&CD) (2011) *Restorative Justice: The Road to Healing"* 3-4.

[7] The definition does not make reference to the state. However, the involvement of the state is presumed by the Child Justice Act preamble as the purpose is to establish a criminal justice system for children within the existing criminal justice system.

[8] *S v Maluleke* 2008 1 SACR 49 (T) para 28.

[9] For a discussion on a number of definitions, see B Tshehla "The Restorative Justice Bug Bites the South African Criminal Justice System" (2004) *SACJ* 1 6-8; A Skelton & M Batley "Restorative Justice: A Contemporary South African Review" (2008) 21 *AJ* 37 38; A Skelton & M Batley *Charting Progress, Mapping the Future: Restorative Justice in South Africa* (2006) 5-10; JD Mujuzi "The Prospect of Rehabilitation as a 'Substantial and Compelling' Circumstance to Avoid Imposing Life Imprisonment in South Africa: A Comment on *S v*

participation" occur in these definitions.[10] Notably, restorative justice is seen and defined as a *process*,[11] whilst others see and define it as a *value*.[12] As a *process* restorative justice brings together all the various stakeholders (the state, offender, victim and community) harmed by the offence to discuss the issues and to seek agreement on restitution for the harm suffered. Conceptualising restorative justice as a *value*, means focusing on the principles of healing and restoring, as opposed to punishing.[13] Braithwaite and Strang see "restorative justice as involving a commitment to both restorative processes and restorative values".[14] Similarly, the

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Nkomo" (2008) *SACJ* 1 7-7, fn 22. Notably, J Dignan *Understanding Victims and Restorative Justice* (2005) 1-10 declines to define restorative justice due to the difficulty in defining a *process* and its *outcomes* in a single definition. Instead he uses a comparative analytical model to describe a variety of criteria against which restorative justice models are compared to other criminal justice models.

[10] Sachs J identifies these elements in *Dikoko v Mokhatla* 2006 6 SA 235 (CC) ("*Dikoko v Mokhatla*") para 114. Also see, Skelton (2010) *SAPL* 96-97. Compare, the "five R's": facing reality, accepting responsibility, expressing repentance, knowing reconciliation and making restitution discussed in M Batley "Restorative Justice in the South African Context" in T Maepa (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (2005) 21 21-22.

[11] For example, the definition of the United Nations, ECOSOC Resolution 2002/12 Annex, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, para I.1, 40: "Restorative process" means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator."

[12] For example, the definition above by the Canadian courts.

[13] Skelton & Batley (2008) *AJ* 39 discuss three categories of values of restorative justice identified by Braithwaite: "constraining values" including procedural safeguards like respectful listening, equal concern for all the stakeholders and accountability; "maximizing values" which promote healing and restoration; and "emergent values" like remorse, apology, mercy and forgiveness which may emerge from the restorative justice process, but may not necessarily do so. Compare the use of similar concepts in fn 85 below by the authors, "constraining standards", "maximizing standards";' and "emergent standards" as criteria for the setting of standards.

[14] J Braithwaite & H Strang "Introduction: Restorative Justice and Civil Society" in H Strang & J Braithwaite *Restorative Justice and Civil Society* (2001) 1 2. Also see A Woolford & RS Ratner *Informal Reckonings: Conflict Resolution in Mediation, Restorative Justice and Reparations* (2008) 65-66 who understand restorative justice as an intertwinement of processes, goals, values, spiritual beliefs, social justice and a lifestyle.

different approaches to restorative justice see restorative justice either as an alternative to the criminal justice system or as a complement to it.[15] As an alternative system, restorative justice is contrasted to the classical retributive criminal justice system and seen as a replacement to it; whilst as a complementary system it operates parallel to the criminal justice system. A third way, the way this dissertation supports, is to see restorative justice as both a process and a value system that can be integrated into and be interdependent of the formal criminal justice system, an approach known as "mainstreaming".[16]

A helpful description of restorative justice encapsulating the above and used for purposes of this dissertation was formulated by Rosenblatt: "restorative *justice* is a set of values, principles and practices to be used in response to crime".[17] This description not only covers the different expressions of restorative justice, but also captures the significant feature that it is a seen as a response to crime.[18]

It is beyond the scope of this dissertation to discuss the different origins and the development of restorative justice. Reference is therefore, limited to the development

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[15] Other terms used are "separatist" for alternative and "reformist" for complementary. For a discussion on these divergent approaches, see Dignan *Understanding Victims* 106-107; Tshehla (2004) *SACJ* 8-9; Skelton & Batley (2008) *AJ* 39-40.

[16] Dignan *Understanding Victims* 107. Compare too, Tshehla (2004) *SACJ* 8-9. Skelton & Batley (2008) *AJ* 45 see restorative justice as both a parallel and inter-linked system with the conventional criminal justice system. Also A Skelton "Tapping Indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and the Denunciation of Crime in South Africa" (2007) *AJ* 228. Also compare FF Rosenblatt *The Role of Community in Restorative Justice* (2015) 13-14 who elects the approach of integration. He further compares the integration of restorative justice into the criminal justice system to Braithwaite's regulatory pyramid explaining that restorative justice represents the broad-based bottom part of the pyramid and should be applied to most criminal cases: punitive measures should only be used where restorative justice is not applicable or does not work.

[17] Rosenblatt *The Role of Community* 11. The emphasis on *justice* is that of the author Rosenblatt. This dissertation supports this: it not only affirms that restorative *justice* is a response to crime, but also that it enriches the understanding of *justice* as part of a legal system.

[18] Restorative justice, as a set of values, principles and practices can be used far more widely than as a response to crime. For example, there may be restorative justice programmes in schools or certain communities that are based on the values of restorative justice but are separate from and independent of the criminal justice system. Also see, Rosenblatt *The Role of Community* 10-11.

of restorative justice in South Africa, especially its connection with traditional justice and *ubuntu*.[19]

3 2 1 Development of restorative justice in South Africa

There have been several calls for South Africa to integrate restorative justice in the criminal justice system.[20] In addition to several research projects by the South African Law Reform Commission ("SALRC")[21] and calls by academics for the integration of restorative justice, there is a growing call to change South Africa's retributive criminal justice system by incorporating indigenous African legal practices.[22] It is submitted that restorative justice in South Africa cannot be fully understood or described without reference to and incorporation of restorative justice principles developed from traditional justice systems.[23]

From the outset mention needs to be made that legal pluralism exists and, therefore, attempting to clearly delineate different forms of law, like contemporary

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[19] The origins of restorative justice in the Western legal systems are considered to be partly due to the rise of social movements as a reaction to the dissatisfaction with the level of efficacy of the classical criminal justice system. The rise of victim-orientated movements is also seen to have contributed to the development of restorative justice. Dignan, in his book *Understanding Victims* 6-7, gives a table of victim-focused reforms in the United Kingdom. For discussion on the general origins and emergence of restorative justice see: Braithwaite & Strang "Introduction: Restorative Justice" in *Restorative Justice* 2-5; Skelton & Batley (2008) *AJ* 37-40.

[20] Tshehla (2004) *SACJ* 2, 14; Skelton & Batley (2008) *AJ* 40 highlight the fact that the 2007 volume of *Acta Juridica*, which is dedicated to restorative justice, as a definitive moment in the development of restorative justice in South Africa.

[21] Formerly known as the South African Law Commission ("SALC"). See projects listed in fn 129 below.

[22] D Velthuizen "Why South Africa's Tentative Moves Towards Restorative Justice Need Support" (14-01-2016) *The Conversation* <https://theconversation.com/why-south-africas-tentative-moves-toward-restorative-justice-need-support-51286> (accessed 25-06-2019). Also see the discussion by Hargovan ("Doing Justice Differently: A Community-based Restorative Justice Initiative in Kwazulu-Natal" (2009) 22 *AC* 63-68) of the DOJCD's various policies, including, Medium Term Strategy Framework, 2007-2013; Tshehla (2004) *SACJ* 2, 12-14. Also compare Skelton (2007) *AJ* 229-230 advocating that much can be learned from the indigenous systems.

[23] Hargovan (2009) *AC* 64; DOJ&CD *Restorative Justice: The Road to Healing* (2011) para 2 3; Skelton & Batley *Charting Progress* 8, 19.

Western law or traditional justice is difficult. Equally complex is the use of common criteria to distinguish the different forms of law, like formal or informal.[24] Also, Obarrio cautions not to overstate or idealise traditional justice, or to overemphasise certain characteristics of traditional justice, like claiming that the community is superior to the individual or that reconciliation needs to be placed before retribution. [25]

Obarrio further points out that the complexity of generic terms such as "traditional justice" or "customary law". [26] Behind each concept lies an intricate and involved set of principles, rules and practices developed over a length of time in different communities which vary from community to community. The historical context of any traditional justice practice is critical to understanding it and care needs to be taken not to simply renew or reinvent any traditional justice practice for contemporary application.[27]

Notwithstanding the complex, fluid and dynamic nature of traditional justice certain characteristics of traditional justice dispute resolution processes, that are common across such processes can be identified: individual disputes affect the community and consequently any resolution also involves the community; role players like family members are guarantors of the agreed solution; a community ethos requires that a dispute resolution be based on reconciliation; and the process is flexible and fairly informal.[28]

Skelton identifies nine similarities between customary law conflict resolutions and contemporary restorative justice processes. Three connections are value based:

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[24] Traditional justice or customary law is usually referred to as informal, in contrast to Western law which is described as formal. However, these categories become blurred as much of customary law in Africa was codified under colonial rule and not all Western laws are formal. So too, the distinction between civil and criminal law in traditional law is neither easy, nor absolute. J Obarrio "Traditional Justice as Rule of Law in Africa: An Anthropological Perspective" in CL Sriram, O Martin-Ortega & J Herman (eds) *Peacebuilding and Rule of Law in Africa: Just Peace?* (2011) 23 25-27.

[25] Obarrio "Traditional Justice" in *Peacebuilding and Rule of Law* 24.

[26] Obarrio "Traditional Justice" in *Peacebuilding and Rule of Law* 25.

[27] Obarrio "Traditional Justice" in *Peacebuilding and Rule of Law* 37-38 warns that such renewal and application denies the complexity of traditional justice laws and may be used for political power and gain.

[28] Obarrio "Traditional Justice" in *Peacebuilding and Rule of Law* 32; D Mekonnen "Indigenous Legal Tradition as a Supplement to African Transitional Justice Initiatives" (2010) *AJCR* 1 2.

each process has the aim of reconciliation and restoring harmony in the community; both processes emphasise not only the rights of the individual and community but also the obligations of the individual and community; and each of the processes are victim-orientated and underscore the values of respect and dignity of each party. In addition, there are a number of procedural comparisons: neither of the processes makes a clear distinction between the civil and criminal justice systems; the procedures in each are flexible and simple; the outcomes are agreed settlements and not subject to the *stare decisis* rule; both processes encourage community participation; the processes are inherently transformative and each process underlines the importance of restoration and restitution.[29] In the light of these overlapping characteristics, it is submitted that it would be more correct in South Africa to identify how the different values, principles and practices in the respective dispute resolution processes intersect and influence one another. Also restorative justice, both traditional and contemporary, needs to be further developed and integrated into the conventional justice systems.

In addition, in South Africa restorative justice has been specifically linked not only to traditional justice systems[30] but also to *ubuntu*.

3 2 2 Restorative justice and ubuntu

> "The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation. Encounter (dialogue) enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Reparation focuses on repairing the harm that has been done rather than on doling out punishment. Reintegration into the community depends upon the achievement of mutual respect for and mutual commitment to one another. And participation presupposes a less formal encounter between the parties that allows other people close to them to participate. These concepts harmonise well with processes well-known to traditional forms of dispute resolution in our

[29] For a discussion of these similarities see Skelton (2007) *DJ* 231-238; Skelton & Batley *Charting Progress* 8-9.

[30] For example, in *S v Maluleke* 2008 1 SACR 49 (T) paras 30, 38-40 Bertelsmann J links restorative justice in the criminal justice system with customary law, "African heritage" and the principles of traditional African legal principles. Also see a discussion of this case by JC Bekker & A van der Merwe "Indigenous Legal Systems and Sentencing: *S v Maluleke* 2008 1 SACR 49 (T)" (2009) *DJ* 239-250.

> country, processes that have long been, and continue to be, underpinned by the philosophy of *ubuntu-botho*."[31]

In South Africa restorative justice is considered to be closely linked with principles of traditional or customary law. A specific link between restorative justice and *ubuntu* has also been made by the courts and commentators and this will be briefly discussed in this dissertation. Regarding the intimate relationship between restorative justice and *ubuntu*, it is necessary to acknowledge that *ubuntu*, like restorative justice, is a porous concept and thus difficult to define.[32] Foundational is the description of *ubuntu* in *S v Makwanyane*:

> "Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it 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. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our

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[31] *Dikoko v Mokhatla* para 114. See also *Van Vuren v Minister of Correctional Services* 2012 1 SACR 103 (CC) para 51.

[32] It is beyond the scope of this dissertation to discuss the understanding of *ubuntu* or the discussion of its profound introduction into the considerations of the Constitutional Court in *S v Makwanyane* 1995 3 SA 391 (CC). Also *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2006 2 All SA 240 (W). Also see commentators who support *ubuntu* being part of the constitutional jurisprudence: D Cornell and N Bohler-Muller "Some Thoughts on the *uBuntu* Jurisprudence of the Constitutional Court" in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 367-376; D Cornell & K van Merle "Exploring uBuntu: Tentative Reflections" in D Cornell & N Muvangua (eds) *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 341-366. Y Mokgoro & S Woolman ("Where Dignity Ends and uBuntu Begins: A Response by Yvonne Mokgoro and Stu Woolman" in D Cornell *Law and Revolution in South Africa: uBuntu, Dignity, and the Struggle for Constitutional Transformation* (2014) 169 170-171) warn that: "we ignore *uBuntu* at our own peril". Also compare authors who are critical of *ubuntu* being applied in the interpretation of legal principles: IJ Kroeze "Doing Things with Values: The Case of uBuntu" in D Cornell & N Muvangua (eds) *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 333-343; T Bekker "The re-emergence of *uBuntu*: A Critical Analysis" in D Cornell & N Muvangua (eds) *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 377-387.

> "rainbow" heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of *humanity* and *menswaardigheid* are also highly priced. It is values like these that Section 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality."[33]

It is important to recall the phrase "*umuntu ngumuntu ngabantu*" meaning "a person is a person by or through other people".[34] The concept of *ubuntu*, although strongly ethical, implies social cohesion and communitarianism.[35] It means that a person is born into a community and that each person who is born is consequently obligated to others, and in turn these others are obligated to each individual, that is, each one born into the community is obligated to each other.[36] Moreover, *ubuntu* asks that each person makes a difference to the community she or he lives in. This imposes an obligation upon each individual but also upon the community as a collective.[37] Doing justice means that a community needs to get *self-interested* individuals back in touch with *themselves and the community* whilst always remembering that *ubuntu* demands respect for each individual, regardless of her or his circumstances.[38]

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[33] 1995 3 SA 391 (CC) para 308. J Donne ("Introduction: The Re-Cognition of *uBuntu*" in *uBuntu and the Law*: *African Ideals and Postapartheid Jurisprudence* (2012) 7-8) considers that Mokgoro J highlights both the ethical and the political-ideological dimensions of *ubuntu* in her definition in this judgment. Mokgoro ("*uBuntu* and the Law in South Africa" in Cornell D and Muvangua N *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* [2012] 117-118) however, maintains that *ubuntu* cannot easily be defined and that to define it with precision is unattainable.

[34] Donne "Introduction" in *uBuntu and the Law* 5.

[35] *Ubuntu* practised in a community portrays key social values of *ubuntu* such as group solidarity, conformity, compassion, respect, human dignity, humanist orientation and collective unity.

[36] Donne "Introduction" in *uBuntu and the Law* 3.

[37] Donne "Introduction" in *uBuntu and the Law* 5.

[38] Donne "Introduction" in *uBuntu and the Law* 5-6. See also *City of Johannesburg v Rand Properties (Pty) Ltd* para 63 in which the influence of *ubuntu* on our inter-connectedness, common humanity and responsibility to one another is described by Jajhbay J. Also, *Tshabala-Msimang v Makhanya* 2008 3 BCLR 338 (W) para 2.

Importantly, a paradigm shift was established in the interpretation of the law through the application of *ubuntu* by the courts.[39] This is known as the conversion principle which "converts the way we understand the past, and converts or translates any current practice of interpretation as we attempt to realize it in the reconstruction of law and legal principle".[40] Cornell understands the use of *ubuntu* by Mokgoro J and other judges as an application of the conversion principle, meaning that an ideal is recollected and re-imagined in the interpretation of the law and consequently projected and formed into future jurisprudence.[41] Sachs J also advocates that the Constitutional Court was, and still is, tasked to tread and adjudicate new territories.[42]

The move to a constitutional democracy necessitated a change in the manner courts interpret legislation. Formerly, during the authoritarian era, when parliament was sovereign, a court had to interpret what the intention of the legislature was. At

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[39] *S v Makwanyane* paras 300, 302, 3047, 310-313. Mokgoro held (para 300) that "when our courts promote the underlying values of an open and democratic society in terms of Section 35 when considering the constitutionality of laws, they should recognise that *indigenous South African values are not always irrelevant nor unrelated to this task. In my view, these values are embodied in the Constitution*" (writer's emphasis).

[40] D Cornell "A Call for a Nuanced Constitutional Jurisprudence: South Africa, *uBuntu*, Dignity, and Reconciliation" in D Cornell & N Muvangua (eds) *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 324 328; Mokgoro & Woolman "Where Dignity Ends and uBuntu Begins" in *Law and Revolution in South Africa* 170-171.

[41] Cornell "Nuanced Constitutional Jurisprudence" in *Ubuntu and the Law* 326-329. See also *S v Makwanyane* paras 300-313.

[42] Sachs J's description *in Strange Alchemy of Life and Law* (2009) 204-208 of the role and objective of the Constitutional Court is insightful, as is his observation that constitutionality heralded three necessary changes to the role of the court: the court had to move from "preoccupation with classification and strict adherence to formal rules to focussing on principled modes of weighing up and competing interests as triggered by the facts of a case and assessed in light of the values of an open and democratic society". The issue is to move from interpreting legislation and attempting to determine the intention of the then sovereign Parliament to determining whether the issue was consistent with the Constitution and its objectives and keeping the law alive. Secondly, a totally new matter of proportionality is now key in respect of the Constitutional Court needing to weigh up different constitutional rights and having to test whether a limitation of a right was justifiable or not. The third shift was regarding remedies and the need for the Constitutional Court to read the purpose of the Constitution into legislation. It is submitted that these observations help to understand the reasoning of the Constitutional Court's majority decision, written by Sachs J, in *M v S* discussed in para ch 3, 3 4, 137ff.

present, however, in the Constitutional era, a court needs to determine if the law is constitutional and in line with the rights protected in the Constitution. A court also has to determine if any protected right is limited and whether such limitation is justifiable in an open and democratic society, bearing in mind the constitutional pillars of human dignity, equality and freedom. This, in turn, necessitates a court to consider matters, case by case, balancing different interests. Sachs J describes this balancing act in the word "proportionality", being the balancing of various interests, or making value judgements based on values clearly spelt out.[43] To understand the use of *ubuntu* by the courts, the principle of proportionality needs to be borne in mind.

It is submitted that for Sachs J *ubuntu* is one of the primary values with which the Constitution is infused and through the lens of which he, and other judges, balance the different interests and rights before them. Cornell understands Sachs J's jurisprudence as trying to harmonise, or synchronise three ideals: dignity, equality and *ubuntu and that the "spirit of ubuntu pervades"* Sachs J's attempt to harmonise such ideals.[44] Sachs J, she argues, recognises that judicial interpretation is not a dualistic exercise, adjudicating between one interest and another, but acknowledging the "both-and" principle and attempting to harmonise them. [45] Furthermore, Sachs J believes we are compelled to seek the harmonising of legal principles as an act of respect for the principles of reconciliation, social harmony and democracy.[46] This interpretation resonates with Sachs himself in stating that the judicial interpretation is a balancing act, using dignity and proportionality, to reach a fair and equitable balance.[47] These judgments and theses on *ubuntu* demonstrate that *ubuntu* is inextricably linked with the interpretation of the law, but also with restorative justice.

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[43] Sachs *The Strange Alchemy* 202-209.

[44] Cornell "Nuanced Constitutional Jurisprudence" in *Ubuntu and the Law* 326-329.

[45] Cornell ("Nuanced Constitutional Jurisprudence" in *Ubuntu and the Law*) 331 describes this as "as an ontic orientation in the world that is sometimes difficult for Westerners to comprehend;" and illustrates this by explaining that, for example, both belief in ancestral worship and the Constitution can exist together coherently from an *ubuntu* perspective, but not necessarily from a Western perspective.

[46] Cornell "Nuanced Constitutional Jurisprudence" in *Ubuntu and the Law* 329-331.

[47] Sachs *The Strange Alchemy* 202-209.

This conclusion is undeniably proven in *Port Elizabeth Municipality v Various Occupiers*[48] ("*Port Elizabeth Municipality*") through profound statements regarding *ubuntu*, restorative justice and mediation made by Sachs J. Regarding *ubuntu*, Sachs J stated: "The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, *suffuses the whole constitutional order*" (writer's emphasis).[49] In addition, Sachs J speaks of the infusion of the "elements of grace and compassion into the formal structures of the law" in the same breath that he speaks of *ubuntu*; particularly when attempting to resolve contradictory rights and interests.[50] Sachs J continues to discuss elements common in *ubuntu*, restorative justice and mediation such as: promoting reconciliation through face to face engagement;[51] the dignity of each person; persons being the bearers of rights;[52] the bringing of divided parties together and "respectful good neighbourliness";[53] and the recognition of "the need for *human interdependence respect and concern*" in our evolving new society (writer's emphasis).[54]

Bohler-Müller[55] commends the judgments of Mokgoro J and Sachs J,[56] believing that they are revolutionary and written against conventional legal decisions and that

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[48] 2005 1 SA 217 (CC). This case dealt with the question of whether the eviction of nine households and three single persons, in terms of legislation, the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act 19 of 1998 (PIE) was constitutional or not.

[49] *Port Elizabeth Municipality* para 37 and fn 36. Sachs J based his use of *ubuntu* on Mokgoro J's definition of *ubuntu* in the *Makwanyane* case para 308.

[50] *Port Elizabeth Municipality* paras 37 and 38.

[51] Para 39: "Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents."

[52] *Port Elizabeth Municipality* para 41.

[53] Para 43.

[54] Para 37. Bekker ("The Re-emergence of *uBuntu* " in *Ubuntu and the Law* 380) is critical of this reference to *ubuntu* by Sachs J, which he argues has no substance and does not contribute to developing *ubuntu* as a constitutional value, but rather only raises the postulation that *ubuntu* is a catchphrase appropriated by some Constitutional Court Judges to strengthen an argument.

[55] N Bohler-Müller "Some Thoughts on the *uBuntu* Jurisprudence of the Constitutional Court" in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 367 374-375.

they have given direction to how *ubuntu-botho* and restorative justice may be incorporated into a new constitutional jurisprudence and have consequently illustrated what a new legal and ethical South African community should look like. It is submitted that these cases illustrate the call by Justices Mokgoro and Sachs and other judicial voices to develop *ubuntu*, an indigenous, historically sustainable value in South Africa's jurisprudence, also in criminal jurisprudence.

It is further submitted that if properly defined, *ubuntu*, as a constitutional value, can and should form a fundamental part of the judicial interpretation and jurisprudence of the law. In recollecting, reimagining and reinterpreting through the lens of *ubuntu,* the courts contribute to establishing and promoting a constitutional democratic community of human-interdependence, of restorative justice. So too, different interests, particularly those of Western and customary law are linked and the law is enriched.[57]

It is evident that the concepts of communitarianism, conciliation and human dignity under *ubuntu* overlap with the elements of restorative justice, especially the participatory role of the community, the rehabilitation and reintegration of the offender and the victim which are discussed in more detail below.[58]

Like *ubuntu*, restorative justice also has a more extensive reach, in that the key role-players are not only the state and the offender. Instead the offender, the victim

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[56] In the *Port Elizabeth Municipality* and *Dikoko v Mokhatla* matters.

[57] Cornell "A Call for a Nuanced Constitutional Jurisprudence" in *Ubuntu and the Law* 332. Compare F Mnyongani ("De-linking Ubuntu: Towards a Unique South African Jurisprudence" (2010) 31 *Obite*r134-145) who in contrast calls for *ubuntu* to be de-linked from the dominant Western legal paradigm so that it may be understood properly.

[58] This is illustrated by T Murithi "Practical Peacemaking Wisdom from Africa: Reflections on Ubuntu" (2006) 1 *JPAS* 25 34, in which lessons from *ubuntu* include public participation, the support of victims and perpetrators in the process; the value of accountability that is linked with remorsefulness and forgiveness and the unity and interdependence of humanity in the community. The five stages of dispute resolution in "Ubuntu societies" Murithi discusses (30-31) also reflect the characteristics of restorative justice. The first stage entails evidence being heard and the offender being encouraged to accept responsibility; in the second stage, the perpetrator is encouraged to repent and demonstrate remorse; the third stage involves forgiveness in that the perpetrator is encouraged to seek forgiveness and the victim is encouraged to grant mercy and to forgive; the fourth stage involves restitution and reconciliation between the parties.

and the community are all actively involved in the process.[59] This illustrates the perception of restorative justice as a democratic, deliberative, participatory process. A process that brings all the affected parties together to deliberate the dispute themselves and agree upon a solution that each takes responsibility for honouring.[60] However, it is submitted in this dissertation that restorative justice is more than simply a democratic deliberative *process*. The *values* that underpin the characteristics of restorative justice are equally important and critical to a proper description and understanding of restorative justice. These include the recognition of the inherent human dignity of each party, the social worth of community, the value of *ubuntu*, the restorative justice aims of responsibility, reparation and reintegration. Consequently, as submitted above, restorative *justice* is a set of values, principles and practices to be used in response to crime.[61]

3 3 Characteristics of restorative justice

The principles of responsibility, restoration and reintegration are central to restorative justice.[62] Under the principle of responsibility the purpose is engagement with the offenders. The offenders are challenged to explore the nature of the offence and realise the consequences of their actions, including the impact they had and may still have on the victims and the community.[63]

Restoration involves restitution and reparation, in a number of ways, for the loss suffered by the victims and the community.[64] Reparation[65] is one of the primary

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[59] Mekonnen (2010) *AJCR* 6; Walgrave et al (2013) *RJIJ* 160; Batley "Restorative Justice" in *Beyond Retribution* 21.

[60] Braithwaite & Strang "Introduction" in *Restorative Justice and Civil Society* 1.

[61] Rosenblatt *The Role of Community* 11.

[62] These principles are akin to the principles of so-called transitional justice based on restorative justice, namely truth, accountability, reparation and reconciliation. See Mekonnen (2010) *AJCR* 9.

[63] Mekonnen (2010) *AJCR* 6.

[64] Mekonnen (2010) *AJCR* 7.

[65] The SALRC *in Sentencing (A New Sentencing Framework) (Project 82)* (2000) para 3.3.37, 70 defines reparation broadly as including both restitution and compensation: "Restitution, in its narrowest sense, means the restoration of an item of property to its lawful owner. Compensation goes further and encompasses the making good of damage resulting

characteristics of restorative justice.[66] Restitution is also the chief and crucial goal argued for in this dissertation regarding the loss suffered in instances of economic crime. Restitution need not always be pecuniary payment to the victim, although it usually is some form of monetary recompense. Restitution may involve community work or payment to a public organisation.[67]

Reintegration emphasises the reconciliation of the parties through the restoration of relationships, or at least the reintegration into the community of both the victims and the offenders, albeit separately from one another. Restorative justice thus highlights looking forward, to the future and not only to the past.[68] It looks at the offence, but also beyond the offence, to a new narrative. Importantly restorative justice involves more pertinently the voice of the victim, as well as the accent of the community. These key characteristics of restorative justice are in contrast to typical retributive justice characteristics that focus more on the offence and the offender and consequently are limited to the past and past deeds. The aims of restorative justice are also more far reaching than the punitive and utilitarian outcomes of a classical criminal retributive system which generally focus on the offender and punishing the offender according to the severity of the crime. To illustrate the meaning of these core characteristics of restorative justice and the resultant benefits of integrating them into the criminal justice system, the focus below is on the various stakeholders involved in a typical criminal offence: the state, the offender, the victim and the community.

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from the commission of a crime." In this dissertation the phrases, reparation, restitution, restoration and compensation are used interchangeably.

[66] SALRC *Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment) (Project 82)* Paper 7 (1997) Ch 2, para 2.2, 8; Ch 4, paras 8 & 9, 37.

[67] Two years of an eight-year sentence given to the renowned tennis player Bob Hewitt for rape was suspended for two years on condition that he pay R100,000 to the Department of Justice and Constitutional Development to use in campaigns against abuse of women and children. *S v Hewitt* 2016 JDR 1079 (SCA) 1.

[68] Skelton & Batley (2008) *AJ* 47, 49.

3 3 1 The state as governing stakeholder

Although restorative justice is said to return the conflict to the persons most affected by the crime, namely the victim and the offender,[69] the state remains one of the major stakeholders in the criminal justice system. An important attribute of restorative justice is the more direct personal involvement of the victims and the community, in addition to the offender in the criminal justice process. However, notwithstanding this inclusivity, the state remains the governing stakeholder and consequently the conventional criminal justice notion that an offence is committed against the state remains valid. [70]

It is the submission of this dissertation that collaboration is important and partnerships between different stakeholders in the state and the community are necessary to successfully address economic crime.[71] Partnerships operate on different levels:[72] at the primary level are partnerships that involve resident groups within the particular community.[73] Another level is partnerships between different criminal justice agencies with the purpose of improving efficiency and efficacy of the

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[69] Rosenblatt *The Role of Community* 16-17. The return of the dispute is associated with the profound statement of Christie that the dispute had been stolen by the state from the victim and the community. Also see Skelton & Batley *Charting Progress* 125-126.

[70] The relationship between the role of the state and civil society regarding the implementation of restorative justice has been considered in a number of ways, including the state having maximum involvement or minimum involvement. See Skelton & Batley *Charting Progress* 123-124.

[71] See fn 101 below regarding the NCPS' emphasis on collaboration and partnerships; The Foreword of the Department of Correctional Services (2005) *White Paper on Correctional Services* ("*White Paper* (2005)") 4 by the then Minister of Correctional Services stated: "South African society must be embraced as our overall partner". See also the *White Paper* (2005) 7 for emphasis on societal partnerships. Many of the proposals in the NCPS also echo the principles of restorative justice; such as rehabilitation of the offender, acknowledgment of the victim, involvement of the community and organisations, other than government. These are encapsulated by an extract from the vision statement NCPS (1996) para 1.2.1.4.1, 5 "South Africa shall be a society where its inhabitants can pursue their daily lives in peace and safety free from undue fear of crime and violence. It shall be a society in which the fundamental rights of the individual are effectively protected *with the support and co-operation of fellow citizens*" (writer's emphasis). See also, Clear et al *Community Justice* 99; Skelton (2007) *AJ* 228-229, 243.

[72] Clear et al *Community Justice* 135.

[73] For example, neighbourhood councils and groups and citizen volunteer groups.

government's efforts to address crime.[74] Yet another level may be collaboration between different government agencies within and outside the justice system, for example a department within the ministry of education invoking members from the prosecution in an education programme about crime in schools.[75] Another level of partnership involves collaboration between government departments and private organisations. [76]

In describing the partnership between the government and civil society the state is said to be responsible for the steering, whilst civil society does the rowing. [77] The state needs to direct and give guidance. A number of specific roles that the state can fulfil have been identified, including that of enabler, resourcer, implementer and guarantor of good practice.[78] As enabler the state needs to provide the necessary legal framework within which restorative justice practices can happen.[79] As resourcer, the state needs to provide the necessary resources, financial, human and otherwise for the implementation of restorative practices.[80] At present, the state is

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[74] For example, the NDPP *Annual Report* 2017/2018 18 19 emphasises the close collaboration between the NPA and the Anti-Corruption Task Team, the Special Investigating Unit, the South African Revenue Service and several other government stakeholders and reports entering into memoranda of understanding with some entities.

[75] *White Paper* (2005) para 4.4.4, 37.

[76] For example, the collaboration between SAPS, the NPA and Business Against Crime to establish the Specialised Commercial Crime Unit ("SCCU"). For a detailed discussion on the SCCU see A Altbeker *Justice Through Specialisation? The Case of the Specialised Commercial Crime Court: Institute for Security Studies Monographs* 76 (2003).

[77] Skelton & Batley *Charting Progress* 128; Skelton (2007) AJ 243.

[78] Skelton & Batley *Charting Progress* 124; Skelton (2007) AJ 243.

[79] There are already a number of enabling restorative justice frameworks in South Africa, principally the policy document, the *White Paper* (2005). Consequent to this was the promulgation of the Correctional Services Amendment Act 25 of 2008, as well as Correctional Services Amendment Act 5 of 2011. The state further fulfils its role as enabler by, for example, regular progress reports by the DCS before the PMG.

[80] The lack of resources is one of the most challenging issues hampering the implementation of restorative justice practices, like rehabilitation and reintegration programmes in South Africa. See DCS *Annual Report* 2017/2018 34 reporting the effect which a reduction in staff due to budget constraints had on its operations, including rehabilitation programmes. The JCIS *Annual Report* 2017/2018 27 states that only 6 out of the 16 sites inspected had educators to support the rehabilitation programmes. See also DH Bayley "Security and Justice for All" in H Strang & J Braithwaite (eds) *Restorative Justice and Civil Society* (2001)

the primary implementer of restorative justice practices in South Africa through the Department of Correctional Services ("DCS").[81] As the guarantor of good practice, the state has the responsibility of ensuring that restorative justice practices are of a good standard. This can be done by imposing a minimum set of standards or qualifications that are required before a person can act as service providers.[82]

It is the submission of this dissertation that collaboration is key to an effective and sustainable implementation of restorative justice practices and that the state should partner with civil society in such implementation.[83] The extent of crime in South Africa is extraordinarily high and the capacity of the state is stretched. Collaboration between the state and civil society can help overcome the lack of resources and capacity that may exist in government or civil society.[84] Although the flexibility and informality of restorative justice processes need to be safeguarded, it is acknowledged that procedural safeguards and protection through training and

214-218 who describes the challenges for the state as resourcer including economic challenges that involve either an increase in budget or a re-allocation of budget; political challenges that fear delegating authority; and social challenges in the light of the diversity of the communities and the difficulties of getting agreement and cooperation in such communities.

[81] Significantly one of the opening statements of the Minister of the Department of Justice and Correctional Serves in the DCS *Annual Report* 2017/2018 8 is that 82% of sentenced offenders had been placed on correctional programmes. See also the report on the rehabilitation (63-70) and community reintegration programmes (75-80). The impression from the JCIS *Annual Report* 2017/2018 27, 31 seems less favourable, but it is difficult to compare the information in the two reports.

[82] Skelton & Batley *Charting Progress* 119-121. For example, the standards set for the accreditation of mediators provided for by R 86 Magistrates' Courts Rules 2014 (GN 854 of 31 October 2014). See also Scott-Macnab & Khan (1985) *SACC* 127, who propose that statutory regulation is necessary to regulate dispute centres and processes and to ensure control, uniformity and consistency.

[83] This is also the proposal of Skelton & Batley *Charting Progress* 125, 136. The *White Paper* (2005) paras 3.1.3, 3.3.3-3.3.6, 35 places societal responsibility central to its strategic framework on correction and the corrective approach to addressing crime.

[84] The DCS *Annual Report* 2017/2018 8, 13, 15 highlights the importance of prevailing partnerships and network of collaborators, which is encouraging. However, Tshehla (2004) *SACJ* 10-11 warns that we should not be blind to the operational and administrative challenges confronting the different state departments.

standards need to be established.[85] The submission is that the state-based criminal justice system be reformed by the integration of restorative justice principles and practices through collaboration with civil society, including appropriate community models.

It is envisaged that the proposed mediation of economic crime offences could involve the participation of a private dispute resolution centre with the NPA. Partnerships, being collective efforts, should result in collective efficacy. Moreover, collaboration between government and the private sector should promote the credibility of the criminal justice system and enhance the understanding of its operations in civil society.

3 3 2 The offender as responsible participating stakeholder

Rehabilitation of the offender is a common aim of both the conventional criminal justice system,[86] as well as of restorative justice; although the conception of and approaches to rehabilitation may vary across the different spheres. The South African state's understanding of rehabilitation is significant here: "Rehabilitation is the *result of a process that combines the correction of offending behaviour*, human development and *the promotion of social responsibility and values*" (writer's emphasis).[87] A fundamental policy document[88] defining rehabilitation, both as a

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[85] Skelton (2007) *AJ* 243-244. Skelton & Batley *Charting Progress* 120 also discuss Braithwaite's three types of standards: "constraining standards" are minimal procedural safeguards like empowerment, respectful listening, and respect for human rights; "maximizing standards" are standards that need to be encouraged like restoration and prevention; and "emergent standards" are standards that naturally evolve from the restorative process, like remorse, forgiveness and mercy and should not be actively encouraged. Compare fn 13 above where these categories are used by the authors with reference to "values". It is submitted that there is a difference between values and standards, but that the types are appropriate to both values and standards.

[86] The main objectives of punishment are: retribution, deterrence and rehabilitation. See JD Mujuzi "Don't Send Them to Prison Because They Can't Rehabilitate Them: The South African Judiciary Doubts the Executive's Ability to Rehabilitate Offenders: A Note on *S v Shilubane* 2008 (1) SACR 295 (T)" (2008) *SAJHR* 330 336; Mujuzi (2008) *SACJ* 11-12. See also Masiloane & Marais (2009) *SACJ* 400-401 regarding the difficulties encountered in the rehabilitation of offenders in the South African system and the high recidivism rates.

[87] The *White Paper* (2005) para 4.2.1, 37

policy and practice, is the Department of Correctional Services (2005) *White Paper on Correctional Services* ("*White Paper* (2005)").[89] It is clear from the *White Paper* (2005) that the rehabilitation of the offender through corrective and restorative principles and practices is fundamental to its policy to prevent crime, correct offenders and promote societal responsibility.[90]

This corrective and restorative approach by the state underscores the core value of rehabilitation in restorative justice. Rehabilitation is a practice which aims to correct the offenders' criminal behaviour, to change their personality, outlooks, habits and opportunities.[91] The description of rehabilitation in the *White Paper* (2005) is fundamental to the understanding of restorative justice and to the participation of the different stakeholders as described in this dissertation: "every human being is capable of change and transformation if offered the opportunity and the necessary resources."[92]

All three arms of the state, the executive,[93] the legislature[94] and the judiciary[95] have acknowledged that rehabilitation is challenging. Some of the difficulties are over-crowded prisons, limited resources in the department of correctional services

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[88] For example, the DCS acknowledges that the *White Paper* (2005) is one of the strategic documents that guides its operations and mandates it to: "develop the DCS into an institution of rehabilitation and social reintegration and promote corrections as a societal responsibility." Also see JICS *Report 2017/2018* 15; DCS *Annual Report 2017/2018* 24.

[89] The *White Paper* (2005) para 4.2.2, 37 views rehabilitation as a strategy to prevent crime, and as a holistic phenomenon incorporating and encouraging: social responsibility, social justice, empowerment of and a contribution to making South Africa a better place to live in.

[90] This is the fundamental principle underlying the *White Paper* (2005) which sets out restoration as a managerial objective of the DCS in ch 5, para 5.2.

[91] Mujuzi (2008) *SAJHR* 337; Mujuzi (2008) *SACJ* 15-17.

[92] The *White Paper* (2005) Executive Summary para 17, 12.

[93] For example, DCS acknowledges that it has challenges, like misaligned organisational structures, to fulfil its rehabilitation mandate. See DCS *Annual Report 2017/2018* 35.

[94] See reports by PMG "Rehabilitation and Reintegration Programme Challenges Correctional Services" briefing by Justice and Correctional Services (17-09-2014) <https://pmg.org.za/committee-meeting/17574/> (accessed 30-06-2019).

[95] *S v Shilubane* 2008 1 SACR 295 (T) paras 5-6; *Kelly v Minister of Correctional Services* 2016 2 SACR 351 (GJ) paras 21, 24-25, 45.

and scarcity of rehabilitation programmes.[96] These difficulties clearly have an impact upon the rehabilitation of offenders and also on their rights.

Responsibility or offender accountability is one of the fundamental aims of rehabilitation. The acceptance of responsibility for their actions is necessary for offenders' rehabilitation, which in turn encourages them to desist from criminal activity and results in the prevention of recidivism. In a conventional adversarial court-based process offenders are alienated by the stark professional environment which they experience as strange and detached. In addition, the control and autonomy of their defences are taken away through the rules and formalities of criminal procedure and rules of evidence. A sanction is also imposed on offenders. It is submitted that a restorative justice process such as mediation will encourage the rehabilitation of offenders. Offenders are given an opportunity to participate in a process in a more conducive and friendly environment. Offenders are able to tell their stories in a more relaxed and informal manner. The underlying reason for the crime may unfold and be received more sympathetically.[97] Importantly, the offenders' participation in the determination of their sanction and agreement to make restitution is likely to strengthen their commitment to fulfil the terms of the sanction and restitution agreement. Mediation thus offers a more humane approach and process to resolving the dispute. It is submitted that it will help offenders to accept responsibility for their actions, and to make good the harm they have caused.[98] In addition, rehabilitation under a restorative process has proven to bring healing and restoration to not only the offender but also the victim and other affected parties.

3 3 3 The victim as respected participating stakeholder

A further characteristic of restorative justice processes is that they are victim aware.[99] A stronger emphasis on a victim-aware approach was identified more than

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[96] Masiloane & Marais (2009) *SACJ* 400-401.

[97] For example, the theft of monies may be due to the need to cover costs of medical treatment or due to a gambling addiction. Although this may be disclosed as part of evidence during a conventional trial it is submitted that the environment of a mediation will be more sympathetic.

[98] See the discussion in ch 2, para 2 4 1, 77ff.

[99] Rosenblatt's (*The Role of Community* 26, 29) term "victim aware" is preferred to the more commonly used victim-centric. This is because restorative justice promotes the participation

20 years ago by the South African justice system.[100] In the first National Crime Prevention Strategy ("NCPS") a call was made for a new approach to crime, to move from a reactionary model to a preventative model, and this new paradigm, in turn, called for a reframing of the traditional criminal justice system; including the call for

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of all the parties, and the offender is also a stakeholder. Victim-aware includes a victim's right to participate and be present in the criminal justice process, the right to obtain information and to services, the right to protection from harassment and victimisation and the right to compensation and reparation. For a discussion of these aspects see: Garkawe (2001) SACJ 134135, 143-151; KL de Klerk *The Role of the Victim in the Criminal Justice System: A Specific Focus on Victim Offender Mediation and Victim Impact Statements* LLM Thesis, University of Pretoria (2012) 5-6. Also compare the SALRC, *Sentencing (A Compensation Fund for Victims of Crime) (Project 82)* (2004) paras 9.100-9.107, 35-39 which concluded that victims have been neglected by the South African criminal justice system and that the system needs to be more victim-orientated.

[100] The National Crime Prevention Strategy, approved by Parliament and released in May 1996 ("NCPS"). Detailed discussion or evaluation of the NCPS is beyond the scope of this dissertation. In brief, the NCPS paras 1.2.1.2 & 1.3 5, 6-7 propose moving from a "crime control" to a "crime prevention" strategy and focusing on prevention of crime rather than reacting to crime. The new approach and strategy are based on developing programmes for the following four pillars: (i) improving the efficiency and efficacy of the criminal justice process, including for example, victim empowerment programmes; (ii) reducing the opportunity for crime by developing various systems for prevention and earlier detection, including for example, joining with private enterprises by developing codes of conduct to combat economic crime; (iii) promoting public values and changing the public's perspectives on crime through various initiatives, including school programmes; and (iv) programmes that reduce trans-national crimes, including better collaboration and shared programmes between various state departments. A summary of the NCPS can be found at <http://www.gov.za/documents/national-CRIME-prevention-strategy-summary> (accessed 6-04-2017). The status of the victim is discussed throughout the document, in particular the inadequate support for the victim (NCPS para 4.10 20-21) and the national programme for victim empowerment and support (NCPS para 17 65-67). Significantly NCPS para 1.3.1.3 6 describes the paradigm shift as follows: "In particular, an emphasis on a *state centred* system should give way to a greater emphasis on a *victim-centred, restorative* justice system. A victim centred criminal justice system is one which is concerned to address the direct effects of crime and place emphasis on those victims least able to protect themselves. A restorative justice system is one which seeks to encourage full rehabilitation." See also S Garkawe "Enhancing the Role and Rights of Crime Victims in the South Africa Justice System – An Australian Perspective" (2001) *SACJ* 131, fns 1 and 2. Also compare Rosenblatt *The Role of the Community* 26-30.

the active participation of the community,[101] and new perspectives on the offender and victim.

A significant contribution restorative justice makes is the normalising of the perceptions of crime, criminals, victims and the combating of crime.[102] Conventional criminal justice systems and criminologists focus on the "criminology of the other". The focus is on particular risks groups, like youth or drug addicts and research is focused on better control of such groups to ensure less crime. Restorative justice, in comparison, looks at "criminology of the self", which includes normalising the offender and the victim. This entails seeing each as ordinary, reasonably responsible persons with particular strengths and weaknesses, who due to their respective contexts, commit crimes or become victims.[103] For instance, with regard to the victim, restorative justice takes the victim seriously and affords her or him an opportunity to be engaged with and participate in the criminal justice procedure.[104] It is asserted that this is not a naïve trust, but an approach that brings a wider and more nuanced understanding of crime and the actual offender and victim.[105]

The participation of victims in the criminal justice process is complex.[106] The recognition of victims is multifaceted and there are also a number of different

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[101] The NCPS (paras 1.2.1.8, 1.2.1.10 & 1.3 6-7; para 3.2.2 10; para 6.7 47) emphasises that the new approach to crime calls for integration on various levels, including integration and co-operation between government departments; and partners in the non-government sector, including social welfare organisations and business enterprises as crime is regarded as being a "social issue" and opposed to a mere "security issue". This is reflected through the various pillars (NCPS para 7 49-52) and national programmes (NCPS para 28 52-80).

[102] L Walgrave, I Aertsen, S Parmentier, I Vanfraechem & E Zinsstag "Why Restorative Justice Matters for Criminology" (2013) 1 *RJIJ* 159 161.

[103] Walgrave et al (2013) *RJIJ* 161-162.

[104] Likewise, the offenders are considered in their personal context and not as a stereotype of a particular group.

[105] Walgrave et al (2013) *RJIJ* 161-162, 163. It is a trust that includes the belief that ordinary persons can, through meaningful participation, find solutions to the crime and its consequences.

[106] The nature and role of the victims could vary, for example, from being an informant to a witness, or a direct victim; and participation could take place at different stages, including pre-trial, during the trial, during the sentencing and post-sentencing.

victims.[107] Burchell has a fairly narrow understanding of a victim: "the sufferer of the harm or his or her relative".[108] The focus is on the victim who has suffered direct harm, against whom the offence was committed.[109] However, it may also be an eye-witness, dependents or relatives.[110] There are also secondary and indirect victims.[111] In the context of economic crime, there may be direct and indirect victims, primary and secondary victims and even unidentifiable victims, but victims nevertheless.[112] The socio-economic and socio-political impact on a broader community has also been recognised by the courts and commentators.[113]

Natural victims have different personalities, different needs and different motives for participating in the process.[114] One of the concerns raised with regard to greater participation by victims in the criminal justice process, especially in the stage of the sanctioning of the offender, is that this will lead to more retributive justice, as the victim is said to want the offender to receive her or his "just deserts". However this has not been empirically supported.[115] Also, it is submitted that a vengeful victim's

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[107] For a discussion of the different categories of victims, see Dignan *Understanding Victims* 20-23.

[108] J Burchell *Principles of Criminal Law* (4ed) (2013) 3.

[109] For example, in a case of theft, the direct victim is the party (a person or a corporate body) from whom money was stolen.

[110] KD Muller & IA van der Merwe "Recognising the Victim in the Sentencing Phase: The Use of Victim Impact Statements in Court" (2006) *SAJHR* 647 650-651.

[111] For example, in the case of theft by a mother, children of the offender are secondary victims that have clearly been affected by the crime and the consequent prosecution of the mother.

[112] For example, in a Ponzi scheme direct and primary victims may be direct investors, secondary victims may be dependents of the investors, whilst creditors of both types of victims may also be victims.

[113] *Shaik v S* 2008 2 SACR 165 (CC) para 72. See ch 1, para 1, 2-4 for discussion.

[114] Clear et al *Community Justice* 68 aptly describe the complexity of victims' differing needs as follows: "Some want a kind of revenge, while others are more interested in restitution. Some want to meet and confront the offender; others do not. Some want to understand why the crime happened, and these victims often look for a way for the offender to be rehabilitated so that future criminality will not occur. Others care little about what is in the offender's head or heart. They just want a meaningful punishment to be imposed by the court."

[115] See, for example, J Doak & D O'Mahony "The Vengeful Victim? Assessing the Attitudes of Victim Participating in Restorative Youth Conferencing" (2006) 13 *Int Rev Vic* 157-177.

attitude and demands are likely to be relativised and changed during a mediation process because the process itself is transformative and leads to change in perceptions and positions of participants.[116]

It has been acknowledged that in the past victims were marginalised in primarily three different ways:[117] the denial of their status as persons who have personally and directly suffered harm; the neglect of attributing to victims a formal role in the criminal justice system and not simply reducing them to witnesses;[118] and the failure to grant victims redress through material restitution or otherwise. It is further acknowledged that a number of restorative justice mechanisms endorsing the status and role of the victim have since been introduced and integrated into the criminal justice system.[119] Victim-impact statements are now commonly recognised and used in the criminal justice system.[120] Particularly important for this dissertation is the development of formal victim participation provided for under 105A(1)(b)(iii) of the CPA.[121] However, the South African criminal justice system is still primarily punitive and retributive.[122]

Accordingly, it is submitted that a more direct and greater role should be made possible for victims to participate in the criminal justice process more effectively. The status, role and redress of victims could be further expanded on and formally integrated into the criminal justice system through a restorative justice process like

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[116] See the discussion on transformative mediation in ch 2, para 2 2 3, 57-58.

[117] Dignan *Understanding Victims* 62-65. Also see the various research projects by the SALRC referred to in fn 129 below and various policy documents, including the NCPS referred to in fn 100 above.

[118] In the past, courts did not see victims as a central participant in a criminal trial and a victim was "equated as simply another witness with no independent right of audience". The experience in court can also be insensitive like a victim having to sit beside an accused; or confrontational through aggressive cross-examination Also see Burchell *Criminal Law* 3.

[119] For example, the acknowledgment by the courts of the important status and role of victims (discussed in para 3 4, 133ff); and provision for formal victim participation in s 276 (correctional supervision) of the CPA. Burchell *Criminal Law* 4 acknowledges that victims' rights are gaining more prominence in the South African criminal justice system and affirm that victims have basic human rights. See also, NDPP *Annual Report* 2017/2018 17 stating that the NPA ensures that everything it does is in the interests of the victim, "thereby confidently claiming its position in society as the 'People's Lawyer'".

[120] Burchell *Criminal Law* 3-4; Müller & Van der Merwe (2006) *SAJHR* 647-663.

[121] This issue is discussed in ch 4, para 4 4 2 2, 327ff.

[122] Burchell *Criminal Law* 3-4; Terblanche *A Guide to Sentencing* para 11.6.

mediation.[123] In a mediation, the victim will have equal status to the other participants including the offender, and in certain instances, the prosecutor. The victim's role will also be more direct and personal and the victim will be recognised and acknowledged as a victim, as somebody who has suffered harm, which can be primary or secondary, direct or indirect. A victim will also be able to be directly involved in the determining of the sanction, which is likely to include some form of restitution. As shown above, mediation will afford victims an opportunity to tell their stories in a non-threatening, non-confrontational and neutral space. This will result in the outcome of restoration, restitution and other benefits discussed above.[124]

3 3 4 The community as active and caring participating stake-holder[125]

Crime also harms the community. It impairs the mutual and reciprocal trust underlying the nature of the community.[126] In South African terms, crime erodes *ubuntu*. It weakens the communitarianism of a particular group.[127] Economic crime also has a significant impact on the socio-political policies of a country and impedes economic growth.[128] The effect and role of crime on the various stakeholders,

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[123] The integration of mediation would fall under the category of "mainstreaming" restorative justice initiatives into the criminal justice system. Compare Dignan *Understanding Victims 106-17,* 138-139

[124] See ch 2, para 2 4 1, 86ff.

[125] Dignan *Understanding Victims* 99-101 identifies the community as a direct, indirect or vicarious stakeholder. For example, in the case of corruption, the community might be a direct stakeholder if it suffered the loss directly and its communitarianism or *ubuntu* was impaired. It would be an indirect stakeholder when corruption has an indirect effect on a community's socio-economic status; and it would be a vicarious stakeholder when its interest in the outcome extends beyond that of the direct victims, or if it is acting as a representative of the direct victims. An example of this is Corruption Watch acting as *amicus curiae* in a corruption case.

[126] TR Clear, JR Hamilton Jr & E Cadora *Community Justice* 2 ed (2011) 117.

[127] *Ubuntu* means interdependence and that each member of the community is linked to each of the disputing parties, the victim and the offender. An offender, who breaks the law, consequently transforms her or his community into a law-breaking group; and conversely if a victim is wronged the whole group is wronged. Consequently, any resolution is aimed at not only repairing the harm to the victim, but also the harm to the community. Murithi (2006) *JPAS* 29-30. Also see Cornell (2005) *AHRLJ* 206-207.

[128] See the discussion in ch 1, para 1 1, 2-3.

including the community, have been considered by the SALRC.[129] The increased engagement of both the community and the victim and the broader focus on correctional supervision of the offender, core characteristics of restorative justice, have been deliberated on and proposed several decades ago.[130]

The participation of the community in the criminal justice process is both a strategy and a philosophy.[131] As a strategy, the responsibility of addressing crime is broadened and partnerships are formed by the state with community groups to help share the obligations of dealing with crime. As a philosophy, the participation of the community is measured as the community's response to crime and its acceptance of a co-responsibility to address crime. It constitutes communitarianism, the building of corporate capital, of collective action to ensure a better community which has less crime and more good.[132]

The community and the role the community can play in the criminal justice system are central to restorative justice processes.[133] The community not only has an interest, but also an obligation in crime control and addressing the consequences of crime.[134] The role of the community is not only in preventing crime, but also in

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[129] Several projects regarding the role of the community, the position of victims and sentencing were initiated in 1991, including the following reports: *Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment) (Project 82)* Paper 7 (1997); *Sentencing (A New Sentencing Framework) (Project 82)* (2000); *Sentencing (A Compensation Fund for Victims of Crime) (Project 82)* (2004).

[130] Also see the SALRC *Sentencing (A New Sentencing Framework) (Project 82)* (2000) part II, para 2.4, 24 and paras 2.13-2.15, 28-29 regarding proposal for a new sentencing framework partnership for sentencing, including the victim and community, and the view that specific attention should be given to the victim's interests and right to restitution and compensation.

[131] Clear et al *Community Justice* 2.

[132] Clear et al *Community Justice* 2-7; Skelton & Batley *Charting Progress* 127.

[133] This is clearly the understanding of the *White Paper* (2005) ch 13, 85-89 and its emphasis on external partnerships, including local, regional and international. Sachs J in *M v S* para 62 highlights the role of the community in correctional supervision and restorative justice and holds: "Central to the notion of restorative justice is the recognition of the community rather than the criminal-justice agencies as the prime site of crime control". See too SALRC *Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment) (Project 82)* Paper 7 (1997) Ch 2, paras 2.1, 2.4, 7.

[134] Clear et al *Community Justice* 118. Also compare the *White Paper's* (2005) chs 3 and 4 emphasis on societal responsibility. Also see references in fns 71 & 100 above.

assisting to address the harm done by a crime that was committed. With regard to the former, the community is involved in community building programmes.[135] The community, usually the care community or micro-community, comprised of persons close to the parties, also has a role in supporting the rehabilitation and reintegration of the offender and the victim into the community. This is based, on the premise that persons close to the offender are more suitable and likely to convince the offender of her or his accountability.[136] The community can also help in repairing the trust in the community.[137] Accordingly, the involvement of the community includes, voicing concern about crime, reporting crime, identifying offenders, testifying in court, participating in the reintegration of offenders and victims into the community.[138]

The importance of the role of the community, and their participation in the fight against crime, including the resolution and prevention of crime, is acknowledged in the National Crime Prevention Strategy (NCPS). The involvement of the community is also one of the core characteristics of *ubuntu.* The participation and voice of the community also form part of traditional mediation practices. Accordingly, a critical issue is the definition or understanding of "community", a concept which remains elusive.[139]

Community may be defined by factors such as geographical place,[140] ethnic culture, language, socio-economic class, gender, age and duration of stay in a

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[135] Clear et al *Community Justice* 117. For example, teaching ethics and accounting at schools and for the public.

[136] Rosenblatt *The Role of Community* 46.

[137] Clear et al *Community Justice* 118. For example, the community can, after the damages and loss caused by a Ponzi scheme assist in repairing the trust in financial investment schemes through financial guidance of investors.

[138] DT Masiloane & CW Marais "Community involvement in the criminal justice system" (2009) *SACJ* 391. Compare Rosenblatt *The Role of the Community* 47-52 who identifies a number of community roles, including acting as mediators; victim and offender networks, and local residents shaping and monitoring restoration plans.

[139] A Edwards & G Hughes "Introduction: the Community Governance of Crime Control" in A Edwards & G Hughes (eds) *Crime Control and Community* (2002) 1 5. Community is a phrase which is overused and little understood and has many meanings. See J Foster "'People Pieces": The Neglected but Essential Elements of Community Crime Prevention" in A Edwards & G Hughes (eds) *Crime Control and Community* (2002) 167 173.

[140] Clear et al *Community Justice* 7-31 discusses in detail the importance of "place" in defining a community's role in the criminal justice system.

place.[141] A descriptive definition comprising a number of the above factors is given by the SALRC:

> "A collection of individuals who maintain homogeneous interests and customs in a distinctive social structure, in a limited territorial area and who show a strong inclination toward group identification."[142]

In *Seedat v S* the definition of the public is interestingly described by the Supreme Court of Appeal ("SCA") as including persons "close to the accused and those distressed by the audacity and horror of the crime".[143]

Although community is "a 'feelgood' word",[144] caution needs to be taken of the dark side of the community demonstrated by vigilantism, which itself "presents a picture of bewildering volatility and complexity".[145] Although complex, one of the causes of vigilantism in South Africa is reportedly that it is a response to the "ineffectiveness, unresponsiveness and ultimately failure of the police and justice

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[141] For example, in Stellenbosch there may be different communities in Kayamandi and Paradyskloof, two suburbs in the same town whose residents comprise persons from different socio-economic and ethnic groups respectively. Also see Foster "'People Pieces" in *Crime Control and Community* 173.

[142] SALRC *Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment) (Project 82)* Paper 7 (1997) Ch 1, para 1.7, 7.

[143] [2016] ZASCA 153 para 39.

[144] J Foster "'People Pieces" in *Crime Control and Community* 173; FF Rosenblatt *The Role of Community in Restorative Justice* (2015) 1. Compare G Pavlich "The Force of Community" in H Strang & J Braithwaite (eds) *Restorative Justice and Civil Society* (2001) 56 58-59, who warns against the dark side of the community and the tendency of the community to exclude "the other" and "the stranger".

[145] TG Kirsch & T Grätz "Vigilantism, State Ontologies & Encompassment: An Introductory Essay" in TG Kirsch & T Grätz (eds) *Domesticating Vigilantism in Africa* (2010) 1 4. It is beyond the scope of this dissertation to discuss this issue. However, reference is made to it to illustrate that the community are involved in some instances of economic crime, albeit brutally and ruthlessly so. For more on this, see M Nel *Crime as Punishment: A Legal Perspective on Vigilantism in South Africa* LLD dissertation, Stellenbosch University (2016), available at <http://scholar.sun.ac.za/handle/10019.1/100325>. See, for example, S Majangaza "Vigilante WSU Students Kill Fellow Student Accused of Theft" (14-04-2019) *Herald Live* <https://www.heraldlive.co.za/news/2019-04-14-vigilante-wsu-students-kill-fellow-student-accused-of-theft/> (accessed 30-06-2019).

system".[146] Another reaction to the dissatisfaction with the formal justice system is the establishment of formal non-governmental counterparts, such as the People's Tribunal on Economic Crime in South Africa, a private organisation that investigates corruption.[147] Important too is the recognition of both formal institutionalised groups[148] and more customary informal social groups[149] representing a community.

Not only is the description of community complex, but so too the determination of the "public interest", "public opinion", "public moral vision" and "public culture". What is the public culture or the expression of the lifeblood and identity of a particular group of people? What and who determines the moral and cultural values of a certain community? There is a plurality, a diversity and ambiguity in the notion "public".[150] It is difficult to name the present, the contemporary society.[151] This is

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[146] L Buur "Domesticating Sovereigns: The Changing Nature of Vigilante Groups in South Africa" in TG Kirsch & T Grätz (eds) *Domesticating Vigilantism in Africa* (2010) 26 28.

[147] An organisation which identifies itself as being formed by civil society to investigate corruption and state capture in response to government's failure to do so. For more details see the website <https://corruptiontribunal.org.za/> (accessed 25-06-2019).

[148] Corruption Watch, an organisation linked as a chapter of Transparency International which helps to fight corruption in South Africa, is an example of a private institution. For more information, see <https://www.corruptionwatch.org.za/> (accessed 25-06-2019). Another example of a regulated institution is the establishment of the Community Policing Forums ("CFP") established under the s 221 of the Interim Constitution. Also see Buur "Vigilante Groups in South Africa" in *Domesticating Vigilantism* 434; and TG Kirsch ("Violence in the name of Democracy: Community Policing, Vigilante Action & Nation Building in South Africa" in TG Kirsch & T Grätz (eds) *Domesticating Vigilantism in Africa* [2010] 139-155 who discusses the phenomena of CFPs and their relationship with vigilante groups.

[149]These could be elders in a community or victim support groups on social media.

[150] NN Koopman "Public Spirit: The Global Citizen's Gift – A Response to William Storrar" 95. Koopman (93-95) identifies three different principal ways in which the notion "public" is used. Firstly, as "that sphere of spaces and practices where an informed public opinion about the normative vision for society is formed and sustained". This concept presumes that public discourse and debate occurs in a free space between equal partners. It is submitted that the public discourse in South Africa is not unconstrained, and participants are not equal or equally informed and consequently the formation of a normative *bonos mores* is difficult and complex. A second broader concept of public is that it has to do with life in general, life in the world: humanity, history, culture and reality. A third way of understanding public is when public refers to specific audiences or publics.

[151] Koopman (2011) *IJPT* 93.

especially true of South Africa, where the plurality of class, culture ethnicity, faith and law constitute a richly diverse and divisive public. The understanding and perception of the law by the different communities in South Africa is necessarily also complex, diverse and divisive. Accordingly, particular caution and care needs to be taken in defining the public or community and its voice in South Africa.[152] Fundamental differences exist between one community and another that are critical to the strategies employed to involve the community in the fight against crime.[153] In South Africa the huge socio-economic equality gap between different groups demands that additional care needs to be taken in defining community, including the defining of a particular group's interests and the role a community can play in the prevention of crime and the restoration of the consequences of crime.[154] Notwithstanding this plurality and deep diversity of the *bonos mores* of different cultural communities, it is submitted that basic human rights and basic *bonos mores* are found in each of these communities. These are the basic human rights and the basic *bonos mores* identified and protected by the Constitution of South Africa, and unified and cemented together across the different communities by *ubuntu*, the national adhesive.

In the light of the complexity of defining community the value of the narrative nature of restorative justice and a process like mediation is fundamental. In this sense, the value of storytelling, of hearing the narratives of the offender and victim are critical. If the story of either one of the parties is silenced or marginalised through

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[152] For example: Is the voice of the media the true voice of the public? Do media houses owned by wealthy, powerful, corporate shareholders reflect the voice of the unemployed and uneducated poor, natural persons? This is not denying that the media is a critical public voice and journalists have been described as "the superheroes of democracy" by senior prosecutors. See A Basson "New Anti-corruption Unit Boss: 'We Have Enough Money'" (22-06-2019) *news24* <https://www.news24.com/SouthAfrica/News/new-anti-corruption-unit-boss-we-have-enough-money-20190622> (accessed 25-06-2019).

[153] Clear et al *Community Justice* 1; Koopman (2011) *IJPT* 97. Importantly, too, is the concept of communal autonomy that allows local communities to deliberate and decide for themselves what constitutes their communal interests and *bonos mores*.

[154] Also see Clear et al *Community Justice* 140-145 for a discussion of the community's role in fighting crime and the possible difficulties that may be encountered in diverse communities and the risk of inequalities arising, not only in identifying community interests, but also in addressing them.

procedural regulations or neglect,[155] the integrity of the justice process is compromised and true justice cannot be attained. There is a disconnection between the dispute arising from the offence, the disruption of harmony and the subsequent reconciliation and reparation for such dispute and disruption. In addition, the recognition of each person's inherent dignity through each party's story is central to the successful functioning of restorative justice.

It is submitted that the proposal to introduce mediation as an additional mechanism to combat economic crime in the justice system of South Africa will contribute to the reversal of the systemic failure by the state to address crime effectively. As has been shown mediation as a restorative justice process enables the meaningful participation of the offenders, victims and community and increases the parties' satisfaction with their experience of the justice system.[156] An outcome of restorative justice is the establishment of justice and ownership of justice at grassroots level.[157] It is submitted that with the participation of different groups, including the offender and her or his supporters, the victim and her or his supporters, and the involvement of the community, a better understanding and appreciation of the operation and nature of the criminal justice system is cultivated. In addition, such involvement and participation increases the transparency and credibility of the justice system and leads to individuals and communities proudly taking ownership of the justice system. This, in turn, lightens the burden of the state to uphold law and order.

Care also needs to be taken regarding the reference to public participation and the voice of the community. The participation of the community cannot be taken for granted and there may be little participation by the public.[158] Obarrio refers to a need for a pedagogy, where mechanisms of traditional justice, formal justice and various

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[155] For example, offenders not fully aware of their rights or victims marginalised by the formal criminal justice system.

[156] See discussion above ch 2, para 2 4, 89-91.

[157] Mekonnen (2010) *AJCR* 11 calls this "a bottom-up culture of human rights."

[158] The public perception may be that restorative justice is "soft justice" and consequently there is a reluctance to participate in restorative justice practices. See, for example, JCIS *Annual Report 2017/2018* 41. Skelton & Batley *Charting Progress* 136 name financial constraints as another factor impeding the participation of the public. Also see Rosenblatt *The Role of Community* 207-2012, who concludes, after certain empirical studies, that the expectancies of public participation are set too high by restorative justice activists and that actual participation is not as effective as claimed.

public organisations educate persons with regard to their public voice and the need for public participation in matters of justice. [159] Consequently, a call for community participation is empty if not accompanied with proposals and structures for such community participation.

Similarly, many victims and offenders are not aware what restorative justice is, and consequently it is necessary to enlighten them.[160] Prior knowledge of the criminal justice system and the nature of restorative justice are fundamental and consequently education of the public regarding the various procedures existing in the criminal justice system is critical. It is submitted that the involvement of the community in the criminal justice system in South Africa has been undervalued and should go beyond mere rhetoric. It is further submitted that notwithstanding these challenges, community-based dispute resolution centres can collaborate with the other stakeholders and mediation processes can become integrated with the criminal justice system in the endeavour to meet restorative justice goals.

3 3 5 The value of truth

Truth is of significant importance in this dissertation. This is because of the nature of economic crime, its complexity and diversity, including the many different kinds of economic crime offences. The complexity and diversity of economic crime makes the burden of proof required in a conventional criminal court, especially onerous and cumbersome. In addition, emphases in this dissertation include the participatory role of the victim and the issue of restitution.

It is true that the typical criminal justice system also focuses on the truth; yet the focus on truth in restorative justice seems broader than the narrow focus on proving the personal liability of the offender through providing the necessary evidence to

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[159] Obarrio “Traditional Justice” in *Peacebuilding and Rule of Law* 40.

[160] After the offence has been committed, the communication process can take place in various formats; either indirect mediation, where a mediator shuttles between the parties, exchanging information; direct mediation involving only the offender and victim with a mediator; or conferencing involving more parties, primarily family members and supporters of either the offender or victim. See, for example, Principle 3 of *Principles of Best Practice for Restorative Justice Processes in Criminal Cases* in New Zealand available at <https://www.justice.govt.nz/assets/Documents/Publications/RJ-Best-practice.pdf> (accessed 02-07-2019).

prove a particular offence. In addition, the evidence led in a criminal trial is strictly limited by rules of evidence and other procedural concerns. In contrast, in a restorative justice process the process is more open and unrestricted. An opportunity is given to the victim to question the offender about the "whys" and answers to these questions may contribute to the victim reaching acceptance and peace.[161] Moreover, victims are granted an opportunity to express their feelings, their anger and despair to the offender.[162] It is submitted that the voice of the victim adds to the various tones of the truth.

Sachs J identifies four types of truth which are helpful to understand the different values of the different types of truths that usually play a role in a criminal justice system: observational truth, logical truth, experiential truth and dialogical truth.[163] Neither one necessarily has more value than another, yet each has its own particular worth. Observational truth is detailed and focused on a particular event at a particular time,[164] and is the type of truth that is usually pursued in a conventional

[161] For example, a victim of a fraud scheme victim may ask: *Why* did you choose to harm *me*? *Why* did *you* do it?

[162] For example, victims of fraud may relate how destitute and concerned they now are consequent to the fraud.

[163] Sachs *Strange Alchemy* 80-82. In another article Sachs J calls "observational truth" "microscopic truth". See A Sachs "Towards the Liberation and Revitalization of Customary Law" in D Cornell & N Muvangua *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 303 306-308. Similarly, De Vos differentiates between "legal truth" and "actual truth". Legal truth includes the state having to prove a certain crime beyond reasonable doubt, but an acquittal does not necessarily mean that the offender did not commit the crime. It means the state did not prove its case beyond a reasonable doubt. This is the limitation of legal truth. This limitation may be due to various factors, including the constraints of the rules of evidence, the interpretation of the presiding officer on the presentation of the evidence and the standard of the presentation of the evidence and the examination and cross-examination of the presented evidence. P de Vos "On 'Khwezi', a Rape Acquittal, and the Limits of 'legal truth'" (27-09-2017) *Constitutionally Speaking* <https://constitutionallyspeaking.co.za/on-khwezi-a-rape-acquittal-and-the-limits-of-legal-truth/ > (accessed 2-10-2017).

[164] For example, issues such as was credit card XYZ swiped at merchant A, B and C at times N, O and P, may be essential to proving that T committed a particular credit card fraud.

prosecution trial. Logical truth, in turn is deductive and inferential.[165] Commonly, prosecutorial courts endeavour to connect logical and observational truth to prove a pre-defined issue or alleged act. This Sachs J concludes is narrow and limited to the legal issues in question.[166] Dialogical truth, conversely, is open-ended and is derived from interaction between people, relating their different experiences and perspectives of an event and can be said to be infinite.[167] Experiential truth is subjective, and involves an inner inward enquiry as to what one is experiencing, and is often contrasted with the so-called objective facts of a case.[168]

Restorative processes, such as the TRC, are more concerned with dialogical and experiential truth, and this leads to "more" truth being revealed during meetings.[169] Logical and observational truth are necessary to attain convictions and satisfy the obligation of proving a person's guilt beyond a reasonable doubt. This is in line with the primary aim of the prosecutorial criminal process to convict and punish. Contrariwise, restorative processes, like the TRC, concentrate on dialogical and experiential truth, enabling the understanding of the different parties' motives and positions. Such engagement and expression are likely to promote restoration and reconciliation. The TRC, which aimed ay building a bridge between the political past and future and building foundations for a new nation, focused on different types of truth, including dialogical and experiential. Surprisingly, it revealed many truths. It has been mooted that many mysteries, killings and atrocities would have remained unresolved and the truth unknown forever had the TRC process not been

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[165] For example, using the above example, if there is video material of T swiping a card at merchant A, B and C payment points, at times N, O and P it may be inferred that he was swiping credit card XYZ, although the actual credit card cannot be seen.

[166] Sachs *Strange Alchemy* 82.

[167] Sachs *Strange Alchemy* 82. In the above example, the owner of the credit card E, may relate in conversation with T, her or his anxiety in realising money was being debited against her or his account, whilst T may relate that she or he felt jittery or full of bravado whilst swiping the credit card.

[168] Sachs *Strange Alchemy* 82. In the above examples, T may reveal that she or he was feeling self-hate at performing a crime; whist E may relate feeling a violation of privacy and person on realising that her or his credit card was being used.

[169] Sachs *Strange Alchemy* 82-83; Sachs "Towards the Liberation and Revitalization of Customary Law" in *Ubuntu and the Law* 307-308.

followed.[170] It may be argued that the reason for such revelations may in part be due to the amnesty offered to persons who came forward and told the truth.[171] Likewise, it is submitted that the reason for an offender to enter into a plea negotiation process and disclose details of an offence may also be motivated by the possibility of gaining some benefit from the process, most likely a reduction in sentence.[172]

It is further submitted that parties would have similar motivations for entering into a mediation process. In addition, more information is likely to be disclosed in the dialogical and experiential truths which emerge during the mediation process. These disclosures are likely to reveal the ways in which the offence was committed or even more offences. Dialogical and experiential truths from the affected parties are also likely to promote solutions, including restitution as part of a mediated sentencing agreement. It is also submitted that restorative justice processes, such as mediation that make use of more dialogical and experiential truth inquiries, are no less significant than prosecutorial processes primarily focused on observational and logical truth. Justice is served equally in either kind of process. In the light of these considerations, it may be concluded that restorative justice processes such as victim-offender interchanges and mediation are processes that allow for a more expansive form of the narrative of a crime; not only from the perspective of the offender and of the victim, but the broader community as well. A broader truth is told.

3 4 Recognition and reception of restorative justice by the courts in South Africa

> "This so-called 'restorative justice' concept is a fabrication of a process whereby it is required of a prisoner to make peace with the family of the victim. … The whole process is an illegal concoction undermining the rights of prisoners to be released on parole when they legally qualify for it."[173]

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[170] Sachs *Strange Alchemy* 84-85.

[171] The TRC did not provide a blanket amnesty to all persons for all atrocities. Amnesty was only granted to individuals and amnesty was not guaranteed, but considered by an Amnesty Committee. See ch 4 of the Promotion of National Unity and Reconciliation Act 34 of 1995. Also see Sachs *Strange Alchemy* 77-79.

[172] See ch 4, para 4 4 2 1, 300, 313-314 below.

[173] Ebersohn J in *Gwebu v Minister of Correctional Services and Others* 2014 1 SACR 191 (GNP) para 5.

Recognition is given to the retributive nature of criminal law and the primary purpose of punishment under the criminal prosecutorial system.[174] However, it is submitted that there is room for restorative justice to be integrated further into the criminal justice system. Particularly in respect of some instances of economic crime, it is submitted that using mediation as a method of alternative dispute resolution may be a more formative and effective manner of resolving the disruption of the balance between the offender, the victim and members of the community. To support this submission, attention is given to the recognition and reception of restorative justice principles by the courts, especially with regard to sentencing.

Notwithstanding that restorative justice was considered and subsequently recommended more than two decades ago,[175] it has not been widely applied in the South African criminal justice system.[176] Restorative justice has, however, received limited application in the sentencing process.[177] It is the submission of this dissertation that restorative justice is a much broader concept and should be recognised as having wider purposes and functions than its narrow role in the sentencing process: restorative justice is an alternative *to* punishment, not an alternative punishment.[178] This discussion in section 3 3 has demonstrated that

[174] See the discussion of participatory justice system in para 3 6, 149ff.

[175] SALRC *Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment) (Project 82)* Paper 7 (1997). The purpose of the paper was to consider the issue of restorative justice and the involvement of victims in the criminal justice system. A later report, SALRC *Sentencing (A New Sentencing Framework) (Project 82)* (2000) Part 1, para 1.17, 9 specifically emphasised the need for victims' interests to be recognised and protected in the sentencing process, including participation by the victim (part 2, para 2.4, 24) and reparation (part 3, ch 3, para 37, 70-73).

[176] Terblanche *A Guide to Sentencing* para 11.1, 191.

[177] Terblanche *A Guide to Sentencing* para 11.5, 194.

[178] Walgrave et al (2013) *RJIJ* 160 assert that the true potential for restorative justice will not be realised if restorative justice is simply seen narrowly as an alternative punishment. Compare the SCA in *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 2 SACR 567 (SCA) para 15 describing restorative justice narrowly as "an alternative form of punishment" and "a new trend in sentencing philosophy".

restorative justice responds to crime in a more holistic manner as it responds to the needs of the victim, the offender and their communities.[179]

Several courts have integrated the concept of restorative justice into their judgments, consequently broadening the function of restorative justice. However, such application has not been without difficulty and there have been varying perspectives on and constructions of restorative justice by the courts in criminal cases, primarily in cases relating to the sentencing process. This is not surprising in view of restorative justice being a supple and permeable concept and sentencing being a complex process.

A notable judgment is *M v S* (*Centre for Child Law as Amicus Curiae*)("*M v S"*)[180] a judgment written by Sachs J which accepted that: "the traditional aims of punishment had been transformed by the Constitution".[181] Acknowledging that sentencing is "innately controversial" Sachs J endorsed the *Zinn* triad which entails the established elements of sentencing: the nature of the crime, the circumstances of the criminal and the interests of the community.[182] The Constitutional Court also confirmed the purposes of punishment as being "deterrent, preventative, reformative and retributive aspects".[183] Significantly, the court affirmed that the element of mercy

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[179] Walgrave et al (2013) *RJIJ* 160, who also assert that such a broad response underscores the credibility of restorative justice, in contrast to classical penal justice which focuses more on the offender and potential offenders.

[180] 2007 2 SACR 539 (CC). This was a case of economic crime. M, a 35-year-old divorced mother of three minor children and a repeat offender had pleaded guilty to several counts of fraud committed during the currency of a suspended sentence for an earlier conviction of fraud. M appealed against the sentence of four years' imprisonment, subject to s 276(1)(i) of the CPA arguing that as a primary care-giver, the court needed to consider the constitutional and international rights of her minor children, and that incarceration of their mother, the primary care-giver was not an appropriate sentence. Although this case is best known for its developments in constitutional and child law, it is submitted that it also an established constitutional application of restorative justice principles. Also see A Skelton "Face to Face: Sachs on Restorative Justice" (2010) 25 *SAPL* 94 100.

[181] *M v S* para 10. The Constitutional Court followed Mthiyane JA in *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 1 SACR 243 (SCA) ("*DPP v P*") para 13.

[182] *M v S* para 10. Notably too, Sachs' J refers (para 10 fn 3) to the SALRC *Report on a New Sentencing Framework* Project 82 (2000), including specific reference to restorative sentencing, position of the victim, compensation and reparation.

[183] *M v S* para 10; *DPP v P* para 13.

has to be included in the sentencing process.[184] Also, a sentencing court has to balance competing legal considerations and appropriate weight needs to be placed on these interests in tension with one another.[185]

Integral to restorative justice is the participation of the parties and the specific engagement between the victim and offender. In this regard, and in light of the issue of restitution, Sachs J states: "(i)t would have special significance if she is required to make the repayments on a face-to-face basis. This could be hard for her, but restorative justice ideally requires looking the victim in the eye and acknowledging wrongdoing."[186] Significantly, Sachs J goes on to describe the restorative and reintegration characteristics of restorative justice:

> "What matters is that in both a practical and symbolic way M begins to *restore a relationship* that would otherwise remain ruptured. For M herself this process of *acknowledgement and reconciliation* removes the silent brand of criminality that imprisonment would bring, and *facilitates restoration of trust and her reintegration into the community*" (writer's emphasis).[187]

Sachs J also highlights the role of the community in correctional supervision and restorative justice and holds:

> "Central to the notion of restorative justice is the recognition of the community rather than the criminal-justice agencies as the prime site of crime control.[188]

These factors identified in *M v S* not only affirm the traditional elements and aims of sentencing but also relativise them by holding that other factors are also important and need to be considered in the sentencing process. Such factors include the elements of encounter, engagement, participation and restoration by the victim and offender, as well as the role of the community.

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[184] *M v S* para 10; *DPP v P* para 13.

[185] For example, in *M v S* paras 37-42 the court had to balance "integrity of the family care" and the "duty to punish criminal misconduct".

[186] *M v S* para 72. This demonstrates Sachs J's emphasis on the need for an encounter and engagement between a victim and offender. Also see Skelton (2010) *SAPL* 96-97, 101-102.

[187] *M v S* para 72. Also see the discussion of restorative justice, particularly resonating with *ubuntu-botho*, in the judgment of Mokgoro J and Sachs J in *Dikoko v Mokhatla* paras 68 and 114, respectively. This case is also discussed in para 3 4 above, 102, 107-112.

[188] *M v S* case para 62. In addition, in para 75 the community is described as having the capacity to deal with moral failures and that the "community should (not) be seen simply as a vengeful mass uninterested in the moral and social recuperation of one of its members".

In addition, the sentencing philosophy of South Africa has developed. This is evident both in the SALRC's report on a *New Sentencing Framework* Project 82 (2000) and the introduction of correctional supervision into the criminal justice system.[189] It is apparent that these developments incorporate more emphasis on the restorative nature of punishment and rehabilitation as opposed to simple retribution.[190] Notably, in *M v S* Sachs J emphasises the importance of correctional supervision[191] and further states that an advantage of correctional supervision is "that it keeps open the option of restorative justice in a way that imprisonment cannot do".[192]

Another case emphasising the principles of restorative justice is *S v Maluleke.*[193] Importantly, Bertelsmann J described the process of restorative justice as a new approach to dealing with crime, victims and offenders, which emphasises the need for reparation, healing and rehabilitation, contrary to long sentences of imprisonment which add to overcrowding of jails and increase the risk of recidivism.[194] Restorative justice is a paradigm shift which shifts from retribution to reconciliation, removal and alienation to healing and re-establishing of societal bonds, and the risk of recidivism to the development of the offender.[195] Restorative justice shifts the focus from retribution to rehabilitation, including healing, reconciliation, accountability and reintegration of the offender.[196]

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[189] CPA ss 276 (1)(h) and (i) introduced in 1991 by s 41(a) of Act 122 of 1991. CPA s 276 (1)(h) was subsequently substituted by s 20 of Act 98 of 1997.

[190] However, Terblanche (*A Guide to Sentencing* para 11.6) comments thus on the future of restorative justice: "Currently, the South African legislature appears to be fixated on using retributive justice to cure all society's ills".

[191] *M v S* paras 57-62.

[192] *M v S* para 62. Also see Skelton (2010) *SAPL* 101.

[193] 2008 1 SACR 49 (T) paras 20-25. Bertelsmann J para 20 found the application of the community's custom of an apology to the family of the deceased enabled the court to involve the community in the sentencing and rehabilitation process and to introduce the principle of restorative justice into the sentencing process.

[194] *S v Maluleke* para 26.

[195] Para 29.

[196] Para 26

The M v S and *Maluleke* cases demonstrate that restorative justice is established within the criminal justice system, particularly with regard to sentencing.[197] The complex question, however, is: When is it appropriate to apply restorative justice? Bertelsmann J cautions in *S v Maluleke* that restorative justice cannot be applied in cases where offenders have no wish to reform and continue to be a risk to society.[198] The series of cases in the *S v Seedat*[199] and *S v Thabethe* matters[200] illustrate that the answer is not without difficulty

In the *Thabethe* matter, the SCA and the High Court held strongly divergent views as to when restorative justice should be applied. The High Court found that in light of the circumstances of the *Thabethe* matter it was one "in which restorative justice could be applied in full measure in order to ensure that the offender continued to acknowledge his responsibility and guilt; that he had apologised to the victim and cooperated in establishing conditions through which she might find closure; that he recompensed the victim and society by further supporting the former and rendering community service to the latter; and that he continued to support his family."[201]

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[197] Also see *S v Shilubane* 2008 1 SACR 295 (T) para 4; *S v Mfana* Review Nr 103/2009 High Court, Orange Free State paras 8, 19-23; *S v Phulwane and Others* 2003 1 SACR 631 (T) para 9.

[198] *S v Maluleke* para 32f.

[199] *Seedat v S* [2016] ZASCA 153 ("*Seedat v S* 2016") and *S v Seedat* 2015 2 SACR 612 (GP) ("*Seedat v S* 2015").

[200] *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 2 SACR 567 (SCA) ("*DPP v Thabethe* 2011") and *S v Tabethe* 2009 2 SACR 62 (T) (note that accused's name is spelt wrongly in the report and should read Thabethe as in the SCA case)("*S v Thabethe* 2009"). In this case, Thabethe pleaded guilty to raping his life companion's young daughter for whom he had become a father-figure, shortly before her 16th birthday. Thabethe supported the family, including the victim. The victim and her mother asked that Thabethe not be incarcerated so that he could continue to support the family, including supporting the victim to finish her schooling. Of his own volition the accused had reported the case to the police and pleaded guilty to rape. He had apologised to the victim and the family; the parties had reconciled; and the victim had forgiven him and the family were living as a family again in the same household. The parties had also participated in a victim/offender mediation programme.

[201] *S v Thabethe* 2009 para 36. The High Court acknowledged the concept of restorative justice, with reference to *Dikoko v Mokhatla* paras 68 & 114, *S v Shilubane* 2008 1 SACR 295 (T) para 4; and *S v Maluleke* 2008 1 SACR 49 (T) para 52. Notably, Bertelsmann J was the judge in the *Thabethe* and *Maluleke* matters.

