



# **Hindu perspectives on alternative dispute resolution: Lessons for South African criminal law**

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## ABSTRACT

Alternative Dispute Resolution (ADR) existed in various forms in most traditional societies since time immemorial. Today, modern ADR mechanisms are widely recognised and utilised globally to resolve a broad range of disputes. Finalising cases through ADR, in *lieu* of litigation, creates a more victim-centred, reconciliatory approach without sacrificing justice. Whereas great progress has been made in South Africa with ADR in the civil law domain, the same is not true in the ambit of criminal law and procedure. The current adversarial court system emphasises retribution, focuses on the offender and no legislative provision is made for ADR in the case of adult offenders.

South Africa presents with high crime rates which impacts case workloads in criminal courts. Currently "informal mediations" are conducted by prosecutors in petty criminal cases despite the absence of legislation authorising these procedures. These shortcomings or lack of criminal legislation formalising ADR creates numerous challenges and uncertainties, not only with legal professionals who are confronted with criminal cases on a daily basis, but also for victims, complainants, their families and others affected by crime. Many cases are either not reported or are withdrawn because insufficient options exist which will solve the case to everyone's advantage and satisfaction.

India has an extensive history of ADR. These ADR mechanisms, having roots in Hindu law, form the basis of the Indian legal system's current legislation on ADR. These examples are explored in this study.

The absence of ADR in South African criminal law and procedure warrants our attention. There are immense benefits attached to utilising ADR in criminal cases in South Africa: the informal and flexible processes; the opportunity for all parties who are involved and touched by crime to heal; the restoration and reconciliation of offenders and complainants; the emphasis on compensation instead of retribution; and the addressing of the victims' needs too. The focus remains on restoring rather than on conflicting and dividing. Furthermore, the added advantage of alleviating congested court rolls, reducing turnaround time for cases, circumventing prolonged and costly litigation, addressing different methods of offender reparation, and allowing the offender to account for misdeeds, cannot be overemphasised.

With criminal law as its focus, this dissertation provides a comparative examination between the Indian and South African legal systems' approach to ADR in criminal cases. Critical pieces of Indian legislation are dissected and the overall impact and influence of ADR in the criminal domain are reflected upon and considered as a learning curve for development of South African legal principles on this aspect.

It is found that there is a dire need for a legislative framework to formalise ADR within the criminal context in South Africa. In as much as, on a practical level, it will be impossible to implement entirely new structures and fora as established in India, the intention is to broaden the scope and applicability of existing structures and resources in South Africa. Recommendations include: extending the scope of the *Criminal Procedure Act* 55 of 1977 to specifically incorporate ADR and victim offender mediations; incorporating ADR modules into university *curricula*; amendments to existing policies promoting ADR usage in criminal matters; utilisation of traditional courts as ADR courts; revising the *NPA Directives* to include ADR in not only petty cases; imposing duties on judiciary and litigators to inform disputants about ADR options; and actively informing the general public about ADR options in criminal cases.

Key words:

Alternate Dispute Resolution (ADR); Criminal Law; Criminal Justice System; Criminal Procedure; *Gram Nyayalayas*; Hindu Law; *Lok Adalat*; Mediation; *Nyaya Panchayat*; *Panchayat*; Prosecutors; Restorative Justice; Traditional Leader; Traditional Courts; Victim Offender Mediation

## SOLEMN DECLARATION

I duly declare that this research entitled, "*Hindu perspectives on alternative dispute resolution: Lessons for South African criminal law*", for the degree of Master of Laws at the Potchefstroom Campus of the North-West University hereby submitted, has not been previously tendered by me for a degree at this institution or any other University. I further declare that this research study is my own work in design, structure and execution and that all materials and sources contained herein have been acknowledged



---

Navilla Somaru

11 November 2017

Date

## **DECLARATION BY SUPERVISOR**

I, Professor Christa Rautenbach, do hereby declare that this dissertation by Navilla Somaru, for the degree of Master of Laws, should be accepted for examination.

A handwritten signature in black ink, consisting of a series of loops and a trailing line, positioned above the word 'Signature'.

Signature

8 November 2017

Date

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## **LIST OF ABBREVIATIONS**

ADR	Alternative Dispute Resolution
AIHC	All India High Court Case
AIR	All India Reporter
AHRLJ	African Human Rights Law Journal
AJCR	Alternative Journal of Conflict Resolution
AJOL	African Journals Online
ARSP	Archiv für Rechts- und Sozialphilosophie
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CFM	Case Flow Management
CJA	Child Justice Act
COGTA	Corporate Governance and Traditional Affairs
CPA	Criminal Procedure Act
DOJ	Department of Justice
DPP	Director of Public Prosecutions
DSD	Department of Social Development
IJL	International Journal of Law
IMMSA	Independent Mediation Service of South Africa
LASA	Legal Aid South Africa
LRA	Labour Relations Act
NADRAC	National Alternative Dispute Resolution Advisory Council



NGO	Non-Governmental Organisation
NICRO	National Institute for Crime Prevention and Reintegration of Offenders
NPA	National Prosecuting Authority
PELJ	Potchefstroom Electronic Law Journal
SAFLII	South African Legal Information Institute
SAHRC	South African Human Rights Commission
SALC	South African Law Commission
SALRC	South African Law Reform Commission
SALC	South African Law Society
SAPS	South African Police Services
SCC	Supreme Court Cases
TCB	Traditional Court's Bill
USAID	United States Agency for International Development
UNODC	United Nations Office on Drugs and Crime
VOM	Victim Offender Mediation

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## CHAPTER 1: INTRODUCTION

### 1.1 Background

In a criminal case which came before the Sasolburg Magistrate's Court in the Free State,<sup>1</sup> an elderly woman, the complainant, discovered that large sums of money were missing from her bank account. She approached the police and a case docket investigating a charge of fraud alternatively theft was opened. During the course of the investigation it was discovered that the daughter of the complainant was the culprit, and she was subsequently arrested for the crime and charged in the district court.

When the complainant discovered that the offender was her daughter she did not desire prosecution because she did not wish a criminal record or a term of imprisonment upon her child. Consequently she requested the charges to be withdrawn with the result that the accused was free to go without taking any responsibility or offering any restitution for her crime. The mother sacrificed justice.

Should the case have taken its course in the South African criminal courts, one of two verdicts would have been the outcome, namely either a conviction or an acquittal. A withdrawal, either at the request of the complainant or by the prosecutor is not a finalisation. The case remains open and can be re-enrolled at a later stage if the complainant or the state so deems fit. However, if ADR (an accepted acronym for Alternative Dispute Resolution) had existed under South African criminal and procedural law, and if the complainant so desired, it could have been applied to this case and the outcome would have been entirely different. The complainant could possibly receive an order for the re-payment of the stolen money, the ADR interventions could have elicited an apology, remedy and explanation from her daughter, the mother could verbalise her frustrations and disappointment and collectively, the mother and daughter would talk about the prevention of such theft in future.

In contrast, had this case appeared in the *Lok Adalat*<sup>2</sup> (which means People's Court) in India, the outcome would have been different. The concept of the *Lok Adalat*<sup>3</sup> is an innovative Indian contribution to global

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<sup>1</sup> Sasolburg police docket, copies of which are in the possession of the author.

<sup>2</sup> This Sanskrit term is defined in greater detail at section 1.8.8 hereof.

<sup>3</sup> This Sanskrit term translates to "people's court"; "*Lok*" meaning people and "*Adalat*" meaning court; Karthyaeni and Vidhi 2009 <http://www.legalservicesindia.com> 1; It is further elaborated upon at paragraph 1.8.8 below.

jurisprudence.<sup>4</sup> It is described as a unique form of people's court wherein the opponents voluntarily resolve their disagreement directly with each other in a formal setting.<sup>5</sup> In India it is regarded as one of the elements of the ADR system.<sup>6</sup> There is an extensive account in the Hindu scriptures of such techniques being practised in the distant past.<sup>7</sup> In ancient times in India, disputes were referred to the *panchayat*<sup>8</sup> or village council where every effort was made to resolve the dispute amicably.<sup>9</sup>

Evolved from Hindu law and now part of Indian law,<sup>10</sup> it has been said that the *Lok Adalat* is one of the most significant mechanisms of the ADR practice in India.<sup>11</sup> With the declaration of the *Legal Services Authorities Act* 39 of 1987<sup>12</sup> in India, it gave statutory recognition to the systems and orders of the *Lok Adalat*. In addition to the *Lok Adalat*, there are further systems of *nyaya panchayat*<sup>13</sup> (community justice) and *gram nyayalayas*<sup>14</sup> (village court)<sup>15</sup> which also co-exist parallel to the *Lok Adalat*. The *Lok Adalat* is still active and prevalent in India today and finalises hundreds of thousands of cases every year.<sup>16</sup>

Had the same scenario as that of the Sasolburg case occurred in India, the parties would have started the proceedings in a criminal court. But, taking into consideration the nature of the dispute, the judicial officer would have transferred the case to the *Lok Adalat* for ADR either *mero motu* or with the permission or insistence of both parties.

The *Lok Adalat* takes the nature of a pseudo court and functions along similar lines to that of a criminal court, although it is more informal and the

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<sup>4</sup> Karthyaeni and Vidhi 2009 <http://www.legalservicesindia.com> 1.

<sup>5</sup> Malik 2007 *AIHC* 129.

<sup>6</sup> Khan *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism* 43.

<sup>7</sup> Sharan *Court Procedure in Ancient India* 85.

<sup>8</sup> According to Collins English Dictionary, the term refers to a village council in India. The word "*panch*" in Sanskrit means five, as the council comprised five elders from the village. For a further definition, refer to paragraph 1.8.9 below.

<sup>9</sup> Sharan *Court Procedure in Ancient India* 90.

<sup>10</sup> The evolution of Hindu law into Indian law will be explained and elaborated on in detail further in chapter 3 of this research.

<sup>11</sup> *PT Thomas v Thomas* *Job AIR* 2005 SC 3575.

<sup>12</sup> This Act will be expanded on further in Chapter 3.

<sup>13</sup> The word "*Panchayat*" means a collection of five elders and "*Nyaya*" means justice. Primarily this term refers to justice meted out by elders in a community. See also Mathur *Nyaya Panchayats as Instruments of Justice* 23.

<sup>14</sup> See paragraph 1.8.11 for the definition.

<sup>15</sup> Venkatesu *Democratic Experiences in India: Experiences, Issues and Challenges* 201.

<sup>16</sup> Nair 23 November 2013 <http://www.dailymail.co.uk>.

strict legal rules pertaining to evidence and procedure do not apply.<sup>17</sup> It must be noted that the *Lok Adalat* is strictly a forum for ADR and not adjudication.<sup>18</sup> The emphasis is on restorative justice using compromise, conciliation, mediation and negotiation.<sup>19</sup> Here, the parties to the dispute are granted the opportunity to engage with each other about what led to the crime, what motivated the offender to steal from her parent, what had gone wrong in the relationship, and importantly, how to rectify the situation. Then they would decide between themselves and if needed, be assisted by members of the *Lok Adalat*, as to how the matter could be resolved. This could be either by the offender offering to reimburse the money, negotiating on the issue of interest, or, *in lieu* of financial recompense, the accused could offer her services to her mother, or even engage in community upliftment and humanitarian projects as a means of giving back.<sup>20</sup>

Either way some recourse would have been sought, even if it was a simple explanation or an apology which would have offered the victim the comfort of closure and healing.<sup>21</sup> Furthermore, should the *Lok Adalat* judge have ordered that counselling would be necessary during the dispute resolution, such would have been arranged with the closest relevant non-profit organisation. The final terms and agreement as determined by the parties themselves would then have been put in writing and becomes a lawful court order.<sup>22</sup>

If one compares the two different scenarios set out above it would seem that justice has a better chance of prevailing in the Indian legal system. It would appear that the entire principle of *Lok Adalat* rests on the premise of access to justice and restorative justice.<sup>23</sup>

It is internationally accepted that access to justice is a basic human right which includes not only admission to conventional justice as we know it, but

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<sup>17</sup> Bansal *Arbitration and ADR* 32.

<sup>18</sup> Khan *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism* 120.

<sup>19</sup> Thilagaraj and Liu *Restorative Justice in India* 63.

<sup>20</sup> In *KN Govindan Kutt Menon v CD Shaji* 2012 2 SCC 51, the Supreme Court held that there is no restriction on the power of the *Lok Adalat* to pass an award based on the compromise arrived at between the parties.

<sup>21</sup> In *State of Punjab and Anr v Jalour Singh and Ors* 2008 2 SCC 660, the Court stated that *Lok Adalats* have no adjudicatory functions. Their functions and duties relate purely to conciliation and must be based on compromise and settlements between the parties themselves. The parties determine the nature and extent of the award that is finally agreed upon and subsequently passed by the court.

<sup>22</sup> In *PT Thomas v Thomas Job* 2005 6 SCC 478 the Court emphasised the practice and procedure of the *Lok Adalat* as well as the binding nature of the final award.

<sup>23</sup> Rao *Handbook for Dispute Resolvers under ADR Processes* 267.

also the ability and capacity to participate in the court process.<sup>24</sup> Justice is defined as "the process or result of using laws to fairly judge and punish crimes and criminals".<sup>25</sup> As stated above, the *Lok Adalat* is the most significant structure of ADR ensuring restorative justice in India.<sup>26</sup> ADR represents all forms of dispute resolution other than litigation or adjudication through the courts.<sup>27</sup> Some practices include mediation, negotiation, conciliation and arbitration. Over the years a wide range of dispute resolution practices have developed as alternatives to litigation. It is evident that these systems advanced to provide easier and quicker access to justice; to reduce the volume of court rolls; to assist in the restoration of the relationship between the parties; and particularly, because it was what the parties desired.<sup>28</sup> Hence these ADR systems of *Lok Adalat*, *nyaya panchayat* and *gram nyayalayas* will be dissected and elaborated on in detail in this dissertation with the aim of investigating its possible contribution and usefulness within the South African context.<sup>29</sup>

In essence, the above processes of *Lok Adalat* and the other ADR systems as practiced in India are all considered a part of restorative justice<sup>30</sup> which accentuates the mending or restoring of the harm or damage suffered by the complainant rather than seeking a punitive or retributive outcome.<sup>31</sup>

In the South African criminal justice environment, the ADR principles of *Lok Adalat*, *nyaya panchayat* and *gram nyayalayas* do not feature at all as they simply do not exist under common law or statutory law. However, the sheer volumes of cases at any given time on the court rolls<sup>32</sup> clearly indicate that

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<sup>24</sup> South African Law Commission *Issue Paper 8 Project 94: Alternate Dispute Resolution* 15. See also Rao *Handbook for Dispute Resolvers under ADR Processes* vii-ix.

<sup>25</sup> Merriam Webster Dictionary <http://www.merriam-webster.com>.

<sup>26</sup> Thilagaraj and Liu *Restorative Justice in India* at xi.

<sup>27</sup> South African Law Commission *Issue Paper 8 Project 94: Alternate Dispute Resolution* 13; Prior to 2003 the Commission was known as the South African Law Commission (SALC) and after 2003 it is known as the South African Law Reform Commission (SALRC).

<sup>28</sup> *Restorative Justice National Policy Framework in 2012* Department of Justice and Constitutional Development 4. See a detailed explanation at paragraph 1.8.4.

<sup>29</sup> These ADR systems will be discussed in detail in Chapter 3.

<sup>30</sup> At paragraph 1.8.4 there is a definition of this concept; *Restorative Justice National Policy Framework in 2012* Department of Justice and Constitutional Development 4. See also Rao *Handbook for Dispute Resolvers under ADR Processes* 286-292.

<sup>31</sup> Van Ness and Heetderks *Strong Restoring Justice: An Introduction to Restorative Justice* 1.

<sup>32</sup> *National Prosecuting Authority of South Africa 2016/2017 Annual Report* 2016 Department of Justice and Constitutional Development 29.

alternative methods of resolving disputes justly, fairly and speedily need to be sought and implemented.<sup>33</sup>

As Hindu law has no applicability within the South African landscape, the systems of *Lok Adalat* and other Indian ADR mechanisms do not apply. Perhaps it is time that the South African criminal procedure included similar ADR practices to alleviate the volumes of cases processed in the courts and to mete out justice broadly, efficiently and speedily.

## **1.2 Problem statement**

With the exception of the *Child Justice Act 75* of 2008 (hereinafter referred to as the CJA) which makes allowance for some, albeit limited forms of ADR (more specifically diversion from the court process as set out in section 51)<sup>34</sup> in cases where children are in conflict with the law, South African criminal legislation, as stated above, is wholly deficient on the subject of ADR.<sup>35</sup> Ordinarily, ADR processes incorporate mediation, negotiation, diversion, arbitration, conciliation and adjudication.<sup>36</sup> Curiously, in South African civil law, family law as well as labour law, some of these aspects of ADR do feature, for example mediations in labour disputes and divorce matters. Yet, the *Criminal Procedure Act 51* of 1977 (hereinafter referred to as the CPA),

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<sup>33</sup> At the end of March 2017, the National Prosecuting Authority of South Africa (hereinafter the NPA) recorded 827 599 new criminal cases which were enrolled in the district courts for that performance cycle of a year. A total of 470 029 cases were finalised with a verdict and 161 367 by way of "informal mediations" and diversions as per the *Policy Directives*.

<sup>34</sup> Section 51 of the *Child Justice Act 75* of 2008 which states as follows:  
The objectives of diversion are to-

- (a) "deal with a child outside the formal criminal justice system in appropriate cases;
- (b) encourage the child to be accountable for the harm caused by him or her;
- (c) meet the particular needs of the individual child;
- (d) promote the reintegration of the child into his or her family and community;
- (e) provide an opportunity to those affected by the harm to express their views on its impact on them;
- (f) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- (g) promote reconciliation between the child and the person or community affected by the harm caused by the child;
- (h) prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system;
- (i) reduce the potential for re-offending;
- (j) prevent the child from having a criminal record; and
- (k) promote the dignity and well-being of the child and the development of his or her sense of self-worth and ability to contribute to society."

<sup>35</sup> Doncabe *The Implementation of the Child Justice Act 75 of 2008: A Case Study of the Diversion Programme* 10.

<sup>36</sup> South African Law Commission *Issue Paper 8 Project 94: Alternate Dispute Resolution* 18.

as well as other legislation within criminal law is completely silent on the issue of ADR.

It is an accepted fact that South Africa's crime figures, particularly violent crime, ranks amongst the highest in the world.<sup>37</sup> As stated earlier, in the 2016/2017 *Annual Report of the National Prosecuting Authority of South Africa*,<sup>38</sup> the approximately 1 600 criminal courts in this country received 827 599<sup>39</sup> new cases in the district courts for the year of which 470 029 cases were finalised with a verdict.<sup>40</sup> These figures are certainly a cause for concern.

The above NPA statistics relate only to cases where there was a successful arrest of the accused by the South African Police Service (SAPS) and the ultimate enrolment by a prosecutor, of that case docket onto the criminal court roll. Consequently, it does not reflect the entirety of all criminal cases reported in the country. Upon drawing a comparison between India and South Africa, it immediately becomes evident that India is also faced with a similar situation, including huge caseloads that lead to court congestion.<sup>41</sup> Confirming this, Justice Rao<sup>42</sup> stated:

Over the years more cases have accumulated in our courts than our courts can decide within reasonable time.

Coincidentally, South Africa, like India experienced a period of British colonial rule and much of the current legal system and legislation are partially founded on English law.<sup>43</sup> Furthermore, the two countries share similar problems regarding congested court rolls and backlogs.<sup>44</sup> Yet, the Indian courts have been effectively using ADR for many years to address their backlogs and apply justice.<sup>45</sup> It would appear that many of their concepts on this point evolved from Hindu law as well as customary law.<sup>46</sup> It is thus

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<sup>37</sup> Kriegler 2016 <http://www.biznews.com>.

<sup>38</sup> *National Prosecuting Authority of South Africa 2016/2017 Annual Report 2016* Department of Justice and Constitutional Development 36.

<sup>39</sup> This figure represents only the new cases which were enrolled during the 2016/2017 financial year. Existing cases on the court rolls, carried over from previous years were not taken into consideration in arriving at this figure.

<sup>40</sup> *National Prosecuting Authority of South Africa 2016/2017 Annual Report 2016* Department of Justice and Constitutional Development 23-28.

<sup>41</sup> Micevska *The Problem of Court Congestion: Evidence from Indian Lower Courts* 1-3.

<sup>42</sup> Rao "Would Conciliation and Mediation Succeed in our Courts?" 2.

<sup>43</sup> Banerjee *English Law in India* 190.

<sup>44</sup> An overview of the court load congestion in India will be provided in chapter 3.

<sup>45</sup> Dutta 2009 <http://www.academia.edu> 6.

<sup>46</sup> Khan *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism* 119.



worthwhile to explore the application of Hindu ADR principles to ascertain the extent and magnitude thereof and their possible application within the South African context.

Given the limited criminal legislation<sup>47</sup> in South Africa on the aspect of ADR, it is envisaged that ADR principles recognised in Hindu criminal law could form a point of departure to extricate lessons for the country. Various methods were adopted in India to resolve disputes, including the *Lok Adalat* system.<sup>48</sup> India has an extensive tradition and chronicle of these ADR procedures which have been observed and applied in communities through the ages.<sup>49</sup> Regrettably, during British rule in India, the traditional ADR systems were done away with when English law was established. Despite this, they survived in many parts of India and are now formally recognised through legislation.<sup>50</sup> Other ADR systems practiced in India such as the *panchayat*, *nyaya panchayat* and *gram nyayalayas* will also be explored to ascertain their relevance, impact and benefit in the South African criminal justice context.<sup>51</sup>

The South African Law Commission<sup>52</sup> referred to the fact that the South African legal system, which is adversarial in nature, can result in lengthy and costly legal processes. This goes against the very grain of the *Constitution*<sup>53</sup> which affirms that every accused is entitled to a speedy trial. Additionally, not only are formal courts expensive, time consuming and inaccessible (geographically as well as linguistically) to a large number of the South African population, but, by their very nature, the legal proceedings are generally exclusive and incomprehensible to most who will not feel as if

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<sup>47</sup> Currently the only piece of criminal legislation in South Africa that deals with ADR is the *Child Justice Act* 75 of 2008. Specifically section 51 which allows the child offender to be diverted from the criminal process through a special diversion programme run by the Department of Social Development. No other criminal legislation exists.

<sup>48</sup> Dutta 2009 <http://www.academia.edu> 2; The *Lok Adalat* system is but one aspect in the entire ADR process as applied in India.

<sup>49</sup> Sharan *Court Procedure in Ancient India* 86; Because the traditional practices of the *Lok Adalat*, *gram nyayalayas* and *nyaya panchayat* persisted mainly in the rural areas in India throughout colonial rule, hence these structures endured and survived in spite of colonial influence.

<sup>50</sup> Dutta 2009 <http://www.academia.edu> 6.

<sup>51</sup> These systems will be described in detail in Chapter 3 hereof.

<sup>52</sup> South African Law Commission *Issue Paper 8 Project 94: Alternate Dispute Resolution* 15-16.

<sup>53</sup> *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as the *Constitution*).

they were part of the process or outcome.<sup>54</sup> Therefore, it becomes necessary and imperative to pursue alternative avenues such as the application of ADR principles in the context of Hindu law as found in India and to compare the outcome to the current situation in South Africa in order to devise recommendations for the development of its own unique criminal law legislation on ADR.

Fortuitously, in an attempt to overcome this lacuna regarding ADR in criminal law, the NPA has issued Directives to prosecutors in Part 7 of their *National Prosecuting Authority Policy Manual*, (hereafter the *NPA Directives*),<sup>55</sup> entitled "Diversion, Restorative Justice and Informal Mediation in Respect of Adult Offenders".<sup>56</sup> These *NPA Directives*<sup>57</sup> issued in terms of section 21 of the *National Prosecuting Authority Act 32 of 1998*<sup>58</sup> form the current framework within which ADR is conducted in the criminal courts. The NPA should be acknowledged and commended for having foresight in recognising the obvious need for ADR in criminal cases by creating such Directives. However, these *NPA Directives* are effectively guidelines to

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<sup>54</sup> South African Law Commission *Discussion Paper 82 Project 90 on the Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* 12-17.

<sup>55</sup> This *NPA Policy Manual* has been prepared in terms of section 22(2)(a) of the *National Prosecuting Authority Act 32 of 1998*, which states that the National Director must determine a prosecution policy and issue policy directives. The *Policy Manual* is not a public document but available to all the office bearers of the National Prosecuting Authority.

<sup>56</sup> Part 7 of the *NPA Directives* addresses the issue of "informal mediations" and provides guidelines to prosecutors on how to handle them. Because the *NPA Policy Directives* is an internal directive issued only to prosecutors employed by the NPA, they are not a public document and the direct contents thereof cannot be publicly divulged. It is in possession of the author and is available for perusal.

<sup>57</sup> In terms of the *National Prosecuting Authority Act 32 of 1998* section 21(1)(b) states that the National Director of Public Prosecutions shall issue policy directives which must be observed in the prosecution process. Hence the policy directives were drafted and form part of the *Policy Manual* for prosecutors.