Bertelsmann J also found that if restorative justice is to be recognised in South Africa, it needs to be applied not only in the case of minor offences, "but also, in appropriate circumstances, in suitable matters of a grave nature."[202] Significantly, Bertelsman J supports his call to integrate restorative justice by referring to challenges in South Africa's justice system. Regrettably, he does not expand upon this.[203] He also refers to the overcrowding of the prisons – a utilitarian argument.[204]

The SCA in the *Thabethe* matter acknowledged that restorative justice has grown in "stature and impact" after a "lukewarm reception" and that restorative justice is "a viable alternative sentencing option provided it is applied in appropriate cases."[205] The SCA however cautioned against restorative justice being used in cases involving "serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society."[206] The SCA further cautioned against the use of restorative justice in inappropriate cases, believing that such use "is likely to debase it and make it lose is credibility as a viable sentencing option".[207]

Another complex issue is the weight to be given to the voice of the victim, as aptly described by Bosielo J in *DPP v Thabethe 2011*:

> "A controversial if not intractable question remains: do the views of the victim of the crime have a role to play in the determination of an appropriate sentence? If so, what weight is to be attached thereto? That the victim's voice deserves to be heard admits of no doubt. After all, it is the victim who bears the real brunt of the offence committed against him or her. It is only fair that he/she be heard on,

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[202] *S v Thabethe* 2009 para 39. Also compare *Seedat v S* 2015 paras 45-47.

[203] *S v Thabethe* 2009 para 39.

[204] *S v Thabethe* 2009 para 39. Compare *S v Shilubane* para 5. Also see the issue of possible conflation of powers in Mujuzi (2008) *SAJHR* 330-340 who contends that the courts are stepping onto the jurisdiction of the executive by reasoning that the courts need to be innovative in finding alternative punishments because of the overcrowding of prisons and the corrosive life in prisons in South Africa.

[205] *DPP v Thabethe* 2011 para 20.

[206] *DPP v Thabethe* 2011 para 20. Compare *Seedat v S* 2016 paras 38-40. Rape which the SCA found to be "a scourge or a cancer that threatens to destroy the moral and social fabric of our (South African) society" is clearly not appropriate. See *DPP v Thabethe* 2011 paras 16-17, 22; *Seedat v S* 2016 paras 39-40.

[207] *DPP v Thabethe* 2011 para 20.

> amongst other things, how the crime has affected him/her. *This does not mean, however, that his/her views are decisive*" (writer's emphasis).[208]

Although the view of the complainant is taken into consideration, this according to the SCA in the *Seedat* matter is not the only factor to be taken into account, and the court emphasised the deterrent value of sentences and held that the courts need to send clear messages to the accused and other potential offenders.[209] In addition, the object of sentencing was to "serve the public interest"; and criminal proceedings had to instil public confidence in the criminal justice system, thereby highlighting the purpose of credibility of the sentencing process.[210]

The status and role of the victim is addressed in *S v Matyityi.*[211] The SCA found that the penal policy, also with regard to the sentencing process, should be victim-orientated, basing its view on the UN Declaration of the *Basic Principles of Justice for Victims of Crime and Abuse of Powe*r and the *Service Charter for Victims of Crime* in South Africa; each of which grant a victim a right to participate in the sentencing process and furnish the court with information.[212] In addition, the SCA relied on restorative justice which emphasises "that a crime is more than the breaking of the law or offending against the State – it is an injury or wrong done to another person."[213] Furthermore, the Court emphasised the constitutional value of human dignity and the need to reaffirm and vindicate "our collective sense of humanity and humanness".[214] Importantly, the Supreme Court gave this balanced essential view:

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[208] *DPP v Thabethe* 2011 para 21; *Seedat v S* 2016 para 38.

[209] *Seedat v S* 2016 para 39.

[210] *Seedat v S* 2016 para 39. Notably, the public is described as including persons "close to the accused and those distressed by the audacity and horror of the crime".

[211] 2011 1 SACR 40 (SCA) ("*S v Matyityi")*. The need for the voice of the victim to be heard is acknowledged in *DPP v Thabethe* 2011 para 21, but as shown above is not considered to be decisive, particularly in view of the seriousness of the offence and the interests of the public.

[212] *S v Matyityi* 2011 para 16.

[213] *S v Matyityi* 2011 para 16. The Supreme Court based this on the SA Law Commission Discussion Paper 7 *Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)* (1997).

[214] *S v Matyityi* 2011 para 16.

> "By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim… By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality, rather than harshness."[215]

The SCA thus underlines the need to hear subjective evidence regarding the impact and aftermath of the crime. Such evidence may include information on the physical and psychological harm experienced by the victim, as well as the social and economic consequences the crime caused and is likely to cause in the future.[216] It is submitted that this victim-orientated view which includes the voice of the victim during the sentencing process is more extensive and more encompassing than the usual evidence in aggravation of sentence.

It is submitted that the application of restorative justice principles by the judiciary as illustrated above has significantly influenced the development and integration of restorative justice into the South African justice systems. It is no longer business as usual. It is further submitted that the triad of the crime, the criminal and the public, has certainly been squared by the victim, hitherto the missing quadrant, in the sentencing process.[217]

It is also submitted that instances of economic crime need to be distinguished from instances of rape, and in this regard reliance is placed on the emphasis of Sachs J in *M v S* regarding the purposes of correctional supervision as being to distinguish between two types of offenders: "those who ought to be removed from society and imprisoned and those who, although deserving of punishment, should

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[215] *S v Matyityi* paras 16 and 17.

[216] *S v Matyityi* para 16.

[217] KD Müller and IA van der Merwe "Squaring the Triad: The Story of the Victim in Sentencing" (2004) 6 *Sexual Offences Bull* 17-24.

not be so removed".[218] Reliance is also placed on the reasoning of Bertelsmann J that restorative justice should be applied not only to minor offences, "but also, in appropriate circumstances, in suitable matters of a grave nature".[219] It is submitted that instances of serious economic crime could present such appropriate circumstances.

Restorative justice has also been raised in several cases relating to parole. Regarding the position of a victim's family, Satchwell J found that no victim should ever be compelled to participate in a restorative programme, or be obliged to "interact with, meet with, communicate or engage with – and certainly not forgive – the offender".[220] This is significant and essential. It is agreed that no person should ever be obliged to participate in any restorative justice programme. The question now arises what about court mandated mediation? May a victim or a victim's family refuse to participate in court mandated mediation? Despite advocating for mediation and court-mandated mediation, it is agreed that a victim or a victim's family member should not be compelled to participate in a mediation. Essential to the mediation process is the voluntary participation of the parties, and the desire of each of the parties for resolution of the issues. Mediation can only be a credible process, if all the parties are able to participate, albeit reluctantly.[221] However, it will not be in the true nature of mediation to obligate parties, who simply do not want to participate, to do so. The core characteristics of mediation will be diminished should any one party be compelled to participate.[222]

In addition, Satchwell J held that a victim or a victim's family member should never be burdened with the responsibility regarding the continued incarceration of an offender.[223] Inversely put: a victim or victim's family member should not be burdened with the responsibility of being party to the imprisonment or sentencing of the

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[218] *M v S* para 58. See also the conclusions in ch 4, para 4 5, 365-366.

[219] *S v Thabethe* 2009 para 39.

[220] *Kelly v Minister of Correctional Services* 2016 (2) SACR 351 (GJ) para 47.

[221] Also see the discussion above in ch 2, para 2 2 2, 40-42.

[222] It should be noted that a party may over time change their stance. Healing, in particular the healing of a victim or a victim's family member is not static and occurs in various stages over a period of time. Thus it may be possible, that someone may at one time refuse to participate and at another time agree to do so.

[223] *Kelly v Minister of Correctional Services* 2016 2 SACR 351 (GJ) para 47.

offender. In short, if they do not wish for their voice to be heard, they should not be compelled to make their voice heard. However, equally so, no victim or victim's family member should ever be denied the opportunity to have their voice heard and to participate in the sentencing or post-sentencing processes.

Ebersohn AJ has made startling and self-explanatory comments on restorative justice. In a matter where the applicant was applying to court to have his delayed parole reviewed, Ebersohn AJ stated:

> This so-called restorative justice concept is a fabrication of a process whereby it is required of a prisoner to make peace with the family of the victim, …. The whole process is an illegal concoction undermining the rights of prisoners to be released on parole when they legally qualify for it."[224]

In a similar matter in the same jurisdiction, Keightley AJ[225] came to another conclusion regarding restorative justice and found that "considerations of restorative justice must be accepted as forming an inherent and underlying component of any parole process".[226] He based his view on the binding authority of the Constitutional Court in *Van Vuren v Minister of Correctional Services* that held:

> "Restorative justice, in our jurisprudence, is linked to the foundational value or norm of *ubuntu-botho*. It is a value that recognises – in the context of this case – that to rehabilitate an offender sentenced to life incarceration to a position where he or she is repossessed of the fuller scope of his or her rights, is to recognise the inherent human dignity of the individual offender. Evidently from the departmental release and placement policy, parole has a restorative-justice aim. It is aimed at the eventual rehabilitation and reconciliation processes of the

[224] Ebersohn AJ *Gwebu v Minister of Correctional Services and Others* 2014 1 SACR 191 (GNP) para 5. Ebersohn AJ also held in *Botha v Minister of Correctional Services and Others* (GP case No 29765/08 10 March 2009) that restorative justice processes are not obligatory in parole cases. Regrettably the judgment in the *Gwebu* case is very brief and Ebersohn AJ does not expand or explain his enigmatic view on restorative justice.

[225] *Barnard v Minister of Justice, Constitutional Development and Correctional Services and Another* 2016 1 SACR 179 (GP). In this case the applicant applied for a review of the Minister's decision denying him parole. Part of the Minister's reasons for such denial was that the applicant needed to participate in restorative justice programmes and attempt contact with members of the deceased victims' family. Barnard, based on two decisions by Ebersohn AJ who held that restorative justice is not compulsory for the granting of parole, applied for the Minister's requirements of restorative justice to be ruled invalid.

[226] *Barnard* case para 67.

> offender – themes that underpin restorative justice. Importantly, all these interests must be balanced against those of the community, which include the right to be protected against crime". [227]

Importantly, in neighbouring Lesotho the Court of Appeal in *R v Mochebelele* [228] held that restorative justice cannot be applied in a case of bribery, where the briber and bribee are equally guilty.[229] This echoes the centuries old *in pari delicto* maxim. Describing restorative justice as the need for the offender, in an appropriate case, to make restitution or pay compensation to his victim for the harm that he has suffered at the hands of the offender, the court concluded that in an instance of bribery both parties are equally guilty and there could be no question of the one re-compensating the other, or in this case the bribee repaying the briber.[230]

From these series of cases it can be concluded that the application of restorative justice remains difficult and complex to apply in criminal matters. Although restorative justice has been acknowledged by the Constitutional Court and the SCA it has been applied sparingly. Restorative justice is approached with great caution by the judiciary.[231] In addition, restorative justice as a sentencing option is not to be applied over zealously and is not appropriate for "serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding citizens and right-thinking members of society."[232]

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[227] 2012 1 SACR 103 (CC) para 51, followed by Keightley AJ in the *Barnard* case para 66.

[228] 2010 1 SACR 577 (LesA). This is another case of economic crime, in which the two accused, who were employed in positions of trust and involved in the Lesotho Highlands Water Project, were found guilty of accepting bribes from Lahmeyer International GmbH over a period of time.

[229] *R v Mochebelele* para 17.

[230] *R v Mochebelele* para 17.

[231] Notably, judgments promoting restorative justice have been made by a number of judges, including Sachs J and Mokgoro J, now retired Constitutional Court judges. Other judges Bertelsmann J and Bosielo J integrate restorative justice principles into their sentencing deliberations, although, in some instances their judgments have been set aside by higher courts. L De Klerk (*The Role of The Victim In The Criminal Justice System: A Specific Focus on Victim Offender Mediation and Victim Impact Statements* LLM Thesis, University of Pretoria [2012]) 44 makes similar observations after discussing a number of South African judgments.

[232] *Thabethe* (2011) para 20, followed by *Seedat v S* (2016) para 38.

It is also submitted that restorative justice is more than just a "sentencing option" as is implied by the SCA,[233] but a broad and complex legal concept that should be integrated into the sentencing process. It is not a concept that stands contrary to the entrenched triad of the circumstance of the accused, the nature of the offence and the interests of the public, but should be read with it. Neither does restorative justice prohibit a sentence of imprisonment. It is not denied that some offences may be of such a serious and repulsive nature that an appropriate and just sentence includes incarceration. However, integrating restorative justice principles into the sentencing process may mean that part of such a sentence be suspended and the remaining part be conditional on some form of compensation being paid.

Acknowledgment is also given by the courts to the voice of the victim in the sentencing process but it cannot be decisive. Although this acknowledgement is welcomed, it would seem that not enough weight is given to the voice of the victim.[234] It is submitted that the voice of the victim should not be a lone voice, but should be heard along with those of the public, the state and the perpetrator. It is submitted that the process of mediation will enable all these voices to be heard properly and ensure that there is no power imbalance.

3 5 Restorative justice and mediation as a restorative justice process

> "Restorative mediation is not an alternative form of justice but a valuable addition to the current criminal justice process which can successfully be used for males and females, young and adult offenders, across racial, ethnic and social class groups and for both property and violent crimes. It focuses on caring, dialogue, forgiveness, reconciliation, accountability and reintegration, and the community plays a crucial role in the mediation process."[235]

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[233] *Thabethe* (2011) para 20.

[234] This is shown in the trial court of the *Seedat* case where the prosecution did not echo or include the victim's voice and her request for financial compensation in the argument for sentencing. See *Thabethe* (2011) para 15.

[235] B Naude, J Prinsloo & A Ladikos "Protocol and Ethical Guidelines on Restorative Mediation" (2003) 16 *AC* 23.

It is strongly submitted in this dissertation that mediation in the context of resolving economic crime is a restorative justice process.[236] This submission is founded upon the links and overlaps between the characteristics of mediation and restorative justice. In particular, they both make provision for participation by all the stakeholders, party autonomy, consented resolutions, accountability and an informal and flexible process that allows dialogical engagement and a safe and non-threatening space.[237] The submission is also based on the strong success of victim-offender mediation processes in different jurisdictions which aim at encouraging offenders to take responsibility for their actions and to participate in the dispute resolution; supporting victims in encountering the offender (on a voluntary basis), supporting their healing process and granting them the opportunity of participating in the dispute resolution process; facilitating and enabling a process that is empowering and satisfying; focusing on the dispute between the victim and the offender and facilitating an acceptable settlement agreement in the dispute that may include reparation, including monetary restitution for the victim.[238]

In the mediation process each party, in this case it would be the complainant and the offender, have an opportunity to be heard. In the instance of the complainant, presumably the victim, the opportunity would be given in a safe and non-threatening

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[236] Skelton (2010) *SAPL* 95. Tshehla (2004) *SACJ* 16. See also Sachs J in *M v S* para 59 identifying victim-offender mediation and family conferencing as "prominent forms of restorative justice". It is submitted that mediation is also the process upon which the (New Zealand) *Principles of Best Practice for Restorative Justice Processes in Criminal Cases* is based. Available at <https://www.justice.govt.nz/assets/Documents/Publications/RJ-Best-practice.pdf>. Mediation, together with conciliation, conferencing and sentencing circles are specifically described as restorative processes by the United Nations Commission on Crime Prevention and Criminal Justice, ECOSOC Resolution 2002/12 Annex, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, para I.2., 40-41.

[237] These issues are discussed in detail in section 2 4 above and only summarised here. Also see MW Bakker "Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System" (1994) 72 *NCL Rev* 1479 1500. Compare Clear et al *Community Justice* 80-81 who simply hold that various forms of mediation, like victim-offender mediation, family group conferencing and circle conferencing, are versions of restorative justice.

[238] See Dignan *Understanding Victims* 111-115, 136-139 for a general discussion and evaluation of the application of victim-offender mediation processes.

space to face the offender.[239] The victim has the opportunity to confront the offender, ask questions, receive answers, express emotion, request restitution and proceed on the journey of gaining restoration.[240] Restoration may be monetary by way of compensation being paid, but it may also simply be emotional such as feeling validated through an admission or apology by the offender.[241] Significantly, the victim plays a far more active role than that which the classical criminal adversarial trial permits. Not only are the victims able to tell their stories, but they are also able to participate in the sanctions to be imposed upon the offender, and have the opportunity to seek restitution. Inevitably, such a participatory role leads to victims feeling more satisfied with the way in which the justice system has treated them.[242]

Offenders too have been shown to benefit from mediation programmes in the criminal justice system.[243] Accountability is key and the acknowledgment of her or his wrongdoing, and the effect it has had on the victim and others is likely to contribute to the rehabilitation of the offender.[244] It has also been shown that offenders are more likely to comply with conditions of their sanctions, including payment of compensation if they personally and actively participate in concluding such sanctions.[245]

Another key principle in this dissertation is the role of the community. The need for community participation in combating economic crime, including prevention and sanction, has been demonstrated through the fundamental constitutional principle of *ubuntu*. The magnitude and depth of economic crime in the South African economy can simply not be addressed by the state alone. In a mediation process, where the voice of the public can be heard and the public can also actively participate in the resolution, benefits not only will accur to the victim and offender, but also to the state

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[239] It is acknowledged that in some instances the mediation may proceed through side-meetings, and thus there may not be an actual face to face meeting.

[240] Bakker (1994) *NCL Rev* 1500.

[241] Bakker (1994) *NCL Rev* 1500-1501.

[242] Research has also shown that victims, subsequent to mediation feel they have more closure about the offence, less fearful of being re-victimised by the offender and the system. Bakker (1994) *NCL Rev* 1502.

[243] Bakker (1994) *NCL Rev* 1502.

[244] This includes a positive change in attitude, a lower recidivism rate and satisfaction with the mediation process and outcome. Bakker (1994) *NCL Rev* 1502.

[245] Bakker (1994) *NCL Rev* 1502-1503.

and promote the sense of justice of the community itself.[246] In addition, the community can through collaboration and partnerships contribute its skills and expertise in providing mediation or other restorative justice practices and services.

It is furthermore submitted that the justice systems, both criminal and civil, also benefit from the mediation process in the criminal justice system. Direct benefits include faster and less expensive resolution of offences.[247] Restorative settlement agreements incorporating suspended or lesser imprisonment sentences will also lighten the burden on the prisons. The satisfactory experiences of the parties involved in a mediation process enhance the perceptions of the public that the formal justice system is fair and just, thereby strengthening its credibility and efficacy.

As shown above in section 2 4 these outcomes of mediation in the criminal justice system are not only restorative in nature, but they also illustrate the core principles of restorative justice.

3 6 A restorative and participatory system

Serious economic crime is disruptive and destructive. It disrupts economic growth and the socio-economic harmony of a community. It causes harm, multi-lateral harm to the victim, the victim's dependants and family, to the community and the economy.[248] It also harms the offender. Consequently, it is submitted that multi-lateral restoration is required:[249] restoration for the offender, the victim and the crime. It is further submitted that the conventional adversarial system is not structured to offer such restoration on its own. Classical courts are impartial and detached from the parties affected and from their interests.[250] In the conventional adversarial confrontational trial system the state and offender spar against one another. The

[246] Bakker (1994) *NCL Rev* 1503.

[247] Bakker (1994) *NCL Rev* 1503-1504.

[248] Clear et al *Community Justice* 78, also 101. Such loss is both social and economic, being a loss in trust and a tangible financial loss.

[249] Clear et al *Community Justice* 80-81.

[250] Clear et al *Community Justice* 61-63 contend that such detachment is due to the operation of courts being strange and impersonal to the offender and the victim, the value of independence and impartiality required from a presiding officer and the somber and formal physical space of a courtroom,

victim's primary function is to testify and the court is not always aware of or sensitive to the needs of the victim.

It is the submission in this dissertation that the dichotomy of retributive and restorative justice principles and processes is not sustainable and that a more nuanced and integrative system is required.[251] Indeed, the two systems have much in common, including disclosure of the truth, ascribing responsibility to the offender, securing proportionality and fairness with regard to the sanction, seeking credibility with the community and broader public and participation and cooperation by the victim. Serious economic crime remains an issue of public importance, and the state remains uncontestably responsible for crime control. Likewise, the state is not alone responsible for crime control, the community is also responsible. Equally true is that the victim is inarguably the party that suffers direct loss and harm. Criminal justice systems should be participatory for all stakeholders, the state, the offender, the victim and the community. The criminal justice system should also be reparative on multiple levels and to multiple stakeholders. Cross-pollination between the classical retributive and restorative justice systems should occur and it is submitted that restorative justice practices should be further integrated into the formal criminal justice system.[252] The proposal of this dissertation is that mediation, a restorative justice practice, should be formally introduced into the criminal justice system to help address instances of economic crime.

It is acknowledged that a concern is that participatory dispute resolution in respect of instances of economic crime, particularly the participation of the offender and

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[251] Doak & O'Mahony ((2006) *Int Rev Vic*) 173-174 and Obarrio ("Traditional Justice" in *Peacebuilding and Rule of Law*) 39-41 advocate a unitary model in the criminal justice system in which the principles of restorative justice are accommodated in and harmonised with the conventional formal system. Also see Woolford & Ratner *Informal Reckonings* 9-10, 65-90, 118-119, 124-131 who show that restorative justice has become fragmented through the various applications and use of restorative justice by communities and the state. They contend further that this fragmentation has led to the integral connection of restorative justice with the formal justice system and such confluence actually "*degrades* the communicative and transformative potential" of restorative justice. Accordingly, they call not for an integration or mainstreaming, but for restorative justice to be an "*informal justice counterpublic*", in the public domain, but persistently countering it.

[252] Provisions in plea and sentencing negotiations and parole hearings in South Africa that provide for participation by the victim are an example of this.

victim in the determination of the sanction, could lead to different solutions, that is different sanctions for similar crimes, because the parties are different and the process informal. This in turn means offenders and victims may not be treated equally and consequently raises constitutional concerns of equality and proportionality. It is submitted that the introduction of regulatory standards will help to alleviate these concerns. In addition, and also because of the public nature of economic crime, it is further submitted in this dissertation that any mediated settlement agreement with regard to an economic offence be presented to the court for judicial approval. It is submitted that this will ensure consistency in sanctioning. The mediated settlement agreement will also become part of the formal jurisprudence. The introduction of mediation will not only ensure the further integration of restorative justice into the criminal justice system, but grant an opportunity for all stakeholders to participate in and reach a just and satisfactory resolution for instances of economic crime.

> "If the courts can benefit from fewer hearings, if communities can benefit from a greater measure of self-help through private dispute resolution, if matters can be expedited more cheaply and effectively, then there is much to be said for arbitration and mediation as a 'better way'."[253]

[253] Scott-Macnab & Khan (1985) *SACC* 128.

CHAPTER 4
MECHANISMS ADDRESSING ECONOMIC CRIME IN JUSTICE SYSTEMS

Chapter overview

4 1 Introduction: Mechanisms addressing economic crime in justice systems

This chapter discusses a number of mechanisms, both in the civil and the criminal justice systems that are used to address instances of economic crime. The primary focus of this dissertation is introducing mediation as an additional mechanism with which economic crime may be dealt with in the criminal justice system. The proposal cannot be fully understood unless a brief overview is given of the context of corporate regulation and mechanisms within the justice systems to deal with instances of economic crime. This is necessary because of the multi-pronged and hybrid approach to corporate regulation and enforcement of such regulation.

Contemporary corporate operations are complex and law reformers need to develop appropriate rules and sanctions to regulate corporate conduct.[1] In a highly regulated business sector many violations, some of which may constitute criminal offences, arise from contraventions of regulations. Consequently, the nature of economic crime today is broader and more complex than the classical common-law offences against property. The responses and remedies to instances of economic crime are similarly complex, and the boundaries between criminal and civil resolution of such crimes at times overlap and become blurred.[2]

Garret concludes that no country can claim to have found the ideal approach to corporate sanction and prosecution.[3] This is true, and may always be true as both the nature of corporate crime and the nature of the response to it is continually changing. It remains, and is likely to remain a complex and controversial field of dynamic hybrid law. This conclusion is endorsed by a meta-analysis of approaches to corporate crime recently published by Schell-Busey and others, which though

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[1] R Tomasic “Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Decriminalization Solutions” (1992) 2 *AJCL* 82 106.

[2] For example, administrative penalties are imposed by administrative bodies without the involvement of the courts to hold companies and persons responsible for corporate crime. This is evidenced by the administrative actions and decisions of bodies such as the SEC in the United States and ASIC in Australia. Also, a statutory administrative body such as the FAIS Ombud in South Africa has the power to order restitution, a remedy equal in force and effect as a judgment in the civil court.

[3] B Garret “The Global Evolution of Corporate Prosecutions” (2017) 11 *LFMR* 55 59.

provisional, shows that a multifaceted approach is the most effective.[4] It is finding the right mix, and the correct balance between persuasion and punishment that remains elusive.[5]

In this complex field of corporate regulation the efficacy of Ayres and Braithwaite's pyramid of responsive regulation and resolution[6] is underscored. It is agreed that "the trick to successful regulation is to establish a synergy between punishment and persuasion".[7] The authors contend:

> "To adopt punishment as a strategy of first choice is unaffordable, unworkable, and counterproductive in undermining the good will of those with a commitment to compliance. However, when firms which are not responsible corporate citizens exploit the privilege of persuasion, the regulator should switch to a tough punitive response."[8]

A key principle in the responsive regulation pyramid is the existence of an upward gradient as this is the most effective deterrent. Companies which are compliant and have the good will and corporate culture of compliance will implement training and self-regulation positioned at the base of the pyramid. Indeed, the very existence of the pyramid, and an upward gradient leading towards punishment is likely to channel most regulatory action to the base of the pyramid. This is so, because even companies who may not initially be compliant will be persuaded to implement self-regulation and training as the costs of sanctions for non-compliance, higher up the

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[4] N Schell-Busey, SS Simpson, M Rorie & M Alper "What Works? A systematic review of corporate crime deterrence" (2016) 15 *Criminology & Public Policy* 387 406-408. The researchers themselves warn of the provisional nature of the research due to the paucity of empirical research of the sanctioning of corporate crime.

[5] J Braithwaite "In Search of Donald Campbell Mix and Multimethods" (2016) 15 *Criminology and Public Policy* 417 418; PC Yeager "The Elusive Deterrence of Corporate Crime" (2016) 15 *Criminology and Public Policy* 439 446-448.

[6] The concept responsive regulation originates from a work of Ayres and Braithwaite *Responsive Regulation* in the early 1990's and has since been refined and expanded by Braithwaite. See I Ayres & J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (1992).

[7] I Ayres & J Braithwaite *Responsive Regulation* (1992) 25.

[8] Ayres & Braithwaite *Responsive Regulation* 26. For a description of the principles of the pyramid of responsive regulation see Ayres & Braithwaite *Responsive Regulation* 35-39.

gradient, persuade them to do so.[9] And should administrative penalties not be a sufficient deterrent, then criminal prosecution may be appropriate. In short, responsive regulation responds to the degree of compliance, or conversely non-compliance, by a company.[10] Although an underlying principle of the synergy of persuasion and punishment is to start at the base of the pyramid with training and education, it may be necessary to jump to the peak in a case of an uncooperative and stubborn offender.[11] The core characteristic of responsive regulation, namely that a regulator can respond to a particular situation with a particular remedy is only effective if the regulator is a "benign big gun".[12] It is being able to alternate between persuasion and punishment that make responsive regulation effective.

It is submitted that the pyramid of responsive regulation for contravention of statutory misconduct is more effective than a binary approach of punishment or persuasion.[13] It is suggested that the concept of a pyramid of responsive regulation assists in portraying the complexity of corporate misconduct, both in the regulation of corporate conduct and in the enforcement of such regulation. In this chapter, a

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[9] For a discussion of enforcement pyramids and a critical challenge on the rational motivation of compliance see S Bronitt & A D'Amico "Fighting Cartels and Corporate Corruption – Public versus Private Enforcement Models: A False Dichotomy" (2018) 37 *U Qld LJ* 69 72-76.

[10] Responsive regulation is contextual. It responds to a particular situation in a particular way (so-called "tit-for-tat" strategy) and depends on the context, regulatory culture and history of a specific situation. See Ayres & Braithwaite *Responsive Regulation* 5, 19-20; DK Smith "A Harder Nut to Crack – Responsive Regulation in the Financial Services Sector" (2011) 44 *UBCL* 695 700, 711.

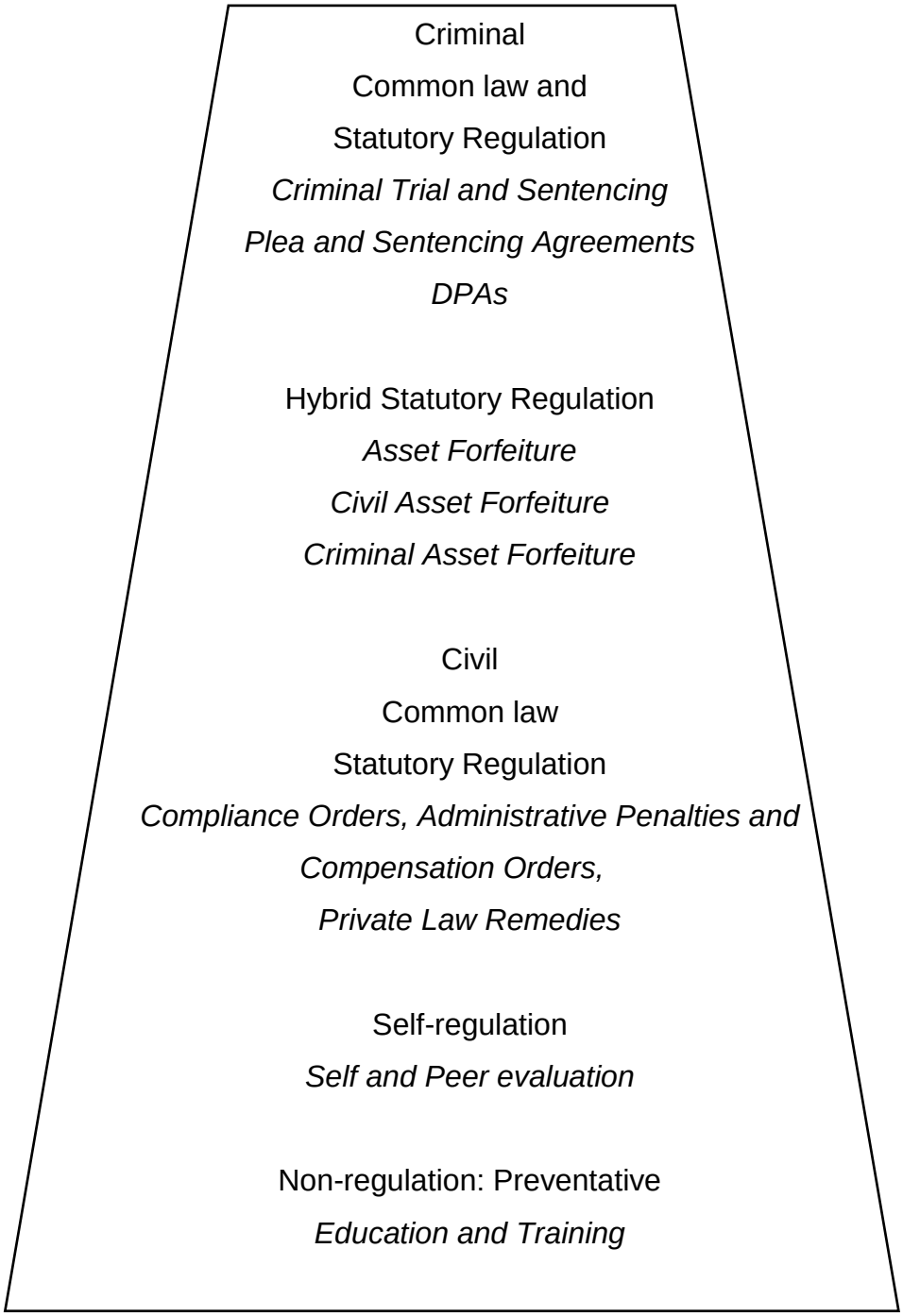
[11] Responsive regulation is based on optimistic rationality, namely that firms and officers want to comply with regulations and reluctant compliers will calculate the risk of non-compliance. However, responsive regulation is not naïve and consequently it may be necessary to respond with severe punishment to a recidivist or irrational player. See Smith (2011) *UBCL* 695 701-702. Also see Ayres & Braithwaite (*Responsive Regulation* 20-35) on mixed motives for compliance

[12] This means that the regulator needs the armoury with which enforce regulation, the tougher the enforcement mechanisms, or the higher the apex the more effective the regulator will be in securing compliance, and the less likely it will be required to fire any shots. In Ayres' & Braithwaite's memorable words: "Regulatory agencies will be able to speak more softly when they are perceived as carrying big sticks". Ayres & Braithwaite *Responsive Regulation* 6, 40-41.

[13] Ayres & Braithwaite *Responsive Regulation* 37.

pyramid of responsive regulation and resolution will be used to illustrate a number of different mechanisms used in justice systems to address economic crime.

Figure 2 Pyramid of responsive regulation and resolution



The base of the pyramid is the sector of prevention and non-regulation. The foundational principle for addressing economic crime is to prevent it. Part of the practice of prevention comprises the mechanisms of training and education. These mechanisms will be referred to in paragraph 4 2 2 2 below in the discussion of corporate compliance and enforcement, with specific reference to the functions of the Companies and Intellectual Property Commission ("CIPC").[14] Above the base-sector of non-regulation and education is another preventative measure, corporate self-regulation.

The mechanism of self-regulation is embodied in corporate South Africa in the self-regulatory principles, policies and practices of the King Report series, a series of governance codes, initiated by the Institute of Directors in Southern Africa ("IoDSA") that have shaped and deeply influenced the culture of corporate South Africa since the advent of the new democracy in 1994.[15] The King Reports are strongly supported in South Africa and are relevant as their aim is good corporate governance, a mechanism to prevent economic crime.

Administrative bodies are another mechanism used in combating contraventions of corporate regulation. A brief discussion will be devoted to the FAIS Ombud operating in the financial sector. The relevance of this mechanism relates to both the scope and the nature of its operations. Within the scope of its authority the FAIS Ombud has the power to order restitution of money lost due to contraventions of

[14] 179ff.

[15] Institute of Directors in South Africa ("IoDSA") *King Report on Corporate Governance for South Africa 1994* ("*King I 1994")* was released in 1994. It is primarily based on the United Kingdom's *Cadbury Report* (*Report of the Committee on the Financial Aspects of Corporate Governance*) (1992). The IoDSA *King Report on Corporate Governance for South Africa 2002 ("King II 2002"*) came into operation in 2002. During 2008-2009 *King II* was reviewed to incorporate the provisions of the draft *Companies Act* 2008 and the third *IoDSA King Report on Corporate Governance for South Africa* was consequently released in 2009 ("*King III 2009"*) and the IoDSA *King Report on Corporate Governance for South Africa 2016* ("*King IV 2016"*) was released in December 2016 and became effective on 1 April 2017. Comparable corporate governance codes to the South African *King Reports* are the *Australian Stock Exchange ("ASX") Corporate Governance Principles and Recommendations* (4 ed)(2019) and the *UK Corporate Governance Code* (2019); and the *Nigerian Code of Corporate Governance* (2018). See too I Esser "The Protection of Stakeholder Interests in terms of the South African King III Report on Corporate Governance: An Improvement on King II" (2009) 21 *SA Merc J* 188 189-191, 195-196.

financial regulations. This sometimes occurs in the context of a pyramid scheme, which may result in criminal liability for the orchestrators of such scheme. The nature of the office of an ombud[16] is significant, as it is informal and flexible. It offers a non-adversarial way in which to resolve contraventions, potentially including serious contraventions, of financial regulations.

Another mechanism under the civil justice system is civil legislation regulating corporate and commercial relationships in South Africa. A discussion of relevant aspects of the Companies Act 71 of 2008 ("the Companies Act 2008") is imperative. Several jurisdictions have seen significant reform in company law and in financial services law during the past two decades.[17] Most have followed the approach to decriminalise certain conduct previously prescribed as criminal offences under company law and have adopted a hybrid and enabling approach, in preference to a predominantly penal approach.[18] Brief attention is given to the decriminalisation of such conduct in the South African Companies Act with reference to the retained criminal liability of corporate entities and their officers, including the provisions of section 214 of the Companies Act. Attention is also given to CIPC, an administrative body created to ensure compliance and enforcement of the provisions of the Companies Act. It is shown that CIPC could and should play a bolder role in the South Africa corporate regime, similar to the authoritative role filled by the Australian Securities and Investments Commission ("ASIC"). The mechanisms of monitoring and enforcement are equally important to the mechanism of regulation. Therefore, the selected powers of CIPC and the introduction of alternative disputes resolution mechanisms into chapter 7 of the Companies Act 2008 are discussed. A comparative overview is given of the powers of ASIC, with particular attention to its powers to investigate suspected misconduct and impose penalties. This is an

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[16] This term is discussed below in para 4 1 3. In this dissertation, the gender neutral word "ombud" or ombudsperson" will be preferred (see fn 198 below).

[17] Department of Trade & Industry ("DTI") *Policy Document of the Department of Trade and Industry The Guidelines for Corporate Law Reform, South African Company Law Reform for a 21st Century* (2004) 14.

[18] J Folson "South Africa Moves to a Global Model of Corporate Governance but with Important National Variations" (2010) *AJ* 219 219-220. See the discussion in para 4 2 2, 167ff below.

illustration of a hybrid mechanism as the nature of the administrative body and the scope of its powers include principles of both the civil and criminal law.[19]

Hybrid mechanisms, which incorporate characteristics from both civil and criminal law, are higher up the pyramid and are discussed in the second part of chapter 4. The complexity, risk and value of hybrid mechanisms in the field of corporate economic crime are demonstrated through the mechanisms of criminal and civil asset forfeiture. Depriving an offender of the proceeds of crime is an effective way to deal with economic crime. Moreover, confiscated or forfeited property may be appropriated to contribute towards the restitution of the loss incurred by the victims of crime. In this regard, chapters 5 and 6 of the Prevention of Organised Crime Act 121 of 1998 ("POCA") are discussed to illustrate these powerful mechanisms.

As shown in chapter 1, the concept of economic crime is wide and diverse, including not only common-law offences of crimes against property, such as theft and fraud, but including an ever growing body of statutory offences. Combating economic crime is complex because the nature of economic crime is complex. Consequently, not all instances of economic crime may require to be resolved through the narrow, yet concentrated principles of criminal law that apply in an adversarial trial court. There are other mechanisms outside the trial court that may deal with economic crime effectively. The aim of the third part of chapter 4 is to discuss a selected number of mechanisms that illustrate the development of alternative additional mechanisms to the classic criminal trial under the criminal justice system.

The mechanism of deferred prosecution agreements, commonly referred to as DPAs will be described. The focus will be on the informal DPA mechanism operative in the Unites States, as well as on the statutory DPA system in England. Again, the objective is not only to demonstrate the working of an additional mechanism with which economic crime can be addressed, but also to extrapolate principles from such mechanisms to use as building blocks for the mechanism of mediation. The mechanism of plea and sentencing agreements is entrenched in the United States and is a fast growing mechanism in South Africa. This mechanism will be discussed

[19] Hybrid mechanisms are located in the middle of the pyramid.

at some length as it is considered that many issues that relate to plea and sentence agreements will be equally relevant to the mechanism of mediation.

Finally mechanisms under the Criminal Procedure Act 51 of 1977 ("CPA") that make provision for the payment of compensation to victims will be discussed. The issue of restitution for loss arising from economic crime is a critical thread in this dissertation. Consequently, the amplification of the use of mechanisms providing opportunities for restitution needs to be underscored.

An important thread throughout chapter 4 is choosing an appropriate mechanism to enforce a particular regulation. In short, it is not only about responsive regulation, but also responsive resolution. The manner in which economic crime is resolved needs to be responsive, appropriate to the particular circumstances.

The chapter concludes with a summary of the different mechanisms that emphasise their role in the integrated mix of multi-mechanisms used by the authorities and companies themselves to combat economic crime. Special issues that relate to the submissions made in this dissertation to use mediation as a mechanism to resolve instances of economic crime are highlighted. The principles of the mechanisms discussed are used to build the proposed alternative mechanism of mediation in the criminal justice system.

4 2 Mechanisms in the civil justice system

Corporate governance and its supervision is one of the mechanisms use to combat economic crime, particularly with regard to corporate misconduct and crime. South Africa has a mixed approach to corporate governance and accountability by corporate institutions, their governing bodies, officers and shareholders. A mixed approach includes self-regulation by a firm or by an industry. Also, the legislature and executive use regulatory mechanisms, together with common-law principles, to control and enforce the accountability of corporate institutions and their directors and employees.[20] This hybrid approach to corporate governance includes various fields

[20] In his article discussing sanctions of corporate conduct and the recommendations of several enquiries into corporate law in Australia, Tomasic (1992) *AJCL* 82-114 points out how difficult it is to get the right mix – the appropriate hybrid package of sanctions. The legislature seems to swing between criminalisation and decriminalisation. He also points out the different approaches and responses of the different role-players, including regulatory

of law, including company law, contract law, labour law, law of delict, financial services law and criminal law.[21] Moreover, there is a continual interaction between public and private law with regard to both the regulation of corporate governance and its enforcement.[22] Likewise, the remedies may also lie in private and public law, comprising, for example, personal liability for damages in the law of contract or delict; administrative and penal sanctions under statutory law; or criminal measures such as fines or imprisonment under public law.

In the regulation of the corporate sector two principles are in tension with one another. On the one hand there is the need for regulations to secure the protection of investors, and on the other the need for sufficient freedom for promotion of modern corporate operations.[23] Often regulatory reform is reactive, in response to some or other scandal in the corporate domain.[24]

Self-regulation as a preventative measure is indispensable in a multi-faceted approach to combat economic crime. Self-regulation may include internal measures put into place by a company itself;[25] or external measures by a particular industry,[26] or by other important bodies within the relevant trade;[27] or by the legislator.[28] In

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bodies, the prosecuting authorities, the judiciary, the legislature and the public, which highlights the complexity of the issue.

[21] E Wymeersch "The Enforcement of Corporate Governance Codes" (2006) 6 *JCLS* 113 116.

[22] Tomasic (1992) *AJCL* 84 rightly points out that a distinct dividing line between civil and criminal sanctions is not always evident, particularly with regard to corporate conduct and misconduct.

[23] Compare the purposes of the Companies Act 2008 in s 7(b), (j) and (l).

[24] KJ Hopt "Modern Company and Capital Market problems: Improving European Corporate Governance after Enron" (2003) 3 *JCLS* 221 221-222.

[25] For example, internal company monitoring and audit protocol and system.

[26] For example, Johannesburg Stock Exchange Listing Requirements. See N Smith "The JSE Limited Listing Requirements" (25-05-2017) *LexisNexis* Bulletin 1 of 2017 1-4.

[27] For example, ISO 37001 is a new anti-corruption international standard aimed at certifying a company as bribery-free, introduced by the renowned and established International Organization for Standardization (ISO) to encourage corporations to apply for certification of ISO 37001. See N Keith & C Oliver "ISO37001: The New Anti-Corruption International Standard" (23-06-2017) *White Collar Post* (accessed 03-11-2017).

[28] For example, internal monitoring bodies such as the Social and Ethics Committee ("SEC") and the Audit Committee ("AC") are prescribed by ss 72(4)-(10) read together with reg 43, and s 94 read together with reg 42, of the Companies Act 2008, respectively. The SEC is

addition, external monitoring bodies measuring corporate governance also play a role. Examples of these are the PIC Corporate Governance Rating Matrix in South Africa,[29] and the innovative Corporate Governance Rating System ("CGRS") in Nigeria that measures corporate compliance, fiduciary awareness and corporate integrity of companies.[30]

It is a matter of concern that corporate self-regulation seems to be decreasing, despite an increase in corrupt activities within corporations.[31] However, corporate South Africa has since the new political dispensation, commenced a new chapter in corporate governance with the introduction and endorsement of the King Reports on Corporate Governance.[32]

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obligated to report to the board and to shareholders at the AGM about a range of issues, including social and economic development and good corporate citizenship. For discussion on the role of the SEC and the legislator's aim to broaden the responsibilities of a company to other stakeholders in the broader economic environment, see I Esser & P Delport "The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Shareholder Value Approach: Part 2" (2017) 50 *De Jure* 221 221-232, 241; Delport *New Entrepreneurial Law* 138-139; R Cassim "Governance and the Board of Directors" in Cassim *Contemporary Company Law;* FHI Cassim "The Duties and Liability of Directors" in Cassim *Contemporary Company Law* 505 522-533.

[29] This is a matrix developed by PIC (Public Investment Corporation) a government owned asset manager, that invests hugely on the JSE and Stellenbosch University Business School. It measures the corporate governance of companies from information drawn from public annual reports and statements. Also see Williams-Elegbe "Corporate Governance Rating Systems as a Means of Targeting Corporate Misconduct in Africa: The Nigerian Example" (2017) 1 *JCLA* 1 19.

[30] In early 2018, 35 companies and 437 individuals had passed the required 70% required by the CGRS. For general information and recent news see M Atumu "The Convention on Business Integrity (CBI) and the Nigerian Stock Exchange (NSE) Honour Companies and Directors for Passing Corporate Governance Rating Assessment" (27-02-2018) *cgrsng* (accessed 30-08-2018); Williams-Elegbe (2017) *JCLA* 4, 9-18.

[31] PWC *Global Economic Crime Survey 2016* found that one in five companies have not undertaken a fraud risk assessment in the past 24 month period and one in ten instances of economic crime are discovered by accident. PWC "Global Economic Crime Survey 2016: Adjusting the Lens on Economic Crime: Preparation Brings Opportunity Back into Focus" (2016) *PWC* 6 (accessed 20-10-2018).

[32] This positive contention does not disregard the disheartening conclusions of the IIA SA "Corporate Governance Index" (2018). The most recent index that measures responses by internal auditors found that the score for ethics, compliance and assurances as set out in the

4 2 1 Mechanism of self-regulation: King Reports on good governance for South Africa

For almost a quarter of a century, corporate South Africa has been profoundly influenced by the King Reports on corporate governance. Although the provisions of the King Reports are not directly enforced by formal legislation, it is the primary code in South Africa for corporate self-regulation.[33] Brief mention is made of some of the principles incorporated into the King Reports.

The pillars that anchor the King Reports are ethical governance, including ethical and effective leadership, which emphasises responsibility, accountability, fairness and transparency.[34] The establishment and promotion of an ethical culture in South Africa's corporate milieu is consequently recognised and constituted in the King Reports.[35] Integration, including integrated accounts as well as integrated thinking encompassing the interdependencies between a corporation and factors within its environment are central to King IV. From the outset, the King Reports have been advocating the broadening of the common-law principle that a company exists for the benefit and in the interests of its shareholders; a philosophy that at times pushes corporations to pursue profit at all costs, including cutting corners, breaking and bending rules.[36] This integrated and inter-related philosophy recognises that a

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King Reports had dropped since 2017 and were the lowest since the IIA began measuring them in 2013. IIA SA "Corporate Governance Index" (2018). See too T Niselow "Worst-ever Score for Corporate Governance in SA – index" (01-11-2018) *Fin24* (accessed 02-11-2018).

[33] *King IV* (2016) 35. Voluntary codes, such as *King IV*, do not operate separate from the law, but rather in conjunction with the law and statutory regulations.

[34] *King IV* (2016) 20.

[35] *King IV* (2016) is the first code to focus on outcomes-based good governance. The four outcomes are: ethical culture, good performance, effective control, and legitimacy. A pivotal driver in *King IV* (2016) is integration, illustrated in the principles of integrated thinking and integrated reporting. These drivers build upon the key principles of *King III*, including integrated sustainability, sustainable reporting, social transformation and leadership. For general discussion on King Reports see Esser (2009) *SA Merc J* 191-196; M Judin, L Roberts & R Naidoo "Corporate Governance . . . Innovative Thinking in South Africa's Latest Code" (01-07-2017) *American Bar Association* (accessed 31-10-2017).

[36] *King III* (2009) recognised that companies operate in an integrated context, and that the sustainable running of a company needs to take cognisance of the social, environmental, political and economic issues and consequently the call for integration and for a company to

corporation is a corporate citizen, and does not exist in isolation from society. Consequently, inclusive recognition is also given to other stakeholders, not only the shareholders.[37] This broader perspective fosters a positive corporate culture that contributes to ethical and viable corporate governance that impacts upon the prevention of corporate misconduct. The shift towards board governance does not diminish the central role shareholders need to play in corporate governance. The King Reports have long recognised the need for shareholders to participate more actively in the oversight of operations of a business to ensure good governance.[38] Moreover, the need to manage and promote internal and external stakeholder relationships is becoming an increasingly important part of corporate governance. Consequently, the use of ADR advocated by *King III* (2009) is underscored by *King IV* (2016).[39]

Transparency, particularly with regarding to reporting, remains a fundamental objective of *King IV* (2016). Accordingly, it has adopted an "apply *and* explain" policy, as opposed to the earlier "apply *or* explain" policy of *King III* (2009)[40] (writer's emphasis).

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recognise that it is a responsible citizen, as much as a natural person is. Proceeding from this identity and philosophy is the inclusive stakeholder approach, which encompasses both the enlightened shareholder and pluralistic stakeholder approach. This can be compared to the approach ultimately taken by the legislature in s 76(3)(b) of the Companies Act 2008 that obligates a director to act in the best interests of the company. It is submitted that this more narrow focus, which may be termed the enlightened shareholder approach, does not necessarily exclude the inclusive stakeholder approach. For discussion hereon see *King III* (2009) 11-12; I Esser & PA Delport "Shareholder Protection Philosophy in terms of the Companies Act 71 of 2008" (2016) 79 *THRHR* 1 14-18; TH Mongalo "An Overview of Company Law Reform in South Africa: From the Guidelines to the Companies Act 2008" (2010) 2 *AJ* xiii xix; FHI Cassim "Introduction to the New Companies Act" in Cassim *Contemporary Company Law* 20-21.

[37] *King IV* (2016) 23-25; Folson (2010) *AJ* 222-225; Esser & Delport (2016) *THRHR* 1 14-18; FHI Cassim "The Duties and Liability of Directors" in Cassim Contemporary Company Law 505 517-522.

[38] I Esser "Shareholder Interests and Good Corporate Governance in South Africa" (2014) 77 *THRHR* 38 44-45; Mongalo (2010) *AJ* xxi.

[39] *King IV* (2016) 33, 71. See too T Wiese "The Use of Alternative Dispute Resolution Methods in Corporate Disputes: The Provisions of the Companies Act 2008" (2014) 26 *SA Merc LJ* 668 669-670. This issue is discussed in more detail in para 4 2 2 below.

[40] *King IV* (2016) 22, 27.

The latest King Report is applicable to most forms of corporate entity, whether public or private, profit or non-profit. Compliance with the King Reports remains voluntary for many companies in South Africa.[41] Notwithstanding voluntary compliance, several methods of enforcement exist in South Africa and elsewhere.[42] Compliance may be formalised through contractual stipulations:[43] certain organisations such the Johannesburg Stock Exchange ("JSE") Listing Requirements require compliance with the King Reports.[44] Moreover, the King Reports themselves increasingly promote self-compliance through principles such as "comply or explain";[45] giving way to the self-proclamation principles, "apply or explain", and, subsequently, "apply and explain" which facilitate monitoring and evaluation by the market.[46] Consequently, the concept of voluntariness needs to be more closely defined, as "voluntary" does not necessarily mean no compliance, no enforcement or no consequences. The distinction between external and substantive compliance with voluntary corporate governance codes is helpful. The former includes monitoring by

[41] I Esser & P Delport "The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Shareholder Value Approach: Part 1" (2017) 50 *DJ* 97 104; Esser I & Locke N "Corporate Law (Including Stock Exchanges)" (2009) *ASSAL* 259 263-264; Esser I (2009) *SA Merc J* 190;

[42] Wymeersch refers to factual monitoring by monitoring bodies, or monitoring by the market developments, or a form of legal enforcement such as incorporation into applicable legislation or a number of other hybrid public- and private law regulation. Wymeersch further identifies the gradual global tendency to codify former self-regulatory corporate governance rules. Wymeersch E "The Enforcement of Corporate Governance Codes" *JCLS* (2006) 6 113 113-116, 135-137.

[43] As was stipulated in the agreement between Retief, Novus and Media 24 in the case *Caxton & CPT Publishers and Printers Limited v Media 24 Proprietary Limited* 2015 ZAWCHC 209 (25-11-2015) 136/CAC/March 2015)(para 22). It may also be incorporated into a company's articles of association. See too Wymeersch (2006) *JCLS* 123-124.

[44] Board Notice 87 in GG 40847 of 19-05-2017 providing in terms of s 71(3)(c)(ii) of the Financial Markets Act 19 of 2012 that the effective date for the *King IV* is 19 June 2017. Whether the market supervisor, like the JSE, should, however, enforce compliance of the code's provisions is another debatable issue. Is external supervision limited to monitoring reporting of compliance by a company, or does it encompass more substantive supervision of actual compliance with the code? Also see Wymeersch (2006) *JCLS* 114, 133-134.

[45] Incorporated into *King II* (2002).

[46] Also see Esser I & Locke N "Corporate Law (Including Stock Exchanges)" (2009) *ASSAL* 259 263-264; Esser I (2009) *SA Merc J* 190-191; Wymeersch (2006) *JCLS* 121.

external entities such as an external audit, whilst the latter refers to internal monitoring, primarily by the board and management, but also by the general meeting of shareholders.[47]

The judicial recognition of the King Reports by the courts in South Africa has been most influential with regard to compliance.[48] At times the courts have referred to the King Reports in the same breath as to the Companies Act 2008, particularly with regard to the principles of good governance and the duties of directors.[49] The provisions of the King Reports have not only been taken into account but held to be "persuasive" by the court.[50] In addition, directors have been held liable for not complying with the King Reports.[51] Victor J held in *South African Broadcasting Corporation Ltd v Mpofu*:

> "*Ubuntu-botho* is deeply rooted in our society. These values should assist in informing corporate decisions made by directors in state owned enterprises. Proper and constructive dialogue would enable better outcomes in the decision making process. Heated and impetuous decision making is the stuff of irrational outcomes. This must be avoided. This form of governance is underpinned by the philosophy of *ubuntu-botho*. *The time is right to incorporate the views of umuntu*

[47] In this context internal monitoring does not just mean ticking the boxes. Also see Wymeersch (2006) *JCLS* 118.

[48] "Practising sound corporate governance is essential for the well-being of a company and is in the best interests of the growth of this country's economy especially in attracting new investments. To this end the corporate community within South Africa has widely and almost uniformly accepted the findings and recommendations of the King Committee on Corporate Governance." Hussain J in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* [2006] ZAGPHC 147 ("*Stilfontein Gold Mining*") para 16.7. Wymeersch highlights the use by judges of corporate governance codes as yardsticks in deciding various issues, including questions regarding corporate negligence. See Wymeersch (2006) *JCLS* 114; Esser & Delport (2017) *DJ* 105-106.

[49] *Mbethe v United Manganese of Kalahari (Pty)* Ltd 2016 5 SA 414 (GJ) paras 21, 93-94, 125-126, 182 & 185; *Stilfontein Gold Mining* paras 16.7-16.9.

[50] *Myburgh v Barinor Holdings (Pty) Ltd* (C280/13) [2015] ZALCCT 1. This was a labour court case and it was argued and then found by the court that provisions of King III which provided that the positions of CEO and the financial director should be separate and independent of one another were "persuasive" (paras 16 and 18).

[51] *Stilfontein Gold Mining* para 16.9. See too Esser & Delport (2017) *DJ* 105-107.

> *ngumuntu ngabantu in the King code of good governance*."[52] (Writer's emphasis).

Essentially, the philosophy of *ubuntu* is expressed in *King IV* in the principle of interdependence between individual corporate institutions, the broader society and the consequential reciprocal rights and obligations which are inherent in *ubuntu*:

> "*Ubuntu* and *Botho* imply that there should be a common purpose to all human endeavours (including corporate endeavours) which is based on service to humanity. As a logical consequence of this interdependency, one person benefits by serving another. This is also true for a juristic person, which benefits itself by serving its own society of internal and external stakeholders, as well as the broader society."[53]

The King Reports illustrate the impact which integrated and transparent corporate governance principles can have on the prevention of economic crime. Moreover, typifying a company as a corporate citizen recognises that a corporation operates not only for its shareholders, but also for the sustainability of other stakeholders and for the public good. Likewise, the incorporation of the deep and strong philosophy of *Ubuntu* into corporate governance attributes moral worth and responsibility to a company which indisputably contributes to the development of a strong ethical corporate culture. Consequently, the King Reports have contributed and continue to contribute positively to address economic crime.

The importance of self-regulation, in particular the development of an internal corporate culture of compliance is underscored.[54] The need to develop upstream mechanisms of internal compliance and enforcement, in conjunction with the usual downstream enforcement mechanisms of external civil and criminal sanctions, should be encouraged.[55] Accordingly, the King Reports with their emphasis on internal ethical governance and the promotion of a sound integrated compliant corporate culture are commended.

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[52] 2009 4 All SA 169 (GSJ) para 66.

[53] *King IV* (2016) 24.

[54] R Tomasic "The Challenge of Corporate Law Enforcement: Future Directions for Corporations law in Australia" (2006) 10 *UWSLR* 1 13-15, 19-23.

[55] Stages of self-regulation include commitment, implementation and institutionalisation. See Tomasic (2006) *UWSLR* 19-20.

4 2 2 Mechanisms in the Companies Act 71 of 2008

> "If the breach is criminal in nature, criminal penalties should follow. But it is draconian to apply such penalties in the absence of criminality. … When gaol terms are provided for breach of the law but the courts are disinclined to impose them because they seem too draconian, the law tends to fall into disrepute. The modest fines which are imposed instead cause some discontent in the community."[56]

A perennial thorny issue is the regulation and enforcement of corporate governance, including intentional dishonesty, but also directorial negligence. The recurring question remains whether such instances are best addressed through criminal sanctions, administrative penalties or civil accountability?[57] Reform of corporate governance provisions needs to be ongoing, continually seeking answers in an ever evolving corporate environment. Corporations do not operate in a vacuum and the supervision and enforcement of corporate governance is not only a matter for the relevant trade sector, but instances of economic crime also involve the criminal courts. Moreover, the issue of economic growth and corporate governance are also matters of political significance. The financial services industry is also a powerful and influential sector, particularly with regard to commercial fraud, and consequently the regulation of the financial services industry is fundamental in the composite effort against economic crime.

In South Africa the Companies Act 1973 contains a multitude of criminal sanctions,[58] yet most have failed to be effective.[59] The reasons for this are numerous

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[56] See Senate Standing Committee on Legal and Constitutional Affairs *Company Directors' Duties, Report on the Social an Fiduciary Obligations of Company Directors* (The so-called Cooney Committee, named after the chair, Senator Cooney) AGPS 1989 17 (para 2.37). Available at: *<https://www.aph.gov.au/~/media/.../senate/committee/.../directors/report_pdf.ashx.>.*

[57] A recent meta-analysis study of global on-line analyses indicated that a multi-policy approach incorporating various strategies, including education, cooperation and compliance, together with multi-enforcement remedies including administrative, civil and criminal sanctions, seemed to achieve the best results in deterring corporate crime. See N Schell-Busey, SS Simpson, M Rorie & M Alper "What Works? A Systematic Review of Corporate Crime Deterrence" (2016) 15 *Criminology & Public Policy* 387 387 & 406-408.

[58] Henning & Du Toit reckon that there have been more than 640; most of which were "purely technical offences". JJ Henning & S Du Toit "Corporate Law Reform in South Africa:

and diverse, including procedural, institutional and practical reasons.[60] Most of the criminal penalties have been seldom used and some penalties related to what are perceived to be lesser contraventions and consequently it has been inappropriate to impose a criminal penalty for such a breach.[61] Likewise, it has been argued that some offences may not necessarily be criminal in nature, and should consequently not attract criminal liability, but alternative mechanisms of accountability.[62] Additionally the penalties that were codified were limited in their application by the stringent procedural rules of criminal law and the delays and duration of criminal trials.[63] The complexity of company law also poses challenges.[64] In addition, the complexity of some instances of commercial fraud has contributed to the failure of

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Empowering the Victims of Economic Crime" in L De Koker, BAK Rider & JJ Henning (eds) *Victims of Economic Crime* (1999) 134 149.

[59] Davis (2010) *AJ* 411.

[60] Henning & Du Toit "Empowering the Victims of Economic Crime" in *Victims of Economic Crime* 149. In a review of a number of court cases in Australia, Professor Tomasic, identified the following reasons: poor drafting of company law rules, attitude of tolerance by business community, peer pressure to engage in company law breaches, failure of professions, such as law and accounting to maintain "arms-length" relationships with their clients, judicial restraint with regard to corporate abuses, the use of law as a tactical device, ineffective enforcement systems and an incremental approach to corporate law reform (a paraphrase by the writer). Tomasic (1992) *AJCL* 83-84.

[61] These may be unintentional or minor infringements. For example, s 207(2) of the Companies Act 1973 provided that it was an offence to publish a report of meetings that was not a "fair summary" and that the burden of proof of any defence was upon the defendant. In terms of this section a director could have been guilty of a criminal offence though he or she may inadvertently have been involved in such publication.

[62] For example, s 38(3)(a) of the Companies Act 1973 provided that it was an offence to provide a loan to a company for the subscription of shares, whilst in terms of the Companies Act 2008 (s 44 read with s 77(3)(e)(iv)) the failure to follow the correct procedure, including obtaining shareholder approval, will result in personal liability of the directors and not constitute a criminal offence. Jooste is critical of criminal liability being left out with regard to the financial assistance provisions in s 44 and contends that the threat of criminal liability was an effective deterrent in this instance. See R Jooste "Corporate Finance" in FHI Cassim (man ed) *Contemporary Company Law* 2ed (2012) 262 333.

[63] Cassim FHI Cassim "Introduction to the New Companies Act: General overview of the Act" in FHI Cassim (man ed) *Contemporary Company Law* 2ed (2012) 1 26; Davis (2010) *AJ* 412.

[64] Henning & Du Toit "Empowering the Victims of Economic Crime" in *Victims of Economic Crime* 149-152.

the criminal sanctions contained in the Companies Act of 1973. Insufficient capacity, both in human and budgetary resources, has also hampered the effective supervision and application of the statutory provisions.[65] It has become apparent that a different approach to the predominantly criminal sanction route is required.

The Close Corporations Act 69 of 1984 ("Close Corporations Act") set corporate legislation in South Africa on the route of decriminalisation.[66] This route was endorsed twenty years later by the policy document *South African Company Law for the 21st Century: Guidelines for Corporate Reform*[67] ("*Guidelines for Corporate Reform* (2004)") that advocated a focus on regulation and the enforcement of such regulation through various statutory administrative bodies and ADR.[68] Recognition was given to creating the proper balance between administrative, civil and criminal enforcement and sanctions.[69] Consequently, in line with the preceding Close Corporations Act, the *Guidelines for Corporate Reform* (2004) and international developments, the Companies Act 2008 have adopted a multi-faceted approach to corporate governance and its supervision and control.[70] Significant to enforcement are the functions of the statutory authorities created in the Companies Act 2008,

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[65] LA Tager "The Regulation of Economic Activity in Southern Africa" in JJ Henning (ed) *Economic Crime in Southern Africa* (1996) 25 28. Similar reasons were evident in Australia. Compare Tomasic (1992) 2 *AJCL* 82 90-91.

[66] See Henning & Du Toit "Empowering the Victims of Economic Crime" in *Victims of Economic Crime* 145-155 regarding some of the alternatives discussed at different meetings regarding reform of company law and commending the route of the Close Corporations Act that contains only 11 offences and emphasises self-enforcement, personal and several liability of the members.

[67] GN 1183 in *GG* 26493 of 23-06-2004.

[68] *Guidelines for Corporate Reform* (2004) 43-48.

[69] *Guidelines for Corporate Reform* (2004) 10; Mongalo (2010) *AJ* xviii-xix; Cassim "Introduction to the New Companies Act" in *Contemporary Company Law* 26; Davis (2010) *AJ* 411-412.

[70] D Farisani "The Potency and Co-ordination of Enforcement Functions by the New and Revamped Regulatory Authorities under the New Companies Act" (2010) *AJ* 433 433-434; Cassim "Introduction to the New Companies Act" in *Contemporary Company Law* 1-5.

namely the Companies and Intellectual Property Commission "CIPC"),[71] the Takeover Regulation Panel[72] ("TRP") and the Companies Tribunal.[73]

The Companies Act 2008 provides primarily two routes through which enforcement of its regulations can take place. The first way is through private enforcement, and the second route is public enforcement which includes enforcement through the public regulator, CIPC, who can exercise its enforcement functions through either ADR, civil or criminal mechanisms. In this section, brief reference will be made to the expansion of the powers of enforcement of various persons in the private law route, but the primary focus will be on the mechanism of a public regulator, CIPC. Comparative comments will be made with regard to CIPC's Australian counterpart, the Australian Securities and Investments Commission ("ASIC").

4 2 2 1 Mechanism of private enforcement

The Companies Act 2008 prescribes various mechanisms for private enforcement under civil law to regulate corporate conduct.[74] Also, the codification of several common-law mechanisms, like piercing the corporate veil and directors' duties, help strengthen the position of various stakeholders.

The pivotal principle of the separate juristic personality of a company remains entrenched and consequently the facility to incorporate a company is provided for in the Companies Act 2008[75] and failure to comply with certain provisions could result

[71] An independent administrative body created in terms of s 185(1) which replaces the Registrar of Companies under the Companies Act 1973.

[72] An independent administrative body created in terms of s 196.

[73] An independent administrative body created in terms of s 193. A further body, the Financial Reporting Standards Council is created in terms of s 203, but unlike CIPC, the TRP and the Companies Tribunal, it does not have an independent juristic personality.

[74] Davis (2010) *AJ* 414, citing strengthening internal governance mechanisms and empowering shareholders in a number of ways.

[75] Ss 14-15 provide for the incorporating and registration of a company. Likewise the capacity of a company and authority of its officers remain important and thus the submission of Memorandum of Incorporation, any shareholders' agreements or company rules are prescribed in s 15. The separate juristic personality of a company comes into being in terms of s 19(1) and evidence of its existence is the registration certificate issued in terms of s 14(4).

in criminal liability.[76] Significantly, the protection of the proper and legitimate use of corporate personality has been partly codified in terms of section 20 of the Companies Act 2008. Interested parties[77] can apply to the court for a restraint order to restrain the company or its directors from doing anything inconsistent with the Companies Act 2008 or the company's Memorandum of Incorporation.[78]

A further statutory mechanism for ensuring accountability is the partial codification of the common-law principle "piercing the corporate veil"[79] in terms of section 20(9)

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[76] See for example, s 32(5) for criminal sanctions for non-compliance with the provisions on the use of company names. The proper use of a company's name and registration number is integral to corporate law and thus any contravention of such proper use is a criminal offence (s 32(1)-(5)). Interestingly although s 32(4) provides that a company's name needs to be mentioned in all official documents, in hardcopy or electronic form, the actual display of a company's name outside its place of business is not prescribed as in s 50(1)(a) of the Companies Act 1973. Compare too *Haygro Catering BK v Van der Merwe* 1996 4 SA 1063 (C) 1070A, where the court found that failure to display a close corporation's name in terms of s 23 of the Close Corporation Act and to use its name at all constituted "gross abuse" in terms of s 65 of the Act. In this case meat was sold to a close corporation. However, the seller was not aware that he was supplying meat to a close corporation and thought he was dealing with a partnership, as the business used a trade name and at no time displayed or used the name of the close corporation. Consequently, it is likely that should a company misstate its name and trade in comparable circumstances that it would be in breach of the Companies Act 2008 and be guilty of a criminal offence in terms of s 32(1)(b) read with s 32(5); or found to constitute "unconscionable abuse" of the juristic personality of a company under s 20 (9). Also see Ncube *(2010) AJ* 47.

[77] Including, directors, officers and shareholders.

[78] S 20(4) and (5) of the Companies Act 2008.

[79] Interestingly, Lady Justice Arden (2017) "Piercing the Corporate Veil – Old Metaphor. Modern Practice" (2017) 1 *JCCL&P* 1, 2 11, distinguishes between "*piercing* the corporate veil" and "*lifting* the corporate veil". Lifting the corporate veil means looking behind it, but not necessarily piercing it; whilst piercing the corporate veil means holding the controllers liable, which lifting does not.. She also identifies various forms of veil piercing, including *legal veil piercing*, which entails statutory liability being imposed upon the shareholders or directors; *judicial veil piercing*, when judges in their judicial discretion pierce the veil and find someone behind the corporate veil liable; *voluntary piercing* where another person guarantees liability for a company's debt; and *reverse piercing* where a court orders a third party to return an asset to a company. Yet another approach is distinguishing between *peeping* behind the veil to look and see who controls the corporation, but still treating each as separate legal entities; *penetrating* the corporate veil when the controllers are found to be liable; *extending* the corporate veil in finding two or more corporations acting as one entity; and *ignoring* the

of the Companies Act 2008.[80] In terms of section 20(9) of the Companies Act 2008, the courts may lift the corporate veil in instances where there has been "unconscionable abuse" of the corporate identity of the company by the directors or shareholders. The first case to consider section 20(9) of the Companies Act 2008 was *ex parte Gore*.[81] Binns-Ward J firstly sketched the history of case law in England, Australia and South Africa relating to piercing the corporate veil and highlighted that there seems to be no entrenched principles as to when the veil will indeed be pierced, illustrating that some courts followed a conservative approach, whilst others follow a more liberal and robust approach.[82] A critical principle to any approach by the court, whatever its label, is "a facts-based determination by the courts".[83] Binns-Ward J concluded that section 20(9) appears to broaden the scope of the application of the piercing the corporate veil as illustrated in earlier cases; and,

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corporate veil is when the corporation is seen to be a total sham and consequently non-existent. See C Hawes, AKL Lau & A Young "Lifting the Corporate Veil in China: Statutory Vagueness, Shareholder Ignorance and Case Precedents in a Civil Law System" (2015) 15 *JCLS* 341 347-348. Binns-Ward J (*Ex parte Gore* 2013 2 ALL SA 437 (WCC) para 4) remarked that the use of the different terms is confusing and inconsistent, and "that nothing really turns on the labels".

[80] This follows the earlier codification in s 65 of the Close Corporations Act. A primary difference 27 years later is that the criteria "gross abuse" is replaced with "unconscionable abuse". In *Haygro Catering BK v Van der Merwe*,[80] van Niekerk J interpreted s 65 of the Close Corporations Act liberally. The court further held that s 65 conferred a "wide discretion" upon the court in deciding when an organisation's juristic personality may be ignored. It also held that section 65 is applicable to a more "oorkoepelende wyse van optrede" by the members of the close corporation, thus applying a general evaluation to the behaviour of the members.

[81] 2013 2 ALL SA 437 (WCC). In this case, disregard for the separate legal personalities of 41 companies within the so called King *Group scheme* group, led to monies being transferred between the companies without any regard to any one of the company's independent legal identities. In view of this commingling, the court held that such disregard and use constituted "unconscionable abuse" of the separate legal personalities of the different companies and that such separate legal personalities should subsequently be disregarded (para 33 32-34).

[82] *Ex parte Gore* paras 19-27. Lim (E Lim "Formalism and Companies" (2013) 13 *JCLS* 477-501) also highlights the inconsistencies, and subsequent uncertainties with regard to the law that arise from the courts approaches to lift, or to not lift, the corporate veil in the United Kingdom.

[83] *Ex parte Gore* para 4.

moreover, in terms of section 20(9)(b) the court has very wide powers with regard to the orders it could make.[84]

Importantly Binns-Ward J regards "section 20(9) of the Companies Act as supplemental to the common law, rather than substitutive."[85] He found that in South Africa a court will pierce the corporate veil when necessary;[86] nonetheless fraud or improper conduct has usually been present when the corporate veil has been pierced.[87] In addition to section 20(9) the common-law remedy of lifting of the corporate veil is still available in instances of abuse by the directors or shareholders of the separate legal personality of a company. Although the grounds for such action have never been exhaustively defined, it is clear that the courts will lift the corporate veil in instances of fraud or improper conduct. Furthermore, in determining whether the legal personality of a company should be ignored or not the courts will weigh up the pivotal importance of "the legal concept of juristic personality", on the one hand, and against its "unconscionable abuse" by corporate controllers on the other hand.[88] In considering these competing principles, the courts have shown awareness of the fact that the legal personality of an organisation remains a creature of statute, and such separate existence will be ignored by the courts if abused.[89]

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[84] Paras 32-34. Binns-Ward J found that "unconscionable abuse" in terms of Companies Act allows for a broader interpretation than "gross abuse" in terms of s 65 of the Close Corporations Act. Also see Arden ((2017) *JCCL&P* 14-*15)* who argues that the courts in South Africa follow a maximalist approach and pierce the corporate veil more readily than their counterparts in the United Kingdom. She arrives at this conclusion on the basis that the judges have a broad discretion in interpreting "unconscionable abuse"; and on the basis that courts may pierce the corporate veil, even in instances where other remedies are available to the claimant.

[85] *Ex parte Gore* para 34. Also see paras 31-33.

[86] "(T)hat despite the repeated affirmation that the courts enjoy no general discretion to do so merely because it would be just and equitable, courts will ignore or look behind the separate legal personality of a company where justice requires it, and not only when there is no alternative remedy." (Para 28.)

[87] *Ex parte Gore* para 28.

[88] *Ex parte Gore* para 29.

[89] "The courts have shown an acute appreciation that juristic personality is a statutory creation and that *'their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted*.'" (*Ex parte Gore* para 29 and also para 4.)

Additional mechanisms for ensuring due corporate governance are the personal liability of directors, both civil and criminal, based on either statutory or common law, or both. The personal liability of directors for contraventions of a company remains a thorny issue as it can be argued that the corporate veil should protect the directors acting in their official capacity, unless the abuse of the separate corporate juristic personality is due to a director's acts or omissions.[90] Similarly contentious is the use of criminal sanctions to enforce proper corporate governance and attributing criminal liability to directors who are purportedly acting in the interests of a company and not their own.[91] Also, the difficult question arises: what or who is included in the best interests of the company? Are only the shareholders considered to be the beneficiaries of a company or are other stakeholders also included? These are important questions as it was for a time considered that only shareholders had the right, as owners, to derivative actions on behalf of a company.[92] Moreover, such entitlement calls for short-term financial results, that generally encourage risk taking, including the contravention of regulations, which may result in economic crime.[93] Recently, however, some have called for a broader inclusion of stakeholders, including the public, investors, creditors and employees.[94] These issues are central to the duties of directors, as directors are mandated to act in the best interests of the company;[95] or do they owe duties to a broader constituency? If the former, more narrow interpretation is followed, the shareholders are the exclusive stakeholders

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[90] K van der Linde "The Personal Liability of Directors for Corporate fault – An Exploration" (2008) 20 *SA Merc LJ* 439 441-442, 450-451, 460.

[91] T Liau "Is Criminalising Directorial Negligence a Good Idea?" (2014) 14 *JCLS* 175 176, 181.

[92] It is beyond the scope of this dissertation to discuss these issues and the possible tension between s 165(2) of the Companies Act that specifically broadens the derivative actions to include a wider group of persons, and s 76(3)(b) which prescribes that directors need to exercise their powers and perform their function in the best interests of the company, as opposed to other stakeholders. See also fns 27, 35 and 40 above.

[93] TH Mongalo "Supervision of the Use of Corporate Power as the Ultimate Purpose of Directorial Duties and the Advisability of Corporate Law Enforcement in the Public Interest" (2017) 1 *JCCL&P* 17 18-19;

[94] Mongalo (2017) *JCCL&P* 17, 33;

[95] S 76(3)(b) of the Companies Act 2008.

who have the right to enforce the directorial duties.[96] The Companies Act 2008 has however, taken a more expansive view for some purposes and recognised that other stakeholders, such as other directors, trade unions or other representatives of employees, or any other person whom the court is satisfied has a legal right requiring protection, may institute derivative proceedings.[97] The right to enforce directorial duties has consequently been extended to a broader group of persons and this extension contributes to the promotion of corporate governance and consequent prevention of corporate crime.

Furthermore, Nigeria has innovatively introduced an additional alternative remedy. The Corporate Governance Rating System ("CGRS") which measures and certifies a director's fiduciary awareness, is a ratings mechanism that assists in the regulation of the fiduciary duties of directors.[98] This novel way of promoting compliance with the fiduciary duties of directors, in addition to the jurisdiction of regulatory bodies and courts, is commended.

In addition, the Companies Act 2008 increases and partly codifies the statutory civil liability of directors.[99] The codification of a director's duties, including the

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[96] Mongalo (2017) *JCCL&P* 22, 28-33.

[97] S 165(2). S 165 is a complex provision. For example, s 165(4)(b)(iii) provides that any derivative action needs to be in the "best interests of a company" and s 165(7) creates a rebuttable presumption that granting leave for a derivative action is *not* in the best interests of a company in certain circumstance. Persons who control the company or who are "related" in terms of ss 165(8) are excluded from the benefit of the rebuttable presumption, consequently it will not be presumed that derivative action against them is not in the interests of the company. However, this exclusion does not extend to directors who are not controllers. This may mean that directors who may be the wrongdoers, actually benefit from this presumption as it will be presumed that such derivative proceedings are not in the best interests of the company. For discussion on the derivative action and these possible obstacles to it, see MF Cassim "Shareholder Remedies and Minority protection" in Cassim *Contemporary Company Law* 755 775-796, particularly 787-789. See too Mongalo (2017) *JCCL&P* 41-45.

[98] The CGRS began in 2013 as an initiative of the Nigerian Stock Exchange and the Convention on Business Integrity. The CGRS in a novel way measures directors' awareness of directorial duties through a training programme, and thus also achieves education and training in the model. See Williams-Elegbe (2017) *JCLA* 9-21.

[99] Notably the definition of "director" is expanded in s 76(1) to include alternate directors, prescribed officers and any person who is a member of any board committee, or of the Audit Committee ("AC"). Notably, a potential defence for a director against a claim for breach of

fiduciary duties of good faith, and duties of care, skill and diligence, primarily falls under section 76 of the Companies Act 2008.[100] Any liability arising from the breach of directorial duties is prescribed in section 77. In terms of section 77,[101] a director can be held personally liable for loss or damages or costs arising from statutory or common-law breaches of duties.[102] Actual loss or damages must have been suffered for a claim to succeed in terms of section 77 and a three-year prescription period applies to such a claim.[103] In addition, section 218(2) is a wide provision attributing

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her or his duties is the business judgement rule has been codified in term of s 77(9). Personal liability may include compensation arising from damages and loss incurred and this may be either directly against a director, jointly or severally, in terms of s 77(6). See too, Henning & Du Toit "Empowering the Victims of Economic Crime" in *Victims of Economic Crime* 153;

[100] Interestingly, Mongalo, one of the authors of the Companies Act 2008, argues that the duty of care skill and diligence in terms of s 76(3)(c), is more onerous than its counterpart in the United States. Like, the United States and the United Kingdom, the objective standard is required in respect of the duty of care and/or diligence, as measured against a person in a similar position, with similar functions. The Companies Act 2008 however, introduced the subjective element with regard to the duty of skill as prescribed in s 76(3)(c)(ii) " … that may reasonably be expected of a person … *having the general knowledge, skill and experience of that director*." (writer's emphasis). This implies that persons who may have a higher skill, face a higher risk of personal liability than persons of a lesser skill. For discussion of the interpretation of s 76(3)(c), see TH Mongalo "Director's Standards of Conduct under the South African Companies Act and the Possible Influence of Delaware law" (2016) 1 *JCCL&P* 1-16.

[101] S 218(2) and 218(3) are general provisions for civil actions and remedies.

[102] Broadly defined in terms of s 77(1) as including an alternate director, a prescribed officer and a member of a committee of the board or audit committee. The issue of liability of non-executive and executive directors and whether a different duty of care and skill is required from each; and the issue of whether concurrent claims in delict and contract exist, and the unfortunate problematic wording of s 77(2)(b) is not canvassed in this dissertation. For a comprehensive discussion of these issues and liability of directors see R Stevens "The Legal Nature of the Duty of Care and Skill: Contract or Delict?" (2016) *PELJ* 1-28. Singapore, like South Africa, recently reformed its corporate law and partially codified the common-law duties of a director. Interestingly, the Singapore legislature provided that any breach of such duties incurs personal liability *and* criminal sanctions. See s 157 of Companies Act (Chapter 50) 2006. Also see Liau *JCLS* 177-184; M Nietsch "Corporate Illegal Conduct and Directors' Liability: An Approach to Personal Accountability for Violations of Corporate Legal Compliance" (2017) *JCLS* 1-34.

[103] S 77(7) of the Companies Act 2008.

civil liability to *any person* who contravenes *any provision* of the Companies Act for *any loss or damages* suffered by any other person as a result of that contravention (writer's emphasis).[104] Section 22[105] read together with sections 77(3)(b), 214(1)(c) and 218(2) of the Companies Act 2008 illustrates the consequences that can arise for a director who knowingly "acquiesces in the carrying on of the company's business in a reckless and fraudulent manner".[106] In terms of section 77(3)(b) a director will be held personally liable for the loss arising from such trading.[107] In addition, a court is mandated to declare such a director delinquent.[108] Criminal liability may also arise if a director "was *knowingly a party* to any act or omission by a company calculated to defraud a creditor, or employee …, or a holder of securities …, or with another fraudulent purpose".[109] Accordingly, the consequences for a director regarding personal liability can be serious.

The Companies Act 2008 also provides various other remedies to encourage and ensure high standards of corporate governance.[110] Internal supervision of a corporation's conduct has been strengthened by granting shareholders more powers

[104] S 218(2) has been named one of the most controversial provisions of the Companies Act and commentators differ regarding the interpretation of it. See N Locke "Safe Harbour Provisions against Liability for Insolvent Trading" (2018) *ABLU* 45 57-58; FHI Cassim "The Duties and Liabilities of Directors" in *Contemporary Company Law* 582.

[105] S 22(1) provides that: "A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose." S 22 is based on the earlier provisions relating to insolvent trading under s 424 of the Companies Act 1973. Locke (2018) *ABLU* 57; FHI Cassim "The Duties and Liabilities of Directors" in *Contemporary Company Law* 587.

[106] For a discussion on these sections and the liability arising for directors see Locke (2018) *ABLU* 53-61; FHI Cassim "The Duties and Liabilities of Directors" in *Contemporary Company Law* 586-592.

[107] In addition, s 78(6) provides that company may not indemnify a director in respect of any liability arising from s 77(3)(a)-(c) or from wilful misconduct.

[108] S 162(5)(c)(iv)(bb).

[109] S 214(1)(c). The offence incurs the heavier punishment of either a fine or imprisonment of up to ten years or both under s 216(a). For a discussion on the interpretation of "knowingly", see FHI Cassim "The Duties and Liabilities of Directors" in *Contemporary Company Law* 589-590.

[110] Preamble and s 7(b)(iii).

and clarifying their rights.[111] These mechanisms help ensure the proper fulfilment of regulatory provisions, or otherwise stated, they deter owners and directors of companies from contravening regulations. The decriminalisation of certain improper conduct under the Companies Act 2008 in South Africa, together with the provisions enabling civil enforcement, illustrates the principle that persuasion is preferred to punishment to regulate and discourage corporate misconduct. However, persuasive measures need to be supported by a gradient of punitive mechanisms; and consequently the role played by CIPC as a public regulator is essential to the proper functioning of corporate law in South Africa.

4 2 2 2 Mechanism of the public regulator: CIPC

The Companies Act of 2008 provides a hybrid of enforcement provisions, including remedies of a private, administrative and public-law nature. Innovatively, the Companies Act 2008 introduced alternative ways of enforcement by providing four different ways in which a complaint may be addressed: (i) by filing a complaint with the Companies and Intellectual Property Commission ("CIPC") or the Takeover Regulation Panel ("TRP"); or (ii) through Alternative Dispute Resolution ("ADR") procedures in terms of Part C of Chapter 7; or (iii) by applying to the Companies Tribunal to adjudicate the dispute; or by (iv) by applying to the High Court.[112] It is

[111] Particularly by ss 160-165 of the Companies Act 2008. Generally speaking minority shareholders are bound by the resolutions of the majority unless those resolutions were intentionally made to prejudice the minority. However, in the event of fraud on the minority, instances of the majority abusing their power to expropriate the minority, the minority are not bound by the resolutions of the majority and can take appropriate legal remedies in terms of ss 20(4), 20(6) and s 165. For a general discussion on improving corporate governance by empowering shareholders, see D Davis "Dealing with Corporate Defaulters: Curbing the Unfettered Exercise of Criminal Law" (2010) *Modern Company Law for a Competitive South African Economy* (formerly *Acta Juridica*) 411 414; Hopt (2003) *JCLS* 226-229; D Davis (ed) *Companies and Business Structures* 291-306; Esser & Delport (2016) *THRHR* 18-22.

[112] The High Court continues to play an important role in the enforcement of the provisions of the Companies Act 2008. The need for a specialised commercial court has been recognised and Gauteng High Court JP Mlambo announced in 2018 that a new Commercial Court would be established in Gauteng. The purpose is to promote case management of commercial matters and ensure that commercial disputes are dealt with efficiently. A further outcome will be the development of commercial jurisprudence and a pool of skilled legal practitioners and experienced judges. C Rickard "New Gauteng Commercial Court could Reshape Corporate

beyond the scope of this dissertation to discuss the four different mechanisms in detail and reference will only be made to CIPC.[113] The significance of these developments in corporate law is the emphasis on civil and administrative law remedies and, moreover, the introduction of ADR. The South African legislature is following international trends to establish alternative forums, separate to the conventional court forum, as places for the resolution of disputes, which should prove to be faster and less expensive than formal court-based litigation.[114]

CIPC has a number of functions under the Companies Act,[115] and in this part the focus will be on its function as a public regulator to enforce the provisions of the Companies Act 2008.[116] Importantly, an objective of CIPC is that such enforcement has to be "efficient, effective and [the] widest possible enforcement of [the] Act".[117] In addition, the aims of enforcement, together with its other functions, are to be understood in the context of the overall purposes of the Companies Act 2008, including the purpose of "provid[ing] a predictable and effective environment for the efficient regulation of companies".[118] Brief reference will be made to some of the

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Disputes" (08-01-2019) *Business Live* (accessed 18-03-2019). For a general discussion on the alternative mechanisms, see Davis (2010) *AJ* 421; Farisani (2010) *AJ* 434, 438, 443-444; P Sutherland "The State of Company law in South Africa" (2012) *Stell LR* 157 177; Wiese *SA Merc LJ* 670-671.