<sup>58</sup> Section 21 of the *National Prosecuting Authority Act 32 of 1998* states that:

- 1) "The National Director shall, in accordance with section 179(5)(a) and (b) and any other relevant section of the *Constitution*-
  - (a) with the concurrence of the Minister and after consulting the Directors, determine prosecution policy; and
  - (b) issue policy directives, which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in this Act or any other law.
- 2) The prosecution policy or amendments to such policy must be included in the report referred to in section 35(2)(a): Provided that the first prosecution policy issued under this Act shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first National Director.

The prosecution policy must determine the circumstances under which prosecutions shall be instituted in the High Court as a court of first instance in respect of offences referred to in Schedule 2 to the *Criminal Law Amendment Act 105 of 1997*."

prosecutors. As a result, they are not binding on the judiciary, attorneys or any other legal professionals. When diversions or "informal mediations" are conducted under this *Directive*, since there is no recognised ADR legislation for adult offenders, the charge is actually withdrawn in court and reflected as such in the court records, police docket and charge sheet.

In terms of the *Directives*, prosecutors are predominantly conducting "informal mediations" in courts but they have not been formally trained to do so. Regrettably, this will raise many concerns regarding the manner and type of cases that prosecutors mediate.<sup>59</sup> Usually, "informal mediations" are concluded by the prosecutor without any statutory procedure, parameter or format and this, in itself, can easily lead to a miscarriage of justice. Prosecutors are skilled litigators – they are not trained mediators. Mediation or ADR specific to criminal cases does not form part of the legal curriculum in South African universities. By acting for the state and on behalf of complainants, prosecutors can find themselves in difficult positions when they have to assume the added role of "unbiased" mediators in courts.

Moreover, and importantly, when considering the *NPA Directives*, Part 7(B)<sup>60</sup> states that ADR can only be considered in less serious cases, normally those to which an admission of guilt fine will apply. Hence, a large number of cases on the criminal court rolls are effectively excluded from being considered for ADR.

One example is the Sasolburg case discussed earlier<sup>61</sup> which would, according to the *NPA Directives*, not qualify for ADR on the basis that charges of fraud or theft of large sums of money does not necessarily attract admission of guilt fines. Therefore, it is clear that there needs to be drastic development of the ADR laws in South African criminal law to also include these scenarios if the complainants so desire.

### **1.3 Aims and objectives**

The general aim of this study is to:

- analyse the scope and application of ADR in the South African criminal justice system

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<sup>59</sup> Langar and Sklansky *Prosecutors and Democracy* 46.

<sup>60</sup> A copy of these guidelines is available with the author for perusal and inspection. It is not regarded as a public document. See footnote 55 above which explains this aspect.

<sup>61</sup> Refer to paragraph 1.1 above.

- analyse the scope and application of ADR in the Indian criminal justice system;
- compare the two ADR systems that exist in South Africa and India, with the purpose of contributing to the development of the current limited scope of ADR in the South African criminal justice system by looking at ADR procedures as established in India; and
- recommend methods through which South Africa can improve and develop its own ADR practices and legislation in criminal law and procedure.

#### **1.4 Research question**

How can Hindu perspectives on ADR be employed to develop and enhance the current application of ADR principles in the South African criminal justice system?

#### **1.5 Research methodology**

Primarily, this will be a literature study encompassing an examination of legislation, case law, academic articles and books, policy documents, as well as electronic sources. The study will be comparative in nature bearing in mind that the Hindu law aspect will be dissected, evaluated and probed for its value and relevance within the South African criminal justice context. Hindu law is one of the legal systems applicable in India, thus the law of India, as far as it applies to Hindu ADR principles, will be investigated. It could be beneficial to study and learn from this particular ancient belief and to discover that timeless philosophies may still have relevance in the modern world.

#### **1.6 Significance of study**

This study will be of interest to law makers, the NPA, the legal fraternity in general and most importantly the greater community of South Africa. As South Africa is recognised for its unique blend of legally pluralistic systems, the borrowing of Hindu law ADR principles can contribute to the diverse legal landscape of the country.<sup>62</sup> It will be interesting to observe the similarities between the two systems' traditional ADR mechanisms, the parallels of *ubuntu* and *dharma* and the connection of the traditional court with the *panchayat* systems and *Lok Adalat*. Significantly, this study can

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<sup>62</sup> Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* at page v.

ignite an evocative debate regarding the issue of community justice as practiced in India which, in turn, could lead to the consequential improvement in the current system in South African criminal law and procedure.

### **1.7 Outline of the dissertation**

This dissertation will comprise the following five chapters:

Chapter one provides an introduction to the study and sets out the statement of the problem, the aims of the research, the methodology concerned as well as a general outline of the research.

In Chapter two, the scope and application of ADR in South African law is discussed.

Chapter three explores the scope and application of ADR in Indian Law.

Chapter four states and compares the principles of ADR as currently practised in South African and Indian criminal law.

Chapter five focuses on the possible learning's from Hindu Law and what can be applied in South Africa to improve the current ADR practices. Additionally, the results of this comparative study will be examined in Chapter five, which will conclude by evaluating the lessons learnt from Hindu Law, and also recommend changes for the improvement of ADR laws in South Africa.

### **1.8 Concepts and words**

Many words and concepts used in this paper are typical to this study. For ease of reference, they are explained briefly here.

#### **1.8.1 What is criminal law?**

In its simplest term, criminal law is that body of law which relates to crime. According to Van der Walt,<sup>63</sup> a crime is conduct which is prohibited by either statute or common law and for which the offender is subject to punishment. In this dissertation, the term "criminal law" refers particularly to criminal statute or legislation. When the term, "criminal procedure" is used it refers to the process or procedure of criminal adjudication in terms of the country's criminal law. The term "criminal justice system" will refer to the entire body

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<sup>63</sup> Van der Walt *et al* *Introduction to South African Law* 24.

of practices and establishments involved in preventing, alleviating, adjudicating and sanctioning criminal behaviour.

### *1.8.2 Definition of civil law*

Civil law is a branch of law which deals entirely with disputes between private parties. It covers areas such as contracts, property, family, labour and others.<sup>64</sup>

### *1.8.3 The meaning of ADR*

ADR is essentially all forms of dispute resolution methods other than formal litigation.<sup>65</sup> Effectively, it refers to any means utilised in order to settle disputes without going through the formal court or trial process.

### *1.8.4 The concept of restorative justice*

Restorative justice is an approach to justice that involves the parties to the dispute as well as others directly concerned with it, in collectively coming together, identifying the harm and damage suffered, accepting responsibility for actions, offering restitution and compensation as well as taking meaningful measures to prevent future recurrence of the same.<sup>66</sup> Fundamentally, the objective is to restore the victim to the same position he or she was in prior to the commission of the crime. Mechanisms such as mediation, negotiation, and conciliation are utilised to achieve restorative justice.<sup>67</sup>

### *1.8.5 Who or what is a Hindu?*

A Hindu is any person who regards himself or herself as an adherent or follower of the Hindu faith or religion.<sup>68</sup>

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<sup>64</sup> Pound *Civil Law – Definition, Examples, Cases and Process* 12.

<sup>65</sup> South African Law Commission *Issue Paper 8 Project 94 Alternate Dispute Resolution* 13.

<sup>66</sup> *Restorative Justice National Policy Framework in 2012* Department of Justice and Constitutional Development 4; Department of Justice and Constitutional Development 2017 <http://www.justice.gov.za>.

<sup>67</sup> Yadav 2017 *International Journal of Law* 60.

<sup>68</sup> Weber *The Religion of India* 3-7.

### 1.8.6 Hindu law

Hindu law is that system of law which is applied to Hindus, Jains, Buddhists and Sikhs in India. Hindu Law is derived from Hindu scriptures, primarily the Vedas.<sup>69</sup>

### 1.8.7 Indian law

This refers to the system of law in modern India which was largely influenced by the British after the colonisation of India. Indian personal law is, however, more complex with each religion in India adhering to its own specific laws, hence separate laws govern the Hindus, the Muslims as well as Christians in India.<sup>70</sup>

### 1.8.8 Lok Adalat

This Sanskrit term loosely translates to "people's court". It is an ancient traditional court system which developed in India. In the past, disputes were resolved in the *Lok Adalat*<sup>71</sup> by a presiding officer who was assisted by respected elders in the village or community.<sup>72</sup> This structure will be elaborated upon in the relevant chapter.<sup>73</sup>

### 1.8.9 Panchayat

Derived from the Sanskrit root word *panch* meaning five, a *panchayat* refers to a village council typically made up of five elders from that village.<sup>74</sup> More than just a forum for dispute resolution, the *panchayat* also functions as a system of local government. Daily disputes unresolved between the parties are referred to this village council for intervention.<sup>75</sup>

### 1.8.10 Nyaya panchayat

Also with roots in ancient scriptures, this is a system of dispute resolution at village level in India. The Sanskrit word *nyaya* literally means law, rules, or judgement. Simply put, this term refers to community justice. It is a simple

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<sup>69</sup> Chaddha *Evolution of Law: A Short History of Indian Legal Theory* 2.

<sup>70</sup> Shukla *Constitution of India* 12.

<sup>71</sup> Formalised under the *Legal Services Authorities Act*, 1987 in India; This forum will be elaborated on in greater detail in Chapter 3

<sup>72</sup> Khan *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism* 6.

<sup>73</sup> Chapter 3 contains additional details on the entire concept and practice of *Lok Adalats* in India.

<sup>74</sup> Shaw and Thaitakoo *Water Communities* 144-145.

<sup>75</sup> Karthyaeni and Vidhi 2009 <http://www.legalserviceindia.com> 1.

and indigenous form of adjudication involving an informal court consisting of five persons to hear local disputes.<sup>76</sup>

#### *1.8.11 Gram nyalayas*

These are essentially village courts and have been in existence in India for many centuries. Today they are formalised by an Act that came into operation in 2009.<sup>77</sup>

#### *1.8.12 Customary law*

Customary law is defined as "the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those people".<sup>78</sup>

#### *1.8.13 Traditional leader*

A traditional leader is the head of a village, tribe or community. He is referred to as the chief or headman whose "roles, functions and powers were defined by customary law".<sup>79</sup> Traditional leaders are responsible for many functions, particularly all forms of dispute resolution, local management issues, as well as the maintenance of peace and stability in their regions.<sup>80</sup>

#### *1.8.14 Traditional courts in South Africa*

These courts are not typical formal courts. Known as customary courts, chief's courts or headman's courts, they are presided over by traditional leaders employing customary law.<sup>81</sup>

### **1.9 Conclusion**

At a time when mounting exasperation of the people regarding the perceived stagnation of the criminal justice system demands different and innovative approaches to administering justice, reducing backlogs and court delays; speeding up the finalisation of cases in the most efficient manner, thus allowing victims the options of alternatively resolving their disputes is

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<sup>76</sup> Raina 1988 *Indian Journal of Public Administration* 1073

<sup>77</sup> *Gram Nyayalayas Act* of 2008 which created 152 functional village courts in rural India. These village courts are elaborated upon in further detail in chapter 3.

<sup>78</sup> Section 1 of the *Recognition of Customary Marriages Act* 120 of 1998.

<sup>79</sup> Khunou 2011 *International Journal of Humanities and Social Science* 279.

<sup>80</sup> Du Plessis 1999 *Koers Journal* 303.

<sup>81</sup> Rautenbach "Traditional Courts as Alternate Dispute Resolution Mechanisms in South Africa" 297.



required. The ADR systems as established and practised in India must therefore be investigated for possible incorporation of their best practices into the South African milieu.

It will be revealed how the entire procedure of ADR in India, including specifically the *Lok Adalat* was devised to promote justice.<sup>82</sup> By all outward appearances, it seems to be a successful and effective method for resolving both criminal and civil disputes in India.<sup>83</sup> This concept of prompt and accessible justice gives credence to the rights enshrined in the South African *Constitution*, specifically those relating to a speedy trial, and the right of every person to access to justice.

It is evident that thousands of cases going through the court process in South Africa are burdensome, expensive, technical and sometimes ineffective.<sup>84</sup> Indeed, ADR and the aim of using alternate methods of dispensing justice is not intended to detract from the court process, as many cases, especially serious offences do genuinely belong in that forum, but by pursuing different methods of dealing with disputes, it casts the net of finding accessible justice that much wider.

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<sup>82</sup> Sharma *Lok Adalats as Most Popular ADR Mode in India: With Special Reference to HP 4*.

<sup>83</sup> Rao *Handbook for Dispute Resolvers under ADR Processes* 151-152, 313.

<sup>84</sup> Withdrawal of cases in criminal courts are often indicative of frustrations encountered by complainants and witnesses who sometimes have to endure repeated court appearances and unnecessary postponements, often at the hands of accused or defence council referred to as 'delaying tactics'. The withdrawal of the above mentioned Sasolburg case is also an example of limited options being available to complainants in South African criminal courts. Clearly, justice was wholly ineffective for the complainant, who suffered losses.

## CHAPTER 2: SCOPE AND APPLICATION OF ADR IN SOUTH AFRICAN LAW

### 2.1 Introduction

Many scholars confidently assert that South Africa has a valuable history of ADR.<sup>85</sup> From prehistoric times to the present, ADR has almost always existed in the country in some form or another. An overview of ADR as well as its scope and application in South Africa will be examined in this chapter. The aim is to sketch the history, development and usage of ADR in South Africa, leading up to present day practices. In so doing, this chapter will place into perspective the pertinence, applicability and relevance of ADR (and lack thereof) within the country's legal system.

#### 2.1.1 Background to South Africa

South Africa is a country situated in the southernmost region of the continent of Africa with a population of approximately 55 million people<sup>86</sup> from diverse backgrounds. With excellent infrastructure, it is the second largest economy in Africa, comprising 1.2 million square kilometres and nine provinces.<sup>87</sup> As a young democracy with eleven official languages and a multi-party system, it has much to offer, such as a rich and beautiful landscape with an abundance of natural resources, but it also unfortunately has some of the highest crime rates in the world.<sup>88</sup> As a result, the country's courts face huge caseloads as well as backlogs.<sup>89</sup> This situation is further compounded by the country's adversarial legal system, which may cause lengthy and costly legal processes.<sup>90</sup> Any delay in bringing a matter to trial is of particular concern as every accused person has a right to a speedy trial in terms of

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<sup>85</sup> De la Harpe "Mediation in South Africa" 257.

<sup>86</sup> Statistics South Africa *Statistical Release P0302: Mid-year Population Estimates (2014)* 2.

<sup>87</sup> Patelia "Implementing Mediation in the Formal Legal System – A South African Perspective" 3.

<sup>88</sup> South African Police Service 2015 <http://www.saps.gov.za>.

<sup>89</sup> According to the National Prosecuting Authority, a backlog case refers to a case that has been on the District Court's roll for more than six months; on the Regional Court's roll for longer than nine months; and on the High Court's roll for longer than one year. Regarding the statistics as per the Annual Report of the *National Prosecuting Authority of South Africa 2013 / 2014* 46: out of the 387 court centres in the country, an outstanding case load of 182 979 cases were carried into the 2015/2016 financial year. Of these cases 27 582 were backlog.

<sup>90</sup> South African Law Reform Commission *Issue Paper 28 on the Review of the Maintenance Act 66 of 1998: Project 100* (Pretoria 2014) 15.

the *Constitution*.<sup>91</sup> This inherent right will not receive its desired intention, given the caseload and backlog figures which are self-explanatory. It is thus envisaged that ADR has a significant role to play within the criminal justice domain as will be revealed later in this research.<sup>92</sup>

### 2.1.2 *The advancement of ADR in South Africa*

There is no denying that the utilisation of non-traditional<sup>93</sup> dispute resolution techniques has become extensively acknowledged within a wide range of dispute circumstances. The practice of settling disputes outside of a courtroom has furthermore become entrenched within the legal systems of many developed and progressive nations in the world.<sup>94</sup> As already alluded to in chapter one, in its simplest expression, ADR refers to, or represents practices, processes or mechanisms whereby legal disputes are resolved outside of the courts using specific methods.<sup>95</sup> Consequently, ADR involves procedures that fall beyond the usual formalised government judicial process.<sup>96</sup> Mediation, negotiation, conciliation, as well as arbitration are some examples of ADR processes<sup>97</sup> or mechanisms which are utilised to settle disputes other than by litigation and, particularly, outside of the formal court process.<sup>98</sup>

It is undeniable that disputes are not only foreseeable but also an unavoidable aspect of all facets of life within society. They range from petty family squabbles to major corporate and even multinational conflicts.<sup>99</sup> If conflict is not properly managed from the outset, it is inevitable that disorder and mayhem will ensue. As highlighted above,<sup>100</sup> over the years, a wide range of dispute resolution practices have developed as an alternative to

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<sup>91</sup> Section 35(3)(d) of the *Constitution* states that every accused person has the right to a fair trial which includes the right to have their trial begin and conclude without unnecessary delay.

<sup>92</sup> Chapter 4 and 5 will elaborate further on this issue.

<sup>93</sup> It is widely accepted that traditional dispute resolution techniques involve the settling of disputes in an adversarial setting, namely a formal court of law. Hence non-traditional techniques of settling disputes involve the settling of disputes outside of the generally accepted adversarial system; Leshchinskiy date unknown <http://legalmatch.com> 1.

<sup>94</sup> US Agency for International Development 1998 <http://www.usaid.gov.za> 1 - 4.

<sup>95</sup> South African Law Commission *Issue Paper 8 on Alternative Dispute Resolution: Project 94* (Pretoria 1997) 13.

<sup>96</sup> Terry *Advantages and Disadvantages of Alternate Dispute Resolution* 2.

<sup>97</sup> Refer to 2.1.3 for the definitions and examples of these processes.

<sup>98</sup> Terry *Advantages and Disadvantages of Alternate Dispute Resolution* 2.

<sup>99</sup> Okharedia "The Emergence of Alternate Dispute Resolution in South Africa: A Lesson for Other African Countries" 1.

<sup>100</sup> Refer to 2.1 above.

litigation.<sup>101</sup> These mechanisms of mediation, negotiation, arbitration and conciliation (as will be defined hereunder) were not intended to replace the conventional court process at all.<sup>102</sup> Indeed, there are ongoing debates as well as criticism as to whether they can or should be applicable within the criminal justice sphere.

As a result, considerable volumes of literature surrounding the concept of ADR, its relevance, application and usage are available. Hence ADR is a familiar notion to many. But first and foremost, to put this study into perspective, it becomes imperative to delve into and expose the aforementioned ADR concepts to some extent, especially because the best practices of ADR in Hindu law are investigated at a later stage for possible incorporation of ideas and best practices into the South African criminal law landscape.

### *2.1.3 A broad view of various ADR models*

Resolving disputes outside the rigid confines of a court process can take various forms and involves a variety of processes or mechanisms,<sup>103</sup> with the prevalent being negotiation, conciliation, mediation and arbitration, each of which is briefly described below.

#### *2.1.3.1 Negotiation*

The following quotation gives a better understanding of the practicalities of the concept of negotiation.

It was Mahatma Gandhi who said:<sup>104</sup>

I realised that the true function of a lawyer was to unite the parties. A large part of my time during the twenty years of my practice was occupied by bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.

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<sup>101</sup> Lewis and McCrimmon "The Role of ADR Processes in the Criminal Justice System: A View from Australia" 1.

<sup>102</sup> *Restorative Justice National Policy Framework the Department of Justice and Constitutional Development* 4.

<sup>103</sup> A process can be described as a series of events which produces a certain outcome, an example being a court case, which goes through many stages such as first appearance, explanation of rights, bail applications, plea, evidence leading, judgement and sentencing until it is finally concluded. A process is something fluid, undergoing change. A mechanism is a device or function which is used to arrive at a desired result. It is the "how" in the process.

<sup>104</sup> Prabhu January 1949 <http://www.mkgandhi.org>.

From the above quotation it can be gathered that negotiation is a mechanism by which both parties to the dispute pursue a mutual, acceptable and satisfactory arrangement and understanding which will serve as an agreement to resolve their dispute.<sup>105</sup> Admittedly, negotiation is the most frequent and commonly practised form of dispute resolution.<sup>106</sup> Unlike the other ADR mechanisms involving third or outside parties, negotiation permits the adversaries to regulate and manage the entire process as well as the outcome. The attention is concentrated on solving the problem, rather than trying to establish guilty or innocent parties. South African criminal law does not make provision for negotiation, except for litigators meeting and negotiating on plea bargains in criminal cases.<sup>107</sup> However, this is an entirely different process altogether.<sup>108</sup>

#### 2.1.3.2 Conciliation

This is a mechanism by which a third party discusses the issues with the opposing parties, to determine the fundamental reasons giving rise to the dispute in the first place. The third (neutral) party must attempt to settle the dispute in an amicable manner.<sup>109</sup> According to the training manual issued by the United Nations Office on Drugs and Crime, conciliation is defined as "a judge initiated practice of guiding the litigants to create an equitable, negotiated settlement instead of proceeding to trial".<sup>110</sup>

A typical example of conciliation in a criminal case would be the following scenario: in an assault case, the victim and the offender would be afforded the opportunity to meet in a safe and protected environment, and in the presence of the conciliator, to discuss the offence, the physical, emotional and financial harm suffered by the victim as well as the terms and agreements relating to compensation for the damage suffered. Subsequently, after taking all factors into consideration, they would be guided to an equitable settlement by the conciliator. For instance, had the offender struck the victim on the head causing injuries requiring medical intervention, expenses and compensation for lost working days, the victim could claim for this.

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<sup>105</sup> *Restorative Justice National Policy Framework the Department of Justice and Constitutional Development* 4–7.

<sup>106</sup> U S Agency for International Development 1998 <http://www.usaid.gov.za> 2.

<sup>107</sup> Refer to chapter 5 herein which will provide insight into how plea agreements can play a role in ADR.

<sup>108</sup> Kerscher *Plea Bargaining in South Africa and Germany* 29 32.

<sup>109</sup> Singh *Labour Bulletin* 6.

<sup>110</sup> United Nations Office on Drugs and Crime October 2007 <http://www.unodc.org> 13.

The conciliator will ensure that the amounts requested by the victim are fair and reasonable and will guide both parties to a just, negotiated and equitable settlement, also taking into consideration time frames and methods of payment. All the parties' agreements form part of a resolution which becomes an order of court and this criminal assault case would be regarded as having been concluded successfully by means of conciliation.<sup>111</sup> Unfortunately, conciliation does not feature in the South African criminal justice landscape.

### 2.1.3.3 Mediation

The former Constitutional Court Judge Albie Sachs<sup>112</sup> expressed the following thoughts on mediation:

Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give and take, mediators can find ways around sticking to points in a manner that the adversarial judicial process might not be able to do.

The prominent feature of mediation is characterised by its informal approach wherein an impartial third party becomes involved to assist the disputing individuals in arriving at an equally acceptable conclusion.<sup>113</sup> The mediator does not force the parties to accept a solution, but rather supports and promotes a solution that will satisfy both parties, without disadvantaging any person.<sup>114</sup>

Using the above assault case as an example, as *per* the words of Judge M Sharma<sup>115</sup> of the Delhi High court:

The mediator proceeds by way of conciliation but, in addition, is prepared and expected to make his own formal proposals and recommendations, which may be accepted.<sup>116</sup>

Thus, the mediator would bring both the offender as well as the victim together, facilitate the dialogue and interaction between them, hear both versions of events, direct the parties towards a compromise and reconciliation and get them to agree on remedies to rectify the harm done.

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<sup>111</sup> Sharma date unknown <http://www.delhimediaioncentre.gov.in> 1.

<sup>112</sup> Sachs *The Strange Alchemy of Life and Law* 108.

<sup>113</sup> U S Agency for International Development 1998 <http://www.usaid.gov.za> 3.

<sup>114</sup> U S Agency for International Development 1998 <http://www.usaid.gov.za> 2.

<sup>115</sup> Sharma date unknown <http://www.delhimediaioncentre.gov.in> 1.

<sup>116</sup> Sharma date unknown <http://www.delhimediaioncentre.gov.in> 1.

Essentially, the mediator would, after giving the victim and the offender an opportunity to relate the events of the offence, direct them not only to reconciliation, but also to: firstly, restore the relationship and to prevent future recurrence of the offence; and secondly, to establish and apportion responsibility as required. The mediator would further determine the loss suffered by the victim because of the assault, consider whether the amount is reasonable, and order the offender to repay the victim a specific amount at a certain date, or, arrive at some other (not necessarily monetary) mutually accepted method of compensation.

This example demonstrates clearly that the role of the mediator is not merely that of passive observer, allowing the parties to arrive at their own conclusion - instead, the mediator plays an active and significant role in resolving the dispute.<sup>117</sup> Mediation can and has been applied successfully to resolve disputes in various areas of law, such as family, labour, civil, contract, tax and succession law among others.<sup>118</sup>

Interestingly, on the issue of mediation, the *NPA Directives* allow prosecutors to conduct "informal mediations" in petty offences. This will be discussed in further detail in this chapter.<sup>119</sup> With the exception of these "informal mediations" as per the *NPA Directives*, South African criminal law is wholly silent on the issue of mediations.