[113] For brief discussions on these mechanisms, see Davis *Companies and Other Business Structures* 307-311; Delport *New Entrepreneurial Law* 263-270.

[114] Davis *Companies and Other Business Structures* 308; Farisani (2010) *AJ* 433-434; *Guidelines for Corporate Reform* (2004) 47.

[115] S 187 of the Companies Act prescribes the functions of CIPC which include promotion of reliable financial statements, and establishment and maintenance of a register. See also, MF Cassim "Enforcement and Regulatory Agencies" in FHI Cassim (man ed) *Contemporary Company Law* 2ed (2012) 824 835-837.

[116] S 187(2) prescribes the enforcement functions of CIPC, including promoting voluntary resolution of disputes, monitoring proper compliance, receiving or initiating and investigating complaints, negotiating and concluding undertakings and consent orders, issuing and enforcing compliance notices and referring matters to the NPA, court or Companies Tribunal. CIPC is also responsible for the enforcement of the legislation listed in Schedule 4, including the Close Corporations Act 69 of 1984 and the Co-operative Acts 14 of 2005. Also see Cassim "Enforcement and Regulatory Agencies" in *Contemporary Company Law* 834.

[117] S 186 (1)(e).

[118] S 7(l) of the Companies Act 2008, which needs to be read together with all the purposes described under s 7. Compare s 1(2) of the ASIC Act of 2001 that sets out its objects,

mechanisms available to CIPC to satisfy it enforcement functions: the duty to initiate, evaluate and investigate complaints[119] and to issue and enforce compliance orders,[120] which it can do unilaterally; the duty to negotiate and conclude undertakings and consent orders which it can do consensually, and the duty to refer matters for civil or criminal investigation which involves cooperation with other public bodies.

An objective of the South African company law reforms was to strengthen the office and role of the then Registrar of Companies, particularly with regard to regulation and enforcement.[121] Consequently, under the Companies Act 2008, CIPC[122] and the TRP[123] both have powers of enforcement. The scope of CIPC's jurisdiction is very wide and in terms of section 168 of the Companies Act a

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including the object to promote and protect commercial certainty and to administer its functions effectively and with a minimum of procedural requirements. For a discussion on the aims of regulation and enforcement of corporate law, see H Bird, D Chow, J Lenne & I Ramsay "Strategic Regulation & ASIC Enforcement Patterns: Results of an Empirical Study (2005) 5 *J Corp L Stud* 191-201.

[119] S 187(2)(c) of the Companies Act 2008.

[120] S 187(2)(g) of the Companies Act 2008; *Guidelines for Corporate Reform* (2004) 47.

[121] Henning & Du Toit "Empowering the Victims of Economic Crime" in *Victims of Economic Crime* 153. Some (Farisani (2010) *AJ* 438) argue that this shift in focus on enforcement is not necessarily a decriminalisation of company law, but simply a provision of other mechanisms of enforcement. However, seen holistically it is argued that the new avenues of enforcement do establish a new map for enforcement, without erasing the ultimate role of the courts in enforcing the laws.

[122] CIPC is established in terms of s 185, whilst its objectives are described in s 186 and its functions in s 187 of the Companies Act 2008. CIPC is responsible for a wide range of matters, including the registration of companies and intellectual property rights, the establishing and keeping of a register and, under s 188, for advising the government and the public and doing research on issues relating to its mandate. CIPC Is also responsible for monitoring compliance and for issuing and enforcing compliance orders and for promoting the use of ADR and true and accurate accounting practices. For brief discussion of the role of the CIPC see Davis *Companies and other Business Structures* 307-311; CIPC *Annual Report 2016/2017*; Farisani (2010) *AJ* 435-439;

[123] The TRP, established in terms of s 196(1) of the Companies Act 2008, is not only concerned with the monitoring and regulation of affected transactions under chapter 5 of the Companies Act, but also has the authority under chapter 7 (ss 168-169) to initiate or receive and investigate a complaint relating to its mandate under chapter 5 or as the minister may direct. For a brief discussion on the role of the TRP, see Davis *Companies and Other Business Structures* 216-222.

complaint may be laid by "any person . . . alleging that a person has acted in a manner inconsistent with this Act, or that the complainant's rights under this Act, or under a company's Memorandum of Incorporation or rules, have been infringed".[124] Significantly, CIPC may also initiate a complaint and subsequently evaluate and investigate such a complaint.[125] It is submitted that the provision to initiate and investigate a complaint grants CIPC extensive powers which it has apparently not actively used since its establishment.[126] In its five-year strategic plan for mid-2017 to mid-2022, CIPC is focusing on two strategic outcomes, the second of which is to establish a reputable business regulation environment in South Africa.[127] To achieve this its strategic objectives are: increased knowledge and awareness on company laws,[128] and improved compliance with company laws.[129] It is not usual for a

[124] Excluding complaints that in terms of s 168(1)(a) fall under the jurisdiction of the TRP as described in part B or C of chapter 5. Also compare s 156 (d) and s 157 (1). This broadened *locus standi* for complainants is welcome, and includes the possibility of class actions. For a short discussion, see Cassim "Enforcement and Regulatory Agencies" in *Contemporary Company Law* 827-828. Details of number and types of recent complaints received, investigated and resolved can be found in Table 6 of the CIPC *Annual Report* 2016/2017. Significantly, the CIPC implemented an independent hotline for complaints of fraud in November 2016. Presently complaints of fraud are dealt with by the Governance, Risk and Compliance Division. See CIPC *Annual Report* 2016/2017 50 & 74-75.

[125] S 187(2)(c). A complaint may also be directed by the Minister under s 168(3) read with s 187(2)(d). CIPC may decline to investigate a matter if it deems it to be "frivolous or vexatious" or finds no grounds for such investigation under s 169(1)(a).

[126] Interestingly, in CIPC's *Annual Report* 2017/2018 (para 1.7 18), the function to initiate or even to investigate complaints and the function to issue and enforce compliance notices was not even recorded in the summary of its mandate under the Companies Act 71 of 2008 despite CIPC being introduced as a "reputable regulator" by the Minister of Trade and Industry (para 1.3 10). However, mention is made of a case initiated by CIPC in the period under review (33).

[127] The outcomes also include the IP protection.

[128] For example, see the number of educational campaigns held by CIPC in *2nd Quarter 2018/2019 Performance Report* 16. This is in line with the proposed reform that education will be a critical function of CIPC through which CIPC is to create awareness of shareholders'' rights and promote shareholder participation. *Guidelines for Corporate Reform* (2004) 46.

[129] CIPC *2nd Quarter Performance Report* 2018/2019 6. These objectives are specifically linked to the Minister of Trade and Industry's priorities. See also the Commissioner's statement (CIPC *Annual Report* 2017/2018 25) that CIPC "is heavily influenced by

regulatory body to formalise its enforcement objectives, but certain focus areas can be derived from annual reports and policy statements.[130] It is, nevertheless, difficult to identify any specific focus areas from CIPC's recent annual reports although there is emphasis on improving compliance.[131] It is strongly submitted that CIPC should specially focus on ensuring compliance with the regulations of the Companies Act 2008 as this is essential for the proper functioning of CIPC and for the attainment of the purposes and objectives of CIPC and the Companies Act 2008.[132] In the light of the fact that CIPC is a young institution and not much information is available, brief reference is made to the Australian Securities and Investments Commission ("ASIC")[133] and its relevant functions and powers to further illustrate the mechanism of a statutory public regulatory body in this field.

government policy and strategy and must align itself to these". Compare s 185(2)(b) which states that CIPC is independent, yet subject to any policy statement, directive or request issued by the minister in terms of the Act and s 185(2)(c) that prescribes that CIPC has to be "impartial and perform its functions without fear, favour, or prejudice".

[130] As an illustration, see the analysis of ASIC's enforcement objectives derived from its Annual Reports 1996-2000 in Bird et al (2005) *J Corp L Stud* 203-209.

[131] For example, the Strategic Objective 2.2 is to improve compliance with company laws; and Programme 3: Business Regulation and Reputation is to educate, promote and enforce legislative compliance. CIPC *Annual Report* 2017/2018 51 and 58.

[132] It is difficult to determine, but the latest reports reflect that less than 50% of registered companies are active and submit the prescribed annual returns and financial statements; and CIPC has reported that the compliance of newly registered companies below 20%. This is alarming. See CIPC *2nd Quarter Performance Report* 2018/2019 Annexure A*;* CIPC *Annual Report* 2017/2018 26; CIPC *Annual Report* 2016/2017 37.

[133] ASIC is responsible for the regulation and enforcement of company regulations, like CIPC. However, ASIC is constituted in terms of s 8 of the Australian Securities and Investments Commission Act 2001 51 of 2001 ("ASIC Act 2001") which came into force together with the Corporations Act 50 of 2001 ("Corporations Act 2001"). ASIC's scope is broader as it includes the financial services industry. Some of the statutory powers attributed to CIPC in ss 186-188 of the Companies Act 2008 are comparable to those attributed to ASIC under ss 11 and 12A of ASIC Act and those prescribed to it under the Corporations Act 2001. For general information see ASIC website and the ASIC *Annual Report* 2016-2017 available at <https://asic.gov.au/about-asic/corporate-publications/asic-annual-reports/#ar17> (accessed 20-08-2018).

ASIC is comparable,[134] yet also different to CIPC.[135] Similarities between CIPC and ASIC are that their objectives and powers are based on principles of responsive regulation and restorative justice. The remedies that each have are based on the regulatory pyramid, and range from education and persuasion at the bottom of the pyramid,[136] moving up towards civil remedies such as enforcement notices and escalating further up to criminal sanctions at the apex.[137] Of particular significance for this dissertation is the statutory authority of CIPC to meet with the complainant and affected persons with the aim to resolve the matter by way of a consent order.[138] These provisions specifically allow the parties to meet and resolve the issues through an ADR mechanism and then submit the consent agreement to the court for approval.[139] This mechanism can be compared to the enforceable undertaking in Australia.[140]

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[134] It is the commission established as a public statutory body over registered companies, like CIPC. Several of its administrative enforcement powers are comparable to ASIC. See Wiese (2014) *SA Merc LJ* 676.

[135] With regard to jurisdiction, ASIC is also responsible for the financial services industry, which CIPC is not, although CIPC does have jurisdiction over all registered companies, including companies in the financial services industry. ASIC has greater power than CIPC, in that it can make certain unilateral decisions like banning a company or director (s of Corporations At) and instituting prosecution proceedings (s of Corporations Act). CIPC, in contrast needs to refer delinquent applications to court (ss 162(3) & 187(2)(g) and matters for prosecution to the NPA (s 187(2)(h) of the Companies Act 2008).

[136] Awareness was visualised as being a "critical function" of CIPC. *Guidelines for Corporate Reform* (2004). See fn 130 above.

[137] Hedges et al (2017) *Melb UL Rev* 925-936 set out the policy of responsive regulation and pyramidal enforcement of corporate law. See too, Bird et al (2005) *J Corp L Stud* 201-202; Tomasic (2006) *UWSLR* 8-9.

[138] S 170(1)(d) of the Companies Act read together with reg 138 and Form CoR 138.

[139] Reg 138(2). Importantly, the consent agreement cannot include an amount for damages unless the complainant has specifically agreed to such damages. A consent order can thus be concluded between only CIPC and the respondent, but may not include damages for the complainant unless she or he has specifically agreed to such an award. This provision is to safeguard the rights of complainant to bring a civil claim against the complainant. Similarly, s 218(3) protects the rights to other remedies, while s 219(2) safeguards a respondent against double jeopardy. See also MF Cassim "Enforcement and Regulatory Agencies in Cassim *Contemporary Company Law* 850.

[140] In terms of s 93AA(1) of the ASIC Act 2001, ASIC may accept a written undertaking from a person in connection with a matter falling under ASIC's jurisdiction. This is very broad

Significantly, CIPC is also to encourage the voluntary resolution of disputes as prescribed in Part C of Chapter 7, which emphasises ADR.[141] Accordingly, CIPC can also refer a complaint to the Companies Tribunal or other accredited body, with the purpose of resolving the dispute by way of mediation, conciliation or arbitration.[142]

The Companies Act thus provides various routes for a complaint to be resolved through ADR and a final consent order: a complainant may apply directly for ADR;[143] or if a complainant has lodged a complaint with CIPC, CIPC may itself resolve the dispute through ADR;[144] or refer the matter to the Companies Tribunal or an accredited entity.[145] It is proposed in this dissertation that these are routes that may be used by the mechanism of mediation to resolve instances of economic crime.[146]

CIPC may also issue a compliance notice,[147] described by one commentator as "the most novel feature" of the Companies Act 2008.[148] A compliance notice can order a wide number of actions which may include restitution and community

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provision and may include a wide range of actions. Importantly, it relates to a negotiated undertaking and may include compensation to be paid. Breach of an undertakings has serious consequences, and invariably ASIC applies to court for a disqualification order or a fine. See Hedges et al (2017) *Melb UL Rev* 924, 942-943.

[141] S 187(2)(a) of the Companies Act 2008. In addition, s 158 emphasises that the purpose of the remedies are to promote the purpose of the act and the administrative bodies are specifically mandated by s 158(b) to promote the spirit, purpose and objects of the Act. See also Farisani (2010) *AJ* 436-437; Wiese (2014) *SA Merc LJ* 671-672.

[142] S 169(1)(b) read with s 166(3) and reg 132(2) and Form CTR 132.2. In terms of s 167(1) and (2), if the parties consent to an order from the tribunal or accredited entity, the tribunal or entity may submit the order as a consent order to the court, which has the discretion to make the order as agreed, change the order or refuse to make the order.

[143] To the Companies Tribunal or an accredited entity or to any other person: s 166(1)(c) read with reg 132(1) and Form CTR 132.1.

[144] S 170(1)(d) of the Companies Act read together with reg 138 and Form CoR 138. See fn 148 above. Wiese ((2014) *SA Merc LJ* 674-676) points out that s 169(1) is vague and provides for CIPC to *either* investigate a complaint *or* refer it to ADR, and consequently a problem arises should ADR not succeed (s 166(2)) as the same complaint cannot be dealt with twice. See too s 156(c) and (d) also worded in the alternative.

[145] S 169(1)(b) read with s 166(3) and Reg 132(2) and Form CTR 132.2. See fn 149 above.

[146] Ch 5 2 below.

[147] S 170(1)(g) read together with s 171.

[148] Davis (2010) *AJ* 419.

service.[149] These alternative remedies, new in the Companies Act 2008, are clearly in line with restorative justice systems as the aim is to resolve disputes to promote the spirit, purpose and objects of the Companies Act 2008 and will best improve the realisation and enjoyment of rights.[150] In addition, the consequence of non-compliance with a compliance order grants CIPC the option of referring the matter to the court for an administrative fine or to the NPA for criminal prosecution.[151]

CIPC is increasingly issuing compliance orders, particularly with regard to financial reporting, which will promote financial accountability and so contribute to discouraging economic crime.[152] Significantly, in 2016 the first criminal conviction in terms of section 214(3) of the Companies Act[153] was secured against a company for non-compliance with a compliance order for not holding annual general meetings or submitting financial statements.[154]

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[149] S 171(2)(c) and (d). A compliance order may also require a person to cease, correct or reverse any action in contravention of the Companies Act 2008, take any action mandated by the Companies Act 2008 or to take any steps reasonably related to the contravention and designed to rectify its effect. See s 172(2)(a), (b) and (e); Davis (2010) *AJ* 419.

[150] S 158(b) of the Companies Act; MF Cassim "Enforcement and Regulatory Agencies" in FHI Cassim (ed) *Contemporary Company Law* 2ed (2012) 824 828-829.

[151] S 171(7)(a) and (b) of the Companies Act 2008. An administrative fine may be imposed by a civil court under s 175(1) read with s 175(5) and reg 163, which fine may be 10% of the respondent's turnover, but may not exceed R1,000,000. If CIPC refers the matter to the NPA and a respondent is convicted of a criminal offence for failing to satisfy the compliance order, under s 216(b) a sentence may include a fine or imprisonment of a period not exceeding 12 months, or a fine and imprisonment. See also Farisani (2010) *AJ* 437-438; Delport (2014) *New Entrepreneurial Law* 267. Conversely, a person issued with a compliance notice has the right under s 172 to apply to the Companies Tribunal or to the court to review the notice and the tribunal or court, after considering representations by the applicant and any other relevant information, may confirm, modify or cancel all or part of the compliance notice. See *Public Investment Corporation SOC v Companies and Intellectual Property Commission* [2019] ZAGPPHC 103.

[152] CIPC *Annual Report* 2016/2017 36-37.

[153] Read with ss 171(7) and 216(b). Interestingly CIPC chose not to apply to court for an administrative fine for non-compliance but laid a criminal complaint for the offender to be charged in terms of s 214(3). In terms of s 216(b), read with reg 163 the conviction of an offence for non-compliance may result in liability of either a maximum fine of R1,000,000 or imprisonment of a maximum of 12 months, or both.

[154] CIPC *Annual Report* 2016/2017 39. *S v Quantum Property Group Ltd* ("*S v Quantum*") (WC)(SCCC, Bellville) (21-07-2016) SH7/67/2016. Interestingly enough this matter was

CIPC can also be a surrogate claimant for a complainant and commence proceedings in the name of the claimant.[155] This is presumably to assist complainants who may not have the necessary information, or the ability to evaluate information or afford the costs of private enforcement.[156] This also raises questions: on whose behalf does a public regulator act – the public or private persons? What are the purposes of public regulation and enforcement?[157]

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resolved via a plea agreement in terms of s 105A of the CPA. Notably the duration of this process was fairly quick: a complaint was lodged by a shareholder in August 2013, and consequently the CIPC in October 2013 first invited the company to fulfil the outstanding obligations and subsequent to failing to do so the CIPC issued a compliance notice in January 2014 which the company also failed to comply with (*S v Quantum* paras B5-B16). The agreed sentence was a fine of R40,000 of which R15,000 was suspended for a period of 5 years. Part of the agreement too was that only the company and not any one of the directors would be held criminally liable for the non-compliance (*S v Quantum* para E). Much emphasis in the plea agreement was placed on the accountability of a company, particularly a listed public company (*S v Quantum* paras D2.1-D2.5) (Writer's note: the copy of the plea agreement/judgment the writer found did not have reference to the presiding officer). CIPC also commenced with 16 other criminal cases to impose fines upon companies not adhering to compliance orders. CIPC *Annual Report* 2016/2017 36. See too Brand-Jonker "1ste Direkteur nóg 'misdadig' Verklaar vir Firma se Probleme" (02-11-2017) *Netwerk24*. S Theobald ("More Vigilant and Energetic Regulator Needed to Tackle White-collar Crime in SA" (06-08-2018) *Businesslive* (accessed 15-08-2018)) is more critical, however, and has called for a more vigilant and active CIPC which should not only react to complaints but also undertake investigations required by the Minister of Trade and Industry under s 187(2)(d) read with s 190(2)(b) of the Companies Act 2008.

[155] Ss 157(2) read with 170(1)(g) and reg 130 and CoR 135.1 of the Companies Act.

[156] M Berkahn & L Trotman "Public and Private Enforcement of Company Law in New Zealand 1986-1998 (2000) 7 *Canta LR* 516 518-519. CIPC has extensive powers to investigate complaints and gather information. See Cassim "Enforcement and Regulatory Agencies in *Contemporary Company Law* 842-845.

[157] It is contended that the purpose is more than regulating the market and ensuring stability and promoting business confidence (see fns 116 and 122 above); but also to ensure good corporate governance and disclosure of required information by firms. For a discussion on different approaches in support of private or public enforcement see Berkahn & Trotman (2000) Canta LR 517-222. Also see Cassim "Enforcement and Regulatory Agencies in *Contemporary Company Law* 825-829, 843, who warns that CIPC's powers of investigation should not be abused to badger companies.

The powers of ASIC are extensive,[158] yet Smith cautions that ASIC has had mixed success in exercising its enforcement powers and that it lacks the invincibility to ensure the efficacy of responsive regulation.[159] Its degree of success also differs from industry to industry and ASIC has not been successful in the financial services sector. Smith contends that responsive regulation is based on relationships. This means that a core characteristic is human agency, namely relationships between regulators and corporations; the former usually represented by inspectors and the latter by corporate representatives.[160] Consequently, if a regulatory body lacks the resources to attend to such relationships through regular inspections and contact, the body does not develop credibility and the successful implementation of a responsive regulation pyramid becomes more challenging. If a regulatory body like ASIC or CIPC does not have the human resources to regulate by building relationships with the corporate sector based on dialogue at the bottom of the pyramid, its efficacy is weakened.[161]

Notwithstanding these challenges, the submission remains that responsive regulation is integral to regulating the corporate sector and more research is needed to refine and review the parameters if necessary. Such research and review also fall under the mandate of CIPC.[162]

Consequently, it is submitted that CIPC should play a stronger and more vibrant role in South Africa's corporate sector;[163] similar to the proactive role ASIC is playing

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[158] For example, ASIC has the discretionary power not only to grant exemptions from statutory obligations, but also to amend the primary Corporation Act 2001 legislation through "class orders". For a detailed discussion on these powers see S Bottomley "The Notional Legislator: The Australian Securities and Investment's Commission's Role as a Law-Maker (2011) 39 *Fed L Rev* 1-31. In comparison, CIPC has no such powers, whilst the Companies Tribunal has the power to grant certain exemptions, such as exemptions to establish Social and Ethics Committees in terms of s 72(5) of the Companies Act 2008.

[159] Smith (2011) *UBCL Rev* 708.

[160] Smith (2011) *UBCL Rev* 708

[161] Notably, a major constraint of CIPC has been the volatility in its human resources department. See CIPC *Annual Report* 2016/2017 82; CIPC *Annual Report* 2017/2018 12.

[162] S 188 of the Companies Act 2008.

[163] In the 2016-2017 year the ASIC prosecuted 409 directors for offences in terms of insolvency laws, reviewed more than 320 financial accounts which culminated in almost an AUD billion worth of assets being revalued by companies and reviewed 9,000 complaints of misconduct from the public. ASIC *Annual Report* 2016/2017 4-5. See S Theobald "More

in fulfilling its mandate, taking into account the differences in the respective corporate contexts.

CIPC's power to initiate its own enquiry is of particular importance.[164] CIPC need not only play a responsive role in responding to complaints filed with it, but may in monitoring and supervising the corporate industry initiate its own inquiry. This could lead to the issue of compliance orders and other corrective actions, including prosecution. In short, CIPC does have the teeth in theory to make a significant contribution in addressing economic crime. It is submitted that CIPC needs to sharpen and use its teeth frequently.

The role played by ASIC, in conjunction with the office of the Attorney General and the Commonwealth Director of Public Prosecutions, illustrates the effective collaborative steps that can be made against corporate crime.[165] Cooperation, communication and liaison by CIPC with other regulatory bodies are provided for in terms of section 188(3)[166] of the Companies Act 2008 that grants CIPC the authority, not only to liaise with any other regulatory authority, but also to conclude agreements with such authorities to co-ordinate, harmonise and ensure consistent enforcement of the principles of the Companies Act 2008.[167] Moreover, the surveillance[168] and

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Vigilant and Energetic Regulator Needed to Tackle White-collar Crime in SA" *Businesslive*. For other statistics see Locke (2018) *ABLU* 63.

[164] Ss 168(2) & 187(2)(c) of the Companies Act 2008; Farisani (2010) *AJ* 436-437.

[165] ASIC *Annual Report* 2016/2017 14. This collaboration resulted in several criminal prosecutions and imprisonments for corporate misconduct. *ASIC Annual Report* 2016/2017 5, 30-32 & 41.

[166] S 188(4) grants the CIPC authority to liaise with international or foreign bodies that have similar functions and objectives.

[167] Farisani (2010) *AJ* 444-445. Compare the reference in the CIPC *Annual Report* 2017/2018 46 to indicative partners. A comparative example, is the 2006 collaboration and cooperation memorandum of understanding ("MOU") between ASIC and the DPP in Australia. For a list of MOUs with entities, see ASIC website: <https://asic.gov.au/about-asic/what-we-do/our-role/other-regulators-and-organisations/.

[168] 70% of ASIC's resources are spent on surveillance and enforcement. In the 2016-2017 year 1,440 surveillance undertakings and 160 investigations were conducted across the various sectors. For details, see the ASIC *Annual Report* 2016/2017 4-5. Monitoring and enforcement are part of the objectives of CIPC in terms of ss 186(1)(d) and (e) of the Companies Act 2008.

educational[169] role played by ASIC is influential in relation to the reform of corporate accountability and consequent regulatory compliance, culminating in reduced corporate misconduct.[170]

Recently, CIPC succeeded in the finalisation of an enforcement process. *Companies and Intellectual Property Commission v Creswell*[171] is the first case in which CIPC secured an order to declare a director delinquent in terms of section 162 of the Companies Act 2008. Although the process took almost a decade from the commencement of the investigation to the granting of the order, it is has been hailed as an historic achievement.[172]

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[169] Through several programmes ASIC has trained and educated tens of thousands of persons, focusing on financial literacy programmes for schools, older persons and culturally and linguistically diverse communities (ASIC *Annual Report* 2016/2017 25). Notably the promotion of education and awareness of corporate law is one the primary objectives of the CIPC in terms of ss 186(1)(c) & 188(2) of the Companies Act 2008.

[170] The value of education and regular inspections by a supervisory body in deterring corporate crime has been proven by the meta-analysis conducted by Shell-Busey. See Schell-Busey et al (2016) *Criminology & Public Policy* 406.

[171] [2017] 38 ZAWCHC. In this case CIPC became aware of possible suspicious operations of Skyport Corporation Ltd, which averred that it was erecting an airport in Malmesbury and was selling shares to the public to raise monies for this operation. In 2008 and 2009, the Minister of Trade and Industry appointed investigators to investigate the operations in terms of ss 258(2), 259(1) and 259(2) of the Companies Act 1973 and arising from these investigations application was made under the current Act to declare the director, Owen Wienand, delinquent for gross abuse of his position as director (paras 1-7). Davis J found Wienand grossly negligent and consequently declared him delinquent for 7 years in terms of s 162(5)(c)(iv)(aa) of the 2008 Act (paras 35-37 and 40-41). Quite fittingly the judgment was delivered by Davis J who has played an instrumental role in the reform of company law in South Africa.

[172] CIPC *Annual Report* 2016/2017 10 and 39; L Ensor "Historic Delinquent Director Declaration for Skyport" (30-03-2017) *Business Live* <https://www.businesslive.co.za/bd/companies/2017-03-30-historic-delinquent-director-declaration-for-skyport/> (accessed 03-11-2017); N Brand-Jonker "1ste Direkteur nóg 'misdadig' Verklaar vir Firma se Probleme" (02-11-2017) *Netwerk24* <https://www.netwerk24.com/Sake/Maatskappye/1ste-direkteur-nog-misdadig-verklaar-vir-firma-se-probleme-20171102?giftcode=093d85b5ff7745688adae8f1fbe3d47f> (accessed 03-11-2017). CIPC acknowledges that is has various challenges in executing its compliance mandate and has plans to improve it fraud prevention strategy. Also see CIPC *Strategic Plan 2017/2018* to 2021/2022 11, 15-17 and 32.

Significantly, a recent article demonstrates that banning or disqualification is the dominant enforcement mechanism used by ASIC.[173] This practice is not without criticism.[174] This prevailing trend is probably due to banning orders being a unilateral decision by ASIC.[175] In contrast, other enforcement mechanisms, such as enforcement orders need the consent of the affected parties, or administrative or criminal sanctions need judicial execution.[176] Making a banning order is an administrative function and is accordingly not subject to strict rules of procedure and evidence. Banning orders are incapacitating and fatal to a company or an individual, particularly as many such orders are permanent.[177] Importantly, the effect and purpose of banning orders have been found to be both protective and punitive by the Australian High Court.[178] Concern has been raised at the increasing prevalence of banning orders as an enforcement mechanism and a call has been made for ASIC to be more accountable and transparent with regard to such orders.[179] As is evident from the *Creswell* case, CIPC does not have any unilateral administrative powers to

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[173] J Hedges G Gilligan & I Ramsay "Banning Orders: An Empirical Analysis of the Dominant Mode of Corporate Law Enforcement in Australia" (2017) 39 514-516 *Sydney L Rev* 501 529. Banning order constituted almost 41% of the total of all enforcement orders and of these 87% of banning orders in the past 18 years (1997-2015) were administrative and the duration of the disqualification orders were longer.

[174] For general evaluation, concern and criticism see Hedges et al (2017) *Sydney L Rev* 501-537.

[175] In terms of s 206F of the Corporations Act 2001 ASIC may disqualify a person for up to 5 years as an administrative sanction. S 206F provides that ASIC has to give the person notice and an opportunity to be heard and needs to satisfy itself that the disqualification is justified. No reasons for the disqualification need to be given. This unilateral power of disqualification is in addition to s 206C which provides that ASIC may apply to court for a disqualification order in the event of the contravention of a civil penalty provision. Hedges et al (2017) *Melb UL Rev* 923-924.

[176] Hedges et al (2017) *Sydney L Rev* 517.

[177] Hedges et al (2017) *Sydney L Rev* 529.

[178] This is a typical case of the blurring of civil and criminal sanctions as the consequences of banning are punitive and quasi-criminal. For a discussion, see Hedges et al (2017) *Sydney L Rev* 529-531; Bird et al (2005) *J Corp L Stud* 209-212; Tomasic (2006) *UWSLR* 8-10. Compare case law in South Africa that has held that disqualification orders are not to punish a person but to protect the public. For a discussion on these cases and issues, see R Cassim "Governance and the Board of Directors" in *Contemporary Company Law* 432-433.

[179] Hedges et al (2017) *Sydney L Rev* 531-536.

make disqualification orders, but is able to apply to a court to declare a director delinquent.[180]

It is also significant that recent empirical analyses show that contrary to the pyramidal responsive regulation enforcement model, most sanctions imposed in Australia were incapacitative sanctions, high up in the pyramid model.[181] Criminal enforcement was emphasised above civil enforcement and this is inconsistent with the policies and purposes of decriminalisation of improper conduct under corporate law and the establishment of a pyramid of responsive regulation and enforcement.[182] Notwithstanding these findings, it is submitted that a pyramid of responsive regulation and enforcement remains the best way in which to establish a hybrid of administrative, civil and criminal corporate enforcement mechanisms.

Cassim prudently observes that a nation's corporate regulation needs to consider that particular country's economic, political and social structures, as well as its history and cultural values.[183] Undoubtedly South Africa's corporate milieu is being overshadowed by the extraordinarily high levels of economic crime. Notwithstanding this dark shadow South Africa also has a robust and progressive Constitution, supported by modern and appropriate corporate laws. It is submitted that the enforcement of corporate regulations, whether private or public, should remain responsive and be developed under the spirit, purpose and objects of both the Companies Act and the Constitution. In this light, the recent establishment of a commercial court dedicated to commercial matters is commended.[184] So too are the

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[180] S 162 of the Companies Act 2008. For a discussion on the application and declaration of a director as delinquent or under probation, see R Cassim "Governance and the Board of Directors" in FHI Cassim (ed) *Contemporary Company Law* 2ed (2012) 400 436-439.

[181] J Hedges, H Bird, G Gilligan, A Godwin & I Ramsay "The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis" (2017) 40 *Melb U L Rev* 905 909. 79% of all sanctions in a 10 year data set from 2005-2014, were incapacitative, being either custodial sentences or disqualification orders.

[182] Hedges et al (2017) 40 *Melb UL Rev* 949-966. The analysis showed that the sanctions imposed were not pyramidal as more than 78% were incapacitative, namely disqualification and incarceration, at the top of the apex.

[183] FHI Cassim "Introduction to the New Companies Act: General overview of the Act" in FHI Cassim (ed) *Contemporary Company Law* 2ed (2012) 1 27.

[184] See fn 112 above for reference to newly established Gauteng Commercial Court High Court.

calls by CIPC and the Companies Tribunal to promote alternative dispute resolution and for persons to use the options provided in the Companies Act 2008. CIPC can and must play an ever stronger and more vibrant role in the regulation of corporate South Africa.

Recent empirical analyses of twenty years of enforcement by ASIC timely remind regulators, judges and corporate policy makers that the field of economic crime remains complex. Self-regulation and instilling ethical values in a corporate culture are critical.[185] In addition, to ensuring compliance with corporate regulation, a call is made to move beyond rational utilitarian motives, such as risk-calculating[186] to more emotional motives, including corporate shaming models for developing the principles of corporate culture and conscience.[187]

4 2 3 Mechanism of the ombud office: FAIS Ombud[188]

In the light of the pivotal role played by the financial services industry in promoting both micro- and macro-economic development and growth, and, moreover, influencing a broad spectrum of stakeholders, including investors, shareholders, bankers and the ordinary citizen, prudential regulation and good corporate governance of the industry are critical.[189] Recent reformation of the global financial sector has been necessitated through the Global Financial Crisis the past decade, as well as the increased complexity of financial products and operations.[190] The

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[185] Tomasic (2006) *UWSLR* 21-22.

[186] Some civil and criminal sanctions result in a corporation calculating the risk of being caught in breaking the rules and the costs of such wrongdoing, in contrast to actually changing the corporation's behaviour. Bronitt & D'Amico (2018) *U Qld LJ* 83.

[187] The submission is that proper compliance originates from legitimacy, moral values such as fairness and emotional dimensions. Consequently, such principles should be developed in designing models for ensuring compliance. Bronitt & D'Amico (2018) *U Qld LJ* 76-79, 82-84.

[188] At the time of writing, the new regulations, discussed below, had not yet come into force and consequently the names of the FAIS Ombud and FSB Board are retained in this discussion.

[189] P Puri & A Nichol "Developments in Financial Services Regulation: A Comparative Perspective" (2014) 55 *Can Bus L J* 454 470, 487.

[190] A Godwin, T Howse & I Ramsay "Twin Peaks: South Africa's financial sector regulatory framework" (2017) 134 *SALJ* 665 665-666.

domestic financial sector has also seen continual reform, and recently, in December 2017 the Financial Sector Regulation Act 9 of 2017 ("Financial Sector Regulation Act") was passed.[191] South Africa has now introduced the so-called Twin Peaks structure of financial regulation by establishing two regulators,[192] being the Prudential Authority ("PA")[193] and the Financial Sector Conduct Authority ("FSCA").[194] In short, the PA will be responsible for prudential supervision of the financial sector, promoting financial stability and prudence; whilst the FCSA will monitor and regulate the market conduct of financial providers.[195] The PA will resort under the Reserve Bank of South Africa, whilst the FSCA is a stand-alone authority created and regulated by statute.[196] Important for this dissertation is the establishment of the Ombud Council,[197] and the role played by ombuds[198] in resolving instances of

[191] The Financial Sector Regulation Act replaces the Financial Markets Act 19 of 2012, which in turn replaced the Securities Services Act 36 of 2004. This is an over simplification, as the Financial Sector Regulation Act impacts on a broad number of acts which are listed in Schedule 1, while the repeals and amendments of numerous acts are listed in Schedule 4. There is also a transition period for various parts of the act. For example, chapter 14, the part relating to the Ombud Council, is due to come into operation on 1 April 2019. For general transitional measures and time periods see GN 169 in *GG* 41549 of 29-03-2018, GN R 405 in *GG* 41550 of 29-03-2018 & GN 1019 in *GG* 41947 of 28-09-2018. For notices, regulations and press releases see *National Treasury* <www.treasury.gov.za/twinpeaks>; *Financial Sector Conduct Authority* <www.gsca.co.za> (accessed 215-03-2019); H Ziady "Banks Face Hefty Fees from Twin Peaks" (18-07-2017) *Business Day* (accessed 20-07-2017).

[192] South Africa's financial regulatory framework is primarily based on the Australian model: AJ Godwin & AD Schmulow "The financial sector regulation bill in South Africa, second draft: Lessons from Australia" (2015) 132 *SALJ* 756 756.

[193] Established under s 32 of the Financial Sector Regulation Act; while s 33 prescribes its objectives and s 34 its functions.

[194] Established under s 56 of the Financial Sector Regulation Act. Its objectives and functions are prescribed in ss 57 and 58 respectively. The objectives of FSCA include the promotion of the integrity of financial markets, the protection of customers and the enhancement of financial stability. Significantly s 58(6) provides that FSCA is to exercise its functions, without fear, favour or prejudice, echoing constitutional vocabulary and values.

[195] For a discussion of the Twin Peaks model see Godwin & Schmulow (2015) *SALJ* 756-768.

[196] Godwin et al (2017) *SALJ* 670-671.

[197] Established in terms of s 175 of the Financial Sector Regulation Act. The South African legislature chose to retain a plurality of Ombud schemes in the broad financial industry which

financial misconduct, which may include financial contraventions and offences by financial service providers. A global tendency in the enforcement of financial regulations and the protection of customers has been the increased use of ADR and the office of the ombud.[199] South Africa is no exception and several ombuds are present in the South African financial industry.[200] One such ombud is the Financial Advisory and Intermediary Services ("FAIS") Ombud, resorting under The Financial Services Board ("FSB").[201] Before highlighting some of the decisions of the FAIS Ombud, illustrating its functions and powers, a few introductory comments on the role of an ombud, demonstrate the role ombuds can play in combating economic crime, particularly crimes in the comprehensive financial sector.

The word ombudsman[202] originates from the Viking word *umbodhsmadhr*, meaning an agent or deputy who had the role of recouping compensation on behalf of a victim from a perpetrator.[203] The contemporary ombudsperson is defined by its

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can be recognised by the Ombud Council, as opposed to the English model of merging the various ombuds in the financial industry into one central authority. See N Melville "Has Ombudmania Reached South Africa? The Burgeoning Role of the Ombudsmen in Commercial Dispute Resolution" (2010) 22 *SA Merc LJ* 50 62-63.

[198] For a definition of ombud or ombudsperson see next paragraph and fn 204 below.

[199] Melville (2010) *SA Merc LJ* 51; Wiese (2014) *SA Merc LJ* 669.

[200] For example, Ombudsman for Long-Term Insurance, Ombudsman for Short-Term Insurance, Credit Ombud and Tax Ombud.

[201] The FSCA under the new Financial Sector Regulation Act. See in particular ss 292-294 regarding transitional provisions. Of specific importance is s 299 relating to the appeals to the Tribunal in terms of s 26 of the FSB Act. As at the time of writing, the FAIS Ombud still operated under the FAIS Act and resorted under the FSB, the discussion in this dissertation relates to the FAIS Ombud. Moreover, the decisions of the FAIS Ombud will remain part of the jurisprudence of the financial industry in South Africa. At present, the FSB is an independent body whose vision and purpose is to promote and maintain a sound financial investment setting in the non-banking sector in South Africa and further afield. The FSB is created and regulated by statute, the Financial Services Board Act 97 of 1990 ("FSB Act"), and has played a supervisory role since its inception in the non-banking financial services industry, including investment schemes (stock market and unit trusts) and insurances schemes (short-term, long-term, funeral). Importantly, too the FSB oversees the licencing and activities of financial advisors and brokers; but can crucially also act against financial service providers that are not properly licensed in terms of the FSB legislation.

[202] In this dissertation, the gender neutral word "ombud" or ombudsperson" is used.

[203] Poignantly in Ethiopia, *Emba Tebaki*, the name of the ombudsperson means "Keeper of the People's Tears". See Mellville (2010) *SA Merc LJ* 50, 57.

primary role, being a representative or an intermediary who acts and investigates complaints on behalf of a complainant. This role model is derived from Sweden, the northern Germanic country, whose parliament more than two centuries ago, appointed an ombudsperson to investigate complaints between the government and common citizens.[204] The global use of ombudspersons has increased exponentially in the past half-century and ombuds have been established in various industries, also in commerce to settle disputes between consumers and service providers and are particularly prevalent in the financial sector.[205] The attractions of ombuds are primarily their accessibility[206] and flexibility.[207] Though many, like the FAIS Ombud, are creatures of statute and regulated by statute, they are more accessible than a court and are enabled to use ADR mechanisms, which grants them a freedom from the constraints of formal rules present in adversarial structures, such as courts. Moreover, ombudspersons are not regulators, but like other presiding officers, interpret and apply regulations.[208] Ombuds are of course required to be independent and impartial, although they receive complaints from one party, usually the weaker party against a stronger party.[209] Ombuds are primarily tasked with solving issues conciliatorily and informally, but significantly, some statutory ombudspersons have the power to make binding decisions upon the parties, thereby bringing a conclusion to an issue speedily and cost effectively.[210] This brief description of the role and functions of an ombudsperson strongly reminds of the role played by traditional and

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[204] Anonymous "Ombudsperson" *The Free Dictionary* <https://legal-dictionary.thefreedictionary.com/Ombudsperson> (accessed 06-09-2018).

[205] For a classification of ombudspersons and the different sectors they operate in see Mellville (2010) *SA Merc LJ* 52-53.

[206] Accessibility includes low or no costs as the cost of the procedure, including assistance with the lodging of a complaint, investigation and inquiry is borne by the relevant bodies in the industry.

[207] For brief description of office and advantages of ombudsperson, see *Sharemax Investments (Pty) Ltd v Siegrist & Bekker* FAIS 00039/11-12/GP1 & FAIS 06661/10-11/WC1, the consolidated appeal before the FSB Appeal Board ("*Sharemax Appeal*") para 15.

[208] Mellville (2010) *SA Merc LJ* 55-56; *Sharemax Appeal* para 16.

[209] For example, an insured client against an insurance company.

[210] For example, in terms of s 28 of the FAIS Act, the FAIS Ombud may make a determination, which has the effect of a civil judgment.

customary leaders in settling disputes and, consequently, the growth of ombuds in contemporary South Africa has been well received and understood.[211]

The work and influence of the FAIS Ombud office has grown remarkably. In the annual period of 2016/2017, it received more than 10,500 new complaints of which 4,263 were justiciable complaints, compared to a decade previously when 666 justiciable complaints out of 3,808 new complaints were received in 2005/2006.[212] Pointedly, the Rand value of cases settled or determined at the end of the 2016/2017 year exceeded R58 million, a figure that illustrates the significance of the work of the FAIS Ombud.[213] The FAIS Ombud was established in terms of section 20 of the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS Act").[214] The vision of the FAIS Ombud is to be a preferred and world-class dispute resolution forum providing an accessible, impartial, efficient and professional service by committed and passionate staff, and to be respected by all stakeholders.[215] The mission of the FAIS Ombud is to promote consumer protection and enhance the integrity of the financial services industry through resolving complaints impartially, expeditiously and economically.[216] In a recent FAIS Ombud Annual Report, the then Minister of Finance, Pravin Gordhan emphasised the Twin Peaks model of regulation for the financial sector, and underlined the role of the FAIS Ombud as forming "an integral feature of the ombud landscape as it provides customers with an alternative

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[211] Mellville (2010) *SA Merc LJ* 57-58. For example, the recognition of ADR and the role of ombuds under chap 7 of the National Credit Act 34 of 2005 and under chaps 3 & 4 of the Consumer Protection Act 68 of 2008. Notably, too the Financial Services Ombud Scheme Act 37 of 2004 regulating and co-ordinating the various ombuds in the financial services sector.

[212] A total number of 10, 846 complaints, of which 5,630 were justiciable, were received. Regarding resolution of complaints for the 2016/2017 year, 3,794 complaints were dismissed, 4,639 were referred to other entities, 592 settled and 24 determined, and 1,810 carried over to the following year. Remarkably the FAIS Ombud resolved more than 11,000 cases in the 2016/2017 year, including cases carried forward from previous years (FAIS Ombud *Annual Report* 2016/2017 17-18 & 41-43); see too FAIS Ombud *Annual Report* 2015/2016 34-36 for the 2015/2016 period.

[213] The precise amount was R58, 343, 824, an increase from the previous year of R50,2 million (FAIS Ombud *Annual Report* 2016/2017 18).

[214] Read with the former Financial Services Ombud Schemes Act 37 of 2004.

[215] FAIS Ombud *Annual Report* 2014-2015 4.

[216] FAIS Ombud *Annual Report* 2014-2015 4.

dispute mechanism thus obviating the need to access the courts".[217] It is thus as a dispute resolution model, alternative to the courts, that the FAIS Ombud is being discussed as a mechnsim to use in instances of financial misconduct in the financial sector. In addition, the office of the FAIS Ombud has an administrative body with regard to the resolution of complaints and the orders it is able to give with regard to compensation are significant for the pillar of restitution in this dissertation.

The FAIS Ombud has, rightfully so, wide and pragmatic powers and its objective is defined by its creating statute as having "to consider and dispose of complaints by clients against financial services providers in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances".[218] The requirement of procedural fairness is based on the Constitution and amplified by the Promotion of Administrative Justice Act 3 of 2000. Importantly any dispute retains its legal character, despite being defined as a complaint in the FAIS Act and accordingly the FAIS Ombud remains bound by the principles of statutory and common law.[219] In addition, section 27(5) grants the FAIS Ombud broad discretion as to the manner in which the FAIS Ombud wishes to proceed with the investigation.[220] Determinations of the FAIS Ombud may be taken on appeal to the Appeal Board of the FSB;[221] and any determination by the FAIS

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[217] FAIS Ombud *Annual Report* 2015-2016 4-5. The FAIS Ombud does not have the jurisdiction to resolve matters that constitute a criminal offence and these would be referred to the relevant authorities.

[218] S 20(3) of the FAIS Act. S 20(4) of the FAIS Act further provides that the FAIS Ombud needs to be independent and impartial when dealing with complaints in terms of ss 27 & 28 of the FAIS Act. S 27(4) of the FAIS Act describes the jurisdictional scope of the FAIS Ombud and primarily codifies the *audi alteram partem* rule by prescribing that the FAIS Ombud cannot investigate a matter until the FAIS Ombud has informed all the parties of the complaint and each party has been given an opportunity to respond to such complaint.

[219] *Sharemax* Appeal paras 16-19.

[220] S 27(5) reads: "The Ombud (a) may, in investigating or determining an officially received complaint, follow and implement any procedure (including mediation) which the Ombud deems appropriate, and may allow any party the right of legal representation."

[221] S 28(5)(b) of the FAIS Act. The Appeal Board is also a creature of statute and does not have "an unfettered or inherent jurisdiction". *See DH Janssens v Life Force Financial Services CC & A Priday* (23-03-2015) para 20. (Writer's note: there is no reference number allocated to the case). For the nature and scope of authority of the Appeal Board of the FSB

Ombud or decision by the Appeal Board of the FSB has the same status as a civil judgment of a court.[222] The role and nature of the ombud is succinctly described by the Appeal Board of the FSB as follows:

> "Because of the special nature of the office, the Ombud deals with matters inquisitorially. She not only investigates but also mediates and if necessary determines disputes by administrative fiat or monetary award which must, by virtue of sec 20(3), be related to legal relationship between the parties. A determination (subject to the right of appeal and review) has the force of a court judgment and may be executed."[223]

Notwithstanding the flexibility and informality of the office of the FAIS Ombud, its office is regulated by the provisions of the FAIS Act, and as a creature of statute its powers are also defined by statute and administrative law.[224] Though playing a significant role in the financial services industry, providing an alternative dispute resolution forum where complaints are dealt with in a more informal, fast and virtually costless process, it is this flexibility, together with the wide discretion attributed to an ombud that has raised various concerns with some of the decisions of the FAIS Ombud over the years. Some decisions of the FAIS Ombud are problematical with regard to the jurisdiction of and procedures used by the FAIS Ombud. Recent determinations by the Appeal Board of the FSB have helped clarify the powers and procedures of the FAIS Ombud.

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see the *Sharemax* Appeal paras 23-25; *CS Brokers CC v JB Wallace* FAB 5/2016 paras 12-14.

[222] S 28(5)(a) of the FAIS Act.

[223] *Sharemax* Appeal para 20. For further amplification, see paras 21-22. Also see *CS Brokers CC v JB Wallace* FAB 5/2017 para 15.

[224] The general administrative powers of the FAIS Ombud are listed in s 24 of the FAIS Act and relate to the general running and functioning of the FAIS Ombud office. More importantly, the scope of the judicial powers and authority of the FAIS Ombud is prescribed in s 28 of the FAIS Act which empowers the FAIS Ombud to make a final determination. This may include (a) the dismissal of the complaint; or (b) the upholding of the complaint, wholly or partially, in which case the FAIS Ombud may award the complainant an amount as fair compensation for any financial prejudice or damage suffered; issue a direction that the authorised financial services provider, representative or other party concerned take such steps in relation to the complaint as the Ombud deems appropriate and just; or make any other order which a court may make. Also see *GA Hattingh v PW Mackie (in his capacity as executor of estate late CW Mackie)* FAB 15/2017 para 20.

With regard to procedural fairness the Appeal Board of the FSB has held that undue delays in investigating and processing a matter,[225] showing bias towards a complainant,[226] not putting allegations to the parties,[227] refusing to hear oral evidence,[228] or refusing to consider an application to have a matter referred to court[229] may constitute a failure of natural justice and result in the setting aside of a determination by the FAIS Ombud to the detriment of the complainant. Moreover, the findings and any determination made by the FAIS Ombud need to be based on facts before the ombud and should not be influenced by personal opinion, speculation or conjecture.[230] Though the ombudsperson is a special office, with a flexible and broad nature, the ombud is not "a super investigator or super judge".[231]

In the *Siegrist* and *Bekker* matters[232] the Appeal Board of the FSB held that the jurisdiction of the FAIS Ombud is properly determined by the interpretation of a

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[225] *DH Janssens v Life Force Financial Services CC & A Priday* (23-03-2015) paras 2 & 23.

[226] *Audenberg Versekering Makelaars BK v Hannes Waterboer* FAB 13/2017 paras 15, 18 & 20; *GA Hattingh v PW Mackie (in his capacity as executor of estate late CW Mackie)* FAB 15/2017 para 24. Also see s 20(4) of the FAIS Act prescribing that the Ombud needs to be impartial and independent.

[227] *Audenberg Versekering Makelaars BK v Hannes Waterboer* FAB 13/2017 paras 11-15 & 20; *CS Brokers CC v JB Wallace* FAB 5/2016 para 20.

[228] *CS Brokers CC v JB Wallace* FAB 5/2016 para 9.

[229] *CS Brokers CC v JB Wallace* FAB 5/2016 para 10.

[230] *GA Hattingh v PW Mackie (in his capacity as executor of estate late CW Mackie)* FAB 15/2017 para 26; *CS Brokers CC v JB Wallace* FAB 5/2016 paras 14-15 & 21.

[231] *Jacobus Johannes van Zyl v Sydney Perumal Naidoo* FAB 2/2015; *Herman Bester and Durandt van Zyl v Stephanus Lourens G*erber FAB 8/2014; and *Jacobus Johannes van Zyl v Stephanus Lourens Gerber* FAB 9/2014 ("*Van Zyl* Appeals") para 35.

[232] *Siegrist v Botha t/a CJ Botha Finansiële Dienste* FAIS 00039/11-12/GP 1 ("*Siegrist*") and *Bekker v Carter-Smith* 06661/10-11/WC 1 ("*Bekker*") are cases determined by the FAIS Ombud in 2013; and subsequently heard as a consolidated FSB Appeal Board case in 2015 with the same case numbers ("*Sharemax* Appeal"). These matters relate to the Sharemax Scheme, a failed property syndicate scheme in which more than 33,000 investors lost an estimated R3 billion. Sharemax Investments (Pty) ("Sharemax") was a duly licenced financial services provider ("FSP") in terms of the FAIS Act. Sharemax's portfolio included two property development companies, Sharemax Zambezi Retail Park Investments (Pty) Ltd and Sharemax Zambezi Retail Park Holding (Pty) Ltd ("Sharemax Properties") that raised monies through unlisted shares and debentures. An integral part of the Sharemax scheme was the use of a so-called "section 13 FSP". S 13 of the FAIS Act allows a registered FSP to use representatives, who are not registered, to provide financial services under the supervision

"complaint" in terms of section 1 of the FAIS Act, and consequently the FAIS Ombud cannot "join" parties to a matter by giving them notice in terms of section 27(4) of the FAIS Act.[233] The main argument for the appellants was that neither of them were cited as wrongdoers by the complainant in the original complaint and consequently the FAIS Ombud did not have jurisdiction to hear the matter. Thus, the procedure adopted by the FAIS Ombud in relation to them was not competent or procedurally fair as prescribed in section 20(3) of the FAIS Act. Much of the decision by the Appeal Board of the FSB thus dealt with the meaning of "complaint" as defined in terms of section 1 of the FAIS Act.[234] The Appeal Board of the FSB upheld the appeal against the decision of the FAIS Ombud on the grounds of the definition of a complaint in terms of section 1 of the FAIS Act. The complaint initially laid was improperly defined as the complaint was only made against the FSP acting under section 13 and not against the appellants. Consequently, the appellants were

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of a registered FSP. A company FSP Network (Pty) Ltd t/a Unlisted Securities South Africa ("USSA") was a licensed FSP and used by Sharemax to market the unlisted securities and debentures in Sharemax Properties. USSA only marketed the prospectuses of Sharemax Properties and it did this through more than one thousand brokers, who did not have the necessary licences, as representatives under s 13 of the FAIS Act. The Ombud found that USSA was intentionally created as the marketing arm of Sharemax and found that USSA and Sharemax were joined at the hip (*Siegrist* paras 51-53, 122). In addition, the FAIS Ombud pierced the corporate veil and found the directors of Sharemax, together with Sharemax, jointly and severally liable for the loss of the investors due to their reckless conduct and unconscionable abuse of the corporate personality (*Siegrist* para 148, 212-224; *Bekker* para 108). Notably, the original complaint laid with the FAIS Ombud was only against the s 13 FSP and not also against USSA, Sharemax or its directors. The FAIS Ombud joined USSA, Sharemax and the directors of Sharemax by granting them notice as interested parties under s 27(4) of the FAIS Act, and these parties appealed ("appellants") against the determination of the FAIS Ombud. For a summary of the facts, see *Sharemax* Appeal paras 26-38.These principles were confirmed in October 2015 by the Appeal Board of the FSB when it jointly heard three appeals *Jacobus Johannes van Zyl v Sydney Perumal Naidoo* FAB 2/2015; *Herman Bester & Durandt van Zyl v Stephanus Lourens Ge*rber FAB 8/2014; and *Jacobus Johannes van Zyl v Stephanus Lourens Gerber* FAB 9/2014 and confirmed the principles laid down in the *Sharemax* Appeal.

[233] *Sharemax* Appeal paras 12-14, 44, 47-49.

[234] A complaint has to be properly defined as prescribed by the FAIS Act and the FAIS Ombud may not "flesh out" or expand a complaint on behalf of a complainant. *Sharemax* Appeal paras 18, 42-43; *GA Hattingh v PW Mackie (in his capacity as executor of estate late CW Mackie)* FAB 15/2017 para 24.

improperly joined by the FAIS Ombud as parties to the complaint.[235] The Appeal Board of the FSB further held that notice given by the FAIS Ombud to the other appellants under section 27(4) of the FAIS Act did not constitute proper notice of the particulars of a complaint against a party in terms of the Act.[236]

As a large part of the FAIS Ombud's determination in the *Siegrist* and *Bekker* cases related to the ombud piercing the corporate veil and finding the directors jointly and severally liable, the Appeal Board of the FSB made brief reference to this principle.[237] The Appeal Board of the FSB cryptically declared that section 20(9) of the Companies Act 2008 granted courts and not tribunals the power to pierce the corporate veil. Application for the court to pierce the corporate veil needs to be done as prescribed by section 20(9) of the Companies Act 2008, and cannot simply be done during the course of a judgment without prior notice to the relevant parties.[238] The stance of the Appeal Board of the FSB is, however, compounded by its decision, a few months earlier in November 2014, in the case *John Alexander Moore and Johnsure Investments CC v Gerald Edward Black,*[239] in which the Appeal Board did

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[235] Sharemax Appeal paras 44-49.

[236] Sharemax Appeal paras 48-52; *Van Zyl Appeals* paras 19-21.

[237] *Sharemax* Appeal para 54.The Appeal Board of the FSB found that the FAIS Ombud did not have the jurisdiction to hear the matter against the appellants on the grounds that the appellants were not part of the complaint originally submitted to the FAIS Ombud (paras 49-51) and consequently the references to piercing the corporate veil are *obiter dicta.*

[238] *Sharemax* Appeal para 55. It thus appears, according to this decision by the FSB Appeals Board, that the FAIS Ombud does not have the jurisdiction to pierce the corporate veil on two grounds. Firstly, it does not have the power to do so; and, secondly, piercing the corporate veil can only be done through the statutory route of s 20(9) of the Companies Act 2008.

[239] FAIS 0110-10/11 WC1. This case involved another property syndicate scheme, Blue Zone (liquidated), where the directors fraudulently used a company to secure improper investments and consequently misappropriated them. In this appeal, the financial broker, Moore, was appealing, claiming that he was not responsible for the loss of the respondent Black, as he was only a FSP representative under s 13, and thus there was no causal link between him providing financial services to Black that led to the investment by and subsequent loss of Black. The supervisor in terms of s 13 was Van Zyl, also a director of Blue Zone. The Appeal Board found both Moore as supervisee responsible, together with Van Zyl the supervisor, as neither exercised the necessary care and skill required from a FSP (paras 37 & 66). It is also important to note that in the Appeal Board found that the corporate veil may be pierced (para 59). The Appeal Board found Van Zyl accountable in his

pierce the corporate veil.[240] In contrast, in October 2015 the FSB Appeal Board jointly heard a further three appeals and confirmed the principles laid down in the *Sharemax* Appeal case with regard to the jurisdiction of the FAIS Ombud.[241] Notably, it is suggested by the FSB Appeal Board that the FAIS Ombud could have advised the complainant to amend the complaint to include the erstwhile directors of the failed syndicate company under the complaint. Consequently, a complaint would have been properly constituted against them and the FAIS Ombud could have enquired into the issues and held them answerable.[242] This is significant as it infers that other parties, companies and directors may be added to an original complaint and be answerable to a complaint provided, inter alia, that they have been cited properly and been given proper notice of the complaint against them. Indeed, it is submitted the FAIS Ombud does have the authority to pierce the corporate veil, provided that the procedural requirements the FAIS Act have been complied with. This is supported by the finding in *ex parte Gore* that the common-law principle of piercing the corporate veil exists alongside section 20(9) of the Companies Act. Moreover, it is suggested the courts and other independent judicial bodies have had a robust approach to instances when they have been prepared to pierce the

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personal capacity as director of Blue Zone, as well as the supervisor in terms of s 13 (paras 60 & 67) and ordered Van Zyl to be jointly and severally liable for the complainant's loss. This is incomprehensible, as Van Zyl was not a party to the proceedings, and this is categorically stated by the Appeal Board (paras 54-55).

[240] Paras 59-60.

[241] *Jacobus Johannes van Zyl v Sydney Perumal Naidoo* FAB 2/2015; cf FAIS); *Herman Bester & Durandt van Zyl v Stephanus Lourens Gerber* FAB 8/2014; and *Jacobus Johannes van Zyl v Stephanus Lourens Gerber* FAB 9/2014 (*Van Zyl* Appeals). These cases also involved the failed Blue Zone property syndicate and the common appellant in each case, Van Zyl, (and Gerber in one matter) was an erstwhile director of Blue Zone. In all the matters, the complainants had originally laid a complaint only against the FSP, and not against Van Zyl or any of Blue Zone's directors. The Appeal Board found there was no complaint as defined in s 1 of the FAIS Act laid against the appellant Van Zyl (or Gerber), who was director of Blue Zone, and consequently the FAIS Ombud had no jurisdiction to make an order against van Zyl (para 18). The Appeal Board is harshly critical of the case management of the matter and the determinations of the FAIS Ombud; including the determination to hold the directors liable on the grounds of running a fraudulent property syndication scheme and further holding the directors as being personally liable by piercing the corporate veil; and the determination to dismiss the leave to appeal (paras 10, 21).

[242] *Van Zyl* Appeals para 35.

corporate veil, balancing the commercial principle of separate juristic personality of companies, with its abuse by persons controlling the companies.[243] In addition, the power of the FAIS Ombud to apply the substantive law is comparable to that of a court. In the light of these principles, it is submitted that the FAIS Ombud does have the common-law discretion to pierce the corporate veil; provided that proper application for such piercing has been made and that such application is part of a complaint lodged with the FAIS Ombud; and provided further that the application has been properly put to the relevant parties to answer and that they have been given proper notice regarding such application. This is further supported by the wide discretion granted to the FAIS Ombud in terms subsections 28(1)(b)(i)-(iii) of the FAIS Act.

The model of an ombudsperson is invaluable in assisting with the enforcement of financial laws and regulations in the contemporary financial sector. Moreover, the nature of the office of the ombud, its accessibility and flexibility of procedure in resolving disputes within the financial sector, and its authority to make determinations, including orders for compensation have become instrumental in contributing to addressing economic crime. One of the primary purposes of the establishment of the Office of the FAIS Ombud was to provide the ordinary South African who uses financial services anywhere in the country easy and expeditious access to free adjudication. “This is what the FAIS Ombud’s work is about, providing access to justice for ordinary people.”[244] There is reason for the FAIS Ombud, together with the other ombud offices, which will resort under the Ombud Council under the new FCSA, to continue to grow in providing an alternative, procedurally fair, informal, expeditious and economical resolution of disputes within the dynamic financial sector.

In the first part of chapter four, selected models within civil and administrative law were briefly discussed to illustrate the different models already operative to combat economic crime. The impact of self-regulatory codes of corporate governance, such as the King Reports in South Africa, was highlighted to show how influential they are in the prevention of corporate crime. Likewise, the decriminalisation of improper

[243] See discussion above paras 4 2 2 1, 171ff above.

[244] A Sithole, then Chairperson of the Board of the FSB in the Chairman’s Report FAIS Ombud *Annual Report* 2012/2013 5.

conduct under the Companies Act 2008 and a move to enable stakeholders to seek resolution under private law against persons who breach their duties in terms of the Companies Act were shown to be in line with trends in other jurisdictions. In addition, the concept of a company being a corporate citizen, together with the broad stakeholder approach, is another development that will contribute to good corporate governance, and subsequently reduce corporate crime.

The innovative approach of chapter 7 of the Companies Act 2008 that introduces ADR and re-creates CIPC as a public regulatory body is particularly important. It was submitted that the proper use and full fleshing out of the role and functions of CIPC could enhance the establishment and enforcement of the parameters of good corporate governance. Lastly, the contribution that an ombud can make to the resolution of disputes in the financial sector was illustrated through the office of the FAIS Ombud. It was submitted that the creation of the Ombud Council in the new financial regulations of the financial sector in South Africa should promote the role of ombudspersons in the financial sector. The large variance demonstrated in the mechanisms already in existence in the civil justice realm illustrates the prudence of a multi-pronged responsive regulation approach to the enforcement in the corporate sector to promote good corporate governance and to combat economic crime.

In the second part of this chapter, asset forfeiture as a hybrid mechanism is discussed. Asset forfeiture is a mixed mechanism which entails characteristics of both civil and criminal law, and in addition the procedure crosses the boundaries between conventional criminal and civil legal systems. Attention is given to asset forfeiture under Chapters 5 and 6 of Prevention of Organised Crime Act 121 of 1998. Chapter 5 regulates so-called criminal forfeiture and Chapter 6 civil forfeiture.

4 3 Hybrid mechanism: Asset forfeiture

The complexity of economic crime has increased with the development of globalisation and transnational business and economic activities. Individual, corporate and organised crime have been on the increase. Evolving technology has also contributed to an increase in technically sophisticated crime, including economic crime such as cyber-crime. Consequently, the response to economic crime has also needed to increase. The fight against economic crime involves all three arms of a democratic society, namely the legislature, the executive and the judiciary. The past

two decades has seen much volatility in the South African national and international context regarding the response to economic crime. There has been movement in all three democratic arms, with new and amended legislation by the legislature and new specialised units in the executive. In its endeavours to combat corruption and in adherence to its obligations under international laws,[245] the legislature has passed a number of anti-corruption laws.[246] These efforts of the legislature are in conjunction with special units created by the executive, such as the Hawks.[247] Recent judgments interpreting these new acts have contributed to evolving jurisprudence in this field.[248]

Fighting economic crime is difficult, complex and multi-fronted.[249] The multi-fronted approach means there is a continual interface between public and private law regarding the regulation of trade and industry but also the enforcement of such regulation.[250] Likewise, the remedies may also be in private and public law, comprising, for example, personal liability for damages in law of contract or delict; or administrative sanctions and penalties under statutory law; or criminal measures such as fines or imprisonment under public law. In the previous section attention was given to mechanisms in civil and administrative legal systems. The overlap between civil and criminal law was illustrated through the statutory criminal offences created by the legislature in civil legislation, namely section 214 of the Companies Act 2008.

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[245] For example, the United Nations Conventions Against Corruption, ratified by South Africa in 2004 and acknowledged in *Shaik v S* 2008 2 SACR 165 (CC) ("*Shaik v S* 2008*")* para 73; the African Union Convention on Preventing and Combating Corruption ratified by South Africa in 2005 and acknowledged in *Shaik v S* 2008 para 74. Also see *National Director of Public Prosecutions v Mohamed* 2003 1 SACR 561 (CC) ("*NDPP V Mohamed* 2003") para 14-16; United Nations Convention Against Transnational Organized Crime 2000 ratified by South Africa on 14 December 2000 and 20 February 2004.

[246] For example, the Prevention of Organised Crime Act 121 of 1998 ("POCA"), and the Prevention and Combating of Corrupt Activities Act 12 of 2004 ("PCCA").

[247] The official title of the Hawks is the Directorate of Priority Crime Investigation, established in terms of the South African Police Service Amendment Act 10 of 2012, as a specialised unit under the South African Police Service.

[248] For example, *NDPP V Mohamed* 2003; *Shaik v S* 2008 and *Savoi v National Director of Public Prosecutions* 2014 1 SACR 545 (CC) ("*Savoi v NDPP*") interpreting POCA.

249 This has been acknowledged by the courts in *Falk v National Director of Public Prosecutions* 2012 1 SACR 265 (CC) ("*Falk v NDPP*") para 1; *Savoi v NDPP* para 82.

250 Tomasic (1992) AJCL 84 rightly points out that a distinct dividing line between civil and criminal sanctions is not always evident, particularly with regard to corporate conduct and misconduct.

Other hybrid mechanisms that are commonly used in the field of economic crime like asset forfeiture, the imposition of penalties and the disgorgement of profits also blur the lines between civil and criminal law.[251] Civil law usually covers matters between private parties. Disputes arising from such matters are characterised by proceedings in civil courts with civil laws of procedure and evidence. Classic criminal law comprises matters between the (alleged) offenders and the state representing the public and usually relate to criminal offences that attract moral censure and severe punishment. Criminal law has complex and strict rules of evidence and procedure that function in an adversarial trial context, which is often subject to long time delays. Criminal law is consequently not always appropriate for complex contemporary economic crime and frustrates the efforts of government to control such crime.

Responsively, a number of national governments have introduced new mechanisms. These are specifically designed to empower authorities outside the criminal trial court to take action and impose sanctions that are normally the subject matter of criminal law. Examples are different types of penalties, disgorgement of profit orders and asset forfeiture orders. Such specially designed statutory mechanisms and processes are found in a number of fields, including corporate and financial laws and are further interpreted and developed through jurisprudence.[252] Young calls these hybrid mechanisms "civil for criminal processes",[253] which it is submitted is a helpful but cumbersome term. Purposes of hybrid mechanisms, include granting to governments flexibility and extraordinary powers.[254] Hybrid mechanisms also enable governments to decriminalise certain areas of law, particularly with regard to corporate and financial law.[255] There are also utilitarian

[251] SNM Young "Enforcing Criminal Law through Civil Processes: How does Human Rights Law Treat Civil for Criminal Processes?" (2017) 133 *J Int'l & Comp L* 133 133.

[252] For a list of such processes in different jurisdictions see Young (2017) *J Int'l & Comp L* 135-139. Domestically, s 59 of the Competition Act 89 of 1998 authorises the Competition Tribunal to impose penalties; whilst part D of chapter 5 of the Tax Administration Act 28 of 2011 authorises the South African Revenue Service, if there are reasonable grounds to suspect tax crimes, to apply to court for a warrant to search and seize property.

[253] Young (2017) *J Int'l & Comp L* 134.

[254] Young (2017) *J Int'l & Comp L* 138. For example, the empowering of government through asset forfeiture under chapters 5 and 6 of POCA.

[255] Young (2017) *J Int'l & Comp L* 138. For example, the issue of compliance notices in the Companies Act 2008, discussed above in para 4 2 2 2.

benefits, including the saving of costs and time that traditional criminal proceedings would have entailed.[256] In many instances, these hybrid processes provide for less formal procedures than classic trial processes. Significantly, hybrid mechanisms are appropriate in corporate law to ensure compliance with regulations.[257] However, there are also risks relating to the application of such hybrid mechanisms. The fact that a forfeiture order can be of a penal nature has led persons to contend that it is a criminal and not a civil procedure and consequently defendants are entitled to rights under criminal law. Thus the infringement of individual human rights is a risk and certain penalties and sanctions may be considered to be criminal in nature, despite being described as being civil in nature. They accordingly trigger a defendant's human rights under national and international law. [258]

Asset forfeiture is a powerful tool that can be applied to address serious economic crime. However, it is highly intrusive[259] and deeply controversial.[260] South Africa followed other national jurisdictions and amended its asset forfeiture legislation by passing the Prevention of Organised Crime Act 121 of 1998 ("POCA").[261] In this

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[256] Young (2017) *J Int'l & Comp L* 139. For example, investigations and actions taken by administrative bodies such as ASIC discussed in para 4 2 2 2 above.

[257] Young (2017) *J Int'l & Comp L* 139. This has been illustrated by Braithwaite and the responsive regulation pyramid, discussed in the introduction to this chapter, para 4 1 above.

[258] The severity of a potential penalty is one of the three criteria laid down by the European Court to determine if a particular mechanism constitutes a criminal mechanism that triggers criminal law rights under the Convention for the Protection of Human Rights and Fundamental Freedom. The criteria were laid down in *Engel v Netherlands* 1976 1 (EHRR) 647. The other two were the domestic classification of the regulation and the nature of the offence. For a discussion on the inconsistent classification of hybrid mechanisms by the ECHR, see Young (2017) *J Int'l & Comp L* 140-153.

[259] In *Prophet v National Director of Public Prosecutions* 2006 2 SACR 525 (CC) ("*Prophet v NDPP*") para 46 Nkabinde J held: "Asset forfeiture orders as envisaged under Chapter 6 of the POCA are inherently intrusive in that they may carry dire consequences for the owners or possessors of properties particularly residential properties."

[260] In *Mohunram v National Director of Public Prosecutions* 2007 4 SA 222 (CC) ("*Mohunram v NDPP")* para 114 fn 7, also paras 119-120, Moseneke DCJ acknowledged the criticism and condemnation of civil asset forfeiture, particularly in the United States.

[261] It is beyond the scope of this dissertation to discuss the international cooperation with regard to asset forfeiture. In *Falk v NDPP* para 1 international cooperation was stated to be essential. This case considered the relationship between POCA, the International Co-operation in Criminal Matters Act 75 of 1996, and asset forfeiture legislation in Germany.

section, the focus will be on the mechanisms of civil and criminal asset forfeiture under POCA.[262] The foundations of POCA are traced to both American and English law, as well as the development of international pressure under conventions and policies to pass harsher laws to combat international crime. The principles of constitutionality, instrumentality and legality developed by the South African courts in the application of POCA are discussed as they serve as safeguards to this powerful and indeed draconian mechanism.

4 3 1 Introduction to POCA

Asset forfeiture is a hybrid mechanism. It has characteristics of both civil and criminal law, evident in its nature and in the prescribed procedure. Hybrid mechanisms present problems because of their mixed nature and application. In the light of this, some of the difficulties encountered in the use of such a mechanism are discussed, including its constitutionality, particularly with regard to the basic rights of a defendant under the Constitution. The scope of POCA is directly related to the interpretation of the statutory concepts “proceeds of crime” and an asset which is an “instrumentality of an offence” and accordingly the issue of instrumentality is also discussed. Finally, the invasive power of the authorities under POCA are considered. The courts have developed the legality principle as a guide to interpreting these unusual powers. Specific reference is given to so-called criminal forfeiture in chapter 5 of POCA and civil forfeiture in chapter 6, and the interpretation by the courts of POCA relating to the confiscation and forfeiture of assets under civil and criminal law principles. In addition, the relationship of the forfeiture of assets to criminal sentencing are touched upon. Another problematic issue is the terminology used in various jurisdictions to describe asset forfeiture.

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[262] S 35 of the CPA, a general asset forfeiture provision under South African criminal law system, needs to be distinguished. S 35 of CPA is a procedure for forfeiture of an article that was used in the commission of offence of which the accused has been convicted. Significantly, it is part of the criminal court proceedings and is not deemed to be a civil procedure as are the forfeiture proceedings under chapters 5 and 6 of POCA. The court in *National Director of Prosecutions v Swart* 2005 2 SACR 186 (SE) at 191 recorded differences between the forfeiture procedure under s 35 of the CPA and s 48 of POCA. Also see Basdeo (2013) *J Int’l & Comp L* 318.

Chapter 5 of POCA, for example, uses the terminology "restraint" and "confiscation" orders. The latter can only be made *after* conviction, whilst a restraint order preserves the assets during the criminal investigation and trial. Restraint and confiscation orders are commonly referred to as criminal forfeiture. In contrast, chapter 6, which relates to forfeiture of assets *before* a criminal conviction, uses the terms "forfeiture" and "preservation". Such action is commonly referred to as civil forfeiture or forfeiture *in rem*. However, in terms of POCA, whose title itself refers to the "prevention of *crime*", both procedures are described as being civil in nature.[263] As noted above, Young coins a new term "civil for criminal processes", and calls for new terminology to be developed to help the discourse in this hybrid field of law to distinguish it from both civil and criminal law proceedings.[264]

Asset forfeiture is a mechanism specifically designed to enable government to make radical intrusions into the rights of individuals by empowering government to seize and remove assets derived from the profits of crime or used in the commission of crime. It is important to understand the history of this mechanism and its development. The origins of POCA[265] can be traced back to forfeiture legislation in England[266] and the United States.[267] A distinction needs to be made between civil

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[263] S 13 prescribes that any proceedings under chapter 5 are civil in nature and not criminal; likewise s 37 prescribes that proceedings under chapter 6 are also civil in nature. To add to the confusion, it is the National Director of *Public Prosecutions* who is authorised in terms of POCA (eg s 48(1)) to represent the state in any proceedings.

[264] In this dissertation, the terms used in POCA are mainly used, namely a chapter 5 confiscation and a chapter 6 forfeiture; except where it is necessary to use the common terms civil forfeiture and criminal forfeiture.

[265] Domestically, POCA was preceded by the Proceeds of Crime Act 76 of 1996, the confiscation order provisions of which were in turn modelled on the English Drug Trafficking Offences Act 1986 and the Criminal Justice Act 1988. POCA is also developed from the Drugs and Drug Trafficking Act 140 of 1992. See also J Bourne "Money Laundering: What is Being Done to Combat it – A Comparative Analysis of the Laws in the United States of America, the United Kingdom and South Africa" (2002) 14 *SA Merc LJ* 475 487; L Jordaan "Confiscation of the Proceeds of Crime and the Fair-Trial Rights of an Accused Person" (2002) 15 *SACJ* 41 41 fn 1.

[266] Primarily the Criminal Justice Act 1988 and the Proceeds of Crime Act 2002. For a discussion on the asset forfeiture legislation in the United Kingdom see Bourne (2002) *SA Merc LJ* 482-486 Jordaan (2002) *SACJ* 55.

asset forfeiture and criminal asset forfeiture. The latter is usually in the form of an *in personam* confiscation order against a defendant after a criminal conviction by the criminal court, although the proceedings for the confiscation are civil in nature. Confiscation orders are readily accepted as it is logical that offenders be deprived of the proceeds of the crime they have been convicted of and accordingly there is little criticism against this mechanism.[268]

Civil asset forfeiture, however, is controversial because it happens independently of a criminal conviction and so raises several legal concerns. The justification for civil asset forfeiture has for decades been based on the legal fiction *in rem*. The legal fiction *in rem* is that the property committed the crime and consequently proceedings

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[267] There are many forfeiture statutes in the United States, but the primary statute upon which POCA is modelled is RICO (Racketeer Influenced and Corrupt Organisations Act), Title 18 of the Organised Crime Control Act of 1970, ss 1961-1968. See NC Ndzengu & JC von Bonde "Legal Expenses POCA Clauses: A Loophole to Make Crime Pay" (2011) 24 *SACJ* 309 313 fn 30. Asset forfeiture in the United States is traced back to the English legal principle of the *deodant* developed in piracy and maritime laws. After a period of dormancy asset forfeiture was revived in the 1970s to empower authorities to address money laundering and illegal drug activities. For discussion on the origin, development and types of asset forfeiture in the United States see D O'Connell "Civil Asset Forfeiture: Lining Pockets and Ruining Lives" (2018) 74 *Nat'l Law Guild* Rev 237 237-244; LE Ellsworth "Pennies from Heaven or Excessive Fines from Hell – Commonwealth v 1997 Chevrolet Keeps Civil Asset Forfeiture's Threat to Homeownership in Purgatory" (2018) 63 *Vill L Rev* 125 129-136; M Fourie & GJ Pienaar "Tracing the Roots of Forfeiture and the Loss of Property in English and American Law" (2017) 23 *Fundamina* 20 21-31; N Boister "Transnational Penal Norm Transfer: The Transfer of Civil Forfeiture from the United States to South Africa as a Case in Point" (2003) 16 *SACJ* 271-294 severely criticises this transnational transfer of penal legislation, which is referred to as the "transnational law enforcement enterprise". He contends that it is unnecessary and improper. He argues that it is particularly worrying when penal legislation is seamlessly transferred from a developed state with a sophisticated law enforcement system to a developing state that may have an unsophisticated or dysfunctional criminal justice system. Boister finds further that the provisions in POCA in fact extend beyond South Africa's international legal obligations under various conventions which have been held to be the justification for the adoption of POCA by the Constitutional Court (for example, *NDPP v Mohamed* paras 14-16 referred to in fn 245).

[268] D Erasmus & NC Ndzengu "A Note on the Introduction of the *nullum crimen*, *nulla poena sine lege* or Principle of Legality in the South African Asset Forfeiture Jurisprudence" (2016) 3 *SACJ* 247 250.

are taken against the guilty property, in contrast to a person.[269] The source of this fiction has been held to be Judeo-Christian.[270] It is submitted that justification upon the Biblical and Torah sources is misplaced as the motive for the killing of the goring ox is more likely to be due to theological reasons, such as the sanctity of human life for Yahweh,[271] rather than to legal reasons. It is further submitted that looking back at older and similar provisions in legal sources, such as the Laws of Eshnunna[272] and the Code of Hammurabi[273] it is evident that the owner of the ox, not the ox, was liable for legal consequences caused by a goring ox. There is no legal precedent for holding the ox guilty. The ox remains innocent. It is suggested it would be more helpful to validate asset forfeiture legislation as a specifically designed mechanism developed by legislators in response to contemporary crime; instead of persisting with a misplaced reliance on an ancient near-east source.

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[269] *Prophet v NDPP* para 58.

[270] The source is taken to be Exodus 21:28-32. Exodus 21:28 reads: "If an ox gore a man or a woman, and he dies, *the ox shall surely be stoned* and his flesh shall not be eaten; but the owner of the ox shall be quit" (writer's emphasis). For discussion on the origins see O'Connell (2018) 74 *Nat'l Law Guild* Rev 237-238; Fourie & Pienaar (2017) *Fundamina* 21-22. See also, *Commonwealth v 1997 Chevrolet & Contents Seized from James Young* 160 A 3d 153 (Pa 2017)("*1997 Chevrolet*") 179; *USA v One Parcel Property* 74 F 3d 1165(11th Cir 1996) 1168.

[271] HL Bosman, Emeritus Professor in Old Testament Stellenbosch University in e-mail correspondence with the writer.

[272] The Laws of Eshnunna ("LE") date back to the 18th century BC. LE 53-55 are relevant. LE 53 decrees that if an ox was known to be a gorer and its owner warned to guard it and it killed a person, the owner was to held liable and pay monetary damages. There is no action against the ox. For comparative discussion of LE and Biblical texts, see R Yaron "The Goring Ox in Near Eastern laws" (1966) 1 *Isr L Rev* 396-406.

[273] The Code of Hammurabi ("CH") dates back to the 17th century. CH 250-252 are relevant. CH 250 decrees that if an ox incidentally killed a man along a street there is no legal action arising against the owner of the ox. The absolving of the innocent owner is similar to the first part of Exodus 21:28. However, like LE 54-55, if the ox was a known gorer and the owner was warned and he did not take precautionary measures, the owner was liable and had to pay monetary damages. Again no action was taken against the ox. Only in Ex 21:29-31 both the man and the ox were to be put to death. See Yaron (1966) *Isr L Rev* 401-402. It is submitted by the writer that the difference lies not in legal rationale, but rather in theological rationale.

The purposes of POCA are comprehensively set out in the preamble of POCA.[274] The relevant purposes can be summed up as depriving persons of the proceeds of unlawful activities and confiscating the assets used or that may be used in unlawful activities. The purposes of POCA have been interpreted by the Constitutional Court in a number of cases.[275] In addition to the overall purpose of POCA, the specific purposes of chapters 5[276] and 6[277] have been highlighted in a number of cases. In *Savoi v National Director of Public Prosecutions*[278] Madlanga J gave a broad encompassing description of the objective of POCA:

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[274] In brief, it may be said the focus of POCA as set out in the preamble is upon national and international "organised crime, money laundering and criminal gang activities". Importantly, it is recognised that such activities "infringe on the rights of the people as enshrined in the Bill of Rights"; and moreover every person has the right "to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals". Furthermore, such criminal activities have a broader effect: that they "present a danger to public order and safety and economic stability, and have the potential to inflict social damage". The preamble strongly states that no person convicted, or otherwise, should benefit from the fruits of any related offence or unlawful activity, or be entitled to use property for the commission of an offence and consequently provision needs to be made for a civil remedy for the restraint and seizure, confiscation or forfeiture of property which is part of the benefits derived from an offence or is derived from unlawful activities or is concerned in the commission or suspected commission of an offence. It is also noted that the proceeds of forfeited assets should be applied to the combating of such criminal activities.

[275] Including *NDPP v Mohamed* 2002 para 14; *Mohunram v NDPP* para 125; *Prophet v NDPP* para 59; *Shaik v S* 2008 paras 49-57; *Savoi v NDPP* paras 1, 14-15.

[276] Chapter 5 makes provision for the confiscation of the proceeds of unlawful activities, their prior seizure under a restraint order, the realisation of confiscated property and the application of such proceeds. The specific purpose is thus to ensure that no person benefits from the proceeds of wrongdoing. *Shaik v S* 2008 paras 22-24 relate to confiscation orders and paras 49-57 refer to the purposes of chapter 5; *NDPP v Mohamed* 2002 para 16; *Mohunram v NDPP* para 118; *Falk v NDPP* para 15.

[277] Chapter 6 makes provision for civil proceedings in terms of which the NDPP may apply for orders for the preservation and subsequent forfeiture of property. Such applications under chapter 6 are not dependent on a criminal conviction or the rules of evidence particular to a criminal court. Again the specific purpose is to deprive a person from the proceeds of crime and also to remove the instruments of crime from offenders. See ss 37 and 38(2) of POCA; *Shaik v S* 2008 paras 44 and 47; *NDPP v Mohamed* 2002 para 16.

[278] 2014 1 SACR 545 (CC) paras 15-33. In this case, the applicants failed in their argument, the so-called definitional challenge, that the definitions of "a pattern of racketeering" and "enterprise" in ss 1 and 2 of POCA were unconstitutional due to being vague and overbroad.

> "POCA seeks to ensure that the criminal justice system reaches as far and wide as possible in order to deal with the scourge of organised crime in as many of its manifestations as possible."[279]

The purpose of POCA was also considered in *National Director of Public Prosecutions v Mohamed,*[280] and said to be necessary because of the rapid growth of organised criminal activities such as money laundering and racketeering, which was described as an international problem and a security threat.[281] Importantly, it held that "conventional criminal penalties are inadequate as measures of deterrence when leaders of organised crime are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice."[282] The Constitutional Court consequently endorsed POCA, although draconian in its provisions, and found its objective to deprive criminals of proceeds acquired through crime to be in line with relevant international instruments.[283] The core purpose of POCA is to "remove the incentive for crime, not to punish".[284]

Chapter 5 of POCA prescribes the procedures for criminal asset forfeiture and in para 4 3 2 below, the mechanism of restraint and confiscation and some of the

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[279] *Savoi v NDPP* para 15.

[280] 2003 1 SACR 561 (CC) paras 14-15; *NDPP v Mohamed* 2002 4 SA 843 (CC) paras 14-15. Two separate cases were heard before the Constitutional Court between the same parties regarding the constitutionality of s 38 of POCA, regarding preservation orders, and Ackermann J delivered both judgments; and coincidentally the purposes of POCA are discussed in paras 14-15 of each of the judgments.

[281] *National Director of Public Prosecutions v Mohamed* 2003 1 SACR 561 (CC) ("*NDPP v Mohamed* 2003") para 14.

[282] The Constitutional Court in the second *NDPP v Mohamed* 2003 para 14 followed the findings in the first case, *NDPP v Mohamed* 2002 para 14.

[283] *NDPP v Mohamed* 2003 paras 14-16. For examples of international conventions and instruments see Bourne (2002) *SA Merc LJ* 476. See also the critical evaluation by Boister (2003) *SACJ* 271-294 of POCA's scope extending beyond its international obligations under conventions.

[284] *NDPP v Mohamed* 2002 para 15; *NDPP v Mohamed* 2003 para 15. Moreover, the Constitutional Court (*NDPP v Mohamed* 2003 para 52) found that a preservation order granted in terms of s 38 of POCA, though resulting in a temporary deprivation of an owner's rights, and thus limiting an owner's property rights, is a justified limitation in the light of s 36 of the Constitution, as it enables the Act to operate for the purpose it was enacted and to help prevent the disposal of the proceeds of crime.

safeguards developed by the courts in South Africa during the past two decades are discussed.

Regarding chapter 6 of POCA, brief reference is made to issues regarding the nature and process of civil asset forfeiture and the principles developed by the courts with regard to the granting of a forfeiture order in terms of chapter 6. The discussion will be limited to the constitutional imperatives of instrumentality, proportionality and legality.

Restitution is a central principle in this dissertation and accordingly attention in para 4 3 4 will be given to ways in which victims can seek restitution under chapters 5 and 6 of POCA.

4 3 2 Mechanism of restraint and confiscation under Chapter 5 of POCA

As indicated above the provisions of POCA are modelled upon forfeiture provisions in the United States' federal legislation[285] and England's Criminal Justice Act 1988.[286] Accordingly, the interpretation of the provisions of POCA are influenced by case law and asset forfeiture jurisprudence in the Unites States and England.[287]

The primary purpose of chapter 5 is to deprive criminals from the proceeds of their crime.[288] In *Shaik v S* ("*S v Shaik* 2008"),[289] dealing with the provisions on the confiscation of the proceeds of crime,[290] the Constitutional Court succinctly set out

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[285] RICO (see fn 266 above).

[286] Part VI of Criminal Justice Act 1988. Particularly, parts relating to money laundering (ss 4 to 7) and confiscation order provisions (ss 18 to 24) of POCA (fn 221) and also the Proceeds of Crime Act 2002. See Bourne (2002) *SA Merc LJ* 488-489; Basdeo (2013) *Afr J Int'l & Comp L* 304; Ndzengu & Von Bonde (2013) *Obiter* 378 fn 2.

[287] *NDPP v Prophet* 2006 2 SACR 525 (CC) para 24; *NDPP v Prophet* 2006 1 All SA 212 (SCA) paras 14, 16, 36-37, 43 & 47; *NDPP v Cole* 2005 2 SACR 553 (W) para 9. Also see Fourie & Pienaar (2017) *Fundamina* 33-34.

[288] *NDPP v Kyriacou* 2004 1 SA 379 (SCA) paras 3 & 27.

[289] 2008 2 SACR 165 (CC). In this case, Shaik and two corporate appellants, Nkobi Holdings (Pvt) Ltd and Nkobi Investments (Pty) Ltd appealed against confiscations orders valued at an agreed amount of R34 million made by the Durban High Court in relation to benefits derived from convictions of corruption as defined by s 1(1)(a)(i) of the Corruption Act 94 of 1992. The benefits which formed the basis of the Constitutional Court appeal was a 25% shareholding in the third appellant, and accumulated dividends from such shareholding. See *S v Shaik* 2008 paras 1, 6-10.

[290] POCA s 18.

the purposes of Chapter 5 of POCA that relate to confiscation orders[291] by a criminal court after a conviction has been obtained:

> "[t]he primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains."[292]

O'Regan ADCJ then continued to describe two secondary purposes that flow from this primary objective, namely general deterrence and prevention.[293] General deterrence means that persons will, in general, be deterred from committing crimes upon the realisation that it does not pay as the proceeds are confiscated. Prevention means that due to the confiscation of the proceeds of crime, no further crime can be committed with such proceeds.[294]

Importantly, O'Regan ADCJ distinguished the primary purpose of chapter 5 of POCA from similar provisions in English law, where English courts held that the purposes of confiscation orders are punitive in nature.[295] The court found that in interpreting the provisions of POCA under the South Africa Constitution, the primary purpose is not the punishment of offenders but ensuring "that criminals cannot enjoy the fruits of their crimes".[296] Deprivation of ill-gotten assets and not punishment is thus the primary objective of chapter 5 of POCA, although such deprivation may have a punitive effect.[297] This is important as a chapter 5 confiscation order is

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[291] S 18(1) of POCA provides that a prosecutor may apply for a confiscation order once a person has been convicted, on which the court makes an inquiry as to whether the convicted person derived a benefit from the offence of which she or he has been convicted. See *Shaik 2008* paras 23 and 50.

[292] *S v Shaik* 2008 para 51 (footnote omitted). The Constitutional Court endorsed the description of the Supreme Court in *NDPP v Rebuzzi* 2002 2 SA 1 (SCA) para 19; *Falk v NDPP* para 15.

[293] *S v Shaik* 2008 para 52; *Falk v NDPP* para 15.

[294] *S v Shaik* 2008 para 52. The *Shaik* 2008 judgment also held that the primary target at which deterrence is aimed is organised crime, and therefore maximum confiscation orders may be necessary to give effect to such intended deterrence (para 71).

[295] *S v Shaik* 2008 para 56.

[296] *S v Shaik* 2008 paras 51 and 57 following *National Director of Public Prosecutions v Rebuzzi* 2002 2 SA 1 (SCA) ("*NDPP v Rebuzzi*") para 1; *National Director of Public Prosecutions v Mansoor* 2011 1 SACR 292 (ECP) ("*NDPP v Mansoor")* para 11.

[297] *S v Shaik* 2008 para 57. Also, *National Director of Public Prosecutions v Phillips* 2001 2 SACR 542 (W) ("*NDPP v Phillips* 2001 (W)") para 42.

independent of and does not form part of the sentencing process. It is also not an additional punishment.[298]

The court also importantly defined the nature of a confiscation order, confirming that it is a civil judgment and is in addition to a criminal sentence.[299] This is significant as it touches upon the interaction between criminal and civil procedure and remedies in a justice system. It also has an impact on the principles of sentencing. It is important to weigh the aims of sections 25 and 26 of chapter 5[300] against the constitutional rights of a defendant, including the right to be presumed innocent until proven guilty.[301] Although the power to restrain, confiscate and realise assets and proceeds under chapter 5 has, as its primary object, deprivation of enjoyment of tainted proceeds from crime, sections 30 and 31 of POCA acknowledge the rights of persons who have interests in the restrained property, including creditors and victims of a crime, to make representations to the court. They also provide for payments from proceeds of a confiscation to be made to such claimants.[302]

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[298] Erasmus & Ndzengu (2016) *SACJ* 250 and especially fn 16. The defendant in chapter 5 proceedings, although being a *convicted* person, is *not an accused* person as the proceedings are civil in nature. Consequently, the fair-trial rights of an accused person in terms of s 35(3) of the Constitution do not apply, e.g. the double jeopardy rule in terms of s 35(3)(m). In *NDPP v Phillips* 2001 (W) paras 33-44 the constitutionality and nature of chapter 5 proceedings are discussed at length. The court concludes (para 44) that an application for a confiscation order is properly characterised in s 13 of POCA as civil proceedings and accordingly a defendant in such proceedings is not an accused person in terms of s 35(3) of the Constitution. For general discussion on constitutionality concerns, see Basdeo (2014) *PELJ* 1061-1065. Jordaan contends that though these presumptions are no longer reverse onus presumptions they still have a '"sweeping effect" and it would be difficult for the NDPP to prove their case without them. In addition, she suggests that because they are mandatory presumptions they may very well be a challenge to a defendant's rights to a fair trial under s 35(3) of the Constitution. See Jordaan (2002) *SACJ* 46-47, 55-56, 58-60.

[299] The court also found that it was an order for the payment of a sum of money, and not the confiscation of a particular object: *S v Shaik* 2008 para 24.

[300] The sections relating to restraint orders over property to prevent the disposal of assets.

[301] *NDPP v Mansoor*) para 24. The right to be presumed innocent is provided for in s 35(3)(h) of the Constitution of RSA 1996.

[302] Ss 30(3)-(5) and 31(1) of POCA discussed in para 4 4 below.

Consequently, any confiscation order does not form part of the sentencing of an accused.[303] The inquiry into whether the defendant received any benefit takes place after conviction upon the application of the state. However, the process under chapter 5 invariably begins long before conviction.[304]

The main stages of the chapter 5 procedure[305] are restraint, seizure, confiscation and realisation. The most significant event which triggers a confiscation order is a conviction,[306] a prerequisite and distinct characteristic of chapter 5 forfeiture. However, because it may be necessary to protect and preserve property before a person is convicted, provision is made for a restraint order, the seizure of assets and the appointment of a *curator bonis* over seized property. The NDPP makes an *ex parte* application before a High Court for a restraint order in the event of prosecution proceedings having been instituted against a defendant[307] or in the event that the court is satisfied that a person is to be charged and there are reasonable grounds to believe that a confiscation order may be made against such a person.[308] Significantly, the criterion is "reasonable grounds" which is not a high standard, but only requires that the NDPP presents evidence that may reasonably support a conviction and consequent confiscation order.[309]

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[303] POCA s 18(1).

[304] It usually begins when investigations start and application for a restraint order can be made before a suspected offender is even charged. However, s 25(2) prescribes that if a person is not charged within a reasonable period the court may rescind the restraint order. See Basdeo (2013) *Afr J Int'l & Comp L* 305-306.

[305] For a discussion on the stages of a chapter 5 forfeiture, see Basdeo (2013) *Afr J Int'l & Comp L* 304-312; *Phillips v National Director of Public Prosecutions* 2003 2 SACR 410 (SCA) ("*NDPP v Phillips* 2003 (SCA)") paras 7-11.

[306] POCA s 18(1).

[307] S 25(1)(a). Notably in chapter 5 a person is called a defendant and not an accused, in line with the proceedings being defined as civil proceedings in s 13.

[308] S 25(1)(b). In this case, under s 25(2) a restraint order against a suspect can be rescinded by the court if the person is not charged within a period deemed reasonable by the court. Prosecution need not be imminent, or a charge sheet presented to the court, but "sufficient information" needs to be placed before the court to enable it to perform its judicial function. See *NDPP v Rautenbach* 2005 1 SACR 530 (SCA) para 88; Basdeo (2013) *Afr J Int'l & Comp L* 306.

[309] *NDPP v Kyriacou* paras 10 & 15, also para 30 (although Southwood AJA on the facts found that there were no reasonable grounds); *NDPP v Rautenbach* 2005 1 SACR 530

The purpose of a restraint order is to preserve assets so that they may be realised in the event of a confiscation order being granted.[310] Conversely, it prevents the assets from being disposed of pending the outcome of a criminal trial that may be pending for a number of years.[311] A restraint order is made over realisable property,[312] and may be made over all the defendant's property, including property not necessarily identified by the NDPP[313] or tainted by the pending or instituted charges.[314] Realisable property also includes property legitimately held by third parties, which is defined as "affected gifts" under POCA.[315] A restraint order deprives any holder[316] of property rights of such rights[317] and usually the court orders that the property be surrendered to a *curator bonis* appointed in terms of section 28 of POCA. The restraint order may be provisional and grants a defendant an opportunity to defend the provisional order.[318] A restraint order is temporary and is rescinded when the proceedings against the defendant are concluded.[319] The court has wide

(SCA) para 27; Basdeo (2013) *Afr J Int'l & Comp L* 307. It is important that it appear to the *court* and not merely to the NDPP, and that there are reasonable grounds. See *NDPP v Basson* 2001 2 SACR 712 (SCA) para 19.

[310] *NDPP v Kyriacou* paras 5 & 22; *NDPP v Rautenbach* 2005 1 SACR 530 (SCA) ("*NDPP v Rautenbach")* paras 24 and 84; Basdeo (2013) *Afr J Int'l & Comp L* 306;

[311] Basdeo (2014) 17 *PELJ* 1050.

[312] As defined in s 14 of POCA.

[313] POCA s 26(2)(b). In terms of s 26(2)(c) assets that may be transferred to the defendant in the future, which are clearly unknown assets, may also be included in the restraint order.

[314] This because all property, including property acquired before and after the criminal offence of which the defendant is convicted can be confiscated to satisfy a confiscation order. The order is not restricted to property relating to the criminal offence,

[315] Under s 14(1)(b) read with s 16 of POCA "affected gifts" can primarily be described as property which the defendant transferred for a consideration significantly less than the property supplied by the defendant.

[316] This could be an owner or a creditor.

[317] Basdeo (2014) 17 *PELJ* 1053. Compare *NDPP v Rautenbach* para 56 weighing up the extent of the interference of property rights against the purpose of a restraint order.

[318] POCA s 26(3). A provisional restraint order may have immediate effect, but a rule *nisi* may simultaneously be issued granting a defendant an opportunity to defend the order.

[319] POCA s 26(10)(b). Conclusion in terms of s 17 of POCA means acquittal, or if no confiscation order is made despite conviction or if the confiscation order is satisfied. The court has no *inherent jurisdiction* to rescind a restraint order and can only do so as prescribed by s 25(2) and 26(10) of POCA. See *Phillips v NDPP* 2003 2 SACR 410 (SCA) para 25.

discretion with regard to the orders it may make for a "proper, fair and effective execution" of a restraint order; which will usually include a seizure order.[320] Importantly, a defendant may apply that any restraint order may provide for reasonable living expenses and legal expenses she or he may incur.[321] Similarly, any affected person may apply to the court for the restraint order to be rescinded or varied if such order will deprive her or him of reasonable living expenses and cause undue hardship, *and* the court finds that such hardship outweighs the risk of the restrained property being destroyed, lost, damaged, concealed or transferred.[322]

The confiscation inquiry aims at ascertaining whether the defendant benefited not only from the offences of which the defendant is convicted, but also from any criminal activity the court finds "sufficiently related" to such offences.[323] This may include criminal activity before or after the occurrence of those offences of which the defendant has been convicted. Importantly, any such determination by the court is based on the civil standard of a balance of probabilities.[324] The inquiry is a question of fact and there are several provisions relating to evidence that assist the state.[325]

There are safeguards built into the chapter 5 forfeiture mechanism regarding the amount of a confiscation order. The primary purpose of the confiscation order is to deprive a convicted person of the proceeds of unlawful activities. The court has a wide discretion and may order an amount that it considers is appropriate. However,

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[320] POCA s 26(8).

[321] S 26(6).This includes reasonable living expenses of the person's family and household and legal expenses pertaining to chapter 5 proceedings and any related criminal proceedings. The court needs to be satisfied that the defendant has disclosed all her or his assets and that there is not sufficient money for living and legal expenses from any unrestrained assets.

[322] POCA s 26(10). See also Basdeo (2013) *Afr J Int'l & Comp L* 308.

[323] POCA s 18(1)(c).

[324] S 18(1) and s 13. See *Phillips v NDPP* 2003 (SCA) para 8.

[325] S 22(1) provides that if it is found that the defendant did not have legitimate sources of income to validate the interest in any property, then the court shall accept this as *prima facie* evidence that such interest forms part of the benefit the defendant received from the criminal activity. Failure by a defendant to disclose information when ordered to do so by a court under s 26(7) or knowingly disclosing false information could also result in negative findings under s 22(2). Although the NDPP retains the burden of proof, these evidentiary presumptions mean certain types of evidence are *prima facie* proof and assist the NDPP in satisfying the burden. See further Jordaan (2002) *SACJ* 43-45.

this figure in terms of section 18(2) may not exceed the lesser of two amounts. The first is the value the defendant derived from the criminal offences of which she or he is convicted, including criminal activities which the court finds to be sufficiently related to such offences. The second is the realisable value of the restrained assets at the time of the confiscation order.[326]

Realisation of chapter 5 forfeited assets only takes place in the event of a defendant failing to pay a confiscation order.[327] Realisation is consequently a statutory form of execution against property that has been restrained.

Particularly important for purposes of this dissertation are the provisions of section 30(4) and 30(5) of POCA to the effect that a court may not authorise a *curator bonis* to realise property before granting persons directly affected and persons who have suffered injury or loss arising from the offences or related criminal activities an opportunity to make representations to the court regarding the proposed realisation. Victims of criminal activity are thus granted an opportunity to make representations.

4 3 3 Mechanism of preservation and forfeiture under Chapter 6 of POCA

An asset forfeiture order under chapter 6 constitutes civil asset forfeiture which is independent of criminal proceedings and which is accordingly highly invasive against property rights. Since the introduction of POCA there has been a significant number of cases heard by the South African courts with regard to the interpretation of the relevant provisions of POCA and the status of the rights of interested persons. Significantly, the Constitutional Court has interpreted the peremptory term *"shall"* in section 50(1) of POCA[328] to mean "*may*" and has consequently developed the

[326] This includes, in terms of s 20(1), the value of property held by the defendant and the value of the affected gifts made by the defendant. See *Phillips v NDPP* 2003 (SCA) para 9.

[327] Basdeo (2013) *Afr J Int'l & Comp L* 312.

[328] POCA s 50(1) reads (in part): "The High Court *shall*, subject to section 52, make an order applied for under section 48(1) if the Court finds on a balance of probabilities that the property concerned – (a) is an *instrumentality of an offence* referred to in Schedule 1" (writer's emphasis). An "instrumentality of an offence" is defined in s 1(1) as: "any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere."

proportionality test to determine when a forfeiture order may be granted.[329] As appears from the discussion of the case law below, the crystallisation of the principle of proportionality and the interpretation of the terms "offence" and "instrumentality of an offence" are definitive in the application of chapter 6 of POCA. The judgments discussed below also illustrate the relationship between forfeiture and other criminal sanctions, particularly sentencing. The judgments highlight the role that asset forfeiture plays in the authorities' efforts to combat crime. In addition, these asset forfeiture cases show the fine balancing of constitutional rights, namely the right of property owners not to be arbitrarily deprived of ownership, weighed up against the right of citizens to be protected against crime and criminals.

Forfeiture is said to be "a strong weapon in the State's arsenal in the war against organised crime"; but if "improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice."[330] The question arises as to how far the scope of POCA with regard to forfeiture orders reaches? Does it only cover offences listed under POCA or reach other criminal offences as well? Answers to these question have been sought with reference to the purposes of POCA and the

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[329] *Mohunram v NDPP* para 121 following *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd* 2004 2 SACR 208 (SCA) ("*NDPP v Cook Properties*") para 74*; Prophet v NDPP* paras 46 and 61.

[330] *Brooks v National Director of Public Prosecutions* ("*Brooks v NDPP*") 2017 1 SACR 701 (SCA) paras 69 & 81. In this matter the two appellants were married to one another in community of property and first appellant was charged with contravening the Diamonds Act 56 of 1986. The High Court granted a forfeiture order in respect of immovable property and ordered that the *curator bonis* pay the second appellant her share of the forfeited property. The appellants appealed against this order, arguing that the granting of the forfeiture order was disproportionate. The property in question consisted of a piece of land upon which the family home was built, in which the appellants and their two minor children resided. The first appellant also ran his legitimate business from the property. Ten of the 19 illegal diamond transactions took place on the property. The monies the first appellant received for being a middleman amounted to R58,000 and the property was valued at R960,000. Taking into account all the factors the SCA found the forfeiture order to be disproportionate, notwithstanding that the wife's share in the proceeds of the forfeited assets had been safeguarded in the forfeiture order (paras 2, 6, 9-11, 46, 77-82). See also the US *1997 Chevrolet* case, discussed below in fn 3563.

interpretation of an "instrumentality of an offence". The question also raises constitutionality issues, such as the right not to be deprived of one's property.[331] In the light of this constitutional right, the courts have developed the proportionality test against which any forfeiture order has to be weighed before it may be granted.

Basically, two types of asset forfeiture are prescribed:[332] namely forfeiture of instrumentalities of offences[333] and proceeds forfeiture.[334] The former relates to property which is shown to be an instrument of an offence, whilst the latter relates to the proceeds of an offence. Unlike chapter 5 forfeiture, no prior criminal conviction is required; but like chapter 5 the procedure is prescribed as being civil in nature.[335] Though the criminal law term "offence" is used, only civil law rules of evidence and procedure apply.[336]

There are primarily two stages in chapter 6 asset forfeiture, firstly the preservation stage and secondly, the forfeiture stage.[337] In terms of section 38 the NDPP may apply to court for a preservation order. Invariably, the NDPP brings an *ex parte* application[338] before a judge in chambers. Notably, there is no provision for a *provisional* preservation order.[339] The issue of an *ex parte* application without notice to a defendant was extensively considered in the *Mohamed* series of cases.[340] The defendant argued that the omission of the legislature to compel the NDPP to grant a defendant an opportunity to present her or his case was an infringement of the basic right of access to courts. The Constitutional Court found that section 38 of POCA did

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[331] S 25 of the Constitution.

[332] In terms of s 38(2)(c) a third type relates to terrorist or related activities but such asset forfeiture is beyond the scope of this dissertation.

[333] POCA s 38(2)(a).

[334] POCA s 38(2)(b).

[335] POCA s 37.

[336] POCA ss 37(1) and (2).

[337] *Ex parte NDPP* [2018] case no1540/2018 ZAFSHC 100 para 22; *NDPP v Mohamed* 2002 paras 17-19. For discussion of the two-stage process see Basdeo (2013) *Afr J Int'l & Comp L* 316-320.

[338] POCA s 38(1).

[339] Basdeo (2013) *Afr J Int'l & Comp L* 316. Compare s 26(3)(a) regarding a provisional restraint order and a return date for a rule *nisi* to afford a defendant an opportunity to defend the provisional restraint order.

[340] *NDPP v Mohamed* 2002 and *NDPP v Mohamed* 2003.

not exclude the *audi alteram partem* rule and that courts could still grant a rule *nisi* and a defendant an opportunity to defend a preservation order.[341]

The constitutionality of section 38 regarding an application for a preservation order under chapter 6 of POCA was raised in *Prophet v National Director of Public Prosecutions ("Prophet v NDPP")*.[342] Nkabinde J succinctly set out the issue before the court:

> "The Court is called upon to strike an appropriate balance between two constitutional principles. The one is that no one should be arbitrarily deprived of property. The other is that the State is under an obligation to protect members of the public from criminal depredations."[343]

The Constitutional Court explained further what is meant by striking the necessary balance and stressed the important role of courts to interpret the intrusive provisions of POCA in terms of section 39(2) of the Constitution[344] and the need to bear in mind the property rights protected in terms of section 25 of the Constitution.[345] The court also laid down fundamental principles of the proportionality test.[346] The Constitutional Court held that the inquiry into proportionality included "weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence".[347] It is also important for the court to be mindful that as

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[341] *Mahomed v NDPP* 2002 paras 37-52, particularly para 51.

[342] 2006 2 SACR 525 (CC) ("*Prophet v NDPP")*. In this case the appellant was appealing against a forfeiture order granted by the High Court, and confirmed by the Supreme Court of Appeal, of a residential property which had been used in the manufacturing of "tik". The appellant was acquitted of charges under the Drugs and Drugs Trafficking Act 140 of 1992 Act due to a technicality (paras 6-7, 21).

[343] *Prophet v NDPP* para 1.

[344] Courts are enjoined by section 39(2) of the Constitution to interpret legislation such as POCA in a manner that "promote[s] the spirit, purport and objects of the Bill of Rights". See *Prophet v NDPP* para 46.

[345] *Prophet v NDPP* para 46.

[346] The court (*Prophet v NDPP* para 69) also held that no real significance or variance in standard lies between different terminology used by the courts regarding proportionality, including phrases like "significantly disproportionate" or "disproportionate" or "reasonably proportional" or "roughly proportional".

[347] *Prophet v NDPP* para 58.

forfeiture orders under chapter 6 may be ordered without a criminal conviction[348] such forfeiture orders do not necessarily constitute "arbitrary deprivation of property" for purposes of section 25 of the Constitution.[349]

Once a preservation order has been granted[350] notice has to be given to all persons that may have an interest in the property,[351] including owners and creditors.[352] A preservation order may also be reviewed, varied or taken on appeal. In addition, section 47 of POCA grants an affected person an opportunity to apply to court to vary or rescind a preservation order on the basis that such an order deprives her or him of reasonable living expenses and causes her or him undue hardship, and such undue hardship outweighs the risk of destruction or disposal of the property. A preservation order is valid for 90 days, within which period application needs to be made for a forfeiture order and notice of such application served on the defendant, failing which the preservation order automatically expires.[353]

The second stage entails an application by the NDPP to have the assets forfeited.[354] The SCA has held that an inquiry into the granting of a forfeiture order is a two-stage inquiry by the court. The SCA heard a trilogy of cases together: *National Director of Public Prosecutions v (1) RO Cook Properties (Pty) Ltd; (2) 37 Gillespie*

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[348] In contrast to forfeiture orders under chapter 5 of POCA, which may only be ordered consequent to a criminal conviction.

[349] *Prophet v NDPP* para 61. The court continued by setting out a number of factors that may be taken into account in deciding whether a forfeiture is arbitrary or not (paras 62-63). On the facts the court found that the residential property was integral to the manufacturing of tik and in light of the offence and the objectives of POCA the forfeiture order was not disproportionate to the owner's property rights (paras 64-69).

[350] The criterion for granting a preservation order is in terms of s 38(2) "reasonable grounds to believe", a like criterion to that with regard to restraint orders under s 25(1)(b)(ii).

[351] S 39(1)(a) of POCA. In terms of s 39(1)(b) a notice also needs to be published in the Government Gazette,

[352] S 39(3) grants "any person who has an interest in the property" an opportunity to exclude her or his interest and to oppose forfeiture of the property.

[353] S 40 of POCA. In *Levy v NDPP* 2002 1 SACR 162 (W) application for a forfeiture order was made within the 90 day period, but notice was only given 91 days after publication in the Government Gazette. Consequently, the court found (para 7) that the forfeiture was outside the 90 days and it was set aside on the grounds of irregularity as the preservation order had by then expired.

[354] S 48 read with s 50 of POCA.

Street Durban (Pty) Ltd; and *(3) Seevnarayan*[355] *("NDPP v Cook Properties").* The first inquiry relates only to the property and the question whether it was an "instrumentality of an offence" or not?[356] The second inquiry relates to the issue of constitutionality, namely the proportionality test.[357]

With regard to the first inquiry whether a property is "an instrumentality of an offence", the SCA formulated a test in *NDPP v Cook Properties*:

> "[T]o constitute an instrumentality of an offence the property sought to be forfeited must in a 'real or substantial sense . . . facilitate or make possible the commission of the offence' and 'must be instrumental in, and not merely incidental to, the commission of the offence'".[358]

The Constitutional Court in *Prophet v NDPP* followed *NDPP v Cook Properties* in interpreting the words "concerned in the commission of an offence" to mean that the link between the crime committed and the property should be reasonably direct, that is the property must play a reasonably direct role in the commission of the offence; and that the employment of the property must be functional to the commission of the crime.[359] In *Mohunram v The National Director of Public Prosecutions* (*"Mohunram v*

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[355] 2004 2 SACR 208 (SCA).

[356] Compare the criteria, namely the six factors recently set out to determine the instrumentality inquiry by the American Supreme Court in *1997 Chevrolet* 191-192. These factors are: (i) is the property uniquely important to the success of the illegal activity; (ii) is the use of the property deliberate and planned; (iii) is the illegal use of the property isolated or repeated; (iv) is the purpose of acquiring, maintaining, or using the property to carry out the offence; (v) is the use of the property extensive spatially, temporally, or both; and (vi) is the property divisible. Also see Ellsworth ((2018) *Vill L Rev* 139-141, 13-148) who gives a critical analysis of these criteria.

[357] Compare the criteria, namely the value of the forfeiture and the gravity of the offence set out recently for the proportionality inquiry by the American Supreme Court in *1997 Chevrolet* 191. See also Ellsworth ((2018) *Vill L Rev* 141-143, 148-151) who gives a critical analysis of these criteria

[358] 2004 2 SACR 208 (SCA) para 56. This test was applied by the SCA in *Prophet v National Director of Public Prosecutions* 2006 1 SA 38 (SCA) para 31 and endorsed by the Constitutional Court in *Prophet v NDPP* 2006 2 SACR 525 (CC)(para 22).

[359] *Prophet v NDPP* para 56. On the facts the court found that the house "was appointed, arranged, organised, furnished and adapted or equipped to enable or facilitate the applicant's illegal activities" (para 57).

NDPP")[360] it was confirmed that the legislature meant to give the phrase "instrumentality of an offence" a "very wide meaning".[361] However, in order to ensure that such a wide interpretation is not unconstitutional and a violation of section 25 of the Constitution a court has to inquire:

> "whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality".[362]

The second part of the inquiry into the granting of a forfeiture order, the issue of proportionality, was also considered in *Mohunram v NDPP.* Moseneke DCJ[363]

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[360] 2007 4 SA 222 (CC). In this case the first applicant Mohunram had been charged and consequently paid admission of guilt fines relating to offences under the KwaZulu Natal Gambling Act 10 of 1996, namely a fine of R1,500 for each of 57 counts of being in possession of unregistered gaming machines without the necessary licence, totalling R85,500 and a fine of R1,000 for each of 3 counts of employing persons in an unlicensed casino. The total value of fines was thus R88,500. In addition the 57 machines, valued at R285,000, were seized and destroyed in terms of the KwaZulu Natal Gambling Act. This constitutional appeal related to the SCA granting the NDPP a forfeiture order in respect of the property in which the gambling machines were housed as "an instrumentality". The building was also used for a legitimate glass manufacturing business. The building was registered in the name of the second applicant, a close corporation, Shelgate Investments CC, in which Mohunram held a 100% shareholding (paras 1, 5-7).

[361] *Mohunram v NDPP* para 44 (excluding footnotes).

[362] *Mohunram v NDPP* para 44 (excluding footnotes). The CC in *Mohunram* followed the reasoning of the Constitutional Court in *Prophet v NDPP*, which in turn was based on the reasoning of the SCA in *NDPP v Cook Properties*. It is necessary to repeat the reasoning of the SCA to illustrate the interpretation of an instrumentality by the courts: "the words 'concerned in the commission of an offence' must . . . be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this, we mean that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense, the property must facilitate or make possible the commission of the offence. As the term 'instrumentality' itself suggests ... the property must be instrumental in, and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the Act: the deprivation will constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties" (para 31 of *NDPP v Cook Properties*).

[363] For the majority who upheld the appeal, and consequently dismissed the forfeiture order.

emphasised that "the requirement of proportionality is a constitutional imperative".[364] Although it is not a statutory requirement in terms of POCA, it a requirement in terms of the "constitutional disdain for arbitrary dispossession of property and unwarranted or excessive punishment".[365] The principle of proportionality is thus "an equitable requirement that has been developed by the courts to curb excesses of civil forfeiture".[366] The application of the proportionality test is, however, not without complexity, and the three different judgments given in the *Mohunram* case regarding this issue demonstrates this complexity.

With further regard to the proportionality test, Moseneke DCJ[367] emphasised that although draconian, "[s]tatutory civil forfeiture of assets is meant to pursue worthy and noble objectives aimed at curbing serious crime." He continued significantly "[t]he initial and central enquiry in asset forfeiture is *whether the property is an instrumentality of an offence*,"[368] and there is no need for the prosecution to prove the owner of an asset committed an offence or had the necessary criminal intent to do so. The court clearly stated that the "criminal standard of proof does not come into it".[369] A forfeiture order, however, has to meet the standard of proportionality, meaning that the forfeiture should not amount to an arbitrary deprivation of property or to punishment not allowed in terms of sections 25 and 12(1)(e) of the Constitution

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[364] *Mohunram v NDPP* para 130.

[365] *Mohunram v NDPP* para 130.

[366] *Mohunram v NDPP* para 130. See also Sachs J in *Mohunram v NDPP* para 142.

[367] Moseneke DCJ, reasoned there were three issues to be considered, namely i) whether the property is an instrumentality of an offence"; ii) what the meaning is of "offence" in terms of civil forfeiture under chapter 6 of POCA; and iii) whether the forfeiture is disproportionate or not in applying the proportionality test (para 108). With regards to i) Moseneke DCJ agreed that the property was "an instrumentality of an offence" and agreed further with the reasoning of Van Heerden AJ (para 110), but took a different view from Van Heerden AJ on the second and third issues (para 109). The majority judgment specifically disagreed that there was a link between the offence that the instrumentality served and the purposes of POCA to fight organised crime (paras 109, 129). See too Sachs J's judgment para 146-154. The majority thus found that the forfeiture of the property was disproportionate when applying the proportionality test and weighing up the purposes of POCA against various factors, including the effect it had on the individual.

[368] *Mohunram v NDPP* para 118 (writer's emphasis).

[369] *Mohunram v NDPP* para 118.

respectively.[370] This involves balancing the need to combat crime against the interference with a person's property rights;[371] and weighing the forfeiture itself against the purpose it serves.[372]

One of the criteria to take into consideration in applying the proportionality test is the effect a forfeiture will have upon the owner of the property.[373] In addition, the nature of the offence and the purpose of POCA are to be considered when determining whether a forfeiture is disproportionate or not. As Moseneke DCJ succinctly put it:

> "[w]hen *ordinary crime* is in issue, the sharp question should be asked whether it is a crime that renders *conventional criminal penalties inadequate*. Is it a crime that requires extraordinary measures for its detection, prosecution and prevention?"[374] (Writer's emphasis).

Van Heerden AJ[375] stated that the purpose of the proportionality inquiry is to establish whether "the grant of a forfeiture order would amount to an arbitrary

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[370] *Mohunram v NDPP* para 121. Section 12(1)(e) of the Constitution relates to the right of freedom and security and the right not "to be treated or punished in a cruel, inhuman or degrading way".

[371] *Mohunram v NDPP* para 122.

[372] *Mohunram v NDPP* para 123. And this involves an inquiry into the relationship of the property to the commission of the crime, whether the forfeiture will prevent further wrongdoing, the nature and use of the property and the effect of the forfeiture on the owner. In his judgment Sachs J held that the primary purpose of POCA is deterrence. Consequently, the purpose of deterrence has to be weighed up against the effect the forfeiture may have upon the individual in light of the relevant offence. If such an effect is unfair or unjust it will be in violation of the constitutional right to dignity of such a person (para 146).

[373] *Mohunram v NDPP* para 123. The owner of the property may not necessarily be the offender of a particular offence, but for the purposes of the inter-play between the principles of forfeiture and sentencing, it is presumed that the owner and offender are the same person.

[374] *Mohunram v NDPP* para 126. Moseneke DCJ (para 112) made a distinction between "organised crime offences", being racketeering, money laundering and criminal gang activities specifically created by POCA; and "ordinary crimes" being other crimes, including those listed din Schedule 1

[375] For the minority (5:6 split), who would have dismissed the appeal against the forfeiture order.

deprivation of property in contravention of section 25(1) of the Constitution".[376] Van Heerden AJ stressed that courts should guard against such forfeiture provisions being abused.[377] The test of proportionality, in her view, concerned the weighing up of the purposes of forfeiture under POCA against the effect it has on the owner of the asset.[378] The judge emphasised the need for criminal sanctions and civil forfeiture provisions to help fight crime, but also the need for such provisions to be constitutionally permissible.[379] Concurrent to the constitutional property rights of owners, which are protected, but not absolute,[380] are the property owners' responsibilities to be stewards and to guard against the use of their property for criminal purposes.[381] Van Heerden AJ clarified that the standard test for proportionality is a legal one[382] that needs to consider all factors and that the burden to prove the requirements of a forfeiture order in terms of section 50 of POCA rests on the prosecution.[383]

A further issue is the scope of POCA and how far chapter 6 reaches? The answer to this question in turn rests upon the question as to how widely the term "offences" is to be interpreted. In several SCA cases[384] it was held that "offences" is to be interpreted widely and may relate to offences other than organised crime and specifically racketeering,[385] money laundering[386] and criminal gang activities[387] as

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[376] *Mohunram v NDPP* para 56.

[377] *Mohunram v NDPP* para 56.

[378] *Mohunram v NDPP* para 57. See too Sachs J's judgment paras 143, 146.

[379] *Mohunram v NDPP* para 58.

[380] *Mohunram v NDPP* para 59-60.

[381] *Mohunram v NDPP* para 58.

[382] *Mohunram v NDPP* para 75. Previously, courts had distinguished between "organised crime" and "ordinary crime" and "disproportionality" and "significant disproportionality". See the discussion in paras 68-74. On the facts and criteria set out, Van Heerden AJ (minority judgment) found that the forfeiture of the factory was not disproportionate (paras 101-102).

[383] Para 75. It is beyond the scope of this dissertation to discuss the standard of proof, being "on a balance of probabilities" in terms of s 50(1); compared to the standard of "reasonable grounds" under s 51 of POCA for believing that property is an instrumentality of offence.

[384] *NDPP v Cook Properties* para 65; *Prophet v NDPP* 2005 2 SACR 670 (SCA) para 33; *NDPP v Van Staden* 2007 1 SACR 338 (SCA) paras 1 and 10.

[385] Chapter 2 of POCA.

[386] Chapter 3 of POCA.

[387] Chapter 4 of POCA.

described in POCA, and may include individual wrongdoing. This issue was considered but not decided in *Mohunram v NDPP*.[388] Van Heerden AJ considered "offences" to have a broad interpretation, and to include "individual wrongdoings".[389] Van Heerden AJ followed several Supreme Court decisions that found that the provisions of POCA did indeed reach far beyond organised crime and extended to individual wrongdoings.[390] Moseneke DCJ did raise the question, but doubted that it was to be interpreted as widely as it was by van Heerden AJ. [391] For purposes of this dissertation it is suggested that the provisions of POCA also extend to individual wrongdoing.[392]

With regard to the nature of the mechanism of forfeiture orders, the Constitutional Court in *Prophet v NDPP* held:

> "Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner. This kind of forfeiture is in theory seen as remedial and not punitive." [393]

Importantly, the Constitutional Court also clarified the different standards of proof in chapter 6 of POCA. The standard of proof required in section 38 with regard to a

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[388] As the appeal succeeded on the third issue of proportionality it was not necessary to pursue the issue of the broad interpretation of "offences" (paras 114-117).

[389] *Mohunram v NDPP* paras 21-34, 56. See too para 113 of the judgment of Moseneke DCJ.

[390] The following Supreme Court cases were discussed in the judgment of van Heerden AJ (paras 21-34) and cited in footnote 6 to para 113 of Moseneke DCJ's judgment: *National Director of Public Prosecutions v Van Staden* 2007 1 SACR 338 (SCA) para 1; *National Director of Public Prosecutions v (1) RO Cook Properties (Pty) Ltd; (2) 37 Gillespie Street Durban (Pty) Ltd; (3) Seevnarayan* 2004 2 SACR 208 (SCA) ("*NDPP v RO Cook Properties"*) para 65. See also *National Director of Public Prosecutions v Mohunram* 2006 1 SACR 554 (SCA) and *Prophet v National Director of Public Prosecutions* 2005 2 SACR 670 (SCA) para 33.

[391] *Mohunram v NDPP* paras 112-117. Sachs J, handing down a separate judgment agreed that "no bright lines can be drawn between organised crime and private criminal activities", and assumed that forfeiture orders under POCA need not only be related to organised crime (para 140).

[392] This follows the interpretation in *NDPP v RO Cook Properties* para 65; and the views of Van Heerden J in paras 21-34 of *Mohunram v NDPP*.

[393] 2006 2 SACR 525 (CC) para 58.

preservation order is that of "reasonable grounds", while the burden of proof applicable to section 50 of POCA with regard to a forfeiture order is higher, namely "on a balance of probabilities".[394] The onus to satisfy this burden of proof with regard to a forfeiture order lies upon the state.[395] In *NDPP v Cook Properties* it was held that the objectives of chapter 6 entail both remedial and penal goals. Sanctions such as forfeiture can include both: although the primary objective may be to remove the incentive from crime and not to punish persons, such forfeiture also has a penal aspect.[396]

Pertaining to the interaction between forfeiture and punishment, the majority of the Constitutional Court in *Mohunram v NDPP* held: "[c]ivil asset forfeiture constitutes a serious incursion into well-entrenched civil protections particularly those against arbitrary and excessive punishment",[397] and cautioned that any civil forfeiture order cannot violate the constitutional right against disproportionate or irrational punishment.[398]

The Constitutional Court emphasised that the purposes of a forfeiture order under POCA are not primarily punitive, but "to remove the incentive for crime".[399] Consequently, the question should not necessarily be whether the offender has been adequately punished, but "whether the civil asset forfeiture is properly related to the purpose of removing the incentives for crime and whether the forfeiture will serve as adequate deterrence to the offender and to the broader community".[400]

A further factor to be taken into consideration is the relationship between the specific legislation regulating the crime and POCA. In the event of such legislation, making provision for the forfeiture of property in the case of a conviction, an additional forfeiture order under POCA may either be redundant or excessively

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[394] *Prophet v NDPP* para 55; *Mohunram v NDPP* para 131.

[395] *Mohunram v NDPP* para 131. In *Prophet v NDPP* it was not necessary for the court to decide this issue (para 70).

[396] *NDPP v Cook Properties* paras 17 and 18.

[397] *Mohunram v NDPP* paras 120 and 118.

[398] *Mohunram v NDPP* paras 118. S 12(1)(e) of the Constitution of South Africa provides that every person has the right "not to be treated or punished in a cruel, inhuman or degrading way".

[399] *Mohunram v NDPP* paras 133. See too Sachs J's judgment para 144.

[400] *Mohunram v NDPP* para 134.

punitive.[401] An illustrative description of the relationship between POCA and other legislation is given by Sachs J:

> "In my view, POCA was not adopted with a view to providing either a substitute for, or a top-up of, ordinary forms of law enforcement. It has its own rationale and its own objectives, which should be jealously guarded".[402]

It can safely be concluded that although the primary objectives of forfeiture under POCA are not punitive, they may indeed be punitive in nature. In addition, the punitive effect which a forfeiture or confiscation order may have upon an individual ought to come into consideration in the application of the proportionality test. Moreover, the constitutional rights that have been referred to by the courts, in determining whether a forfeiture order is disproportionate or not, include the right not to be arbitrarily deprived of property,[403] the right not to be treated or punished in a cruel, inhuman or degrading manner,[404] and the right to dignity.[405] The provisions of POCA with regard to restraining, preservation, confiscation or forfeiture orders can play a role in the proposed mechanism of mediation as it is envisaged that such a strong tool can be prudently used in the proposed process at different stages.[406]

4 3 4 Concluding remarks about hybrid mechanisms and POCA

> "Lex semper reformanda."

Conventional criminal law limits the efficacy of governments in curbing crime. Consequently, new mechanisms need to be found. Asset forfeiture is not new, but its

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[401] *Mohunram v NDPP* paras 127-128. In this particular case the KZN Gambling Act provided for forfeiture of movable property, but not of immovable property. The majority of the Constitutional Court held this is a factor to be taken into consideration when weighing up the proportionality of a forfeiture order under POCA. It can normally be accepted that the remedies enacted by the legislature are effective, adequate and exhaustive.

[402] *Mohunram v NDPP* para 152.

[403] S 25 of the Constitution of South Africa.

[404] S 12(1)(e) of the Constitution of South Africa; *Mohunram v NDPP* para 134.

[405] S 10 of the Constitution of South Africa; *Mohunram v NDPP* para 146.

[406] For example, assets that are forfeited under POCA may, in terms of a mediation settlement agreement, be realised to contribute towards restitution for the victims. See the discussion in chapter 5 below.

application to new fields of law is ever evolving.[407] New statutes with specifically designed procedures for asset forfeiture, like POCA, are being passed, which can help in combating economic crime. The mechanism of asset forfeiture is clearly an area where the conventional delineation between civil and criminal law is blurred. The courts is South Africa have found, like their counterparts in other jurisdictions, that asset forfeiture is a powerful tool in the hands of the state, and that cooperation between different countries regarding asset forfeiture is essential.[408]

POCA remains controversial and intrusive. Yet, asset confiscation and asset forfeiture have been adopted as essential mechanisms to combat economic crime in the light of the unprecedented levels of crime, organised and individual, prevailing in South Africa and in other jurisdictions.[409] In line with its political and legal commitments South Africa followed other jurisdictions in introducing unusual legislation for unusual circumstances. It has been shown that in the past two decades, since its introduction, the courts have developed certain principles to safeguard the principles of the Constitution and also to protect the rights of individuals in the application of POCA. In South Africa in particular, the Constitutional Court has innovatively succeeded in upholding not only the primary purpose of POCA, namely to deprive persons of the proceeds of crime, but also to protect the basic rights of persons in such hybrid procedures. This has been illustrated by constitutional principles of proportionality and instrumentality discussed above and legality discussed below in the application of POCA.

In addition, further safeguards have been developed to check the extraordinary power of the state. Fundamental principles, which underlie the right of access to courts and the right to a fair public hearing,[410] are the opportunity for each party to state her or his case and for such procedure to be public, open and transparent. These rights are limited by sections 26(1) and 38(1) of POCA which empower the NDPP to apply to court to have property respectively restrained or preserved by means of an *ex parte* application. However, an established legal principle serves as safeguard against abuse of this procedural advantage by the state. The *uberrima*

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[407] Fourie & Pienaar (2017) *Fundamina* 21.

[408] *Falk v NDPP* 2012 1 SACR 265 (CC) para 1.

[409] Bourne (2002) *SA Merc LJ* 490.

[410] S 34 of the Constitution of South Africa.

fides rule binds the NDPP to act and bring the application with the utmost good faith.[411] This is particularly so with regard to the disclosure of information to the court and the obligation to place all *material* facts that might influence the court exercising its functions before the court.[412] It is acknowledged that the purpose of the legislature in granting the state such a powerful procedural tool is to deprive a criminal of assets acquired through unlawful activity. The justification underlying the *ex parte* procedure is the need to secure a restraint or preservation order upon assets without the prior knowledge of the defendant so that the defendant is not granted an opportunity to dispose of or destroy the property in any manner.[413] The courts retain a discretion to grant an order based on an *ex parte* application and such discretion includes the appraisal of whether facts omitted from the application are material or not.[414] The emphasis by the courts on utmost good faith, honesty and openness serve to ensure that the expedient, but unusually powerful procedural tool of an *ex parte* application retains its legality and credibility under POCA.[415]

Further safeguards to ensure the constitutionality of the procedures under chapters 5 and 6 are the provisions that grant a defendant and other interested parties an opportunity after a restraint or preservation order to make representations before the court.[416] Important too, particularly with regard to the issue of compensation or restitution to victims, are the matters relating to the proceeds[417] of confiscated or forfeited goods. The management of such proceeds is provided for

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[411] The classical authority for this is *Schlesinger v Schlesinger* 1979 4 SA 342 (W) 348E-349B. For a discussion on a number of *ex parte* applications regarding asset-forfeiture and the application of this rule see NC Ndzengu & JC von Bonde "The Duty of Utmost Good Faith in Asset-Forfeiture Jurisprudence – Some Lessons to Learn" (2013) *Obiter* 377-388.

[412] *NDPP v Basson* 2001 2 SACR 712 (SCA) para 21. Ndzengu & Von Bonder (2013) *Obiter* 378-379.

[413] Ndzengu & Von Bonde (2013) *Obiter* 379.

[414] *Phillips v NDPP* 2003 2 SACR 410 (SCA) 29F-G. The court stated that it would consider the extent of the non-disclosure, the question whether the court may have been influenced by the non-disclosed facts, the reasons for non-disclosure and the consequences of setting aside any order.

[415] Ndzengu & Von Bonde (2013) *Obiter* 388.

[416] S 26(3)(a) and (c), which specifically entitle the defendant to anticipate the return date of the provisional order.

[417] The word "proceeds" is used in general terms and is not referring to the specific definition of "proceeds of unlawful activities" in terms of s 1 of POCA.

under Chapter 7 of POCA. In terms of section 63 of POCA, a Criminal Assets Recovery Account (CARA) was established and section 64 defines the funds that are to be deposited into CARA, including proceeds from confiscation and forfeiture orders.[418] In terms of section 65 of POCA a high-powered committee,[419] known as the Criminal Assets Recovery Committee ("CARC"), has been established to administer the fund, make distributions from the fund and report to cabinet. The proceeds of any assets confiscated or restrained are to be paid over to the state and to be distributed to law enforcement agencies to assist in combating crime, or to other organisations that render assistance to victims of crime.[420] Thus, although some of the proceeds may be paid out to organisations who take care of victims, no mention is made of payments being made directly to victims of crime. The question arises: what about the rights of victims of crime to claim loss or damages arising from a crime? [421] These rights may arise from the common law or in terms of section 300 of the CPA.[422]

Various issues which relate to the provisions of POCA and the rights of a victim were raised in *National Director of Public Prosecutions v Rebuzzi*[423]("*NDPP v*

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[418] S 64(a) and 64(aA).

[419] In terms of s 64(2) the members include the Minister of Justice and Constitutional Development, the Minister of Safety and Security, the Minister of Finance and the NDPP.

[420] S 68(b) and (c) read together with s 69(A) of POCA. CARC makes recommendations to cabinet regarding the distribution of monies and the actual authorisation for distributions is made by cabinet

[421] For example, X may steal R1,000,000 from his or her employer, and the employer will have the right under civil law to claim such monies from X. Also see M Cowling "Criminal Procedure: Recent cases" (2000) *S Afr J Crim Just* 227 231-233.

[422] See further para 4 4 3, 346ff.

[423] 2000 1 SACR 227 (W). In this case the respondent was charged with having stolen or defrauded the complainant, who was her employer PG Bison Ltd, of approximately R900,000. It was alleged that the respondent was gambling away the proceeds and that the value of assets the respondent was said to have retained from the monies stolen was worth only R153,000 (paras 6-8). The assets that the NDPP applied to have confiscated were consequently less than the value of the damages suffered by PG Bison Ltd, and for which it had a right in terms of the common law or s 300 of the CPA to claim from the respondent. The issue before the court in considering the restraint order under s 25(1)(b)(iii) of POCA, was whether there were reasonable grounds for believing that a confiscation order may be made against the respondent (para 10). Goldstein J reasoned that the court had a discretion, and it is unlikely that a court would grant a confiscation order that would result in the

Rebuzzi (W)"). In *NDPP v Rebuzzi (W)* the court held that it was inconceivable that a confiscation order in terms of section 18(1) of POCA would be made so as to deprive a complainant of its right to claim compensation from the respondent.[424] However, the Supreme Court of Appeal clarified certain issues in *NDPP v Rebuzzi*[425] when the decision was taken on appeal. The appellate court held that when exercising the court's discretion in determining whether a confiscation order should be granted or not, the interests of the victim and its possible claim for recovery of loss should be ignored.[426]

Moreover, reading sections 30(5) and 31(1) of POCA together, the appellate court held that the legislature clearly envisaged instances where an identifiable victim, who has a claim for recovery against a respondent, may co-exist with a confiscation order.[427] The rights of a victim are protected as the process of realisation of assets and the distribution of funds by a *curator bonis* are done under the supervision of the court.[428] The court also underlined that the state does not have a preferential claim as this is clearly stated by section 31(1) of POCA.[429] Importantly, the Supreme Court of Appeal placed the emphasis on the purpose of a confiscation order, which is aligned with the primary purpose of POCA and that is to deprive the offender of the proceeds of crime:

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proceeds being forfeited to the state and thus deprive the complainant of its right to claim damages from the respondent (para 11). In addition, should ss 30(5) and 31(1) be read together, it can be argued that the complainant could apply to have its claim paid out of the confiscated assets. Granting a confiscation order in terms of s 18(1) would not only put the complainant to unnecessary expense to protect its interest in the confiscated assets, but would also in effect result in undoing the consequence of the payment to the state (para 18).

[424] Para 11.

[425] 2002 1 SACR 128 (SCA) ("*NDPP v Rebuzzi* (SCA)").

[426] *NDPP v Rebuzzi* (SCA) para 14. In *National Director of Public Prosecutions v Kyriacou* 2004 1 SA 379 (SCA) ("*NDPP v Kyriacou"*) the court held that the omission by the NDPP to mention that an order in terms of s 34(1)(a) of the CPA for return of stolen goods to the rightful owners had been refused, did not preclude the granting of a confiscation order against the convicted person (para 19). However, the decision can be distinguished as the confiscation order also concerned related criminal activity.

[427] *NDPP v Rebuzzi* (SCA) para 17. In the SCA case it became apparent that it was upon the request of the victim that the NDPP applied for a restraint order over the respondent's assets (para 6).

[428] *NDPP v Rebuzzi* (SCA) paras 16 and 17.

[429] *NDPP v Rebuzzi* (SCA) para 17.

> "The primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains. In my view it is therefore not significant that in some cases the State might end up receiving nothing. It is because the purpose of such an order is to prevent the convicted person from profiting rather than to enrich the State that the court's inquiry in terms of s 18(1) is directed towards establishing the extent of his benefit rather than towards establishing who might have suffered loss (writer's emphasis)."[430]

Brief mention needs to be made of interests of different actors that are in tension with one another in the confiscation and forfeiture of proceeds of crime. On the one hand the interests of the victim are recognised, and on the other hand there are the rights of the defendant to claim reasonable living and legal expenses from the restrained or preserved property.[431] There are some safeguards for ensuring that the purposes of a restraint order, including the need to preserve property and to satisfy a confiscation order and pay restitution to victims are not frustrated.[432] Firstly, the applicant[433] has to make an application to court meaning the court has a discretion,[434] and the applicant bears an onus to show that it needs the funds and that it is only for *reasonable* expenses. Secondly, the applicant also has to show that such expenses cannot be met out of unrestrained assets.[435] However, it has been said that POCA is "not victim friendly" as the rights for the victims to make representations in terms of section 30(5) are only at a later stage, the realisation

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[430] *NDPP v Rebuzzi* (SCA) para 19. Also see Cowling (2000) *SACJ* 232.

[431] The state also has interests in the property. Under ss 26(6) and 44 a defendant can claim reasonable living and legal expenses from restrained or preserved property. Chapter 6 places limits on legal expenses by way of ss 45 and 46 but there is no similar provision under chapter 5 restraint orders and this could constitute a loophole for defendants to dissipate restrained
property at the expense of victims. For a full discussion on the inter-relationship of these interests see Ndzengu & Von Bonde (2011) *SACJ* 310, 312-315.

[432][432] For a full discussion on these limitations, see Ndzengu & Von Bonde (2011) *SACJ* 318-321.

[433] This could be the defendant or a possible victim such as the owner of the property.

[434] *Fraser v Absa Bank Ltd (NDPP as amicus curiae)* 2007 3 SA 484 (CC) para 13. The court continued (paras 71-74) to discuss the discretion the High Court has under s 26(6) at some length, including the discretion it has under s 31(1). It also lists a number of factors the High Court could take into consideration when exercising its discretion and that it "will necessarily have to take a somewhat robust approach".

[435] *NDPP v Mcasa* para 85; *Fraser v Absa Bank Ltd* para 13.

stage, whereas the rights of a defendant to claim living and legal expenses are available at the earlier stages of restraint and preservation.[436]

It is clear that the primary purpose of POCA is to deprive a convicted person of the proceeds of crime. However, it is also evident that POCA provides an indirect mechanism for victims to recover losses from the proceeds of realised forfeited or confiscated assets.[437] It is this establishment of a statutory procedural mechanism for the forfeiture and confiscation of property that makes POCA relevant to this dissertation. The powers granted to the NDPP under POCA are extraordinary and the burden of proof is the lighter burden under civil law. In addition, POCA illustrates a convergence of civil and criminal law.[438] This statutorily created convergence is significant because of the role that restraint and confiscation orders could play at different stages of the proposed mechanism of mediation in the criminal process. Moreover, the statutory recognition of the rights of victims in POCA could strengthen the negotiation position of victims in the mediation process, particularly with regard to restitution.

In the United States, under the legislation on which POCA is modelled, the issue of income raised from asset forfeiture is highly controversial, particularly civil asset forfeiture. Civil asset forfeiture amounts to billions of dollars per year.[439] Critics

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[436] Ndzengu & Von Bonde (2011) *SACJ* 321, 331-332. The same applies for creditors in terms of s 30(3). For a detailed discussion of judicial interpretation of the inter-relatedness of the rights of the different actors under the provisions of POCA, including ss 26(6), 30(5), 31(1), and 33(1), see the discussion by Ndzengu & Von Bonde (2011) *SACJ* 321-327 of the case law, especially of the *Fraser* series of cases namely *Absa Bank Ltd v Fraser* 2006 2 All SA 1 (SCA); *Fraser v Absa Bank Ltd (NDPP as amicus Curiae)* 2007 3 SA 484 (CC). The facts were that property of Fraser had been restrained and Fraser consequently applied for money for reasonable legal expenses. Absa applied to intervene as it was a concurrent creditor of Fraser. The Constitutional Court held that in the light of the court's discretion under s 26(6) creditors' claims may form part of the court's considerations. Consequently, creditors may be able to intervene; but creditors do not have right to be joined to s 26(6) proceedings. See paras 63, 70 and 74.

[437] In *NDPP v Rebuzzi* NDPP applied for a confiscation order at the request of the victim, the employer from whom the monies were stolen (see paras 6-10).

[438] *National Director of Public Prosecutions v Mcasa* 2000 1 SACR 263 (TkH) paras 9-12.

[439] For figures and detailed discussion see DM Carpenter et al "Policing for Profit: The Abuse of Civil Asset Forfeiture" 2 ed (2015) *Institute for Justice* (accessed 20-02-2019). Recent figures from the US DOJ show a decline in the number and value of asset forfeitures in the

contend that the government is lining its pockets and ruining lives[440] and describe civil asset forfeiture "as the great money racket"[441] of the United States contemporary criminal justice system.

In South Africa the value of asset forfeiture has also grown. In 2011/2012 the value of recoveries under POCA was R131,1 million, representing R93,8 million paid over to victims and R37,3 million into CARA; whilst R444,2 million was recovered in 2015/2016 of which R390,2 million was paid over to victims and R54,2 million into CARA.[442] The NDPP attributes this to the intentionally *aggressive*[443] focus on

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five- year period 2014-2018 which is attributed to the DOJ Policy 15-1 of severely limiting certain types of asset forfeiture. More recently, DOJ Policy 17-1 relaxed the limitations and there has been a slight increase again. For details see US DOJ "5 year Summary of Seizure and Forfeiture Trends" *DOJ* (accessed 20-02-2019); US DOJ Policy Directive 15-01 (16-01-2015) *DOJ* (accessed 20-02-2019); US DOJ Policy Directive 17-01 *DOJ* (accessed 20-02-2019). On a state level, the focus on asset forfeiture is illustrated by the Southern District of Ohio, which caused assets valued at more than US $ 9 million to be forfeited in 2016; and which in 2017 established a unit dedicated to asset forfeiture. See DOJ Southern District of Ohio "U.S. Attorney Creates Unit Dedicated to Asset Forfeiture" (20-03-2017) *DOJ* (accessed 20-02-2019).

[440] O'Connell is very critical, contending that civil asset forfeiture does not serve justice and is "one of the most universally reviled aspects of the current" legal system in the United States. He illustrates that both state and federal asset forfeiture laws serve to enrich the government, at both the state and federal level, at the expense of individual property owners. See D O'Connell "Civil Asset Forfeiture: Lining Pockets and Ruining Lives" (2018) 74 *Nat'l Law Guild Rev* 237-256.

[441] N Goetting "Editor's Preface" (2018) 74 *Nat'l Law Guild Rev* 192 & 257(front & back cover).

[442] *NDPP Annual Report* 2015/2016 51. The 2014/2015 year was exceptional in that a total of R1 658 million was recovered and paid over to victims and a further R58,2 million paid into CARA. In the *NDPP Annual Report* 2017/2018 (20 & 85) it is reported that assets valued at more than R50 billion have been identified in respect of which chapter 5 and 6 forfeiture actions are planned in the coming three to five years! This remarkable increase would be unprecedented, particularly compared to the R415,5 million (a lower figure of R308,3m is given at 20) recovered under POCA in 2017/2018. The AFU maintains a success rate of over 90% and part of its increase and success is attributed to participation in the ACTT (Anti-Corruption Task Team), a presidential initiative set up to fast track the investigation and prosecution of serious corruption cases. The units involved are the NPA, SCCU, NPA, AFU, SIU and DPCI (Directorate for Priority Crime Investigation). For more information see NDPP *Annual Report* 2015/2016 22 & 43.

chapter 6 asset forfeiture orders, as opposed to chapter 5 asset confiscation.[444] A significant amount of recovered monies under POCA is reported to have been paid over to victims.[445]

The aggressive approach by the NDPP to focus on chapter 6 forfeiture, in contrast to chapter 5 confiscation, has raised several constitutional issues. The NDPP has broad statutory powers under POCA, yet the question has risen whether these powers are unlimited with regard to the type of asset forfeiture that is chosen. In short, are there any factors that limit the powers of the NDPP in deciding whether to follow the criminal asset forfeiture under chapter 5, which is commonly accepted as being more cumbersome;[446] or the faster and less burdensome process of civil asset forfeiture under chapter 6 of POCA? This question and a number of constitutional issues were raised in *Ntsoko v National Director of Public Prosecutions* ("*Ntsoko v NDPP*").[447] The reliance on the doctrine of legality[448] by the courts has introduced further safeguards to the application of POCA, particularly chapter 6 proceedings.

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[443] In contrast to a more cautious approach with regard to chapter 5 actions. NDPP *Annual Report 2017/2018* 85.

[444] Chapter 6 actions represented 34% of forfeiture cases in the ten years up to 2009, increasing to 54% in the following four years and increasing to 75% in 2013/2014. See NPA *Annual Report 2013/2014* 86.

[445] This involves a cumulative amount of over R2,505 million over the six-year period 2012/2013 to 2017/2018. This amount includes the unusually high amount of R1,658 million in 2014/2015, including an amount of almost R1,5 billion relating to a single case involving corruption in the Gauteng Health Department. See NDPP *Annual Report 2014/2015* 96-98 & 105.

[446] *Ntsoko v NDPP* para 9.

[447] 2016 1 SACR 103 (GP). In this case, the NDPP had applied for a forfeiture order of the defendant's' assets under chapter 6 proceedings and not chapter 5. The defendant argued that he was still to face criminal charges and therefore the NDPP should have waited and instituted chapter 5 proceedings after the criminal conviction, if any. In addition, should he wish to defend the proceedings under chapter 6, it would be to his detriment as such defence would in effect violate his constitutional rights to a fair trial and to property (para 2).

[448] For a discussion on the origin, development and application of the doctrine of legality see Erasmus & Ndzengu (2016) *SACJ* 247-272. Erasmus & Ndzengu demonstrate how the doctrine of legality has evolved from being a defence in criminal proceedings also to be applied in civil litigation between private individuals and public officials. It is used as a safeguard to ensure that the exercise of public administrative powers is constitutional. The

The doctrine of legality affirms that the exercise of public powers needs to be lawful, within the powers conferred by any statue and that such exercise complies with the constitutional standards of administrative justice.[449] In the context of asset forfeiture under POCA, the question is did the NDPP in electing to institute either chapter 5 or chapter 6 proceedings exercise its discretion properly as measured against the doctrine of legality. More specifically, the questions are: Did the NDPP act in accordance with the empowering statute POCA? Was the NDPP's decision to institute chapter 6 forfeiture proceedings rational?[450] The court held in *Ntsoko v NDPP* that the rationality or irrationality of the decision is related to the purpose for which the extraordinary power is given to the NDPP under POCA.[451] In addition, the court held that the NDPP, when making the decision as to which forfeiture procedure to institute, is duty bound to take into account and balance the interests of the defendant against those of the communities as stated by the objects of POCA.[452]

The court in *Ntsoko v NDPP* endorsed a further safeguard in the application of POCA. The court confirmed that the decision by the NDPP whether to institute chapter 5 or chapter 6 proceedings falls within the exclusive discretion of the NDPP and is an administrative action which accordingly falls beyond the ambit of PAJA.[453] Nevertheless, "such decisions fall to be reviewed in terms of the principle of legality",[454] and accordingly remain reviewable. The election made by the NDPP thus

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authors also show how the doctrine has developed to include the criterion of rationality in the legality doctrine. The benchmark is: was the decision rational?

[449] Erasmus & Ndzengu (2016) *SACJ* 254, 257, 258, 259.

[450] Erasmus & Ndzengu (2016) *SACJ*

[451] *Ntsoko v NDPP* paras 19-20. See also, Erasmus & Ndzengu (2016) *SACJ* 270-271.

[452] *Ntsoko v NDPP* para 21. This would include taking into account the circumstances of each case and the proximity of the proceeds of crime to the alleged offence. In this particular case the forfeited assets included bank accounts and vehicles evidently purchased from the proceeds and it is probable that such assets would have been depleted or devalued by the end of the criminal proceedings (paras 22-28). See also, Erasmus & Ndzengu (2016) *SACJ* 271.

[453] In terms of the Promotion of Administrative Justice Act 3 of 2000, s 1 "administrative action" (ff), the decision to institute or continue a prosecution is excluded from the scope of that Act and is thus not subject to review under it. See also Erasmus & Ndzengu (2016) *SACJ* 269.

[454] *Ntsoko v NDPP* paras 17-18. Erasmus & Ndzengu (2016) *SACJ* 269. See also *State Information Technology Agency SOC v Gijima Holdings (Pty) Ltd* 2018 2 SA 23 (CC) paras

remains discretionary, but is not beyond the scrutiny of the courts. The need for such decision to be constitutional and rational helps to keep the draconian and invasive powers of POCA in check.

It is submitted in this dissertation that the application of a hybrid mechanism, such as asset forfeiture, can enhance the opportunity for securing restitution for victims. It is acknowledged that some provision has been made for interested parties, such as creditors and victims, to make representations to the court. However, it is submitted that the opportunity for restitution should be both more explicit and mandatory. Provisions, similar to those of section 105A(1)(b)(iii) of the CPA[455] can easily be incorporated into both chapters 5 and 6 of POCA.

Asset forfeiture under both chapters 5 and 6 has been held to be constitutional. The courts have developed a number of constitutional safeguards, including the strict instrumentality test, the proportionality test and the legality test. These are welcome developments in the field of forfeiture jurisprudence where the provisions are draconian and invasive: consequently the need for court vigilance is high.[456]

It is submitted that new terminology needs to be developed to properly and correctly describe and evaluate this growing dimension of jurisprudence. It has been illustrated that the classic delineation between criminal and civil legal systems is not necessarily effective in the interpretation of new contemporary laws. There is no consistency or uniformity in such an approach. Recognising asset forfeiture procedures as indispensable mechanisms, specifically designed for contemporary issues in addressing complex crimes, will contribute to the proper functioning of such statutes. It is submitted that a more effective approach is to interpret and appraise any hybrid mechanisms for what they are, specially designed statutory mechanisms; and to allow the courts to develop jurisprudence specifically to deal with these mechanisms to ensure their application is proportional, rational and constitutional.

52-54 and para 3(b) regarding the granting of a just and equitable remedy against Sita where it raised its own constitutionally illegal granting of a contract after an unreasonable delay.

[455] This subsection provides for representations to be made by the victims and for compensation to be included in a plea and sentence agreement. These issues are fully discussed in full in para 4 3 below.

[456] *NDPP v Rautenbach* 2005 1 SACR 530 (SCA) para 88; *Mohunram v NDPP* paras 56, 120; *Prophet v NDPP* para 45; *Ntsoko v NDPP* paras 15 & 18.

4 4 Mechanisms in the criminal justice system

The criminal justice system in South Africa houses different mechanisms, but the conventional adversarial criminal trial remains dominant. However, the criminal justice system is not keeping up with the number of cases and it is commonly accepted that the conventional criminal trial, though important, cannot be the only mechanism through which economic crime can be addressed. In this third part of chapter 4, specific attention is given to the evolution of alternative procedures within the criminal justice system, alongside the conventional accusatorial prosecutorial process, namely plea negotiation and out of court settlements, such as deferment. The fairly new mechanism of deferred prosecution agreements, introduced into several jurisdictions across different continents primarily to address serious instances of economic crime, is discussed. The application of deferred prosecution agreements, as a statutorily structured procedure in the United Kingdom, is compared to a more informal use of the mechanism in the United States.

The mechanism of plea and sentence agreements, commonly referred to as plea bargaining, is the primary procedure upon which the criminal justice system in the United States operates.[1] The use of plea and sentence agreements in the United States is discussed, as well as the evolving use of the mechanism in South Africa.

The issue of restitution under the criminal process is identified as being critical in this dissertation, and consequently mechanisms within the criminal justice system that grant opportunities for restitution and other restorative justice remedies are discussed, with particular focus on sections 297 and 300 of the CPA. Brief reference is also given to section 276 prescribing correctional supervision and section 276A, a comparatively recent post-sentencing mechanism, based on restorative justice principles, both of which also afford the opportunity for compensation orders.

The purpose of this section is to identify a number of mechanisms already in existence in the criminal justice system that have been or can be applied in addressing economic crime. Another objective is to distil certain principles from these mechanisms to use as building blocks, to develop a further mechanism, mediation in the criminal justice system, alongside the existing mechanisms. Chapter 4 will conclude with a summary of the different mechanisms in the administrative, civil and criminal justice systems. The boundaries between these classically distinguished systems are shown to be blurred and that principles from different

fields of law may be present in any particular mechanism. The application of principles of restorative justice within such mechanisms is highlighted, with specific emphasis on developing the role of the victim and community in criminal processes. The issues of alternative criminal procedures, restitution, the role of the victim and community impact upon the conventional principles of sentencing under the criminal justice system are considered. Consequently, attention is also given to sentencing and its characteristics. It is submitted that the mechanism of mediation is able to be used in different stages of criminal and civil procedure in attempts to hold the perpetrator of economic crime accountable; and simultaneously to grant the victim of the offence restitution.

4 4 1 Mechanism of deferred prosecution agreements in England and the United States

4 4 1 1 Introduction to deferred prosecution agreements

Procedural options for the agencies involved in combating crime continue to evolve. As shown below, the alternative mechanism of plea and sentence negotiation, now complements the classic binary options of declination to prosecute or trial. Recently, yet another mechanism has evolved and is now being used in a number of jurisdictions. It is again an option based upon pre-trial negotiation and involves the authorities entering into an agreement of deferment, commonly called a deferred prosecution agreement (“DPA”). It is primarily aimed at companies involved in serious economic crime. It evolved organically in the United States, but has since been introduced in other jurisdictions as a specific creature of statute. In this section the development of DPAs in the United States is discussed, together with the formal introduction of DPAs in England. The purpose is to show an alternative mechanism that can be applied to combat serious economic crime, particularly offences committed by corporations. A further objective is to distil a number of restorative justice principles, to use as criteria for the development of the proposed mechanism of mediation in the criminal justice system.

Singapore recently passed new legislation introducing deferred prosecution agreements ("DPAs") into their criminal justice system.[457] This follows similar introductions of DPAs in France,[458] Argentina,[459] Australia[460] and Canada.[461] These statutory provisions are similar to and likely to have been influenced by the earlier enactment of DPAs in England.[462]

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[457] Part VIIA and the Sixth Schedule of the Criminal Justice Reform Act 19 of 2018.

[458] Art 18 of Law No 2016-1691 of 9 December 2016 (Sapin II Law) amending articles of the Penal Code, particularly art 131-39-2. Also art 22 of Law No 2016-1691 amending art 41-1-2 of the Code of Criminal Procedure providing for the proposal by the public prosecutor of the entering into a "public interest court agreement", commonly known by its French acronym *CJIP* (c*onventions judiciaire d'intérêt public")*.

[459] *Ley 27401 Responsabilidad Penal* published on 1 December 2017. (Unofficially translated as Law 27.401 Criminal Liability of Legal Persons for Corruption Offences). Art 16 provides for the conclusion of an "effective collaboration agreement" between the prosecution and the corporation. Art 39 provides that the Act will come into force 90 days after its publication, which would have been in March 2018. See too G Jorge and F Basch "Argentina Introduces Deferred Prosecution Agreements, Standards for Compliance Programs" (16-01-2018) *FCPA Blog* <http://www.fcpablog.com/blog/2018/1/16/jorge-and-basch-argentina-introduces-deferred-prosecution-ag.html?printerFriendly=true> (accessed 03-07-2018).

[460] Sch 2 of the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017.

[461] Budget Implementation Act Bill C-74 assented to on 21 June 2018 and in terms of s 409 to come into force 90 days after being assented to. Available at <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-74/royal-assent#enH23405> (accessed 03-07-2018); Department of Justice Canada "Remediation Agreements and Orders to Address Corporate Crime" (27-03-2018) *Department of Justice Canada* <https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html> (accessed 21-05-2018); W Berman, JM Picone & K Byers "Deferred No More: Deferred Prosecution Agreements Finally on their Way to Canada" (02-02-2018) *casselsbrock.com* <http://www.casselsbrock.com/CBNewsletter/Deferred_No_More__Deferred_Prosecution_Agreements_Finally_on_Their_Way_to_Canada> (accessed 21-05-2018); N Keith "Features of Canada's New DPA Scheme" (25-04-2018) *whitecollarpost.com* <http://whitecollarpost.com/category/topics/sentencing-deferred-prosecution-agreements/> (accessed 21-05-2018). In Canada a DPA is called a "remediation agreement" and defined as "an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement". See s 715.3(1) of the Canadian Criminal Code RSC 1985 c C-46.

[462] S 45 and Sch 17 of the Crime and Courts Act 2013.

As its name implies a DPA is by nature an agreement between the prosecution and defendant, and accordingly rights and obligations are established for both the parties. The primary obligation upon the prosecution is to defer prosecution for an agreed period of time, usually ranging between 18 months and three years, or in some instances for a period of five years. The primary obligations of the defendant are multi-fold, including payments of various financial amounts, cooperation with investigating and prosecuting authorities, remedial and compliance requirements.[463] A distinguishing factor of a DPA is that it is laid before a court, needs court approval, and is filed with the court records. Consequently, a DPA becomes a document of public record, subject to public scrutiny and interrogation.[464] Once the period of deferment is over and the conditions fulfilled by the defendant, the charges filed by the prosecution are withdrawn, and consequently the defendant is not convicted and sentenced.

A DPA needs to be distinguished from a Non-Prosecution Agreement ("NPA") and a "declination with disgorgement" agreement used in the United States.[465] A NPA is similar to a DPA and generally includes a brief statement of facts and terms that include payment of penalties and remedial actions such as new corporate governance and compliance procedures and cooperation with the authorities. A fundamental difference is that a NPA is not laid before the court for approval, and can thus be described as a private agreement between the DOJ and defendant company. Advocates for NPAs justify an NPA as being permissible as it falls within the principal discretion of a prosecutor whether to prosecute or not. On the other

[463] See Nasar (2017) *NYU JL & Liberty* 849-870 for practical illustrations of the standard terms in a DPA. See also *United States v HSBC* (2017) at 130.

[464] In *United States v HSBC* (2017) at 135 & 142 it was held that a Monitor's Report in terms of a DPA is not a judicial document, and is thus not open to public scrutiny. See too paras 12 & 13 of Schedule 17 that provide for the possible postponement of the publication of information by the prosecutor and the limitations on the use of such information in criminal proceedings.

[465] For full discussion on DPAs, NPAs and declination with disgorgement agreements see Woody (2018) *U Mich JL Reform* 269-311; Koehler (2015) 49 *UCD L Rev* 497-565.

hand, critics of NPAs and DPAs argue that the DOJ is abusing its discretion and fulfilling the roles of prosecutor, judge and jury simultaneously.[466]

A declination with disgorgement agreement is yet another option, introduced by the DOJ in April 2016 under a pilot programme within the enforcement of the Foreign Corrupt Practices Act of 1977 ("FCPA").[467] The purpose is to incentivise companies to self-report wrongdoing. Basically, a declination with disgorgement agreement entails that in the event of a corporation voluntarily self-reporting and disclosing a wrongdoing, offering its cooperation and disgorging its profits derived from such wrongdoing, the DOJ will decline to prosecute. After the initial year and the application of this novel mechanism, it was incorporated into the United States Attorneys' Manual ("USAM") in November 2017.[468] This model, particularly its name, has been criticised as causing confusion and blurring the lines of criminal law. Inherently, the agreement itself appears corrupt. On the one hand, in the event of a company having committed a crime, it can now simply buy a declination and so avoid criminal prosecution. On the other hand, equally objectionable, if the prosecution is unable to prove a crime in a criminal court, then the agreed disgorgement becomes government extortion.[469] Moreover, like a NPA, there is no judicial supervision and consequently, possible instances of economic crime are settled outside the court.

The enactment of legislation in a number of important jurisdictions in different continents, with the definite purpose of introducing DPAs, as an alternative dispute mechanism to deal with instances of economic crime, illustrates the increased use of DPAs across the world. It is argued that this discretionary tool is a commendable additional manner in which to respond to alleged economic crime. It enables parties to enter into negotiations with the aim of concluding a DPA. The authorities are able,

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[466] Koehler (2015) 49 *UCD L Rev* 557; Copland & Gorodetski "Without Law or Limits" *Manhattan Institute* 13.

[467] The guidelines are: DOJ Criminal Div "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (05-4-2016) available at <https://www.justice.gov/archives/opa/blog-entry/file/838386/download> (accessed 19-12-2018).

[468] USAM Insert 9-47.120 – FCPA Corporate Enforcement Policy available at <https://www.justice.gov/criminal-fraud/file/838416/download> (accessed 19-12-2018).

[469] Woody (2018) *U Mich JL Reform* 299-302.

with the cooperation of the defendant, to do a thorough investigation, and subsequently enter into an agreement with various terms. The essence of a DPA is the prosecution agreeing to defer and not to continue with conventional prosecution and trial procedures, whilst the defendant agrees to certain reform and repayment conditions. Moreover, a DPA needs to be approved by a court, thereby ensuring transparency and public oversight.

Below a short overview will be given of the legal framework created by DPA legislation in England and the interpretation and application of such legislation by the courts in recent cases. A brief comparison will also be made between the use of DPAs in England and in the United States, with specific reference to contentious issues and points of difference relating to the use of DPAs in the two jurisdictions. Concluding remarks will highlight lessons that can be drawn from the experiences of the United States and United Kingdom to enhance the building blocks for the use of mediation as a further alternative way in responding to instances of economic crime in South Africa.

4 4 1 2 Deferred prosecution agreements in England and Wales and in the United States

DPAs were introduced into the criminal justice system of England and Wales[470] through section 45 and Schedule 17 of the Crime and Courts Act 2013 ("Schedule 17");[471] which is to be read in conjunction with the applicable rules, Part 11 of the Criminal Procedure Rules 2015 ("the 2015 Rules").[472] Significantly, the legislation and codes introduced in England are specifically directed at the introduction of DPAs, in contrast to the use of DPAs in the United States, which are concluded through indirect legislation, in terms of section 3161(h)(2) of the Speedy Trial Act,[473] which was enacted for a completely different purpose.[474]

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[470] In terms of s 61(13)(g) of the Crime and Courts Act 2013, the provisions relating to DPAs only relate to England and Wales. In this dissertation, the term England is used with the understanding that it includes Wales, unless otherwise stated.

[471] S 45 of the Crime and Courts Act 2013 simply refers to Schedule 17.

[472] Originally the Criminal Procedure (Amendment No 2) Rules 2013 in SI 3183 (L 25), but now Part 11 of the revised 2015 Criminal Procedure Rules.

[473] The proper citation is s 3161(h)(2) of 18 United States Code ("USC"), but more commonly known as the Speedy Trial Act, which imposes time limits in the criminal justice system to

The operation of DPAs in England occurs within an integrated legal framework. It is beyond the scope of this dissertation to discuss such framework in detail. The basic framework includes the main role-players, the Serious Fraud Office ("SFO") and the Crown Prosecutors, who are tasked with the investigation and prosecution of economic crime, particularly bribery and corruption, both nationally and internationally. This integrated network evolved from the recommendations of the *Roskill Report (Fraud Trials Committees Report) 1986*, and subsequently the SFO was established under the Criminal Justice Act 1987 and authorised to investigate and prosecute instances of economic crime that primarily fall under the Bribery Act 2010 and Criminal Law Act 1977. In addition, the SFO and Crown prosecutors are guided by several codes, including the *Code for Crown Prosecutors 7th Edition (*2013) ("*Code for Crown Prosecutors*") issued by the Director of Public Prosecutions under section 10 of the Prosecution of Offences Act 1985; and the *Deferred Prosecution Agreements Code of Practice (2013)* ("*DPA Code of Practice*") issued by both the Director of Public Prosecutions and the Director of the Serious Fraud Office in terms of paragraph 6(1) of Schedule 17.[475] These codes have been judicially applied in a number of cases involving DPAs brought before the courts for

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ensure that cases are dealt with within a reasonable time. Provision is made for certain exceptions to the time limits. S 3161(h)(2) is such an exception and reads: "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." The United States Department of Justice ("DOJ") has also published guidelines and memoranda to guide the DOJ in the application of DPAs. These are discussed below. Also see PR Reilly "Corporate Deferred Prosecution as Discretionary Injustice" (2017) *Utah L Rev* 839 844-845; *United States v HSBC Bank USA* 863 F3d 125 (2 Cir 2017) ["*United States v HSBC* (2017)"] at 144; *United States v Saena Corp* 140F Supp 3d 11 ("*United States v Saena Corp*") at 38-40.

[474] The enactment of s 3161(h)(2) was initially intended for minor instances of crime and was further aimed at the rehabilitation of a certain profile of persons, being individuals who were disadvantaged not only regarding the legal justice system, but also economically and socially. This purpose is clearly in contrast to the development and use of DPAs for large corporations in terms of s 3161(h)(2).

[475] Furthermore, when negotiating the terms of a DPA the members of the SFO and Crown Prosecution need to take into consideration the *Joint Prosecution Guidance on Corporate Prosecutions and the Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* (2011).

approval, namely *Serious Fraud Office v Standard Bank plc,*[476] *Serious Fraud Office v XYZ Limited,*[477] *Serious Fraud Office v Rolls-Royce plc*[478] and *Serious Fraud Office v Tesco Stores Limited*.[479] Importantly, when negotiating financial issues, the subject of victim compensation needs to be addressed in terms of the *Code of Practice for Victims of Crime (2015);* as does financial disgorgement and financial penalties in terms of the *Definitive Guideline* issued by the Sentencing Council for Fraud, Bribery and Money Laundering Offences. Consideration also needs to be given to the prosecutorial power to recover assets under the Proceeds of Crime Act 2002.[480]

The formal statutory definition of a DPA in England is a very general broad definition: "an agreement between a designated prosecutor and a person whom the prosecutor is considering prosecuting for an offence."[481] In essence, a DPA provides prosecutors with an additional pre-trial option to the conventional binary options of either prosecuting or declining to prosecute.[482] The choice is within the prosecutor's discretion and is to be made upon consideration of the various prescribed factors, including the seriousness of the offence, the history of prior misconduct of the

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[476] U20150854.

[477] U20150856. For example in para 18 of *SFO v XYZ Ltd* (Preliminary).

[478] U20170036.

[479] U20170287 2017 WL 10765126 para 9.

[480] Regard is also to be given to international conventions, including the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.* Generally too, members of the SFO need to follow their internal guideline, the *SFO Handbook.*

[481] Para 1(1) of Schedule 17. It is to be noted that "an offence" is delineated by Part 2 of Schedule 17. Para 1(2) as read with s 2 of Schedule 17 provides for compliance by the accused person and suspension of prosecution by the prosecution. In addition para 5 of Schedule 17 sets out the required contents of a DPA, including a statement of facts of the offence, the period of the DPA, financial penalties, compensation for victims, disgorgement of profits, payment of costs, compliance and cooperation terms.

[482] United States Attorneys' Manual ("USAM") Principles of Business Organizations 9-28.1100B. See too K Woody "Declinations with Disgorgement in FCPA Enforcement" (2018) *U Mich JL Reform* 269 279-280; M Koehler "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement (2015) 49 *UCD L Rev* 497 500-503.

corporation, self-disclosure and cooperation by the defendant, remedial measures and collateral consequences.[483]

The purpose of a DPA, as an alternative procedural option in criminal law, is succinctly described by Sir Brian Leveson P in the very first DPA assessed and approved by the court in England, *Serious Fraud Office v Standard Bank plc*:[484]

> "Its purpose is to provide a mechanism whereby an organisation (being a body corporate, a partnership or an unincorporated association, but not an individual) can avoid prosecution for certain economic or financial offences by entering into an agreement on negotiated terms with a prosecutor designated by the 2013 Act."[485]

There are numerous other aims of a DPA that have been enumerated by the legislators, policy makers and courts, including efficacy and utilitarian purposes, reformation of corporate governance, restitution for victims, and avoidance of economic and political collateral consequences such as losses to employees, shareholders and general business.[486] It is correctly argued that the use of DPAs

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[483] The DPA Code of Practice para 1.2 sets out a two-stage test: firstly, an evidential stage and, secondly, a public interest stage. This is extensively amplified in para 2 which sets out the factors to be taken into consideration to determine if a DPA is an appropriate mechanism. In the United States the guidelines are in the USAM Principles of Business Organizations 9-28.1000.

[484] Case No U20150854. It is to be noted that there are two judgments under the same case name and number. A preliminary judgment heard privately on 4 November 2015 ("*SFO v Standard Bank* (Preliminary)") but which judgment was only made public during the final judgment on 30 November 2015 ("*SFO v Standard Bank* (Final)"). This is in accordance with the procedure laid down by paras 7 and 8 of Schedule 17 that the judgments only become public once the court has finally approved the DPA. Also see paras 2 and 3 of *SFO v Standard Bank* (Final) judgment.

[485] Para 1 of *SFO v Standard Bank* (Final).