#### 2.1.3.3.1 Victim offender mediation

Another interesting mechanism, also known as victim offender mediation (VOM) has long been in existence in many developing countries.<sup>120</sup> Utilised specifically in the criminal justice domain, VOM is described as a process that allows the victim to meet directly with the offender in a safe, protected and structured environment, in order to engage in a dialogue on the crime.<sup>121</sup> Venter<sup>122</sup> asserts that VOM is a "guided face-to-face meeting between a crime victim and the person who victimised them". Ideally, the mediation session will include the victim, the offender, parties interested in the crime as well as the mediator. The main objective of VOM is to allow the

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<sup>117</sup> South African Law Commission *Issue Paper 8 on Alternative Dispute Resolution: Project 94* (Pretoria 1997)18.

<sup>118</sup> Walsh 26 March 2015 <http://www.disac.co.za> 1.

<sup>119</sup> Refer to paragraph 2.2.13.1.

<sup>120</sup> Wynne "Leeds Mediation and Reparation Service: Ten Years of Victim-Offender Mediation" 1.

<sup>121</sup> Kadar date unknown <http://www.aic.gov.au> 426.

<sup>122</sup> Venter *Guidelines for Victim-Offender Mediation for Probation Officers in South Africa* 25.

offender to account for his actions, afford the victim an opportunity to express the effect and impact of the crime, and to permit the offender to develop a plan to redress the harm suffered. Most importantly, the entire dialogue and engagement, takes the focus away from the offender to the victim, creates a victim centred approach to justice, assists in victim empowerment, closure and moving forward.<sup>123</sup>

Glaeser<sup>124</sup> submits that the greatest VOM successes that were achieved occurred in cases of domestic violence - especially those involving physical abuse and battering that compromise the intimate relationship between the parties, and where VOM could play a role in enhancing the healing and reconciliation process. Many authors support the view that restorative justice cannot be effective without VOM.<sup>125</sup> Umbriet suggests that VOM is "the clearest expression of restorative justice".<sup>126</sup> Interestingly, a study conducted in Texas found that only fifty-seven percent of victims who went through a formal trial process were satisfied as compared to seventy-nine percent of victims who engaged in VOM programs.<sup>127</sup>

There are only two Acts in South African criminal law which deals with VOM; the *Child Justice Act*, specifically section 62,<sup>128</sup> as well as the *Correctional Services Act*. Under the CJA, the VOM is convened by a probation officer appointed by a magistrate. The aim is to relieve the victim of the impact and

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<sup>123</sup> Umbriet *Guidelines for Victim-Sensitive Victim-offender mediation: Restorative Justice through Dialogue* 1.

<sup>124</sup> Glaeser "Victim-offender mediation in Cases of Domestic Violence" 1.

<sup>125</sup> Crosland and Liebman *40 Cases: Restorative Justice and Victim Offender Mediation* at the Introduction vii.

<sup>126</sup> Umbriet *Guidelines for Victim-sensitive Victim-offender Mediation: Restorative Justice through Dialogue* 1.

<sup>127</sup> Umbriet, Coates and Kalanj *Victim Meets Offender: The Impact of Restorative Justice and Mediation* 15.

<sup>128</sup> Section 62 of the *Child Justice Act* 75 of 2008 states:

- 1) (a) "Victim-offender mediation means an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together at which a plan is developed on how the child will redress the effects of the offence.  
(b) A victim-offender mediation may only take place if both the victim and the child consent.
- 2) If a child has been ordered to appear at a victim-offender mediation, section 61(2), (4), (5), (6), (7), (8) and (9) applies with the changes required by the context.
- 3) A probation officer appointed by a magistrate referred to in section 42, an inquiry magistrate or a child justice court must convene the victim-offender mediation.
- 4) The victim-offender mediation must be mediated by a probation officer or a diversion service provider referred to in section 56(1), who or which may regulate the procedure to be followed at the mediation."



trauma of the crime, and to find a sense of healing and closure, while addressing the effects of the offence on both victim and offender.<sup>129</sup> The second VOM appears in section 52(1)(g)<sup>130</sup> of the *Correctional Services Act*. This process of VOM is directed at the already sentenced offender in preparation for community corrections and a life outside of prison. The VOM together with the family group conferencing forms part of the rehabilitative purpose and restorative justice remedy. Reconciliation between the parties is also promoted and encouraged as a significant aspect of this approach. Consequently, as currently performed in South Africa, VOM is not a result or outcome of a trial. Rather, it remains a parallel process and a criminal trial proceeds as normal, (if the case is not diverted under the CJA).<sup>131</sup>

#### 2.1.3.4 Arbitration

Arbitration is a dispute resolution process whereby an arbitrator adjudicates the inquiry and makes a finding based on the merits of the dispute.<sup>132</sup> In essence, this process is certainly more structured than the previous procedures. Although it is not as rigid as a court case, it does allow for more flexibility. Arbitration is primarily an adversarial hearing, akin to a trial wherein each party is offered the opportunity to present their case.<sup>133</sup> Both parties to the dispute are afforded the opportunity to testify and to present documentary and other evidence. The arbitrator is usually a legally qualified person.<sup>134</sup> Although similar to a judicial process, arbitration is not as formal or intimidating as a court hearing.<sup>135</sup>

Arbitration has many benefits. It is not as costly as conventional litigation, is less complicated, and has the added benefit of a speedier finalisation as it takes place outside of court. When considering arbitration within the criminal law context, the Sasolburg case of fraud is a perfect example.<sup>136</sup> Had arbitration existed in the South African criminal justice system, and had it been applied to this case, the following scenario would have probably unfolded: in all likelihood, both parties would have surrendered to the

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<sup>129</sup> Van der Merwe 2013 *De Jure* 1031.

<sup>130</sup> S 52(1)(g) of the *Correction Services Act* 111 of 1998 states under "Conditions relating to community corrections that the person concerned participates in mediation between victim and offender or in family group conferencing."

<sup>131</sup> Van der Merwe 2013 *De Jure* 1033.

<sup>132</sup> Gilfillan date unknown <http://www.alternativedisputeresolution.lawyers.com> 1.

<sup>133</sup> Repa 2017 <http://www.nolo.com>.

<sup>134</sup> Gilfillan date unknown <http://www.alternativedisputeresolution.lawyers.com> 1.

<sup>135</sup> South African Law Commission *Issue Paper 8 on Alternative Dispute Resolution: Project 94* (Pretoria 1997)18.

<sup>136</sup> Refer to paragraph 1.1.

arbitration voluntarily, the mother as well as the daughter would have testified and evidence from the bank would have been led.

The arbitrator, upon making the finding that the daughter was responsible for the loss of the money, would examine her financial situation to redress the loss suffered by the mother. If the daughter were willing to pay back a certain amount of the money per month, until the entire amount was recovered, and if the mother had agreed to this, the arbitrator would then have issued the final judgement as well as the award which would become a binding court order.<sup>137</sup> This fraud matter would then have been deemed successfully concluded by arbitration.

The above provided an overview of conventional ADR mechanisms. Prior to colonialism, traditional communities in South Africa resolved disputes in their own unique manner. These techniques will be explored hereunder.

#### *2.1.4 Traditional ADR mechanisms*

A pertinent point of departure here could be summed up in the significant words of Nyakundi:<sup>138</sup>

Traditional societies had well outlined indigenous techniques of settling conflicts. These techniques bordered on restorative justice approaches through the use of mediation and arbitration in order to re-establish the pre-conflict geniality between the disputants. African culture affirmed methods that promoted its foundations on brotherliness and harmony.

From the above it is evident that modern day ADR is linked to traditional mechanisms of resolving disputes.<sup>139</sup> Whereas modern methods of criminal dispute resolution has a more retributive aspect, traditional systems focused primarily on restoring the equilibrium and harmony in societies, rather than on punishing the offender. In traditional societies, there was no difference between civil and criminal disputes.<sup>140</sup> All conflicts were resolved using methods as discussed hereunder. The aim of ADR was reconciliation of the parties and restoration of the harm done.

An old English adage declares that "the more things change, the more they remain the same". Remarkably, this adage also finds relevance with the

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<sup>137</sup> White July 2005 <http://www.lawreform.ie> 17.

<sup>138</sup> Nyakundi *Development of ADR Mechanisms in Kenya and the Role of ADR in Labour Relations and Dispute Resolution* 8.

<sup>139</sup> Nyakundi *Development of ADR Mechanisms in Kenya and the Role of ADR in Labour Relations and Dispute Resolution* 18.

<sup>140</sup> Rautenbach *Traditional Courts as ADR Mechanisms in South Africa* 302-303.

concept of ADR. For many thousands of years, South Africa was populated by traditional communities before the colonialists began arriving from 1652.<sup>141</sup> As in any community, the daily lives of the people within these communities were not as tranquil and peaceful as one would assume. Conflict between various members within the tribes, as well as with different tribes occurred from time-to-time. Disagreements arose over food, livestock, hunting grounds, resources such as land and water, as well as differences between family members.<sup>142</sup> So how did these traditional communities resolve their disputes?

Subsequently when disputes occurred, the parties looked to others to resolve their disagreements. The practice in those days was that the conflicting parties approached other members of their tribe or community, usually the elders, and both disputants would be given a hearing.<sup>143</sup> The elders, who would act as mediators, would use a familiar and accepted standard to resolve the dispute.<sup>144</sup> If a resolution was not achieved within this smaller group, the matter would be escalated to the larger community and everyone in the village gathered together and deliberated the dispute, offering their input, viewpoints and suggestions until such time a solution was reached and the dispute resolved.<sup>145</sup> It would appear that the dispute was resolved collectively by all present.

The traditional leader of that community often presided over these disputes.<sup>146</sup> He was the village chief or headman, as well as the most important and revered person in that community.<sup>147</sup> Accordingly, it is clear that disputes were settled in terms of customary law as, according to Khunou<sup>148</sup> "the roles, functions and powers of traditional leaders were defined by customary law". Primarily the traditional leader's role was characterised by an indefinite onus or duty to act for the betterment of his subjects.<sup>149</sup> Rautenbach<sup>150</sup> demonstrates how the entire process of traditional justice conforms to the concept of therapeutic jurisprudence<sup>151</sup>

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<sup>141</sup> Boule 2005 ADR Bulletin 1.

<sup>142</sup> Kariuku date unknown <http://www.kmco.co.ke> 2 - 4.

<sup>143</sup> Rautenbach 2015 *Journal of International and Comparative Law* 278.

<sup>144</sup> Ajayi and Buhari 2014 *AJOL* 143.

<sup>145</sup> Boule 2005 ADR Bulletin 1.

<sup>146</sup> Bennett *Customary Law in South Africa* 142.

<sup>147</sup> Mountain *The First People of the Cape: A Look at their History and the Impact of Colonialism on the Cape's Indigenous People* 46.

<sup>148</sup> Khunou 2011 *International Journal of Humanities and Social Science* 279.

<sup>149</sup> Bennett *Customary Law in South Africa* 103.

<sup>150</sup> Rautenbach 2015 *Journal of International and Comparative Law* 302.

<sup>151</sup> The concept of therapeutic justice as the cornerstone of traditional courts is explained by Rautenbach in the journal article.

with the traditional leader exercising therapeutic outcomes in order to maintain stability and justice in the community.<sup>152</sup>

After finalising the dispute, a feast would be held to acknowledge and announce the resolution of the dispute, and to validate the extension of goodwill and reconciliation between the parties.<sup>153</sup> It can be argued that this practice clearly demonstrates the concept of mediation together with conciliation as a means of restoring the peace and rectifying the harm done. A prominent feature of this type of dispute resolution was to unite the parties, heal the relationship and prevent unnecessary conflict and unhappiness in the community.<sup>154</sup> It is evident that the method utilised was not rigid, but sufficiently flexible to address the specific needs of the parties.<sup>155</sup> As pointed out, mediators were usually selected from within that specific community and the elders were frequently the chosen ones, owing to their years of accumulated wisdom and experiences. The role of the elders was to listen to the parties, offering suggestions, emphasising the local practice on a particular issue, and negotiating a solution.<sup>156</sup>

Interestingly, grievances and conflicts were addressed in various ways. Usually meetings were held, the parties were given a hearing and the elders intervened where necessary.<sup>157</sup> The dynamics of the community were considered and the disputants were also given an opportunity to vent their anger, frustration and hurt.<sup>158</sup> Everyone present received the opportunity to add to the discussion. In subsequent chapters on the system of ADR in India within the criminal law arena, similarities between the practices of both countries will be exposed, highlighted and elaborated upon.<sup>159</sup>

Traditional forms of dispute resolution have long existed and been practiced in South Africa.<sup>160</sup> Ajayi<sup>161</sup> affirms that:

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<sup>152</sup> Rautenbach 2015 *Journal of International and Comparative Law* 303.

<sup>153</sup> Ajayi and Buhari 2014 *AJOL* 143.

<sup>154</sup> Rautenbach 2015 *Journal of International and Comparative Law* 303.

<sup>155</sup> Behrendt and Kelly *Resolving Indigenous Disputes: Land Conflict and Beyond* 111.

<sup>156</sup> Ajayi and Buhari 2014 *AJOL* 149-150.

<sup>157</sup> Behrendt and Kelly *Resolving Indigenous Disputes: Land Conflict and Beyond* 95.

<sup>158</sup> Behrendt and Kelly *Resolving Indigenous Disputes: Land Conflict and Beyond* 96.

<sup>159</sup> Chapter 3 will elaborate on ADR within the Indian criminal law system.

<sup>160</sup> South African Law Commission *Issue Paper 8 on Alternative Dispute Resolution: Project 94* (Pretoria 1997) 16.

<sup>161</sup> Ajayi and Buhari 2014 *AJOL* 149.

The methods of performing conflict resolution in the traditional African societies are as follows: mediation, adjudication, reconciliation, arbitration and negotiation.

However, the most important emphasis was clearly on reconciliation. Disputants were encouraged to conclude the dispute speedily, amicably and most importantly to restore the peace. The idea was to make compromises and concessions.<sup>162</sup> Furthermore, an apology from the offending party, not only to the aggrieved party, but to the entire community was usually directed through the mediator or an elder.<sup>163</sup>

Interestingly, some recommendations proposed further in this dissertation will feature several characteristics of traditional forms of dispute resolution, both Indian and African, which may hopefully become applicable in the South African criminal justice system.<sup>164</sup>

#### 2.1.4.1 Traditional courts in South Africa

Traditional courts currently exist in South Africa. They are presided over by traditional leaders,<sup>165</sup> namely the chief or headman of a particular village, region or tribe. Traditional courts are also known as chief's courts, headman's courts, or customary courts.<sup>166</sup> There are approximately 1 500 traditional courts in South Africa.<sup>167</sup> These courts utilise customary law, which is a personal legal system that applies to the indigenous population of South Africa.<sup>168</sup> Currently, the *Constitution* of South Africa legitimises traditional courts.<sup>169</sup> Furthermore, in terms of the *Black Administration Act*

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<sup>162</sup> Brock-Utne 2001 *Institute of Educational Research* 8-11.

<sup>163</sup> Ajayi and Buhari 2014 *AJOL* 152.

<sup>164</sup> Chapter 3 expands on this aspect.

<sup>165</sup> Section 1 of the *Traditional Leadership and Governance Framework Act* 41 of 2003 defines traditional leadership as "the customary institutions or structures, or customary systems or procedures of governance, recognised, utilised or practiced by traditional communities".

<sup>166</sup> Rautenbach *Traditional Courts as ADR Mechanisms in South Africa* 294.

<sup>167</sup> Bennet *Customary law in South Africa* 141.

<sup>168</sup> Rautenbach *Traditional Courts as ADR Mechanisms in South Africa* 292.

<sup>169</sup> As per Schedule 6 of the *Constitution* of South Africa section 16(1) "every court including courts of traditional leaders, existing when the new Constitution took effect, continues to function and exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office".

1927, specifically sections 12<sup>170</sup> and 20<sup>171</sup>, traditional courts are authorised to preside over certain categories of civil and criminal offences.<sup>172</sup> Briefly, with regard to civil claims, traditional courts can hear "any civil claim arising out of black law and custom" as long as the parties reside within the specified geographical jurisdiction.<sup>173</sup> No monetary limit or ceiling is cited for civil claims. In so far as its criminal jurisdiction is concerned, the court can preside over any criminal offence arising out of customary law, with the exception of the following: treason, public violence, sedition, murder, culpable homicide, rape, robbery, indecent assault, arson, bigamy, *crimen injuria*, abortion, abduction, incest, extortion, perjury and fraud.<sup>174</sup> It is clear that the criminal and civil jurisdiction conferred upon traditional courts is wide and caters for an extensive scope of claims and offences making the courts of the traditional leader an appropriate tribunal to settle disputes by ADR.

Traditional courts operate predominantly in the rural areas of South Africa.<sup>175</sup> The designated chief, assisted by councillors or advisors, presides over the proceedings. The local language of the area is utilised in proceedings, legal representation is not allowed, and there is no presumption of innocence. The proceedings are inquisitorial in nature with the chief and the advisors or councillors questioning the parties and witnesses in order to arrive at the truth.<sup>176</sup> Customary law is applied, and the main purpose of the hearing is to reconcile the relationship of the affected parties, to restore peace and harmony, to repair the harm, loss or injury suffered and to ensure stability in the community. Appeals from a traditional court follow the normal appeal route associated with any of the

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<sup>170</sup> Section 12(1)(a) *Black Administration Act* 1927 states that "the Minister may authorise any Black chief or headman recognised or appointed under sub-section (7) or (8) of section 2 to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within his area of jurisdiction".

<sup>171</sup> Section 20(1)(a) *Black Administration Act* 1927 "confer upon any Black chief or headman jurisdiction to try and punish any Black who has committed (i) any offence at common law or under Black law and custom other than an offence referred to in the Third Schedule to this Act".

<sup>172</sup> This aspect relating to traditional courts in South Africa will be dissected further in chapter 4 herein.

<sup>173</sup> Section 12(1)(a) *Black Administration Act* 1927.

<sup>174</sup> Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 237.

<sup>175</sup> South African Law Commission *The Harmonisation of the Common law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* 16.

<sup>176</sup> South African Law Commission *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* 33.

formal courts in South Africa. Accordingly, an appeal arising from a traditional court will begin at the magistrate's court and can proceed all the way to the Supreme Court of Appeal or Constitutional Court if necessary.<sup>177</sup>

As supported by Soyapi:<sup>178</sup>

Traditional justice affirms the values of customary law and is deeply rooted in the principles of restorative justice and reconciliation. As such, traditional courts are an indispensable part of the administration of justice in South Africa.

Likewise as reiterated by Rautenbach,<sup>179</sup> "traditional courts apply ADR automatically to all members". It is clear that the aim of these courts is to heal the relationships between parties by resolving a dispute, albeit unintentionally, through acknowledged ADR methods.

There are many advantages associated with traditional courts, mostly that their processes are simple, flexible, accessible, speedy, and most importantly, based on restorative outcomes as opposed to retribution and punishment. Significantly, all community members are familiar with the court process, customary law, general customs and traditions, along which lines these courts operate.<sup>180</sup>

An integral aspect to the successful resolution of disputes within traditional African communities was the principle of *ubuntu*.<sup>181</sup> Many scholars have positively asserted that *ubuntu* is an ancient African value.<sup>182</sup> This value plays a significant role in ADR and restorative justice, specifically within criminal law. *uBuntu* seeks to restore, rather than punish; to unify, rather than segregate, to heal rather than destroy.<sup>183</sup> Whereas western methods of dispute resolution involve procedural formalities, retribution, punishment and imprisonment, traditional dispute resolution is based on peace and harmony, reconciliation, compensation, rehabilitation and arriving at the truth.<sup>184</sup> Applying *ubuntu* principles to criminal cases detracts from the retributive and punitive aspect which goes hand-in-hand with criminal

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<sup>177</sup> South African Law Commission *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* 16.

<sup>178</sup> Soyapi 2014 *PELJ* 1442.

<sup>179</sup> Rautenbach *Traditional Courts as ADR Mechanisms in South Africa* 291.

<sup>180</sup> Soyapi 2014 *PELJ* 1442.

<sup>181</sup> Louw *The African Concept of uBuntu and Restorative Justice* 161-171.

<sup>182</sup> Rautenbach and De la Harpe are some such scholars.

<sup>183</sup> Ntamushobora *The Philosophical Presuppositions of uBuntu and its Theological Implications for Reconciliation* 6.

<sup>184</sup> Rautenbach 2015 *Journal of International and Comparative Law* 277.

justice. This chapter will be incomplete without a brief exposition of the philosophy of *ubuntu*.

### 2.1.5 *The principle of ubuntu and its relevance to ADR*

An abundance of academic research reiterates that ADR is a modern version of an ancient set of practices. Consequently, it is not an alien concept to traditional cultures and beliefs.<sup>185</sup> ADR is therefore not an unfamiliar idea in South Africa, with its valuable heritage of the African humanist philosophy known as *ubuntu*.<sup>186</sup> In order for ADR to succeed, *ubuntu* plays an integral part in the process. The concept of *ubuntu*, like many other unique African concepts, can never really be adequately defined.

On one level *ubuntu* can be expressed as humanity, dignity, respect and compassion for others, but on a higher level, it refers to the interconnectedness that should exist between all people. Rautenbach<sup>187</sup> confirms this when she illustrates that, "this concept of customary law refers to the key values of group solidarity, namely compassion, respect, human dignity, and conformity to the basic norms of the collectivity". She goes further and states the following:<sup>188</sup>

*uBuntu* is a value-laden concept which has drawn a fair amount of both criticism and praise. Although historically an African ethical philosophy of life, it has been introduced into the legal landscape by the post-amble of the interim *Constitution* which provides, amongst other things, 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".

As pointed out previously, the spirit of *ubuntu* features prominently in traditional African ADR, particularly mediations.<sup>189</sup> Upon closer inspection it becomes clear that the values of reconciliation, restoration, harmony, truth and justice are undercurrents that ought to flow for mediation, or any ADR for that matter, to be successful.<sup>190</sup> Subsequently it is clear that traditional ADR mechanisms are value-based and therefore pose a greater chance for success.<sup>191</sup>

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<sup>185</sup> *Restorative Justice National Policy Framework the Department of Justice and Constitutional Development* 4.

<sup>186</sup> *uBuntu* is an ancient African term having an ethical and philosophical dynamic.

<sup>187</sup> Rautenbach 2008 *AHRLJ* 440.

<sup>188</sup> Rautenbach 2015 *Journal of International and Comparative Law* 290.

<sup>189</sup> Boniface 2012 *PELJ* 383.

<sup>190</sup> Rautenbach 2015 *Journal of International and Comparative Law* 290-292.

<sup>191</sup> Himonga, Taylor and Pope 2013 *PELJ* 1.



### 2.1.6 *uBuntu in the legal domain*

Judge Lamont<sup>192</sup> said the following of *ubuntu* which especially gives credence to its applicability within the legal domain:

*uBuntu* is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies, which contribute towards more mutually acceptable remedies for the parties in such cases. *uBuntu* is a concept which, *inter alia* dictates a shift from (legal) confrontation to mediation and conciliation.

The *Constitution* is the supreme law of the land and brought about important revolutionary changes in the legal sphere of South Africa.<sup>193</sup> Of great significance, South Africa's interim *Constitution* included a post-amble entitled "National Unity and Reconciliation", which stated:

The adoption of this *Constitution* lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. 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.

This provision was particularly profound because, for the first time ever in modern-day South Africa, a traditional African concept - *ubuntu* - was integrated into state law. Regrettably, South Africa's 1996 *Constitution* did not make any specific declaration of *ubuntu* but did recognise customary law "subject to the *Constitution*", requiring courts to apply customary law "when that law is applicable, subject to the *Constitution* and any legislation that specifically deals with customary law".<sup>194</sup>

As a result, up to this day, the traditional African communities in South Africa still use time-honoured dispute resolution methods. As affirmed by De la Harpe,<sup>195</sup> "the objectives of African mediation are not only to repair the wounded feelings but also to arrive at a solution that will enhance and develop future relationships". This approach is particularly significant because it remains the ideology behind the successful practice and implementation of ADR within traditional African communities in South Africa as has been practiced for many centuries.

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<sup>192</sup> Onyango *African Customary Law: An Introduction* 114.

<sup>193</sup> Rautenbach, Janse van Rensburg and Pienaar 2003 *PELJ* 1.

<sup>194</sup> Himonga, Taylor and Pope 2013 *PELJ* 372.

<sup>195</sup> De la Harpe "Mediation in South Africa" 257-259.