[486] For example, the Australian legislators explain that the DPA scheme is to address serious corporate crime through encouraging self-reporting by corporations; to avoid financial and reputational losses that are linked to long investigations and trials; to improve accountability of Australian businesses for corporate misconduct, and to promote corporate compliance with regulations. See Paras 11 and 12 of the Explanatory Memorandum to the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017. Also see the *United States DOJ USAM, Principles of Federal Prosecution of Business Organizations at 9-28.000* available at <https://www.justice.gov/United States/United Statesm-9-28000-principles-federal-prosecution-business-organizations> (accessed 09-07-2018).

ensures a faster and less costly mechanism of resolution for all the parties concerned than a conventional criminal trial. Although investigations could still last for a considerable period of time and cost a vast amount of money, the cooperation between the investigating authorities and the company concerned does result in time and expenses being saved in comparison to both parties needing to prepare for and conduct a lengthy trial.[487] Significantly, Leveson P warns corporations not to take calculated risks and attempt to "brazen out an investigation" as the direct and indirect costs of litigation would "almost inevitably spell a far greater disaster".[488] Since the Arthur Andersen implosion at the beginning of the twenty-first century, the limitation of the ramifications of the prosecution of a large corporation for its employees, other stakeholders and the broader economy has been the paramount consideration in economic, political and legal evaluations of the use of DPAs.[489] Various national governments and corporate sectors have been cautious to avoid such consequential ramifications of the collapse of a large corporation resulting from criminal litigation and thus the use of DPAs is being advocated.[490] In addition, the opportunity for the

[487] This includes the company having to fund costly internal investigations and, in some instances, paying the prosecution's' costs. The costs of the Crown's investigation alone in the Rolls Royce matter totalled just under £13 million. In the United Kingdom it is a recommended standard clause that the defendant pays the costs of investigation of the Crown. Reilly (2017) *Utah LR* 842; Paras 58, 59, 124, 125 & 143 of *SFO v Rolls Royce*. In *SFO v Tesco*, the defendant had to pay £3 million towards the Crown's costs (paras 102-103).

[488] Para 143 of *SFO v Rolls Royce*. A fundamental risk of a conviction of a corporation is of being disqualified from tendering for government business, or of being generally disqualified from doing business with the government.

[489] Commonly referred to as "the Arthur Andersen Effect". In the United States companies that have been convicted of a crime lose government subsidies and are debarred from doing business with government which could lead to the financial implosion of the company. See Koehler (2015) 501-501; JA Nasar "In Defense of Deferred Prosecution Agreements" (2017) 11 *NYU JL & Liberty* 838 839-840; G Markoff "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century" (2013) 15 *U Pa J Bus L* 797 804-807.

[490] A number of countries which have introduced DPAs are mentioned above, including Canada, Singapore, Argentina and France. Interestingly, some argue that prosecution does not necessarily lead to an implosion as experienced by the Arthur Andersen saga and that the Andersen Effect does not exist and is "no more than a bogeyman" See Markoff (2013) *U Pa J Bus L* 828-830, 846; Koehler (2018) *UCD L Rev* 501-511.

authorities, not usually available in adversarial processes, to introduce and enforce corporate structural reform through compliance procedures, serves as another purpose of using DPAs.[491] The last two decades the United States has promoted the increased use of DPAs to address instances of corporate crime to such an extent that DPAs are now the dominant means used by the United States Securities Exchange Commission ("SEC") and the DOJ to deal with investigations under the Foreign Corrupt Practices Act.[492]

This phenomenon has been mainly achieved through pragmatic and utilitarian policies and guidelines released by the United States DOJ. To understand this remarkable growth of DPAs and the present debate on the use of DPAs in the United States a brief overview of the policies issued by the DOJ and the establishment of a new enforcement agency is necessary. The Enron debacle and the implosion of Arthur Andersen in the period 2000-2004 substantially changed the way in which economic crimes were being addressed by the SEC and DOJ. In 2002 President Bush established the Corporate Fraud Task Force and together with aggressive prosecutors, the practice of using DPAs for corporate crime came into being and a substantial increase in the use of DPAs was seen.[493] The basis for such practice was

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[491] Markoff (2013) *U Pa J Bus L* 807-812. Markoff undertook an empirical study of prosecuted companies in the decade 2001-2010 and proved that there is no hard evidence of the Andersen Effect and showed that corporate structural reform can be obtained through the plea negotiation mechanism: see Markoff (2013) *U Pa J Bus L* 812-831.

[492] Koehler's research has shown that in the decade 2004-2014, approximately 85% of cases dealing with FCPA enforcement used an ADR mechanism, either a DPA or a NPA. See Koehler (2015) 49 *UCD L Rev* 500-521. See too Reilly (2017) *Utah L Rev* 841. For statistical data and evaluations of the use of NPAs and DPAs see JR Copland & I Gorodetski "Without Law of Limits The Continued Growth of the Shadow Regulatory State" (19-03-2015) *Manhattan Institute* <*https://www.manhattan-institute.org/download/8980/article.pdf*> (accessed 19-07-2018); JR Copland & RA Mangual "Justice Out of the Shadows Federal Deferred Prosecution Agreements and the Political Order" (June 2016) *Manhattan Institute* <*https://www.manhattan-institute.org/download/8980/article.pdf*> (accessed 19-07-2018); Markoff (2013) *U Pa J Bus L* 807.

[493] There were 18 NPAs and DPAs in the decade 1992-2002, which increased to 85 NPAs and DPAs in the three-year period 2005-2007, and to 100 in 2015 (this included 75 of the so-called Swiss Bank Agreements). D Thornburgh "Deferred Prosecution and Non-Prosecution Agreements" *Washington Legal Foundation* (17-3-2007) available at

the vehicle of pre-trial deferment offered by section 3161(h)(2) of the Speedy Trial Act, coupled with guidelines and memoranda issued by the DOJ. The early pre-trial diversion regulations were not particularly relevant to corporations and instances of economic crime guidelines, but were intended for the diversion of certain offenders, mainly individuals, charged with minor offences. The purpose was to divert such offenders from the traditional criminal trial system into probationary-type programmes for supervision and rehabilitation thus granting such offenders an opportunity for rehabilitation, while avoiding the conventional trial and sentencing process.[494] However, with the formation of the new unit, the Corporate Fraud Task Force, and with a forceful and creative DOJ, the modus for addressing corporate crime was to use NPAs and DPAs more frequently.

NPAs and DPAS are attributed to different sources. The agreement with Solomon Brothers in 1992 is commonly recognised as the origin of contemporary NPAs. Instead of being prosecuted for making false bids to purchase treasury notes, the defendant agreed to pay penalties, cooperate with the DOJ, remove employees responsible for the contraventions and introduce compliance measures.[495] However, there is the notable agreement in 1994 between *Prudential Securities Inc and the United States,*[496] in which the DOJ agreed to defer prosecution for securities fraud against Prudential for three years on condition that Prudential agreed to cooperate and pay a penalty and appoint an external overseer.[497] Ironically, in 1996 a NPA was signed between *Arthur Andersen LLP and the DOJ (District of Connecticut)* regarding the investigation into the audit of a real estate firm, Colonial Realty Company, which had been running a Ponzi scheme. The DOJ agreed not to prosecute whilst Arthur Andersen LLP agreed to cooperate and pay an amount of

<http://www.wlf.org/upload/chapter6DPAs.pdf> (accessed 20-12-2018). Thornburgh was a former Attorney General.

[494] USAM 9-22.000 Pretrial diversion program available at <https://www.justice.gov/jm/jm-9-22000-pretrial-diversion-program> (accessed 20-12-2018). See too Pooler J overview in *US v HSBC* 863 F 3d (2017) at 142-143.

[495] Nasar (2017) *NYUJL & Liberty* 845.

[496] Attorney's office for the Southern District of New York.

[497] See Buell (2018) 827-828 fns 13-14 for details of the letter agreement from MJ White, the US Attorney S Dist of NY to the attorneys of Prudential Securities Inc (27-10-1994).

US $10 million.[498] These precedents, together with the memoranda issued by the Deputy Attorney General ("Deputy AG")[499] provided mechanisms and guidelines for the use of NPAs and DPAs.[500] To better understand the remarkable evolution of DPAs, and how such development is linked to the policies issued by the DOJ, it is necessary to sketch the time-line of the prominent Deputy AG memoranda.

The Holder Memorandum (1999)[501] read together with the 2001 Seaboard Report,[502] are considered to be the official birth of NPAs and DPAs for corporations and economic crime. The Seaboard Report set out four factors that were taken into account by the SEC when considering enforcement against companies that are under investigation and which may influence the SEC to grant leniency, namely self-

[498] The money was paid into an investment fund against which investors in the failed Colonial Reality Company could claim. See Buell (2018) 829 fns 26-28. See too G Judson "Accountants to pay $10 million to Victims of Real Estate Fraud" (24-04-1996) *New York Times* <https://www.nytimes.com/1996/04/24/nyregion/accountants-to-pay-10-million-to-victims-of-real-estate-fraud.html> (accessed 26-12.2018).

[499] Traditionally named after the Deputy AG issuing the memorandum.

[500] For a discussion on the prosecutorial procedure and practice, including the provisions of the *USAM* and *The Principles of Federal Prosecution of Business Organizations*, see SS Beale "The Development and Evolution of the US Law of Corporate Criminal Liability and the Yates Memo" (2016) 46 *Stetson LR* 41 50-55.

[501] Memorandum from Deputy Attorney General Eric Holder "Bringing Criminal Charges Against Corporations" (16-06-1999) ("Holder Memorandum") available at <https://www.justice.gov/>.

[502] The name "Seaboard Report" is derived from two official releases and a statement by the SEC on 23 October 2001 advising that the SEC was not pursuing enforcement against the Seaboard Corporation for financial accounting irregularities. The specific grounds for the leniency and non-enforcement: self-reporting, cooperation, self-policing and remediation still prevail today. See *Securities Exchange Act of 1934 Release No 44969* (23-10-2001) & *Accounting and Auditing Enforcement Release No 1470* (23-10-2001). Interestingly, a cease and desist order was given against Meredith, the controller of the subsidiary, who was responsible for the financial accounting irregularities which misrepresented the finances of the parent company, Seaboard Corporation. The SEC releases and statement are available at <https://www.sec.gov/litigation/investreport/34-44969.htm> (accessed 20-12-2018). The releases and cease and desist order pertaining to Meredith are *Securities Exchange Act of 1934 Release No 44970 & Accounting and Auditing Enforcement Release No 1471* (23-10-2001) available at <https://www.sec.gov/litigation/admin/34-44970.htm> (accessed 20-12-2018).

reporting, cooperation, self-policing and remediation by corporations.[503] The Holder Memorandum (1999) hinted at the possibility of deferred prosecution by including the option of weighing up likely collateral consequences as one of the factors to be considered when the prosecution decides to decline to prosecute or indict a corporation. Significantly, the Thompson Memorandum (2003) [504] specifically, though indirectly, referred to the possible use of pre-trial diversions for instances of economic crime, by stating "(i)n some circumstances … granting a corporation immunity or amnesty or *pretrial diversion* may be considered" (writer's emphasis). The McNulty Memorandum (2006)[505] replaced the Thompson Memorandum. It primarily refined the assessment by the DOJ of cooperation given by corporations by formalising the practice of the DOJ to demand attorney-client waivers from defendants, and to negatively assess the assistance corporations gave employees facing criminal investigation.[506] Subsequently the Filip Memorandum (2008)[507] explicitly stated that the use of DPAs should be considered as mid-way between a declination and a trial. Recently, the Yates Memorandum (2015)[508] expounded the criteria for DPAs and particularly focused on stipulating that a company can only

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[503] Also see the SEC webpage on its enforcement programme SEC "Enforcement Cooperation Program" (20-09-2016) *US Securities and Exchange Commission* <https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml> (accessed 20-12-2018).

[504] Memorandum from Deputy AG Larry D Thompson "Principle of Federal Prosecution of Business Organizations" (20-01-2003)("Thompson Memorandum") available at <https://www.justice.gov/>.

[505] Memorandum from Deputy AG Paul J McNulty "Principles of Federal Prosecution of Business Organizations" (12-12-2006) ("McNulty Memorandum") available at <https://www.justice.gov/>. For evaluation of the McNulty Memo (2006) see WM Sullivan "The McNulty Memorandum: New DOJ Policies on Attorney-Client Privilege and Attorney Work Product Protections" (01-02-2007) *CCBJ* 34 <http://ccbjournal.com/articles/7857/mcnulty-memorandum-new-doj-policies-attorney-client-privilege-and-attorney-work-produc> (accessed 02-08-2018).

[506] Some employers would grant employees assistance in paying for legal costs and such assistance was assessed negatively by the DOJ.

[507] Memorandum from Deputy AG Mark Filip "Principles of Federal Prosecution of Business Organizations" (28-08-2008)"Filip Memorandum") available at <https://www.justice.gov/>.

[508] Memorandum from Deputy AG Sally Yates "Individual Accountability for Corporate Wrongdoing" (09-09-2015) ("Yates Memorandum") available at <https://www.justice.gov/>. For an evaluation of Yates Memorandum see Beale (2016) 46 *Stetson L R* 41 63-68.

receive mitigation for cooperation if it has fully disclosed the names of all the individuals involved in the misconduct being investigated.

Although these policies and guidelines are not legally enforceable legislation, they comprise the shadow under which, not only the DOJ, but also corporations, critics and the state approach and address corporate crime.[509] Indeed these policies and guidelines of the SEC and DOJ have evolved into what has been referred to as "a common law of corporate criminal enforcement".[510] However, there is little consistency in the United States regarding the terms and conditions of DPAs and the limited role played by the courts in the use of DPAs. Consequently, the increase in the use of DPAs in the United States has not been without criticism.[511]

There have been attempts by some members of congress in the United States to introduce statutory regulation of NPAs and DPAs but this has until now not been successful.[512] In addition some judges have made a strong call for statutory regulation of pre-trial deferment processes like NPAs and DPAs that result in circumventing true judicial oversight. Sullivan J in *US v Saena Tech Corp* made an in-depth analysis of the legislative history of section 3161(h)(2) of the Speedy Act;[513] finding that an amendment to the draft legislation specifically introduced the need for court approval.[514] Despite this the courts continued to interpret such prescribed

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[509] Buell (2018) *NCL Rev* 834.

[510] SW Buell "Why do Prosecutors Say Anything: The Case of Corporate Crime" (2018) 96 *NCL Rev* 823 835.

[511] See Buell (2018) *NCL Rev* 832-836; Gilchrist (2018) *Ga St U L Rev* 350-356; Koehler (2015) 500-515; Nasar (2017) *NYUJL & Liberty* 844-849; S Oded "Coughing up Executives of Rolling the Dice: Individual Accountability for Corporate Corruption" (2016) 35 *Yale L & Pol'y Rev* 49 52-59; Beale (2016) 46 *Stetson L R* 41 62-68; Markoff (2013) *U Pa J Bus L* 808-812.

[512] Since 2008 certain congressmen have attempted to introduce legislation to regulate the use of NPAs and DPAs. The last such attempt was HR 4540 (113th): Accountability in Deferred Prosecution Act of 2014 ("ADP Act"), which though introduced in January 2014 has not progressed further than being referred to a sub-committee in July 2014. See the United States Congress Tracker at <https://www.congress.gov/bill/113th-congress/house-bill/4540/text>.

[513] 140F Supp 3d 11 (2015) 23-24 & 37-46.

[514] 140F Supp 3d 11 (2015) 25.

judicial approval narrowly;[515] and Sullivan J calls for limited, but meaningful, court review.[516] In addition, Sullivan J asked for the expansion of the use of DPAs, not only for corporations, but for individuals too, which the Speedy Act specifically allows, advocating that a DPA would be a powerful tool for use against individuals charged with non-violent offences.[517] Pooler J in *US v HSBC* stated that the use of DPAs for corporate crime, though very different from the original intention by Congress, is "neither improper nor undesirable".[518] However, Pooler J also raised concern about "the prosecution exercis[ing] the core judicial functions of adjudicating guilt and imposing sentence without any meaningful oversight from the courts" [519] and made a strong call for Congress to review the bill before them at that time.[520]

Another perspective of DPAs is given by a jurisdiction in which the entering and conclusion of DPAs is strongly regulated. In addition, it calls for a meaningful and stronger supervisory role to be played by the court in approving a DPA by having to measure it against the prescribed statutory criteria. An illustration of the operation of DPAs in a more regulated context is England. A brief description of the prescribed procedure in England is given. This is followed by a discussion of some pertinent issues relating to the use of DPAs, both in a regulated context such as England, and in a less regulated context such as the United States.

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[515] 140F Supp 3d 11 (2015) 25-27. Sullivan J sketches the courts' decisions in several cases, including *US v HSBC* 12 CR 763 *(*2013) and the *US v Fokker* cases.

[516] 140F Supp 3d 11 (2015) 29-30 & 30-35. Sullivan J continued to discuss the nature of such judicial supervisory power in some detail, saying that it serves to protect the integrity of the court and ensures that DPA agreements are neither unlawful nor improper.

[517] 140F Supp 3d 11 (2015) 46 and 37-46. Sullivan J discusses the original purposes of the Speedy Act trial, the problems connected with incarceration and Presidential call for rehabilitation of young offenders.

[518] *United States v HSBC* 863 F 3d (2017) at 142-143. Also see *US v Saena Tech Corp* 140F Supp 3d 11 (2015) 37-42.

[519] *United States v HSBC* 863 F 3d (2017) at 142-143. Pooler J concurred with the majority to limit the power of the court in DPAs, but wrote separately to highlight the need for statutory regulation of DPAs and strongly suggested that Congress should implement legislation regulating the review of DPAs by the court.

[520] *United States v HSBC* 863 F 3d (2017) at 143-144. Bill HR 4540 specifically provides in s 7 for a stronger role to be played by the courts in the approval of the terms and conditions of a DPA and for monitoring reports to be submitted to the court for judicial review.

The procedure set out by Schedule 17 of the Crime and Courts Act 2013 emphasises the role of the court. Indeed, the court is intensely involved in a two-step procedure.[521] The prosecution first has to apply to the court to approve a *proposal* to enter into a DPA,[522] which application is held in private.[523] After that a further application has to be made to the court for approval of the final terms of the DPA.[524] This hearing may either be in public or in private.[525] Variation of a DPA is possible in the event where there has been a breach of the DPA,[526] or to avoid a possible breach of the DPA by the defendant.[527]

[521] Para 7(1) of Schedule 17 read with R 11.3 of the 2015 Rules deals with the preliminary hearing, whilst para 8(1) read with R 11.4 of the 2015 Rules regulates the final hearing. This two-step judicial procedure usually results in two judgments being published. The first judgment relates to the preliminary application, while the second judgment relates to the application for final approval of a DPA. Importantly, the preliminary hearing is considered to be private and its contents are usually only published upon the approval by the court. Usually the publication of the preliminary and final judgments occur simultaneously. Also see paras 8(7) and 12 of Schedule 17 regarding mandatory publication of the judgments.

[522] Para 7(1) of Schedule 17 read with R 11.3 of the 2015 Rules. Para 7(3) states that a prosecutor may re-apply for preliminary approval in the event of the court having refused the first application. This implies that the parties have an opportunity to re-negotiate part of the terms of the DPA before returning for preliminary approval by the court to conclude a DPA.

[523] Para 7(4) of Schedule 17 read with R 11.2(1)(a) of the 2015 Rules.

[524] Para 8(1) of Schedule 17 read with R 11.4 of the 2015 Rules. Para 10 of Schedule 17, read with R 11.6 of 2015 Rules, provides for the variation of an approved DPA; and para 11 of Schedule 17 read with R 11.7 of 2015 Rules for the termination of an approved DPA and the lifting of the suspension of prosecution.

[525] R 11.2(1)(b) of 2015 Rules.

[526] Para 10(1)(a) grants the prosecutor and defendant the opportunity to agree to vary the terms of an approved DPA; while para 10(2) of Schedule 17 read with R 11.5 specifically provides that the prosecutor needs to apply to court in the case of a suspected breach of a DPA for the court to decide whether there is in fact such a breach and whether to vary or terminate the DPA. Once again the test for any variation is that such variation needs to be in the interests of justice, and on fair, reasonable and proportionate terms.

[527] Para 10(1)(b) of Schedule 17 read with Rule 11.6.

Leveson P held that "(j)udicial involvement in the process is pivotal."[528] In fact, he specifically underscores the different approach in England to that of the United States:

> "In contra-distinction to the United States, a critical feature of the statutory scheme in the UK is the requirement that the court examine the proposed agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA. … In that way, the court retains control of the ultimate outcome".[529]

In considering both the preliminary and final applications, the court needs to be satisfied that the DPA is in the *public interest*; and that the terms of the agreement are *fair, reasonable and proportionate*"[530] (writer's emphasis). These are the important criteria laid down by the legislators. Firstly, the entering into[531] and conclusion[532] of a DPA are to be "in the interests of justice".[533] The first step, the preliminary hearing, entails the court adjudicating that the use of a DPA, an alternative dispute resolution mechanism, as opposed to prosecution, is in the

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[528] Para 2 of *Serious Fraud Office v XYZ Limited* 2016 Case no. U20150856, which preliminary hearing judgment was handed down in redacted form on 8 July 2016 ("*SFO v XYZ Ltd* (Preliminary)").

[529] Para 2 of *SFO v Standard Bank* (Preliminary); and repeated in para 2 of *SFO* v *XYZ Ltd* (Preliminary). Also see paras 2 and 27 of *Serious Fraud Office v XYZ Limited* 2016 Case no. U20150856, of which the final hearing judgment was handed down on 11 July 2016 ("*SFO v XYZ Ltd* (Final)").

[530] The same criteria are applicable in the federal legislation of Canada and Australia. See s 715.37(f) of the Canadian Criminal Code as amended by Bill C-74. Notably, s 17D(1) of the Australian Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 provides that a DPA has to be approved by an "approving officer", as opposed to a court. S 17(G), in turn, stipulates who may be appointed as "an approving officer". The grounds for approval, however, are the same: s 17D(4) specifies that the terms of the DPA are to be "in the interests of justice" and that they are to be "fair reasonable and proportionate."

[531] Para 7(1)(a) of Schedule 17 applying for court approval at the preliminary hearing, read together with para 5 of Schedule 17, setting out the contents and requirements of a DPA that are mandatory and non-mandatory; and with R 11.3(i), particularly R 11.3(i)(i) of the Rules 2015.

[532] Para 8(1)(a) of Schedule 17 applying for court approval for the agreed terms at the final hearing.

[533] Paras 7(1)(a) and 8(1)(a) of Schedule 17.

interests of justice.[534] Factors to be taken into account in weighing up whether a DPA is in the interests of justice were judicially expounded by Sir Brian Leveson P in the first three cases approved by the courts in England.[535] In the first case, *SFO v Standard Bank plc*, four factors were emphasised: the nature and seriousness of the offence; the cooperation given by the defendant; the defendant's prior conduct with regard to economic crime; and finally the change of culture and future compliance measures by the company.[536] Notably, regarding the factor of the seriousness of the offence, Leveson P held that the "more serious the offence, the more likely it is that prosecution will be required in the public interest and the less likely it is that a DPA will be in the interests of justice".[537]

The factors to be considered in determining whether a DPA is in the interests of justice were explained further in the second case, *SFO v XYZ Ltd*, in which the court also highlighted the importance of incentivising the exposure and self-reporting of corporate wrongdoing.[538] In addition, the importance of considering possible

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[534] Para 6 of Schedule 17 provides that the Director of Public Prosecutions and the Director of the Serious Fraud Office must jointly issue a Code for prosecutors to give guidance as to when the use of a DPA will be appropriate. This is the DPA Code of Practice which must be read together with the Code for Crown Prosecutors. Also see generally other related codes available on the SFO website https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/codes-and-protocols/ (accessed 21-06-2018).

[535] These factors include: i) the seriousness of the offence; ii) the importance of incentivising the exposure and self-reporting of corporate wrongdoing; iii) the history of similar conduct; iv) corporate compliance; v) the extent to which the entity has changed both in its culture and in relation to relevant personnel; vi) the impact of prosecution on employees and others innocent of any misconduct. (A summary of para 20 of *SFO v XYZ Ltd* (Preliminary)). The court continued to apply these factors in paras 21-34. Also see paras 24-35 of *SFO v Standard Bank* (Preliminary).

[536] Paras 24-35 of *SFO v Standard Bank Plc* (Preliminary); paras 32-46 of *SFO v XYZ Ltd* (Preliminary) and para 15-18 of *SFO v XYZ Ltd* (Final).

[537] Para 25 of *SFO v Standard Bank Plc* Preliminary Judgment; para 21 of *SFO v XYZ Ltd* (Preliminary); para 2.5 of the DPA Code. In *SFO v XYZ Ltd* the court went into some detail to explain the approval of a DPA despite the offences being serious (paras 15-18 and 27-28 of *SFO v XYZ Ltd* (Final)).

[538] Para 16 of *SFO v XYZ Ltd* (Final). The relevance of incentivising was also considered in *Serious Fraud Office v Tesco Stores Limited* ("*SFO v Tesco*") Case no. U20170287 2017 WL 10765126 paras 45 & 66. It should be noted that in *SFO v Tesco* there are several documents. There is the judgment *SFO v Tesco*. There is also the actual DPA between the

collateral consequences, namely the impact that a conviction may have on innocent persons, such as employees and shareholders and the broader economy was endorsed.[539] In *SFO v Rolls-Royce,* other more utilitarian considerations such as the cost of investigations and the limited resources of the prosecution and court were also factored into the computation of whether a DPA would be in the best interests of justice.[540] Interestingly, in *SFO v Tesco* the court phrased the inquiry differently, stating that in considering whether a DPA was in the interests of justice the court had to examine "on the one hand, the seriousness of the offence and, on the other hand six features of relevance."[541] This suggests that the seriousness of the offence has to be weighed against the other features and is not simply one of the criteria to be taken into account along with the other criteria.

Importantly too, the avoidance of debarment[542] and the ability to continue operating and participating in tender procedures may be critical to an organisation.[543] A further criterion in determining if a DPA would be in the interests of justice is that of self-reporting.[544] In terms of the DPA Code of Practice, self-reporting is considered to be central to determining the cooperation of a defendant.[545] Moreover, self-reporting has been emphasised by the SFO and endorsed by the courts in the earlier

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parties, referred to as "*Tesco* DPA"; and the Statement of Facts, incorporated into the *Tesco* DPA referred to in this dissertation as the "*Tesco* Statement of Facts".

[539] Paras 15 and 16 of *SFO v XYZ Ltd* (Final); Paras 52-57 and 60 of *Serious Fraud Office v Rolls-Royce Plc & Rolls-Royce Energy Systems Inc* Case no. U20170036 handed down on 17 January 2017 ("*SFO v Rolls-Royce*"); *SFO v Tesco* paras 45 & 61-64. Also see A Milford "Deferred Prosecution Agreements – the Perspective from England and Wales" (14-09-2016) *SFO* <https://www.sfo.gov.uk/2016/09/14/deferred-prosecution-agreements-perspective-england-wales/> (accessed 23-06-2018).

[540] Paras 58 and 59 of *SFO v Rolls-Royce*; *SFO v Tesco* paras 45 & 65.

[541] The six features were: the extent of cooperation; changes in leadership in Tesco; remedial measures undertaken; the consequences of the misconduct; the efficient use of public resources; and incentivising other companies to cooperate in cases of corporate misconduct (para 45).

[542] Debarment refers to mandatory rules and policies in different countries that prohibit trade by public bodies with any organisation that has been convicted of an offence.

[543] Para 53 of *SFO v Rolls-Royce*. Clearly illustrated too by the *KPMG* and *Arthur Andersen LLP* cases in the United States discussed above.

[544] *SFO v Tesco* para 50.

[545] Para 2.8.2(i) as read with para 2.9 of the *DPA Code of Practice*.

judgments.[546] However in *SFO v Rolls-Royce*, Leveson P went further and approved a DPA, even though there had been no initial self-reporting by Rolls-Royce. The court held that though there had been no initial self-reporting, there had been "extraordinary cooperation" by the defendant, including the waiver of privilege.[547] The court emphasised that a purpose of DPAs is to incentivise disclosure by corporations to enable the proper investigation and effective prosecution of corruption, and such disclosure may include information that would not otherwise have been known to the prosecution.[548] This approach has been criticised. It is argued that the court has clouded the issue of requirements for a DPA.[549] However, it is submitted by the writer that the "robust and pragmatic approach"[550] by the court needs to be applauded. The non-exhaustive listed criteria in the *DPA Code of Practice* and other Codes should not be so rigidly and restrictively interpreted that no discretion remains for the parties and the court to evaluate, boldly and pragmatically, the factors that may be in the interests of justice, on an individual, case by case, basis.[551] Cooperation, including cooperation by the corporation before and after concluding a DPA, remains essential for the proper functioning of a DPA and for the purposes of a

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[546] See Milford "Deferred Prosecution Agreements – the Perspective from England and Wales" *SFO Speeches;* Para 16 of *SFO v XYZ Ltd* (Final).

[547] *SFO v Rolls-Royce* paras 20-22, 38-39, and 60.

[548] *SFO v Rolls-Royce* paras 20-22, 38-39, and 60. The magnitude of this investigation was unprecedented, encompassing the disclosure of more than 30 million documents and costing the SFO more than £13 million and Rolls-Royce itself more than £123 million.

[549] R Cheung "Deferred Prosecution Agreements: Cooperation and Confession" (2018) *CLJ* 12 13-14.

[550] Cheung (2018) *CLJ* 13. Milford echoes the pragmatism of DPAs stating that the courts have recognised that DPAs "are a pragmatic response by our Parliament to serious corporate crime". Milford "Deferred Prosecution Agreements – the Perspective from England and Wales" *SFO.*

[551] Subsequent to the *SFO v Rolls-Royce* judgment and criticism, Milford on behalf of the SFO mentioned the extent of the cooperation of Rolls-Royce, making it clear that though there was no initial self-reporting, the intensive cooperation disclosed more information of wrongdoing that what the SFO had knowledge of, including wrongdoing unrelated to the initial investigation. Milford "Alun Milford on Deferred Prosecution Agreements" *SFO Speeches*.

DPA scheme to be achieved.[552] The determination of such cooperation, particularly with regard to disclosure by the company and the tension between waiver and the safeguarding of legal professional privilege, is problematic. A further complexity is the extent to which a company's cooperation is adjudged by the company needing to identify the employees involved in the misconduct. These issues are discussed below.

The second test the legislator requires to be applied is inter-related to the first question. The court needs to approve the proposed[553] and agreed[554] terms of the DPA as "fair, reasonable and proportionate".[555] Paragraph 5 of Schedule 17 gives guidance on the primary content of the terms of a DPA, including imposition of financial penalties,[556] compensation to victims and others,[557] disgorgement of

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[552] Conversely stated: "(i)f a company is not co-operative, we will not offer it the opportunity to enter into a DPA." Milford "Deferred Prosecution Agreements – the perspective from England and Wales" *SFO Speeches.* In other words, it is the stance that a corporation takes once it becomes aware of wrongdoing that is determinative. B Morgan "Deferred Prosecution Agreements (DPA): A Practical Guide by Defence and Prosecution" (17-10-2016) *SF0 Speeches* <https://www.sfo.gov.uk/2016/10/17/deferred-prosecution-agreements-dpa-practical-guide-defence-prose> (accessed 23-06-2018).

[553] Para 7(1)(b) of Schedule 17 as regards applying for court approval at the preliminary hearing, read together with para 5 of Schedule 17 setting out the contents and requirements of a DPA that are mandatory and non-mandatory; and with R 12.3(i), particularly R 12.3(i)(ii) of the Rules 2015.

[554] Para 8(1)(b) of Schedule 17 on applying for court approval for the agreed terms at the final hearing.

[555] Paras 7(1)(b) and 8(1)(b) of Schedule 17, read with the provisions of the *DPA Code of Practice*, and in some instances s 130(12) of the Power of Criminal Courts Act 2000; *the Definitive Guideline issued by the Sentencing Council in respect of Fraud, Bribery and Money Laundering Offences* read with s 142-144 and 164 of the Criminal Justice Act 2003. Usually the indictment relating to a DPA is in terms of the Criminal Law Act 1977 and the Bribery Act 2010 and as such these are also to be read when adjudicating the terms of the DPA. Also see Milford "Deferred Prosecution Agreements – the Perspective from England and Wales" *SFO*.

[556] Para 5(3)(a), read with other relevant legislation. See fn 472 above.

[557] Paras 5(3)(b) and (c), read with other relevant legislation, including s 2A of the Proceeds of Crime Act 2002, the *Code of Practice for Victims of Crime 2015*, *SFO Handbook: Victims and Witnesses*. Also see SFO Publications "*Victims and Witnesses – Our Commitment to You".*

profits,[558] payment of costs[559] and future compliance and cooperation.[560] The assessment of these terms occurs within the context of the agreed measures a defendant takes and the need to reflect the conventional elements of sanction, including deterrence, penalisation, disgorgement and compensation. However, the terms of a DPA also need to incentivise other corporations to self-report and give disclosure. It is an issue of balance, a very delicate balance.[561]

The pivotal role played by the court in the measurement of these criteria was emphasised in both the preliminary and final judgments in the first DPA matter in England, namely *SFO v Standard Bank plc* and echoed in subsequent cases.[562] Indeed, in the second case in England, *SFO v XYZ Ltd,* Leveson P endorsed the strong and important role played by the court in identifying and laying down additional principles against which the use and terms of a DPA are to be adjudicated to ensure that it is in the best interests of justice with fair, reasonable and proportionate terms.[563] The challenging issue for the court in this case was in determining what is in the best interests of justice: should one prosecute and heavily fine a small to medium enterprise "demonstrably guilty of serious breaches of the criminal law", which would inevitably lead to insolvency of the enterprise and consequential loss of jobs and harm suffered by various role players; or should one enter into a DPA, which includes terms that substantially mitigate the penalties

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[558] Para 5(3)(d) of Schedule 17.

[559] Para 5(3)g) of Schedule 17.

[560] Paras 5(3)(e) and (f) of Schedule 17.

[561] Morgan, the joint head of Bribery and Corruption at the SFO, illustrated the difficulty in getting the balance right between sanction for a serious criminal offence and leniency as a reward in order for the terms of a DPA to be approved as fair, reasonable and proportionate by the court. On the one hand, "a DPA must be a punishment. It cannot be a cosy deal". On the other hand, the sanction needs to be sufficiently lenient to reward the corporation for self-reporting and disclosure, and in addition to encourage others to do likewise. B Morgan "Deferred Prosecution Agreements (DPA): A Practical Guide by Defence and Prosecution" (17-10-2016) *SF0 Speeches* <https://www.sfo.gov.uk/2016/10/17/deferred-prosecution-agreements-dpa-practical-guide-defence-prosecution/> (accessed 27-12-2018).

[562] *SFO v Standard Bank plc* (Final) para 2; *SFO v XYZ Ltd* (Preliminary) para 2; *SFO v Rolls-Royce* paras 7-11. Also see A Milford "Alan Milford on Deferred Prosecution Agreements" (08-09-2017) *SFO Speeches* <https://www.sfo.gov.uk/2017/09/05/alun-milford-on-deferred-prosecution-agreements/> (accessed 27-12.2018).

[563] *SFO v XYZ* (Final) para 27.

imposed upon the enterprise?[564] The role played by the courts was accentuated in *SFO v Rolls-Royce* when the court pushed the boundaries of the applicability and approval of a DPA even further by finding a DPA to be in the best interests of justice, notwithstanding the gravity of the offences over a period of time.[565]

In contrast to the United Kingdom, the extent of the involvement of the court in DPAs in the United States is contentious, even more so after the *Fokker* cases.[566] In *Fokker I*, District Judge Leon did the unprecedented: he refused to approve a DPA between the prosecution and the defendant Fokker, holding that the terms of the DPA were "grossly disproportionate to the gravity" of the offences[567] and that "it would undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time".[568] The decision was overturned on appeal on the grounds of separation of powers and the higher court found that the District Court had "significantly overstepped its authority".[569] *Fokker II* was followed by yet another Court of Appeals judgment in *United States v HSBC Bank* which found that a court does not have the authority to monitor the progress of a DPA and to ask for monitoring reports to be submitted to it.[570] Moreover, the court went further and held that the supervisory power of the court should be narrowly interpreted and limited to determining that a DPA is made

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[564] *SFO v XYZ* (Preliminary) paras 3 and 6-10. Also, the substantially large discount in computing the fine in the *SFO v Rolls-Royce* matter has been criticised as being difficult to reconcile with the earlier judgments. See Cheung (2018) *CLJ* 14-15.

[565] *SFO v Rolls-Royce* paras 35-37 and particularly the conclusion reached in paras 61-67. Despite stating "(m)y reaction when first considering these papers was that if Rolls-Royce were not to be prosecuted in the context of such egregious criminality over decades, involving countries around the world, making truly vast corrupt payments and, consequentially, even greater profits, then it was difficulty to see when any company would be prosecuted;" the court still found a DPA to be in the interests of justice.

[566] The District Court judgment of 2015 *United States v Fokker Services BV* 79 F Supp 3d 160 (DDC 2015) ("*Fokker I*"), overturned by the appellate court *United States v Fokker Services BV* 818 F 3d 733 (DC Cir 2016) ("*Fokker II*"). For a detailed analysis of these cases see Reilly (2017) *Utah L Rev* 848-851 and 853-878.

[567] *Fokker I* at 167.

[568] *Fokker I* at 167.

[569] *Fokker II* at 747.

[570] 863 F 3d 125 (2 Cir 2017) 136 and 137.

in good faith and genuinely intended to allow a defendant to demonstrate his good conduct; it does not extend to the court considering public policy matters in approving a DPA.[571] The perennial issue of the discretion of the prosecution, and the relationship between the executive, the legislature and the judiciary is highlighted in the use of DPAs in the United States.[572] Particularly, the seemingly unfettered power of the prosecution in the conclusion, and even extension of DPAs, seems to be virtually unlimited and is receiving criticism from two opposing camps.[573] The effect of *Fokker II* and *United States v HSBC* (2017) is that the court does not have the authority to reject DPAs.[574] Zendeh graphically states that the issue is not that the

[571] 863 F3d 125 (2 Cir 2017) 137 and 138. This echoes the interpretation of limited review of the court in *United States v Saena Corp* 40 F Supp 3d 11 (DDC 2015) 30 and 31.

[572] Zendeh discusses this issue in depth and concludes that Congress, the legislature, is authorised to and should regulate the powers of the executive by making provision for increased judicial review through legislation. See ZA Zendeh "Can Congress Authorize Judicial Review of Deferred Prosecution and Nonprosecution Agreements? And does it need to?" (2017) 95 *Tex L Rev* 1451-1485. It is to be noted that in the United States the prosecution is considered to form part of the executive. See Bekker (1996) *CILSA* 187-192 for a discussion on the role of the judge and prosecutor in the United States, particularly in plea negotiation, the discretion of the prosecutor and the difference between prosecutors in the United States and Europe. This issue, specifically the power of the prosecutor, is discussed above in para 4 4 and again below in para 5.

[573] Zendeh helpfully refers to the powers of the executive as "nonprosecution discretion" as he argues that this is a more accurate description of the "discretionary and plenary power not to prosecute" which is sacrosanct in the criminal justice system in the United States. Zendeh further identifies two camps of critics. On the one side are abuse critics who advocate that the prosecution could coerce corporations into concluding unfair and unjust DPAs. On the other side, the leniency critics argue that the prosecution is influenced by the power of the corporations and that the terms of DPAs are not strict enough. Zendeh (2017) *Tex L Rev* 1453, 1457-1462. Also see Nasar (2017) *N Y U J L & Liberty* 878-882; Reilly (2017) *Utah L Rev* 842-843. Reilly 839-840 and 878-883, moreover raises concerns about the limitations *Fokker II* places on a court's power to review and warns that such limitations result in underscoring the unfettered discretion of the prosecution and could lead to the relegation of public interest and the reduction of the principle of separation of powers. Koehler (2015) *U C D L Rev* 557-560 also warns of the disturbing trend of DPA jurisprudence developing outside the courts and the DOJ simultaneously fulfilling the role of prosecutor, judge and jury.

[574] This limitation on the court's discretion results in judges becoming rubber stamps. Nasar (2017) *NYUJL & Liberty* 843. Also see Reilly (2017) *Utah L Rev* 840.

prosecution is playing with the judiciary's toys, but that the court is "being shut out the playpen altogether".[575]

The DPAs concluded in the Rolls-Royce matters are Illustrative of the different approaches to the conclusion of DPAs and the role played by the court and prosecution in the United States and the United Kingdom.[576] In December 2016, the United States District Court approved a DPA between *United States of America v Rolls-Royce plc*,[577] *("United States v Rolls-Royce DPA")* whilst on 17 January 2017 the Crown Court approved a DPA in *SFO v Rolls-Royce*. The latter case is indicative of the court weighing up and evaluating the use of a DPA and the terms of the DPA against the statutory requirements that a DPA needs to be in the interests of the public and that its terms be fair, reasonable and proportionate. The documents available in the United States are only the charge sheet, the actual DPA agreement and a press release statement.[578] These are, however, simply descriptive, leaving the public uninformed of the actual application and appraisal of the terms of the DPA

[575] Zendeh (2017) *Tex L Rev* 1480.

[576] The investigation involving bribery and corruption offences by Rolls-Royce was a global undertaking and DPAs were concluded between Rolls-Royce and authorities in the United States, Brazil and England. The DPA between the United States DOJ and Rolls-Royce was approved on 20 December 2016, and took into account terms, including financial orders of the leniency agreement between the Brazilian Ministério Público Federal ("MPF") and Rolls-Royce (see para 128 of *SFO v Rolls-Royce*). The United States' DPA was only unsealed on publication of the judgment regarding the English DPA between the *SFO and Rolls-Royce*. The global financial sanctions against Rolls-Royce amounted to over US $800 million, including approximately US $170 million paid in terms of the *United States v Roll-Royce,* a penalty of approximately US $25,6 million paid to the MPF and almost £500,000 paid in terms of *SFO v Rolls-Royce*. See DOJ "Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case" (17-01-2017) *United States DOJ* <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act> (02-08-2018); Editor "Rolls Royce to pay $810 Million to Get Prosecutions Deferred in Bribery Case" (17-01-2017) *Corporate Crime Reporter* <https://www.corporatecrimereporter.com/?s=Rolls+Royce+to+get+prosecutions+deferred> (accessed 02-08-2018).

[577] Case No. 2:16 cr 247 in the US District Court for the Southern District of Ohio Eastern Division.

[578] *United States of America v Rolls-Royce plc* Case No. 2:16 cr 247 para 4, including sub-paras 4a-4k, in the US District Court for the Southern District of Ohio Eastern Division, available on the DOJ website at <https://www.justice.gov/criminal-fraud/fcpa/cases/rolls-royce-plc" (accessed 30-01-2019),

against the DOJ policies and guidelines. This is indicative of the lack of transparency in the conclusion of DPAs in the United States, which confirms the unchecked power of the prosecution. The worrying ambiguity regarding the use of DPAs and the role of the courts presently prevailing in the United States appears to reflect the result of DPAs being introduced through the backdoor through legislation drafted for a different purpose.[579] The path taken by other jurisdictions to specifically provide for DPAs, and, moreover, to specifically provide for judicial approval, is consequently preferable.[580] Indeed, this has been advocated by some judges and academics in the United States.[581]

Lack of transparency is a criticism against the use of DPAs, particularly in the United States. The assertion has been that little detail is known about the negotiations between the prosecutor and the company involved.[582] In contrast, the *DPA Code of Practice* in the England specifically states that "(t)ransparency remains a key aspect of the success and proper operation of DPAs"[583] and provision is made for the publication of court decisions and agreements.[584] The proceedings with regard to the preliminary court approval in terms of paragraph 7 of Schedule 17 are

[579]As discussed above, the Speedy Trial Act was introduced to make provision for pre-trial diversion programmes focused on rehabilitation for individuals with a certain profile and from backgrounds with socio-economic challenges.

[580] These jurisdictions include France, Canada, Argentina and Australia. See above 246-247.

[581] See above regarding the concerns voiced and calls made by Pooler J in the *United States v HSBC* (2017) and Sullivan J in *United States v Saena Corp* 40 F Supp 3d 11 (DDC 2015) 29-31 and 37-47. Also see Nasar (2017) *NYUJL & Liberty* 883-885, 889; Reilly (2017) *Utah L Rev* 878-883; Zendeh (2017) *Tex L Rev* 1485; PC Henry "Individual Accountability for Corporate Crimes after the Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform" (2016) 6 *Am U Bus L Rev* 153 165-167.

[582] Koehler (2015) 49 *UCD l Rev* 527-528; Buell (2018) *N C L Rev* 852.

[583] Para 16.1 of *DPA Code of Practice*.

[584] Paras 8(7), 9(5)-(8), 10(7)-10(8) read with para 12 of Schedule 17 and para 16 of the *DPA Code of Practice*. The provisions regarding publication are discussed in detail by the court in *SFO v Tesco* paras 107-114. Notably, in Australia, publication of a DPA is required even if it is not laid before an open court. See s 17D(7) of the Australian Combatting Corporate Crime Bill 2017.

held in private.[585] The initial application in terms of paragraph 8(1) of Schedule 17 for the final approval of a DPA is in also heard in private.[586] This is understandable as privacy needs to be maintained in the event of the court refusing an application in terms of paragraph 8(1) of Schedule 17. But if a court approves a DPA and makes a declaration in terms of paragraph 8(1) of Schedule 17, it has to do so in open court.[587] The court retains the discretion to postpone the publication to avoid prejudicing any legal proceedings.[588] Transparency through open court hearings and publication of the DPAs and court judgments contributes to building the public's confidence in the DPA mechanism.[589] It also serves to incentivise other corporations to self-report and to cooperate with the SFO and other authorities, and to

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[585] Para 7(4) of Schedule 17. The preliminary hearing judgment is usually only published upon the final approval of the DPA by the court. Consequently the publication of the preliminary and final judgments occurs simultaneously. Also see para 11 of the *DPA Code of Practice*. The court may order any part of the DPA to be kept confidential (see para 11.3 of *DPA Code of Practice)* and application for private hearings may be made (para 15 of the *DPA Code of Practice).*

[586] Para 8(5) of Schedule 17; *SFO v Tesco* para 108.

[587] Para 8(6) of Schedule 17. Also see para 8(7) of Schedule 17, which prescribes that a prosecutor has to publish the DPA, the declaration and reasons of the court, and in the event of the court having initially declined to approve a DPA, the reasons for such refusal.

[588] Para 12 of Schedule 17; *SFO v Tesco* para 110. Publication may also be prohibited by other enactments, like s 4 of the Contempt of Court Act 1981. This was the case in the DPA between the SFO and Tesco, which was not published initially because of a court order, pending the finalisation of criminal charges against three of Tesco's executives. Leveson P (paras 111-114) postponed the publication of the DPA, the statement of facts, and reporting of the proceedings in the public hearing in terms of para 12 of Schedule 17 and s 4 of the Contempt of Court Act. These documents were finally published on 23 January 2019 after the criminal charges against three senior executives were decided. See SFO "SFO agrees Deferred Prosecution Agreement with Tesco" (10-04-2017) *SFO News Releases* <https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/>; SFO "Deferred Prosecution Agreement Between the SFO and Tesco Published" (23-01-2019) *SFO News Releases* <https://www.sfo.gov.uk/2019/01/23/deferred-prosecution-agreement-between-the-sfo-and-tesco-published/>. Another illustration is the DPA in *SFO v XYZ Ltd*, where the DPA was published but the SME was not named due to ongoing legal proceedings. See SFO "SFO Secures Second DPA" (08-07-2016) *SFO News Releases* <https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/> (all accessed 06-02-2019).

[589] Milford "Deferred Prosecution Agreements – the Perspective from England and Wales" *SFO Speeches*.

demonstrate to shareholders, customers and employees of the opportunities and consequences of DPAs.[590]

The statutory obligation to publish the terms of a DPA in England has caused some controversy in the *SFO v Tesco* matter. All three former senior executives of Tesco were acquitted because of the lack of evidence against them.[591] The controversy is based on the publication of the *Tesco* DPA and the *Tesco* Statement of Facts which clearly names and provides details of the alleged wrongdoing by the three persons. Ironically, on the day that the third accused was acquitted, the *Tesco* DPA and *Tesco* Statement of Facts were published.[592] The difference of opinion regarding the facts between the court which approved the DPA and the criminal court is puzzling. In the criminal trial court, Sir John Royce found that in crucial areas, the prosecution's case was so weak that no reasonable jury, properly directed, could find the accused guilty.[593] However, in *SFO v Tesco,* in the judgment approving the DPA, Leveson P had previously given credit and recognition to the

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[590] Leveson P remarked on openness and the importance and benefits of the public process: *SFO v XYZ Ltd* (Preliminary) para 45 and *SFO v XYZ Ltd* (Final) para 28. The importance of self-reporting and compliance have been underlined by the SFO. See Milford "Deferred Prosecution Agreements – the Perspective from England and Wales" *SFO Speeches*; Milford "Alun Milford on Deferred Prosecution Agreements" *SFO Speeches*.

[591] Charges against two of the employees, Bush and Scouler, were dismissed by the trial court under s 6 of the Criminal Justice Act which provides that a judge may dismiss charges if it appears to the judge that the evidence presented by the prosecution is insufficient for a jury to properly convict an accused. This dismissal was confirmed by the Court of Appeal on in *R v Bush, Scouler* Case no. 2018049021 C1 (30-01-2019) paras 5-7 & 143. The third accused, Rogberg, was "super acquitted' in the sense that the SFO offered no evidence against him at a hearing on 23 January 2019. See SFO "Tesco plc" (23-01-2019) *SFO Case Information* <<https://www.sfo.gov.uk/cases/tesco-plc/> (accessed 06-02-2019); Z Wood & S Butler "Former Tesco executive Carl Rogberg cleared of fraud" (23-01-2019) *The Guardian* <https://www.theguardian.com/uk-news/2019/jan/23/former-tesco-executive-carl-rogberg-cleared-of-fraud> (accessed 07-02-2019).

[592] On 23 January 2019, when the SFO offered no evidence against Rogberg. Publication was delayed in terms of the order of postponement of publication of the DPA and other ancillary matters made by Leveson P on 10 April 2017. See para 114 of *SFO v Tesco*.

[593] *R v Bush, Scouler* Case no. T201606538 (26-11-2018) ("*R v Bush, Scouler*") para 59. See also, reports on the judgment: Wood & Butler "Two Tesco Directors Cleared of Fraud as Judge Labels Case 'weak'" *The Guardian*; BBC "'I Should Never Have Been Charged' – Former Tesco Director" *BBC* (23-01-2019); Reuters "Former Tesco Directors Cleared of Fraud Over 2014 Accounting Scandal" (06-12-2018) *IOL* (accessed 26-02-2019).

"fullest investigation" and remarked that it "revealed *clear evidence* of what amounts to a serious breach of the criminal law and, without reaching any conclusion (which, in the light of criminal prosecutions that are presently being pursued, at the time of this judgment is still to be determined), implicates senior management" (writer's emphasis).[594] Notwithstanding Leveson P qualifying his statement and the different standards of proof in the two different courts,[595] the invidious position is that in one court individuals are named as the perpetrators of false accounting, while being the controlling minds of Tesco.[596] However, in another court, they were acquitted due to weak or no evidence. This situation has been called perverse.[597]

The acquitted persons did apply to court to have the statement of facts redacted but their application was turned down by Leveson P.[598] This refusal is understandable as the publication of a DPA is a requirement of the DPA Scheme under Schedule 17, and the court cannot amend an earlier judgment. However, the court approving a DPA does have a discretion to prevent the publication of a DPA, or to order the publication of a redacted version, which, for example, does not identify individuals. Ironically this was the case with the whistle-blower in *SFO v Tesco* who in the *Tesco* Statement of Facts is simply referred to as Employee A,[599] but in the criminal trial is clearly identified as Mr Soni. Similarly, in *SFO v Rolls-Royce* no individuals were named in the published documents although the names were

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[594] *R v Bush, Scouler* para 16.

[595] In light of a DPA being approved on the basis of a statement of facts and other criteria there is no prescribed standard for proof of facts. Again, the DPA procedure illustrates a hybrid mechanism: it is a deferred *prosecution* agreement of alleged *criminal* offences but is heard in a civil court based on an agreed statement of facts.

[596] The three individuals are named throughout the Statement of Facts, but in paras 9, 61, 62 & 70, are specifically implicated in the falsification of Tesco's accounts, and in paras 51-52 Bush and Rogberg respectively are said to be a controlling mind of Tesco.

[597] The full quotation is: "The position is perverse. The three men have been cleared by a court, but damned in the SFO's court-approved agreement with Tesco Stores." N Pratley "Tesco Trio Cleared by a Court but Damned by Other Means" *The Guardian* (23-01-2019) <https://www.theguardian.com/business/nils-pratley-on-finance/2019/jan/23/tesco-trial-proves-to-be-a-drubbing-for-the-sfo-and-its-dpa> (accessed 07-02-2019).

[598] *Serious Fraud Office v Tesco Stores Limited* ("*SFO v Tesco* (2019)") case no. U20170287 (22-01-2019) 2019 WL 00295772 para 4.

[599] Para 10 of the *Tesco* statement of facts

disclosed to the court.[600] It is certainly an injustice to the individuals. It is submitted it is poor comfort for them for the court to state that it is common knowledge that the acquitted persons are not involved in or party to the DPA, and that the DPA only addressed the liability of Tesco, and not that of the individuals.[601] Conversely, it can be argued that the whole DPA was based on the "statement of facts" setting out in some detail the wrongdoing of the persons who had been identified as perpetrators on the *assumption* that they were guilty. It is submitted that much of the inequity suffered by the individuals named in the *SFO v Tesco* matter could have been avoided had the court ordered that no names be mentioned in the documents, as had been done in the *SFO v Rolls-Royce* matter.

The absence of transparency in the United States necessarily also raises questions about the powers attributed to the negotiating parties. Does the prosecutor have unfettered discretion? Are very powerful companies using their power to negotiate beneficial terms?[602] With the publication of the *SFO v Tesco* judgment and DPA, the matter and its regrettable consequences for the individuals are open to public scrutiny and criticism. It is submitted that the public evaluation and response to the use of the mechanism of DPAs in England can contribute to the reform and more prudent use of DPAs by the SFO and corporations in England. Public participation simply enhances the reform of and respect for justice and different mechanisms in a justice system.

A further concern regarding lack of transparency and thus the secrecy of negotiations is the volume of the voice of the public, the victims and other interested parties. Are they being heard? Again, under the legal framework in England the legislator has specifically addressed this by providing that a DPA must include details of compensation for victims[603] and the court is mandated to apply itself to this

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[600] Paras 31-32. Moreover, in *SFO v XYZ Ltd* the approved judgment that was published was redacted, keeping the name of the company and the names of the employees undisclosed. The group of which it is a member was also only referred to as "ABC Companies" (para 6).

[601] *SFO v Tesco* (2019) para 4.

[602] Buell (2018) 825-826, 857; Reilly (2017) *Utah L Rev* 866-867.

[603] Para 5(3)(b) of Schedule 17. Significantly para 5(3)(c) of Schedule 17 also provides the possibility "to donate money to a charity or other third party". These dual provisions for compensation and donations are echoed in s 17C(1)(2)(a)(i) and s 17C(1)(2)(a) of the

issue when considering the terms of the DPA.[604] In addition, various policies and codes exist to guide the negotiating parties regarding the need to consider victims' positions and compensation for them.[605] Subsequently, part of the composite purpose of the DPA mechanism is restitution for the victims or the community. It is argued in this dissertation that the concepts of "the victim" and "victim compensation" should be understood broadly. In many instances of corporate corruption, direct victims cannot easily be identified and consequently in some instances the courts and public prosecutors have not used the provisions for restitution. However, Thomas advocates a restorative justice model with regard to corruption[606] and maintains that restitution may incorporate anti-corruption programmes[607] and practices[608] by the offending company in communities where the corruption occurred.[609] Such programmes and practices can help to have a positive impact on the culture of corruption in such communities. This would increase the efficiency of business and increase the trust of the citizens in the corporate world and,

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Combatting Corporate Crime Bill 2017 of Australia, and in s 149E(3)(b) and (c) of the Criminal Justice Reform Act 19 of 2018 of Singapore.

[604] Indeed Leveson P states that compensation "is a necessary starting point for any DPA." See *SFO v Standard Bank (Preliminary)* para 41. In this case it was a term of the DPA that Standard Bank pay the Government of Tanzania compensation (paras 39 and 40). See also Para 40 of *SFO v XYZ Ltd (Preliminary)* in which Leveson P held that compensation is a "priority" over fines. The proposed s 715.31(e) of the Canadian Criminal Code RSC 1985 places an obligation upon the public prosecutor to inform the victims of a possible DPA and to obtain victim-impact statements.

[605] In the United Kingdom there is: the *Code of Practice for Victims of Crime 2015*; the section on "Victims and Witnesses" in *SFO Operational Handbook*; paras 7.2 and 7.9.ii of the *DPA Code of Practice*. See paragraphs 39-41 of *SFO v Standard Bank (Preliminary)* for application of the legislation by the court.

[606] A Thomas "A Reimagined Foreign Corrupt Practices Act: From Deterrence to Restoration and Beyond" (2016) 30 *Temp Int'l & Comp LJ* 385 398.

[607] For example, programmes that may empower local communities by educating them about corrupt practices and how to detect and eradicate them through insisting on transparency, monitoring and accountability of authorities and corporations. See too Thomas (2016) *Temp Int'l & Comp LJ* 407-408.

[608] For example, practices such as identifying both compliant and non-compliant companies and sharing such information with relevant authorities; partnering with compliant role-players; and identifying and supporting independent organisations promoting an anti-corruption culture. Also see (2016) *Temp Int'l & Comp LJ* 407-409.

[609] Thomas (2016) *Temp Int'l & Comp LJ* 407-411.

accordingly, benefit the community.[610] It is submitted that such participation in and contribution to for example, anti-corruption programmes and practices can be incorporated into the terms of a DPA.

In *SFO v Rolls-Royce Plc* and *SFO v XYZ Ltd,* the court followed a narrow interpretation when considering the issue of compensation, stating that it is intended for "clear and simple cases" with regard to both the identification of individuals and the calculation of the loss.[611] This is regrettable, and it is submitted that this overlooked the possibility of indirect victims and the possibility of introducing programmes and practices by the offending companies to help change the culture of corruption, as elucidated by Thomas. It is further submitted that these are issues that can readily be explored during the intensive and comprehensive negotiations between the SFO and a defendant company. The payment of compensation was part of the terms of the DPA approved in *SFO v Standard Bank*.[612] In *SFO v Tesco*, which was evidently not a clear and simple case, recognition was also given by the court to money paid into a fund to benefit shareholders who may have suffered loss.[613] In contrast to the statutory and judicial emphasis on compensation in England, enforcement authorities in the United States have been slow to recognise the need for compensation.[614] Interestingly, in the United States a provision

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[610] In addition, Thomas (2016) *Temp Int'l & Comp LJ* 404-407 argues that such interventions promote the corporate social responsibility of a company, increase investor confidence in the company and attract future business contracts. They are accordingly beneficial to all.

[611] *SFO v Rolls-Royce plc paras 81-84; SFO v XYZ Ltd (Preliminary)* para 41; *SFO v XYZ Ltd (Final)* para 20; *SFO v Tesco* paras 74-76.

[612] Standard Bank was required to pay the Government of Tanzania the amount it would have received but for the payment of the bribe, i.e. US $ 6 million plus interest. See *SFO v Standard Bank (Preliminary)* paras 39-41 and *SFO v Standard Bank (Final)* para 13 i.

[613] Although the payment of compensation was not part of the terms of the DPA, recognition was given by the court to a scheme of compensation in terms of an agreement reached between Tesco and the Financial Conduct Authority. Tesco agreed to pay £84,4 million into a fund from which shareholders whose share value had dropped due to the overstatement of income in the accounts could claim. This payment was considered when assessing the penalty to be paid by Tesco, as well as when confirming that the DPA is in the interests of justice and that its terms are fair, reasonable and proportionate. See paras 6, 41, 77-79, 85 & 105.

[614] Thomas (2016) *Temp Int'l & Comp LJ* 399 & 400.

prohibiting payment to unidentified victims was included in the draft (United States) Accountability in Deferred Prosecution Bill.[615]

Another matter that has led to different interpretations is legal privilege and the waiver of legal privilege,[616] particularly in the context of assessing the cooperation of a defendant company. In the *SFO v Standard Bank plc* and *SFO v XYZ Ltd* cases, no waiver of privilege was made by the defendants. However, in the *SFO v Rolls-Royce plc* matter, one of the criteria reckoned into the extraordinary cooperation of the defendant was the waiver of legal professional privilege by Rolls-Royce. Nevertheless, it is less clear how the claiming by a company of legal professional privilege will be construed.[617] Could this be interpreted as non-cooperation?[618] And how far do the powers of the SFO under section 2(3) of the Criminal Justice Act 1987 reach?[619] These questions are particularly important in the context of DPAs and the principles of self-reporting, cooperating with and disclosure to the authorities like the SFO in England. Important too for the successful operation of DPAs is the status of evidence arising from investigations once discussions occur between the SFO and a corporation.

The court in *Director of Serious Fraud Office v Eurasian Natural Resources Corporation Limited ("SFO v ENRC"),*[620] clarified the issue of the privilege of

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[615] S 6.

[616] It is beyond the scope of this dissertation to discuss the law of legal privilege or, more specifically, the interpretation of legal advice privilege and legal litigation privilege in English law.

[617] Para 3.3 of the DPA Code of Practice emphasises the voluntary nature of DPAs and specifically states that neither Schedule 17, nor the DPA Code of Practice changes the law on legal professional privilege.

[618] Cheung ((2018) *CLJ* 14) suggests the link by the court in *SFO v Rolls-Royce* on cooperation and waiver may be taken to mean that a corporation's insistence on legal privilege could be interpreted as non-cooperation.

[619] In terms of s 2(3) of the Criminal Justice Act 1987, the SFO has far-reaching powers to demand documents pertaining to any investigation.

[620] 2018 EWCA Civ 2006. This was an appeal from the judgment of Andrews J in *Director of Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2017] EWHC 1017 (QB). The Law Society was joined as an intervener in the appeal. Briefly, the facts are that the SFO and ENRC were in discussion regarding possible wrongdoing by one of ENRC's subsidiaries. In the light of allegations raised by a whistle-blower, ENRC had appointed legal advisers to investigate the allegations and to give them legal advice. Extensive

documents[621] arising from discussions between a corporation and the SFO. Significantly, the court held that once the SFO "specifically makes clear to the company the *prospect of its criminal prosecution*, …, and legal advisers are engaged to deal with that situation, …, there is a clear ground for contending that criminal prosecution is in reasonable contemplation" (writer's emphasis)[622] and, subsequently, litigation privilege would be applicable. It is difficult to imagine any corporation practising good governance not seeking legal advice once it has become clear, or even hinted, that the SFO might be investigating its activities for alleged wrongdoing.[623] Consequently, any subsequent communication between the legal advisers and the company is likely to be covered by legal professional privilege, including legal advice privilege and probably also, litigation privilege.

Indeed, the inter-play between legal professional privilege, investigation into a company's allegations of wrongdoing, and the possible waiver of any legal

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investigations were done, including a vast number of interviews with employees. Discussions between ENRC and the SFO broke down. The SFO demanded disclosure of documents relating to the investigation by ENRC and its legal advisers. ENRC, however, claimed legal privilege over the documents. In the earlier case, Andrews J found that most of the documents were not privileged. Andrews J found that a criminal investigation by the SFO should not be construed as criminal litigation, as criminal prosecution might not necessarily follow, and therefore a company could not rely on professional privilege as a defence in declining to disclose certain documents.

[621] In English law, legal professional privilege is sub-divided into *legal advice privilege* and *litigation privilege* (writer's emphasis). The latter relates to communications in connection with or in contemplation of legal proceedings. The former relates to communication made in connection with the giving of legal advice. See *Director of Serious Fraud Office v Eurasion Natural Resources Corporation Limited* [2018] EWCA Civ 2006 ("*SFO v ENRC* [2018] EWCA Civ 2006") paras 61-66, specifically para 63.

[622] *SFO v ENRC* [2018] EWCA Civ 2006 para 96. The court of appeal also suggested that not "every SFO *manifestation of concern* would properly be regarded as adversarial litigation" (writer's emphasis).

[623] As was the case in *SFO v ENRC:* immediately ENRC received an e-mail from a whistle-blower it handed the matter over to legal advisers for further investigation and advice (see *SFO v ENRC* [2018] EWCA Civ 2006 paras 8 & 92). ENRC's handling of the receipt of the e-mail in view of corporate "compliance" and "governance" principles and the risk of civil or criminal litigation illustrates probable action to be taken by a company in such an event. The inference is that a whistle-blower's allegations are likely to be handed over to legal advisers for advice and investigation, and subsequent communications between the legal adviser and the company will be covered by legal professional privilege (paras 98 &109).

professional privilege in the negotiation of a DPA is specifically raised by the court of appeal.[624] Leveson P makes specific reference to the waiver of *any privilege attached to documents produced from internal investigations*, as being one of the factors a court will take into account in considering the cooperation of a company when determining whether a DPA is in the interests of justice and whether its terms are fair, reasonable and proportionate.[625] Indeed, Leveson P goes as far as to suggest that had the court been asked to approve a DPA, ENRC's failure to be full and frank (and waived its privilege by disclosing the documents) would have counted against it![626] The inference from this *obiter dictum* is that the question asked earlier as to whether a company wishing to uphold its rights of legal professional privilege will be adjudged to be non-cooperative is answered in the affirmative. It is submitted that this could be considered to be coercive.

Nevertheless, it is submitted that the issue of legal professional privilege need not hamper cooperation between the SFO and a corporation, but may in fact promote such cooperation, as the rules of the negotiation and cooperation are now defined more clearly. A more narrow interpretation of legal professional privilege would be contrary to the purposes of a DPA and the incentivising of corporations to self-report as they would be reluctant do so in the event of their legal professional privilege being confined. The balance between retention and waiver of legal professional privilege is a perilous balance. In the context of DPA schemes, the importance of disclosure of information and the waiver of privilege can be understood. The corporation does after all gain benefits by making disclosure and waiving parts of its legal professional privilege, including the avoidance of criminal conviction, costs and debarment.[627]

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[624] *SFO v ENRC* [2018] EWCA Civ 2006 paras 115-117. Interestingly, Leveson P, (then president of the QB) the author of the three DPA judgements in England is also the author of the judgment of the court of appeal in *SFO v ENRC* [2018] EWCA Civ 2006.

[625] *SFO v ENRC* [2018] EWCA Civ 2006 para 117.

[626] Para 117. Leveson P refers to the cooperation of Rolls-Royce plc in *SFO v Rolls-Royce* to illustrate his *obiter dictum*.

[627] *SFO v ENRC* [2018] EWCA Civ 2006 para 115.

In addition, it is submitted that this uneasy balance is linked to a DPA being an ADR mechanism, as opposed to being a simple adversarial mechanism.[628] Arising from the nature and dynamics of concluding a DPA and the cooperation between the role players, more information is likely to come to light than in the case of an adversarial process.[629] This reminds one of former Justice Sachs' distinction that there are different types of truth and that ADR mechanisms, such as plea agreements, DPAs and mediation enable parties who participate in the processes to come to disclose other truths in addition to limited facts that are likely to come out of in evidence during an adversarial trial process. Disclosure of more information is an outcome in the best interests of all.[630]

In England DPAs are not available for individuals, unlike in the United States where natural persons may enter into DPAs.[631] A major criticism against the use of DPAs in the United States has been the insignificant consequences for executives.[632] The main criticism has been that while companies are being

[628] In the United States, the DOJ issued guidelines to regulate the demand of the waiver of attorney-client privilege by its officers in the McNulty Memo (2006). Also see Buell (2018) *N C L* Rev 843-844; Sullivan "The McNulty Memorandum: New DOJ Policies on Attorney-Client Privilege and Attorney Work Product Protections" *CCBJ* 34.

[629] As pointed out by Sir Leveson P in para 22 of *SFO v Rolls-Royce Pl*c.

[630] See Ch 3, para 3 3 5, 131ff.

[631] The Manhattan Institute that reviews DPAs and NPAs has only noted one NPA and one DPA with individual persons in the last few years. Although pre-trial diversions with individuals regarding corporate crime are not common, Copland & Gorodetski reckon the very fact of such agreements with individuals is alarming as the prosecution exert too much power over an individual regarding such agreements and the individual consequently does not have the protection of constitutional criminal safeguards which accused individuals would normally have through the laws and courts. See Copland & Gorodetski "Without Law or Limits: The Continued Growth of the Shadow Regulatory State" *Manhattan Institute* 12-15.

[632] Recently, however, more individuals, 25 in 2018, have been prosecuted by the DOJ or had administrative enforcements imposed upon them by the SEC under the FCPA. For analysis of enforcement action taken by the DOJ and SEC against individuals with regard to the FCPA see Shearman & Sterling "FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act (January 2019) *FCPA Shearman* <https://fcpa.shearman.com/> (accessed 02-02-2019); Wilmer Hale "Foreign Corrupt Practices Act Alert: Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018" *Wilmer Hale* <https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-and-predictions-for-2018> (accessed

prosecuted or pursued and pre-trial diversion agreements concluded, very few individuals are being prosecuted, and even fewer executive members of an organisation.[633] The adage that a "corporation can only act through natural persons"[634] highlights not only the accountability of the corporation through vicarious liability,[635] but also that of the natural person. It is the latter, the accountability of the natural individuals, that the Yates Memorandum seeks to address: "(o)ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing."[636]

The relationship between a company and its employees in the context of a DPA is emphasised by the court in *SFO v Tesco*:

> "[I]t is important to add some remarks about the significance of DPAs in general and this DPA in particular. As I have said, any corporate entity is only a structure that operates through its directors and employees. If they commit crime in apparent interests of the company, that criminal offence is personal to them unless they are a controlling mind in which case the crime can be brought home against the company itself."[637]

However, as Yates herself concedes, holding an individual accountable is not a simple matter for a number of reasons, including the complexity of white-collar crime

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02-02-2019). Also, Dep AG Rosenstein reported that prosecution of white-collar crime had increased in 2018, and charges against 30 individual defendants under the FCPA were brought in 2018. See Dep AG RJ Rosenstein "Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act" (29-11-2018) *DOJ* <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0> (accessed 02-02-2019).

[633] Gilchrist (2018) *Ga St U L Rev* 335-340, 354; Henning (2014) *Miss L J* 43-45; Beale (2016) *Stetson L Rev* 62-36; Henry (2016) *Am U Bus L Rev* 155-156.

[634] Holder Memo (1999) 4. Also see Yates Memorandum (2015) 4; Gilchrist (2018) *Ga St U L Rev* 337, 344.

[635] In United States jurisprudence, this is known as the *respondeat superior* principle. See Holder Memorandum (1999) 4; Beale (2016) *Stetson L Rev* 43-49. For discussion on corporate liability under the *respondeat superior* doctrine see LE Dervan "Corporate Criminal Liability, Moral Culpability, and the Yates Memo" (2016) 46 *Stetson L Rev* 111 111-114.

[636] Yates Memorandum (2015) 1; Gilchrist *Ga St U L Rev* (2018) 338, 350-351;

[637] Para 115. In this matter Bush and Rogberg were each stated to be a "controlling mind" in the statement of facts (paras 51, 52).

and the organisational structure of a company.[638] Gilchrist argues that the call for increased prosecution of individuals will fail due to what he calls the "accountability gap".[639] The accountability gap exists not only between the corporation and the individuals, but also between executive persons and lower managers. In the case of the former, it is the company, or in reality the shareholders that usually pay the price for contraventions while the executives escape accountability.[640] In the latter situation, the executive usually also escapes liability as lower-level employees are held accountable.[641] Gilchrist emphasises that the lack of evidence or the complexity of the evidence in corporate crime constitutes the primary stumbling-block in securing criminal convictions for individuals in the context of corporate crime.[642] Convictions in criminal law condemn offenders and as such high standards in law are set to secure such convictions. The prosecution needs to prove the necessary *mens rea* of an accused but it is particularly difficult in cases of corporate crime to prove the accused had an intention to commit a crime.[643] Often it is the intangible

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[638] Yates Memorandum (2015) echoes the obstacles already identified in the Holder Memo (1999). See too Buell (2018) *N C L Rev* 855-856; Oded (2016) *Yale L & Pol'y Rev* 52, 56-57.

[639] GM Gilchrist "Individuality Accountability for Corporate Crime" (2018) 34 *Ga St U L Rev* 335 335.

[640] Gilchrist (2018) *Ga St U L Rev* 337.

[641] Gilchrist (2018) *Ga St U L Rev* 351-352.

[642] Gilchrist (2018) *Ga St U L Rev* 363-364.This is illustrated in the criminal charges brought against three senior executives in the Tesco matter, who after 4 years of criminal investigation and prosecution were acquitted of fraud by abuse of position and false accounting charges due to lack of sufficient evidence to hold them individually liable. See P Rappo & L Bullock "Failed Tesco trial shows that when it comes to evidence, every little helps" (13-12-2018) *DLA Piper* <https://www.dlapiper.com/en/pr/insights/publications/2018/12/failed-tesco-trial-shows-that-when-it-comes-to-evidence-every-little-helps/>; Also, *R v Bush, Scouler*.

[643] Gilchrist (2018) *Ga St U L Rev* 365-366; Beale (2016) *Stetson L Rev* 66-67. Enlightening is Henning's proposal that the *mens rea* standard for corporate crime could be replaced by a new crime with a lower standard of recklessness. Gilchrist reminds that recklessness is also a thorny issue, as shareholders not only suffer losses, but often reap the rewards of recklessness by executives. See Gilchrist (2018) *Ga St UL Rev* 383-384. Also see PJ Henning "A New Crime for Corporate Misconduct?" (2014) 84 *Miss LJ* 43 46-47 & 51, 82. Henry ((2016) *Am U Bus L Rev* 169-172), in turn, argues that the *Park* doctrine arising from *United Sates v Park* 421 US 658 (1975) that attributed criminal liability to corporate executives who were unaware of violations by the corporation but were in a position to stop

culture of an organisation evolved over time through executive management and boards that form the context for contraventions by middle or lower management.[644] Furthermore, contemporary corporate operations are heavily regulated. Consequently, corporate crime involves contraventions of regulations.[645] As many regulations are vaguely or widely worded or out of date this adds to the difficulty of the state to prove its case beyond a reasonable doubt.[646] Consequently, from a criminal law perspective, it is very difficult to acquire and present the necessary evidence that a certain senior executive committed a specific crime. In an attempt to address these difficulties the Yates Memorandum introduced new policies, particularly with regard to cooperation and disclosure by companies wishing to enter into DPAs. The Yates Memorandum promotes an "it's all or nothing" approach by stating that a corporation can only receive credit for cooperation if it discloses all the details of the employees involved in the wrongdoing, regardless of position or seniority.[647] This approach raises a number of concerns.

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such violations should be extended to the finance and security industries. For the past 40 years this doctrine of strict liability for corporate officials has been applied in the food and drug industry in the United States.

[644] For example, because of a corporate culture involving uncompromising pressure for profits, this may cause subordinates to disregard safety measures and to take short cuts, but this falls well short of providing evidence of criminal intent on the part of senior management: see Gilchrist (2018) *Ga St UL Rev* 360-367. Another example is the Rolls-Royce saga discussed above (fn 576) involving persons at various management levels in different countries, which illustrates how complex a corporate culture of a large corporation is. Also compare the operational structure in the *Tesco* matter fn 673 below.

[645] For example, insider trading, banking regulations and safety regulations. Many investigations of corporate contraventions in the United States are in the environmental or health and safety sectors. For a detailed analysis see Koehler (2015) *UCDL Rev* 516-556; Markoff (2013) *U Pa J Bus L* 818-820.

[646] Gilchrist (2018) *Ga St UL Rev* 368-374.

[647] Yates used these words when she announced the new policy. SQ Yates Deputy Attorney General US Dep't of Justice Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (10-09-2015), <https://www.justice.gov/opa/speech/deputy-attomey-general-sallyquillian-yates-delivers-remarks-new-york-university-school> (accessed 14-07-2018) See too the guidelines in the Yates Memo: "In order for a company to receive any consideration for cooperation …, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible

A thorny issue is the effect that the Yates Memorandum will have upon the relationship between the corporation and its executives. The Yates Memorandum not only places a major burden upon a corporation, but also effectively places corporations in direct confrontation with its employees, including executives, and creates a conflict of interests between them.[648] In addition, executive management has control and influence over what information to give and what to withhold, precisely what the guidelines attempt to avoid.[649] Oded argues that the Yates Memorandum will influence the way in which both corporations and employees respond to economic crime.[650] Employers will need to choose: whether to disclaim their employees or whether to go to trial,[651] and whether to self-report and cooperate or to take the chance of not being detected. Each of these choices will have cost and risk consequences. Moreover, employers run the risk of infringing on the employees' constitutional rights in cases of possible coercion to give statements or evidence in

for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct." Yates Memorandum (2015) 3.

[648] Dervan (2016) *Stetson L Rev* 125. Oded (2016) *Yale L & Pol'y Rev* 75-82. This is illustrated in the *SFO v Tesco* matter where former executives, Bush and Grace instituted action against Tesco for unlawful dismissal. See A McCulloch "Tesco Faces Unfair Dismissal Claim after Fraud Case Acquittal" (25-01-2019) *Personnel Today* (accessed 08-02-2019).

[649] Gilchrist (2018) *Ga St UL Rev* 359-360.

[650] Employees, who may be involved in wrongdoing, are also likely to be reluctant to whistle-blow, self-report or challenge any investigation into any wrongdoing, knowing that the focus is now more on the wrongdoers, than on the wrongdoing. Oded (2016) *Yale L & Pol'y Rev* 75-88.

[651] The three acquitted individuals in the *SFO v Tesco* matter claim that Tesco chose to put its commercial interests first and to sacrifice them by concluding a DPA with the SFO in which they were used as scapegoats. See I Quinn "Carl Rogberg Cleared in Tesco Fraud Case" (23-01-2019) *The Grocer* (accessed 06-02-2019); Apparel Resources News-Desk "Former Tesco Director, the Third Accused in 2014 Fraud Case, Acquitted; Says he was Made a Scapegoat" (25-01-2019) *Apparel Resources* (Accessed 08-02-2019); N Pratley "Tesco Trio Cleared by a Court but Damned by Other Means" (23-01-2019) *The Guardian*; BBC "'I Should Never have Been Charged" – Former Tesco director" (23-01-2019) *BBC* (accessed 08-02-2019); J Bloom "Analysis: Justice Abandoned?" (23-01-2019) *BBC* (accessed 08-02-2019).

the event of an investigation by authorities.[652] Prior to the Yates Memorandum the United States enforcement authorities followed a cooperation enforcement model, granting credit cooperation to corporations that cooperate in the prevention and detection of contraventions.[653] The introduction of the Yates Memorandum and the all or nothing approach have narrowed the principle of cooperation credit. This is likely to have a chilling effect not only on corporate cooperation, but also on the addressing of economic crime. The nature of much economic crime is such that its detection and prosecution is difficult and thus cooperation by corporations, employers and employees alike plays a pivotal role in combating economic crime. The credit cooperation model incentivises such cooperation and it is argued that that the Yates Memorandum will dampen such motivation.[654] Moreover, it is argued that such provisions result in corporations becoming part of the legal enforcement teams, as opposed to simply enforcing their own corporate governance.[655] The Yates Memorandum and its all or nothing approach could consequently have adverse effects. It could actually deter and not encourage corporate cooperation.[656]

The Yates Memorandum has since been revised and a differentiation has been made between criminal liability and civil liability.[657] Regarding the former "any

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[652] Another risk is a company concluding a DPA and a statement of facts with the authorities on the assumption that certain identified individuals are guilty of wrongdoing, without granting such employees an opportunity to state their case. This was the invidious position in *SFO v Tesco* where the identified executives were suspended and not given an opportunity to participate in the compilation of the statement of facts.

[653] This could be in the form of prosecutorial procedures. The decision whether to prosecute, enter plea negotiations or DPAs is made taking the corporation's cooperation into account. It could also be in the form of mitigated sentences and reduced financial penalties. Oded (2016) *Yale L & Pol'y Rev* 55-61.

[654] Oded (2016) *Yale L & Pol'y Rev* 78-80.

[655] Oded (2016) *Yale L & Pol'y Rev* 78; JR Copland & RA Mangual "Justice Out of the Shadows Federal Deferred Prosecution Agreements and the Political Order" *Manhattan Institute* 13-14.

[656] However, compare Nasar (2017) *NYUJL & Liberty* 860-862 who argues that an increased focus on individual wrongdoers may have a positive effect.

[657] Dep AG RJ Rosenstein announced these changes in an address in late November 2018. See "Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act" *DOJ*; sub-sec 4-3.100 of the Justice Manual available at <https://www.justice.gov/jm/jm-4-

company seeking cooperation credit in *criminal* cases must identify *every individual* who was *substantially involved* in or responsible for the criminal conduct" (writer's emphasis).[658] Focus is now only on individuals who were "substantially involved" or who "played significant roles" in the wrongdoing.[659] Regarding civil enforcement, the DOJ acknowledged that their binary "all or nothing" policy was less successful at recovering monies and discretion has been restored to civil litigators, subject to supervisory review.[660] These revisions to the DOJ policy reflect that the DOJ has responded to the concerns raised and acknowledged that due to the complexity of corporate crime, it may not to be practical or possible to identify every individual involved in violations. In addition, such an "all or nothing" policy had practical implications in that it led to time delays and high costs due to the length and complexity of investigations. The revised policy allows for recognition and appropriate credit cooperation to be given to companies who engage in "full and frank discussions";[661] but those who dishonestly withhold information will not receive the offered cooperation credit.[662] It is not disputed that individual wrongdoers need to

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3000-compromising-and-closing?utm_medium=email&utm_source=govdelivery#4-3.100> (accessed 02-02-2019).

[658] "Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act" *DOJ*.

[659] Dep AG Rosenstein Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act" *DOJ*. Also see Shearman & Sterling "FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act" (January 2019) 23-24 for an analysis of these changes.

[660] In addition, it was acknowledged that the "all or nothing" policy had only been partially applied in some instances and that corporations were given partial credit cooperation. "Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act" *DOJ*.

[661] Dep AG Rosenstein Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act" *DOJ*.

[662] Twenty-five percent discount of penalties is offered for full cooperation credit, but in recent cases this has been less, ranging between 15% and 20%. Dep AG Rosenstein's concluding remarks were: "In God we trust; all others must bring data." Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act" *DOJ.* Separate

be held accountable. Nevertheless, the matter remains complex and consequently the reviewed nuanced approach is commended.

The nature of economic crime and the various obstacles to its detection and holding individual persons and corporations accountable remain challenging. Consequently, a menu of alternative mechanisms to address contraventions is preferable. The non-regulated and broad use of NPAs and DPAs in the United States over the past two decades has raised various issues in addition to those discussed above relating to the powers of the prosecution to adjudicate and punish corporations or persons that have not been convicted in open court.[663] Criticism has also been raised against the intrusive power which the executive has exercised in the governance of corporations.[664]

This dissertation submits that the regulated use of DPAs in England is a commendable mechanism in the broader context of addressing economic crime, particularly with regard to large corporations. However, the *Tesco* debacle is a timely reminder of the complexity of economic corporate statutory crime and the risks of the DPA mechanism. The complexity of economic crime is starkly illustrated in the *Tesco*

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commentators give an analysis of the cases where partial cooperation credit was granted: Shearman & Sterling "FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act" (January 2019); Wilmer Hale "Foreign Corrupt Practices Act Alert: Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018" (accessed 02-02-2019).

[663] For example, the standard term in a DPA is that it is in the sole discretion of the prosecution to decide whether a defendant has breached a DPA or not. In some instances, the prosecution has simply decided that a defendant had not properly fulfilled the terms and unilaterally extended the period of a DPA. For details of the unilateral extension of the DPA between DOJ and Standard Chartered Bank and other cases see Copland & Gorodetski "Without Law or Limits The Continued Growth of the Shadow Regulatory State" *Manhattan Institute* 10-12. Other concerning issues are the so-called "muzzle" clauses that silence corporations and the integrity and status of the statement of facts, particularly with regard to possible civil actions. See Copland & Mangual "Justice out of the Shadows" *Manhattan Institute* 12-13; Koehler (2015) *UCDL Rev* 547-548.

[664] For example, common terms in a DPA are that a company needs to dismiss certain employees, restructure its organisation, change its business strategy, appoint and pay external monitors, chosen by the DOJ and who report to it. In some instances, a company has even had to report on the actions of competitors and third parties. For illustrations, see Copland & Gorodetski "Without Law or Limits: The Continued Growth of the Shadow Regulatory State" *Manhattan Institute* 7-14.

matter. The overstatement of approximately £250 million[665] of profit relating to commercial income for a short half-year period, covered more than 2,600 stores and arose over several years.[666] The overstatement of commercial income arose from standard accounting practices, some lawful, others constituting possible false accounting.[667] The magnitude and cost[668] of the investigation and consequent DPA and criminal trial are mind-boggling. The case spans a period of more than four years.[669] The criminal case involved 30 witnesses and more than 400 documents covering 3000 pages.[670] In addition, the intricacy of the structure of a large corporation is well portrayed.[671] So too the nature and scope of the responsibility and

[665] Revised to £284 million and again to £326 million. See *SFO v Tesco* para 3*;* I Quinn "Carl Rogberg cleared in Tesco fraud case" (23-01-2019) *The Grocer* (accessed 06-02-2019).

[666] The estimated profit, as published, was £1,1 billion. The overstatement arose from the financial year 2013/2014 and the first half of 2014/2015. As a consequence of announcing the overstatement to the market, Tesco's share price fell by 11,59% equating to a reduction of £2,16 billion in share value. See *SFO v Tesco* paras 1-4, 14.

[667] There were a number of ways in which commercial income was accounted for. For example, credits and discounts from suppliers could be accounted for upfront, although the supply contract was for a year. Some of the accounting procedures required accounting judgement. This meant that some accountants would find a certain accounting practice acceptable, others less so. Also, some of the overstatement was due to fraudulent documents furnished by buyers. See *R v Bush, Scoular* (Appeal) paras 21-24; *SFO v Tesco* paras 27-34.

[668] The cost of the SFO's investigation related to the DPA is reckoned to be £3 million, as this is the amount Tesco was ordered to pay the SFO with regard to costs (*SFO v Tesco* para 103); while the SFO's costs related to the criminal case are estimated to be £10 million.

[669] The disclosure by Tesco was made in September 2014, whilst the DPA was concluded in April 2017 and the criminal trials in January 2019. The obligations in the DPA continue until April 2020. Furthermore, Tesco still faces several legal claims relating to the loss incurred by shareholders and unlawful dismissal from former employees. See *SFO v Tesco* paras 42; the DPA para 4.

[670] *R v Bush, Scoular* para 4. Royce J who presided over the criminal trial court reportedly declared that the jurors who sat in on the trial and had to hear all the evidence were relieved from jury duty for 20 years! See Z Wood & S Butler "Two Tesco Directors Cleared of Fraud as Judge Labels Case 'weak'" (06-12-2018) *The Guardian* (accessed 08-02-2019).

[671] Leveson P discusses the leadership structure of Tesco plc and Tesco Stores Limited in *SFO v Tesco* paras 53-58. The governance of Tesco plc and Tesco Stores Limited is recorded in the *Tesco* statement of facts paras 19-32.

liabilities of individuals show the complexity of executive positions.[672] Furthermore, to succeed in proving criminal liability against an individual in composite corporate misconduct is highly unlikely. The acquittal of the three identified employees for lack of evidence shows how difficult this is.[673]

Moreover the difficulty in identifying the authors and implementers of a corporate culture is shown. For example, in the Tesco matter who was truly accountable for the corporate culture of meeting financial targets in a difficult economic climate by overstating income through unlawful accounting practices? Was it the board or CEO that set the targets, or was it the managing director and the finance director, as assumed in the Statement of Facts and alleged in the criminal trial?[674] As rightfully pointed out by Leveson P stripping a company of human beings means it can no longer have a will or ability to decide how it should behave.[675] However, it is suggested that identifying the human being who is the controlling mind of a corporation and what behaviour may have given rise to such a culture is very complex and probably impossible in a large corporation such as Tesco. It is

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[672] For example, the Finance Director of Tesco had up to 300 persons reporting to him and was responsible for considering more than 2,000 reports a month. See Quinn "Carl Rogberg cleared in Tesco fraud case" *The Grocer* (23-01-2019).

[673] This is illustrated by the facts of the *Tesco* trial. It was disclosed that not even Mr Soni, the whistle-blower, who was a senior financial officer and gatekeeper knew earlier of the *unlawful* accounting practices before warning the accused, his managers. The question consequently arose how were the managers were to know as they were further removed from the hundreds and thousands of invoices generated by the relevant department in Tesco. In addition, Mr Soni in discussions with the managers, believed the overstatement of income was a commercial problem and not an unlawful practice and could be traded out of in the coming months. Indeed, it was not the prosecution's case that the accused participated in the unlawful accounting practices, but that after they became aware of the improperly recognised income, they did nothing to correct the figures, but insisted on targets being met even if it meant such unlawful practices had to continue. *See R v Bush, Scoular* (Appeal) paras 24, 26-41; 51-55, 62-68; also *R v Bush, Scoular* (Trial) para 5 and an analysis of the evidence in paras 16-33. It is evident that to hold senior managers criminally liable for accounting practices, which were not fully known or understood to be unlawful, is extremely difficult.

[674] See paras 54-60 of Statement of Facts; paras 32-34 of *SFO v Tesco*; paras 21-24 of *R v Bush, Scouler.* The prosecution's case was that h three defendants were generals who coerced and bullied employees into meeting financial targets.

[675] *SFO v Tesco* para 53.

submitted elsewhere in this dissertation that a corporate body is more than the sum of the human beings representing it and acting on its behalf.[676] So too, the development and promotion of a corporate culture is a dynamic and complicated process.[677] The concept "corporate culture" is itself elastic and awkward to define and delineate.[678] Consequently to hold certain individuals responsible for a large corporation's corporate culture developed over a period of time may be imprudent.

The nature of economic crime, in particular the complexity of statutory economic crime, is highlighted by the *Tesco* matter. The company was charged with false accounting;[679] and the three executives with fraud and false accounting.[680] To secure a criminal conviction the requirements of the criminal offences need to be proved, probably an unsurmountable task in a matter such as *Tesco*.[681] It is submitted that this case underscores not only the complexity of corporate crime, but also the difficulty of holding individuals accountable. Indeed, there may not necessarily be any responsible *individuals*, but the wrongdoing may be due to a corporate culture and corporate practices practiced by departments over a period of time. It is not denied that there was corporate wrongdoing. The existence of corporate wrongdoing was validated by the court-approved DPA.[682] However, it is suggested that in this case, and likely in other corporate economic crime cases, attributing such

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[676] See ch 4, para 4 2 1, 163ff.

[677] W Scobie ("Questions of Corporate Responsibility: Can Hannah Arendt's 'thoughtlessness' Apply to Companies and their Actors?" (2017) 42 *Alt LJl* (2017)) 55 57 argues persuasively that laws and corporate policies have the power to influence and shape corporate culture and behaviour.

[678] Compare the definition of "corporate culture" in the Australian Criminal Code Act 12 of 1995 s 12.3(6): "an attitude, policy, rule, course of conduct or practice existing within the organisation generally or in the part of the organisation in which the relevant activity takes place". Also see, a discussion on corporate criminal liability in K Griffiths "Criminalising Bribery in a Corporate World" (2016) 27 *Current Issues Crim Just* 251 257-262.

[679] S 17 of the Theft Act 1968. See *SFO v Tesco* paras 7 & 106.

[680] S 4 of the Fraud Act 2006 and also s 17 of the Theft Act 1968. See *R v Bush, Scoular* paras 14 & 15.

[681] See paras 16, 43-50 recording the requirements and the evidence of the prosecution.

[682] See the comments by Hallet VP in *R v Bush, Scouler* para 144; Leveson P in *SFO v Tesco* (2019) para 4; Lisa Osofsky, Director of the SFO stating in news release "Deferred Prosecution Agreement between the SFO and Tesco Published" (23-01-2019) *SFO*.

wrongfulness to individual persons by way of a criminal conviction will seldom be possible.[683]

The *Tesco* saga also identifies the vulnerability of the relationship between a company and its executives. The risks and shortcomings of the DPA mechanism are also cruelly portrayed. As was shown above, the invidious situation is that three persons are simultaneously damned in a court-approved DPA, whilst been acquitted in a criminal court.[684] This casts doubt on the credibility of the DPA scheme,[685] as well as on the investigations and operations of the SFO.[686] It also calls for reform of the DPA scheme to protect the rights of individuals more explicitly.[687] The fact that a document, such as a statement of facts being prepared, for example, by the SFO and Tesco, which explicitly points to identified individuals as being responsible for corporate misconduct, without such individuals being given an opportunity to state their case, can be interpreted as infringing their basic rights.[688]

This dissertation emphasises the position of the victim. Notably, the *Tesco* matter also portrays how difficult the identification of victims can be. Although the court in approving the DPA acknowledges shareholders as being victims, it continues to state that no victims had come forward to submit claims to the SFO.[689] Subsequent to the publication of the DPA and supporting documents and the illustration of Tesco's corporate culture of meeting financial targets, the question may be asked whether investors were the true victims? Was the pressure on financial targets not

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[683] See illustration in fn 673.

[684] The assumptions upon which the DPA was approved were not supported by the evidence in the criminal court. See R Dixon "Tesco Trial Shows the Dangers of Deferred Prosecution Agreements" (31-01-2019) *The Grocer* (accessed 08-02-2019).

[685] J Dimmock & T Crawford "Tesco Trial Collapse Highlights Dangers of an Early Deferred Prosecution Agreement" (01-02-2019) *White & Case*.

[686] R Dixon "Tesco Trial Shows the Dangers of Deferred Prosecution Agreements" (31-01-2019) *The Grocer*; I Quinn "Tesco Directors Acquitted of Fraud Charges due to Lack of Evidence" (06-12-2018) *The Grocer*; P Rappo & L Bullock "Failed Tesco Trial Shows that When it Comes to Evidence, Every Little Helps" (13-12-2018) *DLA Piper* (accessed 08-02-2019).

[687] R Dixon "Tesco Trial Shows the Dangers of Deferred Prosecution Agreements" (31-01-2019) *The Grocer*.

[688] Limited protection can be given by withholding the identity of the alleged wrongdoers as was done in *SFO v Rolls-Royce* (paras 31-32).

[689] *SFO v Rolls-Royce* paras 41-42; 76.

for the benefit of the shareholders? The executives have been acquitted, but with their reputation and lives irreparably harmed from the charges, it may well be said that they are victims.[690] Perhaps, Tesco too can claim to be a victim. It is paying dearly, first the penalties and other amounts in terms of the DPA,[691] and it is likely to be paying more money in other civil claims instituted against it.[692]

The recent developments in the regime of DPAs in England and the United States reflect that tensions will continue to exist with the use of alternative dispute mechanisms. Koehler is particularly scathing about the development of alternative dispute resolution methods within the criminal justice system, contending that they are developing due to the rhetoric of enforcement agencies claiming efficiency and certainly for resolution of criminal disputes. Pragmatic reasons dominate at the cost of the true rule of law.[693] Mixed mechanisms that cloud the clear lines of conventional criminal justice are likely to continue to give rise to wrestling bouts between the various role-players. However, this does not mean that such alternative mechanisms are to be rejected. It is suggested that the introduction of specific legislation, as recently happened in a number of jurisdictions with regard to DPAs, is well suited to guide ADR mechanisms and to manage the tensions naturally arising between the prosecution, the defendants and the public. Judicial review is a critical guardian of the DPA system, its interpretation and application. Transparency is also important in inviting and securing the trust of not only corporations, but also that of the public in the use of DPAs. Debatable issues remain regarding the power and discretion of the prosecutor, the availability of a DPA for natural persons and the identification of victims and compensation or restitution for victims. The courts and public officers need to be mindful of the thorny relationship between a company and its employees. Notwithstanding these criticisms and risks, DPAs have become part of the legal landscape in addressing instances of economic crime in the United

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690 For example, Rogberg suffered a heart-attack and describes the ordeal as lost years in his life and that of his family. See Wood & Butler "Former Tesco Executive Carl Rogberg Cleared of Fraud" *The Guardian* (23-01-2019).

691 In excess of £200 million. See *SFO v Tesco* para 105.

692 See fn 669 above.

693 Koehler (2015) *UCD L Rev* 560-565.

States and England.[694] As stated above, DPAs have also been introduced into several other countries. It is submitted in this dissertation that the proposal of using mediation as an ADR mechanism will, in addition to building upon the use and application of plea agreements, also build on the principles of DPAs and contribute to this growing field of additional mechanisms to address economic crime.

4 4 2 Mechanism of plea and sentencing agreements in the United States and South Africa

> "There is no glory in plea bargaining. In place of a noble clash for truth, plea bargaining gives us a skulking truce. Opposing lawyers shrink from battle, and the jury's empty box signals the system's disappointment. But though its victory merits no fanfare, plea bargaining has triumphed. Bloodlessly and clandestinely, it has swept across the penal landscape and driven our vanquished jury into small pockets of resistance. Plea bargaining may be, as some chroniclers claim, the invading barbarian. But it has won all the same."[695]

In this section the mechanism of plea and sentencing agreements is discussed to illustrate an alternative mechanism through which instances of economic crime may be addressed. Emphasis is on the nature of the mechanism, that it is a negotiation process, involving a give and take on both sides of the dispute.[696] As is shown below, it is a process of concessions made and benefits gained by the prosecutor and the defendant.[697] However, it is to be noted that although plea and sentence agreements involve negotiation between the prosecutor and the defence, it remains

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[694] Morgan, Joint Head of Bribery and Corruption at the SFO remarked "you should know that work on DPAs is now part of business as usual at the SFO". See Morgan "Deferred Prosecution Agreements (DPA): A Practical Guide by Defence and Prosecution" *SFO Speeches*. Osofsky, the Director of the SFO, also affirms DPAs as being an "important tool in changing corporate culture for the better". See SFO "UK's first Deferred Prosecution Agreement, between the SFO and Standard Bank, successfully ends" *SFO News Releases*. Though the Tesco matter has dented the efficacy of DPAs and resulted in much criticism and concern, DPAs are likely to be continue to be used in England. See M Walters "'Jury Still Out' on DPAs Following Tesco Failure (25-02-2019) *The Law Society Gazette* (accessed 25-02-2019).

[695] G Fisher "Plea Bargaining's Triumph" (2000) 109 *Yale LJ* 857 859.

[696] *S v Esterhuizen* 2005 1 SACR 490 (T) 493J.

[697] Discussed below 314-316; and again 322-323.

a negotiation process between two adversaries within an adversarial system.[698] The purpose of discussing plea and sentence agreements is to demonstrate the development in the criminal justice system from the classical binary model of either a declination[699] to prosecute, or a trial between two opponents before a presiding officer or jury within the confinements of strict formal rules of evidence and procedure. In this dissertation it is submitted that using the process of mediation in addressing instances of economic crime is a natural legal evolution of plea and sentencing agreements. Plea and sentencing agreements have laid a foundation upon which mediated agreements in the criminal justice system can be built.

Plea and sentencing agreements[700] are entrenched in the criminal justice system of the United States of America ("the United States"). Remarkably, more than 90% of

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[698] *S v Esterhuizen* 493J.

[699] A technical term used in practice by the DOJ and courts in the United States.

[700] In this dissertation, the terms "plea and sentencing agreement" and "plea negotiation" are intentionally used in preference to the common term "plea bargaining". This is because of the negative connotations attached to the word "bargaining" and the impression that justice is an object over which persons can bargain. A "plea and sentence agreement" is not a single act, and the process may involve negotiating a "plea agreement" and subsequently a "sentence agreement". Kerscher also highlights issues that arise from the use of the term "plea bargaining", particularly with the word "bargaining" in criminal jurisprudence, and refers to alternative terms such as "plea settlements" or "plea agreements". In addition, Kerscher identifies the contradictions in the words "plea" and "bargaining" in the term "plea bargaining". The negative connotations which the word "plea bargaining" raises are illustrated by Bennun's comparison of plea and sentence negotiations to bargaining in a marketplace. There is also some support for the use of "negotiation" in preference to "bargaining" in the South African case law in the context of s 105A. See *S v Esterhuizen* 2005 1 SACR 490 (T) at 493I-J and 494E-G and *Jansen v S* 2016 1 SACR 377 (SCA) para 16 in which emphasis is placed on the negotiation-based nature of the process, though the term "plea bargaining" is indirectly used. Compare, however, *S v Armugga* 2005 2 SACR 259 (N) at 265A-C, where the term "plea bargaining" is primarily used. Also see M Kerscher *Plea Bargaining in South Africa and Germany* LLM thesis, Stellenbosch University (2013) 2-4; MB Rodgers *The Role of the Victim in the South African System of Plea and Sentence Agreements: A Critique of Section 105A of the Criminal Procedure Act* LLM thesis, University of the Western Cape (2009) 14-15; MB Rodgers "The Development and Operation of Negotiated Justice in the South African Criminal Justice System (2010) 23 *SACJ* 239 239; PM Bekker "American Plea Bargaining in Statutory Form in South Africa" (2001) 34 *CILSA* 310 310-311; ME Bennun "Negotiated Pleas: Policy and Purposes" (2007) 20 *SAJC* 17 29. CT Clarke ("Message in a Bottle for Unknowing Defenders: Strategic Plea

criminal matters brought to court are resolved through guilty pleas, of which the majority are consequent to plea and sentence negotiation.[701] Few guilty pleas relate to economic crime, but this is not due to such cases rather going to trial, but due to the fact that economic crime makes out a relatively small portion of all crime in the United States.[702] Several high profile cases of economic crime have enjoyed not only high publicity but political attention, pertinently after the Enron implosion at the turn of the century.[703] In this section, the phenomenon of plea and sentence negotiation is briefly discussed, with particular reference to the United States federal criminal justice system.[704] Attention will focus primarily on plea and sentence negotiation in relation to economic crime, and some of the issues arising from it such as the thorny issue of sentencing, the power of the prosecution and the precarious position of the defendants. A comparative view of the relatively young plea and sentence negotiation mechanism in the South African criminal jurisprudence is also provided.

Negotiations Persist in South African Criminal Courts" (1999) 32 *CILSA* 141 142-143) also prefers the term "plea negotiation" or "plea agreement" because of the negative connotations of "bargain-basement justice".

[701] LE Dervan "Plea Bargaining's Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post-Enron World" (2007) 60 *Okla L Rev* 451 452; see too PM Bekker "Plea Bargaining in the United States of America and South Africa" (1996) 29 *CILSA* 168 168-170.

[702] USSC "Quick Facts Theft, Destruction of Property and Fraud Offences" *USSC* <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft_Property_Destruction_Fraud_FY15.pdf> (accessed 31-08-2019).

[703] Enron was a huge company dealing in energy, gas, electricity and communications. It collapsed in October 2001, causing thousands to lose their investments and jobs. The collapse revealed substantial corporate fraud and misrepresentation. A further casualty in the Enron scandal was its accounting firm Arthur Andersen. The highly publicised Enron saga moved government to promulgate additional laws and regulations and establish new units in its war against corporate and financial crime. Notable are the Sarbanes-Oxley Act of 2002 signed into law by President Bush on 30 July 2002, and the establishment of the Corporate Fraud Task Force, also in July 2002. See Dervan (2007) *Okla L Rev* 453-454; R Peavler "Sarbanes-Oxley Act and the Enron Scandal – Why Are They Important?" (18-10-2016) *the balance* <https://www.thebalance.com/sarbanes-oxley-act-and-the-enron-scandal-393497> (accessed 25-05-2017).

[704] The United States criminal justice system is vast and complex, and the discussion in this dissertation is not comprehensive, but merely focuses on certain federal legislation, and attempts to sketch broad strokes of plea negotiation within the United States criminal justice system.

The origins of plea and sentence negotiation are difficult to trace.[705] Abdullahi begins the story with Galileo who in 1633 was charged with heresy, and in exchange for agreeing to renounce the Copernican theory that the earth revolved around the sun, received a sentence of life-long house arrest and reciting penitential psalms for three years instead of the death sentence.[706] A well-known illustration of plea and sentence negotiation is the failed plea negotiation of Al Capone who had entered into a plea and sentence agreement with the prosecution regarding charges of tax evasion and violations of the prohibition legislation in the 1930s. When the judge rejected the sentence proposal, Capone changed his plea to a plea of not guilty. The case continued to trial[707] and Capone was finally convicted and sentenced to eleven years' imprisonment, then the longest sentence yet handed down for an economic crime.[708]

Researching the development of plea negotiation in the city of Boston's jurisdiction mainly from a socio-political perspective, Vogel attributes the origin of plea and sentence negotiation to matters relating to violations of property and personal security in the 1830s and 1840s. In one decade alone guilty pleas grew

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[705] For a brief discussion on the origins of and reasons for plea negotiation in the United States see Bekker (1996) *CILSA* 178-181.

[706] I Abdullahi "Plea Bargaining in the United States of America: A Model for Nigeria's Criminal Justice System?" (2014) 2 4 *IJBLR* 99 103. On 22 June 1633 the Catholic Church decreed: "We order that by a public edict the book of Dialogues of Galileo Galilei be prohibited, and We condemn thee to the prison of this Holy Office during Our will and pleasure; and as a salutary penance We enjoin on thee that for the space of three years thou shalt recite once a week the Seven Penitential Psalms." History.com Staff "Galileo is convicted of heresy" (2009) *History.com* <http://www.history.com/this-day-in-history/galileo-is-convicted-of-heresy> (accessed 14-06-2017).

[707] DO Linder "Al Capone Trial (1931): An Account" *famous-trials* <http://famous-trials.com/alcapone/1474-home> (accessed 14-06-2017).

[708] On 30 July 1931 Judge Wilkerson rejected the sentence agreement of 2½ years. The full sentence was: 11 years' imprisonment, the payment of a fine of $50,000, and the court costs of $30,000. Additionally, Capone was ordered to pay $215,000 plus interest in respect of back taxes. DO Linder "Al Capone Trial (1931): An Account" *famous-trials* <http://famous-trials.com/alcapone/1474-home> and "Al Capone Trial (1931): A Chronology" <http://famous-trials.com/alcapone/1475-chronology> (accessed 14-06-2017).

from 15% of all pleas in 1830 to 28,6% in 1840.[709] The remarkable phenomenon is that approximately 90% of convictions in the United States criminal justice system are due to guilty pleas, of which the majority represent guilty pleas arising from plea and sentence negotiation. This illustrates that plea and sentence agreements are the essence of the United States criminal justice system.[710] Vogel attributes the extraordinary growth and entrenchment of plea negotiation in the nineteenth century in the United States criminal justice system to various social and political factors, such as common-law leniency granted by the judicial officers, and the influence of the religious practices of admonition and pardon.[711] Vogel further argues that in the 1830s and the decade thereafter, Boston experienced a substantial growth in industrialisation, which together with the inflow of immigrants from Europe and the consequent turbulence in society, caused a rise in crime and criminal charges. These elements required legal reform and consequently the lower courts were introduced, judges became more influential and plea negotiation, building upon the practice of leniency, was granted an opportunity as "a unique innovation in lawyerly practice".[712] Moreover, plea negotiation also granted benefits to the different actors in the legal process. The discretionary powers of the judiciary, particularly with regard to sentencing, were endorsed[713] and gradually the negotiating powers of the prosecution were strengthened.[714] Meanwhile, the defendant had the benefits of the finality of a case, lower court costs and concessions in sentencing.[715] It may be concluded that the evolution and remarkable growth of plea and sentence negotiation in the United States is due to various factors, including political, social, economic and legal factors. Today plea and sentence negotiation is absolutely

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[709] ME Vogel *Coercion to Compromise: Plea Bargaining the Courts and the Making of Political Authority* (2007) 93 and 95.

[710] Vogel *Coercion to Compromise* 3.

[711] Vogel *Coercion to Compromise* 133-140, 140-145.

[712] Vogel *Coercion to Compromise* 170, also 147-173. Vogel also argues that a weak central government system that led to strong local administration of courts and politically partisan appointed officers of the court were also factors that contributed to the rise in plea negotiation. Vogel *Coercion to Compromise* 179-183.

[713] Vogel *Coercion to Compromise* 176, 184-185.

[714] Vogel *Coercion to Compromise* 185.

[715] Vogel *Coercion to Compromise* 186-187. Defendants were usually ordered to pay the costs of the court and such costs were invariably far more than the fine imposed.

entrenched in the United States criminal justice system, and it prevails as the dominantly used but still complex phenomenon. But what is plea and sentence negotiation?

A comprehensive legal definition of plea negotiation is elusive.[716] In the operational context plea negotiation extends to sentence negotiation as well, and is also subject to the decision of the court.[717] This is understandable as plea negotiation is a compound. As a composite concept, it includes charge negotiation and sentence negotiation. This is underlined in *United States v Hyde*[718] when the Supreme Court held that the plea by the defendant and the plea agreement are not a single unit, but are two separate aspects in the criminal justice process.

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[716] Various definitions are given in the SALRC *Project 73 Discussion Paper 94 Simplification of Criminal Procedure (Sentence Agreements)* (2001) paras 2.3-2.6. Kerscher in his thesis illustrates this difficulty and provides several definitions used in South Africa, the United States and Canada. Kerscher *Plea Bargaining* 2-4. Also see Rodgers *The Role of the Victim* 14-15; Bekker (2001) 34 *CILSA* 310-311. In an earlier paper, Bekker gave a more detailed discussion of the various meanings of plea bargaining, and what is understood by "charge bargaining", "sentence bargaining" and "concessions" and concluded with this helpful description: "The typical plea bargaining situation is, therefore, that the prosecutor initiates the agreement with an offer to drop some of the charges against the defendant or to make a favourable sentence recommendation to the court in exchange for the defendant's guilty plea to a lesser offence." Bekker (1996) *CILSA* 172-177.

[717] In this dissertation the terms "plea negotiation" and "plea and sentencing negotiation", as well as "plea agreement" and "plea and sentencing agreement" are used interchangeably. However, a distinction is specifically highlighted in section 4 4 2 2 when discussing plea negotiation and plea and sentencing negotiation in South Africa as two different procedures.

[718] 520 US 670 (1997). In this case the defendant who was charged with several fraud charges, had consequent to plea negotiations, agreed to enter a plea of guilty to four charges whilst the state agreed to drop the remaining charges and not to pursue additional fraud charges against him. After an intensive enquiry into the circumstances, the court accepted the defendant's plea of guilty on the four charges. However, when the matter came before the court again a month later for the court to consider the plea agreement the defendant applied to have his pleas of guilty withdrawn as he maintained they were made under duress. The Supreme Court found that the different parts of Rule 11 do not suggest that the pleas of guilty and the plea agreements are a single unit, but that they are distinct and separate steps in the criminal justice process (at 674-678).

From another angle, plea negotiation involves a waiver of multiple rights by the defendant and the making of multiple concessions by the prosecution, [719] and may simply be described as:

> "the process where the prosecution makes certain concessions (either with regard to the charge or sentence) in return for the accused pleading guilty to a charge (often a "lesser" or included offence)".[720]

Importantly, plea negotiation requires the involvement of the court in the process as the court needs to approve the plea and sentence agreements reached between the prosecution and the defence. The court also needs to ensure the integrity of the process and, as will be shown, the court needs to satisfy itself of a number of issues, including the fact that the defendant understands the process and has given her or his consent voluntarily. The complexity of this process is illustrated by the amount of litigation and the number of academic articles that have been written over the past number of decades on the interpretation of the law of plea negotiation, including topics such as the waiver of the defendant's rights, the power of the prosecutor and the discretion of the court.

Interestingly, neither in the United States or South African legislation dealing with "plea bargaining" does the word "bargain" appear.[721] However, it has been used by the courts. Msimang J used the following definition in *S v Armugga:*[722]

> "[P]lea bargaining can be defined as the procedure whereby the accused person relinquishes his right to go to trial in exchange for a reduction in sentence. As the term itself connotes, the system involves bargaining on both sides, the accused bargaining away his right to go to trial, in exchange for a reduced sentence and the prosecutor bargaining away the possibility of a conviction [on a more serious charge], in exchange for a punishment which he or she feels would be retributively just and cost the least in terms of the allocation of resources."

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[719] Bekker (2001) *CILSA* 313-314.

[720] AM Anderson "Alternative Disposal of Criminal Cases by the Prosecutor: Comparing the Netherlands and South Africa" *UvA-DARE (Digital Academic Repository)* (2014) 100 116.

[721] In s 105A of the CPA, the words "plea and sentence agreement", the verb "negotiate" and the nouns "negotiation(s)" and "agreement" are used. Compare, Rule 11(C) of the Federal Rules of Criminal Procedure of the United States, in which the words "plea agreement" are used, together with words such as "discuss" and "reach plea agreement".

[722] 2005 2 SACR 259 (N) 265A-B; followed by *S v Nel* 2008 JDR 0170 (W) para 10(b).

It is helpful to distinguish between formal and informal plea negotiation.[723] Formal plea negotiation is an institutionalised and legislated process, like the complex plea negotiation regulations, read together with the US Sentencing Guidelines of the United States federal criminal justice system. Informal plea negotiation involves informal discussions, primarily between the accused or the accused's legal representative and the prosecutor, with the purpose of the accused entering a guilty plea in exchange for some form of concession. Both formal and informal plea negotiations thus share characteristics such as concessions related to lesser charges and smaller sentences against the accused, withdrawal of charges against a third party or agreement by the accused to testify as a state witness against another party. Formal plea negotiation happens strictly in accordance with the prescribed legislation, rules and guidelines. Therefore, the difference lies not so much in the "what" as in the "how". The "what" that may be negotiated is expansive and as Uijs AJ noted in *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)*("*North Western Dense Concrete*"): "the permutations of what may be negotiated and ultimately agreed on are virtually infinite."[724] The complexity and nature of plea negotiation will be discussed below, with reference to formal plea negotiation in the United States and then to plea negotiation in South Africa.

4 4 2 1 Mechanism of plea and sentencing agreements in the United States federal criminal justice system

Plea negotiation is provided for in Rule 11(c) of the Federal Rules of Criminal Procedure of the United States,[725] which makes provision for three types of plea

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[723] Andersen (2014) *UvA-DARE* 117.

[724] 1999 2 SACR 699 (C) 673 I. For a list of possible types of agreements see E Steyn "Plea Bargaining in South Africa: Current Concerns and Future Prospects" (2008) 20 *SACJ* 206 211.

[725] This is not the only provision relating to plea negotiation in the United States, which has a complex federal criminal legal system, but it may be said to be the primary federal provision. Rule 11(c) provides as follows: "Plea Agreement Procedure.
(1) *In General*. An Attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach [a] plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to

agreement.[726] Rule 11(c)(1)(A) provides for so-called Type A agreements[727] whereby the prosecution and the defence negotiate regarding the charges the defendant was charged with at arraignment. The negotiation process involves the defendant pleading guilty to a lesser or related charge, or the prosecution undertaking to apply for the dismissal of some of the charges on condition that the accused pleads guilty to others. Rule 11(c)(1)(B) provides for Type B agreements which represent cases where the prosecution and defence negotiate and present the court with a sentencing agreement recommended by the prosecution or requested by the defendant. The court has the discretion to accept, reject or amend the sentencing agreement. In terms of a Type B recommended sentence the court is obliged to inform defendants that they will have no right to withdraw their pleas, should the court not accept the sentence.[728] Rule 11(c)(1)(C) provides for a fixed sentencing agreement, a Type C Agreement, which the court has to accept or reject, but cannot alter. The court has to advise the defendant whether it accepts or rejects the plea and sentencing agreement of a Type A or Type C agreement.[729] In the event of the

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either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
(A) not bring, or will move to dismiss, other charges;
(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or
(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)."
Federal Rules of Criminal Procedure > Title IV. > Arraignment and Preparation for Trial > Rule 11. Pleas <https://www.law.cornell.edu/rules/frcrmp/rule_11> (accessed 23-05-2017).

[726] It is to be noted that "plea agreement" is the term used by the United States legislature and may include agreements regarding both the plea and sentencing of an accused.

[727] The technical terms Type A, Type B and Type C are used in practice by the DOJ and courts.

[728] Rule 11(c)(3)(B). For a brief discussion of these different types of sentence agreements, see Bekker (1996) *CILSA* 194.

[729] Rule 11(c)(3) of the Federal Rules of Criminal Procedure Title IV "Arraignment and Preparation for Trial and Notes". The court may also defer a decision until it has reviewed

court rejecting the plea and sentence agreement, the court also has to advise the defendant that she or he has an opportunity to withdraw her or his plea, and further to warn the defendant that such withdrawal may lead to a less favourable outcome than that agreed on in the plea and sentencing agreement.[730]

Notably, in the United States, a plea agreement may be negotiated and entered into with the defendant directly,[731] whilst section 105A(1)(a) of the Criminal Procedure Act, South Africa provides that such an agreement may only be concluded with a legally represented defendant.[732]

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the pre-sentence report. Indeed, the practice is that such a report is first reviewed before a court makes its final decision.

[730] Rule 11(c)(5) of the Federal Rules of Criminal Procedure Title IV "Arraignment and Preparation for Trial". For example, the accused may be charged with five counts of fraud. The plea agreement provides that the accused pleads guilty to one charge of fraud and the prosecution agrees to withdraw the other charges. In a Type A plea agreement, the court may not accept the plea of guilty to one charge of fraud, and the agreed withdrawal of the other charges of fraud and consequently reject the plea agreement. The court needs to inform the accused that it rejects the plea agreement and to warn the accused that a court may find him or her guilty of more than one count. The same provision applies if the court rejects the sentence that the parties agreed to in a Type A or Type C agreement.

[731] Rule 11(c)(1) of the Federal Rules of Criminal Procedure Title IV "Arraignment and Preparation for Trial". In South Africa, the draft plea and sentencing agreement provisions contained in the SALRC *Project 73: Fourth Interim Report Simplification of Criminal Procedure (Sentence Agreements)* provided for plea negotiation to occur with an unrepresented or represented accused (proposed s 111A(1)(a)), but ultimately the legislature stipulated that plea and sentence negotiations can only occur with represented accused persons See too Bekker (2001) *CILSA* 319-320. For a brief discussion on representation of defendants in the United States see Bekker (1996) *CILSA* 202-205.

[732] However, several rules in the United States help to protect the defendant: Rule 11(b)(1) of the Federal Rules of Criminal Procedure, Title IV, ensure that the court places the defendant under oath and advises her or him of various issues. Furthermore, Rule 11(b)(2) mandates a court to ensure that the plea has been made voluntarily. Rule 11(b)(1)(D) mandates a court to inform a defendant that she or he has a right to legal representation and further to enquire specifically if an unrepresented accused entering a plea of guilty does so in terms of a plea agreement or not. The rule further mandates the court to ensure that the plea is in the best interests not only of the defendant but also of the administration of justice. In practice, most defendants are legally represented. See Notes on Rule 11 <https://www.law.cornell.edu/rules/frcrmp/rule_11> (accessed 23-05-2017). For a brief discussion on the representation of the accused in plea negotiations in South Africa, see Bekker (2001) *CILSA* 318-320.

The constitutionality of plea negotiation was confirmed in *Brady v United States*:[733]

> "But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial — a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[734]

The essence of the constitutionality of plea negotiation in the United States is waiver. The defendant waives her or his right "to a trial before a jury or a judge".[735] This right and other related rights are primarily codified in the Fifth[736] and Sixth Amendments[737] of the Constitution of the United States. Importantly, through such

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[733] 397 US 742 (1970). In this case the appellant Brady had been charged with kidnapping and not releasing the victim unharmed. The maximum penalty for this charge in terms of the law was the death penalty. Upon hearing that his co-accused was pleading guilty, Brady changed his original plea of not guilty to guilty. Thereafter, Brady appealed to the Supreme Court on the basis that he had been coerced into a plea of guilty by the sentencing statute providing that the court may impose the death penalty. The issue was thus whether his plea of guilty had been given voluntarily or not.

[734] *Brady v United States* 397 US 742 748 (1970). Similarly, a South African High Court in *S v De Goede* WCC 30-11-2012 case no. 121151 held: "The mandatory provisions contained in section 105A provide protection to the accused person who has, by virtue of entering into a plea and sentence agreement, waived his or her rights in terms of section 35(3) of the Constitution to a public trial before an ordinary court and to be presumed innocent[,] in return for agreeing to both plea and sentence. Consequently adherence to the provisions of section 105A provides an appropriate check and balance against the abuse of the plea bargain process in the context of the waiver of the accused's constitutional rights." (para 12). Also see *S v Solomons* 2005 2 SACR 432 (C) para 7.

[735] *Brady v United States* 397 US 742 748 (1970).

[736] Amendment V reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."<https://www.law.cornell.edu/constitution/fifth_amendment> (accessed 7-06-2017).

[737] Amendment VI reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to

waivers of their constitutional trial rights, defendants do not waive a single right, but a number of constitutional rights.[738] In addition to the waiver of the right to a trial before a jury or judge, the defendant has other constitutional rights, such as the right to confront the prosecution's witnesses, including through cross-examination, which is waived, as is the right to have the prosecution prove its case beyond a reasonable doubt.[739] In *United States v Andrades*[740] Pooler J held:

> "A criminal defendant's plea of guilty is perhaps the law's most significant waiver of constitutional rights, and district courts must not accept this waiver lightly."

The importance of constitutional rights prevails after the proper acceptance of a guilty plea, and also applies during the sentencing of a defendant. For example, the significance of the right to have the state prove beyond a reasonable doubt the facts upon which a sentence is based, is the subject matter of the law-changing *Booker* case, discussed below.[741] *Santobello v New York*[742] ("*Santobello* case") is a

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be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." <https://www.law.cornell.edu/constitution/sixth_amendment> (accessed 7-06-2017).

[738] Interestingly, the waiving of rights is the foundation upon which Gilchrist proposes "trial bargaining". Trial bargaining is a modification of plea bargaining, that retains some form of adjudicative trial. Trial bargaining, Gilchrist describes, is the limited and gradual waiver of rights by the defendant. This includes, the waiving of the right to a maximum number of jurors, waiving the right to remain silent and waiving the privilege not to self-incriminate. It may also include negotiating the change in prescribed time limits, agreeing on the number of witnesses and making evidentiary concessions. GM Gilchrist "Trial Bargaining" (2016) 101 *Iowa L Rev* 609 617-628.

[739] Gilchrist (2016) *Iowa L Rev* 614, 617-618.

[740] 169 Fed 3d 131 (2d Cir 1999). In this case the defendant had pleaded guilty to a charge of conspiracy regarding the distribution of cocaine. The court found that the district court had not complied with Rule 11(f), which requires that the court must ensure that the defendant *understands the nature of the plea* (writer's emphasis). Accordingly, the guilty plea was set aside.

[741] *United States v Booker* 543 US 220 (2005). See fn 764.

[742] 404 US 257 92 S Ct 495 30 L Ed 2d 427 (1971). This case reached the United States Supreme Court as the defendant, subsequent to plea negotiations, agreed to plead guilty to a lesser charge on the basis that the prosecutor would make no recommendation regarding sentence. There were several delays in the prosecutorial process and in bringing the plea agreement before the court. A subsequent prosecutor reneged on the former undertaking by

significant case in the plea agreement system of the United States as it acknowledges that plea agreements are an integral part of the criminal justice system and should be encouraged on condition plea discussions and consequent plea agreements are done properly and in fairly.[743] This case shows that the issue of plea negotiation and consequent plea agreements is complex and that the nature of plea agreements in the criminal justice system is not only an expedient to lighten the load of the prosecution and the courts' timetable, but, according to Chief Justice Burger, also "highly desirable" as it serves justice in that criminal cases are disposed of promptly, protects the public from criminals, spares criminals from lengthy pre-trial confinement and augments the rehabilitative prospects of the convicted.[744]

Plea negotiation, although undertaken by nine out of ten defendants, is said to be coercive.[745] It results in many controversies and complexities: particularly with regard to the powerful position of the prosecution, and concomitantly the weaker position of the jury and judge; the inconsistencies regarding sentencing and the subsequent risks the defendant faces. Gilchrist categorises the issues related to plea negotiation under "the innocence problem, the jury problem, and the narrative problem".[746]

The innocence problem is a systemic problem. In short, the institutional system of plea negotiation is an incentive to plead guilty, and is offered to both the guilty and the innocent.[747] In the light of the difficulties of exercising one's constitutional right of being held to be innocent until proven otherwise, the innocent are coerced into entering a plea of guilty. Consequently, the guilty are at an advantage as they can negotiate to plead guilty to lesser charges. The innocence problem is primarily due to the power of the prosecution to negotiate the charges to be brought or not to be

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the prosecution and recommended the maximum permissible sentence of one year's imprisonment on this charge. In the best interests of justice, the Supreme Court remanded the case back to the state courts for further consideration.

[743] Notably, however, the statement that plea negotiation plays an invaluable role in the criminal justice system was made in the context of Chief Justice Burger highlighting the fact that a prosecutorial lapse, due to the heavy workload and understaffing of prosecutors, although understandable, is inexcusable. Properly administered, plea negotiations are to be encouraged: *Santobello* case 404 US 207 260.

[744] *Santobello* case 404 US 207 261.

[745] Gilchrist (2016) *Iowa L Rev* 631.

[746] Gilchrist (2016) *Iowa L Rev* 629.

[747] Gilchrist (2016) *Iowa L Rev* 629-630.

brought against the defendants.[748] It is also due to the risks the defendant faces in going to trial, particularly with regard to sentencing.

With regard to the jury problem, Gilchrist contends: "plea bargaining has very nearly killed the jury trial".[749] The deeper impact of the consequence of plea negotiation is the move from an adjudicative criminal justice system to a confessional system; and concurrent with this, the transfer of discretionary power from the judge and jury to the prosecutor. Gilchrist further maintains that plea negotiation silences defendants and that this precludes the stories of defendants from being heard, and consequently, the criminal justice system is weakened and undermined.[750] This is what he calls the narrative problem.[751] Gilchrist illustrates this by showing how little a defendant is required to speak in an open court during the presentation to the court of the plea agreement. This silencing of the defendant's voice he argues challenges the legitimacy of the criminal justice system, and further erodes compliance with the law.[752]

In the ensuing paragraphs, further attention will be given to two controversial issues innate to plea negotiation: the issue of sentencing and the position and role of the public prosecutor.

Sentencing, particularly with regard to white-collar crimes, has been the subject of criticism. Disparities between so-called soft sentences for persons convicted of white-collar crimes, which usually include brief imprisonment with substantial fines, in contrast to other crimes, such as theft by a blue-collar person, which will more often result in longer sentences of imprisonment. These discrepancies, pointedly those arising from the bias or leniency of judges, have been addressed by the United States legislature, and the sentencing guidelines on mandatory minimum or maximum sentences for white-collar crime have been systematically increased by

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[748] "The real impact of plea bargaining is not, however, that defendants who would likely be acquitted will nonetheless plead guilty; the real impact is in who gets charged." Gilchrist (2016) *Iowa L Rev* 634.

[749] Gilchrist (2016) *Iowa L Rev* 638.

[750] Gilchrist (2016) *Iowa L Rev* 642.

[751] Akin to this description is what Kemp calls the "didactic value" of a trial. As a didactic tool trials tell a story and contributes to the public conversation and debate, and subsequently enriches the criminal jurisprudence and the public welfare. Kemp (2014) *Stell LR* 436.

[752] Gilchrist (2016) *Iowa L Rev* 642-645.

the legislature in the United States over the past thirty years or so.[753] Sentencing in the United States is notoriously very complex and the Sentencing Commission has over the past three decades developed a complex table of sentencing, including different levels of charges, different criteria that need to be taken into account, such as the monetary value of the crime, the number of victims, and the skills and position of the defendant.[754] For the purposes of understanding the pivotal and influential role

[753] The Sentencing Commission's Guidelines introduced in 1984, became mandatory in 1987, and are regularly reviewed. For example, the Sentencing Commission raised sentences for theft and fraud in 1998 (Sentencing Guidelines for the United States Courts, 63 Fed Reg 65,982, 65,982-92 (Nov 30, 1998)); whilst in 2001 the Economic Crime Packages increased them further [Sentencing Guidelines for the United States Courts, 66 Fed Reg 30,512, 30,540 (06-06-2001)]; and subsequent to the ENRON saga the Sarbanes-Oxley Act of 2002 was promulgated on 30 July 2002, and mandated the Sentencing Commission to review the sentencing guidelines for white-collar crime. As a result the sentences were made heavier and more levels of economic crime were introduced regarding violations by corporate officers and directors relating to shares and securities (US Sentencing Guidelines Manual s 2B1.1(a), (b)(14) (2003) and Supplement to the 2002 Sentencing Guidelines Manual s 2B1.1(b)(1)(O), (P)(2003)). Also see Bibas "White-collar Crime and Plea Bargaining and Sentencing after *Booker*" (2005) 47 *Wm & Mary L Rev* 721 726-727; W Sloane "'Booker' After a Year: New Highs for Sentences, Guidelines Followed" (06-03-2006) *Carter Ledyard & Milburn LLP* <https://www.clm.com/publication.cfm?ID=88> (accessed 22-10-2018); Dervan (2007) *Okla L Rev* 459-462; D Richman "Federal White Collar Sentencing in the United States: A Work in Progress" (2013) 1 *Law & Contemp Probs* 53-55.

[754] This may be illustrated by the trial judge in the *United States v Olis* matter taking various so-called enhancement factors into account when considering the sentencing of Olis after conviction: "During sentencing, the district court determined the following facts: (1) Olis was responsible for an approximately $105 million loss to UCRS, which enhanced his base offense by twenty-six levels under the Sentencing Guidelines; (2) Olis's offense involved sophisticated means, requiring a two-level enhancement; (3) Olis used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, resulting in another two-level enhancement; and (4) Olis's scheme included fifty or more victims, requiring a four-level sentencing enhancement." None of these findings was proven beyond a reasonable doubt to the jury or admitted by Olis. Relying on these judge-found facts, and as mandated by the Sentencing Guidelines, the court calculated Olis's total offence level to be 40. Olis had no criminal history for purposes of the Sentencing Guidelines. These determinations yielded a sentencing range of 292 to 365 months in prison. The trial court, noting that it was "required to follow . . . the Federal Sentencing Guidelines," stated that it took "no pleasure in sentencing [Olis] to 292 months," but that it was the court's job "to follow the law." Notably, too the court's findings on the enhancements dramatically increased Olis's

of plea negotiation and the mechanism of sentencing in the United States for economic crime, a brief sketch of the development of sentencing in the United States is necessary.

In view of the inconsistency in sentencing, including the leniency shown towards white-collar criminals and the rare imprisonment of such individuals, Congress was compelled to introduce the Sentencing Reform Act of 1984[755] that established the United States Sentencing Commission ("USSC") and the USSC in turn drafted and approved the United States Sentencing Commission Guidelines ("US Sentencing Guidelines") that are promulgated by Congress. The establishment of the USSC and the US Sentencing Guidelines heralded a new era for sentencing processes in the United States criminal justice system and initiated heavy regulation of sentencing parameters. The consequence of this complicated regulation was the limitation of the discretion of judges in the sentencing process. Ironically, it simultaneously strengthened the bargaining powers of prosecutors in the plea bargaining process.[756] The result of the increase in such prosecution power was also the diminishment of the bargaining power and consequently cognisance of the constitutional rights of the defendant. A substantive review of sentencing, including a review of the US Sentencing Guidelines, was undertaken by the USSC towards the end of the

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sentencing range beyond the maximum sentence permitted on the facts found by the jury. The case was taken on appeal and the Court of Appeals remanded the case for resentencing, whereupon Olis' sentence of more than 24 years was reduced to 6 years. See *United States v Olis*, 429 F 3d 540, 541-545 (5th Cir 2005). Also see US Sentencing Guidelines Ch 5 Pt A; United States Sentencing Commission Departure and Variance Primer 2014 <www.ussc.gov/sites/default/files/pdf/.../primers/2014_Primer_Departure_Variance.pdf> (accessed 27-5-2017). For brief critical discussion of the US Sentencing Guidelines see Bekker (1996) *CILSA* 196-200. Also see the discussion below (fn 774).

[755] This forms part of the Comprehensive Crime Control Act of 1984 signed by President Reagan on the 12 October 1984. The part relating to sentencing reform is known as the Sentencing Reform Act of 1984. USSC "Introduction to the Sentencing Reform Act" (12-10-1984) 5 <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/chap1.pdf> (accessed 27-05-2017); Richman (2013) *Law & Contemp Probs* 55; Stappert (2004) *Vill L Rev* 695-697.

[756] Dervan (2007) *Okla L Rev* 465-467; Bekker (1996) *CILSA* 188-192, 198-199.

twentieth century and culminated in the 2001 Economic Crime Package.[757] Described as a milestone in the history of the USSC and the US Sentencing Guidelines, the 2001 Economic Crime Package substantially amended the prevailing US Sentencing Guidelines with regard to economic crime, by consolidating the sections on "theft" and "fraud";[758] revising the "loss table" and redefining "loss".[759] Ironically, at the same time in late 2001 the Enron implosion occurred which led to Government hastily taken action and promulgating the Sarbanes-Oxley Act of 2002 ("SOX") on 30 July 2002. It mandated the USSC to review the sentencing guidelines for white-collar crime within 180 days. Accordingly, the sentences were again increased and more levels of economic crime were introduced regarding violations by corporate officers and directors relating to shares and securities.[760] In a further attempt to control the powers of both the judges and the prosecution, Congress introduced the so-called PROTECT Act and various policy documents.[761] The

[757] Approved by the USSC in April 2001 and signed into law in November 2001 by President Bush.

[758] Now consolidated into s 2B1.1, which includes larceny, embezzlement, and other forms of theft; offences involving stolen property; property damage or destruction; fraud and deceit; forgery; offences involving altered or counterfeit instruments. US Sentencing Guidelines available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft_Property_Destruction_Fraud_FY15.pdf> (accessed 27-05-2017).

[759] FO Bowman III, "The 2001 Economic Crime Package: A Legislative History" (2000) 13 *Fed Sent R* 3 3; Richman (2013) *Law & Contemp Probs* 56.

[760] Remarkably, the previous amendment, the so called Economic Crimes Package had only recently been approved by the USSC in April 2001 and promulgated in November 2001 after more than six years of intensive consultation between government, the prosecution services, the judiciary, business and the public. It brought about the first major reformation of sentencing of economic crimes in the history of the more than then 15 year old US Sentencing Guidelines. Scarcely seven months later, the USSC was obliged to decree a further amendment. See too FO Bowman III, "The 2001 Econ Crime Package: A Legislative History" (2000) 13 *Fed Sent R* 3 3; Dervan (2007) *Okla L Rev* 454-460; Richman (2013) *Law & Contemp Probs* 55-57.

[761] Prosecution Remedies and Other Tools to End the Exploitation of Children Today Act of 2003. Title IV s 401 Sentencing Reform, which section is also known as the Feeney Amendment 2003, prohibited judges from departing downwards from sentence terms in the US Sentencing Guidelines, unless specifically permitted to do so in the US Sentencing Guidelines. Similarly, prosecutors were also prohibited from requesting or acceding to downward departures except in limited specifically authorised circumstances. See Memorandum from Attorney General John Ashcroft "Department Policy Concerning

Feeney Amendment[762] to the PROTECT Bill rightfully received much resistance and criticism and some prophesised that "(t)he Feeney Amendment is potentially a life sentence for judicial discretion and a death sentence for justice".[763]

Since then, the US Sentencing Guidelines have regularly been updated, but in 2005 the United States Supreme Court struck a blow to the efforts by Congress. *United States v Booker*[764] is a definitive case in the United States criminal justice system regarding sentencing and plea negotiation that effectively nullified the binding

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Charging Criminal Offenses, Disposition of Charges, and Sentencing" (22-09-2003) para D available at <https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm> (accessed 26-12-2018). See too Editor "Provisions of Original Feeney Amendment as Passed by House, March 27, 2003" (2003) 15 *Fed Sent R* 336-340 <http://www.jstor.org/stable/10.1525/fsr.2003.15.5.336> (accessed 27-05-2017); Dervan (2007) *Okla L Rev* 255-258.

[762] Named after the person, Representative Thomas Feeney from Florida, who proposed the amendment to the PROTECT Bill to the effect that that there should be a restriction on all downward departures from the Sentencing Guidelines. Stappert (2004) *Vill L Rev* 700-702.

[763] P Stappert "A Death Sentence for Justice: The Feeney Amendment Frustrates Federal Sentencing" (2004) 49 *Vill L Rev* 693 694. Stappert (2004) *Vill L Rev* 722 also records one judge, the Honourable John S Martin Jr, a federal district judge, resigning and lamenting his resignation: "For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice .... I no longer want to be part of our unjust criminal justice system."

[764] 543 US 220 (2005). In this case the defendant was convicted of possession of more than 50g of cocaine; as the jury found that he had 92.5g in his duffel bag. The US Sentencing Guideline required the court to impose a sentence between 210 and 262 months. The District Court Judge held a post-trial sentencing proceeding and found on the preponderance of evidence that the defendant had 566gm of additional cocaine on him and that he had obstructed justice. In such circumstances, the US Sentencing Guidelines required a sentence of between 360 months and life. The judge imposed a sentence of 30 years. The defendant appealed to the Supreme Court on the basis that his Amendment VI Constitutional rights had been violated; and the Supreme Court had to answer the question: "Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant." See *United States v Booker* 543 US 220, 229 (2005). The Supreme Court confirmed that the statutory maximums a judge may apply are those that "solely relate to the facts reflected in the jury verdict or admitted by the defendant". See the *Booker* case 220, 227-228, 236, 245.

force of the statutory US Sentencing Guidelines. The Supreme Court found that the US Sentencing Guidelines were unconstitutional as the guidelines were used to invoke the maximum sentences prescribed by the US Sentencing Guidelines based on facts, not proven beyond a reasonable doubt to a jury, nor admitted by a defendant. Effectually, therefore, the US Sentencing Guidelines since the *Booker* case carry an advisory, as opposed to a mandatory effect.[765] Indeed, within three decades, the sentencing of white-collar crime offenders seems to have come full circle. The discretion has been handed back to the judiciary, who are now mandated by the general statutory sentencing provisions and only guided by the US Sentencing Guidelines.[766]

A brief enquiry into the trends in the sentencing of economic crime show that neither the increased regulation, including higher sentences, nor the *Booker* case seem to have had a pointed effect upon the sentencing of economic crime, and as before over the past three decades, sentences are inclined to be significantly below the US Sentencing Guidelines. Dervan illustrates over the ten-year period between 1995 and 2006 that actual sentences have not significantly increased for financial crime in the post-Enron era despite the increased prescribed sentences and the rhetoric of government.[767] Recent statistics from the USSC also show that the departures from the US Sentencing Guidelines remain high, and that more than half of the sentences in the fiscal year 2015 departed downwards from the US

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[765] "So modified, the federal sentencing statute, see Sentencing Reform Act of 1984 (Sentencing Act), as amended, 18 USC s 3551*et seq.*, 28 USC s 991 *et seq.*, makes the US Sentencing Guidelines *effectively advisory*" (writer's emphasis). It requires a sentencing court to consider US Sentencing Guidelines ranges, see 18 USC s 3553(a)(4)(Supp. IV), but it also permits the court to tailor the sentence in the light of other statutory concerns as well, see s 3553(a). *United States v Booker* 543 US 220, 245-46 (2005). Also see S Bibas "White-collar Crime and Plea Bargaining and Sentencing after *Booker*" (2005) 47 *Wm & Mary L Rev* 721, 722; W Sloane "'Booker' After a Year: New Highs for Sentences, Guidelines Followed" (06-03-2006) *Carter Ledyard & Milburn LLP <http://www.clm.com/publication.cfm?ID=88>* (accessed 24-05-2017).

[766] Richman (2013) *Law & Contemp Probs* 73.

[767] The average sentence for fraud increased slightly from 14 months to 14.85 months from 2001 to 2003; while only the sentences for the crimes of mail and wire fraud increased significantly from an average of 22-24 months to 30 months for the same period. Dervan (2007) *Okla L Rev* 471-474.

Sentencing Guidelines.[768] Neither has the length of imposed sentences increased notably.[769] Departure due to government sponsorship[770] is significant and this illustrates the plea negotiation power of the prosecution.[771]

The disparity in sentencing increases when comparing sentences imposed as part of plea negotiation and those imposed after a successful conviction in a trial process. This is due to the coercive nature of plea bargaining, which some say may be attributed to the bargaining power of the prosecution.[772] Others contend that it may be due to the so-called trial-penalty, the substantial difference between sentences imposed on persons convicted as part of the plea bargaining process, and those

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[768] USSC "Quick Facts Theft, Destruction of Property and Fraud Offences" *USSC* <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft_Property_Destruction_Fraud_FY15.pdf> (accessed 07-01-2019).

[769] For example, in 2015 more than two-thirds (69.8%) of economic crime offenders were sentenced to an average of 24 months imprisonment, a slight increase from an average of 22 months in 2011. This should be measured against the average of the US Sentencing Guideline's minimum sentence for the same offences having increased from 27 months to 34 months during the same period. In effect, during the five-year period, 2011-2015, the number of imposed sentences falling within the US Sentencing Guideline's range of sentences thus declined from 54.4% in 2011 to 42.4% in 2015, with most falling below the minimum guideline. For a detailed summary see USSC "Quick Facts Theft, Destruction of Property and Fraud Offences" *USSC* <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft_Property_Destruction_Fraud_FY15.pdf> (accessed 27-05-2017).

[770] This includes plea agreements, early plea, waiver of indictment or appeal and other government motions and savings. USSC *Quarterly Report Fiscal Year 2016* A-3 (available at <https://www.ussc.gov/sites/default/.../USSC-2016_Quarterly_Report_Final.pdf> *(accessed 5-09-2017).*

[771] Although the majority of securities and investment fraud offenders (88.1%) were sentenced to imprisonment; the average sentence for such offenders decreased during the three years 2013 to 2015 to 57 months, despite the US Sentencing Guidelines average minimum sentence having increased to 107 months. Notably between one-fourth to one-third of securities and investment fraud offenders received a sentence below the applicable guideline range because the government sponsored the below range sentence, while offenders received an average reduction of 64.7% in their sentence during the same three-year time period. Also see Dervan (2007) *Okla L Rev* 477-478 who attributes this trend to the increased leverage granted to the prosecutors by the Sentencing Guidelines, SOX and other regulations. The same trend is evident in the 2016 fiscal year. See USSC *Quarterly Report Fiscal Year 2016* 23, 25, 29.

[772] Dervan (2007) *Okla L Rev* 481-483.

convicted after trial.[773] This disparity raises distinct problems in white-collar crime cases, not only for individuals charged, but also for the companies involved. This is illustrated by the different sentences received by individuals involved in the Dynegy saga[774] and the consequences for the respective companies and their employees in the *Arthur Andersen LLP*[775] and *KPMG*[776] cases.

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[773] Dervan argues that the legislative reforms have in fact not only increased the bargaining power of the prosecution in the plea negotiation process, but also their influence in determining post-trial sentences. Dervan (2007) *Okla L Rev* 483, 483-488.

[774] In the Dynegy scandal, senior management contrived "Project Alpha" which was to show a $300 million loan as money derived from business operations. Three persons were indicted, Jamie Olis, then Senior Director of Tax and Planning and International; his boss, Gene Foster, then Vice President Tax; and Helen Sharkey, an employee in the risk control and deal structure division. Foster and Sharkey entered into plea negotiations and plea agreements; while Olis exercised his constitutional right to go to trial. Subject to the then prevailing US Sentencing Guidelines, Foster and Sharkey were subject to sentences of a maximum of five years imprisonment for the charges to which they pleaded guilty. Yet Jamie Olis, who had been convicted after trial, faced imprisonment of more than 24 years. Foster was finally sentenced to 15 months imprisonment, three years' probation and a $1,000 fine; while Sharkey was sentenced to 30 days imprisonment and a $10,000 fine. After going on appeal, Olis' sentence was reduced to six years imprisonment. See Bibas (2005) *Wm & Mary L Rev* 721 727-728; W Sloane "'Booker' After a Year: New Highs for Sentences, Guidelines Followed" (6-03- 2006) *Carter Ledyard & Milburn LLP* <http://www.clm.com/publication.cfm?ID=88> (accessed 24-05-2017); S Taub "Ex-Dynegy Finance Pair Get Prison Terms" (06-01-2006) *CFO* <http://ww2.cfo.com/risk-compliance/2006/01/ex-dynegy-finance-pair-get-prison-terms/> (accessed 24-05-2017); ES Podgor "White Collar Innocence: Irrelevant in the High Stakes Risk Game" (2010) 85 *Chi Kent L Rev* 77 81-82.

[775] *Arthur Andersen LLP v United States* 544 US 696 (2005). In this case, the company, an auditing and accounting firm, was initially found guilty by a jury after a trial of destroying documents (related to the infamous Enron case), and then fined $500,000 and placed on probation for 5 years. The conviction was finally reversed on appeal. However, consequent to the initial conviction, the firm lost the ability to audit public companies and subsequently became insolvent. As a consquence more than 28,000 employees in America lost their work. For a detailed discussion, see ES Podgor (2010) *Chi Kent L Rev* 79.

[776] KPMG faced charges relating to defrauding the US government, tax evasion and fraud. KPMG chose to enter into plea negotiations with the prosecution and concluded a deferred prosecution agreement. In terms of this, their prosecution was deferred and they paid $458 million, including a fine, restitution and penalties to the IRS. Compliance with the terms of the agreement meant KPMG were not prosecuted as originally charged. Significantly, however, the firm could continue to work and audit public companies (the deferred prosecution

The powerful influence prosecutors have over economic crime and plea negotiation is illustrated by Dervan, who argued that statistics showed that several years after the Enron saga and substantial legislative and policy reform, the number of defendants that pleaded guilty with regard to economic crime, as part of plea negotiation, remained above 95%.[777] Dervan argued that this was because the legislative and policy reforms had actually increased the bargaining power of the prosecutors; and also their influence over sentences. Thus they are able to forcibly bargain and secure guilty pleas from defendants.[778] Interestingly, Richman argues that this leverage for prosecutors is necessary to secure the cooperation of defendants and, accordingly, to obtain information about offences relating to economic crime.[779]

Furthermore, it is to be remembered that the prevalence of plea negotiations are due to a number of benefits. Almost 50 years ago, in the *Brady* case when the constitutionality of plea negotiation was confirmed, the court acknowledged that one of the benefits of plea negotiation for the defendant was the probability of a lesser penalty.[780] Moreover, the court touched upon the mutuality of benefits for the state and for the defendant. Benefits for the defendant include not only the likely reduction in sentence, but also the limitation of exposure, the elimination of the burden of a trial and the immediate commencement of correctional processes.[781] Benefits for the state include prompt conviction and sentencing that may be more effective in achieving the objectives of sentencing, while the resources saved can be applied to

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agreement specifically provided that they could continue to audit the Department of Justice's financial statements!), enabling KPMG to remain viable and its employees to retain their jobs. The DPA between KPMG and the US Dep Jus (NYSD) is available at <http://fs.monadnockresearch.com/pubfiles/KPMG_2005_Deferred_Prosecution_Agreement.pdf>; ES Podgor" (2010) *Chi Kent L Rev* 80.

[777] Dervan (2007) *Okla L Rev* 477-478; Dervan (2010) *Ga St U L Rev* 244-245. Bekker reminds his readers that the position of the public prosecutor in the United States is a political position, and needs to be distinguished from the positon of the public prosecutor in South Africa. Bekker (1996) *CILSA* 185-187.

[778] As Dervan ((2007) *Okla L Rev* 478, 483-488) says: "The history of plea bargaining's growth is the history of prosecutors gaining increased leverage to bargain." Also see Stappert (2004) *Vill L Rev* 700-701.

[779] Richman (2013) *Law & Contemp Probs* 67-68.

[780] *Brady v United States* 397 US 742 751 & 752 (1970).

[781] *Brady v United States* 397 US 742 751-752 (1970).

other cases.[782] Interestingly, economic crime does not constitute a high proportion of prosecuted crime in the United States, but has consistently been around a tenth of the total of all prosecuted crime.[783] Nevertheless, economic crime remains an issue of high political relevance and public concern and it is likely that Congress will continue to regulate the sentencing of convictions by regularly increasing the guideline sentences of the US Sentencing Guidelines, despite the departures from it. Moreover, the sentencing of economic crime in practice is likely to remain inconsistent and unstable.[784] The disparities in sentences, particular with regard to persons convicted after a plea negotiation process compared to those convicted after a trial, remain cause for concern.

Podgor[785] rightfully warns against the consequences for the corporate world and the high risk in pleading innocent and going to trial. The dire consequences, for both employees and for the company, of proceeding to trial are simply not worth the risk. Consequently, companies and individuals may enter into plea negotiation and plea agreements, despite being innocent, as this is the path of least risk. This, of course, impacts upon the integrity of the criminal justice system. As Podgor states "[t]his

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[782] *Brady v United States* 397 US 742 751-752 (1970).

[783] In the fiscal year 2015, 7,543 of 71,003 offenders were economic offenders (primarily fraud), whilst in the fiscal year 2016, 6,517 fraud cases accounted for 9.6% of the total federal caseload of 67,742 cases, and other white-collar crime accounted for 3,3%. See USSC "Quick Facts Theft, Destruction of Property and Fraud Offences" *USSC*. In the fiscal year 2015, there were 218 securities and investment fraud offenders, who accounted for only 0.3% of all offenders sentenced under the Guidelines. The number of securities and investment fraud offenders decreased by 22.7% from fiscal years 2013 to 2015. The median loss for these offenses was $3,454,756, of which 2.6% involved loss amounts greater than $7 million; and 21.1% of involved loss amounts of $400,000 or less. See USSC "Quick Facts on Securities and Investment Fraud Offences" *USSC* <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Securities_Fraud_FY15.pdf> (accessed 27-05-2017); USSC *Quarterly Report Fiscal Year 2016* 1. Also see D Richman "Federal White Collar Sentencing in the United States: A Work in Progress" (2013) 1 *Law & Contemp Probs* 53. Others like Bowman state the ratio of economic offenders to be about a quarter, probably due to the different application of statistics. FO Bowman III, "The 2001 Econ. Crime Package: A Legislative History" (2000) 13 *Fed Sent Rep* 3.

[784] Richman (2013) *Law & Contemp Probs* 61.

[785] ES Podgor (2010) *Chi Kent L Rev* 88-87; Dervan LE (2007) 60 *Okla L Rev* 451 489.

means that innocence or guilt does not frame the judicial process in white-collar cases".[786]

The *Booker* case highlighted the complex relationship between the different role-players in the United States criminal justice system, including judges, the jury, Congress and, centrally, prosecutors. Bibas[787] discusses these intricate relationships and the convoluted operation of the United States prosecution and sentencing mechanism, illustrating the discretionary and negotiating powers that the various role-players and prosecutors, in particular, have. Under the United States criminal justice system, in which plea negotiation plays an integral and substantial role, prosecutors have incredible power as they can decide at which sentencing level a defendant is to be charged. They are able to decline or defer charges if the defendant offers restitution or civil settlement to the victims, and they can enter into non-prosecution and cooperation agreements. Notwithstanding the US Sentencing Guidelines, which before the *Brooker* case bound judges, prosecutors have always been able to manipulate the complex system.[788] Indeed, Bibas, himself a past prosecutor, states: "All of these avenues leave prosecutors with keys to the prison."[789]

The inordinate power and very broad discretion granted to the prosecutor during the plea negotiation process, which relate not only to the offences that the defendant is finally charged with, but also to the sentences that may be imposed upon the defendant, are controversial. It could be argued that the prosecutor in the conventional trial process has a wide discretion in any event, particularly with regard to the decision whether to prosecute or not. Prosecutorial power is by its very nature susceptible to abuse. It can also be argued that the courts inherently retain their discretion regarding sentencing; but this is only true up to a point and in some legal systems, such as the United States and South African criminal justice systems, the

[786] ES Podgor (2010) *Chi Kent L Rev* 87.

[787] S Bibas "White-collar Crime and Plea Bargaining and Sentencing after *Booker*" (2005) 47 3 *Wm & Mary L Rev* 721-741.

[788] Bibas (2005) *Wm & Mary L Rev* 729.

[789] Bibas (2005) *Wm & Mary L Rev* 729.

legislature has imposed minimum or maximum sentences in relation to certain crimes.[790]

The success or so-called triumph of plea negotiation is attributed to different causes. The administrative theory places such success at the door of the prosecution, and pertinently the prosecutorial power, in the plea negotiation process, as well as the prosecution's powerful influence over the actual sentence, whether it be with a plea of guilty or a guilty conviction after trial.[791] In short, the defendant has little, if any choice, but is coerced into accepting the plea negotiation process, as the alternative to proceeding to trial poses such high risks that it would simply be foolish to do so. A further theory is the shadow-of-trial theory, which postulates that both the prosecutor and defendant have power and influence, in that each of them computes the likely outcome of the case regarding conviction and sentence, should it proceed to trial. Such computations will determine whether or not the negotiation process will take place.[792] This theory is based on both parties, the defendant and the prosecution, realising that a guilty verdict is likely and thus entering plea negotiation secures benefits for each, primarily in reducing the time and costs involved in going to a lengthy trial. This shadow-of-trial theory is similar to the mutuality of benefits recognised by the court in the *Brady* case.[793] Dervan illustrates that the nature of plea negotiation is more complex, and that the different stages in the process, as well as some of the inherent and institutional benefits of the process, should be acknowledged and distinguished.[794] Dervan refers to what he calls "the unilateral bargain benefits" that are benefits inherent to the institution, and thus outside the power of the prosecution.[795] For example, the costs and shame avoided by the defendant by not going to trial, but choosing plea negotiation lie outside the domain of the prosecution. The possible leniency that may be given by the court to the defendant consequent to the cooperation given by the defendant in pleading

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[790] For example, the US Sentencing Guidelines, and s 51 of the South African of the Criminal Law Amendment Act 105 of 1997.

[791] LE Dervan "The Surprising Lessons from Plea Bargaining in the Shadow of Terror" (2010) 27 *Ga St U L Rev* 239 242, 246-250.

[792] Dervan (2010) *Ga St U L Rev* 242, 250-253.

[793] *Brady v United States* 397 US 742 751-752 (1970).

[794] Dervan (2010) *Ga St U L Rev* 253,

[795] Dervan (2010) *Ga St U L Rev* 257-259.

guilty.[796] The so-called bilateral plea bargaining benefits arise when plea negotiations between the prosecution and the defence commence. The benefits for and the bargaining power of the parties vary, depending on the nature of the charges, and the defendants themselves.[797] However, the prosecution does retain the power to make the ultimate decision regarding what charges will be brought and whether plea agreements are to be concluded or not.[798] Dervan proposes a benefit distribution theory.[799] This incorporates and modifies aspects of the opposing administrative and shadow-of-trial theories, highlighting the benefits available to each party and the process through which each party goes to weigh up and consider such benefits. Dervan concludes:

> "This is not a process where defendants are subjected to the whims of the government without any voice or participation, but rather a complex evaluation of the barriers to success at trial and the barriers to success of the plea bargain itself. Plea bargaining has triumphed, therefore, because the process effectively captures both parties' interests and resolves the conflict in a manner appealing to all but a handful of defendants."[800]

Plea negotiation is essential for the functioning of the United States criminal justice system due to its efficiency. Moreover, as acknowledged recently by the Supreme Court, it composes the central and major part of it:

> "Because ours 'is for the most part a system of pleas, not a system of trials', ... to a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It

[796] Dervan (2010) *Ga St U L Rev* 257-258, 292-295.

[797] Dervan (2010) *Ga St U L Rev* 266-267. For example, in the *KPMG* case, KPMG could bargain for the deferment of prosecution and the provision that it continue to audit public companies, including the Department of Justice's finances; whilst the prosecution negotiated a heavy financial payment related to restitution and penalties. Similarly, Sharkey negotiated for a higher fine to be paid immediately and a lesser sentence, which was later, pending her giving birth to twins, suspended and converted to home confinement. [Reference.]

[798] Dervan (2010) *Ga St U L Rev* 274.

[799] Dervan (2010) *Ga St U L Rev* 274.

[800] Dervan (2010) *Ga St U L Rev* 297.

> is not some adjunct to the criminal justice system; it is the criminal justice system."[801]

Plea negotiation will thus seemingly continue to triumph in the United States criminal justice system, despite the controversies and criticisms. Indeed, controversy is likely to continue, and whilst plea negotiation prevails as a model for effective and true justice, criticism too will endure, especially against the power and discretion of the prosecution and the disparity and inconsistency regarding sentencing. The so-called utilitarian arguments in support of plea negotiation as it is a cheaper and a faster system are likely to continue to be criticised for being against the principles of true justice. At worst, plea negotiation can be said to be a coercive confessional system that negates the pivotal principle of criminal justice – the innocence of the accused until proven guilty beyond a reasonable doubt. At best it is a model that grants benefits to all the parties, the accused, the prosecution, the courts and, consequently, also to the criminal justice system.

4 4 2 2 Mechanism of plea and sentencing agreements in the South African criminal justice system

In comparison, South Africa's use of plea negotiation is minimal. This may be because formal plea and sentencing negotiation is still a comparatively recent innovation, only having been incorporated into the Criminal Procedure Act 51 of 1977 ("the CPA") at the end of 2001.[802] The mechanism of formal plea and sentencing negotiation has thus formed part of the South African criminal justice system for the past 17 years. Although mooted as a "fundamental departure"[803] from the adversarial criminal justice system in South Africa, plea negotiation still plays a relatively small role in South Africa with a mere 0,08% of cases finalised in the

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[801] Justice Kennedy in *Missouri v Frye* 132 SCT 1399 1407 (2012), after confirming more than 95% of pleas of guilty are decided through plea bargaining. In this case the Supreme Court held that a defendant's 6th Amendment right to effective counsel assistance extends to the consideration of plea offers that lapse or are rejected. Also see Gilchrist (2016) *Iowa L Rev* 646.

[802] 14 December 2001 in terms of s 2 of the Criminal Procedure Second Amendment Act 62 of 2001.

[803] *Hiemstra Criminal Procedure15*-5; Rodgers (2010) *SACJ* 239.

criminal courts being concluded through plea agreements.[804] This compares poorly with other countries, such as the United States, where plea-negotiations and agreements constitute approximately 97% of the federal cases resolved.[805]

Some argue that informal plea negotiation has always been part of the South African criminal jurisprudence, and will remain so.[806] Indeed, a robust discussion of the reality of informal plea negotiation, before the incorporation of section 105(A) of the CPA is given by Uijs AJ in the *North Western Dense Concrete* case.[807] The primary instrument for informal plea negotiations is section 112 of the CPA dealing with guilty pleas, in particular sub-sections 112(2) and 112(3) of the CPA.[808] Thus, according to the NDPP's 2010 directive, section 105A is complementary to and is not an alternative to or a substitution for the established practice of the acceptance of a plea of guilty in terms of section 112 of the CPA.[809] Recently, the continued co-existence of the informal or common-law plea negotiation mechanism, alongside the formal section 105A plea negotiation structure, was confirmed by the court in *S v Phillips*[810] and *Van Heerden v Regional Court Magistrate, Paarl*.[811] Moreover the

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[804] Being 2,587 plea agreements representing 0,8% out of a total of 317,475 cases finalised in the 2017/2018 period. This was an increase of more than 30% from the previous year that recorded 1,988 agreements (NDPP *Annual Report* 2017/2018 37-38). In 2015/2016 there were 1,901 plea and sentence agreements out of a total of 310,850 cases finalised (NDPP *Annual Report* 2015/2016 33).

[805] JS Rakoff. "Why Innocent People Plead Guilty" 20-11- 2014. *The New York Review of Books* http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ (accessed 10-10-2016).

[806] W de Villiers "Section 105A of the Criminal Procedure Act: A Step Forward?" (2004) 37 *De Jure* 244 253; ME Bennun "Negotiated Pleas: Policy and Purposes" (2007) 20 *SAJC* 17 17; SALRC (2001) Discussion Paper 94 para 3.13; Bekker (2001) *CILSA* 315, 321, 324; Bekker (1996) *CILSA* 218; Clarke (1999) *CILSA* 141, 152-156.

[807] 1999 2 SACR 699 (C) 672H-678E. Also see *S v Yengeni* 2006 1 SACR 405 (T) para 65; *S v Armugga* 2005 2 SACR 259 (N) 262F-G.

[808] *North West Dense Concrete* 677C. For general discussion of informal plea discussions and negotiations, see Bekker (2001) *CILSA* 315-318.

[809] Directive 2 reads: "The procedure enacted in section 105A of the *Criminal Procedure Act, 1977* does not supplant the standard procedure for pleas of guilty in terms of section 112 of the Act. The established practice of accepting pleas of guilty on the basis of *bona fide* consensus reached, remains applicable. Section 105A of the Act is a complementary disposal mechanism."

[810] 2018 1 SACR 284 (WCC) paras 32-33 & 42.

courts have declared that section 112(2) of the Criminal Procedure should not be rendered nugatory, whilst section 105A plea and sentence agreements are encouraged.[812] A primary distinction between the two is that under section 112 the sentencing remains wholly at the discretion of the court, and the prosecutor only "undertakes to *recommend* that a reduced sentence be imposed or undertakes not to motivate for a harsher sentence" (court's emphasis). [813] In contrast, under section 105A, the court and the prosecutor are bound to facts agreed upon, and in the event the court does not agree that the sentence is just, there is a due process that needs to be followed.[814] Rodgers emphasises that the recognition of sentence agreements in the South African criminal justice system is the effective consequence of the introduction of section 105A.[815] Rodgers makes a further distinction between informal plea negotiation and agreement and formal plea agreements.[816] Rodgers

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[811] (883/2015) [2016] ZASCA 137 (29-09-2016) *SAFLII* <http://www.saflii.org/za/cases/ZASCA/2016/137.html> (accessed 17-01-2019) para 17.

[812] *S v Streak* 2009 JDR 0931 (NCK) case nr CA&R 21/2009 delivered on 18-09-2009 and extensively considered in *S v Asele* 2016 1 SACR 13 (NCK) para 13. In the latter case, the court clearly understood the need for the co-existence of plea negotiations in terms of s 112(2) and plea and sentence agreements in terms of s 105A of the CPA: "The State must therefore be vigilant not to render the provisions of s 112(3) of the Criminal Code nugatory or to tie the court's hands behind its back. … When the State and the defence intend to enter into plea-bargain proceedings in terms of s 105A of the Criminal Code they must go all the way to the sentencing phase and not stop at the verdict. Plea-bargaining is a specifically designed plea and sentence agreement to do justice and facilitate the disposal of cases, which must be encouraged" (para 13[6]). See also Rodgers (2010) SACJ 254.

[813] *S v Phillips* paras 40-41. The court stated in para 40: "And therein lies the fundamental principle which underpins s 105A: an accused is able to strike a bargain with the state regarding the sentence to be imposed and, once the court has sanctioned that sentence, he/she can tender a plea of guilty, safe in the knowledge that that very sentence will be imposed." See also *Van Heerden v Regional Magistrate, Paarl* para 17.

[814] S 105A(9)(a). Also see *S v Phillips* paras 40-41; *Van Heerden v Regional Magistrate, Paarl* para 17.

[815] Rodgers (2010) *SACJ* 255-257; Steyn (2007) *SACJ* 207; HJ Lubbe & GM Ferreira "The National Prosecuting Authority's Policy and Directives Relating to Post-Truth and Reconciliation Commission Prosecutions" (2008) 21 *SACJ* 151 158.

[816] Rodgers (2010) *SACJ* 240-244. In addition Rodgers (240) describes a number of different types of informal plea agreements, including an agreement on a lesser charge, for example pleading guilty to contravening a statutory regulation under the Banks Act, instead of fraud.

contends that section 112 regulates guilty pleas and not plea agreements.[817] There is no obligation upon the prosecution or the defence to advise the court of a plea agreement, like there is, for example, in terms of section 105A(4)(a) an obligation upon the prosecution to advise the court that there is a plea and sentence agreement. Plea negotiation in terms of section 112 remains largely unregulated and unmonitored. The prosecution and defence negotiate and agree on the facts to be placed before the court. There are no procedural rules that prescribe the process, and consequently no supervision or transparency of the process. The court does, however, retain the discretion to convict or not to convict on those facts, and to sentence accordingly.[818] Additional differences between informal and statutory plea negotiations are that the latter are more transparent due to the duty to disclose the conclusion[819] and the contents[820] of such an agreement to the court; neither of which are necessary under section 112. Furthermore, the process under section 105A is subject to the scrutiny and supervision of the court;[821] and this lends legitimacy to plea and sentence negotiation, but is not obligatory in informal plea negotiation.[822]

The proposals of the SALRC *Discussion Paper 94 (Project 73) "Simplification of Criminal Procedure (Sentence agreements)* (2001) ("SALRC *Project 73*") led to further studies and interim reports, and ultimately resulted in the amendment to the

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Another type could be where there are two accused, the plea agreement could be that one accused pleads guilty, whilst charges are withdrawn against the other.

[817] *North Western Dense Concrete CC* is judicial authority for the recognition of informal *plea* agreements, as the State was held bound to its agreement. Also see Rodgers (2010) *SACJ* 256.

[818] Rodgers (2010) SACJ 240, 243. Rodgers contends, for example, that the court would not have become aware of the agreement in *North Western Dense Concrete CC* had the state not reneged on its informal agreement.

[819] S 105A(4).

[820] S 105A(5).

[821] Including verification before the accused pleads that such agreement does indeed exist (s 105A(4)(a)(i)), and that the prosecutor has fulfilled the obligation of consultation with the investigating officer and afforded the victim an opportunity to make representations (s105(4)(a)(ii). The court also needs to scrutinise the plea agreement and ensure that the accused understands the admissions made and terms agreed upon, admits the charges and that she or he has done so freely and voluntarily (s 105(6)(a)(i)-(iii)). The court also needs to consider the sentence agreement and satisfy itself that it contains a just sentence (s 105A(7) and 105A(8). Also see Rodgers (2010) *SACJ* 250-254.

[822] Lubbe & Ferreira (2008) 21 *SACJ* 158.

CPA and the introduction by the legislature of section 105A in the CPA in December 2001.[823] Presently, the CPA makes provision for formal plea and sentence agreements in terms of section 105A,[824] which needs to be read together with the current directives issued by the NDPP in terms of section 105(A)(11).[825]

The positive position, purpose and an illustrative description of formal plea and sentencing process in South Africa is given by the Supreme Court in *S v DJ:*[826]

> "The purpose of the plea bargaining process is to afford the parties, in advance, an opportunity to make an informed decision regarding whether to agree to and abide by the agreement. This process entails consultation with all the people involved in the offence, the accused, the complainant, the victim and stakeholders which the prosecution deem relevant for the proper determination of the sentence. Evidently, once plea negotiations are entered into and, in the spirit of transparency, the accused will make his defence known to the State which will, in turn, make available the contents of its dockets to the accused. In that way both parties will have a fair idea of each other's case. The negotiations are conducted in the spirit of give and take[:] the accused will make certain concessions and if the State is satisfied with his explanation, it will then accept the negotiated plea on the basis of the available facts. There is no doubt that a properly negotiated plea will yield a result which is transparent to all the stakeholders and one that is in the interests of justice."

De Villiers[827] splits the process of plea negotiation in terms of section 105(A) into five stages. The first stage entails the negotiations between the parties regarding a plea and sentence agreement. The following three stages involve the court, which initially has to verify that all the requirements for a valid plea and sentencing agreement have been met; and which subsequently first considers the plea agreement and thereafter the sentencing agreement. The fifth stage covers the reporting and recordkeeping of pleas and sentencing agreements.

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[823] Rodgers (2010) *SACJ* 243-244.

[824] For a summary of the s 105A plea and sentence agreement process, see De Villiers (2004) *DJ* 244. Also see Rodgers (2010) *SACJ* 245-255; *Hiemstra Criminal Procedure* 15-3-15-10.

[825] The current directives were tabled in parliament on 22 October 2010.

[826] 2016 1 SACR 377 (SCA) para 16.

[827] De Villiers (2004) *DJ* 245.

The first stage of negotiation has to be between a duly authorised prosecutor[828] and a represented accused and involves reaching an agreement with regard to both the plea and sentence in terms of section 105A(1)(a) of the CPA.[829] There are three specific obligations upon the prosecutor.[830] The prosecutor needs to consult with the investigating officer,[831] exercise her or his discretion with regard to the appropriateness of a plea and sentence agreement in the light of certain factors,[832] and afford the complainant an opportunity to make representations.[833] Significantly the prosecutor's discretion in terms of the obligation to consult with the investigating

[828] A prosecutor authorised in writing by the National Director of Public Prosecutions ("NDPP") (s 105A(1)(a)). This provision must be read with Directive 6 which provides that an unauthorised prosecutor who receives a request for plea and sentence negotiations should refer the matter to an authorised prosecutor. Directive 7 further provides that a s 105A agreement may not be considered in cases which the NDPP or DPP has instructed should be prosecuted without the specific authorisation of the NDPP or relevant DPP. Directive 13 provides that only a DPP or a Deputy DPP may authorise a plea and sentence agreement which deviates from a prescribed minimum sentence. Also see *S v Sassin* (para 10) holding that such "proof of authority is an essential prerequisite for a plea agreement under sec. 105A"; followed by *S v Knight* 2017 2 SACR 583 (GP) where no certificate of authorisation by the NDPP had been handed in to the court, which constitutes an irregularity (paras 6-8 and 13-14). Also see Du Toit *Commentary on the CPA* 15-22 regarding the compliance with directives from the NDPP.

[829] Du Toit *Commentary on the CPA* emphasises that s 105A is only activated with regard to a plea *and* sentence agreement, not one or the other, but both. Also see Rodgers (2010) *SACJ* 256-257. One of the requirements that needs to be met during this stage of negotiation and concluding an agreement is that the agreement reached needs to be reduced to writing and signed by all the parties under s 105(A)(2). For examples of such plea and sentencing agreements, see *Maddock v S* WCHC 26-11-2010 *c*ase no. A641/2010, Exhibit A and *S v Madisha* 2016 JDR 0049 (GP) (para 22). In terms of directive 8 an agreement cannot be finalised before a report on the accused's previous convictions has been obtained. In terms of directive 9, special care needs to be taken in negotiating agreements in cases where there are multi-accused. For a detailed discussion of the process, see De Villiers (2004) *DJ* 245-248.

[830] For a discussion of these obligations, see Rodgers (2010) *SACJ* 245-247.

[831] S 105A(b)(i) read with s 105A(c).

[832] S 105A9b)(ii) includes the nature and circumstances of the offence, the personal circumstances of the accused, previous convictions and the interests of the community. This is not an exhaustive list of factors. See Du Toit *Commentary on the CPA* 15-10.

[833] S 105A(b)(iii).

officer and afford a complainant an opportunity to make representations is subject to the scrutiny of the court under section 105A(4)(a)(ii).[834]

The status of negotiations between the prosecutor and a represented accused was the subject of an application in *S v Phillips.*[835] In this the defence applied to hold the state bound to section 105A plea and sentencing negotiations before the finalisation of a section 105A plea and sentence agreement. The court recognised the co-existence of common law or pre-section 105A negotiations, but with regard to section 105A emphasised compliance with the structure of section 105A.[836] The court stated that the structure of the section 105A "reflects that the legislature contemplated an incremental approach as those negotiations proceeded, *safe in the knowledge that s 105A guarantees the parties an opportunity to resile from negotiations at the appropriate stage if either is dissatisfied with the outcome thereof*" (writer's emphasis). The court added that in terms of section 105A the contract needs to be in writing and "in accordance with the general principles of contract, the written agreement will be the parties' 'exclusive memorial'. Accordingly, any pre-contractual discussions will be of no force and effect once the written agreement is concluded in light of the parol evidence rule."[837]

The court went further and considered plea and sentence agreements in the light of public policy considerations, describing the nature of plea and sentence agreements, that it is a matter of give and take, an exercise in seeking consensus, of placing the plea and sentence agreement before the court for approval, and being afforded the opportunity to resile should the court not approve it.[838] The court declared that public policy considerations that underpin statutory plea and sentence

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[834] This point is discussed in more detail below.