With reference to the above, it is evident that ADR was essentially the method of resolving disputes in traditional communities. It is well documented how the colonists brought with them to South Africa a court system as well as their own form of justice as followed in Europe and Britain at that time.<sup>196</sup> As a result, a formal westernised legal system became entrenched in South Africa.<sup>197</sup> This system and practice was superimposed onto the local population irrespective of whether they appreciated, understood or even accepted it. Thereafter, and specifically from 1961 onwards with the subsequent independence from British rule, South African courts were used to enforce apartheid legislation. Unfortunately, this laid the foundations for the mind-set to resolve all disputes through the courts.<sup>198</sup>

#### 2.1.7 *The relevance of ubuntu within the South African criminal justice context*

Judge Mokgoro<sup>199</sup> stated the following:

While *uBuntu* envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

In addition to the above description, Judge Madala was most succinct when he depicted *ubuntu* as "carrying in it the ideas of humaneness, social justice and fairness".<sup>200</sup>

The above quotations are relevant and important. For ADR to succeed in any given situation, elements of fairness, forgiveness, humility, compassion and tolerance must be present. Himonga<sup>201</sup> is of the view that *ubuntu* can be applied to several areas of law, including the criminal field.<sup>202</sup> Thus, *ubuntu* has a significant role to play within the ambit of criminal law and procedure, more especially where the victim has suffered harm or loss at the hands of the offender. One of the outstanding features of *ubuntu* is the emphasis it places on reconciliation as opposed to punishment and

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<sup>196</sup> Hosten *et al* *An introduction to South African Criminal Law* 144.

<sup>197</sup> Van der Merwe and Du Plessis *Introduction to the Law of South Africa* 1.

<sup>198</sup> De la Harpe "Mediation in South Africa" 262-263.

<sup>199</sup> *S v Makwanyane* 1995 3 SA (CC) 391 para 307.

<sup>200</sup> *S v Makwanyane* 1995 3 SA (CC) 391 para 236.

<sup>201</sup> Himonga, Taylor and Pope 2013 *PELJ* 67.

<sup>202</sup> Himonga, Taylor and Pope 2013 *PELJ* 67.

retribution.<sup>203</sup> This association between *ubuntu* and reconciliation is candidly clarified by Judge Madala:<sup>204</sup>

It is true that they might have shown no mercy at all to their victims, but we do not and should not take our standards and values from the murderer. We must, on the other hand, impose our standards and values on the murderer.

These very insightful words give profound effect to the true spirit of *ubuntu*.

#### 2.1.8 Current ADR trends in South Africa

This brings us to post-*apartheid* South Africa. The "New South Africa" emerged from negotiations and agreement between the National Party of the time and the African National Congress. It has been declared that it was mediation, negotiation and reconciliation that set the tone for the peaceful transition that led to the new democracy.<sup>205</sup> In 1994 the South African legal system was revolutionised by the enactment of the interim *Constitution*. The features of the former parliamentary sovereignty were consigned to the past due to the dramatic changes brought about by the advent of the democratic era.<sup>206</sup>

The *Bill of Rights* contained in the *Constitution* became a tangible example of the social contract that was concluded with the people of South Africa to correct the errors of the past.<sup>207</sup> The pre-amble of the *Constitution* displays the commitment by the people of South Africa to the people of South Africa. It is trite that the *Constitution* of the Republic of South Africa is the supreme law of the land. Obviously, any law or conduct inconsistent with the *Constitution* is invalid.<sup>208</sup> The *Constitution* is significant and relevant to this study on ADR, specifically section 34 on access to courts which declares that:

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

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<sup>203</sup> Himonga, Taylor and Pope 2013 *PELJ* 67.

<sup>204</sup> *S v Makwanyane* 1995 3 SA (CC) 391 para 247.

<sup>205</sup> Patelia "Implementing Mediation in the Formal Legal System – A South African Perspective" 5.

<sup>206</sup> De la Harpe "Mediation in South Africa" 279.

<sup>207</sup> Chapter 2 of the *Constitution*, 1996: "This *Bill of Rights* is the cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. The duty of the State is to respect, protect, promote and fulfil the rights in the *Bill of Rights*". Emphasis added.

<sup>208</sup> Section 2 of the *Constitution*, 1996.

This section<sup>209</sup> is vital to this study as it distinctly acknowledges and directs the creation of tribunals and fora for the resolution of disputes in appropriate circumstances. It is impractical and unfeasible for every dispute to go through the courts. Moreover, not every complainant or victim wants to go to trial.<sup>210</sup> Consequently, justice has to prevail for those who do not desire formal court proceedings. Section 34 gives recognition to impartial fora where disputes can be resolved. ADR mechanisms can be utilised in this forum to effectively resolve disputes. The relevance of this section in the sphere of criminal ADR will emerge in chapter 5.

Since 1994 and the enactment of section 34, no fewer than fifty statutes that provide for ADR in some or other way to resolve disputes have been passed in South Africa.<sup>211</sup> These laws are diverse and cover a wide range of fields, for example they range from environment,<sup>212</sup> family,<sup>213</sup> water,<sup>214</sup> education,<sup>215</sup> labour,<sup>216</sup> human rights<sup>217</sup> and land reform<sup>218</sup> to name but a few. Upon broad examination it becomes clear that these fields cover almost every aspect of daily life. It will be impossible to examine all fifty pieces of legislation in this research, but a few have been selected to offer a better understanding of the ADR mechanisms developed, as well as the impact they have on the citizens of the country. More importantly, it is submitted, that in the same manner that the following areas of law (labour, divorce, children and debt) have evolved, advanced and developed to include ADR, the equivalent can be achieved within the criminal justice system, to create new laws and to amend the CPA to include ADR mechanisms.

#### 2.1.9 ADR in labour law

As the volume and complexity of labour related disputes have increased considerably over the years, a varied range of options has developed over time to address the challenges of protracted and extensive legal battles in courts accompanied by the exorbitant associated costs of litigation. Inevitably, delays resulted in resolving these claims.<sup>219</sup> Historically in South

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<sup>209</sup> Ngwenyama *The Impact of Section 34 of the Constitution of the Republic of South Africa, 1996 on Banking Law* 8-11.

<sup>210</sup> Maier *Rape, Victims and Investigations: Experiences and Perceptions of Law* 107.

<sup>211</sup> De la Harpe "Mediation in South Africa" 279.

<sup>212</sup> *National Environment Management Act* 108 of 1998.

<sup>213</sup> *Mediation in Certain Divorce Matters Act* 24 of 1987.

<sup>214</sup> *National Water Act* 36 of 1998.

<sup>215</sup> *Higher Education Act* 101 of 1997.

<sup>216</sup> *Labour Relations Act* 66 of 1995.

<sup>217</sup> *Human Rights Commission Act* 54 of 1994.

<sup>218</sup> *Land Reform Act* 3 of 1996.

<sup>219</sup> Shields 26 May 2011 <http://www.lexology.com> 1.

Africa, the practice of ADR has a long history of applicability and success specifically within the area of labour relations. The ADR methods of mediation, arbitration, conciliation and negotiation were not only accepted in the realm of labour law but became institutionalised.<sup>220</sup> Before and during the transition in government, many NGOs sponsored by donor funding, undertook numerous ADR initiatives across South Africa.<sup>221</sup>

The Independent Mediation Service of South Africa (IMSSA) founded in 1980 focuses mostly on resolving labour disputes.<sup>222</sup> It is one of the foremost institutions in South Africa to utilise ADR processes such as mediation, arbitration and conciliation.<sup>223</sup> In 1995, to give effect to the constitutionally established labour rights, the new South African government established a legislative framework to reform labour laws. To this end, the *Labour Relations Act* (LRA)<sup>224</sup> was passed. This Act established the Commission for Conciliation, Mediation and Arbitration (CCMA)<sup>225</sup> which was specifically created to resolve disputes in the workplace. It must be mentioned that the CCMA is an independent legal entity which has jurisdiction in all provinces in South Africa.<sup>226</sup>

The CCMA was created to substitute the former system of statutory conciliatory bodies such as the Industrial Courts<sup>227</sup> which proved to be exorbitant, inadequate and complex.<sup>228</sup> To address these problems, the CCMA offers services such as conciliation and arbitration thereby reducing the burden on the labour courts and allowing them to concentrate on more intricate and complex matters that arise in the workplace.<sup>229</sup>

The CCMA operates in the following manner - as soon as a dispute is referred to it, a commissioner is appointed to resolve the dispute within a

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<sup>220</sup> Ashman *The Impact of Alternative Dispute Resolution (ADR) in Employment Law* 1.

<sup>221</sup> De la Harpe "Mediation in South Africa" 279.

<sup>222</sup> Okharedia "The Emergence of Alternate Dispute Resolution in South Africa: A Lesson for Other African Countries" 5.

<sup>223</sup> Bendeman 2007 *AJCR* 1.

<sup>224</sup> The complete citation is the *Labour Relations Act* 66 of 1995.

<sup>225</sup> Aimed at promoting fair and reasonable practices in the workplace, the CCMA is an independent authority which provides advice on and resolves labour disputes. It was established under the *Labour Relations Act* 66 of 1995. It plays a significant role in bringing about peace in the workforce.

<sup>226</sup> Okharedia "The Emergence of Alternate Dispute Resolution in South Africa: A Lesson for Other African Countries" 7.

<sup>227</sup> Ferreira *The Commission for Conciliation, Mediation and Arbitration* 73-75.

<sup>228</sup> Okharedia "The Emergence of Alternate Dispute Resolution in South Africa: A Lesson for Other African Countries" 6.

<sup>229</sup> Okharedia "The Emergence of Alternate Dispute Resolution in South Africa: A Lesson for Other African Countries" 6.

period of thirty days. A process known as conciliation is employed.<sup>230</sup> This process includes a fact-finding mission, mediation and advice rendered to both parties. At this stage, the powers of the commissioners are confined to the issuing of subpoenas, requesting and perusing relevant documentation and making on-site visitations.<sup>231</sup> However, legal representation is not allowed.<sup>232</sup> If the dispute cannot be resolved by conciliation, a commissioner is appointed by the CCMA to arbitrate and proceeds to hear the merits of the dispute<sup>233</sup> by way of the leading of both documentary and oral evidence. An award is ordered, which will entail, either compensation, re-employment, or reinstatement.<sup>234</sup> In mediation and conciliation, the disputants themselves decide upon the desired outcome, agreeing only if the terms work in their best interests. In South Africa today, the mechanisms of conciliation and arbitration are the most popular remedies for resolving labour disputes.<sup>235</sup>

In labour disputes, there are many varied benefits and advantages of ADR as opposed to litigation. ADR is faster, cheaper and informal,<sup>236</sup> encourages harmony and agreement and offers a broader range of solutions, for example, apology, reinstatement, as well as agreement on a settlement amount.<sup>237</sup> In a study conducted in 2006, it was determined that the CCMA had an average turnaround time of thirty-six days to resolve a matter by conciliation, thirty-seven days to solve disputes relating to unfair dismissals, and an average turnaround time of 143 days for arbitrations.<sup>238</sup> The CCMA handles well over 10 000 cases annually with minimal costs and delays involved.<sup>239</sup> The mechanisms employed by the CCMA as well as the figures demonstrated are clearly indicative of a success story in their own right.

Disappointingly, none of the above-mentioned remedies exist in South African criminal law except for the provisions of the *Child Justice Act*. It will be argued that similar ADR advancements can be successfully formulated

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<sup>230</sup> Bendeman 2007 *AJCR* 137-139.

<sup>231</sup> Bendeman 2007 *AJCR* 140-145.

<sup>232</sup> In terms of the Rule 25(1)(a) of the CCMA Rules, legal representation is not allowed at conciliation stage, however it is allowed in terms of Rule 25(10)(c) at the arbitration stage except in cases involving incapacity and misconduct dismissals.

<sup>233</sup> Section 138(1) of the *Labour Relations Act* 66 of 1995.

<sup>234</sup> Okharedia "The Emergence of Alternate Dispute Resolution in South Africa: A Lesson for Other African Countries" 12.

<sup>235</sup> Okharedia "The Emergence of Alternate Dispute Resolution in South Africa: A Lesson for Other African Countries" 20-22.

<sup>236</sup> Singh *Labour Bulletin* 7.

<sup>237</sup> Shields 26 May 2011 <http://www.lexology.com> 1.

<sup>238</sup> Bhorat, Pauw and Mncube *Development Policy Research Unit* 40-47.

<sup>239</sup> Allardyce and Partners 27 June 2016 <http://www.allardyce.co.za>.

and legislated in criminal law, taking best practices examples and lessons from Hindu law.<sup>240</sup>

### 2.1.10 ADR in divorce cases

During 1987 the *Mediation in Certain Divorce Matters Act*<sup>241</sup> was passed and came into effect in 1990. Section 4(1)<sup>242</sup> of this Act provides for mediation in divorce cases, specifically where minor children are involved. It cannot be denied that by its very nature, divorce is a stressful, painful and difficult process and it goes without saying that all parties to the proceedings will be subjected to trauma and anxiety. Many researchers have concluded that divorce causes emotional damage to children, specifically younger children who often do not understand the process of divorce and how it affects them.<sup>243</sup>

Furthermore, and most importantly, every child has a right to be heard, and the nature of divorce proceedings in South Africa coupled with the intimidating court system is not conducive to this right. Therefore, the principle behind this particular Act is to protect minor children. As a result, the Office of the Family Advocate was established in 1990. As per section 4(3)<sup>244</sup> of this Act, any party to the divorce proceedings can approach the Office of the Family Advocate to request assistance, particularly where children are involved and issues regarding custody, access and guardianship are in dispute. Hence the Office of the Family Advocate functions as mediators working in the best interest of the child. On a

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<sup>240</sup> Refer to Chapter 3.

<sup>241</sup> 24 of 1987.

<sup>242</sup> Section 4(1) of the *Mediation in Certain Divorce Matters Act* 24 of 1987 states:

1) "The Family Advocate shall-

(a) after the institution of a divorce action; or  
(b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979),

if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court."

<sup>243</sup> Shaffran date unknown <http://www.sanluistherapy.com>.

<sup>244</sup> Section 4(3) of the *Mediation in Certain Divorce Matters Act* 24 of 1987 states that "any Family Advocate may, if he deems it in the interest of any minor or dependent child shall, if so requested by a court, appear at the trial of a divorce action or the hearing of any application referred to in sub-sections (1)(b) and (2)(b) and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat."

practical level, the mediatory effort takes the form of a pre-trial conciliation with the family, involving the Family Advocates in an attempt to resolve issues concerning the children affected in the divorce.<sup>245</sup>

The family mediator is usually a qualified person, having knowledge and experience in family and divorce law. The prime role of the mediator is to gain a better understanding of the needs and requirements of all the parties involved in the divorce proceeding. The parents, who are in the process of divorce must agree on each parents' responsibilities as far as residence, education, medical, social and extra mural activities of the child are concerned.<sup>246</sup> After consulting with all parties and taking all factors into consideration, the mediator then enables and facilitates an agreement based on the best interests of the child or children concerned.<sup>247</sup>

Grobler<sup>248</sup> summed up the impact of this Act when he stated the following:

The Act's inventive combination of the principles of legal protection of the interests of minor children, with the objective of a mediatory approach to divorces in which such children are involved, puts the South African administration of justice firmly in the company of the pioneering systems of family law and divorce procedures of the world.

The above viewpoint, considered together with the following case, practically illustrates the benefits as well as success of ADR in divorce matters in South Africa. In the case of *Townsend-Turner v Morrow*<sup>249</sup> the full bench of the Cape Provincial Division of the High Court made the following decision when presented with a case of access dispute between the father of a seven-year-old boy and the boy's maternal grandmother. The parties were ordered to attend mediation offered by private mediators of their own choice or those proposed by the Office of the Family Advocate, to try to resolve the issues of conflict between them including, the issue of access to the minor child.<sup>250</sup>

The court ordered that the mediation had to commence within two weeks of the granting of the order and that it should continue for a period of at least three months or for the duration of at least four mediation sessions. The case was successfully resolved and the parties were ordered to share the

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<sup>245</sup> Anon date unknown <http://www.mediate.com>.

<sup>246</sup> Grobler 1990 *Consultus* 133.

<sup>247</sup> De la Harpe "Mediation in South Africa" 275.

<sup>248</sup> Grobler 1990 *Consultus* 133.

<sup>249</sup> 2003 ZAWCHC 53 (8 October 2003).

<sup>250</sup> De la Harpe "Mediation in South Africa" 276.



costs of mediation on an equal basis.<sup>251</sup> It is evident that mediation in divorce cases can avoid litigation, extended conflict and minimise exposure to trauma and harm, especially where children are involved.

The above case illustrates a practical example of mediation in a divorce case. Similar provisions can also be made for mediations in criminal law and procedure. Unfortunately, no such ADR method exists in South African criminal law currently, except the CJA.<sup>252</sup>

#### *2.1.11 Mediation in terms of the National Credit Act 34 of 2005*

Prior to the enactment of the *National Credit Act*,<sup>253</sup> not only low-income earners but disadvantaged and naive citizens in South Africa were subject to gross violations by unscrupulous businesses, especially by so-called "loan sharks".<sup>254</sup> The *National Credit Act* serves to regulate the credit industry in South Africa. It aims to prevent and rectify the problem of over indebtedness by consumers. As a result, in 2005, the procedure of debt review was initiated under section 86<sup>255</sup> of this Act. Consumers who experience financial difficulty and are thus unable to service debts, can request an impartial and objective debt counsellor or mediator to investigate their financial situation, offer guidance and arrive at an arrangement between debtor and creditor.<sup>256</sup>

The agreement concluded between the parties is documented, but not necessarily as an order of court, although it can be made such. This mediatory intervention prevents the costly and lengthy process involved in the civil recovery of debt. The figures speak for themselves - as at September 2013, there were more than 2 000 registered debt counsellors in South Africa and more than 6 000 debt review applications were made per month under this Act.<sup>257</sup>

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<sup>251</sup> 2003 ZAWCHC 53 (8 October 2003).

<sup>252</sup> Refer to paragraph 2.1.12.

<sup>253</sup> 34 of 2005.

<sup>254</sup> A loan shark is a money-lender who offers loans at extremely high interest rates – often illegally. Generally viewed as a form of predatory lending, these money lenders often resort to illegal and corrupt means, blackmail, threats and violence to get their money back.

<sup>255</sup> 34 of 2005.

<sup>256</sup> De la Harpe "Mediation in South Africa" 277.

<sup>257</sup> De la Harpe "Mediation in South Africa" 277.

### 2.1.12 The Child Justice Act 75 of 2008

Interestingly, this is the only piece of legislation in criminal law that contains some mediatory objective as directed by section 34<sup>258</sup> of the *Constitution*. This Act has changed the way in which children in conflict with the law are managed within the criminal justice system in South Africa. It not only looks at the best interests of the offender, but it also strives to empower victims by giving them an active role in the legal process.<sup>259</sup> The emphasis of this piece of legislation is to divert<sup>260</sup> child offenders from the criminal justice system, to avoid a criminal record and ultimately, keep them out of prison.<sup>261</sup> The Act provides for the development of child justice courts,<sup>262</sup> as well as

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<sup>258</sup> S70-71 of the *Rules Board for Courts of Law Act* 107 of 1985 sets out the objectives of the Act in order to give effect to S34 of the Constitution, and details the purposes of mediation.

<sup>259</sup> Van der Merwe 2013 *De Jure* 1022-1027.

<sup>260</sup> Section 67 of the *Child Justice Act* 75 of 2008:

- 1) (a) "A child justice court may, at any time before the conclusion of the case for the prosecution, make an order for diversion in respect of a child in accordance with the provisions of section 52(5).  
(b) A child justice court that makes a diversion order must postpone those proceedings, pending the child's compliance with the diversion order and warn the child that any failure to comply with the diversion order may result in any acknowledgment of responsibility being recorded as an admission in the event of the trial being proceeded with as referred to in section 58(4)(b).
- 2) The child justice court must, on receipt of a report from the probation officer that a child has successfully complied with the diversion order, and if the child justice court is satisfied that the child has complied, make an order to stop the proceedings."

<sup>261</sup> Van der Merwe 2013 *De Jure*.

<sup>262</sup> Section 63 of the *Child Justice Act* 75 of 2008:

- 1) (a) "Any child whose matter has been referred to the child justice court in terms of section 49(2), must appear before a court with the requisite jurisdiction to be dealt with in terms of this Chapter.  
(b) A child justice court must apply the relevant provisions of the Criminal Procedure Act relating to plea and trial of accused persons, as extended or amended by the provisions as set out in this Chapter and Chapter 10.
- 2) Where a child and an adult are charged together in the same trial in respect of the same set of facts in terms of sections 155, 156 and 157 of the Criminal Procedure Act, a court must apply the provisions of-
  - (a) this Act in respect of the child; and
  - (b) the Criminal Procedure Act in respect of the adult.
- 3) Before plea in a child justice court, the presiding officer must, in the prescribed manner-
  - (a) inform the child of the nature of the allegations against him or her;
  - (b) inform the child of his or her rights; and
  - (c) explain to the child the further procedures to be followed in terms of this Act.
- 4) A child justice court must, during the proceedings, ensure that the best interests of the child are upheld, and to this end-
  - (a) may elicit additional information from any person involved in the proceedings; and

One Stop processing centres. Furthermore, it emphasises the child offender's rehabilitation and reintegration into the community.<sup>263</sup> The aim is to hold the offender accountable for his or her actions and the effect and impact it had on the victim, thereby creating an incentive to avoid re-offending.<sup>264</sup>

Section 61<sup>265</sup> of the *Child Justice Act*, which came into operation in April 2010 caters for family group conferences as well as mediation by an

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(b) must, during all stages of the trial, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child.

- 5) No person may be present at any sitting of a child justice court, unless his or her presence is necessary for the proceedings of the child justice court or the presiding officer has granted him or her permission to be present.

Section 154(3) of the *Criminal Procedure Act* applies with the changes required by the context regarding the publication of information."

<sup>263</sup> Sections 72 to 78 of the *Child Justice Act* 75 of 2008 deals with the various sentencing options for child offenders.

<sup>264</sup> Pinnock *Mail and Guardian* 1.

<sup>265</sup> Section 61 of the *Child Justice Act* 75 of 2008:

- 1) (a) "A family group conference is an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together, supported by their families and other appropriate persons and, attended by persons referred to in subsection (3)(b), at which a plan is developed on how the child will redress the effects of the offence.
  - (b) A family group conference may only take place if both the victim and the child consent.
- 2) If a child has been ordered to appear at a family group conference, a probation officer appointed by the magistrate referred to in section 42, an inquiry magistrate or a child justice court must, within 21 days after the order, convene the conference by-
  - a) setting the date, time and place of the conference; and
  - b) taking steps to ensure that all persons who may attend the conference are timeously notified of the date, time and place of the conference.
- 3) (a) The family group conference must be facilitated by a family group conference facilitator, who may be a probation officer or a diversion service provider referred to in section 56(1).
  - (b) A family group conference may be attended by the following persons:
    - (i) The child and his or her parent, an appropriate adult or a guardian;
    - (ii) any person requested by the child;
    - (iii) the victim of the alleged offence, his or her parent, an appropriate adult or a guardian, where applicable, and any other support person of the victim's choice;
    - (iv) the probation officer, if he or she is not the family group conference facilitator;
    - (v) the prosecutor;
    - (vi) any police official;
    - (vii) a member of the community in which the child normally resides, as determined by the family group conference facilitator; and
    - (viii) any person authorised by the family group conference facilitator to attend the conference.

approved or accredited mediator, normally a probation officer or a diversion service provider. Section 62<sup>266</sup> of the Act stipulates victim offender

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- 4) If a family group conference fails to take place on the date and at the time and place set for the conference, the probation officer must convene another conference, as provided for in this section, within 21 days from the date on which it was to take place.
  - 5) Participants in a family group conference must follow the procedure agreed on by them and may agree to a plan in respect of the child, in accordance with subsection (6).
  - 6) A plan referred to in subsection (5)-
    - (a) may include-
      - (i) the application of any option contained in section 53(3); or
      - (ii) any other action appropriate to the child, his or her family and local circumstances, which is consistent with the principles contained in this Act; and
    - (b) must-
      - (i) specify the objectives for the child and the period within which they are to be achieved;
      - (ii) contain details of the services and assistance to be provided to the child and a parent, an appropriate adult or a guardian;
      - (iii) specify the persons or organisations to provide the required services and assistance;
      - (iv) state the responsibilities of the child and of the child's parent, an appropriate adult or a guardian;
      - (v) state personal objectives for the child and for the child's parent, an appropriate adult or a guardian;
      - (vi) include any other matters relating to the education, employment, recreation and welfare of the child as are relevant; and
      - (vii) include a mechanism to monitor the plan.
  - 7)
    - (a) The family group conference facilitator must record the details of and reasons for any plan agreed to at the family group conference and must furnish a copy of the record to the child and to the probation officer or person referred to in section 57(1).
    - (b) In the event of the conference not taking place or the child failing to comply with the plan agreed to at the family group conference, the probation officer or person must notify the magistrate, inquiry magistrate or child justice court in writing of the failure, in which case section 58 applies.
  - 8) If the participants in a family group conference cannot agree on a plan, the conference must be closed and the probation officer must refer the matter back to the magistrate, inquiry magistrate or child justice court for consideration of another diversion option.
  - 9) No information furnished by the child at a family group conference may be used in any subsequent criminal proceedings arising from the same facts."

<sup>266</sup> Section 62 of the *Child Justice Act* 75 of 2008:

- 1)
  - (a) "Victim-offender mediation means an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together at which a plan is developed on how the child will redress the effects of the offence.
  - (b) A victim-offender mediation may only take place if both the victim and the child consent.
- 2) If a child has been ordered to appear at a victim-offender mediation, section 61(2), (4), (5), (6), (7), (8) and (9) applies with the changes required by the context.

mediation. The purpose of this provision is to bring the child offender together with the victim, in the presence of the mediator, usually a probation officer. This type of mediation can only take place with the consent of both the parties.

The child offender must acknowledge his/her crime and accept accountability for it, because mediation cannot possibly succeed if the offender does not accept full responsibility for his or her actions.<sup>267</sup> Thereafter a discussion takes place between the parties, typically focusing on the crime itself as well as on how the offender will make good or restore the harm done, with the object of restoring peace and harmony between the parties.<sup>268</sup> If the mediation is successful, the child is diverted into a properly accredited diversion programme, ordinarily run by the Department of Social Development (DSD).<sup>269</sup> It is clear that the diversion is essentially restorative in nature as it involves the child offender, the victim, as well as community members who work collectively to address the damage done.<sup>270</sup>

The diversion programmes run by DSD normally focus on general life skills, anger management, weekend camps and sporting activities. If drugs or alcohol are involved in the commission of the offence, the child is directed to an appropriate and accredited programme.<sup>271</sup> As a result of this Act, the child offender who accepts responsibility for the crime does not appear in court, does not go through a criminal trial, is diverted from the criminal justice system, does not receive punishment or a criminal record and is equipped with meaningful life skills.<sup>272</sup>

This Act directs cooperation between various government departments such as DSD, SAPS, Justice, Correctional Services, Education and Health, the purpose of which is to ensure a uniform, consistent and integrated approach to handling a child offender from the time of the offence, ultimately

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- 3) A probation officer appointed by a magistrate referred to in section 42, an inquiry magistrate or a child justice court must convene the victim-offender mediation.
  - 4) The victim-offender mediation must be mediated by a probation officer or a diversion service provider referred to in section 56(1), who or which may regulate the procedure to be followed at the mediation."

<sup>267</sup> Gallinetti *Getting to know the Child Justice Act* 38, 43 and 44.

<sup>268</sup> Van Eeden *An Analysis of the Legal Response to Children who commit crimes in South Africa* 83-87 and 101.

<sup>269</sup> Hereinafter referred to as DSD.

<sup>270</sup> Jokani *Innovations Introduced into the South African Criminal Justice by the Child Justice Act 75 of 2008* 58.

<sup>271</sup> Pinnock *Mail and Guardian* 2-3.

<sup>272</sup> Berg *Child Diversion Programme Minimum Standard Compliance in the Western Cape: An Explorative Study* 51-64.

leading to the successful mediation as well completion of the diversion programme. This multi-faceted and integrated approach, in due course, serves the best interests of the child and victim.

It is evident that this Act, not only because of its multi-sectoral approach generally, but specifically owing to the advancements brought about by the mediatory aspect as well as the feature of diversion, has indeed been an innovation in the South African criminal justice system and can very well set the tone for future legislation on this aspect of mediation.

### *2.1.13 ADR in the criminal justice arena*

As can be deduced from the foregoing, South African criminal law is seriously deficient in legitimate ADR mechanisms. Except for the CJA as discussed above, no other legislation within the criminal justice domain exists in South Africa that allows for ADR to legally find application in the criminal courts. Despite this, South African prosecutors are mediating criminal cases on a daily basis. How is this possible?

#### *2.1.13.1 Informal mediations under the NPA Policy Directives*

As explained in chapter one, the *NPA Policy Directives*<sup>273</sup> offer guidelines within which criminal matters can be mediated. In terms of the *Directives*, this type of mediation is labelled "informal mediations" wherein the prosecutor acts as mediator in "less serious" cases. These are not specifically stated, suffice to mention certain types of cases which may not be mediated, such as murder, robbery, rape and offences which carry prison sentences. Also, specifically excluded are domestic abuse cases involving violence or threats of violence, cases involving vulnerable groups such as children, racially motivated cases, and cases where the accused had previously committed a similar offence. For instance, if an accused has been convicted of shoplifting and is facing a new charge of shoplifting, irrespective of the value of the item, or the circumstances surrounding the offence (which could possibly have been poverty), or whether the complainant requests mediation, it will be denied in terms of the *Policy Directives*.

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<sup>273</sup> As stated previously herein, the *NPA Policy Directives* are confidential institutional documents which are not classified as public documents. Hence, they cannot be footnoted verbatim. Wherever possible, an overview of relevant *Directives* will be given in the text.

In terms of the *Policy Directives*, the prosecutor drives the "informal mediation" process,<sup>274</sup> prepares and finalises the agreement between the victim and the accused and finally, withdraws the charges against the accused in court. The police docket is then returned to the police station and recorded as finalised in court by way of a withdrawal.

The *Policy Directives* are not clear as to the number of counts the accused is facing and whether it will be suitable to mediate such cases. For example, should an accused be charged with assault, and malicious damage to property, on its own, each case could be mediated. However, in terms of the *Policy Directives*, there is no mention of how to proceed when two or more charges are brought against an accused. Furthermore, there is no clarity from the *Policy Directives* when one considers the scenario of more than one complainant in a single case docket. As an example, in one case an accused assaults the complainant and then destroys a cell phone belonging to another family member. In this instance, there are essentially two victims, with totally different needs. It could very well happen that one complainant wishes to proceed by ADR and the other by way of trial. Although it will be unreasonable to foresee and include every single eventuality within the *Policy Directives*, basic factors such as the number of charges and complainants affected ought to be detailed. These vacuums in the *Policy Directives* can lead to confusion and inconsistencies in the manner in which prosecutors conduct the "informal mediations".

Significantly, it is not mentioned in the *Policy Directives* that a prosecutor has a duty to mediate cases informally. This discretion is an inherent prosecutorial discretion and the prosecutor makes the final decision as to the cases that will go to court and those that will be mediated. This situation is open to abuse, irregularities and unfairness to both the accused and complainant.<sup>275</sup> Some prosecutors can and do mediate excessively with a significant portion of their court rolls being "informally mediated". Conversely, there are other prosecutors who do not believe in "informal mediations" and do not mediate at all, preferring to take matters through the court process. Additionally, the *Policy Directives* obviously do not cater for most possibilities within this "informal mediation" process; hence it is construed as vague and lacking a comprehensive framework.

As this process of "informal mediations" is entirely driven by the prosecutor, there is no uniformity in its application in the various courts in the country.

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<sup>274</sup> Hargovan "Knocking and Entering: Restorative Justice Arrives at the Courts" 34.

<sup>275</sup> Naude, Prinsloo and Ladikos 2003 *Acta Criminalologica* 11.

Indeed, some prosecutors understand, support and encourage the process as they observe the benefits of ADR for the parties involved. Unfortunately, owing to the lack of legislation, there are many who do not feel obligated or compelled to utilise ADR processes in their courts.<sup>276</sup> In addition to this, there are many judicial officers<sup>277</sup> in many courts in the country, who simply do not recognise the *NPA Policy Directives* as they are not bound by them and as such do not recognise or support "informal mediations" because it is not legislated and they do not consider it as part of criminal law.

Because these "informal mediations" are not formally recognised legal mechanisms, it is unknown if any case law exists in the country, which may act as some sort of guidance or framework going forward.

Specifically, the *Policy Directives* exclude mediations in serious crimes. However, studies have shown that mediation in certain violent crimes have proved to be very beneficial and advantageous to both victim and offender.<sup>278</sup> Although it is possible that mediation can be concluded effortlessly in minor or petty cases, it should not be summarily dismissed simply because a case is more serious or has an element of violence. It is apparent, that in certain circumstances, ADR could be exceptionally valuable in dealing with trauma and the healing process.

Evidently, there is a need for formal recognition of ADR mechanisms within South African criminal law. Currently ADR is being utilised by prosecutors without any legislative standards or guidelines.<sup>279</sup> Although the *Policy Directives* exist, they do not constitute binding legislation. It is imperative that legislation on criminal ADR needs to be formulated. In any country and in any given situation, laws need to be progressive to keep up with the times. It is essential that there be wider application and implementation of ADR mechanisms in criminal law in South Africa. In drafting such legislation, it is worthwhile to look at other jurisdictions. Consequently, in the following chapter, ADR principles in Hindu law will be examined, for possible lessons

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<sup>276</sup> De Klerk *The Role of the Victim in the Criminal Justice System: A Specific Focus on Victim Offender Mediation and Victim Impact Statements* 44.

<sup>277</sup> Judicial authority is bestowed on magistrates and judges who have to act within the confines of legislation. Informal mediations as currently practiced by prosecutors is not legislated, hence not recognised by courts.

<sup>278</sup> Wright and Galaway *Mediation and Criminal Justice: Victims, Offenders and Community* 101.

<sup>279</sup> De Klerk *The Role of the Victim in the Criminal Justice System: A Specific Focus on Victim-offender Mediation and Victim Impact Statements* 41.



and best practices to be identified and incorporated into the South African legal framework.

## **2.2 Conclusion**

In reflection of the above chapter, although it is evident that there have been major developments and achievements in ADR in South Africa from pre-historic times to the present, they are obviously insufficient within the criminal justice domain. Although the enactment of more than fifty pieces of legislation is progressive, it is evident that more needs and can be done specifically within the area of criminal law which has shown a deficiency. This is where major developments could and should take place, based on insights borrowed from Indian law of ADR, with the emphasis on Hindu law.

## CHAPTER 3: SCOPE AND APPLICATION OF ADR IN HINDU LAW

### 3.1 Introduction

To grasp and fully understand the operational process of the ADR system in India, it is essential to comprehend its source (ancient Hindu practices and principles) and history and to track its development to modern-day usage. The main purpose of this chapter is to provide a theoretical background to the scope and application of ADR in Hindu law, and to trace the development and practice of ADR in Hindu law up to its current-day usage. Thus, a brief background and history of the legal system will be examined.

Furthermore, crucial legislation which specifically addresses ADR in the criminal law environment will be dissected and explored, with a view to incorporating some or similar aspects into the South African criminal law domain. Moreover, and most importantly, the distinctiveness of utilising ADR as a unique mechanism to dispense justice efficiently and speedily, using Hindu law principles will be explored. The successes, advantages and achievements of the ADR mechanisms in India will be highlighted. In the process, it will put into perspective the relevance and applicability of ADR within this system which will be analysed and elaborated on in this chapter

### 3.2 Background

Immense masses of water from the world's highest mountain range, the Himalayas, carved out the enormous Indus River system that was to cultivate the first civilization on the Indian subcontinent.<sup>280</sup> This civilization flourished in the North-western region of India, what today is known as Pakistan<sup>281</sup> and Punjab.<sup>282</sup> The original inhabitants of this region were known as Dravidians,<sup>283</sup> who appeared to have occupied India 65 000 years

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<sup>280</sup> Talpur *Moen Jo Daro: Metropolis of the Indus Civilization* 2.

<sup>281</sup> Prior to 1947 the country currently known as Pakistan was a part of India. At the partitioning of India on 15 August 1947, the Muslims living in India requested their own self-governing state; hence the British partitioned India into West Pakistan, India and East Pakistan, which is current day Bangladesh.

<sup>282</sup> Duiker *Contemporary World History* 28-33.

<sup>283</sup> The Dravidians are believed to be the original indigenous inhabitants of India. They were categorised by their relatively darker skin as opposed to the Aryans who arrived later and who had much lighter skin; Thomson 2008 <http://www.encyclopedia.com>; Sharma *Looking for the Aryans* 5-15; Anon date unknown An Introduction to Indian History [www.historyindia.org](http://www.historyindia.org).

ago.<sup>284</sup> The Indus Valley civilization was one of the largest of the four ancient civilizations of Mesopotamia, Egypt and China.<sup>285</sup> The major cities in this region were Mohenjo-Daro and Harappa. The earliest evidence of religious practices in this area dates back approximately to 5 500 BCE, farming began in 4 000 BCE and urbanisation around 3 000 BCE.<sup>286</sup> For some unknown reason, (approximately between 1 500 BC – 1 900 BC) these cities were suddenly abandoned at the pinnacle of their development. This community then migrated south and west, further into India, either because of drought or invasions.<sup>287</sup>

After the decline of the Indus Valley civilisation, another civilisation, known as Aryans<sup>288</sup> flourished in India. It is believed that they arrived at around 1700 BC-1 500 BC as pastoral and semi-nomadic tribes, but soon organised themselves into tribal kingdoms. They conquered the Dravidians and the two groups merged over the years. This amalgamation strengthened the foundations of Hinduism.<sup>289</sup>

This research is essentially a comparative study of the South African and Indian legal systems as far as ADR, and its applicability within criminal law and procedure. The geographical location and background of South Africa were emphasised in chapter two. This chapter will be incomplete without a brief exposition on the second geographical location pertinent to this study, India, as it is the hub of Hinduism and Hindu law in the world.<sup>290</sup>

### 3.3 India

India, the southern sub-continent of Asia has a landscape as diverse as its people and is the largest democracy in the world. It is also the global hub of Hindu law.<sup>291</sup> Twenty-two major languages, with over 720 dialects are

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<sup>284</sup> Anon 25 September 2009 Aryan-Dravidian Divide a Myth: Study <http://timesofindia.indiatimes.com>.

<sup>285</sup> Carr Date unknown The Harappan Civilization [www.archaeologyonline.net](http://www.archaeologyonline.net).

<sup>286</sup> Banerji *The History of India* 14-21.

<sup>287</sup> Agarwal *The Vedic Core of Human History* 1-15.

<sup>288</sup> The original meaning and source of this term is unknown; however it is generally accepted in scholarly circles to mean "nobility" or "nobleman" and that they were possibly a heterogeneous group of people having roots in Europe, Central Asia and north-western India. One theory is that they were made up of different nomadic communities that eventually found themselves on the Indian subcontinent. Hence they appear to have a shared or common ancestry. It is believed that the Rajputs of India today are their descendants; Rathore *Rajputs – Aliens or Indigenous* 1-4.

<sup>289</sup> Symons *This is Hinduism* 6.

<sup>290</sup> Rautenbach and Bekker *An Introduction to Legal Pluralism in South Africa* 262.

<sup>291</sup> Malhotra and Malhotra Date unknown Alternative Dispute Resolution in Indian Family Law – Realities, Practicalities and Necessities <https://www.iafl.com> 1-3.

spoken. The country is almost the size of Western Europe, with an estimated population of 1.2 billion people living in twenty-nine states, on a territory of approximately 3.28 million square kilometres. Most of the population, almost eighty percent, is Hindu.<sup>292</sup> Hindu law emanates from India and refers to the laws of the Hindu community and is only practised in India.<sup>293</sup> According to the *New World Encyclopaedia*, Hindu law refers "to the system of personal laws traditionally derived from Hindu texts and traditions that shaped the social practice of Hindu communities". Currently, Hindu law refers to the code of law as applied to Hindus, Buddhists, Jains and Sikhs as practised in India.<sup>294</sup> According to Rautenbach,<sup>295</sup> Hindu law in India currently is extensively codified and exists in legislation.

### **3.4 An understanding of Hinduism**

As this research revolves primarily around Hindu perspectives on ADR, it is vital to delve into the concept of Hinduism, albeit briefly, to conceptualise the term and place this study in perspective. As will be realised later in this chapter,<sup>296</sup> much of the current ADR laws in India have their roots in Hinduism and Hindu law.

The word Hindu initially began as an ethnic characterisation or identity which referred to people who lived on the opposite banks of the Sindh River in South Asia.<sup>297</sup> It thereafter evolved to refer to those people who followed the prescripts of *Sanatan Dharma*,<sup>298</sup> or the Eternal Religion. Hinduism is not an organised religion: it does not have a single founder or prophet such as Christ or Buddha, it does not have a single text such as the Bible or the Koran, nor does it have a single set of rules such as the Ten Commandments. Despite these perceived shortcomings, followers of this

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<sup>292</sup> Rautenbach and Bekker *An Introduction to Legal Pluralism in South Africa* 262.

<sup>293</sup> David and Brierley *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* 463, 465.

<sup>294</sup> Menski *Hindu Law: Beyond Tradition and Modernity* 1.

<sup>295</sup> Rautenbach and Bekker *An Introduction to Legal Pluralism in South Africa* 267.

<sup>296</sup> Refer to paragraph 3.9 herein.

<sup>297</sup> Rautenbach and Bekker *An Introduction to Legal Pluralism in South Africa* 259.

<sup>298</sup> *Sanatan Dharma* is the original name of Hinduism. It does not refer to a religion *per se*, however it represents a way of life, or code of conduct or even a value system with spirituality as its basis.

faith believe in one Supreme Being, and adhere to certain views of truth, *dharma*,<sup>299</sup> and *karma*.<sup>300</sup>

The period from 4 000 BC to 600 BC in Hinduism is known as the Vedic Age as this was the age that saw the emergence of the *Vedas*, essentially, the first written Hindu texts, which are a collection of hymns, prayers and religious texts.<sup>301</sup> There are four *Vedas* but there is no known single author as they are considered divine in origin<sup>302</sup> and the contents were transmitted orally<sup>303</sup> for many generations before finally being transcribed.<sup>304</sup> After the *Vedas*, many Hindu scriptures governing all aspects of daily life emerged.

The *Upanishads*, *Puranas*, *Bhagavad Gita*, *Ramayana*, *Manusmriti*<sup>305</sup> and many other sacred texts from yoga, to philosophy, mathematics and medicine appeared over the years.<sup>306</sup> Hindu law emerged from these ancient Hindu texts.<sup>307</sup> In 1910 Mayne<sup>308</sup> declared that classical Hindu law has the oldest pedigree of all known systems of jurisprudence in the world. Fundamentally, Hindu law is considered as divine law and is intertwined with religion. A central feature in Hinduism is that there is no dividing line between the sacred and the secular.<sup>309</sup>

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<sup>299</sup> *Dharma* is a *Sanskrit* word which has wide meaning. In a sense it encompasses righteousness, duty, morality and law. It provides the structure for leading a good, pure and righteous life. The basic tenants are virtue, truthfulness and purity. However, the meaning and scope of *dharma* is wide enough to cover all aspects of daily living, from not only legal procedure but also other ordinary daily activities such as dress code and personal hygiene.

<sup>300</sup> *Karma* means deed, work or action. It also refers to a spiritual principle of cause and effect. Hindus believe that an action or deed performed by an individual has future repercussions or consequences. As Hindus believe in reincarnation, this concept of *karma* is said to influence future births and lives.

<sup>301</sup> Marbaniang 05 June 2015 History of Hinduism Pre-Vedic and Vedic Age [www.lulu.com](http://www.lulu.com) 30.

<sup>302</sup> According to *Swami Vivekananda*, (a renowned Hindu monk, learned in Hindu philosophy, religion, and *vedanta*) the *Vedas* represent a collection of spiritual laws which are divine laws that have always existed. Hence, he regarded the *Vedas* as the sum total of eternal truths. This particular excerpt is taken from his discourse entitled *Paper on Hinduism*, delivered at the World Parliament of Religions in Chicago on 19 September 1893.

<sup>303</sup> Violatti 18 January 2013 The *Vedas* [www.ancient.eu](http://www.ancient.eu).

<sup>304</sup> Violatti 18 January 2013 The *Vedas* [www.ancient.eu](http://www.ancient.eu).

<sup>305</sup> Also known as the Laws of *Manu* it is a collection of laws attributed to its author *Manu*.

<sup>306</sup> Hare 2010 Sacred Texts of Hinduism [www.sacred-texts.com](http://www.sacred-texts.com).

<sup>307</sup> Day *The Conception of Punishment in Early Indian Literature* 18-22.

<sup>308</sup> Mayne *A Treatise on Hindu Law and Usage* at the preface section.

<sup>309</sup> Rao 1998 *Fordham Law Review* 1185.

### 3.5 Sources of Hindu Law

In this research, it is crucial to study the sources of Hindu law as these sources are directly linked to the development of its legal history as well as the evolution of its laws particularly relating to ADR and the way in which it is currently handled. As will be revealed, the same principles have been utilised since pre-historic times to resolve disputes. These specific and enforceable doctrines of ADR were established in antiquity, and are still relevant and applicable in India today.

#### 3.5.1 *Sruti*

India has a recorded legal history beginning from the Vedic ages.<sup>310</sup> It is generally accepted in scholarly circles that Hindu law is presumed to be about 6 000 years old.<sup>311</sup> According to Desai,<sup>312</sup> there are three main sources of Hindu law: namely the *Sruti*,<sup>313</sup> the *Smriti*<sup>314</sup> and custom. Considered the initial and oldest source of Hindu law is the *Sruti*, which literally means "that which was heard or that which was revealed".<sup>315</sup> *Sruti* is considered as having a divine origin as it is often described as being divinely revealed to the *Rishis*.<sup>316</sup> The *Sruti* was thereafter documented into the four *Vedas*, namely the *Rig*, *Sama*, *Yajur* and *Atharva*, which form the earliest composition in Hindu literature.<sup>317</sup> Together with the *Brahmanas*<sup>318</sup>

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<sup>310</sup> Pukhrajgarwal 24 August 2015 An Introduction to Ancient Indian Laws <https://ilchslcu.wordpress.com>.

<sup>311</sup> Rautenbach *The Legal Position of South African Women under the Law of Succession* 60.

<sup>312</sup> Desai *Principles of Hindu Law* 9.

<sup>313</sup> The word is derived from the Sanskrit root word *sru* which means "to hear". *Sruti* are believed to have been heard by sages during a revelation by God, hence they are considered as having a divine source. The four *Vedas* as well as the *Upanishads* are scriptures which make up the *Sruti*.

<sup>314</sup> *Smriti* literally means "that which is remembered". Unlike *Sruti* which are considered as having a divine origin, *Smriti* are attributed to human origin and are believed to be recollections of the sages which were handed down over generations.

<sup>315</sup> Desai *Principles of Hindu Law* 3.

<sup>316</sup> *Rishis* are regarded as highly evolved or divine souls; also referred to as sages who engaged in deep meditation in solitude. During this state of intense meditation certain truths and eternal knowledge were revealed to them, which they then composed into hymns and shared with the community.

<sup>317</sup> Das *What are the Vedas? A Brief Introduction* 1.

<sup>318</sup> The word *Brahmana* may refer to the utterances of a priest (*Brahman*) or an explanation of the sacred hymns. There are many recorded *Brahmanas* of each of the *Vedas*, for example, the *Brahmanas* of the *Sama Veda* consist of the twenty-five books of the *Panchavimsha* and the twenty-six books of the *Shadvimsha*. One can conclude that the *Brahmanas* take the form of a commentary on a particular *Veda*.

which were the appendices to the *Vedas*, this vast body represents the earliest Hindu scripture.<sup>319</sup>

### 3.5.2 *Smriti*

The *Sruti* still exists and has never been replaced. Sometime after the *Sruti*, the *Smriti*<sup>320</sup> came into being. The *Smriti* refers to that class of oral Hindu literature, based on memory and recollection, which was passed down over the generations. There are two classes of *Smriti*: an earlier category referred to as *Dharmasutras*<sup>321</sup> and a later class referred to as the *Dharmasastras*. The *Dharmasastras* are numerous, (at some stage they numbered 100) and they are basically discourses or dissertations on *dharma*. They deal with discussions of personal virtues, non-violence against all forms of life, rules of a just war, proper goals of life, duties, ethics and responsibilities. In essence, the *Dharmashastras* are regarded as the very first Hindu law books.<sup>322</sup>

#### 3.5.2.1 The Dharmashastras

The *Dharmashastras* have three main categories. The first category is the *Acharya* which contains rules on daily rituals, specific duties for the different castes and proper conduct for ideal living. The second category known as *Vyavahara* contains laws and legal procedures. It also prescribes the obligations and duties of kings, how to establish courts, the leading and examining of witnesses as well as the enforcement of punishment.<sup>323</sup> The third category which is known as the *Prayaschitta* basically sets out the different types of punishment as well as penances for atonement.<sup>324</sup>

Of the hundreds of *Dharmashastra* texts, the following are considered the most important. These are the *Manusmriti* (which appeared around 200 BC) also known as the Laws of Manu, the *Yajnavalkyasmriti* (possibly around 300 CE–500 CE), the *Naradasmriti* (300 AD), the *Brhaspatismriti* (300 AD–

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<sup>319</sup> Rautenbach *The Legal Position of South African Women under the Law of Succession* 60.

<sup>320</sup> This translates directly to "that which was remembered".

<sup>321</sup> According to the *Concise Oxford Dictionary of World Religions*, *Dharmasutra* refers to a class of Sanskrit texts dealing with law and rules of conduct; however, they differ in style from the *Dharmasastras* in that they are written in prose as opposed to the *Dharmasutras* which are written exclusively in verse.