[835] 2018 1 SACR 284 (WCC). In this case, there were negotiations between the prosecutor and the defence but no agreement had been reached for a number of reasons, including that the State was not satisfied with the admission by the defence and neither had the authorised DPP authorised the draft plea and sentence agreement. The defence applied to hold the State bound to the draft agreement arguing that it was a multi-phased process. The first phase being that the accused would plead guilty to culpable homicide, the second that the state and defence had agreed on a non-custodial sentence and the third that the charges of rape and murder would be withdrawn (para 29).

[836] *S v Phillips* paras 42 and 43.

[837] *S v Phillips* para 44.

[838] *S v Phillips* paras 45 to 46.

agreements would be offended should an accused, in a case where no final consensus was reached, be permitted to "hold the state to its initial willingness to explore a plea bargain, and so secure a partial concession by the state made during the negotiation process, is to permit the accused to choose those parts of the negotiations that are favourable to him in the absence of an adequate *quid pro quo* from his side."[839] *S v Phillips* clarifies that the status of negotiations under a section 105A mechanism is simply that negotiations have no force and effect unless reduced to writing as prescribed by section 105A(2).

An important feature of sub-section 105(A)(3) is that it precludes the court from participating in the negotiations. The court becomes involved in the second stage, that requires the verification of the negotiation and agreement process by the court in terms of sub-sections 105(A)(4) and (5). Specifically excluding the court from the negotiation stage ensures that the court will be able to give an independent and objective evaluation of the plea and sentencing agreement.[840] The court needs to find that the agreement is just and such "decision is made by the court independently of the parties to the agreement".[841] Importantly, the prosecutor has to inform the court before the accused is asked to plead that an agreement in terms of section 105(A) has been reached between the parties.[842] The court needs to confirm this with the accused and verify that the negotiation process and requirements of section 105A have been met.[843] The court must then grant the parties an opportunity to rectify any non-compliance with the negotiation process and agreement.[844]

It is to be noted that in terms of sections 105A(1)(b)(i) the prosecutor may enter into a section 105A plea and sentence agreement *after* consultation with the investigating officer. This requirement may be interpreted to ensure the involvement of other role players in the criminal justice system as well; and it is submitted that this may also be a prudent safeguard against the autonomy of the prosecution's

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[839] *S v Phillips* para 47.
[840] Lubbe & Ferreira (2008) *SACJ* 165.
[841] *S v Yengeni* para 25.
[842] S 105A(4)(a).
[843] S 105A(4)(a)(i)-)ii).
[844] S 105A(4)(b)(i)-(ii).

authority.[845] In addition, it is submitted that the prosecutor's power is countered by the fact that an offender needs to be represented by a legal representative. On the other hand, it may be argued that the prosecution retains its discretion, as section 105A(1)(c) provides that prosecutors may dispense with such consultation if they deem it will delay the process to a prejudicial extent. As demonstrated above, this obligation is subject to the scrutiny of the court[846] and the court will need to satisfy itself that prosecutors have exercised their discretion properly.[847] Should the court not be satisfied that these obligations have been met, the court must notify the parties of this and grant them an opportunity to comply with the obligations.[848]

One of the objectives of the reform of the criminal procedure was increased victim participation in the criminal justice system; and this has to an extent been achieved in plea and sentencing agreements.[849] This objective is formalised in section 105A(1)(b)(iii) which reads:

> "[A]fter affording the complainant[850] or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances

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[845] Directive 10 provides that in the absence of an investigating officer, her or his superior must be consulted. In general, regarding this requirement of consultation with the investigating officer, see M Watney "Judicial Scrutiny of Plea and Sentence Agreements" (2006) *TSAR* 224 225-226; De Villiers (2004) *DJ* 247. With regard to the extraordinary powers of the prosecution in South Africa and the exercise of such powers under s 105A, see Steyn (2007) *SACJ* 206-207, 218-219.

[846] S 105A(4)(a)(ii).

[847] Du Toit *Commentary on the CPA* 15 contends that the prosecutor will need to advance sufficient reasons for compliance, part-compliance or non-compliance. Also see Rodgers (2010) *SACJ* 251-252.

[848] S 105A(4)(b).

[849] De Villiers (2004) *DJ* 247; Watney (2006*) TSAR* 226; SALRC (2000) *Project 82 Report Sentencing (A New Sentencing Framework) paras 6-7, 15, 20.* Steyn ((2007) SACJ 212-213, 217) rightfully points out that there is no similar obligation upon the prosecution to consult with victims under s 112 of the CPA.

[850] Though a complainant may not necessarily be the victim, the interpretation of s 105A (1)(b)(iii) is that the complainant is the victim. Mujuzi notes that the terms "complainant" and "victim of a crime" are used interchangeably by the High Court and the Constitutional Court in *Wickham v Magistrate, Stellenbosch* 2016 1 SACR 273 (WCC) ("*Wickham* 2016 (WCC)") and *Wickham v Magistrate, Stellenbosch* 2017 1 SACR 209 (CC) ("*Wickham* 2017 (CC)"), respectively, and by the legislators in the drafting of s 105A(1)(b)(iii). See JD Mujuzi "Victim Participation in Plea and Sentence Agreements in South Africa as a 'right': Analysing

> relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding-
> *(aa)* the contents of the agreement; and
> *(bb)* the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss."

"Complainant" is also given a broad interpretation and has been declared to include not only the interests of the victim, but also "the broader interests of the criminal justice system and society."[851] Though the prosecutor is not bound to follow the representations or requests by the complainant, the importance of victim participation in the plea and sentencing procedures was emphasised in *S v Sassin*:

> "This particular provision has as its objective victim participation in the plea bargaining process. To my mind this is an absolutely essential cog in the machinery of plea bargaining and plea agreements – it lends legitimacy and credibility to the process."[852]

Moreover, the Constitutional Court in *Wickham v Magistrate, Stellenbosch*[853]referred to a victim's right to participate in proceedings relating to plea and sentencing agreement in terms of section 105A, including the right to be make representations to the prosecutor.[854] This is notable as it is argued by Mujuzi that section 105A does not expressly place such an obligation on the prosecutor or grant such a right to a victim. The Constitutional Court did not give any explanation

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Wickham v Magistrate, Stellenbosch & Others 2017 (1) SACR 209 (CC)" (2016) 31 *SAPL* 1 4.

[851] *S v Sassin* paras 11.3 & 11; *Wickham* 2016 (WCC) para 52. Also see Du Toit *Commentary on the CPA* 15-12 to 15-13; Bekker (1996) *CILSA* 209.

[852] Para 11.4.

[853] 2017 1 SACR 209 (CC). This was an application for leave to appeal regarding the judgment in *Wickham v Magistrate, Stellenbosch* 2016 1 SACR 273 (WCC). In this matter the accused, in terms of a s105A plea and sentence agreement, was convicted of culpable homicide and sentenced to correctional supervision and ordered to pay a fine relating to the death of a young man in a vehicle accident. The parents of the deceased objected to the charge and sentence, and applied to participate in the s105A plea and sentence agreement and to give evidence in court with regard to the charge and sentence of the accused.

[854] *Wickham* 2017 (CC) para 27.

for this declaration.[855] On a close reading, the High Court ruled that the victim does not have "a right" to be make representations to the prosecutor, but has "an opportunity" to do so. The High Court held "the prosecutor seeking to enter into a plea and sentence agreement with an accused person *must afford* the complainant or his representative *an opportunity to make representations* but only where it is reasonable to do so and taking into account the circumstances relating to the offence and the interests of the complainant" (writer's emphasis).[856] The High Court found this provision peremptory based on the reading of sections 105A(4)(b), together with section 105A(1)(b);[857] concluding that should there be non-compliance with section 105A(1)(b)(iii) the accused shall not be required to plead.[858] The court emphasised the "purpose of this provision [section 105A(1)(b)(iii)] is to ensure that the prosecutor has given the complainant an opportunity to make representations".[859] In addition, the High Court found that in negotiating and concluding plea and sentence agreements in terms of section 105A, a prosecutor is performing an administrative function, exercising her or his public power and authority, as prescribed by section 179(2) of the Constitution. Consequently, any failure to do so as prescribed by section 105A, including the failure to afford a complainant an opportunity to make representations, where it would be reasonable to do so, would be unlawful and the complainant would be able to take the matter on review under the Promotion of Administrative Justice Act 3 of 2000.[860]

The obligation to afford a complainant an opportunity is qualified by the requirement of reasonableness;[861] and this, it is submitted, is a further indication of the discretionary nature of section 105A(1)(b)(iii). In addition, as succinctly put by the

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[855] Mujuzi regrets that the Constitutional Court did not give reasons for the expression that a victim has a right as opposed to an opportunity. Mujuzi raises the question whether the basis for such right may be a statutory right, a common-law right or perhaps a customary-law right. See Mujuzi (2016) *SAPL* 4,10-13.

[856] *Wickham* 2016 (WCC) para 54.

[857] *Wickham* 2016 (WCC) para 54.

[858] *Wickham* 2016 (WCC) para 55D.

[859] *Wickham* 2016 (WCC) para 55D.

[860] *Wickham* 2016 (WCC) paras 56-58.

[861] "Reasonable in the context" relates to the situation in the light of the nature and circumstances of the offence and the interests of the complainant. See Du Toit *Commentary on the CPA* 15-13.

Constitutional Court "the prosecutor is obliged to give the victim an opportunity to make representations, but the prosecutor is not obliged to agree with the victim".[862] In *Wickham v Magistrate, Stellenbosch* the Constitutional Court held that a victim's right to place evidence before the court during sentencing proceedings in terms of section 105A(7)(b)(i)(bb) is "wholly within the court's discretion";[863] and cannot be acceded to should such representation infringe upon the rights of the accused.[864]

The provision for the voice of the victim to be heard in section 105A plea and sentencing negotiations and agreement is an encouraging institutionalisation of these elements in the criminal justice system.[865] Indeed, Rodgers contends that a "fundamental difference between informal and statutory negotiated justice lies in the victim's participation in the negotiation process".[866] In the informal plea negotiation process the victim has no recognised rights and little is known about victim participation due to the non-transparent nature of the process. It is considered that

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[862] *Wickham* 2017 (CC) para 28F; Mujuzi (2016) *SAPL* 7-8.

[863] *Wickham* 2017 (CC) para 31. The Constitutional Court also considered a victim's rights under s 2 of the Victims' Charter, and found these to be general and not absolute (paras 25-26). In the light of this it is clear that Steyn's interpretation that a victim has the right to request that a matter go to trial is incorrect (Steyn (2007) *SACJ* 213).

[864] *Wickham* 2017 (CC) para 34. Also see Mujuzi (2016) *SAPL* 14-15.

[865] Watney (2006) *J S Afr L* 226. Rodgers provides an in-depth discussion of the participation of the victim in the negotiated plea process. See Rodgers *The Role of the Victim* 76-88. Rodgers 92-103 also argues that s 105A(1)(b) has not gone far enough and proposes an amendment to s 105A(1)(b) to give proper legal and practical effect to the participation of victims in the plea and sentencing agreement process. Also see Bekker (2001) *CILSA* 321 and 323 regarding the reference by the SALRC to plea negotiations helping to protect a victim from having to give evidence and the input of victims in the negotiation process. Earlier Bekker discussed the interests of victims, and although recognising the need to acknowledge victims and their interests, reduced such interests simply to "restitution" and "retribution". Bekker (1996) *CILSA* 207-210. Consequent to the puzzling decision of the Constitutional Court in *Wickham* 2017 (CC) Mujuzi also calls for the legislature to amend section 105(1)()(iii) and clearly prescribe the right of the victim to make representations. See Mujuzi (2016) *SAPL* 13.

[866] (2010) SACJ 257. Rodgers 258 contends further that the lack of statutorily protected victim participation under s 112 plea agreements presents a basis for a constitutional challenge as victims in informal plea agreements are treated differently to victims in s 105A plea and sentence agreements.

any victim participation is likely to be limited.[867] The benefits of victim participation are not confined to the psychological and financial interests of the victim alone, but extend to the interests of the criminal justice system and broader society.[868] Victim participation grants legitimacy to the criminal justice system and substantiates plea and sentencing negotiation. It also ensures that more information is provided to the prosecutor and the court. Lubbe and Ferreira correctly state that section 105A(1)(b)(iii) can "play a vital role in … the transformation South Africa is facing".[869]

Once the court is satisfied that the requirements of a section 105A agreement have been met, the third stage, the considering of the plea agreement by the court commences,[870] and the accused will be asked to plead to the charges. After pleading, the contents of the agreement, as opposed to its existence, will be disclosed to the court.[871]

The court now has to consider and confirm that the accused is indeed guilty of the charges to which the accused pleaded guilty. This involves the following steps: confirming with the accused the terms of the agreement, including the admissions made by the accused;[872] and considering and confirming that the facts disclosed and admitted support such plea[873] and that "the agreement was entered into freely and voluntarily [by the accused] in his or her sound and sober senses and without having been unduly influenced".[874] Once these matters have been considered and confirmed the second part of stage three can follow and the court has to enter a plea of guilty or not guilty. Though the accused offered a plea of guilty this can only be entered by the court once the court has made the necessary enquiries and satisfied itself that the accused is indeed guilty of the offences charged with and the allegations admitted in the section 105A agreement.[875] However, the court is

[867] Steyn (2007) *SACJ* 217; Lubbe & Ferreira (2008) *SACJ* 163.

[868] Lubbe & Ferreira (2008) *SACJ* 160.

[869] (2008) *SACJ* 160. This was said in the context of post-Truth and Reconciliation Commission prosecutions, but it is submitted that it is no less true today.

[870] De Villiers (2004) *DJ* 245, 248.

[871] S 105A(5).

[872] S 105A(6)(a)(i).

[873] S 105A(6)(a)(ii).

[874] S 105A(6)(a)(iii).

[875] S 105A(7)(a).

compelled to enter a plea of not guilty if the court is not satisfied that the accused is guilty of the agreed offence;[876] or if the court finds that the admissions were not made or are incorrect;[877] or for any other reason, the court may decide that the plea of guilty cannot stand.[878]

It is clear that there is a heavy responsibility on the court to ensure that the guilty plea is proper and correct in terms of the law. In the event of the court having entered a plea of not guilty, it needs to provide reasons for this,[879] and the trial needs to start afresh before another presiding officer.[880] It is significant that the legislature provides that the accused may waive her or his right to the new trial being conducted by a different presiding officer.[881]

In the event of a guilty plea being accepted and recorded, the fourth stage is the consideration of the sentence by the court.[882] In terms of section 150A(7) the court has both discretionary[883] and mandatory[884] factors to consider in determining whether the sentence in terms of a sentence agreement is a "just sentence".[885] As in the United States, the issue of sentencing is a thorny issue, and although formal plea negotiation in terms of section 105A has only been part of the South African criminal jurisprudence for fewer than two decades, several cases have helped to crystallise criteria that may be used to determine what a "just sentence" is. Obviously, in considering the sentence agreement, the courts have built upon earlier principles relevant to sentencing.

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[876] S 105A(6)(b)(i).

[877] S 105A(6)(b)(ii).

[878] S 105A(6)(a)(iii).

[879] S 105A(6)(b).

[880] S 105A(6)(c).

[881] S 105A(6)(c).

[882] De Villiers (2004) *DJ* 245, 249.

[883] S 105A(7)(b)(i) prescribes that the court may ask questions regarding previous convictions and hear evidence by or on behalf of the accused or the complainant. For a discussion on stage four, see De Villiers (2004) *DJ* 249.

[884] S 105A(7)(b)(ii) prescribes that a court must have due regard to any minimum penalty prescribed by law. For example, see *S v Sassin*, where the court deviated from the minimum penalty in considering a just sentence (493 B-J), and *S v Madisha* where the court did not deviate from the minimum sentences (para 34).

[885] S 105A(1)(a)(ii).

One of the first decisions regarding a section 105A plea and sentence agreement was *S v Sassin*[886] *("Sassin* case*")*; which endorsed the court's supervisory role to ensure that the sentence is "just".[887] In the *Sassin* case, when required to decide whether a deviation from a minimum sentence of 15 years' imprisonment was "just", Majiedt J noted that it is important that the statutory provision use the word "just" and not "appropriate" and further reasoned that this means that the court "retains its judicial discretion in sentencing, albeit in fettered form".[888] In exploring what "just" means, he said that it does not demand that the court be asked to agree with the sentence, but the court needs to be satisfied that the sentence is an appropriate (not necessarily the most appropriate) one with regard to the circumstances of the case, the accused, the interests of society and the victims.[889] Importantly, the court continued by holding that it must be borne in mind that it is a plea negotiation matter and thus, when considering whether the sentence is just, it must do so within the parameters of plea negotiation. This may involve, in addition to the traditional factors relating to the offence and accused, also the voice of the victim and the needs of society "within the confines of the plea bargaining framework".[890] The court

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[886] 2003 4 All SA 506 (NC) ("*S v Sassin*"). This case involved a pyramid scheme run by accused involving amounts of over R29 million. The accused had originally been charged, together with two of his children, with fraud and contraventions of various financial regulations, including the Banks Act 94 of 1990, the Stock Exchange Control Act 1 of 1985, and the Companies Act 61 of 1973 (para 3-8). In terms of a plea and sentence agreement under s 105A of the CPA it was agreed that the first accused plead guilty to 1,527 counts of fraud and contraventions of the aforementioned acts (para 14.1 to 14.3). Approximately R3 million spent on himself or the family had been recovered (para 15.11), and other monies of approximately R18 million were in the process of being recovered by the liquidators (para 15.12). The charges against his children, the second and third accused, be withdrawn.

[887] *S v Sassin* para 15.1. In terms of sub-section 105A(1)(a)(ii) a sentence in terms of a sentence agreement needs to be a "just sentence"; while section 105A(8) provides that the court needs to satisfy itself that "the sentence agreement is just".

[888] *S v Sassin* para 15.5.

[889] *S v Sassin* para 15.5; also see Watney (2006) *JS Afr L* 226-227.

[890] S *v Sassin* para 15.7 and 18.1. In para 18.1 the court suggests that it would not have usually considered a sentence of 15 years' imprisonment, of which six years is suspended for five years, appropriate for the fraud offences, but that it is called to decide whether the sentence is just within the plea bargaining framework: "(t)he test here is *different* – the question is simply whether I consider the sentence on the fraud charges to be *just*.

importantantly in holds: "[a] sentencing court must, in my view, in such a case consider whether the proposed sentence is just in respect of the *offender* and the *victim*, bearing in mind the gravity of the *offence*" (writer's emphasis).[891]

The probability that a sentence may be lighter in a plea negotiation matter, in the light of the nature of plea negotiation and concessions made by either or all of the parties is echoed in *S v Esterhuizen*:[892] "(t)he price may be that the sentence which would normally flow from the commission of such a crime is lower than might otherwise have been imposed. This does not mean that justice has not been achieved."[893]

Bennun seems to hold the contrary viewpoint that a plea of guilty in terms of section 105A should not result in any sentence other than a sentence that would have resulted after a full trial.[894] Bennun also makes the point that this is the intention of subsections 105A(6)-(9) and cites the court's decision in *S v Yengeni*[895] to support this view.[896] However, it is suggested that Bennun's viewpoint conflicts with the traditional viewpoint that plea negotiation, and plea and sentencing agreements, as provided for in terms of section 105A, may very well result in a

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Moreover, I must be mindful of the fact that this is a plea bargain matter" (writer's emphasis). Also see *S v Esterhuizen* 494-495; Steyn (2007) *SACJ* 214.

[891] *S v Sassin* para 15.7.

[892] 2005 1 SACR 490 (T).

[893] 494H.

[894] Bennun (2007) *SACJ*, 29, 35-36.

[895] 2006 1 SACR 405 (T).

[896] Bennun (2007) *SACJ* 34-36. It is submitted that *S v Yengeni* can be distinguished as it was clearly not an agreement in terms of s 105A and did not purport to be. At most it could be said to be informal plea negotiation which was unwisely undertaken by the prosecution and the accused, together with the then Minister of Justice (see the facts in para 10(z)gg-10(z)hh). The comments made by the court in paras 66 and 67 relating to s105A plea and sentencing agreements are *obiter*, but important as they set out the purposes of s105A plea and sentence agreements. Moreover, it is submitted that the court does not support what Bennun claims it supports, namely that a sentence in terms of s 105A should be the same as a sentence after a full blown trial. Indeed, it is argued that paras 66 and 67, where the court follows *S v Esterhuizen*, is an endorsement of the contours drawn by the court in *S v Esterhuizen*, including the confirmation of the judicial discretion of the presiding officer regarding sentencing.

sentence that may be lighter than one handed down after a full trial.[897] It would, in any event, be difficult to speculate what a sentence after a trial would have been. It is significant that the court retains a supervisory role and is not precluded by section 105A from inquiring into the circumstances of the accused and any laws relating to the particular offence. This was stated clearly in *S v Yengeni* which held that "the trial court had the power to enquire into all relevant circumstances relating to the sentence proposed in the agreement".[898] Moreover, the court in *S v Yengeni* called upon courts to be vigilant, in instances of crimes of dishonesty perpetrated by elected officials and officials in positions of trust, to ensure "that appropriate retribution is exacted from the criminal concerned".[899] This emphasises that although sentences in plea and sentence agreements may usually be lighter because of the confessions and concessions made by the parties, any such sentences still need to be just, reflecting the principles of retribution and deterrence in the light of each offender's individual circumstances.

Furthermore, Els J in *S v Esterhuizen*, drew more contours regarding the test of a "just sentence", as prescribed by section 105A and held that a court cannot decide for itself in a vacuum what sentence it would have imposed. He also held that there were several considerations to be taken into account when assessing whether the sentence is just. He emphasised the role which the state representatives played[900] and the discretion they had, while also noting that there was "substantial room left in the negotiation process for both the state and the defence to achieve a settled result".[901] Els J further determined that "[a]s long as the sentence bears an adequate relationship to the crime and the moral blameworthiness content of the crime,… , the sentence should be found to be 'just' for the purposes of s105A."[902]

Section 105A(7)(b)(ii) provides that the court, with respect to offences that carry a minimum sentence, needs to give due regard to this.[903] The NDPP has also issued a

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[897] Lubbe & Ferreira (2008) *SACJ* 162.

[898] *S v Yengeni* para 72.

[899] *S v Yengeni* para 71.

[900] *S v Esterhuizen* 494C-E.

[901] *S v Esterhuizen* 494G.

[902] *S v Esterhuizen* 494I-J.

[903] This was the position in the *S v Sassin* case. Also see Watney (2006) *J S Afr L* 227-229.

directive that only a DPP or Deputy Director may authorise any deviation from a prescribed minimum sentence in a sentencing agreement.[904]

In the event that the court is satisfied that the sentence is just, the court needs to inform the prosecutor and the accused, whereupon the court shall convict the accused of the offence charged and sentence the accused in terms of the plea and sentence agreement.[905]

An important part of the sentencing stage is the obligation on the court in terms of section 105A(9) to inform the accused and the prosecution if it is not satisfied that the sentence is just.[906] Furthermore it must advise them what the court deems will be a just sentence. This stage of the process will allow the accused or the prosecutor to withdraw from the plea agreement,[907] or to abide by the plea agreement and to accept the court's sentence.[908] In both *S v Solomons*[909] and *S v DJ*[910] the court found that the provisions of section 105A(9)(a) are peremptory.[911] Thus, in the event that presiding officers did not inform the parties that they did not consider the

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[904] Directive 13 of the 2010 Directives.

[905] S 105A(8). In *S v Knight* 2017 2 SACR 583 (GP) the court found that the provisions of s 105A(8) are peremptory and the omission of the trial court to convict the accused of the offences charged was a fatal irregularity. Thus the sentence was set aside and the matter referred back to the trial court to be heard *de novo* (paras 18-20 & 24). Also see Du Toit *Commentary on the CPA* 15-22.

[906] S 105A(9)(a).

[907] S 105A(9)(b)(ii). Also see *S v DJ* 2016 1 SACR 377 (SCA) para 19.

[908] S 105A(9)(b)(i). Also see De Villiers (2004) *DJ* 249; *S v Solomons* 2005 2 SACR 432 (C) para 6-7 and 11; *S v DJ* 2016 1 SACR 377 (SCA) paras 18-20 & 22.

[909] 2005 2 SACR 432 (C) para 11.

[910] 2016 1 SACR 377 (SCA) paras 19-20.

[911] The decision in *S v DJ* 2016 1 SACR 377 (SCA) paras 18-22 was followed by *S v Muller* 2018 JDR 2007 (WCC) paras 9-10. Interestingly, in the *S v Muller* case, the magistrate interfered with the agreed sentence in terms of the s105A plea and sentence agreement as he considered he had to do a post-sentence inquiry in terms of s 35 of the National Road Traffic Act "NRTA"). The s105A plea and sentence agreement made provision for the defendant's driver's licence to be suspended for a period of six months, while the NRTA prescribed that a licence should be suspended automatically for five years in certain instances. The appeal court found, however, that the s 35 NRTA inquiry forms "an integral part of the determination of an appropriate sentence". Consequently, the magistrate's interference with the agreed sentences was an irregularity: the magistrate should have followed the procedure in terms of s 105A(9) if he deemed the sentence "unjust" (para 15).

sentence to be just and did not afford them the opportunity to make a decision in terms of section 105A(9)(b), the convictions and sentences were set aside and the matter was ordered to be tried anew.[912]

In *S v Armugga*[913] the court stated that sentencing is not an "exact science" with no "precise formulas" and in properly exercising their discretion different courts may arrive at different sentences on the same facts.[914] Similar to the *Sassin* and *Esterhuizen* cases, the court found that "the very nature and essence of plea bargaining needs to be taken into account"[915] and defines plea bargaining or plea negotiation[916] as a "procedure whereby the accused person relinquishes his right to go to trial in exchange for a reduction in sentence."[917]

In both the *Sassin* and *Esterhuizen* cases, the plea and sentencing agreements included direct imprisonment, although there was a deviation from the minimum period prescribed. Attention was also given to the plea negotiation framework and the authority and negotiating room given to the prosecutor and the accused. In addition, in the *Sassin* case, particular emphasis was placed on the voices of the victims[918] and the interests of society[919] in the criminal justice system.

The issue of review and appealing a conviction and sentence in terms of a section 105A agreement has been the subject of several cases.[920] In *S v Nel*, Moshidi J significantly depicted the position as follows:

> "Indeed, the whole purpose of the provisions of s 105A of the Act will be defeated at great expense and wastage of resources, if accused persons who

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[912] *S v Solomons* 2005 2 SACR 432 (C) para 13; *Jansen v S* 2016 1 SACR 377 (SCA) paras 22-23; *S v DJ* para 384; *S v Muller para*16.

[913] 2005 2 SACR 259 (N) ("*S v Armugga*").

[914] *S v Armugga* paras 264G-H.

[915] *S v Armugga* para 265A.

[916] See fn 700 above regarding the terms plea bargaining and plea negotiation.

[917] *S v Armugga* paras 265A-B.

[918] Affidavits were obtained from 31 victims who had lost money in the scheme in which they set out their claims, the recovery of part of the monies and agreement to the plea bargaining agreement, which included the cooperation of the accused. *S v Sassin* para 11.5.

[919] Represented by the affidavits of the liquidators which were held to be representative of all the creditors. *S v Sassin* para 11.6.

[920] *S v De Goede* WCC 30-11-2012 case no. 121151; *S v Armugga* 2005 (2) SACR 259 (N); *S v Nel* 2008 ZAGPHC case no. A352/07; *De Koker v S* 2010 2 SACR 196 (WCC).

> enter into procedurally faultless plea and sentence agreements were subsequently allowed to resile from such agreements at will, and not on any legal or constitutional basis."[921]

In *De Koker v S,*[922] the court clearly stated "(b)y following the process created by section 105A, the appellant settled the *lis* between the state and him once and for all."[923] This confirms that in the event of the peremptory provisions of sections 105A being complied with, parties will be bound by the section 105A agreement and an appeal is not possible.[924] This finality is contrary to the possibilities mooted in *S v Armugga*. In *S v Armugga,*[925] the court held that any appeal in respect of an agreed sentence in terms of a section 105A agreement is a limited appeal and will only succeed in "exceptional circumstances".[926] In *S v Nel,*[927] the court, with reference to

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[921] 2008 JDR 0170 (W) para 15.

[922] 2010 2 SACR 196 (WCC).

[923] *De Koker v S* para 5. See too Hiemstra 15-10.

[924] "I cannot think of a clearer case of peremption than one where an accused duly concludes a plea and sentence agreement with the state in term of s 105A of the CPA, confirms the agreement to the court before which he is arraigned, asks the court to convict and sentence him in accordance with the agreement and is thereupon duly convicted and sentenced in accordance with the agreement." *De Koker v S* para 5. Also see *Hiemstra Criminal Procedure* 15-10.

[925] This case also involved fraud and the accused were found guilty and sentenced in terms of a plea and sentence agreement in terms of s 105A. The agreed sentence involved fines and a term of imprisonment and fourteen of the accused subsequently appealed against the sentence alone, arguing that the presiding officer had not made sufficient inquiries into the circumstances of the accused as required in terms of s 105A(8) in determining that the sentence agreement was just. An important issue is whether parties to such an agreement can appeal: can the accused in this case "unilaterally resile" from the contract? The court found that in the omission by the legislature of the draft s 105A(10), that prohibited either party subsequent to a s105A agreement to appeal, from the enacted amendment to the CPA, that such a right does, therefore, exist (263C-G). Importantly, both in *S v Solomons* 2005 2 SACR 432 (C) (paras 1 and 12) and *S v De Goede* WCC 30-11-2012 case no 121151 (paras 3-5 and 12) plea and sentence agreements were taken on review in terms of s 302 or s 304 of the CPA. This is further evidence of the supervisory role which the courts have over s105A agreements. Also see *Maddock v S* [2015] ZAWCHC 575 WCHC 26-11-2010 case no A641/2010, being an appeal against a refusal to reconsider a sentence agreed in terms of a s105A plea and sentence agreement.

[926] *S v Armugga* 264E. The court based its finding on the decision of the Canadian Court in *Attorney General of Canada v Roy* (1972) 18 CRNS 89 (Que QB). It also relied on the

S v Armugga, held that a Court of Appeal would be reluctant to interfere with a matter if the procedure was strictly complied with "unless there are glaring or ascertainable gross irregularities or a violation of the accused's constitutional rights to a fair trial".[928]

It is submitted that the definitive consequence of a plea and sentence agreement in terms of section 105A means there is no appeal available to the convicted person, unless there are gross irregularities in the procedure or constitutional challenges.[929] There are sufficient safeguards built into the plea negotiation procedure of sections 105A[930] and it is constitutionally sound. This conclusion is logically correct, as allowing either the state or the accused to easily resile from such an agreement would bring about much uncertainty.

There have also been a number of cases regarding the review of a plea and sentence agreement in terms on section 105A. In *S v Taylor,*[931] Yekiso J examined

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Canadian Law Commission and SALRC that considered that the prosecution could only appeal, in the event of either the prosecutor or the court being "wilfully misled in some material aspect" (263E-264H). *S v Armugga* was followed in *S v Nel* 2008 ZAGPHC 43 case no. A352/07 (para 4) where Moshidi J held: "a Court of Appeal will be reluctant to interfere in the outcome unless there are glaring or ascertainable gross irregularities or a violation of the accused's constitutional rights to a fair trial". Watney (2006) *J S Afr L* 229-230 argues that the appeal need not be limited, and that any appeal or review should be in the ordinary course of the relevant provisions and principles. *Maddock v S* [2015] ZAWCHC 575 supports the latter viewpoint as the appeal related to the reconsideration of a sentence after a portion of the sentence had been served and application was made to reconsider part of the sentence and convert it to house arrest. The High Court found that s 276A(3) can be applied in the case of a plea and sentence agreement should the an appropriate situation arise (*Maddock v S* at 9).

[927] 2008 JDR 0170 (W) ("*S v Nel*").

[928] *S v Nel* para 5. Also see paras 10-11 where the court follows *S v Armugga*.

[929] *Hiemstra Criminal Procedure* 15-10. Also see *S v Masemola* 2009 JDR 1345 (GNP) paras 13-18 where the court declined to intervene in the sentence agreed upon between the parties themselves, even though the sentence was, on one count, the maximum sentence.

[930] Also see Kemp (2014) *SLR* 434-435.

[931] 2006 1 SACR 51 (C). *Taylor* was followed by *S v Salie* 2007 1 SACR 55 (C) paras 12-13. Interestingly, the *Salie* matter concerned a s105A plea and sentence agreement in terms of which the defendant pleaded guilty to robbery with aggravating circumstances and also agreed to testify against his co-accused. In terms of the agreement, he was sentenced to four years' imprisonment. In the trial of the co-accused, the trial court found them guilty of robbery with aggravating circumstances and sentenced them to eight years' imprisonment.

several grounds for review,[932] and found that the only grounds for a possible review are the Court's inherent power in terms of section 173 of the Constitution.[933] Significantly, the court stated that an accused "cannot now, once the shoe starts pinching, begin to complain about the procedure followed at trial".[934] The inherent power of the courts, in considering the interests of justice, is confirmed as being comprehensive and applicable, also to section 105A sentence agreements, further safeguarding the process and the parties to such agreements.[935] An *obiter dictum* made in *Wickham v Magistrate, Stellenbosch* stated that in entering into and concluding a plea and sentence agreement in terms of section 105A, prosecutors execute an administrative function. Thus, any exercise of their public power or performance of their public function that may adversely affect the rights of any

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On appeal however, the conviction was altered to robbery and the sentences reduced to 4 years. The issue before the court was should the *Salie* matter be reviewed as the defendant was convicted of a more serious offence than his co-accused, arising from the same facts, and thus it could be argued he was not treated equally before the law. However, the court found that the uncertainty regarding the presence of aggravating circumstance in the trial of the co-accused is not a basis to fault the s105A plea and sentence agreement (para 16). Van der Merwe emphasises that a s105A plea and sentence agreement is based on the "formal or procedural truth" entailing agreed facts between the prosecution and defence. This is in contrast to a trial which "is a contest or dispute that must be settled in accordance with adversarial principles which require, amongst others, that the prosecution must prove its case beyond a reasonable doubt". See SE van der Merwe "January to March 2007(1)" *JQR Criminal Procedure* 2007 (1) para 2.6.

[932] The matter was not automatically reviewable in terms of s 302 of the CPA as the accused was legally represented (para 5). As a s105A plea and sentence agreement can only be concluded between a represented accused at present, an automatic review in terms of s 302 is highly improbable. See too *S v Salie* para 12. Neither was it reviewable under s 304(1) as the review was not at the instance of the magistrate (para 5). Neither was it reviewable under the Promotion of Administrative Justice Act 3 of 2000, because the judicial functions of a judicial officer do not fall under that act (para 14). Also see SE van der Merwe "January to July 2006 (1)" *JQR Criminal Procedure* 2006 (1) para 2.24; Van der Merwe *JQR Criminal Procedure* 2007 (1) para 2.6.

[933] *S v Taylor* paras 16-17. In terms of s 173 of the Constitution, the Constitutional Court, the Supreme Court of Appeal and the High Courts have "the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice". Also see *S v Salie* para 13.

[934] *S v Taylor* para 20. Followed by *S v Nel* para 15.

[935] *S v Nel* 2008 JDR 0170 (W) paras 12-14; *S v Armugga* 2005 2 SACR 259 (N) 263E-264H; *S v Taylor* paras 16-17; *S v Salie* para XXX.

person is subject to review under the Promotion of Administrative Justice Act 3 of 2000.[936]

Maddock v S illustrates that the sentence part of a section 105A plea and sentence agreement can be reconsidered in terms of section 276A(3)(a) of the Criminal Procedure Act.[937] The court held that section 276A(3)(a) enjoins the court to "reconsider the sentence in view of all the facts, not only those facts that existed at the time of the trial."[938] It is submitted that section 276A which relates to correctional supervision demonstrates the characteristics of restorative justice that have been integrated into the South African criminal justice system.[939]

Caution needs to be exercised in a case where there are multi-accused.[940] It is common practice to enter into a plea and sentence agreement with one or more of the co-accused on the condition that such accused will testify against the other co-accused. Entering into a plea and sentence agreement may not necessarily mean that the accused is convicted of a lesser charge or receives a lesser sentence.[941] Indeed, in *Van Heerden v National Director of Public Prosecutions*[942] a number of the co-accused were granted a stay of prosecution, notwithstanding that one of the

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[936] *Wickham* 2016 (WCC) paras 56-58. Mujuzi ((2016) *SAPL* 13-14) points out that the Constitutional Court did not disagree with this *obiter dictum*, and this raises the issue of the relationship between s 105A(1)(b)(iii) and the Promotion of Administrative Justice Act s 1 "administrative action" (ff), which specifically provides that the decision to institute or continue a prosecution is not administrative action. It is argued by Mujuzi correctly, it is submitted, that the execution by a prosecutor of her or his powers under s 105A to decide whether to allow a complainant to make representations or not is surely part of the decision whether to institute prosecution.

[937] On appeal the High Court converted the remaining portion of the appellant's agreed imprisonment to correctional service, including house arrest and community service, programme supervision and the prohibition of the use of alcohol and non-prescribed drugs (*Maddock v S* 14-16).

[938] *Maddock v S* 9.

[939] Correctional supervision is discussed below in section 4 4 3 345ff.

[940] Directive 9.

[941] As illustrated above in *S v Salie* 2007 1 SACR 55 (C).

[942] 2017 2 SACR 695 (SCA) ("*Van Heerden v NDPP*"). It is submitted that this case is extraordinary as the delay in finalising the charge sheet and the behaviour of the prosecution was unusual, and as the court stressed, applications for stay of prosecution are fact-specific and to be determined on a case-by-case basis (para 69).

other accused had entered into a plea and sentence agreement and had agreed to testify against the other accused.[943]

The fifth stage of the plea and sentence agreement process in terms of section 105A of the CPA is administrative and stipulates that the NPA needs to keep proper records and statistics regarding any section 105A agreements[944] and to submit these to parliament at least once a year.[945] This administrative procedure ensures accountability by the NPA and serves as a safeguard to oversee the correct use of section 105A. It is difficult to draw any conclusions regarding the number or nature of section 105A agreements in the South African criminal justice system, and the only statistics available are those in the annual reports of the DNPP, which are either in narrative form, or figures in a table format.[946]

Plea negotiation in South Africa appears to be a permanent feature.[947] In considering the advantages and disadvantages of plea negotiation in South Africa, only a few issues will be highlighted.[948] A restricting factor regarding plea and sentence agreements is the requirement that an accused has to be legally represented. As only a few accused are legally represented in South Africa this lack of representation is probably a contributory factor to the relatively little use of plea negotiation in terms of section 105A of the CPA.[949] De Villiers questions the validity of this requirement, particularly as unrepresented accused may enter guilty pleas and be sentenced via the conventional route of section 112 of the CPA or via the

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[943] *Van Heerden v NDPP* para 14.

[944] S 105A(11)(b)(iv) and Directive 17. For a discussion on stage five see De Villiers (2004) *DJ* 249-250.

[945] S 105A(12).

[946] See fn 189. See also Kemp (2014) *Stell LR* 433-434; Kerscher *Plea bargaining in South Africa and Germany* 10-11.

[947] Indeed, there is a call by the judiciary for it to be encouraged: *DJ v S* 2016 1 SACR 377 (SCA) para 17.

[948] For more detailed advantages of plea negotiation see the executive summary of the SALRC interim fourth interim report. See too a discussion of the advantages and disadvantages by De Villiers (2004) *DJ* 249–255.

[949] Steyn (2007) *SACJ* 218 points out that plea negotiation may be perceived to be a mechanism for the rich who can afford legal representation. See also Lubbe & Ferreira (2008) *SACJ* 159 fn 34 for further discussion on this issue.

traditional informal plea agreements.[950] It may be argued that in terms of section 35(3)(g) of the Constitution, the accused is entitled to legal representation at state expense, as part of her or his right to a fair trial "if substantial injustice would otherwise result".[951] Interestingly, De Villiers argues that the failure of section 105A of the CPA to grant an unrepresented accused the opportunity to enter into a plea and sentence agreement is not sustainable and may be unconstitutional.[952] In contrast Lubbe and Ferreira contend that the provision that offenders have to be legally presented when entering a plea and sentence agreement ensures that they understand the nature and consequences of the process.[953] The assumption is that the offenders have been so informed and advised by their legal representatives. Equally, however, as pointed out above, legal representation is not prescribed for plea negotiations under section 112 of the CPA, and it may be argued that an unrepresented offender may not understand the nature or consequences of a plea under such provision.

As in the United States, the South African judiciary[954] and authors[955] concede that plea negotiation will assist the efficacy of the criminal justice system and that the exclusion of the mechanism may very well contribute towards the opposite effect and result in a breakdown due to the heavy caseload and clogging up of the criminal courts.[956] However, there are also several warnings. De Villiers warns that plea negotiation cannot provide an effective response to the problem of an inefficient and incompetent criminal justice system.[957] Indeed, he argues that the success of plea

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[950] De Villiers (2004) *DJ* 253–254.

[951] Lubbe & Ferreira (2008) *SACJ* 159.

[952] De Villiers (2004) *DJ* 254.

[953] (2008) *SACJ* 160.

[954] Uijs AJ in *North Western Dense Concrete* 676G. This is comparable to Burger CJ in *Santobello v New York* 404 US 527 260 (see fn 744 above).

[955] De Villiers (2004) *DJ* 255; Lubbe & Ferreira (2008) *SACJ* 163. Steyn (2007) *SACJ* 207-208, 211-212 specifically promotes plea and sentencing agreements under s 105A on the basis of pragmatism.

[956] Reference has already been made to criticism of this pragmatic motive, the objective of efficiency, including the lightening of caseloads. Also see Kemp (2014) *Stell LR* 430, 433-434.

[957] De Villiers (2004) *DJ* 252-253.

negotiation rests on competent and trustworthy prosecutors.[958] More importantly, De Villiers argues that one of the disadvantages of plea negotiation is that it may undermine a primary purpose of a criminal justice system, namely deterrence.[959] A further core value in criminal jurisprudence that is at risk is the burden of proof: plea negotiation results in waiver of the constitutional right of the accused to remain silent[960] and to have the state prove its case beyond a reasonable doubt.[961] Kemp, in turn, warns that plea negotiation, particularly in relation to economic crime, which entails individual autonomy and participation by an accused, may allow potential offenders to calculate the cost-benefits of certain economic crimes and to conclude that crime does indeed pay.[962]

As in the United States, the issue of just sentencing in plea and sentencing agreements remains problematic. Although there have only been a relatively small number of cases since the formalisation of plea negotiation in South Africa: the courts have laid down sound principles and the reported cases illustrate that the courts will be robust in their application of their traditional discretionary authority in supervising just and proper sentences.

The powerful position of the prosecutor, as *dominus litis*, endowed with independent discretionary powers, remains entrenched. Bekker forecast that in the

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[958] De Villiers (2004) *DJ* 254.

[959] De Villiers (2004) *DJ* 251.

[960] S 35(3)(h) of the Constitution. Also see *S v De Goede* WCC 30-11-2012 case no. 121151 para 12.

[961] De Villiers (2004) *DJ* 251; Bennun (2007) *SACJ* 20. By way of illustration, Bennun discusses the *S v Thatcher* case, in which in terms of a s 105A agreement, Thatcher was found guilty of a contravention of the Regulation of the Foreign Military Assistance Act 15 of 1998 and sentenced, despite Thatcher only admitting to have been "unwittingly" involved, which would normally constitute a defence to a charge requiring the necessary *mens rea* to commit a crime. See Bennun (2007) *SACJ* 21-23. T Fisher "The Boundaries of Plea Bargaining: Negotiating the Standard of Proof" (2007) 97 *J Crim L & Criminology* 943 946-947, 955-956 argues that plea negotiation results in the prosecution gaining total exemption from the standard burden of proof and calls for an alternative model that only results in partial exemption of the prosecution from its obligations regarding the burden of proof. Lubbe & Ferreira (2008) *SACJ* 164 contend, however, that the mechanism under s 105A has to present sufficient evidence to satisfy the court of the validity of the plea and that the sentence is just. In summary, a plea and sentence agreement has to be sound in law.

[962] Kemp (2014) *Stell LR* 425-426, 434-435.

plea negotiation process in South Africa, the public prosecutor will not play as dominant a role as in the United States.[963] However, it is argued that the prosecutor retains a definitive role in the South African criminal justice system, also in terms of plea and sentence negotiations.[964] Bennun[965] highlights the problem that the NDPP directives may pose in relation to the discretionary powers of the prosecutor with regard to the criteria of "the demands of justice and/or the public interest" which are incorporated in Directives 3[966] and 4.[967] What is meant by the "demands of justice" and "the demands of public interest" and who has the discretion to determine that, the public prosecutor? If that is the case, what is the role of the courts and their statutory obligation to inquire into the sentencing agreement? And are the decisions of the public prosecutor reviewable or not?[968]

It is to be noted, however, that in the plea negotiation process, the primary focus remains on the accused and the crime committed and that the main parties to the negotiation, namely the prosecutor and the represented accused remain

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[963] Bekker (2001) *CILSA* 318.

[964] Steyn (2007) *SACJ* 207. The role and position of the prosecutor in the criminal justice system is discussed more fully in section 5 3 1 below.

[965] Bennun *SACJ* 27.

[966] Directive 3 (2010), formerly Directive 2 (2002) reads: "Section 105A of the Act is to be utilized for those matters of some substance, the disposal of which will actually serve the purpose of decongesting or reducing the court rolls without sacrificing the demands of justice and/or the public interest."

[967] Directive 4 (2010) reads: "Negotiating a plea and sentence agreement is not meant to bargain away a sentence of imprisonment for a non-custodial sentence. Where justice and/or public interest require(s) a custodial sentence, this must be adhered to." Formerly, the corresponding directive was Directive 3 (2002), which read: "Negotiating a plea and sentence agreement is not to be understood as meaning the bargaining away of a sentence of imprisonment for a noncustodial sentence. Where justice and/or the public interest require(s) an effective sentence of incarceration that is the stance to be taken. If those considerations dictate a shorter term of imprisonment or an alternative sentence, the position is different."

[968] These issues are also raised by Kemp (2014) *Stell LR* 430-432 and he similarly warns of the "enhanced role" of prosecutors in plea negotiation matters that practically make them "judges before the courts". As the actions of a prosecutor have been defined to be administrative, s 105A plea and sentence agreements are subject to review as discussed above.

adversaries.[969] It is heartening that the interests of the community[970] and, when it is reasonable to do so, the representations of the complainant,[971] are specifically included in the list of factors that need to be taken into consideration by the prosecutor when negotiating section 105A plea and sentence agreements.

The mechanism of plea negotiation has triumphed in the United States criminal justice system and is likely to play an ever larger role in the South African criminal justice system.

4 4 3 Mechanisms of restitution in the South African criminal justice system

> "It seems to be eminently desirable that where it is possible for a complainant to be compensated in this manner and at the same time for an appropriate sentence to be imposed upon the wrongdoer, this course should be followed."[972]

A vexing matter is the issue of restitution in criminal jurisprudence. Can the restitution a criminal makes to a victim be considered when passing sentence, or does this allow persons with the means to do so to buy themselves a non-custodial sentence? Does ordering restitution as part of a criminal sentence blur the lines between civil and criminal systems of law? These are not new questions, but they have regained prominence with the rebirth of restorative justice policies and alternative mechanisms within criminal justice systems in recent times. Indeed, several criminal law mechanisms contain provisions allowing for restitution, but the prevailing question is how far may they be stretched?[973] Limits may also be placed on the value of compensation that may be ordered.[974] Ordering compensation may

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[969] *S v Esterhuizen* 2005 (1) SACR 490 (T) at 493H.

[970] CPA s 105A(1)(b)(ii)(dd).

[971] CPA s 105A(1)(b)(iii).

[972] Corbett JA in *S v Charlie* 1976 2 SA 596 (A) 599A.

[973] There are different forms of restitution, normally divided into the following broad categories: administrative compensation funds, administrative compensation orders, criminal-court ordered restitution, and civil-court compensation orders. The rights for the latter arise from the common law, such as the principles of the law of delict or contract, or may be provided for in legislation. The rights to administrative or criminal compensation orders usually arise from statutes that generally also prescribe who qualifies as a victim.

[974] For example, the power of the FAIS Ombud to order compensation is currently limited to R800,000. Who qualifies as a victim and the nature of the claim are discussed in para 4 2 3, 192ff above.

also form part of the general inherent discretion of a presiding officer regarding the imposition of a sentence.[975] In this section specific mechanisms that afford an opportunity to order compensation to victims under the CPA are discussed. The focus is on sections 276 and 276A relating to compensation orders to victims as part of correctional supervision measures; section 297 regarding restitution as a condition of a suspended or postponed sentence, and section 300 providing for an order of compensation as a civil judgment.

It is submitted in this dissertation that ordering restitution to a victim under the criminal justice system is important as it affords an opportunity for the victim's loss to be recovered without costs, both financial and emotional, of an independent civil claim.[976] Indeed, as Hiemstra observes, the opportunity to order compensation as a condition for a suspended sentence is not used enough.[977] This is echoed by the courts. Claassen J has stated that "(c)ompensation as a condition of a suspended sentence is too often not considered."[978] In addition, the purpose of a compensation provision like section 300 is to help limit the administrative workload of the regional and high courts[979] and thus its use is to be encouraged. The application of a restitution mechanism is an important factor in efforts not only to address economic crime, but also to mitigate the injury caused by such crime to victims. It is further submitted that the mechanisms for restitution and compensation, already in existence in the CPA, will complement the proposed mechanism of mediation.[980]

Section 297 of the CPA provides that the passing of a sentence[981] may be postponed[982] or suspended[983] on various conditions, including the payment of compensation,[984] or the rendering to the victim of some specific benefit or service in

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[975] See for example ss 297 and 276 of the CPA discussed below.

[976] *Hiemstra Criminal Procedure* 29-3; Du Toit *Commentary on the CPA* 28-45.

[977] *Hiemstra Criminal Procedure* 29-3.

[978] *S v Khoza* 2011 1 SACR 482 (GSJ) para 10.

[979] Terblanche *Sentencing in SA* 462. Du Toit *Commentary on Criminal Procedure* 29-2.

[980] It is beyond the scope of this dissertation to discuss these provisions in detail. However, it is important to describe the broad processes of these mechanisms.

[981] Offences that are legally subject to a minimum punishment are excluded.

[982] S 297(1)(a).

[983] S 297(1)(b).

[984] S 297(1)(a)(i)(aa).

lieu of compensation for damage or pecuniary loss.[985] These are positive conditions and require an offender to pay an amount or render a service that will result in the sentence being postponed or suspended.[986] The performance without remuneration outside the prison of some service for the benefit of the community that is commonly known as community service, is prescribed in section 297(1)(a)(i)(cc) of the CPA and must be distinguished from the condition of rendering a specific benefit or service to the aggrieved person.[987] In this section a brief description of paying compensation as a condition for postponement or suspension of sentencing is provided.

Although courts have strongly advocated the use of the payment of compensation as part of the sentence,[988] this is not often done.[989] The sentencing provision to pay compensation is indicative of restorative justice principles incorporated into the criminal statutory system.[990] Gubbay JA in *S v Zindoga*[991] held that the issue of restitution raises two competing public interests, restitution and deterrence, each of which needs to be weighed and balanced against another by the court. On the one hand it is in the public interest that victims receive restitution for their loss; while on the other hand it is also in the public interest that a sentence be imposed which will have a deterrent effect.[992] The offer to make restitution is a mitigating factor that the court takes into consideration when exercising its discretion in the sentencing

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[985] S 297(1)(a)(i)(bb). The application of this subsection is rare, probably as it is restricted to rendering a service to the "aggrieved person". See *Hiemstra Criminal Procedure* 28-75.

[986] Terblanche *Guide to Sentencing* 404; *Hiemstra Criminal Procedure* 28-71.

[987] *Hiemstra Criminal Procedure* 28-75; Terblanche *Guide to Sentencing* 420.

[988] *S v Charlie* 1976 2 SA 596 (A) 599 A-B. In *S v Edward* 1978 1 SA 317 (N) 318A-D the court emphasised that ordering the offender to pay compensation to the complainant for injuries sustained underscores to the offender the wrong she or he committed. *S v Bepela* 1978 2 SA 22 (BH) 24E, 25A-B. See also *S v Tlame* 1982 4 SA 319 (B) 320H; *R v Zindoga* 1980 2 SA 991 (RA) 992H.

[989] Terblanche *Guide to Sentencing* 417.

[990] Terblanche *Guide to Sentencing* 362, 417. McNally JA makes the profound statement in *S v Mambo* 1995 1 ZLR 50 (S)(54C): "It seems to me that it is also in the Zimbabwean tradition that *compensation, restitution and restoration are at the heart of criminal justice*, rather than mere punishment which benefits the victim not at all" (writer's emphasis).

[991] 1988 2 ZLR 86 (SC).

[992] *S v Zindoga* 89H-90A.

process.[993] In order to ensure that restitution does not necessarily or habitually result in a non-custodial sentence, the offer of restitution and other mitigating factors need to be weighed up against the nature of the offence and other aggravating factors.[994] Another factor to consider is the impact the offence has on the victim.[995] From these guiding principles it can be concluded that although the sentence needs to induce offenders to make restitution, wealthier offenders must not be able to buy themselves a stay-out-of-jail card.[996]

The general purposes of a suspensive condition of sentencing such as prevention, mitigation, preservation of positive elements and rehabilitation remain applicable.[997] The more specific purposes of ordering compensation and suspend a term of imprisonment, wholly or in part, as part of a sentence has been justified by the court as being: "to keep the offender out of prison, to assist the offender to realise the consequences of her actions, and to compensate the victim for her loss".[998] The court in Zimbabwe added a fourth purpose, namely to induce compliance by the offender with the conditions of suspension.[999] Offenders will know that if they do not make restitution in terms of the suspensive condition, they are likely to serve a longer term of imprisonment. Conversely, should they comply and pay compensation, they would "earn" a lesser sentence.[1000]

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[993] *S v Charlie* 1976 2 SA 596 (A) 599A; *S v Omar* 1982 2 SA 367 (N) 360B-E; *S v Zindoga* 89F; *R v Zindoga* 992E.

[994] *S v Zindoga* 90C.

[995] *S v Mlala* 291G-H. In this case the court found it a strong mitigating factor that the complainant, an uncle of the offender, did not want to press charges. Korsaj J (291A-B) held: "If the person directly prejudiced, in such circumstances, can show mercy, a court of law cannot ignore such magnanimity".

[996] In *R v Zindoga* (292F) Macdonald CJ warns that if too much weight is given to restitution and courts habitually impose suspended sentences on condition restitution is made, crimes against property are likely to increase. For first offenders, the weight of restitution is generally considerable, depending also on the other circumstances of the offence (292E).

[997] Terblanche *Guide to Sentencing* 406-407; Du Toit *Commentary on the CPA* 28-15.

[998] *Stow* para 24 (quoting Terblanche *Guide to Sentencing in South Africa* 2 ed 364). Also see Terblanche *Guide to Sentencing* 418-419, based on *S v Tshondeni* 1971 4 SA 79 (T) 82H-83F; *S v Zumbika* 1978 3 SA 155 (R) 156D-E; *S v Mlala* 1985 2 ZLR 287 (H) 289F-G; *S v Mahlangu* 2006 JDR 0852 (T) para 5.

[999] *S v Mpfou* 2 1985 1 ZLR 285 (H) 295A-C.

[1000] *S v Mpfou* 295A-C.

Another issue is whether the offender's ability to pay compensation should be taken into account or not by the sentencing court. A court, in the specific context of partial suspension of sentence on condition of restitution, has stated: "whether or not the accused can pay does not always influence this decision".[1001] However, it remains a pertinent question and is answered differently by different courts.

There are two different approaches by the Zimbabwean courts to the offender's ability to pay in the context of a suspended sentence.[1002] On the one hand some courts have stated that the condition of restitution must be "reasonably capable of fulfilment".[1003] If the condition is unlikely to be fulfilled, then the objective of preventing the offender from serving a prison term is nullified, as is the objective of compensating the victim.[1004] As Gubbay J held "(t)he offender will then serve imprisonment on account of his poverty and not because of any *mala fides* or negligence on his part".[1005] In the light of this, there is an obligation upon the sentencing court when exercising its discretion to inquire into the offender's ability to pay compensation.[1006] Accordingly, an accused needs to be given an opportunity to address the court on the court's proposal to suspend part of the sentence on

[1001] *S v Mpfou* 295C.

[1002] *S v Mpfou* 294 A; *S v Mambo* 1995 1 ZLR 50 (S) 54A.

[1003] *S v Zumbika* 156F. See also *S v Mpofu* 294B; *S v Manzini* 1984 1 ZLR 33 (H) 36A-G; *S v Mukura* 2003 1 ZLR 596 (H) 598B-600A. These Zimbabwean cases follow the Zimbabwean appellate division (as it was then) in *R v Lamb* 1969 3 SA 149 (A)(151) where Quenet ACJ stated "When a court considers that part of a sentence of imprisonment should be suspended, subject to stated conditions, it does so in the hope and expectation that the conditions will be fulfilled. If it is reasonably clear that the conditions are incapable of fulfilment, there is no point in granting a suspended sentence." See also *S v Kok* 2015 2 SACR 637 (WCC) para 15.

[1004] *S v Zumbika* 156F.

[1005] *S v Zumbika* 156F. Reynolds J in *S v Mpofu* (297F-298B), does not agree with this interpretation and maintains that the offender is not being penalised because she or he is poor, but because she or he is unable to earn the lesser sentence offered to her or him by making restitution. See also *S v Mambo* 54B.

[1006] *S v Zumbika* 155H; *S Mukura* 600B-C; *S v Tawanda* 2007 JDR 0321 (ZH) 6. 600B-C. Also see *Hiemstra Criminal Procedure* 28-75.

condition compensation is paid.[1007] Subsequent to such inquiry, it may also, be appropriate to make an order providing that payment to be made in instalments.[1008]

On the other hand, other courts have held that an order may be made, even if it is evident at the time of sentencing that the offender is not able to make payment.[1009] In *R v Zindoga* Macdonald CJ held:

> "A court, however, does not have to be satisfied of the ability of the accused person to make restitution before making appropriate provision in its sentence for such an eventuality. Nothing is lost by making appropriate provision for the possibility of restitution, even where the prospects of this appear to be remote."[1010]

A sentence, including part of a period of imprisonment which is suspended on condition that compensation be paid acts as an incentive to offenders to make payment.[1011] It grants offenders an opportunity to serve a lesser sentence. To deny offenders such an opportunity on the basis that there is doubt whether they can pay the compensation at the time of sentencing, will be inequitable.[1012] Such an offender

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[1007] *S v Manzini* 36H-37C; *S v Mahlangu* para 5.

[1008] *Hiemstra Criminal Procedure* 28-75. Also *S v Khoza* para 9.

[1009] *R v Zindoga* 1980 2 SA 991 (RA) 992G-H; *S v Mpfou* 2 1985 1 ZLR 285 (H). In *S v Mpofu* Reynolds J (294E-295C) having decided that he was bound by *S v Zumbika*, tries to reconcile the two opposing approaches with reference to the objective of inducement, namely that the courts convey a threat or a promise with the imposition of a suspensive condition. If the condition is complied with, the accused gets a lesser sentence. If not, she or he will not benefit from the suspensive condition. Consequently whether or not the accused can pay does not always influence the court's decision.

[1010] *R v Zindoga* 992G-H. In this matter the offender at the trial indicated that he wished to make restitution but upon questioning from the magistrate it became evident that he would not be able to do so, and consequently the magistrate did not make an order of compensation as a suspensive condition. Subsequently, relatives offered to help him make restitution (992D), necessitating an appeal against the magistrate's unconditional sentence.

[1011] Reynolds J in *S v Mpofu* (296A-H) cites the examples that family members may be willing to assist in the payment of the compensation; or the offender may experience a change of heart and use income derived from concealed stolen property to pay the compensation. It could also be added that the offender's financial circumstances may change, for example, as a result of an inheritance. Also see *S v Mambo* 54C-D.

[1012] *S v Mpofu* 295H. It is submitted by the writer that this rationale is correct. Inequality would arise if only persons who are able to make restitution are granted a suspended

is no worse off for not being able to pay. On the contrary, should they manage to make payment their time of imprisonment can be reduced. As McNally JA succinctly put it:

> "If the inducement fails, the appellant is no worse off than he would otherwise be. If it succeeds, then both he and the complainant will be better off."[1013]

Both approaches have merit. In exercising discretion in sentencing, one of the cardinal principles is that the person and circumstances of an offender need to be considered by the sentencing court. This means the position of offenders, including their financial position will influence their ability to pay a fine or compensation and thus the amount to be paid. However, it is submitted that with regard to compensation as a suspensive condition, a broader perspective is appropriate. This broader perspective allows, for example, the reality that family or friends assist the offender with the restitution. The objective of inducement thus grants offenders an opportunity to earn a lesser term of imprisonment. It is further submitted that the proposed mechanism of mediation, during which restitution will be discussed and mediated, affords offenders an opportunity to discuss various possibilities of restitution, such as assistance from relatives or possible guarantors that could form part of a mediated agreement. Ways of restitution become broader than the single inquiry into the offender's ability at the time of sentencing to make restitution.

Under section 297 of the CPA, there is no express limit to the amount of compensation that can be ordered and care needs to be taken that the compensation relates to the victim's loss, and is not seen as merely a fine paid to the victim instead of to the state.[1014] The amount of compensation is generally determined by three factors, being "the extent of damages, the offender's ability to pay and the blameworthiness of the offender".[1015] There also needs to be a rational and causal link between the offence of which the accused has been convicted and

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sentence. In other words, the wealthy offender will be able to buy her or his way out of prison by restitution, while a poor offender will not be given the opportunity to do so.

[1013] *S v Mambo* 55B. It is to be noted this was stated in a context where the offender said he had no money to make restitution, and any civil remedy was likely to be fruitless. The court found that the only possible way to recover the monies was the inducement of a suspended sentence.

[1014] *Hiemstra Criminal Procedure* 28-74.

[1015] *S v Mahlangu* 2006 JDR 0852 (T) para 4.

the loss in respect of which the compensation order is being made.[1016] The amount of compensation needs to be specific.[1017] Compensation can relate to either patrimonial loss or pain and suffering, and in this regard the court exercises its discretion.[1018] It must also be borne in mind that notwithstanding the imposition of a compensation order in terms of section 297, a victim does not lose her or his rights to a civil claim against the offender.[1019]

The time period given within which to make restitution needs to be reasonable,[1020] and needs to take into account the time spent in prison.[1021]

[1016] *S v Stanley* 1996 (2) SACR 570 (A) 571B-E. In this case the accused was convicted of the theft of a motor vehicle and part of the sentence was suspended in terms of s 297(1)(a)(i) on condition that he pay R10,000 compensation in respect of goods that were in the vehicle, specifically golf clubs, although he was not convicted of the theft of the goods in the motor vehicle. The court held that it was a question of fact whether or not there is such a link, and in this instance, there was a rational and causal link: for if the vehicle had not been stolen the goods would not have been lost. Also see *S v Mahlangu* para 5.

[1017] Terblanche *Sentencing Guide* 419; *S v Tshondeni* 84A-B. It is respectfully submitted that the order for compensation granted by the court in *S v Pitout* 2005 1 SACR 571 (B) para 33 is strange. The court's way of arriving at the sum of R20,000 compensation for the theft of cattle is puzzling. The court argued that the number of cattle would have increased because some of them were in calf, and inflation could have increased the amount of the loss. Consequently, the court increased the amount of compensation from R15,400 to R20,000. It is submitted that it could equally be argued that any number of the cattle may have died, or the price of cattle may have dropped. Compare the remarks of Goldin J on compensation linked to stolen cattle in *S v Katevera* 667H-668A.

[1018] *S v Edward* 318H; *Hiemstra Criminal Procedure* 28-75. In the Zimbabwean case of *S v Tivafire* 1999 1 ZLR 358 (H) 366A-H and 367C-H, the court interpreted s 358 of the Criminal Procedure and Evidence Act [Chapter 9.07] narrowly. This provision is similar to s 297 that provides for a sentence to be suspended on condition "compensation for damage or pecuniary loss caused by the offence" is paid. The court's interpretation was that a compensation order as a suspensive condition can only be made for "damage or loss which is not of a personal injury kind but loss or damage to property which is readily ascertainable" (365B-D). It is submitted that this interpretation is too narrow and that an order in terms of s 358 may include non-patrimonial damages. Notwithstanding this narrow interpretation, it should be noted that all the Zimbabwean cases referred to in this section concern offences relating to property, for example, theft or fraud.

[1019] Terblanche *Guide to Sentencing* 418; *S v Manzini* 37H.

[1020] *S v Katevera* 1979 3 SA 666 (R) 667G. In *S v Kok* (para 17) the court held that a condition to pay compensation of a relatively large sum in a year was "unduly onerous and it was not reasonably possible for the accused to comply with this".

Significantly, section 105A(1)(ii)(bb) and (cc) make provision for a sentence to be postponed in terms of section 297(1)(a), or suspended in terms of section 297(1)(b). Moreover, sub-section 105(1)(a)(ii)(dd) permits suspension of sentencing in the event of an award of compensation being contemplated in terms of section 300 of the CPA. This cross-reference demonstrates that the legislature envisaged that the payment of compensation as a suspensive condition of postponement or suspension in terms of section 297, or a compensation order in terms of section 300 could be part of a plea and sentence agreement in terms of section 105A. Accordingly, a statutory mechanism exists for paying compensation or rendering some benefit or service to a victim, to be ordered as part of a negotiated plea and sentence agreement. It is contended in this dissertation that these same statutory mechanisms can be incorporated into the proposed mediation process.

Section 300 of the CPA provides for a court to hear evidence and make an order regarding compensation to be paid to the victim.[1022] The significant difference between sections 297 and 300 is that an order regarding the payment of compensation in terms of section 300 is not conditional on the suspension or postponement of the sentence. An order in terms of section 300 is fully independent of the sentencing proceedings. Consequently, it is not a punishment.[1023] Terblanche emphasises that the procedure under section 300 takes place after conviction,[1024] and is "totally apart from the sentence the sentencing court imposes"[1025] and that the "court should rid itself of its role as criminal court and adopt the role of a civil

[1021] *S v Katevera* 667G. An order that an accused not be released until compensation has been paid to the complainant is not competent (667H).

[1022] At present, the maximum amount for a district magistrate's court is R300,000 and for a regional court it is R1 million. There is no limit on the orders made in the High Court. GN R 62 in *GG* 36111 of 30-01-2013.

[1023] *S v Hendriks* 21C; Du Toit *Commentary on CPA* 29-3.

[1024] In *S v Tlame* 1982 4 SA 319 (B) the court emphasised that the procedure to order compensation can only commence after a conviction, and, accordingly, any inquiry should only commence after conviction and not during the trial proceedings (320B-C). However, as evidence regarding the compensation is often led during the criminal proceedings the magistrate may under s 300(2) have regard to this evidence (320E).

[1025] Terblanche *Guide to Sentencing in SA* 462; *Hiemstra Criminal Procedure* 29-3.

court".[1026] It is necessary for the court to give the complainant an opportunity to present its case and the offender an opportunity to respond.[1027]

Claassen J made a helpful distinction in the application of sections 297 and 300, concluding that an order in terms of section 300 should only be made when the offender has enough means to compensate the victim in full. If this is not the case, then a suspended sentences under section 297 to make restitution in periodic payments would be more suitable.[1028] In *Stow,* it is argued that the absence of any statutory requirements for determining when a compensation order can be made in terms of section 297 in stead of section 300, rendered section 297 unconstitutional.[1029] It was contended that if a section 300 compensation order is made, there would be no threat of imprisonment for non-payment by the offender, as the effect of a section 300 order is that of a civil judgment.[1030] Consequently, if an order to pay compensation is made as a suspensive condition under section 297(1)(a), failure to pay will result in an offender having to serve the suspended sentence. This it was argued is discrimination.[1031] The court in considering this argument made a helpful distinction, highlighting the fact that a compensation order under sections 297 or 300 related to a crime having been committed, and someone having a right to compensation arising from such crime. As such it must be differentiated from a civil judgment debt.[1032] The court highlighted other distinctions between sections 297 and 300, emphasising that compensation as a condition of suspension under section 297 is an integral part of the sentence that includes the purpose of keeping an accused out of prison.[1033] Moreover, it is a flexible condition

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[1026] Terblanche *Guide to Sentencing in SA* 462. In *S v Bepela* Hiemstra CJ emphasised the need for the sentencing court to make an inquiry into the ability of the compensation order to be executed, stating "(i)t could be a useless order if the accused had no money or other assets" (24G). This was subsequently followed by *S v Tlame* 320E-F.

[1027] *S v Tlame* 320C-D.

[1028] *S v Khoza* para 9; *S v Medell* 686A-D; *S v Bepela* 24G; *Hiemstra Criminal Procedure* 29-3.

[1029] *Stow* para 60.

[1030] The Constitutional Court in *Coetzee v Government of RSA* 1995 4 SA 631 (CC) para 19 found imprisonment for a civil debt unconstitutional. Also see *S v Medell* 686E-G.

[1031] *Stow* para 61.

[1032] *Stow* para 63.

[1033] *Stow* para 64.

that can be used to shape a suitable sentence, taking into account the accused's means and the time it will take to make restitution.[1034] Section 300, on the other hand, although a "convenient means of recovering a debt", is only available in restricted circumstances, upon the application of the victim or the state on behalf of the victim, and can be renounced by the victim. It is consequently not as effective a tool as a compensation order under section 297 in the sentencing process.[1035]

In addition, the compensation order under section 300 can only be made by a court to a victim who has suffered economic loss;[1036] while an order in terms of section 297 may include compensation for pain and suffering.[1037] A compensation order in terms of section 300 is made at the request of the victim, or the public prosecutor acting upon the instructions of the victim.[1038] The order has the same effect as a civil judgment.[1039] Consequently, no time limit should be fixed by the court within which payment has to be made.[1040] The victim has 60 days after the award has been made to renounce the award in writing.[1041] This may occur in the event of the award being less than the victim believes she or he can recover by using civil litigation. The court has the discretion whether to award the compensation or not, and any such award is conditional upon a conviction. Importantly, the inquiry into compensation generally only begins after conviction. This has both advantages and disadvantages for the victim. On the one hand, a compensation order can only be

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[1034] *Stow* para 64.

[1035] *Stow* para 64. In *S v Bepela,* the court highlights the distinction between the two procedures under s 297 and s 300, confirming that the latter is only possible upon the request of the complainant as it affects the complainant's civil claim (24E-H). The court encouraged the sentencing court to consider a sentence suspended on condition of restitution in instalments (24G, 25A-B).

[1036] *S v Edward* 318G.

[1037] *Hiemstra Criminal Procedure* 29-3; *S v Bepela* 24E; *S v Edward* 318H-319A.

[1038] S 300(1); *S v Hendriks* 2004 NR 20 (HC) 21D. In *S v Panduleni* 1995 NR 125 (HC) (126E-F) a *mero motu* order of compensation in terms of s 300 by the magistrate was set aside on review. Also see *S v Smith* 2009 JDR 0606 (GNO) para 9.

[1039] S 300(3)(a) of the CPA; *S v Smith* para 10.

[1040] *S v Tlame* 320H; *S v Hendriks* 21E.

[1041] S 300(5)(a) of the CPA. Interestingly, in *S v Khoza* (para 12), the court obliged the sentencing court to inquire whether the complainant was prepared to accept a smaller amount of compensation. No reference was made by the court to the complainant's right to reject the order under s 300(5)(a).

made after a criminal conviction requiring a higher standard of proof, which is after an offence has been proved beyond reasonable doubt. On the other hand, such compensation could save the victim the time and costs of a civil claim. Moreover, after conviction, a compensation order cannot be abused for debt collecting, as the prosecution may otherwise complain if a charge is made but subsequently withdrawn after payment before conviction.[1042] Importantly, as a compensation order under section 300 has the effect of a civil judgment, it is inappropriate and ineffective to make such an order if it is evident that the offender does not have the ability to pay and has no executable assets.[1043]

In addition, it is important to note that consequent to *Coetzee v Government of the Republic of South Africa*[1044] civil imprisonment for a debt is unconstitutional. It follows that any threat or order of imprisonment with regard to non-payment of a compensation order in terms of section 300 is improper.[1045] A more appropriate order would be a sentence of imprisonment under section 297 suspended on condition of compensation, payable in instalments over a period of time.[1046] It is equally important for the sentencing court to give the accused an opportunity to respond by making representations regarding the amount of damages claimed by the victim.[1047] Also, the court needs to identify the beneficiary of any order under section 300 clearly,[1048] both for the benefit of the creditor and the offender.

In *S v King*[1049] it seems that the sentencing court commingled sections 297 and 300 of the CPA. The term of imprisonment imposed was suspended on condition

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[1042] With reference to the complaint made by Adv M Govender DDPP, Regional Head, SCCU, Western Cape during an interview with the writer (16-09-2016).

[1043] *Hiemstra Criminal Procedure* 29-3; *S v Bepela* 24G; *S v Medell* 1997 1 SACR 682 (C) 686A-B;

[1044] 1995 4 SA 631 (CC).

[1045] *S v Medell* 687H-J.

[1046] *S v Medell* 687G. See also *Hiemstra Criminal Procedure* 29-3.

[1047] *Hiemstra Criminal Procedure* 29-5; *S v Smith* para 11.

[1048] *S v Medell* 686C-D.

[1049] 2014 JDR 2727 (ECG). Similarly, in *S v Pitout* (579A-580E) the court discussed s 300, then the requirements of a suspended sentence without reference to s 297, and then ordered a suspended sentence on condition that the accused paid the complainant compensation by a certain date. It is submitted that the order made in *S v Pitout* is

that the accused reimburse the complainant in terms of section 300.[1050] This part of the sentence was set aside, as the requirements in terms of sections 300, including the requirement that an application for compensation must be initiated by the victim,[1051] that the prosecutor must make it clear that she or he is acting on behalf of the victim,[1052] and that the accused be given an opportunity to address the court were not met.[1053]

A requirement of a section 300 compensation order is that there needs to be a causal connection between the order for compensation and the loss sustained as a result of the offence of which the offender is convicted.[1054] The amount of the compensation is determined by hearing evidence, including the evidence heard during the trial or additional evidence, whether verbal or on affidavit.[1055] The entitlement to compensation and the amount need only be established on a balance of probabilities. Hiemstra[1056] argues that proof of the quantum needs to be simple and swift and that these provisions are not appropriate for complex claims where there is still an unresolved dispute between the accused and the victim. In addition, the *audi alteram partem* rule applies and the accused needs to be given an opportunity to respond to the claim.[1057] Once an award has been granted and accepted by the victim, the victim forfeits her or his civil claim, as the compensation

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confusing, and that a clear distinction needs to be maintained between s 297 and s 300, as illustrated by the review court in *S v King*.

[1050] *S v King* para 4. Similarly, in *S v Tjisuta* 1991 NR 146 (HC)(147D) the sentencing court ordered the accused to pay compensation in terms of s 300 or alternatively serve a custodial sentence.

[1051] *S v King* para 6.

[1052] *S v King* para 7.

[1053] *S v King* para 8; *S v Tjisuta* 148C.

[1054] *S v Velaphi* 2013 JDR 0127 (ECG) para 11; Du Toit *Commentary on the CPA* 29-2.

[1055] S 300(2) of the CPA.

[1056] *Hiemstra Criminal Procedure* 29-2. See too Terblanche *Sentencing Guidelines* 462; *S v Lombaard* 1997 1 SACR 80 (T) at 83G-I. In this case the complainants applied for compensation after the accused had been convicted of fraud. The court found that s 300 was not appropriate because the claim for compensation was complicated as it involved issues of misrepresentation, speculation with property, suretyship and determining the value of property and shares over time. The nature of the claim was such that it could only be decided upon proper and thorough civil litigation.

[1057] Terblanche *Sentencing Guidelines* 462; *S v Lombaard* 1997 1 SACR 80 (T) at 83G-H.

order is *in lieu* of such civil claim.[1058] The compensation order, like other orders, is subject to appeal or review by the accused;[1059] and this may be a risk the victim has to weigh up in choosing whether to request compensation through the criminal case or to lodge a claim in the civil courts.

Another mechanism is the possibility to make compensation orders in terms of sections 276 and 276A of the CPA which relate to correctional supervision. *S v Stanley* confirmed that it is competent for an order of compensation to be made in conjunction with an order of correctional supervision.[1060] Similarly, *S v Maddock* is authority for the reconsideration of a sentence in terms of section 276A, even should such sentence be in terms of a plea and sentence agreement under section 105A of the CPA.[1061] Compensation, as an appropriate order, can serve as a term of correctional supervision under section 276; or as part of reconsidering sentences in terms of section 276A.[1062] An order of compensation as a mechanism of restitution

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[1058] S 300(5)(b) of the CPA.

[1059] It can be appealed because it is a "resultant order" in terms of s 309(1)(a). A compensation order is also subject to review in terms of s 304(2)(c)(ii). Also see *Hiemstra Criminal Procedure* 29-6.

[1060] 575D-F. An order of compensation is possible under s 276(1)(h) or 276(1)(i). It is beyond the scope of this dissertation to discuss the differences between s 276(1)(h) that relates to direct correctional supervision ordered by the court, and s 276(1)(i) on indirect correctional supervision. This being a sentence of imprisonment allowing the offender to be placed under correctional supervision in the discretion of the commissioner of correctional services or the parole board. As pointed out in *S v Stanley* (575G-I) it is important to ensure that a sentence is in line with the time constraints of s 276(1)(i), namely 5 years; and that conditions of the sentence do not interfere with the discretion of the commissioner or parole board. (Since the judgment s 276(1)(i) was amended by s 20 of the Parole and Correctional Supervision Amendment Act 87 of 1997 to include a parole board.) It is also to be noted that in *S v Stanley* the order of compensation was a suspensive condition in terms of s 297 of the CPA and not an order of compensation in terms of s 52 of the Correctional Services Act 111 of 1998. Compare a similar order of correctional supervision combined with a sentence suspended on condition of good behaviour and restitution in terms of s 297 in *S v Kasselman* 1995 1 SACR 429 (T) 434A-J.

[1061] Although an order for compensation was not one of the conditions for correctional supervision in *S v Maddock*, restitution was part of the approved plea and sentence agreement. The issue emphasised here is that the terms of a plea and sentence agreement can be amended under section 276A.

[1062] This would be possible in terms of s 52(1)(e) of the Correctional Services Act 111 of 1998. See Terblanche *Sentencing Guidelines* 334.

can thus be used by the courts when sentencing someone to correctional supervision. This additional sentencing option is briefly discussed, as a compensation order combined with a sentence of correctional supervision is one of the options that may be incorporated into the proposed mediated settlement agreement.

Correctional supervision, "an innovative form of sentence",[1063] is not a soft option.[1064] Correctional supervision does however demonstrate the shift in approach by the legislature that punishment, reformative and highly punitive, can be achieved through alternative ways, and not necessarily through imprisonment.[1065] Sentencing courts are to be encouraged to use correctional supervision,[1066] and the flexibility of the sentencing option has been emphasised,[1067] as well as its rectification in the event of failure.[1068] Recently the judiciary's lack of trust in the Department of Correctional Services to properly implement correctional sentences has negatively impacted on their use and application by the sentencing courts.[1069]

[1063] *S v M (Centre for Child law as Amicus Curiae)* 2007 2 SACR 539 (CC) ("*S v M*") para 61.

[1064] *S v M* 570C. Also see Terblanche *Sentencing Guidelines* 323. In *S v Mtsi* 1995 2 SACR 296 (W) (209A-B) the court stated that "depending on the content of correctional supervision, this kind of sentence can constitute very severe punishment". Also in *S v Flanagan* 1995 1 SACR 13 (A)(16B-C) Smalberger JA said "(o)fskoon aanvaar kan word dat dit minder afskrikwaarde het as direkte tronkstraf, bly dit egter, indien behoorlik aangewend, 'n gevoelige straf wat wesenlike en effektiewe bestraffing sonder gevangesetting kan bewerkstellig". Compare the reference by Leveson J in *S v Prinsloo* 1998 2 SACR 669 (W) 672J to the "somewhat softer choice of correctional supervision".

[1065] *S v R* 1993 1 SACR 209 (A) translated paraphrase of statement at 221H-I; *S v Kruger* 1995 (1) SACR 27 (A) 30E. Also see Du Toit *Commentary on the CPA* 28-10E; Terblanche *Guide to Sentencing* 318. These commentators describe *S v R* as the *locus classicus* and an outstanding decision on correctional supervision.

[1066] See the cases discussed by Du Toit *Commentary on CPA* 28-10E-10F.

[1067] *S v R* 221E, 222C-G; *S v Omar* 13C-D.

[1068] *S v R* 222G with reference to s 276A(4) providing, in the event of the failure of correctional supervision, that a matter can be referred back to the court for reconsideration of an appropriate sentence.

[1069] In *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 1 SACR 243 (SCA) (para 25) Mthiyane JA commented: "(w)hen correctional supervision was introduced, courts embraced it enthusiastically as a real sentencing option, something that would have a substantial effect on the prison population in this country. As time went on, courts became more sceptical but I am now completely disillusioned." Also see the prudent warning in *S v Schutte* 1995 1 SACR

A primary benefit of correctional supervision is that it can both serve to impose a sentence that is highly punitive[1070] as well as enable and encourage the rehabilitation of an offender.[1071] A most helpful distinction given by Kriegler AJA is that the option helps to differentiate between two types of offenders, namely offenders that need to be removed from society, and others that need not be removed from society, but need to be punished.[1072] A useful yardstick for the sentencing court to use is whether any real purpose is served by sentencing an offender to a term of imprisonment.[1073] The positive characteristics of rehabilitation and differentiation between different personalities of offenders may be well suited for some offenders and offences relating to instances of economic crime.[1074]

The mechanism of being able to order compensation in terms of section 52(1)(e) of the Correctional Services Act as a condition of correctional service is relevant to

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344 (C) (350C-E) (echoed by Van den Heever JA in *S v Sinden* (708H-I)) that courts should be careful not to "debase the coinage of correctional supervision as a form of punishment" as its indiscriminate use will lead to it losing its credibility. For a discussion on the risk of losing trust in the system and on the perception of leniency of correctional supervision see Terblanche, *Guide to Sentencing* 348.

[1070] For a discussion on the severity of correctional supervision, see Terblanche *Guide to Sentencing* 323-324.

[1071] For a discussion on the rehabilitative characteristics of correctional supervision see Terblanche *Guide to Sentencing* 321-322. In *S v R,* Kriegler AJA (220G-J) underlined the fact that the legislature had introduced a new phase and that the focus has moved from incarceration to rehabilitation: "Ons straftoemeting het egter nou 'n heel nuwe fase betree. … Die belangrikste aspek daarvan is die klemverskuiwing vanaf gevangenisstraf na hervorming." Regarding general benefits of correctional supervision recognised by the courts see *S v Kruger* 1995 1 SACR 27 (A) 31B-E.

[1072] *S v R* 221H. Also see *S v Omar* 10H, 13E-F and Terblanche *Guide to Sentencing* 324-325, 326. An illustrative example is found in *S v Kasselman* concerning two policemen who impulsively and recklessly stole part of police trap money. The court found (431J) "dat [die] beskuldiges nuttige lede van die gemeenskap is wat *nie misdadigers in die ware sin van die woord is nie* maar dit geword het deur impulsiewe onbesonneheid en die versoeking wat administratiewe nalatigheid en gebrek aan beheer vir hulle geskep het" (writer's emphasis).

[1073] *S v Kasselman* 431J.

[1074] It is submitted that some offenders may not be a danger to society and the seriousness of the crime of such a nature that imprisonment may be avoidable. It is equally agreed that some offenders may not be suitable for rehabilitation, and also that incarceration is necessary as a deterrent or due to the nature of the crime. These criteria will be illustrated in the cases discussed below.

this dissertation. As, with other restorative sentence options, this mechanism to order compensation is underutilised.[1075] This is regrettable, for the involvement of victims in the process of correctional supervision would help give credibility and validity to the process.[1076] However, for purposes of this dissertation, it is important to note that correctional supervision, whether direct in terms of section 276(1)(h) or indirect in terms of section 276(1)(i), has been ordered by the courts for serious cases on economic crime, involving for example, theft or fraud.[1077] The opposite is also true and in a number of cases the option of correctional supervision was refused by the courts.[1078] The dilemma of sentencing courts in determining an appropriate sentence of having to weigh up the interests of society, and balance it with the interests of the offender, together with the seriousness of the offence, is voiced by Zietsman JP in *S v Erasmus*:

[1075] Terblanche *Guide to Sentencing* 334.

[1076] Terblanche *Guide to Sentencing* 334.

[1077] In *S v Mtsi* 1995 2 SACR 206 (W) (209A-J) an offender convicted of contravening the Corruption Act 94 of 1992 or alternatively fraud had his sentence of imprisonment converted to a sentence of correctional supervision. In *S v Kruger* (32F-G) Kriegler J referred a case involving the theft of meat by a first offender back to the sentencing court to reconsider sentencing in view of the appellate division's proposal of correctional supervision. In *S v Flanagan* (17H) a sentence of imprisonment for fraud was replaced by a sentence of correctional supervision.

[1078] In *S v Prinsloo* (672A-J) a term of imprisonment was imposed on a first offender for theft of almost R450,000, despite the offender being a young mother who had repaid the monies. The court emphasised the vulnerability of employers and that theft from employers should be heavily punished. A request for an order of correctional supervision was also refused in *S v Vorster* 2007 2 SACR 283 (E) (291B-D) which involved theft of approximately R1,6 million by an attorney from trust accounts, none of which had been repaid. In *S v Botha* 1998 2 SACR 206 (SCA) (211J-212H) an appeal against a sentence of imprisonment for offences of theft, fraud and forgery involving approximately R45,000 was dismissed. The magistrate held that correctional supervision was not appropriate as it could not prevent the offender from recidivism at a workplace. The court of appeal found that the sentence was not unreasonable and that the magistrate had not misdirected herself, although she referred to correctional supervision as a "half-hearted antidote" and an "inadequate response" to the crimes committed. In *S v Sinden* 1995 2 SACR 704 (A) (708J-709C) an appeal on the basis that the magistrate should have used correctional supervision was turned down on the ground that the interests of society outweighed those of the offender. Terblanche *Guide to Sentencing* 323-324 contends that the judgments by Van den Heever JA, like *S v Sinden* (708J-709C) regarding the perceived leniency of correctional supervision are too harsh.

> "Because of the gravity of your offence I cannot accede to your counsel's request that you be kept out of jail entirely. I will, however, impose a sentence which, depending upon your conduct and your cooperation with the authorities, could result in your sentence being changed to one of correctional supervision after you have spent [only part] of your sentence in jail." [1079]

The cases discussed illustrate that sentencing is a complex responsibility and consistency amongst sentences and the application of correctional supervision is not easily achieved.[1080] It is clear that each case has to be decided on its own facts and circumstances. It is also clear that despite the reservations and the disillusionment with correctional supervision it remains a flexible and innovative sentencing option, particularly when used in conjunction with a condition to pay compensation in instances of economic crime.

S v Maddock identifies another opportunity, post-sentencing, for the mechanism of mediation to be used in instances of economic crime. Section 276A(3) is a "unique provision"[1081] that detracts from the principle that courts give final and binding orders regarding sentencing. This section, like section 276(1)(i),[1082] grants the commissioner of correctional services or the parole board the power to bring a matter before the courts to reconsider a sentence. It is important to note that in reconsidering the sentence, the court considers the circumstances of the matter anew, including events which have taken place after sentencing, that is post-

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[1079] 1999 1 SACR 93 (SE) 99E-G (it is to be noted that this case is reported twice, also *as S v Erasmus* 1998 2 SACR 466 (SE)). In this case the offender was a first offender who was convicted of theft of almost R2 million over a period of two and a half years. The offender was clearly remorseful, co-operative, unlikely to repeat the offence, clearly no risk to society and had almost fully repaid the monies by selling all his assets. On the other hand economic crime had reached alarming proportions and the sum was significant and stolen over a period of time. The offender was sentenced to five years' imprisonment in terms of s 276(1)(i)(98A-99F).

[1080] Also see the concern of Leveson J in *S v Prinsloo* (672J-673B) regarding disproportionate sentences and his request to the Attorney-General to make his and other judgments available to magistrates.

[1081] *Hiemstra Criminal Procedure* 28-42(1).

[1082] The main difference between s 276A(3) and 276(1)(i) is that a sentence brought before the court in terms of the former had no initial provision for conversion of a sentence, as s 276(1)(i) does.

sentencing circumstances.[1083] Moreover, section 276(A)(3)(e)(iii) grants the court the power to impose a suitable sentence, other than the initial sentence.[1084] It is thus a two-stage process. Firstly, the commissioner brings the application before the court, and then the court reconsiders the sentence, and can decide not to interfere, or to interfere by granting an order of correctional supervision or another sentence.[1085] It is submitted that mediation between the victim and offender, one of the correctional measures listed in section 52 of the Correctional Services Act,[1086] could also be harnessed in a case where restitution may not yet have been made to the victim.[1087] The mechanism of mediation could help the offender in securing the second chance provided by section 276(3)(A).[1088]

It has been demonstrated that the mechanism of an order of compensation, either as a suspensive condition of a sentence under section 297(1)(aa), or as a compensation order after conviction under section 300, is a restorative tool that has been applied successfully by the courts for the past 40 years. Indeed, the courts have encouraged more use of these mechanisms of restitution for victims. More recently, the legislature has introduced the opportunity to use the mechanism of compensation under an order of correctional supervision under section 276, or as a suspensive condition in the reconsideration of a sentence in terms of section 276A(3). It is also clear that the legislature intended that the mechanism of compensation be used as part of a plea and sentencing agreement under section 105A of the CPA. Such concurrent application of an order of compensation as part of sentencing options in the criminal justice system is used as a building block for

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[1083] *S v Maddock* 9, 10; *Hiemstra Criminal Procedure* 28-42(2).

[1084] As was the case in *S v Maddock* converting the balance of the offender's initials sentence to correctional supervision (14). *Hiemstra Criminal Procedure* 28-42(1).

[1085] *S v Maddock* 9-10.

[1086] S 52(1)(g).

[1087] For example, in a case where a person was sentenced to direct imprisonment and no order for compensation had been made, and less than 5 years' of incarceration were remaining, a mediated order of compensation between the victim and offender could place the offender in a position to have her or his sentence converted or an alternative sentence imposed. It is noted that an offender has no right to bring an application in terms of s 276A(3) and that the discretion to do so lies with the commissioner of correctional services or with the parole board.

[1088] *Hiemstra Criminal Procedure* 28-42(2).

restitution orders to be made under the proposed mechanism of mediation. Consequently, notwithstanding restrictions and reservations regarding these sections, provision already exists in the South African criminal justice system for the voice of the community and the complainant to be heard and for restitution to be made to the victim for loss suffered by the victim.

4 5 Multi-faceted mechanisms in the justice systems

It has been shown that in a highly regulated business sector, the combating of economic crime can no longer effectively be achieved through only the conventional adversarial criminal trial mechanism. Additional mechanisms are clearly necessary. The approach to combating economic crime is multi-faceted and rightly so. This has been demonstrated in this chapter by a description of mechanisms under civil and criminal law, as well as hybrid mechanisms that are applied to address economic crime. To illustrate this complex field of corporate regulation, the pyramid of responsive regulation approach of Ayres and Braithwaite was adapted to identify methods of regulation and mechanisms of enforcement.[1089]

It is evident from the discussion above that the approval by a court of a mediated settlement agreement is imperative in the proposed mechanism. This is due to the importance attributed to the voice of the public and the critical value of transparency. It is submitted that these two considerations are particularly relevant to South Africa, where economic crime is disproportionately high and authorities have conceded that they are not winning the battle against it. In addition, the mistrust of the justice system is illustrated through the existence of vigilante courts and the establishment of parallel investigating and prosecuting bodies.[1090]

The mechanism of a plea and sentencing agreement is critical to the proposal in this dissertation. It is submitted that several issues that arise in negotiating plea and sentencing agreements are similar to those that will arise in mediation. The constitutionality of waiver of an offender's constitutional rights by using a process such as a plea and sentencing agreement has been assured.[1091] It is suggested that the same assurance be given to the process of mediation. So too, the issue of a just

[1089] See the discussion in para 4 1, 153ff.

[1090] See the discussion in ch 3, para 3 3 4, 127-128, especially fns 145 and 148.

[1091] See the discussion of the waiver of constitutional rights in paras 4 3 2 1 and 4 3 2 2.

sentence within the context of plea and sentencing agreements will assist the determination of a just sentence in the context of mediation.

Importantly, the recognition and inclusion of restorative justice principles, such as the specific requirements to grant a victim an opportunity to make representations and to consider restitution under section 105A, are critical to the proposed mechanism of mediation. It is suggested that developing these principles further in the proposed model will be a natural evolution under the CPA and criminal law in South Africa.

Negotiated justice, including mechanisms like plea and sentencing agreements and DPAs, illustrate that alternative mechanisms to the conventional adversarial trial do exist in the criminal justice system. In addition, the elements of sentencing have become more integrated, with orders for compensation forming part of the conventional orders for incarceration. It is submitted that such integration should be promoted and developed further, particular with regard to economic crime.

In this chapter various mechanisms of addressing economic crime have been discussed to illustrate that the approach to economic crime needs to be multi-dimensional, encompassing voluntary, administrative, civil and criminal mechanisms. Undoubtedly, more ways of addressing economic crime, both in civil and criminal law, as well as hybrid models, will emerge. Consequently, it is proposed that mediation, conventionally used to resolve civil disputes, can also be harnessed as a mechanism to address instances of economic crime:

“Scrap[ping] the plea-bargain: Mandatory mediation of criminal cases would further justice, at a lower social cost”.[1092]

[1092] The title of an article calling for mediation to be used expansively in the criminal justice system was made at the turn of the century. J Smith “Scrapping the Plea-bargain: Mandatory Mediation of Criminal Cases Would Further Justice, at a Lower Social Cost” (2000) 7 *Disp Resol Mag* 19.

CHAPTER 5
PROPOSALS AND CONCLUSION

Chapter overview

5 1 Introduction

> "[C]riminal mediation does not replace traditional adjudication within the criminal justice system, it just makes the criminal justice system better."[1]

On 26 November 2010 a tragedy occurred. Seventy-one year old Cowan, a highly respected legal practitioner, took his own life soon after a suspicious bridging loan was detected in the financial records of the firm. After bringing various information together it appears that Cowan had been operating a Ponzi scheme for a number of years and that investors and other persons who had paid monies into the law firm for whom Cowan worked had lost between R150 and 200 million. His

[1] Simms (2007) *Ohio St J on Disp Resol* 797 fn 1.

deceased estate was declared insolvent. The extent of the losses, details of the Ponzi scheme and what had happened to the monies may never be known. Eight years later victims are still pursuing civil actions against the law firm in which Cowan had been a senior partner. In his suicide note to the law firm, Cowan wrote: "I have committed fraud and compromised the firm by doing so. I am deeply sorry that I breached the trust placed in me."[2]

This tragic incident illustrates the complexity of economic crime. The fraud is difficult to piece together, but it appears parts of the scheme involved early investors receiving very high returns of 30 to 48% interest on monies paid for bridging finance. Other monies received for normal commercial transactions were misappropriated and used to repay the lenders. The story also illustrates the complexity of identifying victims of an economic crime: are the early advancers who received extraordinary returns initially truly victims? The clients whose monies were entrusted to the law firm's trust accounts for other purposes and whose funds were then misappropriated are victims. Likewise, the law firm itself identifies itself as a victim, saying it was totally unaware of Cowan's fraudulent activities. The surviving widow and family members are also clearly victims. The legal and Jewish communities in which Cowan was well known and respected also suffered harm. None of the stakeholders: neither the state, nor the victims, including direct victims, close family and the broader public, nearly a decade later, have experienced a satisfactory resolution to the dispute.

This incident has been used not only to demonstrate the complexity of the nature of economic crime, the difficulty of identifying victims and the complications in resolving the different disputes between the stakeholders, but also to suggest that mediation may serve as an effective way of resolving similar economic crimes and the disputes arising from them. It is submitted that the opportunity to participate in mediation and to reach a mediated settlement within the criminal justice system is a necessary additional mechanism through which economic crime may be addressed.

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[2] For a more detailed account, see T Broughton "Ponzi Victims Pursue Law Firm After Attorney's Suicide" (03-06-2018) *Sunday Times* <https://www.timeslive.co.za/sunday-times/news/2018-06-02-ponzi-victims-pursue--law-firm-after-attorneys-suicide/> T Broughton "Cowan Fraud Battle Hots Up" 25-01-2011) *IOL* <https://www.iol.co.za/news/south-africa/kwazulu-natal/cowan-fraud-battle-hots-up-1016660> (all accessed 11-07-2019).

5 2 Principles on which to build and integrate the mechanism of mediation into the criminal justice system

> "No one punishes a wrong-doer putting his mind on what they did and for the sake of this, unless one takes mindless vengeance like a wild beast. But he who undertakes to punish with reason does not avenge himself for the past offence, since he cannot make what was done as though it had not come to pass; he looks rather to the future, and aims at preventing that particular person and others who see him punished from doing wrong again."[3]

In chapter 1, the magnitude, complexity and debilitating effect of economic crime was described. It is recognised that the present mechanisms in the criminal justice system to address economic crime are not succeeding. Accordingly, there is an opportunity and a need for an additional way in which to deal with economic crime. The submission in this dissertation is that mediation can make a contribution and will serve as an effective and resourceful alternative dispute method through which some instances of economic crime can be resolved. The characteristics and benefits of mediation were described in chapter two, including the relative informality and flexibility of the process and the establishment of a safer more engaged space within which participants can consider and attempt to resolve the disputes. Moreover, the dynamic nature of mediation and the uncovering of larger narratives through dialogical and experiential truth is fundamental for the negotiation about and resolution of disputes arising from complex economic crime. Significantly too, mediation is considered to be a restorative justice process and is rehabilitative and reformative.

The foundation on which the proposed mediation dispute resolution model in the criminal justice system will rest is restorative justice. The core principles and characteristics of restorative justice were discussed in chapter 3. The importance of the different stakeholders in a restorative justice model, namely the state, the offender, the victims and the community were identified; and it was further demonstrated that their participation in the criminal justice system is a realisation of the policies and purposes of the reformation of the criminal justice system in South

[3] Plato, *Protagoras* 324 a-b <http://www.perseus.tufts.edu/hopper/> (accessed 16-08-2016).

Africa.[4] Significantly, the importance of the participatory roles of offenders and victims and the mainstreaming of restorative justice was recently endorsed by the new Minister of Justice and Correctional Services.[5]

The basic requirements of a successful mediation are an offender and a victim willing to participate voluntarily.[6] Implicitly, the offender is willing to take responsibility and accountability for her or his wrongs, whilst a victim is willing to participate to seek a resolution. In addition, it is suggested that a formal statutory opportunity for mediation, which robustly encourages, but does not force persons into mediation will be appropriate to persuade participants to engage in a mediation process.[7] However, instances of economic crime involve other stakeholders too, including the police, the prosecution, the courts and the broader public.

Primary stakeholders in addressing economic crime are the prosecution and the police. Section 179 of the Constitution provides for the establishment of the National

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[4] The adoption and development of restorative justice in the South African criminal justice system was discussed in ch 3, para 3 2 1, 104ff. See also H Hargovan "Doing Justice Differently: A Community-based Restorative Justice Initiative in KwaZulu-Natal (2009) 22 *AC* 63 66-68.

[5] In his recent address to parliament on 16 July 2019, minister Ronald Lamola indicated that the CPA is due to be amended to ensure that it is in line with the Integrated Criminal Justice System ("ICJS") (2017), including the consideration of victims of crime and witnesses as being main beneficiaries of the system. See L Ensor "Justice Minister to Seek More Resources for Cash-strapped NPA" (16-07-2019) *Business Live* <https://www.businesslive.co.za/bd/national/2019-07-16-justice-minister-to-seek-more-resources-for-cash-strapped-npa/> (accessed 17-07-2019). The ICJS (2017) approved by cabinet on 29 March 2017 includes the promotion of ADRM as a focus area. This includes mediation in criminal matters and collaboration with the community. See DOC&CD "Focus Areas Integrated Criminal Justice System (ICJS) *pmg* <https://pmg.org.za/files/170531focusareas.ppt> (accessed 19-07-2019). Also see ch 3, para 3 2 1, 104ff. In a pilot project, H Hargovan ("Doing Justice Differently: Prosecutors as 'Gate-Keepers' of Restorative Justice (2010) *AC* 18 33) found that the mainstreaming of restorative justice into the main criminal justice system is also supported by the prosecution.

[6] ZD Gabbay "Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-collar Crime" (2007) *Cardozo J Conflict Resol* 8 421 474-475. Notably, Gabbay contends that the victim has to be a natural person. However, in this dissertation it is submitted that a victim may be any person, including a company, because juristic persons are represented by natural persons.

[7] See discussion in ch 2, para 2 2 2, 41, 42-45.

Prosecuting Authority ("NPA")[8] and the establishment of the position of the National Director of Public Prosecutions ("the NDPP").[9] Section 179(2) grants the NPA the authority to institute criminal proceedings, and importantly section 179(4) provides that "national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice". The National Prosecuting Authority Act 32 of 1998 ("NPA Act") regulates the powers of the prosecution.[10] The Criminal Procedure Act 51 of 1977 ("CPA") underscores the discretionary power of the prosecutor as *dominus litis*, by prescribing the prosecution's discretion to prosecute or not to prosecute.[11] This discretionary power is further illustrated in various provisions describing the prosecution's power in specific circumstances.[12]

It is beyond the scope of this dissertation to discuss the role and the powers of the prosecutor.[13] However, throughout this dissertation concern has been raised about the very powerful discretionary position of the prosecutor, with little review and recourse for persons prejudiced by the decisions of a prosecutor. It has been

[8] As provided by s 179(1) of the Constitution, s 2 of the NPA Act established a single national prosecution authority, the NPA, as opposed to the former independent provincial prosecution agencies.

[9] S 179(5) grants the NDPP extensive powers to determine prosecution policy, issue policy directives, review decisions to prosecute or not to prosecute and to intervene in the event of prosecutorial policy directives not being followed. The position of the SDPP of the Specialised Commercial Crime Unit ("SCCU") is also relevant for this dissertation.

[10] In *S v Basson* 2007 1 SACR 566 (CC) para 44 the Constitutional Court found that particular powers of an independent prosecution in terms of the NPA Act endorse the fact that "effective prosecution of crime is a constitutional objective". See also *Brown v National Director of Public Prosecutions* Case no 1800/2011 I ("*Brown v NDPP* (2011)") para 29.

[11] S 6(a) of the CPA.

[12] For example, s 112 of the CPA entitling the court to enter a plea of guilty based on acceptance by the prosecution of such plea; s 57A of the CPA enabling the prosecution to invite an accused to admit guilt and pay a fine. Also see Clarke (1999) *CILSA* 160-164.

[13] Compare Uijs AJ in *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 699 I paras 679H-I & 680A-E who emphasises the traditional discretionary and independent nature of a prosecutor's power and authority to decide whether an accused should be prosecuted or not, even if a *prima facie* case has been made out against the accused (para 681B). The only time the court may interfere with the independent discretion of the prosecutor is in the event of *mala fides* (679I-J); or "if justice dictates that (it) should do so" (681G). Also see *Brown v NDPP* (2011) paras 26-32 describing prosecutorial misconduct and the duties of a prosecutor, including the duty "to ensure that an accused's right to a fair trial is protected and not to act arbitrarily".

submitted that mediation may serve to mitigate some of the disproportionate power of the prosecution, particularly too with regard to plea and sentencing agreements. This is because the prosecutor will become one of the participants, together with the offender and victim, in the negotiation process facilitated by the mediator. This can be compared to prosecutors being the more powerful negotiators in negotiations seeking plea and sentencing agreements under section 105A of the CPA, or exercising their prosecutorial power in deciding whether to accept or decline a guilty plea under section 112 of the CPA, or whether to prosecute or not to prosecute. It can be said that prosecutors retain the power to decide whether to engage in mediation or not to engage in mediation, except in instances where the court refers a matter for mediation.

The intention of this dissertation is to check the powers of prosecutors in the conclusion of plea and sentencing agreements, not to dilute their constitutional independence.[14] A mediator assesses and manages the power relationships between the parties.[15] By granting a stronger voice to the offender and the victim through the facilitation of a mediator in terms of the proposed section 105B of the CPA, the procedural power of the prosecutor under mechanisms like sections 112 and 105A of the CPA is countered. In addition, the critical oversight of the court is necessary. Judicial supervision is required in section 105A plea and sentencing agreements and will similarly be provided for in the proposed section 105B mediated settlement agreements.

It is also submitted that a model with more participation by the stakeholders in the criminal justice system will be more effective. The investigating officers play an integral role in the criminal justice system[16] and effective and successful cooperation between the prosecution and police is a prerequisite for combating economic crime

[14] The power of the prosecutor is official, based on formal authority and consequently it can be said the prosecutor has immense procedural power. This issue was discussed in ch 4, para 4 4 2 1, 316-319. Also see R Lyster “Mediating Constitutionally Protected Rights Disputes: Some Caveats and Recommendations” (1996) *SAJHR* 230 241.

[15] Lyster (1996) *SAJHR* 242.

[16] The South African Police Services (“SAPS”) is responsible for the investigation of crime in South Africa.

successfully.[17] It is envisaged that the police will also play an important role in the proposed model. This is based on police practices that demonstrate that investigating officers influence the negotiation of charges brought against a defendant.[18] The cooperation of the police and prosecution will be vital in cases where assets already have or may be forfeited through steps taken by the Asset Forfeiture Unit ("AFU").[19] The forfeiture and realisation of assets may play a pivotal role in the resolution of a dispute, particularly with regard to restitution of loss suffered by the victims.[20]

Similarly, the participation of the victim and the community influences the efficacy of the criminal justice system. The participation of the victim, the recognition of the legitimate interests of the victim and the benefits gained by such participation have been discussed throughout this dissertation, primarily the benefits of restoration.[21] The role the community can play, whether as collaborative partners in providing mediation services or in other correctional measures, has also been highlighted in

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17 It is beyond the scope of this dissertation to discuss the operations of the police and the NPA. Notably, effective cooperation between the two bodies has been validated by the operations of the SCCU in the NPA. For a detailed discussion see A Altbeker *Justice through Specialisation? The Case of the Specialised Commercial Crime Court: Institute for Security Studies Monographs* 76 (2003). Cooperation and collaboration between the different state departments is a focus area of the ICJS (2017) and underscored by the NPA. See "Report of the Portfolio Committee on Justice and Correctional Services on Budget Vote 21: Justice and Constitutional Development" (12-07-2019) *pmg* <https://pmg.org.za/tabled-committee-report/3883/> (accessed 19-07-2019) emphasising the integration of different departments and the need to address the "silo" approach. The NDPP *Annual Report* 2017/2018 18 19 also emphasises the close collaboration between the NPA and the Anti-Corruption Task Team, the Special Investigating Unit, the South African Revenue Service and several other government stakeholders through concluding memoranda of understanding with one or another. Also see ch 3, para 3 3 1, 115ff.

[18] During her research in South Africa, CT Clarke ("Message in a Bottle for Unknowing Defenders: Strategic Plea Negotiations Persist in South African Criminal Courts" (1999) 32 *CILSA* 141 153) found that the police have an influence on plea negotiations and that defence lawyers negotiate directly with the police before the matters are handed over to the NPA.

[19] A special unit in the NPA whose work is inextricably linked to that of the police. See the discussion in ch 4, para 4 3, 207ff.

[20] See the discussion in ch 4, para 4 3 4, 238-242.

[21] See the discussion in ch 3, para 3 3 3, 121ff.

chapter three.[22] Such increased participation by the victim and community will contribute to the integration and mainstreaming of the principles and objectives of restorative justice which are in line with the macro-policy and aims of the criminal justice system in South Africa.[23]

The role of the court is critical. It is not the intention of this dissertation to privatise or decriminalise offences relating to economic crime, but to ensure that they fall under the discretion of the court and come into the public domain. The role of the court is not only to receive and consider a mediated settlement agreement, but also, where appropriate, to direct and refer matters for mediation. In addition, this dissertation makes the case that judicial mediation is possible.[24]

In chapter 4, different mechanisms available in the civil and criminal justice systems were discussed. It was shown that the law remains dynamic and that hybrid mechanisms such as asset forfeiture and DPAs have evolved, particularly in the field of economic crime.[25] The particular significance of DPAs is to illustrate the development of additional alternative mechanisms to the adversarial trial court process in the realm of negotiation, but still under the wing of the court's jurisdiction. Although it is not the proposal of this dissertation that DPAs be introduced in South Africa, it is submitted that certain of its guiding principles like legal privilege of information disclosed during negotiation,[26] and protection of disclosure of identity of persons[27] are both informative and formative[28] for the proposed mechanism of mediation. The disclosure of a DPA, a confidentially negotiated agreement, in a public court to ensure critical judicial oversight has shown the potential utility of a

[22] See ch 3, para 3 3 4, 126ff.

[23] Acknowledgment by the prosecution of the importance of collaboration with the community and public organisations, like NICRO; and participation of victims and offenders in mediation and other restorative justice programmes has been shown in research done in KwaZulu-Natal recently. See Hargovan (2010) *AC* 32 37-38.

[24] See ch 2, para 2 4 1, 81-86.

[25] See the discussion in ch 4, para 4 3, 207ff and para 4 4 1, 248.

[26] See the discussion in ch 4, para 4 4 1 2, 279-282.

[27] See the discussion in ch 4, para 4 4 1 2, 274-276.

[28] In the sense of giving shape or form.

hybrid model in the criminal justice system.[29] Like DPAs, mediated settlement agreements can be negotiated outside the courtroom, but approved inside it.[30]

This is in addition to the use of plea and sentencing agreements which has long been the primary way to resolve crime in the United States, and which is increasingly being used in South Africa. It is submitted that the recognised benefits of DPAs and plea and sentencing agreements, including the saving of legal costs and time, restitution for victims and continued existence of companies will be shared by the proposed negotiation model of mediation.[31] In addition, it is acknowledged that mediation may increase the awareness of individuals and members of the community of the nature of economic crime and of their role in the prevention and response to economic crime, as well as in the resolution of disputes arising from such crimes.[32] This, in turn, will encourage and promote "more constructive and less repressive criminal justice outcomes."[33]

The above principles of negotiated justice, restitution and judicial supervision already established in the criminal justice system present building blocks with which an additional mechanism, mediation, can be built on restorative justice, alongside section 105A plea and sentencing agreements. It is suggested that the proposed section 105B is a natural extension of section 105A plea and sentencing agreements. An understanding already exists in the jurisprudence of negotiated plea and sentencing agreements and the application of the "just sentence" criteria in terms of section 105A.[34] In addition, more meaningful participation by the victim in the criminal justice system has been statutorily endorsed by section 105A, and the proposed section 105B will serve to entrench such participation further.[35] Moreover, the mechanisms available in the CPA regarding restitution, like sections 297 and

[29] See discussion in ch 4, para 4 4 1 2, 263-272.

[30] This is clearly shown in the discussion of the publication of DPAs in ch 4, para 4 4 1 2, 272-276 above.

[31] The benefits of mediation, DPAS and plea and sentencing agreements have been discussed in ch 2, para 2 4 1, 88-91; ch 4 para 4 4 1 2, 255-256; and ch 4, para 4 4 2 1, 316 respectively.

[32] Compare the discussion in ch 2, para 2 4 1, 88-91. Also see CEPJ *Mediation in Penal Matters*, Recommendation R(99) 19.

[33] CEPJ *Mediation in Penal Matters*, Recommendation R(99) 19.

[34] See the discussion in ch 4, para 4 4 2 2, 334-338.

[35] See the discussion in ch 4, para 4 4 2 2, 329-333.

300, have been specifically incorporated into section 105A, and will be specifically borne in mind in the negotiation of plea and sentencing proposals during the proposed mediation.[36]

In view of the above considerations, it is submitted that the proposal to introduce mediation in the criminal justice system as an appropriate dispute resolution mechanism to resolve instances of economic crime in the criminal justice system has been proven justified and necessary.

5 3 Section 105B of the South African Criminal Procedure Act 51 of 1977: A proposed model for mediation in the context of economic crime in South Africa

5 3 1 The legal context for the introduction of section 105B

The supreme governing law in South Africa is the Constitution of South Africa,[37] and since its commencement all laws, statutory, common and otherwise are to be tested against the Constitution. Provisions relating to the prosecution of offenders of economic crime and the resolution of such disputes thus need to adhere to the provisions of the Constitution. Section 35(3) provides that every accused person has a right to a fair trial, including the right "to a public trial before an ordinary court."[38] The public nature of any process used to prosecute an offender or resolve a dispute of a criminal nature is strongly emphasised in the South African criminal system; and rightly so. However, the question arises whether an adversarial trial process before an ordinary court is the only place where such a public process may take place?

It is acknowledged by the NPA that the fulfilment of its constitutional mandate to prosecute matters successfully may include "resolving criminal matters outside of the formal trial processes through alternative dispute resolution mechanisms."[39] The opportunity to resolve matters under the state's mandate creates the possibility of

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[36] See the discussion in ch 4, para 4 4 3, 353ff.

[37] Constitution of the Republic of South Africa, 1996 ("Constitution").

[38] S 35(3)(c) of the Constitution.

[39] NDPP *Annual Report* 2015/2016 19. The possibility of using alternative mechanisms to the adversarial trial also forms part of the ICJS (2017) focus areas, especially the prospect of mediation. See DOC&CD "Focus Areas Integrated Criminal Justice System (ICJS) *pmg* <https://pmg.org.za/files/170531focusareas.ppt> (accessed 19-07-2019).

using mediation to negotiate plea and sentencing agreements to be approved by the court.

It is submitted that this process will not infringe on the constitutional rights of the parties and that although mediation, like plea and sentencing agreements, may result in the voluntary waiver of certain constitutional rights necessary safeguards can be built into the process, as has been done in section 105A of the CPA.[40]

Law is dynamic and ever evolving and accordingly there are undoubtedly grey areas in which the conventional delineation between civil and criminal law is blurred. This is particularly true in the realm of the response to economic crime and the use of administrative penalties to hold companies and persons responsible for corporate crime. [41] The prevailing international tendency to settle charges of economic crime on the perimeter of criminal law, yet not fully within the jurisdiction of criminal law through the use of NPAs and DPAs further blurs the borders between criminal and civil law. Hybridity prevails. This is evident in the erosion of the accusatorial and adversarial trial processes through alternative dispute resolution mechanisms such as plea negotiations, DPAs and deferments.[42] Similarly, the traditional duel between the prosecutor and defence attorney has become less adversarial with the recognition, albeit slowly, of the participatory roles of the public and the victim. So too, the elements of sentencing have become more integrative, with orders for compensation forming part of the conventional orders for incarceration. Current sentences in cases of economic crime show that restorative measures are now being integrated with retributive principles. The contemporary overlap of and blurring of the traditional boundaries between criminal and civil justice systems are recognised and acknowledged. It is submitted that this trend should be promoted and developed further, particularly in the realm of economic crime.

It is in this context of hybridity and ever-evolving criminal justice that it is proposed that mediation be formally introduced into the criminal justice system to contribute to combating economic crime.

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[40] See the discussion of the waiver of constitutional rights in paras 4 3 2 1 and 4 3 2 2.

[41] This is evidenced by the administrative actions and decisions of bodies such as the SEC in the United States, the ASIC in Australia and the FAIS Ombud in South Africa.

[42] Clarke (1999) *CILSA* 149-151.

5 3 2 The proposed section 105B

Draft provisions of the proposed section 105B, including explananory notes, are in Annexure A, which need to be read together with the *Principles of Best Practice for Mediation in the Criminal Justice System* in Annexure B.

5 3 3 The benefits and challenges of section 105B

The benefits of mediation relate to its particularity. It is a particular process, in the sense that it is an informal and flexible process of which the nature is determined by the unique circumstances of the participants, the nature of the issues raised by them, and the mediation style of the mediator. Critiques of mediation argue that this informal nature is contrary to the formal due process afforded by the conventional procedural process with rules and regulations. Yet it has been shown that offenders and victims feel that the mediation process treated them fairly and culminated in a fair outcome.[43] In this dissertation, it is asserted that the nature of the process and the participants themselves should be trusted, albeit in a dynamic way, and not rigidly cast into rules and regulations. Consequently, preference is given to principles of the practice of mediation, in contrast to legislated rules or regulations. However, it is proposed that a code of conduct be developed to protect the professionalism of the process.[44]

The particularity of the participants in mediation is also definitive. Contrary to the conventional justice system, in which the prosecution and the offender appear as the main role players and as adversaries before a presiding officer, mediation includes more participants. These are notably the victim, and at times members of the community, who appear on an equal footing with the offender. At times, the prosecution is also a participant to discuss and negotiate a resolution for the dispute, with the assistance and facilitation of a mediator. This multi-party process has been criticised as involving too many persons, and that the focus on the interests of the persons clouds the real issues of justice of identifying and proving a particular offence and ordering a just sanction against an offender. It has also been criticised

[43] See the discussion in ch 3, para 3 5, 148ff.

[44] See Annexure B, *Principles of Best Practice for Mediation in the Criminal Justice System*, Principle 7.

as being cumbersome and time consuming. Yet research also shows that this is generally not so, and that mediation does save time and that a multi-party process does not necessarily hinder justice.[45]

Mediation is also particular regarding punishment. Arising from the particular characteristic that mediation emphasises the parties' interests and not their rights, punishment is particular to each case. Restoration, both economic and personal, is more readily achieved during mediation than in an adversarial process. Monetary restitution, although possible in the adversarial civil and criminal systems, is not readily awarded in a criminal trial and it is limited by rules of evidence and procedure. It has also been shown that offenders are more likely to pay restitution in terms of a mediated settlement than they are in terms of a court order.[46] Moreover, restitution is particular and unique to each case.

Restoration, of both the offender and the victim, is important. Mediation is only successful if there has been some admission and accountability by the offender. It has been shown that this accountability may serve the interests of justice better, as the offenders are less likely to be recidivists. Restoration for the victims is also distinct and it may be that simply hearing the truth or hearing answers to questions such as "why"? or "why me?" may help the victim to obtain closure and healing. Similarly, an offender, hearing the victim, and hearing the effect her or his action had on a victim, can lead to an offender recognising and acknowledging the magnitude and impact of her or his actions, and subsequently accepting accountability.[47]

There are two primary challenges foreseen regarding the proposal. The first is reluctance, firstly by the prosecution, but also by defence counsel. As has been shown, prosecutors possess a very powerful broad discretion with regard to how instances of crime are dealt with and prosecutors may thus fear the relinquishment of their power. Akin to this may also be a general reluctance by defence counsel to use alternative dispute mechanisms as the complicated criminal justice system has been developed to protect the rights of an offender. It is submitted that mediation is a

[45] For a general discussion on the concerns and benefits of mediation in the criminal justice system see ME Laflin "Remarks on Case-management Criminal Mediation (2004) 40 *Idaho L Rev* 571 608-619; RN Koman "Balancing the Force in Criminal Mediation (2016) 7 *Beijing L Rev* 171 172-173. Also see the discussion in ch 2, para 2 4 1, 88ff.

[46] See the discussion in ch 2, para 2 4 1, 88ff.

[47] See the discussion in ch 3, para 3 5, 148ff.

natural extension of a plea and sentence agreement. Therefore it is not a radical proposal. The possibility of mediation, in fact, offers the parties an additional way to solve the disputes arising from economic crime. In addition, like the introduction of DPAs in other jurisdictions through specific legislation, the formal introduction of mediation illustrates the trend to introduce more alternative mechanisms to resolve instances of economic crime and to move beyond the binary option: to prosecute or not to prosecute.

A further challenge is the public perception that mediated plea and sentence agreements may be considered "soft options". Accordingly, the public may also be reluctant to participate in and support mediation. However, it is submitted that the involvement of the public in the mediation process will go towards changing such perceptions and grant them a more informed appreciation of the criminal justice process. Also, as repeatedly noted in this dissertation, education and awareness of the mechanism is vital to its success.[48]

5 4 Different stages in the criminal justice process when a case may be referred to mediation

It is submitted that mediation can be used in various stages of the criminal justice system: pre-charge, pre-plea, pre-conviction, pre-sentencing and post-sentencing.[49]

5 4 1 Before a criminal charge is laid

A serious inhibition to combating economic crime in South Africa is that it is not reported to the relevant authorities.[50] It is understood that there is a practice in

[48] See the discussion in ch 3, para 3 3 4, 131.

[49] CEPJ *Mediation in Penal Matters*, Recommendation Appendix part II, art 4.

[50] Adv M Govender, Deputy Director of Public Prosecutions and Regional Head, SCCU, Western Cape (16-09-2016) in an interview explained that one of the NPA's main problems is that complainants are not lodging charges against offenders. Consequently, the SCCU often finds that when it prosecutes an offender, it may technically be the offender's first recorded offence, but investigations reveal she or he may have been dismissed for similar acts of wrongdoing at previous places of employment. Compare too, research by Statistics South Africa showing that more than 43% of households questioned believe there is no point in reporting corruption as nobody cares. Corruption News "South Africans' Reasons for Not Reporting Corruption" (10-12-2014) *Corruption Watch*

corporate South Africa where upon detection of an offence, the complainant and the person alleged to be responsible for a wrongdoing agree to sign an acknowledgment of debt in terms of which the wrongdoer agrees to repay the monies.[51] This is evidently problematic. On many occasions no criminal charges are laid and consequently much crime goes unreported. The reasons for this practice and the reluctance to lay criminal charges are diverse. However, one of the reasons is a lack of confidence in the police services and the courts to resolve the dispute effectively and speedily.[52]

It is submitted that mediation of the dispute in the pre-charge stage can be appropriate upon detection of the wrongdoing. There may be instances where the complainant confronts the wrongdoer, or the wrongdoer confesses to the complainant. Alternatively, a professional body may have investigated a member for wrongful conduct.[53] Whatever the case, a process, other than the standard laying a charge with the SAPS is needed.[54]

In the event that the offender or victim is a company it is suggested that using chapter 7 of the Companies Act 2008 regarding resolution of disputes through ADR could be considered. The parties can either agree to mediation voluntarily in terms of section 187(2)(a) of the Companies Act 2008; or the complainant may apply directly for the dispute to be resolved by ADR.[55] The matter can be resolved directly by

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<https://www.corruptionwatch.org.za/south-africans-reasons-for-not-reporting-corruption/> (accessed 11-07-2019); Statistics South Africa *Victims of Crime Survey 2013/2014* P0341 55.

[51] Compare the facts in *Machanick Steel & Fencing v Transvaal Cold Rolling* 1979 1 SA 265 (W) 266G-268A; *Hohne v Super Stone Mining* (Pty) Ltd 2017 3 SA 45 (SCA) paras 6-12. These cases also dealt with the risk of having the acknowledgment of debt set aside on the grounds of duress or it being inadmissible evidence in a civil trial.

[52] The complainant may calculate that it is likely to lose more through wasted time and costs in lodging a charge with the police, so decides to cut its losses and not report the crime.

[53] For example, the South African Institute of Chartered Accountants (“SAICA”) may have investigated a case of fraud or incorrect accounting by a registered member of SAICA.

[54] The complexity of South African labour law is acknowledged when there is an employer/employee relationship between the victim and offender. It is beyond the scope of this dissertation to discuss these issues. However, it is envisaged in such a case that the contractual employment relationship between the participants will also form part of the issues to be resolved during the mediation.

[55] S 166(1)I read with reg 132(1) and Form CTR 132.1.

CIPC,[56] or be referred by CIPC for mediation by the Companies Tribunal or by a private accredited entity.[57] The mediated settlement agreement can be made an order of the court.[58] As suggested in chapter 4, CIPC can also be more proactive and initiate or refer such disputes for mediation.[59] The suggested mediation process would not preclude involvement of a member from the public or from a body with a relevant interest in the matter.[60]

The constitutional independence and powers of the NPA are acknowledged[61] and this suggestion is made having considered the powers of the Australian Securities and Investments Commission ("ASIC") to cause prosecution to be instituted.[62] The close collaboration between ASIC and the Director of Prosecutions in Australia is a further relevant consideration.[63] Accordingly, the suggestion is that there should be closer collaboration between CIPC and the NPA in South Africa, and that an agreement be concluded between CIPC and the NPA regarding the mediation of instances of economic crime by CIPC, the Companies Tribunal or accredited entities

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[56] S 170(1)(d) read together with reg 138 and Form CoR 138.

[57] S 169(1)(b) read with s 166(3) and reg 132(2) and Form 132.2. See discussion above in para 4 2 2 2. The proposed deletion of mediation by a private accredited entity in s 22 of the Companies Amendment Bill (draft) 983 in *GG* 41913 of 21-09-2018 is noted.

[58] It is submitted that s 167(2) which provides for a consent order, on application, to be made an order of the court, would extend to a mediated settlement agreement as proposed in this dissertation. The court retains its discretion to require changes (A 167(2)(b)). It is proposed that s 167 be amended to specifically include a court in the criminal justice system as the present provisions evidently refer to the High Court in the civil justice system (see s 156(c)).

[59] See ch 4, para 4 2 2 2, 181, 187-195.

[60] For example, fraud by a registered member of SAICA may involve not only the complainant, but also a representative of SAICA, who could make proposals regarding the corrective supervision or conditional suspension of the defendant as a member of SAICA.

[61] The NPA is an independent constitutional body established in terms of s 179 of the Constitution with the power in terms of s 179(2) of the Constitution read together with s 20 of the National Prosecuting Authority Act 32 of 1998 to institute criminal proceedings. No other body may interfere with the authority and functioning of the NPA, and, consequently, no other body may institute criminal proceedings.

[62] Australian Securities and Investments Commission Act 51 of 2001 ("ASIC Act 2001") (compilation no 64, 28-09-2017) Part 3, Division 5, s 49. In addition, the powers of ASIC to request disclosure and cooperation in terms of the ASIC Act 2001 and the Corporations Act 50 of 2001 (compilation no 81, 28-09-2017) ch 9, Parts 9:4AA and 9:4B, ss 1317DAA-1317Q are important.

[63] See the discussion in ch 4, para 4 2 2 2, 181, 191-192.

as envisaged by section 188 of the Companies Act 2008.[64] It is further suggested that such collaboration agreement make provision for the mediated settlement agreements to be referred to the NPA for further action in terms of the powers and functions of the NPA.[65]

The primary proposal of this dissertation is that mediation should be developed alongside section 105A of the CPA, and consequently the NPA will be fully involved in terms of the CPA. The proposed section 105B would be used after a charge has been laid, and accordingly this is the triggering event upon which this proposal is focused.

5 4 2 After a charge is laid, but before a plea

In practice, the pre-trial period from the time the charge is laid and the trial is heard can be a frustratingly long and very costly period. During this time, the matter is being investigated and a case put together by the investigation units. It is envisaged that the proposed section 105B would be most used during this stage. After a charge has been laid but before the offender is asked to plead the different parties could reach settlement through mediation. As in the pre-charge stage, the primary persons involved would be the offender and the victim. A designated member of the NPA may also participate in the mediation process or may decline to do so and subsequently agree to accept the mediated settlement agreement and either formally defer the matter or present it to the court for approval. In addition, it is envisaged that mediation may assist to break an impasse between the prosecution and defence in plea and sentence negotiations.

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[64] Compare the policy of the NDPP (*Annual Report* 2017/2018 18 19) to enter into and conclude collaboration agreements with the Anti-Corruption Task Team, the Special Investigating Unit, the South African Revenue Service and several other government stakeholders. Also see the discussion in ch 3, paras 3 3 1, 115, ch 4 para 4 2 2 2, 181, 191-192.

[65] Notably, in the light of recent economc crime in South Africa and the wrongdoing by registered members of professional bodies, the CEO of an accounting professional body, the Independent Regulatory Body for Auditors (“Irba”), has made a call for collaboration and sharing of information between the relevant bodies and the NPA to ensure criminal prosecution of the offenders. See L Buthelezi “Change Needed to Jail Rogue Bean-Counters” (13-08-2019) *Business Day* <https://tisobg.pressreader.com/> (accessed 14-08-2019).

In practice, the police may also play an important role, including by suggesting that the matter be mediated.[66] Again, it is envisaged that the mediation will resolve pertinent issues, including: an agreed statement of relevant facts, admissions of wrongdoing, restitution and a proposed sentence.

5 4 3 After plea, but before conviction

After the defendant has been asked to plead, the matter may also be referred to mediation by the court upon the request of either the prosecution or the defence, or on its own initiative, to resolve the matter, or to resolve any particular issue regarding the dispute.[67]

5 4 4 After conviction, but before sentencing

Mediation could also be appropriate after trial and conviction, but before sentencing. It is submitted in this dissertation that restorative justice is more than simply an alternative sentencing option. However, there is indisputably an opportunity for mediation between the state, the offender, the victims and relevant representatives of the community before sentencing. Provision is already made in the criminal justice system for compensation and for victim-impact statements, yet it is argued that these processes do not always hear the voice of the victim or the offender and thus true justice is tenuous. Mediated discussion between the offender and the victim at this stage will ensure direct participation of the stakeholders and consequently could culminate in a resolution of greater meaning and substance. Building on the use of victim-impact statements and victim-offender mediation it is proposed that mediation will better serve not only the aims of correctional measures for the offender but also restoration for the victims. As discussed above, the correctional measures may include the postponement or suspension, in whole or in part, of sentences of imprisonment on condition of payment of compensation or other forms of restitution. Terms may also be included regarding the integration of the offender into the community. Any sentence process could thus incorporate the

[66] Compare the practice in Kwazulu-Natal where the police refers matters for mediation. See Hargovan (2009) *AC* 66; fn 18.

[67] For example, an issue relating to evidence, like agreeing on an amount the offender admits to filching.

principles of restorative justice, not simply the objective goals of restitution and retribution, but also the subjective goals of the experience and satisfaction of the offender, victim and public of being heard and consequently justice being felt by them to have been done.[68]

Sentencing by South African courts still follow more retributive than restorative measures.[69] In a recent survey among South African magistrates and prosecutors regarding sentencing options, including diversion and restorative mediation, the authors concluded that South African magistrates and prosecutors seem to be more punitive in their sentencing options than their counterparts in other countries.[70] The presence or absence of the voice of the victim during the sentencing procedure, including evidence before the court regarding the impact which the offence had on the victim and the victim's expression of an opinion regarding the sentence to be imposed upon the offender also have an impact on the sentence granted.[71]

Mellon argued more than a decade ago that South African courts should make more use of community service orders, instead of incarceration for instances of economic crime.[72] Two hurdles were identified, namely the perception that community sentences are "soft" punishment and the practical implementation of such penalties.[73] In South Africa, there are a number of conditions that can be imposed for

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[68] See the discussion in ch 3, para 3 6, 149ff.

[69] Terblanche *Sentencing in SA* ch 12, Conclusion: the current core of sentencing, para 12, 194-195 states that: "Retribution forms the current foundation of every sentence, and is present in this form in every sentence".

[70] B Naude, J Prinsloo & A Ladikos "Magistrates' and Prosecutors' Sentencing Preferences Based on Crime Case Scenarios" (2003) 16 *Acta Criminologica* 67 68 and 71.

[71] De Klerk discusses different sentences granted by different presiding officers related to similar offences and illustrates that in the instances where the voice of the victim was heard through victim-impact statements or evidence the victim's voice did have an impact. KL De Klerk T*he role of the victim in the criminal justice system: A specific focus on victim offender mediation and victim impact statements* LLM Thesis, University of Pretoria (2012) 24-31.

[72] A Mellon "Sentencing White-collar Offenders: Beyond a One-dimensional Approach" (2009) *SACJ* 327 343-344.

[73] Mellon 2009 *SACJ* 347-348. She maintains that both the public and the judiciary perceive community penalties not to be severe enough and thus the latter are reluctant to use them. Furthermore, it is not only the practical implementation that is problematic, but also the theoretical understanding of such penalties. Like incarceration, community penalties can also be restrictive and limit the standard and freedom of a sentenced person's life. Moreover,

correctional supervision, including house detention and community service.[74] Conditions of correctional supervision can be both positive and negative and may also be imposed in conjunction with suspended or limited sentences of imprisonment.[75] It is submitted that South Africa needs to implement more hybrid forms of sentencing, including expanding the types of combination of sentences already possible in terms of the appropriate legislation. It is submitted further that an increase in a combination of sentences and conditions of sentence could significantly improve the effectiveness of sentences of persons convicted of economic crime. For example, a non-custodial sentence, suspended or postponed, but limiting the guilty person's lifestyle, as well as ordering restitution and community service, is also likely to achieve the conventional objectives of sentencing. It is envisaged that a mediated settlement agreement will include provisions relating to a sentencing agreement, which, in turn, will comprise terms relating to a postponed or suspended imprisonment sentence, payment of compensation, and correctional supervision.

In summary, with regard to sentencing in South Africa the judicial discretion of the presiding officer rightly prevails, guided by the *Zinn* triad of the offender, the crime and the interests of society. It is, however, submitted throughout this dissertation that

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community penalties can contribute positively to the community and consequently greater understanding and awareness of the nature of community penalties and correctional supervision needs to be promoted. See Terblanche *Sentencing in SA* 3 ed (2016) ch 11 paras 1-7 317-329, for a discussion of the nature of correctional supervision and its reception and application in the criminal justice system. Also see ch 4 para 4 4 3.

[74] CPA s 276(1)(h), read together with s 276A and Correctional Services Act 111 of 1998 chapter VI, s 52(1) set out the structure in which conditions of correctional supervision may be imposed. Compare the types enumerated in s 177 of the United Kingdom Criminal Justice Act 2003 which includes orders that may impose geographical and activity limits upon convicted persons. For example, an unpaid work requirement [s 177(1)(a)]; a prohibited activity requirement (s 177(1)(d)); a curfew requirement (s 177(1)l); or a foreign travel requirement (s 177(1)(ga)). As an illustration, a qualified accountant convicted of fraud may be sentenced to teaching community members basic accounting, whilst also being prohibited from travelling abroad or participating in in relaxing or luxury activities. Also see Terblanche *Sentencing in SA* ch 11, Correctional Supervision, para 8, 331-341.

[75] CPA s 276(1)(h), read together with s 276A. For example, a sentence may comprise a term of imprisonment suspended on condition that compensation is paid to the victim, and a further period suspended on a correctional supervision condition, like the imposition of a geographical limit on an offender's movement.

the triangle should be squared to grant equal weight to the voice of the victim.[76] It is this pillar, a victim-orientated approach to the quadrangle, which is interwoven with the characteristic of restorative justice that will bring even better balance to the sentencing process, also with regard to economic crime.

5 4 5 After sentence, but before parole

Mediation could also be meaningful at the post-sentence stage, with a view to the rehabilitation and re-integration of the convicted persons and the possibility of parole. This is possible through sections 276A(3) and 276(1)(i) [77] of the CPA. Section 276A(3) is a "unique provision"[78] that detracts from the principle that courts give final and binding orders regarding sentencing. Section 276A(3) grants the Commissioner of Correctional Services or the Parole Board the power to bring a matter before the courts to reconsider a sentence. This restorative opportunity is demonstrated through *Maddock v S.*[79] In that case the original sentence given by the court was bought before the court again for reconsideration.[80] In reconsidering the sentence, the court considers the circumstances of the matter anew, including events which have taken place after sentencing, in other words post-sentencing circumstances.[81] Moreover, section 276(A)(3)(e)(iii) grants the court the power to impose a suitable

[76] KD Müller and IA van der Merwe "Squaring the Triad: The Story of the Victim in Sentencing" (2004) 6 *Sexual Offences Bull* 17-24.

[77] The main difference between s 276A(3) and 276(1)(i) is that a sentence brought before the court in terms of the former had no initial provision for conversion of a sentence in the discretion of the commissioner of the parole board as s 276(1)(i) provides.

[78] *Hiemstra Criminal Procedure* 28-42(1).

[79] WCHC 26-11-2010 Case no A641/2010 ("*S v Maddock* 2010").

[80] In this case Maddock appealed against a refusal to reconsider a sentence agreed in terms of a s105A plea and sentence agreement. Maddock was an accountant involved in a fraud scheme and entered into a plea and sentence agreement regarding his involvement in the fraud and was sentenced to 6 years' imprisonment of which 3 years was suspended on a number of conditions. Accordingly, Maddock fell under the provisions of s 276A(3) and the opportunity to have his sentence reconsidered by a court, if in the opinion of the commissioner or a parole board, the person is a fit subject for correctional supervision.

[81] *S v Maddock* 2010 9, 10; *Hiemstra Criminal Procedure* 28-42(2). For example, the offender showing remorse or offering to pay compensation.

sentence, other than the initial sentence.[82] It is thus a two-stage process. Firstly, the commissioner brings the application before the court, and then the court reconsiders the sentence, and can decide not to interfere, or to interfere by granting an order of correctional supervision or another sentence.[83] It is submitted that mediation between the victim and offender, a mechanism which already exists and is used as one of the correctional measures in terms of section 52 of the Correctional Services Act,[84] could also be applied in a case where outstanding issues, like restitution for the victim, may be considered.[85] The mechanism of mediation could help the offender in securing the second chance provided by section 276(3)(A).[86]

It is acknowledged that the issue of parole is contentious[87] and has been shown to be a vexatious issue in the United States. In the United States, the issue of parole was becoming problematic, as sentences carefully given in terms of the Sentencing Guidelines were altered in practice through a Parole Board granting prisoners earlier parole. This led to the policy of "truth in sentencing" first in Minneapolis and Minnesota, but eventually in most of the United States. [88] Similarly, in South Africa the powers of the Parole Board are questioned as it seems to nullify the prudent process of sentencing undertaken by the trial court and the conventional

[82] As was the case in *S v Maddock* 2010, converting the balance of the offender's initial sentence to correctional supervision (14). See *Hiemstra Criminal Procedure* 28-42(1).

[83] *S v Maddock* 2010 9-10.

[84] S 52(g).

[85] For example, in a case where a person was sentenced to direct imprisonment and no order for compensation had been made, and fewer than five years of incarceration were remaining, a mediated order of compensation between the victim and offender could place the offender in a position to have her or his sentence converted or an alternative sentence imposed. It is noted that an offender has no right to an application in terms of section 276A(3) and that the discretion lies with the commissioner of correctional services or with the parole board.

[86] *Hiemstra Criminal Procedure* 28-42(2).

[87] Parole is the function of the executive. In South Africa parole falls under the Department of Correctional Services and is governed by the Correctional Services Act 111 of 1998, read together with the Parole and Correctional Supervision Amendment Act 87 of 1997. Parole of course affects sentencing and the actual period a convicted offender spends incarcerated.

[88] For a discussion on these issues see M Lippman *Contemporary Criminal Law* 2nd ed (2010) 52, 60. The policy of "truth in sentencing" in various laws across the United States ensures that a significant part of imprisonment sentences is indeed served, and that fewer people are released early on parole.

discretionary powers regarding sentencing vested in the judiciary.[89] Early release from prison can also have an adverse effect on the victims and the public as they may perceive that justice is being undermined. However, the legal position is that the issue whether anyone may be released on parole, though likely, is in fact not known beforehand.[90] Consequently, the courts have held that a probable earlier release on parole may not be taken into consideration whilst sentencing a person.[91] Whilst the distinction between the executive and the judiciary and the independence of both has been emphasised in South Africa,[92] it is also true that South Africa has an integrated criminal justice system. In a sense a court's order of imprisonment will always be indeterminate, because it cannot determine the maximum period actually to be served, as the integrated justice system grants offenders opportunities for rehabilitation and correctional supervision.

5 5 Conclusion

In a country overshadowed by economic crime, citizens look towards law for justice, but seemingly find little. This is evident in suspected and accused perpetrators who use the law to fend off investigations, inquiries and disclosure. It is also evident in the para-legal bodies established by civic society to address economic crime, or worse still in the *bundu* courts in the streets.[93] Crime does indeed seem to pay.

It has been submitted that a multi-dimensional and multi-layered approach is necessary to address economic crime. Braithwaite's pyramid of responsive regulation and resolution is such an approach.[94] It has been demonstrated that the foundational level of the pyramid includes instilling values and principles of honesty

[89] FW Kahn "Recommendations for Parole Reform" in JJ Henning (ed) *Economic Crime in Southern Africa* (1996) 95-96.

[90] Terblanche (2013) "Judgments on Sentencing: Leaving a Lasting Legacy" (2013) 76 *THRHR* 95 102.

[91] Stewart CJ in *S v Lebalo* 1991 1 SACR 398 (BA) para 401D; *S v Khumalo* 1983 2 SA 540 (N).

[92] *S v Mhlakaza* 1997 1 SACR 515 (SCA) para 521D-522E. Also see Terblanche's discussion on parole in (2013) *THRHR* 101-103.

[93] See ch 4, para 4 5 fn 1090.

[94] See Figure 2, 158.

into children at primary school. This is effectively illustrated by education programmes run by corporations and administrative bodies.[95] Another dimension is that of corporate self-regulation, like the King Codes that are widely accepted and applied by members and enforcers of the commercial sector in South Africa.[96] Together with peer monitoring bodies such the Nigerian CGRS, these mechanisms of self-regulation and evaluation help to reduce economic crime.

At a higher level up the pyramid administrative bodies such as CIPC and the Companies Tribunal can and should provide fast, effective and efficient resolution to commercial disputes, including instances of contravention of regulations that constitute economic crime.[97] Similarly, ombuds in various industries play a critical role in addressing and redressing the consequences of economic crime. This has been demonstrated by the functions and decisions of the FAIS Ombud.[98]

Yet higher up the pyramid there are several mechanisms of diversion that operate in the courtyard of the criminal courts, including informal mediation and DPAs. These mechanisms have also been shown to effectively resolve economic crime disputes. On the threshold of the criminal court, informal and formal plea and plea and sentencing negotiations and agreements take place. Plea and sentence agreements have proved to be an alternative, yet highly effective, mechanism that has become the mainstay in the United States and is increasingly important in South Africa. At the pinnacle of the pyramid is the classical adversarial criminal trial.

The submission of this dissertation is that there is room for an additional alternative mechanism alongside plea and sentencing agreements on the threshold of the criminal court: mediation. It has been shown that mediation is an appropriate dispute resolution mechanism that can be used at several levels of the pyramid of responsive regulation. However, the primary focus is on the proposed section 105B to be used in the precincts of the criminal court. In view of the prevalence of economic crime in South Africa and public expectation, the courts need to be involved and be a critical part of the process. Judicial oversight will validate the proposed model of negotiated justice.

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[95] Like CIPC in South Africa or ASIC in Australia. See ch 4, para 4 2 2 2, fns 136 and 169.

[96] See the discussion in ch 4, para 4 2 1, 165ff.

[97] See the discussion in ch 4, para 4 2 2 2, 181ff.

[98] See the discussion in ch 4, para 4 2 3, 195ff.

Mediation has been chosen as it has proved to be a successful and satisfactory mechanism to resolve disputes, including disputes of a criminal nature. In particular, mediation presents an opportunity for the prosecutor, the offender, the victim and the community to meet in a facilitated process. The opportunity is created for the voice of each participant to be heard in a managed space. The voice of the victim is likely to relay the sounds of loss and injury. The voice of the offender may portray the picture of why and how, and express remorse and restitution. The voice of the prosecutor will proclaim justice and sanction. The voice of the community will lament the prevalence of crime, but it will also affirm rehabilitation and restoration. Mediation brings accountability and reconciliation, restitution and reform: better outcomes than retribution.

Mediation has been chosen as it is embedded in and resonates with the unique South African jurisprudence. Mediation is traced back to both the traditional African justice system, as well as the English justice system, both of which form part of the South African justice system. Moreover, mediation embraces and embodies the principle and purpose of *ubuntu* and the purpose of the constitutional democracy of South Africa:

> "These can now be addressed on the basis that there is
> a need for understanding but not for vengeance,
> a need for reparation but not for retaliation,
> a need for *ubuntu* but not for victimisation."[99]

[99] Epilogue of the Interim Constitution of South Africa, Act 200 of 1993 para 50, with reference to the atrocities of the past.

ANNEXURE A: SECTION 105B: MEDIATED SETTLEMENT AGREEMENTS

EXPLANATORY MEMORANDUM

To amend the Criminal Procedure Act, 1977, to allow a prosecutor, an accused and a victim to enter into a mediated settlement agreement; and to provide for matters connected therewith.

Section 105B(1) provides for specific definitions which are necessary as the mechanism of mediation is limited to economic crime. A definition of a victim is also required.

Section 105B(2) provides for a matter, or part of it, to be referred to mediation, either by agreement between the prosecutor and the accused, or by order of the court upon application of either the prosecutor or the accused, or in the discretion of the court.

Mediation, whether by agreement or by application can only be initiated by the prosecutor, the accused or the court but cannot take place without the victim being given an opportunity to participate. The victim has the right to participate in the mediation but does not have the right to apply for mediation and may decline to participate. The right to engage or not to engage in mediation remains part of the independent prosecutorial power of the prosecutor, under the Constitution, but subject to the accused having the right to apply to court for mediation and the court's discretion to order it. The court may also exercise this discretion on its own initiative.

A party to a mediation can be, but need not be legally represented. Accordingly, it is possible for an unrepresented accused to participate in mediation.[1] *In a case with multiple accused or multiple victims, not all the accused or all the victims need to participate in the mediation.*[2]

Section 105B(3) provides that the appointment of an accredited mediator can be by agreement between the parties or by a body that has been authorised and accredited by the NDPP, or by the court.

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[1] Compare the discussion in ch 4, para 4 4 1 2 and fns 731 & 732, 302-303.

[2] Compare Directive 9 and the discussion in ch 4, para 4 4 2 2, 341-342.

Section 105B(4) provides for the minimum conditions with which a MSA must comply. These prerequisites protect the constitutional rights of the accused and concern procedural formalities.[3]

Section 105B(5) provides judicial oversight, which ensures that the constitutional rights of the accused have been properly protected and which validates the terms of the MSA, including that the agreed plea and sentence agreement are just.

Section 105B(6) provides for instances when the court can enter a plea of not guilty if it is not satisfied that the accused is guilty of the offences in respect of which the MSA was entered into or admissions were made.

Section 105B(7) provides for the trial to start de novo before another presiding officer if the court finds that the plea of guilty is inappropriate. Accordingly, the accused's rights are protected.

Section 105B(8) provides for the court to consider the proposed sentence in terms of the MSA if the court is satisfied that the plea of guilty is proper. The same criterion as in section 105A is used, namely that the court needs to consider that the sentence is "just". Equal consideration by the court needs to be given to the interests of the accused and the victim.[4]

Section 105B(9) provides for the instance when the court is satisfied that the sentence is just and then convicts the accused and sentences the accused in terms of the MSA.

Section 105B(10) provides for the instance when the court is not satisfied that the sentence is just.

Section 105B(11) provides for the situation when a MSA is null and void and a trial needs to start de novo.

Section 105B(12) provides for the amendment of a MSA. The terms of a MSA may need to be amended in the event that the circumstances of the accused or the victim change, and may be necessary to avoid failure by the accused to comply with its terms in circumstances that were not, and could not have been, foreseen by the prosecutor, the accused or the victim at the time the MSA was agreed.[5]

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[3] Compare the discussion on the waiver of rights by the accused in ch 4, para 4 4 1 2, 302ff.

[4] See the discussion on the rights of the victim in ch 4, para 4 4 2 2, 328-331.

[5] Compare the (English) Crime and Court Act 2013, Sch 17, para 10 regarding DPAs.

Section 105B(13) provides for the role of the mediator in the context of the criminal justice system. It is necessary to define the role of the mediator to clearly distinguish between the functions and role of the mediator and that of the court; and to make provision in the event that the mediator is a presiding officer.

Section 105B(14) provides for the termination of the mediation for various reasons.

Section 105B(15)and (16) provide for confidentiality, legal privilege and the status of and use of the material and information disclosed during the mediation in any other criminal proceedings. The accused and the victim also need to be protected and given the right to apply to the court to have any part of the information contained in the MSA or disclosed to the court not disclosed publicly.

The following section is hereby inserted into the principal Act after section 105A:

Mediated Settlement Agreement

Section 105B(1) In this section:

"**economic crime**" means a non-violent illegal act committed by a person to gain economic profit or benefit"; [6]

"**mediation**" means a process in which parties to a dispute, with the assistance of a mediator, who facilitates communication and negotiation between the parties, endeavour to reach a voluntary resolution regarding their dispute;

"**mediator**" includes a co-mediator and means an individual who conducts a mediation and who has been accredited in terms of the applicable rules;

"**mediation agreement**" means an agreement by two or more persons to refer for mediation the whole or part of a dispute in connection with economic crime which has arisen, or which may arise between them, and may include an agreement entered into between the disputing parties and the mediator *before* the mediation process commences which sets out the terms of the mediation;

"**mediator's report**" means a report in terms of section 105B(13)(d);

"**mediated settlement agreement**" ("MSA") means an agreement, by some or all, of the parties to the mediation settling, the whole or part, of the dispute to which the mediation relates";

"**prosecutor**" means a prosecutor duly authorised and designated by the National Director of Public Prosecutions;

"**victim**" means a person who has suffered direct harm as a result of economic crime.[7]

(2) *(a)* In any criminal proceeding regarding economic crime, the prosecutor and the accused[8] may, before the accused is asked to plead, negotiate and enter

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[6] It is proposed that certain types of crime in respect of which s 105B will apply can be further provided for through directives issued by the NDPP.

[7] The term "victim" is preferred to the term "complainant" used in s 105A. However, as shown the term victim can be very widely interpreted. It is proposed that the term victim be specifically defined through directives issued by the NDPP. See the discussion in ch 3, para 3 3 3, 119ff.

[8] The term "defendant" is preferred but because the term "accused" is used in the CPA, it is also used here.

into a mediation agreement; or the prosecutor or the accused may apply to court for an order, or the court may on its own initiative direct, that any issue with regard to the charge be referred to mediation for resolution. The victim must be given an opportunity to participate in any such mediation, but may decline to do so.

(b) Subject to paragraph (a), participation in mediation is voluntary and will take place only upon agreement of the relevant parties. Not all accused persons in a case involving multiple accused need to join in the application for mediation.

(c) A mediation agreement must be in writing. A mediation agreement is in writing if its content is recorded in any form, whether or not the mediation agreement has been concluded orally, by conduct or by other means.

(d) Participants in a mediation may be legally represented.

(3) An accredited mediator may be appointed by agreement, or by an accredited body or by the court.

(4) A MSA shall

(a) state that the accused, before entering into the agreement, has been informed that she or he has the right:

(i) to be presumed innocent until proved guilty beyond reasonable doubt; and

(ii) not to be compelled to give self-incriminating evidence.

(b) state fully the terms of the agreement, contain a statement of substantial facts, all other facts relevant to the proposed agreed sentence in the MSA and any admissions made by the accused.

(c) A MSA is for an agreed period, but may not be for more than five years.

(d) The MSA may impose time limits within which the parties must comply with the requirements imposed on them.

(e) The MSA may include a term setting out the consequences of a failure by a party to comply with any of its terms.

(f) The terms of the MSA

(i) shall be in writing, and shall be signed by all the participants, including participating legal representatives;

(ii) shall be approved by the Director of Public Prosecutions having jurisdiction or an official authorised to do so.

(5) *(a)* The prosecutor shall, before the accused is required to plead, inform the court that a MSA has been entered into and the court shall

(i) require the accused to confirm that an MSA has been entered into; and

(ii) satisfy itself that the requirements for an MSA in subsection (4) have been complied with.

(b) If the court is not satisfied that the MSA complies with the requirements of subsection (4), the court shall

(i) inform the prosecutor and the accused of the reasons for non-compliance; and

(ii) afford the prosecutor and the accused the opportunity to comply with the requirements concerned.

(c) If the court is satisfied that the MSA complies with the requirements of subsection (4), the court shall require the accused to plead to the charge and order, subject to an application in terms of sub-section (14), that certain of the contents of the MSA not be disclosed in open court.

(d) After the contents of the agreement have been disclosed, the court

(i) shall question the accused to ascertain whether

(aa) she or he confirms the terms of the MSA and the admissions made by her or him in the MSA;

(bb) with reference to the alleged facts of the case, she or he admits the allegations in the charge to which she or he has agreed to plead guilty; and

(cc) the MSA was entered into freely and voluntarily in her or his sound and sober senses and without having been unduly influenced;

(ii) shall question the victim to ascertain whether the victim confirms the terms of the MSA;

(iii) may consider the mediator's report under subsection 13(d)(i).

(6) After an inquiry has been conducted in terms of section105(B)(5), the court shall –

(a) if the court is not satisfied that the accused is guilty of the offence in respect of which the MSA was entered into; or

(b) it appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge; or

(c) for any other reason, the court is of the opinion that the plea of guilty by the accused should not stand;

record a plea of not guilty and inform the prosecutor and the accused of the reasons therefor.

(7) If the court has recorded a plea of not guilty, the trial shall start *de novo* before another presiding officer: Provided that the accused may waive her or his right to be tried before another presiding officer.

(8) *(a)* If the court is satisfied that the accused admits the allegations in the charge and that she or he is guilty of the offence in respect of which the MSA was entered into, the court shall proceed to consider the terms of the proposed agreed sentence in the MSA.

(b) For the purposes of this paragraph, the court

(i) may

(*aa*) direct relevant questions, including questions about the previous convictions of the accused , to the prosecutor and the accused; and

(*bb*) hear evidence, including evidence or a statement by or on behalf of the accused or the victim, or a mediator's report; and

(ii) shall, if the offence concerned is an offence

(*aa*) referred to in the Schedule to the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997); or

(bb) for which a minimum penalty is prescribed in the law creating the offence, have due regard to the provisions of that Act or law.

(9) If the court is satisfied that the proposed agreed sentence in the MSA is just, the court shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the proposed sentence in the MSA.

(10) *(a)* If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor, the accused and the victim of the sentence which it considers just.

(b) Upon being informed of the sentence which the court considers just, the prosecutor, the accused and the victim may

(i) abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence; or

(ii) withdraw from the agreement.

(c) If the prosecutor, the accused and the victim abide by the agreement as contemplated in paragraph (*c*)(i), the court shall convict the accused of the offence charged and impose the sentence which it considers just.

(d) If the prosecutor, the accused or the victim withdraws from the agreement as contemplated in paragraph (*c*)(ii), the trial shall start *de novo* before another presiding officer: Provided that the accused may waive her or his right to be tried before another presiding officer.

(11) Where a trial starts *de novo* the agreement shall be null and void and no regard shall be had and no reference made to –

(a) any negotiations which preceded the entering into the MSA;

(b) the MSA; or

(c) any record of the agreement in any proceedings relating thereto, unless the accused consents to the recording of all or certain admissions made by her or him in the agreement or during any proceedings relating thereto and any such admission so recorded shall stand as proof of such admission;

(d) the prosecutor, the accused and the victim may not enter into another MSA in respect of a charge arising out of the same facts; and

(e) the prosecutor may proceed on any charge.

(12) The terms of a MSA may be amended on good cause shown, with consent of all the participants,[9] subject to compliance with subsection 2(c) and the approval of the court.

(13) *(a)* The role of the mediator is limited to facilitating the mediation process.

(b) The mediator shall subsequently not accept a guilty plea nor sentence the accused.

(c) The mediator shall not preside over any future aspect of the case, other than further facilitation of the matter.

(d) The mediator and the court shall have no contact or communication except that the mediator may report to court –

(i) that a MSA has been concluded;

(ii) that the parties are at an impasse;

[9] The mediator is not considered to be a participant.

(iii) that meaningful mediation is ongoing;

(iv) that the mediator withdraws from the mediation;

(v) that the mediation has been terminated.

(14) *(a)* The mediator or any participant may withdraw from the mediation at any time and the mediation is thereby automatically terminated.

(b) The court may terminate the mediation at any time if further progress towards a fair and just agreement is unlikely or issues arise which make mediation no longer appropriate.

(c) Upon termination of the mediation the prosecutor may proceed on any charge.

(15) Mediation proceedings are in all respects confidential and not to be reported or used by any participant including the mediator, except for the concluded MSA, which is presented to court, subject to the court, upon application by any one of the parties or on its own initiative, having the discretion to order on good cause that any part of the MSA not to be published or disclosed in open court.

ANNEXURE B: PRINCIPLES OF BEST PRACTICE FOR MEDIATION IN THE CRIMINAL JUSTICE SYSTEM

The Principles of Best Practice[1] *are intentionally drafted as principles in contrast to rules and regulations.* [2] *This is because of the growing jurisprudence arising from making some of these characteristics part of statutory provisions.*

Principle 1 relates to the key characteristic of voluntariness of mediation.

Principle 2 relates to the full and fair participation by the parties in the mediation.

Principles 3 relates to the need for proper understanding of the process of mediation. The outcome and consequences of the procedure within the criminal justice system are critical and accordingly the need for a pre-mediation meeting is a pre-requisite.[3]

Principle 4 relates to accountability which is a core characteristic of mediation and is necessary for an effective and meaningful resolution of economic crime disputes.

Principle 5 relates to the connection between the process of mediation and the process before the court.

Principle 6 relates to the nature of the mediation, including the key characteristics of flexibility and informality.

Principle 7 relates to the professionalism of mediation and the need for a code of conduct to be drafted for mediation in the criminal justice system, a sui generis type of mediation. Although core characteristics of mediation are flexibility and informality,

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[1] These principles are primarily based on the *Principles of Best Practice for Restorative Justice Processes in Criminal Case*s in New Zealand available at <https://www.justice.govt.nz/assets/Documents/Publications/RJ-Best-practice.pdf>. Also see *Restorative Justice Best Practice Framework 2017* <https://www.justice.govt.nz/assets/Documents/Publications/restorative-justice-best-practice-framework-2017.pdf>; Model Standards of Conduct for Mediators (2005) <https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.pdf>.

[2] Compare L Love & E Waldman ("The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation" (2016) 31 *Ohio St J on Disp Resol)* 123 128-129 who disucss the need for a profession, such as mediators to self-regulate and adopt principles to "improve practice and protect the public".

[3] Compare CEPEJ (1999) Part II, art 10: "*Before* agreeing to mediation, the parties should be fully informed of their rights, the nature of the mediation process, and the possible consequence of their decision," (writer's emphasis).

it is submitted that standards of conduct will ensure a uniform and effective mediation model.[4] *It is submitted that this can be done through appropriate training and accreditation and the establishment of a professional and ethical code of conduct.*[5]

Principle 8 relates to the suitability of mediation. Although, it is not submitted that the criterion, the public interest, be a formal requirement for mediation it is suggested that the application of the criterion, the public interest, can meaningfully assist in determining whether a certain matter is appropriate for mediation or not.[6] It is *envisaged that criteria for determining which matters may be suitable for mediation will be provide for through directives issued by the NDPP.*

Principle 9 relates to the appointment process of a mediator. It is foreseen that the appointment of a mediator will take place in primarily two ways: by the court or by an authority authorised and accredited to do so in terms of a directive.[7] *The subject of collaboration by the NPA with various role players in the state and in the public has been emphasised in this dissertation.*[8] *It is strongly suggested that the proposed sui generis form of mediation will usually be most effective when using co-mediation*.[9]

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[4] In CEPEJ, *Mediation in Penal Matters* (1999) Part V, The Operation of Mediation Services, the principles concerning the standards, qualifications, training and conduct of mediators are underscored.

[5] For a discussion of these issues and the regulation of mediators and mediation see Lyster (1996) *SAJHR* 243-245; R Feehily "Cost Sanctions: The Critical Instrument in the Development of Commercial Mediation in South Africa" (2009) 126 *SALJ* 291 305-311.

[6] Compare the second stage test of the Full Code Test of the *Code for Crown Prosecutors* 7th ed 2013 paras 4.7-4.12, 7-10 available at <https://www.cps.gov.uk/publication/code-crown-prosecutors>. Also see the discussion of the criterion the "public interest" for the approval of DPAs in ch 4, para 4 4 1 2, 261ff.

[7] The appointing authority could be a body like South African Association of Mediators ("SAAM") or the South African Dispute Resolution Accreditation Council ("DiSAC").

[8] See ch 3, para 3 3 4 and ch 2, para 2 4 1.

[9] See the discussion in ch 2, para 2 2 3, 64.

Voluntariness: Mediation is essentially consensual

1.1 Participation must be voluntary throughout the mediation process.

1.1.1 Mediation can only take place with the *informed* consent of the victim and offender (see Principle 3).

1.1.2 Participants should not feel coerced into giving their consent or to participating in a mediation.

1.1.3 Participants may at any time withdraw from the mediation.

1.1.4 Mediators may at any time end the mediation should either party be unwilling or the mediator is of the opinion that any party experiences coercion.

1.1.5 Any party may seek independent advice before agreeing to participate.

1.1.6 Any party may be legally represented at a mediation.

1.2 Resolutions and the mediated agreement must be arrived at voluntarily.

1.2.1 Resolutions need to be discussed, developed and agreed between the parties, primarily the victim and the offender.

1.2.2 Mediators need to ensure that all parties understand the requirements of the resolution, particularly the agreed obligations upon any party.

2 Participation: Full participation by the victim and the offender should be encouraged

2.1 The victim and the offender are the primary participants in the mediation.

2.1.1 The victim and the offender should be encouraged to participate at a level that they feel comfortable.

2.1.2 The mediator should ensure that the participation from each party is fair to the other parties.

2.1.3 Although, there may be other parties present,[10] the interaction between the victim and the offender are central, as is that of the prosecutor in the process.

2.2 Victims must determine their own level of involvement

2.2.1 While the offender always needs to be present, the victim needs to determine her or his own level of involvement.

[10] For example, members of the prosecution or community, or experts.

2.2.2 The victim needs to be present in person and may participate through indirect means (for example behind protective measures or through video conferencing).

2.2.3 The victim may participate through a representative.

2.2.4 Where there are multiple victims, each victim needs to be given the choice whether to participate or not, and whether to participate in a joint or separate conference.

2.2.5 Principles regarding participation should be discussed at the pre-mediation stage (see Principle 3).

2.3 The community may be represented during the mediation.

2.3.1 Representatives may include those providing support for the victim or the offender, and/or other interested[11] representatives from the public.

2.3.2 The presence and participation of members of the community should be discussed with the victim and the offender at the pre-mediation stage.

2.4 Professionals[12] may be present during the mediation

2.4.1 Professionals may attend, and give advice but are not to dominate the discussions.

2.4.2 Consent to the presence of professionals by the victim and the offender is necessary. Their presence and level of participation should be discussed at the pre-mediation stage or during the mediation.

2.4.3 Any further contact between the parties should only be on the terms discussed and agreed upon during the mediation.

3 Pre-mediation: Participants need to be well-informed of the process of mediation to ensure effective participation.

3.1 Participants in a mediation need to be well prepared.

3.1.1 Pre-mediation meetings should be held by the mediator with all participants, particularly with the victim and the offender. The information that needs to be given and discussed, includes:

3.1.1.1 the nature and legal status of the mediation;

[11] "Interested" means persons that may be affected by the offence (for example, parents of a school whom the offender has defrauded).

[12] "Professionals" may include investigating officers and legal representatives.

3.1.1.2 the role and rights and obligations of each of the parties;

3.1.1.3 confidentiality of the process and of the outcome;

3.1.1.4 the procedure to be followed, including who will be present and the ground rules;

3.1.1.5 the expectations of the parties and the realistic options of dealing with the offence;

3.1.1.6 the benefits and risks of participation.

3.1.2 Community members and professionals who may attend also need to be informed of the nature of the process and the extent of their participation.

3.1.3 The role of the court and the processes before the courts, in the event of a successful or failed mediated outcome, need to be discussed.

4 Accountability: The offender must be held accountable

4.1 The offender must acknowledge responsibility and culpability before a matter can be mediated.

4.1.1 This may be an admission of guilt.

4.1.2 The provision of a provisional statement of facts by the offender should be encouraged.

4.2 Agreed resolutions need to be fair, realistic and achievable. Parties need to be aware that an agreed outcome needs the ultimate approval of the court.

4.3 Any agreed resolution needs to be monitored and this should be clearly provided for in the mediated settlement agreement.[13]

4.4 Non-compliance with a mediated settled agreement should be discussed and the remedy included in the mediated settlement.

4.5 The mediation should be limited to the offence that is the subject of the original referral.

4.6 Should further offences become known during the mediation process, the offender needs to be made aware that the police may be informed of such further offence.

[13] For example, time-frames and details of payments should be set out clearly.

5 Court approval: Validation of the mediated agreement.

5.1 The court needs to be informed of the outcome of the mediation.

5.1.1 The outcome may include

5.1.1.1 a formal report written and signed by the mediator;

5.1.1.2 a joint report drawn up by all the parties and signed by all the parties;

5.1.1.3 a mediated settlement agreement signed by all the parties in respect of the issues agreed upon.[14]

5.2 The process and proceedings during the mediation remain confidential and may not be used as evidence.

5.3 The outcome becomes public once presented before a court, subject to the court's discretion to order any part of the outcome to remain confidential.[15]

6 Flexibility and Informality: Flexibility and responsiveness are inherent characteristics of mediation

6.1 Mediation should be guided by the inherent characteristics and values of mediation, including:

6.1.1 Flexibility of the process, notwithstanding the particular style of the mediator;

6.1.2 Honesty and full discourse by the participants;

6.1.3 Respect for the dignity of each party and the process;

6.1.4 Impartiality and independence of the mediator(s);

6.1.5 Transparency of the nature of the process and the outcomes;

6.1.6 Enablement of the participants.

6.2 Costs of mediation should be responsive to each particular case.[16]

7 Professional Mediation: Establishment of a professional and efficient mediation

7.1 Robust and transparent mediation practices are required.

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[14] This may not include all the issues.

[15] For example, the names of any beneficiaries of any compensation agreement may remain confidential.

[16] It is beyond the scope of this dissertation to discuss the complex issue of the costs of mediation.

7.1.1 Mediators need to be properly trained and accredited.

7.1.2 Mediators should possess the necessary skills and knowledge.

7.1.3 Mediators should possess the personal qualities of honesty, integrity, and accountability.

7.1.4 Mediators should possess the ability to be impartial and objective.[17]

7.2 Co-mediation of offences involving economic crime is encouraged, with one mediator being an expert in law.

7.3 Formal accreditation of training programmes is necessary.

8 Mediation should only be undertaken when appropriate

8.1 Mediation needs to be appropriate.

8.1.1 Careful screening of matters for referral for mediation is necessary.

8.1.2 Sensitivity for cultural differences needs to be accommodated. This may include:

8.1.2.1 language sensitivity (for example, mediation needs to be in the language of the participants or with sensitive use of an interpreter);

8.1.2.2 mediator(s) of the same cultural background as participants; and ensuring the participants are aware of the cultural differences that may exist between them;

8.1.2.3 locality of the venue;

8.1.2.4 seeking advice from community members, if applicable (for example, elders, restorative justice organisations);

8.1.3 Arrangements for mediations should be responsive to the participants' needs and preferences. Usually, the victim's preference will prevail, but the mediator needs to try and resolve conflicts about these issues through discussion and negotiation.

8.2 Mediation is an additional, not a substitutional mechanism.

8.2.1 Careful consideration is necessary before a matter is referred to mediation. Factors to be considered may include:[18]

[17] This includes the ability to be culturally sensitive, as the victim and offender may be from different cultures. Also see Lyster (1996) *SAJHR* 241-242.

[18] In considering the public interest, the factors raised in the (English) *Code for Crown Prosecutors* are helpful, namely: seriousness of the offence, level of culpability of the

8.2.1.1 the type and seriousness of the economic offence;

8.2.1.2 the willingness of the victim and offender to participate;

8.2.1.3 the suitability of the participants; including their ability and maturity to participate in mediation;

8.2.1.4 level of culpability of the offender;

8.2.1.5 any prior convictions;

8.2.1.6 power imbalances between the parties;

8.2.1.7 the nature and extent of the harm caused and the possibility of restitution through compensation or other correctional measures;

8.2.1.8 impact on the community;

8.2.1.9 whether mediation, in contrast to other available mechanisms,[19] is a proportionate response to the offence;

8.2.1.10 generally, whether mediation is in the public interest.[20]

8.3 Matters can be referred to mediation at various stages:

8.3.1 Pre-charge;

8.3.2 Pre-plea;

8.3.3 Pre-conviction;

8.3.4 Pre-sentencing;

8.3.5 Post-sentencing.

9 Appointment of a mediator[21]

9.1 The parties shall endeavour to appoint a mediator by agreement.

9.2 The parties may agree to replace a mediator.

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offender, circumstances of and the harm caused to the victim, impact on the community and whether prosecution is a proportionate response to the offence.

[19] Such as a plea in terms of s 112 of the CPA, a s105A plea and sentencing agreement or an adversarial trial.

[20] In considering the public interest, compare the factors raised in the (English) *Code for Crown Prosecutors* are helpful, namely: seriousness of the offence, level of culpability of the offender, circumstances of and the harm caused to the victim, impact on the community and whether prosecution is a proportionate response to the offence.

[21] This section closely follows draft arts 3.2-3.4 of the UNCITRAL Mediation Rules (2018). In the context of The Principles, “mediator” includes a co-mediator, where applicable.

9.3 The parties may seek the assistance of an appointing authority for appointing a mediator. In particular:

9.3.1 A party may request an appointing authority to recommend suitable candidates; or

9.3.2 The parties may agree that the appointment shall be made directly by the appointing authority.

9.4 In recommending or appointing, by consent or recommendation, individuals to act as mediator, regard shall be given to:

9.3.3 The professional expertise and qualifications of the prospective mediator, including expertise in the subject matter in controversy, experience as a mediator and ability to conduct the mediation;

9.3.4 The availability of the mediator; and

9.3.5 Such considerations as are likely to secure the appointment of an independent and impartial mediator.

10 Termination of mediation

The mediation shall be terminated: [22]

10.1 By the signing of the MSA by the parties, on the date of the agreement;

10.2 By a declaration of the parties to the mediator to the effect that the mediation is terminated, on the date of the declaration;

10.3 By a declaration of a party to the other party and the mediator, if appointed/selected, to the effect that it no longer wishes to pursue mediation, on the date of the declaration, unless the parties are prohibited by the applicable international instrument, court order or mandatory statutory provision from unilaterally terminating the mediation before the expiration of a defined period;

10.4 By a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration; or

10.5 At the expiration of a defined period in the mediation agreement, statutory provision or court order.

[22] This section closely follows draft art 10 of the UNCITRAL Mediation Rules (2018).

11 Arbitral, judicial or other dispute resolution proceedings

11.1 Mediation may take place any time regardless of whether arbitral, judicial or other dispute resolution proceedings have been already initiated. [23]

11.2 Mediation may take place with regard to any issue, or part issue with regard to the dispute.[24]

[23] This section closely follows draft art 11 of the UNCITRAL Mediation Rules (2018). Although arbitration is typically not permitted regarding matters relating to criminal liability, a related dispute regarding civil liability in relation to the same facts may have been referred to arbitration.

[24] For example, mediation may take place with regard to the charge, or the sentence or both, or simply with regard to the quantum of the harm or compensation.

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