<sup>322</sup> Rautenbach *The Legal Position of South African Women under the Law of Succession* 61.

<sup>323</sup> Venkataraman *Hindu Law Principles and Precedents* 3-4; Derrett *Introduction to Modern Hindu Law* 4-5.

<sup>324</sup> Rama *Ancient Indian Law* 86.

600 AD) and the *Katyayanasmriti* (300 AD–600 AD).<sup>325</sup> These texts served as the foundation of Hindu law and jurisprudence.<sup>326</sup> Interestingly, when the British ruled India, they used the *Manusmriti* to settle disputes relating to inheritance, marriage, and succession.<sup>327</sup>

The *Katyayanasmriti* set out the following six types of courts in order of hierarchy beginning with the *Kula* or family councils, the *Shreni* or assembly of elders, the *Gana* or village assembly, the *Adhitkrita* or court appointed by a king, the *Sasita* or Kings court and finally ending with the *Nripa* or the king himself who was the supreme authority.<sup>328</sup> This structure of the gradation of courts in India goes back to Vedic times when the King was the highest legal authority.<sup>329</sup>

### 3.5.2.1.1 The courts of the *Kula* and the *Shreni*

Of the six types of courts set out in the *Katyayanasmriti*, the *Kula* and the *Shreni* are the most relevant to this research. They represent two of the three courts which fall under the category of Peoples' Courts<sup>330</sup> as described in the *Katyayanasmriti*.<sup>331</sup> The *Kula* is defined as "an assembly of impartial persons functioning as *panchayats*", and the *Shreni* is defined as a "corporation of people following the same profession, craft or trade",<sup>332</sup> effectively an assembly of elders, the only difference being that the entire membership had to belong to a single occupation. As elaborated by Rama,<sup>333</sup> the duty of these two councils is to decide primarily on all disputes over which they had jurisdiction. Furthermore, in terms of hierarchy, the *Shreni* was deemed to be at a higher level, as it had the power to review the decision of the *Kula*.<sup>334</sup>

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<sup>325</sup> Rama *Legal and Constitutional History of India* 29–33.

<sup>326</sup> Jayaram date unknown *Manusmriti the Laws of Manu* [www.hinduwebsite.com](http://www.hinduwebsite.com) 1.

<sup>327</sup> Jayaram date unknown *Manusmriti the Laws of Manu* [www.hinduwebsite.com](http://www.hinduwebsite.com) 1.

<sup>328</sup> Rajendra "Concept of Judiciary in Ancient India" 80.

<sup>329</sup> Nath *Judicial Administration in Ancient India* 27.

<sup>330</sup> There was a distinct division between Peoples' Courts and Kings' Courts. As the name suggests, Peoples' Courts were presided over by members of the local community, whereas Kings' Courts were presided over by the King himself.

<sup>331</sup> Rama *Legal and Constitutional History of India* 490.

<sup>332</sup> Rama *Legal and Constitutional History of India* 490-492.

<sup>333</sup> Rama *Legal and Constitutional History of India* 491.

<sup>334</sup> Rama *Legal and Constitutional History of India* 491.



### 3.5.3 Custom

Custom is an important source of law in most legal systems in the world. Similarly, in India, custom was regarded as "unrecorded revelation"<sup>335</sup> and ancient writers insisted upon its adherence. For custom to be legally enforceable, it had to meet the following requirements: it had to be continuous, uniform, certain, reasonable, moral and not opposed to any law or policy.<sup>336</sup> Three different kinds of custom were recognised in India: local custom, class custom and family custom.<sup>337</sup>

Interestingly, even in South African law, as described in Chapter two,<sup>338</sup> custom in common law and customary law are significant. In the section dealing with traditional ADR mechanisms<sup>339</sup> it is clear that there are many similarities, specifically relating to established dispute resolution systems between traditional African and Hindu societies. For instance, the village headman in traditional African societies and the village elders and the *panchayat* in traditional Hindu societies, and the respective roles they performed in resolving disputes within their communities are similar. It is notable to observe these parallels and the similarities in dispute resolution techniques.

### 3.6 The concept of *dharma*

According to Desai,<sup>340</sup> "law, as understood by the Hindu, is a branch of *dharma*".<sup>341</sup> *Dharma* can be interpreted widely and presents itself as the sum of duties and obligations, whether they are moral, ethical, religious, social or legal.<sup>342</sup> On one level, *dharma* signifies the underlying orderliness of human life. On another level, *dharma* is deemed to be the epitome of human life. Clearly, *dharma* permeates not only jurisprudence, but all aspects of daily life. This concept of *dharma* originates from the *Vedas* and includes all that is moral, good, proper and right. According to

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<sup>335</sup> Venkataraman *Hindu Law Principles and Precedents* 13.

<sup>336</sup> Derrett *Introduction to Modern Hindu Law* 15.

<sup>337</sup> Venkataraman *Hindu Law Principles and Precedents* 15.

<sup>338</sup> Refer to paragraph 2.1.4 in Chapter 2 which deals with traditional ADR mechanisms in South Africa.

<sup>339</sup> Refer to paragraph 2.1.4 in Chapter 2.

<sup>340</sup> Desai *Principles of Hindu Law* 1.

<sup>341</sup> Desai *Principles of Hindu Law* 1.

<sup>342</sup> Desai *Principles of Hindu Law* 2.

Radhakrishna,<sup>343</sup> "*dharma* is synonymous with the rule of law". He further went on to elaborate:<sup>344</sup>

*Dharma* is that which upholds, nourishes, or supports the stability of society, maintains social order and secures the general wellbeing and progress of mankind.

Fundamentally, *dharma* is synonymous with Hindu law and the two cannot be separated. As reiterated by Lingat<sup>345</sup> "in Hinduism, the concept of *dharma* includes Hindu law". Significantly, this concept of *dharma* plays a vital role, particularly in the dispensation of justice in the *Nyaya Panchayat*, *Gram Nyayalayas* as well as *Lok Adalat*, as will be observed during discussion on these aspects further in this chapter.<sup>346</sup>

Another noteworthy parallel that can be drawn between Hindu law and traditional South African customary law is that, whereas Hindu law epitomises *dharma* as the underlying principle in all legal duties and obligations, the ancient African concept of *ubuntu* plays a similar and significant role within traditional communities particularly in resolving disputes. As expressed previously in this research,<sup>347</sup> for ADR to succeed within traditional African communities, the principle of *ubuntu* must be observed. Moreover, as with *dharma*, *ubuntu* is also recognised as an "important source of law" according to Judge Lamont.<sup>348</sup> Therefore, the only positive conclusion that can be drawn is that in order for ADR to succeed within the South African and Indian context, the principles of *dharma* and *ubuntu* must be taken cognisance of to be effective.<sup>349</sup>

### 3.7 Schools of Hindu law<sup>350</sup>

Derrett<sup>351</sup> affirms that two main schools of Hindu law developed over the years: the *Mitakshara* and the *Dyabhaga*. *Mitakshara* is considered more

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<sup>343</sup> Radhakrishna *The Dharma Concept vis-à-vis Judicial System* 1.

<sup>344</sup> Radhakrishna *The Dharma Concept vis-à-vis Judicial System* 1.

<sup>345</sup> Lingat *Law and Religion in India* 490-491; Lingat 1962 *Asiatique* 250.

<sup>346</sup> Refer to paragraph 3.9 for further discussions on this aspect.

<sup>347</sup> Refer to 2.1.5 in Chapter 2.

<sup>348</sup> Onyango *African Customary Law: An Introduction* 114.

<sup>349</sup> This parallel will be explored in greater detail in the succeeding chapter.

<sup>350</sup> This paragraph is brief and does not do the topic any justice; however, it serves to simply state the two main schools of Hindu law. For a better and detailed explanation on schools of Hindu law, the following sources provide a useful and suitable account; Jhabvala *Principles of Hindu Law* 10-13; Pathak *Hindu Law and Its Constitutional Aspects* 11-13; Diwan *Modern Hindu Law* 50.

<sup>351</sup> Derrett *Introduction to Modern Hindu Law* 23.

orthodox than *Dyabhaga*.<sup>352</sup> Other differences do exist, particularly in their approaches to law of succession and family law.<sup>353</sup> Consequently, these schools of law still have contemporary application, depending on the various regions in India where they are relevant, as well as the specific areas of application, for example, in resolving succession and maintenance issues, *Mitakshara* still tends to be popular.<sup>354</sup>

Over the years, Hindu law went through various stages and transformations, from the classical Vedic stage, through numerous invasions, right up to India's independence in 1947.<sup>355</sup> Today, the legal system as practised in India is based largely on the English law and follows an adversarial system, very much like South Africa. It does not use the jury system and has an independent judiciary.<sup>356</sup>

It is against this background that ADR in Hindu law, with reference to criminal law, will be explored. The aim of this is to acquire lessons and best practices for the possible inclusion of their ADR best practises and successes into the South African criminal justice system.

### **3.8 Hindu law in South Africa**

Although sixty percent of the Indian population is Hindu, they account for only two percent of the overall South African population.<sup>357</sup> Hindus from India arrived in South Africa as indentured labourers from 1860 onwards and they observe and practise their own customs and religion. In as much as South Africa is a multi-pluralistic legal system, Hindu law is not recognised in South Africa.<sup>358</sup>

### **3.9 ADR in Hindu law**

Most traditional communities in the world had some or other workable form of dispute resolution techniques before formal legal structures such as courts were established. Likewise in India, the method of cordial resolution of disputes can be traced back in history, when village disputes were

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<sup>352</sup> Rautenbach *The Legal Position of South African Women under the Law of Succession* 62.

<sup>353</sup> Rautenbach *The Legal Position of South African Women under the Law of Succession* 62.

<sup>354</sup> Katju *The Importance of Mitakshara in the 21st Century* 3.

<sup>355</sup> Indian Law Encyclopaedia Britannica [www.britannica.com](http://www.britannica.com).

<sup>356</sup> Sharma *Indian Legal System* 18.

<sup>357</sup> Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 11.

<sup>358</sup> Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* at the Introduction and at 271.

resolved between members of the community. In rural India, the *panchayats* (assembly of elders and respected inhabitants of a village) settled almost all disputes locally. The methods of amicable dispute resolution that were used in the *panchayats* were established and acknowledged systems of administration of justice and not just an "alternative" to a formal justice system.<sup>359</sup>

### 3.9.1 *The panchayat system in India*

The *Rig Veda*, *Manusmriti*, *Dharmashastras*, *Upanishads* and other ancient Hindu texts refer to *panchayats*.<sup>360</sup> The word itself denotes a council of five members. A detailed description of these village councils can be found in a scripture called *Arthashastra* written by Kautilya who lived around 400 BC. The *panchayat* is a system of village administration in India. Initially, it began as a system of local government<sup>361</sup> under the leadership of the village headman only, but thereafter grew to include other influential, respected and wise members of the community.<sup>362</sup> Essentially it is a system which operates at grass roots level in the community and is a form of self-governance that enjoys various responsibilities and duties, including judicial.<sup>363</sup> Upon closer inspection of the workings and operations of a *panchayat*, it becomes clear that it has all the characteristics of an organised system of local government.

A *panch* or *pancha* refers to a single member of the *panchayat*, and all the *panchas* or members of the *panchayat* are elected directly by the villagers.<sup>364</sup> As already alluded to, each *panchayat* consists of at least five elders (*panchas*) from the immediate village. The duties of this council or assembly are to enforce and administer justice, look after the interests and welfare of the community, impose punishment on defaulters and liaise with the higher administrative authorities in the state.<sup>365</sup> These *panchayats* are also instrumental in resolving all village disputes, both criminal and civil, and

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<sup>359</sup> Malhotra and Malhotra date unknown Alternative Dispute Resolution in Indian Family Law – Realities, Practicalities and Necessities <https://www.iafl.com> 7.

<sup>360</sup> Singh *Panchayat Raj Manual: A Socio-Historical Cum Legal Perspective* 10.

<sup>361</sup> Mathew *Panchayati Raj in India: An Overview: Status of Panchayati Raj in India* 3.

<sup>362</sup> Singh *Panchayat Raj Manual: A Socio-Historical Cum Legal Perspective* 10.

<sup>363</sup> Ghosh *Panchayat System in India: Historical, Constitutional and Financial Analysis* 208.

<sup>364</sup> Seetharam *Citizen Participation in Rural Development* 34.

<sup>365</sup> Ghosh *Panchayat System in India: Historical, Constitutional and Financial Analysis* 209-210.

include such offences as infringement of property rights, succession, rape, murder, matrimonial and other family disputes.<sup>366</sup>

The *panchayat* system is still active and practised in India today. In fact, it never ceased operating, especially in the rural areas. Nowadays it has been formalised in terms of Article 40 of the *Directive Principles of the State Policy* which proclaims:

The states shall take steps to organise village *panchayats* and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.<sup>367</sup>

According to Mathur:<sup>368</sup>

*Panchayat* justice is not a novel idea but a time honoured institution having its deep roots in the ethos of the country. It is village self-government in action at the level of administration of justice. It both helped in involvement of people in dealing with law and justice and institutionalisation of expeditious local resolution of disputes.<sup>369</sup>

Taking this statement into consideration, the role of *panchayats*, particularly within the ambit of criminal law in India, will be explored. Furthermore, the importance of *dharma* as an instrument in dispensing justice within the system of *panchayats* will be detailed. In addition, the process of the court systems of *Kula* and *Shreni* as described earlier in this chapter<sup>370</sup> will become clear and placed in perspective. Also, the mechanism of these courts will be illustrated in a logical and pragmatic level as they relate directly to the *Nyaya Panchayat*, *Gram Nyayalayas* as well as *Lok Adalat*. Most importantly, three significant pieces of legislation formalised in India and specifically relating to or incorporating ADR in criminal law will be dissected and discussed with a view to integrating similar legislation into the South African criminal justice system in future. In addition to this, a parallel will be drawn between the *panchayats* as practiced in India along with the customary court system as found currently in South Africa.<sup>371</sup>

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<sup>366</sup> Jaffe *Ironies of Colonial Governance* 168-169.

<sup>367</sup> *Bharatada Samvidhana*, English version of the *Directive Principles of the State Policy of Constitution of India*, Article 40.

<sup>368</sup> Mathur *Nyaya Panchayats as Instruments of Justice* 23.

<sup>369</sup> Mathur *Nyaya Panchayats as Instruments of Justice* 23.

<sup>370</sup> Refer to 3.5.2.1.1 for a description on the various types of courts which existed.

<sup>371</sup> Refer to chapter 4 for further details.

### 3.9.2 *The Nyaya Panchayat*

The *Nyaya Panchayat* specifically, was an informal and indigenous system of adjudication that had existed in India since pre-historic times.<sup>372</sup> Also a *panchayat* council, the *Nyaya Panchayat* focused solely on judicial issues. Technically a village court, according to Panadan,<sup>373</sup> "was a prestigious institution of ancient India to impart speedy and easy justice to the people". As a form of participatory and inclusive justice, it values public opinion and input. The essential features of the *Nyaya Panchayat* are simplicity and flexibility.<sup>374</sup> This village tribunal dispensed justice in an informal, uncomplicated and understandable manner, bearing in mind that the majority they served were ordinary village folk.

ADR mechanisms such as arbitration, negotiation and mediation were used in the *Nyaya Panchayat* in order to settle disputes.<sup>375</sup> Taking into consideration the fact that currently, more than sixty-seven percent of the Indian population resides in the rural areas<sup>376</sup> of India, the formalising of this institution can only be considered a welcome relief, especially to those members of society who are most in need of it, particularly in so far as access to justice and active participation of all people in the court system are concerned. The benefits of this ancient institution, gave rise to the formalisation of the *Nyaya Panchayat* and was legislated by the *Nyaya Panchayats Act* of 2009, which will be discussed further below.

### 3.9.3 *The Nyaya Panchayats Act of 2009*

This Act was legislated and passed in 2009 and it formally recognised the importance and contribution of the *Nyaya Panchayats* to drive the concept of ADR at rudimentary level in the villages of India. These *Nyaya Panchayats* are inherently local or community courts and are presided over by resident community members. The entire purpose of this Act was to improve access to justice to the people most in need of it.<sup>377</sup> The Act directs the creation of *Nyaya Panchayats* for every village in India. The pre-amble to the Act emphasises a "decentralised dispute redressal system". Section 14(1) stresses "the *Nyaya Panchayats* shall follow persuasion, conciliation and mediation as means to resolve disputes". It is clear that ADR is the main

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<sup>372</sup> Panadan 2007 *Journal of Dharma* 297.

<sup>373</sup> Panadan 2007 *Journal of Dharma* 298.

<sup>374</sup> Panadan 2007 *Journal of Dharma* 305.

<sup>375</sup> Elahi date unknown Lok Adalat System in India [www.academia.edu](http://www.academia.edu) 1.

<sup>376</sup> According to the 2017 World Bank Data on Rural Population.

<sup>377</sup> Upadhyay *A Study to Review and Strengthen Nyaya Panchayats in India* 3, 9.

purpose of this forum, and not adjudication. This Act will now be analysed with the most important provisions dealt with below.

### 3.9.3.1 Jurisdiction of *Nyaya Panchayats*

As per section 13(1) of the *Nyaya Panchayat Act* of 2009, the *Nyaya Panchayat*:

Shall have exclusive jurisdiction to hear and deal with cases, claims, issues, offences and proceedings arising within their geographical territory and shall have exclusive jurisdiction over particular civil and criminal matters.

Section 13(1)(a) of the Act states the following in respect of its civil jurisdiction:

(a) Civil jurisdiction:-

- (i) claims relating to recovery of debts and contractual monies not exceeding rupees twenty-five thousand, and all proceedings arising with respect thereto, provided that the parties may agree in writing to waive the bar on the maximum value of a suit;
- (ii) disputes relating to property and physical boundaries, except those involving issues of law or title to land or any other right or interest in any immovable property or mortgages;
- (iii) all suits of partition, except where a complicated question of law is involved;
- (iv) claims for damages relating to grazing or trespass;
- (v) claims for recovery of movable property or cattle or for its value, including those where separate criminal proceedings have been instituted;
- (vi) claims for compensation for wrongfully taking or damaging movable property, including those where separate criminal proceedings have been instituted;
- (vii) disputes relating to custody and maintenance of children and dependants, including divorced spouses;
- (viii) any other matter covered by or falling under schedule 11 of the *Constitution*;
- (ix) claims for rent of immovable property;
- (x) disputes relating to environmental pollution and public nuisance;

settlement of consumer disputes and matters connected herewith, within the meaning and definition as provided under section 2(1)(c) of the *Consumer Protection Act*, 1986 up

to a limit of Rs 1 Lakh and in the manner as prescribed under sections 11,12, 13 and 14 of the *Consumer Protection Act* of 1986:

Provided that, unless otherwise provided in any law for the time being in force, the right to bring a claim in respect of any of the above instances should have accrued within three years prior to the claim being referred to the *Nyaya Panchayat*.

Provided further that, where the *Nyaya Panchayat* is of the view that, complicated question of law or title is involved, in a suit for partition the *Nyaya Panchayat* shall transfer such suit to the court of competent jurisdiction:

Provided further that the parties to a suit of the above description under clauses (ii) and (iii) may, by a written agreement, refer the suit to the *Nyaya Panchayat* for decision irrespective of the value of the suit and the bench shall, subject to such rules as may be prescribed as to court-fees and other matters, have jurisdiction to hear and determine the said suit under this Act:

Provided further that the *Nyaya Panchayat* shall by a written agreement of the parties, have jurisdiction to hear and determine a suit of any description irrespective of the value of the suit subject to such rules as may be prescribed as to court-fees and other matters.

The above section is self-explanatory, and again, the wide scope of its application to civil cases is obvious. Civil cases involving rent claims, damage to property, public nuisance, custody and maintenance issues, uncomplicated partition suits, and boundary issues can be heard in the *Nyaya Panchayat*. In so far as the monetary jurisdiction is concerned, in as much as section 13(1)(a)(i) avers that the maximum value of recovery of debt claims as well as contractual claims is twenty-five thousand rupees,<sup>378</sup> it also adds the proviso that this ceiling amount can be set aside by both parties relinquishing this bar of the maximum value in writing. Consequently, claims of higher values can be heard in the *Nyaya Panchayat*, should the parties agree.

Likewise, section 13(1)(b) of the *Nyaya Panchayat Act* of 2009 deals with its criminal jurisdiction:

(b) Criminal jurisdiction:-

- (i) compoundable offences (footnote 380 below explains this aspect) (in which permission of court is not necessary) in terms of sub-section (1) of section 320 of the *Code of Criminal Procedure*, 1973, namely, sections 298, 323, 334, 341, 342, 352, 355, 358, 426, 427, 447, 448, 491, 497, 498, 500, 501, 502, 504, 506 and 508 of the *Indian Penal Code*, 1860;

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<sup>378</sup> This amount roughly translates to R5000 as per the April 2017 exchange rate.



- (ii) offences alleged to have been committed under sections 160, 172, 174, 175, 178 to 180, 269, 277, 279, 283, 285, 289, 290, 294, 323, 324, 334, 336, 341, 352, 357, 358, 374, 379, 403, 411, 426, 428, 430, 431, 447, 448, 504, 506, 509 and 510 of the *Indian Penal Code*, 1860 (No. XLV of 1860);
- (iii) offences under the *Cattle Trespass Act*, 1871, (No. 1 of 1871);
- (iv) offences under the *Public Gambling Act*, 1867 (No. III of 1867);
- (v) offences relating to treatment of women and children, including domestic violence, sexual harassment, humiliation and child labour under the relevant laws;
- (vi) any offence under this Act or any rule made hereunder;
- (vii) any other offence which the State Government may from time to time declare, by notification in the Official Gazette, as cognizable by a *Nyaya Panchayat*.

From the above two sections 13(1)(a) and 13(1)(b), it would appear that the jurisdiction conferred on the *Nyaya Panchayat* is not narrow and limited; rather it covers a wide variety of both criminal and civil matters. Upon closer inspection of the offences listed, it is evident that they are by and large, petty offences such as gambling in public, trespassing, damages caused by grazing stock, environmental pollution, public nuisance and similar petty offences. However, some offences relating to women and children, such as maintenance, child labour and domestic violence, can also be heard in the *Nyaya Panchayat*. Under section 13(1)(b)(i), some of the compoundable offences<sup>379</sup> referred to, include assault, theft, defamation, intimidation, sale of counterfeit property, using a false trademark, diverting water unlawfully, killing or maiming an animal, fraud, receiving stolen property and kidnapping. These are examples of some criminal cases that can be heard in the *Nyaya Panchayat*.

As far as the bench is concerned, section 4 of this Act specifically states:

Any person who is enrolled as a voter in the *Nyaya Panchayat* area shall, unless disqualified under this Act or any other law for the time being in force

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<sup>379</sup> A compoundable offence is explained under section 320 of the *Indian Criminal Procedure Code*. Briefly, compoundable offences are those offences of a less serious nature which affect private persons directly. These offences are not considered harmful to the public at large. Usually the victim is the complainant and they involve offences such as motor accident claims, matrimonial disputes, land issues, damages etc. A non-compoundable offence is usually a more serious offence where the State is the complainant or victim. Rapes, murder, robbery are examples of non-compoundable offences.

and who has attained twenty-five years of age shall be qualified to be elected as a *Panch*.

Hence, it is clear that no special legal qualifications are necessary for a person to form part of this council, and it would appear, that any fit and proper person, over the age of twenty-five can be appointed onto the *Panchayat*. Lawyers are completely barred from appearing in the *Nyaya Panchayat*, therefore no legal representation is allowed.<sup>380</sup>

### 3.9.3.2 Procedure and powers of the *Nyaya Panchayat*

Upon cursory inspection of the sections relating to the procedures of the *Nyaya Panchayat*, it appears as if they were specifically formulated to bypass technicalities and to prevent delays. Section 14 of the *Nyaya Panchayats Act* of 2009 sets out the procedure to be followed as well as the powers conferred upon the *Nyaya Panchayat*.

Firstly, and most importantly, section 14(1) instructs:

*Nyaya Panchayats* shall follow persuasion, conciliation and mediation as means to resolve disputes.

Furthermore, section 14(2) directs that the *Nyaya Panchayat* is not bound to follow the procedure as set out in the *Code of Criminal Procedure* or in the *Code of Civil Procedure*. Clearly, it has the power to adopt its own procedure including deciding on the location of the *Nyaya Panchayats*. As per section 14(2) of the *Nyaya Panchayats Act*:

Subject to the provisions of this Act and the rules made thereunder, the *Nyaya Panchayat* shall have powers to regulate its own procedure including the place at which it shall have its sittings. The *Nyaya Panchayat* shall not be bound by the procedure laid down by the *Code of Criminal Procedure*, 1973 (2 of 1974), or the *Code of Civil Procedures*, 1908 (5 of 1908), the *Provincial Small Cause Courts Act*, 1887 (9 of 1887) or any other law for the time being in force but shall be guided by the principles of natural justice.

Noticeably, the above section dictates that the procedure be simplified and informal to a large extent. Explicitly, section 14(2) instructs that the *Nyaya Panchayat* shall be guided by principles of natural justice. This section is particularly significant as it means that despite the lack of specifically legislated criminal and civil procedure, this court is still bound to act on the principles of fairness and the right to a fair trial. This is where the concept of *dharma* plays a crucial role. As declared by Mathur,<sup>381</sup> members of the

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<sup>380</sup> Bail *Social Legal Review* 89, 94.

<sup>381</sup> Mathur *Nyaya Panchayats as Instruments of Justice* 26.

*panchayats* had to be well versed in *dharma*. Prasad<sup>382</sup> affirms this and specifies that the council members had to be "propagators of *dharma*". Undoubtedly, an inherently fair and due process, applying the principles of *dharma* as detailed in paragraph 3.6 must be followed in the *Nyaya Panchayat* as well as the other courts described hereunder.

Additionally, as per the provisions of section 14(4), the very same powers that are conferred on civil courts are similarly vested in the *Nyaya Panchayat*. Section 14(4) of the *Nyaya Panchayats Act* of 2009 states that the *Nyaya Panchayats*:

shall, for the purposes of discharging its functions under this Act, have the same powers as are vested in a civil court under the *Code of Civil Procedure*, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath:

provided that no women shall be compelled to appear in person before the *Nyaya Panchayat*, and she may be examined on commission in the manner prescribed;

- (b) requiring the discovery and production of documents or other records;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) reviewing its decisions;
- (f) dismissing an application in situations where the applicant does not appear at a due date, provided the *Nyaya Panchayat Pramukh* may dismiss for good reasons any proceeding for default or deciding it *ex parte*;
- (g) any other matter which may be prescribed by the State Government.

With the above section in mind, it becomes clear that the *Nyaya Panchayats* have the same powers of ordinary civil courts in so far as ordering the attendance of persons, discovery and production of documents, receiving evidence by way of affidavits, examination of witnesses and documents and reviewing its own decisions, as well as dismissing applications.

Section 20 of the Act sets out the procedure to be followed in civil cases, which chiefly states that the claimant will approach the relevant *Nyaya*

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<sup>382</sup> Prasad *Poetics of Conduct: Oral Narrative and Moral Being in a South Indian Town* 113.

*Panchayat* and specify the value of the claim as well as the relief sought. With regard to criminal cases, specifically those referred to under section 13(B) of the Act, the procedure is set out in section 21.<sup>383</sup> Essentially, the aggrieved party, a witness to a crime or any person having knowledge of the crime, including the police, can notify the *Nyaya Panchayat*. If the accused is in custody, the police shall notify the *Nyaya Panchayat* of the offence. Thereafter the details of the offence and offender are noted in the *Nyaya Panchayat* record.

Most importantly, in terms of section 14(5) of this Act, every proceeding of the *Nyaya Panchayat* is deemed a judicial proceeding and has the same effect of any other civil court in India. The following section 14(5) clarifies this aspect perfectly:

Every proceeding before the *Nyaya Panchayat* shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the *Indian Penal Code* (45 of 1860), and it shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the *Code of Criminal Procedure*, 1973 (2 of 1974).

Lastly, in terms of jurisdiction, the *Nyaya Panchayat* is not allowed to impose a sentence of imprisonment as per section 14(6),<sup>384</sup> "either substantively, or in default of payment of a fine". This section is perfectly clear and needs no further elaboration.

### 3.9.3.3 Dispute resolution under the *Nyaya Panchayats Act*

Chapter 5 of the Act addresses the issue of dispute resolution, specifically section 22, which states the following:

The *Nyaya Panchayat* shall, upon receiving a complaint from a party, announces a date for conciliation proceedings in the matter and request

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<sup>383</sup> Section 21 of the *Nyaya Panchayats Act*, 2009: "(1) Any criminal offence referred to in this Act occurring within the geographical jurisdiction of a Nyaya Panchayat shall be notified to the *Nyaya Panchayat Pramukh* of the area by Chowkidar or any person witnessing or having knowledge of the offence having been committed or by the police authorities as soon as it is practicable to do so. (2) In cases where the defendant is under arrest and in the custody of the police, the *Nyaya Panchayat* shall be kept informed by the police. (3) The *Nyaya Panchayat Pramukh* shall have details of the offence entered into the *Nyaya Panchayat* record, together with details of the complainant, bare facts of the offence and any directions given to the accused or the police."

<sup>384</sup> Section 14 (6) of the *Nyaya Panchayats Act*, 2009: "The *Nyaya Panchayat* shall not inflict a sentence of imprisonment whether substantively or in default of payment of fine."

parties concerned to be present at the *Nyaya Manch* or in exceptional cases at a mutually agreed public place at a suitable time.

Section 23 of the Act deals with ADR, particularly conciliation as well as the way in which the conciliation must be handled by the *Nyaya Panchayat*. Section 23(1) significantly imposes a duty on the *Nyaya Panchayat* to make every attempt to amicably settle the dispute between the parties through the process of conciliation. Section 23 of the *Nyaya Panchayats Act* of 2009 states as follows:

- (1) It shall be the duty of the *Nyaya Panchayat Pramukh* to attempt an amicable settlement of dispute between the parties through conciliation.
- (2) If parties agree to conciliation proceedings, the *Nyaya Panchayat Pramukh* shall give an opportunity to each such party to choose a conciliator from amongst voters resident in the area of the *Nyaya Panchayat* to represent them in the conciliation process.
- (3) The *Nyaya Panchayat Pramukh* shall nominate two *Panchas* to participate in the conciliation process.
- (4) The persons so selected shall together hear parties to the dispute and any member of the public who volunteers to assist the *Panchayat* in attempting conciliation.

The above section is quite significant. It distinctly states that ADR is the priority and that every effort must be made to ensure the amicable settlement of the dispute. Moreover, in terms of section 23(2), if the parties do consent to the conciliation, they have the added advantage of being able to choose their own conciliator from resident voters in the area. This aspect of permitting the parties the opportunity to choose their own conciliators, allows for transparency, confidence and active participation in the resolution process. This aspect will ensure that the parties make every possible attempt to resolve the dispute.

In addition to the above, section 23(3) stipulates that the *Nyaya Panchayat* "shall nominate two *Panchas* to take part in the conciliation process". Undoubtedly, this section affirms that it is the duty of these selected persons to listen to the dispute and attempt conciliation. Notwithstanding these additional conciliators and *Panchas*, section 23(4) goes further to include "any member of the public who volunteers to assist the *panchayat*"<sup>385</sup> can also take part in the conciliation process. Obviously, this section casts the net as wide as it can possibly be in terms of settling the dispute amicably. This entire process is reminiscent of the traditional ADR methods used in

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<sup>385</sup> Section 23(4) of the *Nyaya Panchayats Act*, 2009.

South Africa, as explained in Chapter two<sup>386</sup> where the village headman or chief would resolve a village dispute in an open gathering, where, not only the disputing parties, but every member of the community actively participated to resolve the dispute.

To conclude, should the conciliation process still fail, despite all the processes and systems in place as per section 23 of the Act, the matter will proceed to adjudication in the same *Nyaya Panchayat*.<sup>387</sup>

#### 3.9.3.4 The adjudication process

Section 24<sup>388</sup> deals with the process of adjudication. As expressed above, should the conciliation process fail, the matter must proceed to adjudication. The *Nyaya Panchayat* then determines a date for the hearing, the parties are heard, and any supporting evidence is tendered. As per section 24(3)<sup>389</sup> the case must be decided upon within a maximum of three hearings or two months, whichever comes first. The hearings are held in public<sup>390</sup> and the language<sup>391</sup> used must be that which is predominantly spoken by the parties and understood in that particular *Nyaya Panchayat* area. As per section 28,<sup>392</sup> oral and documentary evidence can be led and sworn affidavits can

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<sup>386</sup> Refer to paragraph 2.2.4 on Traditional ADR Mechanisms in Chapter 2.

<sup>387</sup> Section 31(3) of the *Nyaya Panchayats Act*, 2009: "Where the *nyaya panchayat* in unable to obtain a settlement or reconciliation between the parties, the *Nyaya Panchayat Pramukh* may proceed with adjudication."

<sup>388</sup> Section 24 of the *Nyaya Panchayats Act*, 2009:

"(1) The *Nyaya Panchayat* may, on failure of conciliation or on the behest of the aggrieved party take up a dispute for adjudication.

(2) On the fixed date for hearing, the *Nyaya Panchayat* shall hear the parties and if needed call for evidence in support of their claim.

(3) The *Nyaya Panchayat* shall, based upon evidence, decide the matter within three hearings or a period of two months of taking up of the matter whichever is earlier."

<sup>389</sup> Section 24(3) of the *Nyaya Panchayats Act*, 2009: "The *Nyaya Panchayat* shall, based upon evidence, decide the matter within three hearings or a period of two months, of taking up the matter, whichever is the earlier."

<sup>390</sup> Section 25 of the *Nyaya Panchayats Act*, 2009: "The *Nyaya Panchayat* shall hold all its proceedings in public at the *Nyaya Manch* and at a time convenient to the parties to dispute, interested persons and the *Panchas*: provided that in exceptional cases where the proceedings cannot be held at the *Nyaya Manch*, the proceedings shall be held at a place convenient to the parties to dispute, interested parties and the *Panchas* and the said change in place of holding the *Nyaya Panchayat* proceedings shall be publicized one week in advance: provided that the *Nyaya Panchayat Pramukh* may allow any person to speak or give clarification before the *Nyaya Panchayat* which may assist in adjudication of the dispute or the controversy."

<sup>391</sup> Section 26 of the *Nyaya Panchayats Act*, 2009: "The language used in proceedings before the *Nyaya Panchayat* shall be that which is commonly understood in the *Nyaya Panchayat* area and by the parties".

<sup>392</sup> Section 28 of the *Nyaya Panchayats Act*, 2009:

be tendered in the absence of witnesses. Failure by any party to attend the *Nyaya Panchayat* will result in the claim being dismissed with costs.<sup>393</sup> After hearing the parties and taking all evidence into consideration, the *Nyaya Panchayat* will make a formal order recording the terms of the settlement.<sup>394</sup>

### 3.9.3.5 Final decision

The *Nyaya Panchayat* pronounces its final decision by way of an order, which is binding on both parties.<sup>395</sup> In cases requiring maintenance or compensation, the maximum order that can be granted is 25 000 rupees (around R5 000). As directed by section 35, the *Nyaya Panchayat* can exercise its discretion to award interest and costs if it so deems.<sup>396</sup> In cases relating specifically to maintenance, the *Nyaya Panchayat* can order regular monthly payments.<sup>397</sup> In criminal matters, the *Nyaya Panchayat* can impose a fine on the guilty party. No order of imprisonment may be imposed by the *Nyaya Panchayat*.

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"(1) The *Nyaya Panchayat* shall ascertain all relevant facts of the case and may make any reasonable order with regard to the production of documents or other evidence, including the tender of oral evidence by witnesses it considers necessary for the resolution of the dispute before it.

(2) The *Nyaya Panchayat* may permit a witness to tender a signed statement by way of evidence, or for evidence to be given at a location other than the venue of the hearing if he is unable to attend on the prescribed date by reason of ill-health or any other cause acceptable to the *Nyaya Panchayat*."

<sup>393</sup> Section 30 of the *Nyaya Panchayats Act*, 2009.

<sup>394</sup> Section 31 of the *Nyaya Panchayats Act*, 2009.

<sup>395</sup> Section 32 (1) of the *Nyaya Panchayats Act*, 2009.

<sup>396</sup> Section 35 of the *Nyaya Panchayats Act*, 2009:

"The *Nyaya Panchayat* may exercise its discretion to award interest and costs in addition to the principle amount of the claim, and counter-claim, if any, on the following basis -

- (i) Interest payable at the rate fixed as at the date of the final decision by the local branch of any nationalised bank; and
- (ii) Costs to include the amount of the suit fees and any out-of-pocket expenses paid by the successful party, or for travel etc."

<sup>397</sup> Section 33 of the *Nyaya Panchayats Act*, 2009:

"(1) In cases other than those for a simple recovery of monies under the provisions of this Act, the *Nyaya Panchayat* may order compensation or maintenance to a claimant of the amount which it considers just having regard to all the circumstances of the case, including the conduct of the respondent, provided that same shall not exceed rupees twenty-five thousand.

(2) In suits relating to maintenance, the *Nyaya Panchayat* may make orders for maintenance by monthly instalments at such rate as the *Nyaya Panchayat* deems fit."

### 3.9.3.6 Appeals

Section 36<sup>398</sup> of the *Nyaya Panchayat Act* sets out the appeal procedure. An appeal against any order of the *Nyaya Panchayat* must be recorded within thirty days after the date of the order. Such appeal will then be heard by the full bench of the *Nyaya Panchayat*. All five *Panchas* together with two other persons form a quorum, which constitutes the full bench which will ultimately hear the appeal. None of the *Panchas* who heard the initial case, may form part of the Appeal Bench.<sup>399</sup>

If the appeal fails, or if any of the parties are unhappy with the decision of the Appeal Bench, that matter is then referred to the *District Nyaya Panchayat Appellate Authority and Ombudsman* in terms of Chapter 9 of the *Nyaya Panchayats Act*. This *Appellate Authority and Ombudsman* consists of three members, one of which must be a qualified district judge and who will also be the president of this body, the second member must be a women, and any other suitable person will be the third member. All three members must possess a bachelor's degree, have at least ten years' experience in problems relating to law and public affairs and must be at least thirty-five years old. This body is the highest appeal authority for cases arising from the *Nyaya Panchayat* and the matter cannot be taken up any further nor can it be transferred to any other court. It ends at the *District Nyaya Panchayat Appellate Authority and Ombudsman*.

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<sup>398</sup> Section 36 deals with the appeals procedure.

<sup>399</sup> Section 36 of the *Nyaya Panchayats Act*, 2009:

"(1) An appeal against any order or decision of a bench of the *Nyaya Panchayat* shall be preferred within the period of thirty days after the date of the passing of such order or decision to the full bench of the *Nyaya Panchayat* and shall be heard by it in the prescribed manner.

(2) All five *Panchas* along with two other persons not otherwise disqualified from being elected as a *Panch* from amongst a panel of names suggested by the parties to the dispute shall form the quorum for the purpose of constituting a full bench for hearing an appeal under sub-clause (1):

provided that no *Panch* shall participate in the proceedings of the full bench of the *Nyaya Panchayat* or be involved in any manner with any proceeding before the full bench where any party is either a near relation or a business partner.

(3) An appeal against any order or decision of a full bench of the *Nyaya Panchayat* shall be preferred within a period of 30 days after the date of the passing of such order or decision to a *Panchayat Appellate Authority* established under sub-clause(1) of clause 37.

(4) The order under challenge in appeal shall be not given effect to till the appeal is finally disposed of."



### 3.9.3.7 Advantages of the *Nyaya Panchayats* Act 2009

After broad examination, a few possible advantages of the *Nyaya Panchayat Act* have been identified and are summarised below:

- (a) This Act allows for justice to be meted out within the area where the dispute originated;
- (b) It creates a forum to ensure speedy justice because of its specific time frames;
- (c) As this is a mobile court, taking justice to the people, costs and inconvenience to the community are reduced considerably thereby improving access to justice;
- (d) It allows for an informal and highly simplified procedure to be followed thereby allowing the proceedings to be comprehended by all, including illiterate people;
- (e) Reconciliation is actively encouraged in this forum thus repairing the relationship between members of the community;
- (f) Strict time frames are set out for conciliation and adjudication thereby eradicating unnecessary postponements and delays;
- (g) Values and customs of the local community are taken into consideration and play an intrinsic role in the settlement of the dispute; and
- (h) The disputants themselves take active participation in as well as direct the outcome of the conciliation.

### 3.9.3.8 Comments on the *Nyaya Panchayats* Act 2009

The preamble of this Act sets out the securing of access and administration of justice in all areas and to all the people of India.<sup>400</sup> A unique feature of this Act is that it empowers the *Nyaya Panchayat* as an institution and gives it credence and authority. The institution of *Nyaya Panchayat* must take justice to the door of its citizens. An excellent justice delivery mechanism, based on years of usage and acceptance, has been legitimised. The *Nyaya Panchayat* can hear a limited scope of civil and criminal matters and may not impose a term of imprisonment as punishment. It is apparent that every

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<sup>400</sup> Upadhyay *A Study to Review and Strengthen Nyaya Panchayats in India* 4.

attempt must be made to resolve the matter amicably as the Act directs that "persuasion, conciliation and mediation" must be employed to resolve disputes. Clearly the emphasis is on the speedy and amicable resolution of disputes. Particular legislation such as the *Nyaya Panchayats Act* does not exist under South African criminal law. Can similar legislation work in South Africa? It is indeed worth considering if such an Act will work, given the proper resources and support. A proper and detailed comparative study follows in the ensuing chapter.

#### 3.9.4 *The Gram Nyayalayas Act 2009*

Other significant legislation addressing ADR in India will now be discussed. Apart from the *Nyaya Panchayats Act* of 2009, the *Gram Nyayalayas Act* of 2008 came into force on 2 October 2009. The *Gram Nyayalayas Act* was created primarily for access to justice for the rural, needy and underprivileged areas in India. The Law Commission of India, in its 114th report<sup>401</sup> specifically recommended the creation of *Gram Nyayalayas* to provide speedy, cheap and substantive justice to the community. A *Gram Nyayalaya* is a mobile village court created to bring justice to the poor and needy in the extreme rural areas in India. Section 2(a) of the *Gram Nyayalayas Act* specifically states that a *Gram Nyayalaya* "means a court as established under section 3".

Considered as a dramatic expansion of the Indian legal system, this Act was passed in 2008 and came into effect on 2 October 2009 "to establish courts at grass roots level for providing access to justice to the citizens at their doorsteps".<sup>402</sup> Deemed the lowest tier of the judiciary in India, the *Gram Nyayalaya* was specifically formalised as an institution to ensure access to justice, particularly in rural areas. It is a fully fledged and fully resourced mobile court which travels to the people at specific intervals. They operate in a similar fashion as South African periodical courts, which visit rural and outlying areas regularly, taking justice to the people. Vital aspects of the *Gram Nyayalayas Act* are discussed below.

##### 3.9.4.1 Jurisdiction and authority

A *Gram Nyayalaya* is presided over by a *Nyayadhikari*<sup>403</sup>, who can only be appointed as such if he is "eligible to be appointed as a judicial magistrate

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<sup>401</sup> Law Commission of India 114th Report on *Gram Nyayalaya* August 1986 7.

<sup>402</sup> The Preamble to the *Gram Nyayalayas Act* 4 of 2009.

<sup>403</sup> Effectively, the presiding officer of the *Gram Nyayalaya*.

of the first class".<sup>404</sup> The salary and benefits of the *Nyayadhikari* will also be the same as a first class judicial magistrate in India.<sup>405</sup> A vast difference exists to the *Nyaya Panchayat Act* where the presiding officer or officers required no particular qualification, save to be fit and proper persons. On the other hand, the presiding officer of the *Gram Nyayalaya* must be a legally qualified person and bears the same status and responsibility as a judicial magistrate. Such judicial magistrate of first class is appointed by the State Government after consulting with the relevant high court.<sup>406</sup> It is interesting to note that section 6(2) of the Act dictates that representation of members of "Scheduled Castes" and "Scheduled Tribes" as well as women should be considered when appointing a *Nyayadhikari*.<sup>407</sup> Furthermore, two advocates are appointed for each *Gram Nyayalaya* and they offer free representation to the parties in both civil and criminal cases. Like the *Nyaya Panchayat Act*, section 11 of this Act confers upon the *Gram Nyayalaya* jurisdiction over both civil and criminal matters.<sup>408</sup>

A *Gram Nyayalaya* may receive a case either from the police or directly from the complainant.<sup>409</sup> In criminal matters, a *Gram Nyayalaya* can try offences which bear a maximum penalty of a one-year prison sentence, unlike the *Nyaya Panchayat* which may not hear matters if they carry a term of imprisonment. Fines can also be imposed by the *Gram Nyayalayas*. In civil matters, the *Gram Nyayalayas* can preside over all civil cases as classified

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<sup>404</sup> Section 6 of the *Gram Nyayalayas Act* 4 of 2009.

<sup>405</sup> Section 7 of the *Gram Nyayalayas Act* 4 of 2009: "The salary and other allowances payable to, and the other terms and conditions of service of, a *Nyayadhikari* shall be such as may be applicable to the Judicial Magistrate of the first class."

<sup>406</sup> Section 5 of the *Gram Nyayalayas Act* 4 of 2009: The State Government shall, in consultation with the High Court, appoint a *Nyayadhikari* for every *Gram Nyayalaya*"; Section 6 of the *Gram Nyayalayas Act* 4 of 2009 - A person shall not be qualified to be appointed as a *Nyayadhikari* unless he is eligible to be appointed as a Judicial Magistrate of First Class"; Section 7 of the *Gram Nyayalayas Act* 4 of 2009 "The salary and other allowances payable to, and the other terms and conditions of the service of a *Nyayadhikari* shall be such as may be applicable to the Judicial Magistrate of First Class."

<sup>407</sup> Section 6(2) of the *Gram Nyayalayas Act* 4 of 2009: "While appointing a *Nyayadhikari*, representation shall be given to the members of the Scheduled Castes, the Scheduled Tribes, women and such other classes or communities as may be specified by notification, by the State Government from time to time."

<sup>408</sup> Section 11 of the *Gram Nyayalayas Act* 4 of 2009: "Notwithstanding anything contained in the *Code of Criminal Procedure*, 1973 or the *Code of Civil Procedure*, 1908 or any other law for the time being in force, the *Gram Nyayalaya* shall exercise both civil and criminal jurisdiction in the manner and to the extent provided under this Act."

<sup>409</sup> Section 12 of the *Gram Nyayalayas Act* 4 of 2009: "Notwithstanding anything contained in the *Code of Criminal Procedure*, 1973 or any other law for the time being in force, the *Gram Nyayalaya* may take cognizance of an offence on a complaint or on a police report."

under the Second Schedule.<sup>410</sup> The normal trial procedure follows in both civil and criminal matters, although the strict legal rules do not apply, as with the *Nyaya Panchayat*.<sup>411</sup> Like the *Nyaya Panchayat*, any of the official languages can be used. Unlike the *Nyaya Panchayat* which is limited to two months, the *Gram Nyayalaya* must process and finalise a case within ninety days of its institution and must pronounce judgement within one week of the last hearing.

It is interesting to note that as per section 16 of the Act, the *Gram Nyayalayas* may also receive enrolled cases from a district court or a court of session.<sup>412</sup> Once these cases have been registered, the *Gram Nyayalayas* may either retry them or continue from the stage at which it was transferred from the court *a quo*. Advocates can represent parties at the *Gram Nyayalayas* and free legal services are provided for accused persons who are unable to afford representation.

If the matter proceeds to trial, the normal trial procedure ensues, and the appellant has the right to appeal within thirty days of judgement.<sup>413</sup> All appeals are referred to the Court of Session, (a district court) which must finalise the appeal within six months.<sup>414</sup>

#### 3.9.4.2 ADR under the *Gram Nyayalayas Act*

Conciliation is actively encouraged in this Act. Section 26 specifically instructs that in every case and at the very first instance, the *Gram Nyayalaya* must make every endeavour to "assist, persuade and conciliate

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<sup>410</sup> Section 13(1)(a) of the *Gram Nyayalayas Act* 4 of 2009: "Try all suits or proceedings of a civil nature falling under the classes of disputes specified in Part I of the Second Schedule."

<sup>411</sup> Section 30 of the *Gram Nyayalayas Act* 4 of 2009: "A *Gram Nyayalaya* may receive as evidence any report, statement, document, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act 1872."

<sup>412</sup> Section 16(7) of the *Gram Nyayalayas Act* 4 of 2009: "The District Court or the Court of Session, as the case may be, with effect from such date as may be notified by the High Court, may transfer all the civil or criminal cases, pending before the courts subordinate to it, to the *Gram Nyayalaya* competent to try or dispose of such cases."

<sup>413</sup> Section 33(4) of the *Gram Nyayalayas Act* 4 of 2009: "Every appeal under this section shall be preferred within a period of thirty days from the date of judgement, sentence or order of a *Gram Nyayalaya*: provided that the Court of Session may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period."

<sup>414</sup> Section 33(6) of the *Gram Nyayalayas Act* 4 of 2009: "An appeal preferred under sub-section (5) shall be heard and disposed of by the Court of Session within six months from the date of filing of such appeal."

the parties" to arrive at a just settlement.<sup>415</sup> Furthermore, the *Gram Nyayalayas* may adjourn to allow for conciliation proceedings to take place between the parties.<sup>416</sup> The conciliation efforts are well organised. In terms of section 27, only qualified social workers may act as conciliators and only if they appear on the panel prepared by the district judge.<sup>417</sup>

This important provision of the Act, coupled with the provisions of section 9<sup>418</sup> not only provides for ADR, but allows welcome relief for those sections of the population who are not able to access justice easily. This mobile court, not only allows for easy access to justice, but the ADR mechanisms provides for effective finalisation of cases. A huge problem encountered in India, is the extensive case backlog which leads to massive delays, particularly in the lower courts.<sup>419</sup> If the ADR efforts fail, the *Gram Nyayalaya* must proceed with that trial.

#### 3.9.4.3 Court procedure under the *Gram Nyayalayas Act*

Chapter 6 of the Act sets out the trial procedure. Like the *Nyaya Panchayats Act*, the *Gram Nyayalayas Act* has very relaxed rules of evidence<sup>420</sup>, allows

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<sup>415</sup> Section 26(1) of the *Gram Nyayalayas Act* 4 of 2009: "In every suit or proceeding, endeavour shall be made by the *Gram Nyayalaya* in the first instance, where it is possible to do so, consistent with the nature and circumstances of the case, to assist, persuade and conciliate the parties in arriving at a settlement in respect of the subject matter of the suit, claim or dispute and for this purpose, a *Gram Nyayalaya* shall follow such procedure as may be prescribed by the High Court."

<sup>416</sup> Section 26(2) of the *Gram Nyayalayas Act* 4 of 2009: "Where in any suit or proceeding, it appears to the *Gram Nyayalaya* at any stage that there is a reasonable possibility of a settlement between the parties, the *Gram Nyayalaya* may adjourn the proceeding for such period as it thinks fit to enable them to make attempts to affect such a settlement."

<sup>417</sup> Section 27(1) of the *Gram Nyayalayas Act* 4 of 2009: "For the purposes of section 26, the District Court shall, in consultation with the District Magistrate, prepare a panel consisting of the names of social workers at the village level having integrity for appointment as Conciliators who possess such qualifications and experience as may be prescribed by the High Court."

<sup>418</sup> Section 9(1) of the *Gram Nyayalayas Act* 4 of 2009: "The *Nyayadhikari* shall periodically visit the villages falling under his jurisdiction and conduct trial or proceedings at any place which he considers is in close proximity to the place where the parties ordinarily reside or where the whole or part of the cause of action had arisen: provided that where the *Gram Nyayalaya* decides to hold mobile court outside its headquarters, it shall give wide publicity as to the date and place where it proposes to hold mobile court."

<sup>419</sup> Court News Volume VIII Issue number 2. For the period April to June 2012 there were over 26 000 000 cases pending in India's lower courts.

<sup>420</sup> The *Gram Nyayalayas Act* clearly sets out that it is not bound by the Rules of Evidence as provided for in the *Indian Evidence Act*, 1872.

for evidence to be tendered both orally as well as via affidavit, and has the power to summon witnesses and examine documentary evidence.<sup>421</sup>

#### 3.9.4.4 The appeal procedure

The appeal procedure is dealt with in Chapter 7, section 33<sup>422</sup> of the Act. No appeal shall follow from a case where a party pleaded guilty in the *Gram Nyayalayas* or where the fine imposed is less than one thousand rupees (approximately R250). All other appeals arising from the *Gram Nyayalayas*, whether civil or criminal are forwarded to the local district court for consideration.<sup>423</sup>

#### 3.9.4.5 Main features of the *Gram Nyayalayas Act*

The *Gram Nyayalaya* is a mobile court which takes justice to the most rural areas of India. It is presided over by a magistrate. Legal representation offered by the state is available for indigent parties. Every attempt to resolve the dispute through ADR must be made from the date of first appearance, failing which the case proceeds to trial in this forum. Certain categories of civil and criminal offences are heard in the *Gram Nyayalaya* and the maximum penalty of a one year prison sentence may be imposed in criminal cases. As with the *Nyaya Panchayat*, stringent time frames are allocated for the finalisation of cases and appeals.

After discussing the two vital pieces of legislation above, the *Nyaya Panchayats Act* as well as the *Gram Nyayalayas Act*, ADR in Indian criminal law will not be complete without a proper discussion of the *Lok Adalat* which is widely considered as the most important mode for ADR.<sup>424</sup>

#### 3.9.5 *Lok Adalats*

The third and by far the most popular forum for ADR settlements in India is the *Lok Adalat*. The word *Lok Adalat* literally means "people's court", arising

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<sup>421</sup> Chapter VI *Gram Nyayalayas Act* 4 of 2009, particularly sections 29-32 which are the same as the *Nyaya Panchayat Act* discussed at paragraph 3.9.3 above.

<sup>422</sup> Section 33(2) of the *Gram Nyayalayas Act* 2009: "No appeal shall lie where an accused person has pleaded guilty and has been convicted on such plea and where the *Gram Nyayalaya* has passed a sentence of fine not exceeding one thousand rupees."

<sup>423</sup> Section 33(3) *Gram Nyayalayas Act* "an appeal shall lie from any judgement, sentence or order of a *Gram Nyayalaya* to the Court of Session."

<sup>424</sup> Khan *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism* 47.

from the word *Lok* which means people and *Adalat* which means court.<sup>425</sup> It is interesting to note that a *Lok Adalat* is not a court in the strict and formal sense of the word. Rather, it resembles a forum where disputes are settled between the parties using ADR mechanisms. It can be likened to a process of dispensing justice outside of the formal and rigid court process. According to Khan,<sup>426</sup> "*Lok Adalat* is a forum where voluntary efforts are made to bring about the settlement of disputes". Furthermore, to place the *Lok Adalat* in perspective, Khan<sup>427</sup> outlines that it is a "para-judicial institute developed by the people" and that its primary function is to provide "speedy and effective justice at the doorsteps of the people".

History clearly indicates that *Lok Adalats* have been a prominent feature of the Indian justice landscape from time immemorial.<sup>428</sup> Even after the numerous and constant invasions of India over the years, the structure and mechanism of these courts remained largely unchanged.<sup>429</sup> Fundamentally, *Lok Adalats* provide an effective alternate dispute resolution device for the expeditious and inexpensive delivery of justice.<sup>430</sup> An important point to take into consideration is that the *Lok Adalat* was formalised in recent years, not to displace the ordinary court system, but rather to complement and enhance it. The value and benefits of the *Lok Adalat* cannot be underestimated. Consequently, the *Legal Services Authorities Act* 39 of 1987 which came into effect on 11 October 1987 formalised and legislated *Lok Adalats*. This Act is discussed in the following section.

### 3.9.5.1 Procedure of the *Lok Adalat*

When the *Legal Services Authorities Act* is perused it becomes clear that the procedure applicable to the *Lok Adalat* is purposefully uncomplicated, clear-cut and straightforward. Section 19 of the Act stipulates that state, high and district courts may "organise *Lok Adalats* at such intervals and such places and for exercising such jurisdiction and for such areas as it thinks fit".<sup>431</sup> Section 19(2) declares that the *Lok Adalat* may be composed "of

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<sup>425</sup> Dashora March 2011 Significance of Lok Adalats in Present Scenario [www.legalservicesindia.com](http://www.legalservicesindia.com) 1.

<sup>426</sup> Khan *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism* 29.

<sup>427</sup> Khan *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism* 29.

<sup>428</sup> Marge 1984 *AIR Journal* 68.

<sup>429</sup> Beveridge *A Comprehensive History of India* 102; Sarkar *Mughal Administration* 72.

<sup>430</sup> Sarkar *Law Relating to Lok Adalats and Legal Aid* 11.

<sup>431</sup> Section 19(1) of the *Legal Services Act* 39 of 1987: "Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee may organize Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit."

serving or retired judicial officers and such other persons as prescribed by the *Legal Services Authority*".<sup>432</sup>

Section 20 is pertinent as it pronounces that any case which is pending in any court can be transferred to the *Lok Adalat*, with the permission of the parties concerned. Even if the parties are unwilling for the matter to be transferred to the *Lok Adalat*, a court can, of its own accord, transfer such matter if it is satisfied that the *Lok Adalat* will be the appropriate forum to hear the dispute.<sup>433</sup> Parties may appoint legal representation and if they cannot afford such, free legal aid is provided. The *Lok Adalat* operates on finalising cases based on compromise between the disputing parties. In the case of *State Bank of Indore v Balaji Traders*<sup>434</sup> the Supreme Court stated that:

The *Lok Adalat* is a forum for alternate dispute resolution. The Bench of *Lok Adalat* can act on conciliation. It has no adjudicatory functions. For adjudication of a case, the parties had to be sent back to a regular court.

As a result, it is clear from the above, that the *Lok Adalat* actively promotes ADR and its sole purpose is to resolve disputes and not adjudicate trials. Section 22(c)(5) specifically states "the permanent *Lok Adalat* shall, during conduct of conciliation proceedings under sub-section (4), assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner".

Importantly, the Supreme Court reaffirmed, in the case of *Interglobe Aviation v Satchitanand*<sup>435</sup> that the proceedings at the *Lok Adalat* are conciliatory in nature and not adjudicatory.

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<sup>432</sup> Section 19(2) of the *Legal Services Act* 39 of 1987:  
"Every *Lok Adalat* organized for an area shall consist of such number of-  
(a) serving or retired judicial officers; and  
(b) other persons, of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee or, as the case may be, the Taluk Legal Services Committee, organizing such *Lok Adalat*."

<sup>433</sup> Section 20(1)(b)(ii) of the *Legal Services Authorities Act* 39 of 1987 states that "the court is satisfied that the matter is an appropriate one to be taken cognizance of by the *Lok Adalat*, the court shall refer the case to the *Lok Adalat*".

<sup>434</sup> *State Bank of Indore v Balaji Traders* 20033 RCR (Civil) 339.

<sup>435</sup> *Interglobe Aviation Ltd v N Satchitanand* 2011(7) SCC 463.



### 3.9.5.2 Referral of cases to the *Lok Adalat*

Section 20(1) to (3) of the *Legal Services Authorities Act 39 of 1987* sets out the process in which cases can be referred to the *Lok Adalat* for consideration. They are as follows:

- (1) Where a case referred to in clause (i) of sub-section (5) of section 19.
  - (a) the parties thereof agree; or
  - (b) one of the parties thereof makes an application to the court, for referring the case to the *Lok Adalat* for settlement and if such court is *prima facie* satisfied that there are chances of such settlement; or
- (ii) the court is satisfied that the matter is an appropriate one to be taken cognizance of by the *Lok Adalat*, the court shall refer the case to the *Lok Adalat*:

provided that no case shall be referred to the *Lok Adalat* under sub-clause (b) of clause (i) or clause (ii) by such court except after giving a reasonable opportunity of being heard to the parties.

- (2) Notwithstanding anything contained in any other law for the time being in force, the Authority or Committee organizing the *Lok Adalat* under sub-section (1) of section 19 may, on receipt of an application from any one of the parties to any matter referred to in clause (ii) of sub-section (5) of section 19 that such matter needs to be determined by a *Lok Adalat*, refer such matter to the *Lok Adalat*, for determination:

provided that no matter shall be referred to the *Lok Adalat* except after giving a reasonable opportunity of being heard to the other party.

- (3) Where any case is referred to a *Lok Adalat* under sub-section (1) or where a reference has been made to it under sub-section (2), the *Lok Adalat* shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

Briefly, the following is a summary of the procedure highlighted in the above section of the Act:

- a) a case can be referred from an ordinary court to the *Lok Adalat* with the consent of both parties to the dispute;
- b) a case can be referred to the *Lok Adalat* as soon as one of the parties makes an application for that case to be referred to that forum; and
- c) Even if both parties are not in agreement, but the court is of the opinion that the matter before it should be referred to the *Lok Adalat* for ADR consideration, such a court can, of its own accord, do so.

### 3.9.5.3 Cases suitable for the *Lok Adalat*

Section 22(C)(1) of the *Legal Services Authorities Act* stipulates the type of cases which the *Lok Adalat* can take cognisance of. They are basically the following:

- a) any dispute which is brought directly to or referred from another court to the Lok Adalat;
- b) any offence which as is non-compoundable;
- c) any offence where the value of the property does not exceed twenty-five lakh rupees.<sup>436</sup>

In analysing the above section, it becomes evident that a wide spectrum of cases can be dealt with in the *Lok Adalat*. In the case of *Afcons Infrastructure and Ors v Cherian Varkey Construction and Ors*,<sup>437</sup> the Supreme Court set out the following as suitable cases for the *Lok Adalat*:

- a) cases involving contracts, trade and commerce;
- b) all cases involving familial and marital disputes;
- c) all cases requiring the reparation of pre-existing relationships;
- d) all cases involving disputes between neighbours, friends and other members of the community;
- e) all consumer related disputes;
- f) all road accident claims; and
- g) all claims arising from tortuous liability.<sup>438</sup>

### 3.9.5.4 Judicial procedure at the *Lok Adalat*

A crucial and defining aspect of the *Lok Adalat* is that it gives less importance to legal technicalities and places more emphasis on the harmonious resolution of disputes. A *Lok Adalat* is chaired by a judicial

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<sup>436</sup> This figure converts to approximately R500 000 as per the rupee/rand currency conversion rate on 18 April 2017.

<sup>437</sup> *Afcons Infrastructure and Ors v Cherian Varkey Construction and Ors* 2010 8 SCC 24.

<sup>438</sup> *Afcons Infrastructure and Ors v Cherian Varkey Construction and Ors* 2010 8 SCC 24, 48-54.

officer, retired or in service<sup>439</sup> as well as "other persons"<sup>440</sup> and as per section 22, a *Lok Adalat*:

Has the same powers as are vested in a civil court under the *Code of Civil Procedure* 1908".

This is meaningful as this section essentially recognises the *Lok Adalat* as a fully-fledged court and confers upon it the same status as other civil courts in the country. In addition, according to section 22(1),<sup>441</sup> the *Lok Adalat* has the power to do the following:

- a) to summon a witness and enforce the attendance of a witness and to examine him or her under oath;
- b) to effect the discovery and production of documents;
- c) to receive evidence by way of affidavits;
- d) to requisition any public document or record from any court or office; and
- e) to deal with any other such matters as may be prescribed.

Furthermore, as directed by section 22(2), "all proceedings before a *Lok Adalat* shall be deemed to be judicial proceedings", and "every *Lok Adalat* shall be deemed to be a civil court". Effectively, this section reaffirms that the *Lok Adalat* is a properly recognised court.

As clarified in the case of *Menon v Shaji*<sup>442</sup> the Supreme Court held that there was no restriction on the power of the *Lok Adalat* to authorise an award based on the agreement arrived at between the disputing parties. Consequently, the *Lok Adalat* can hear matters from the civil and criminal courts, the family court, the rent control court, the consumer redress forum,

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<sup>439</sup> Section 19(2) of the *Legal Services Authorities Act* 39 of 1987:  
"Every *Lok Adalat* organized for an area shall consist of such number of  
(a) serving or retired judicial officers; and  
(b) other persons,  
of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee or, as the case may be, the Taluk Legal Services Committee, organizing such *Lok Adalat*."

<sup>440</sup> Section 19(2)(b) of the *Legal Services Authorities Act* 1987.

<sup>441</sup> *Legal Services Authorities Act* 39 of 1987.

<sup>442</sup> *KN Govindan Kutt Menon v CD Shaji* 2012 2 SCC 51.

motor accidents claims tribunals and other tribunals.<sup>443</sup> Clearly the *Lok Adalat* has widespread jurisdiction relating to the type of cases that fall within its ambit.

According to section 22D, "the *Lok Adalat* shall, while conducting conciliation proceedings, be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice, and shall not be bound by the *Code of Civil Procedure* of 1908 and the *Indian Evidence Act* of 1908".

The importance of the above section cannot be minimised. Undoubtedly, the intention is not to confine the *Lok Adalat* to legal jargon and obtuse technicalities which will go over the heads of the parties. The procedure is significantly simplified and much of the technicalities have been removed. The aim of this provision is obviously to streamline proceedings to such an extent that it does not become a burden on the participants in the attempt to steer them towards an amicable compromise. Most importantly, in as much as the *Lok Adalat* does not have to conform to strict legal rules relating to procedure and evidence, the rules of *dharma*, natural justice and fairness always remain paramount.

It must be noted that in the very first instance, the Act instructs the *Lok Adalat* to utilise the process of conciliation and to support the parties in their endeavour in arriving at an agreeable settlement in a fair and objective manner.<sup>444</sup>

Upon closer inspection, it will appear that the "other persons" as referred to in section 19(2)(b), in addition to the judicial officer, are usually social workers or members of the legal profession. In recent years, the practice has been that the *Lok Adalat* bench is made up of the judicial officer, one practising advocate and a third person, usually an expert, depending on the nature of the case before it. For example, if the case involves a dispute relating to medical malpractice or such, a medical doctor will be the third person on the bench, and if the case is family or community oriented a social worker or counsellor will be involved. Consequently, any suitable person who can assist the bench and the parties in arriving at a fair, just and informed settlement can form the third person.<sup>445</sup>

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<sup>443</sup> Rao *Handbook for Dispute Resolvers under ADR Processes* 265.

<sup>444</sup> Section 22(D) of the *Legal Services Authorities Act* 39 of 1987.

<sup>445</sup> Sharma *Lok Adalats as most Popular ADR mode in India: With Special Reference to HP* 16.

The award passed upon finalisation of the dispute is final and becomes an order of the *Lok Adalat*. It cannot be appealed because primarily, the award is regarded as a judgement by consent.<sup>446</sup>

#### 3.9.5.5 ADR as per the *Lok Adalat* and the role of the judicial officer

Agarwal<sup>447</sup> deduces that the *Lok Adalat* is a fine blend of the main methods of ADR, namely negotiation, mediation, conciliation and arbitration. Agarwal<sup>448</sup> goes further to add:

The ancient concept of settling disputes through mediation, negotiation or through arbitral process known as 'people's court' verdicts or decisions of *Nyaya Panch*, is conceptualised and institutionalised in the philosophy of *Lok Adalat*.

Bearing in mind, that since ancient times, disputes have been resolved using the *panchayat* system, the *Lok Adalat* is reminiscent of that system and familiar to the community at large. More than that, it is a system which has gained the trust and confidence of the people owing to its age-old traditions. As a result, such an accustomed system is more likely to be accepted, respected and probably has greater credibility in any community. The following section examines the methods of ADR as employed in the *Lok Adalat*.

Under ordinary circumstances, ADR usually takes place outside of a formal court establishment. With the *Lok Adalat* however, being a fully-fledged court, and presided over by a judicial officer, the scenario is quite unique, in that it is a court that is specifically legislated for ADR purposes. As a result, some formality is retained. The presence of the judicial officer legitimises the ADR proceedings as well as the outcome, all in one course of action.

The ADR proceedings are overseen by a judicial officer, who is a neutral role-player, who directs the parties towards compromise. To retain impartiality and fairness, the bench consists of at least three persons, akin to a jury of sorts. The parties themselves are not noticeably in direct control of the proceedings, although they can determine the outcome. The judicial officer may grant an adjournment to allow for more time for the parties to

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<sup>446</sup> Section 21(2) of the *Legal Services Authorities Act* 39 of 1987: "Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award."

<sup>447</sup> Agarwal *Role of Alternate Dispute Resolution Methods: Development of Society: Lok Adalat in India* 4.

<sup>448</sup> Agarwal *Role of Alternate Dispute Resolution Methods: Development of Society: Lok Adalat in India* 5.

engage in and deliberate on the terms of the agreement.<sup>449</sup> Each party presents a factual account of the dispute, and the strict formalities and rules that apply in ordinary court cases do not apply to the *Lok Adalat*. Consequently, this makes the proceedings simple, applicable and meaningful to the ordinary man in the street.

The judicial officer, after proceeding with the conciliation route, navigates the parties towards an acceptable compromise, which eventually becomes a recorded settlement of the *Lok Adalat* and as contextualised in the section below, has the effect of a civil court order. Thus, the role of the judicial officer in the *Lok Adalat*, is not that of a passive bystander, but rather an active participant, whose duty it is to assist the parties in arriving at a just settlement.

#### 3.9.5.6 The *Lok Adalat* award

After negotiations between the parties, an agreement is arrived at. Section 21 sets out the status of a *Lok Adalat* award. The following are the salient points of section 21:<sup>450</sup>

- a) Every award of the *Lok Adalat* is deemed to be and has the effect of a decree of a civil court.
- b) The award conferred by the *Lok Adalat* is considered final and is binding on all parties to the dispute.
- c) Because the award is ordered after the conciliation and negotiation agreement between the parties, it is considered completely voluntary, hence no appeal can arise from the award of the *Lok Adalat*.<sup>451</sup>

When the parties arrive at an understanding which becomes the agreement on the settlement of that dispute, both parties will have to sign the settlement agreement. The *Lok Adalat* then passes an award based on the terms of

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<sup>449</sup> Ramaswamy *Settlement of Disputes through Lok Adalats is one of the Effective Alternative Dispute Resolution on Statutory Basis* 93.

<sup>450</sup> Section 21 of the *Legal Services Act* 39 of 1987: "Every award of the *Lok Adalat* shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at by a *Lok Adalat* in a case referred to it under sub-section (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the *Court-fees Act*, 1870. Every award made by a *Lok Adalat* shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award."

<sup>451</sup> This aspect was reiterated in the case of *PT Thomas v Thomas* 2005 6 SCC 478.

this resolution and a copy of the award is handed over to the disputants. This award is final, enforceable and then becomes a decree of court.<sup>452</sup> Failure to comply with the terms of the award will result in that order being executed by the civil court.<sup>453</sup>

### 3.9.5.7 Failure to arrive at a settlement

If, after the best efforts of the parties, guided by their representatives, social workers and other conciliators as well as the *Lok Adalat* panel, no compromise is arrived at, that dispute is then referred to an ordinary criminal or civil court for trial. The *Legal Services Authorities Act* stipulates very clearly that the *Lok Adalat* may not adjudicate any matter. This is to prevent the *Lok Adalat* from being hampered by litigation since its primary role is conciliatory. In the case of *BP Moideen Sevamandir v AM Kutty Hassan*<sup>454</sup> the Supreme Court stated that since there was no compromise between the parties in the *Lok Adalat*, the matter must be referred to the court for an ordinary adjudicatory process to follow, and that there was no punishment for not being able to arrive at a settlement.

Importantly, as per the case of *Pathak v State*<sup>455</sup> the Supreme Court declared that any statements made by any party at the *Lok Adalat* will not be regarded as evidence once that matter is referred to the trial court.

### 3.9.6 Essential differences between the *Nyaya Panchayats Act*, the *Gram Nyayalayas Act* and the *Legal Services Authorities Act* on *Lok Adalats*

**Table 1: Differences between the *Nyaya Panchayats Act*, the *Gram Nyayalayas Act* and the *Legal Services Act* on *Lok Adalats*<sup>456</sup>**

	<i>Nyaya Panchayats</i>	<i>Gram Nyayalayas</i>	<i>Lok Adalats</i>
Presiding officer/s	Community members with no legal qualification necessary, and	A legally qualified person, with the same rank and	Retired judges, advocates together with professional volunteers such as

<sup>452</sup> Chowbe and Dhanokar Date Unknown *Lok Adalat: A Strategic Forum for Speedy and Equitable Justice* <http://papers.ssrn.com>; *New India Insurance Company Ltd v Sabharathanam* AIR 2009 Kerala 71.

<sup>453</sup> *KN Govindan Kutty Menon v CD Shaji* Civil Appeal Number 10209 of 2011 17 1.

<sup>454</sup> *BP Moideen Sevamandir v AM Kutty Hassan* 2009(2) SCC 198.

<sup>455</sup> *Mayank Pathak v State* (Government of NCT Delhi) 2015 11 SCC 798.

<sup>456</sup> Ahmad 2007 *Centre for Policy Research* 6.

	elected by the community.	status as a judicial officer of first class.	doctors, social workers.
Representation	No legal representation is allowed and parties must appear in person.	Parties can appear in person to represent themselves or they can appoint their own lawyers, if not, state appointed lawyers in the form of legal aid is provided.	Same as <i>with Gram Nyayalayas</i> .
Penalty	Only a fine, no term of imprisonment can be imposed.	A fine as well as a term of imprisonment of a maximum of one year in appropriate cases can be imposed.	No fine or term if imprisonment can be imposed as the matter is settled by ADR and the order is awarded according to the desires of the parties.
Procedure applicable	Not bound by the Code of Criminal or Civil Procedure.	Not bound by the Code of Criminal or Civil Procedure.	Not bound by the Code of Criminal or Civil Procedure. Does not have powers of adjudication, only reconciliation.
Powers of adjudication	Can proceed with trial if the reconciliation efforts fail.	Can proceed with the trial if the reconciliation efforts fail.	Cannot proceed with trial if the ADR efforts fail. The case is then referred to a criminal or civil court for adjudication.
Appeal procedure	An appeal is lodged to a full bench of the <i>Nyaya Panchayat</i> made up of five <i>Panchas</i> and two other persons. If this appeal fails, it can be escalated to the <i>District Nyaya Panchayat Appellate Authority and Ombudsman</i> which is the highest and final appeal authority for the <i>Nyaya Panchayat</i> .	An appeal can be lodged to a District Court of Session which is an ordinary district court. No further appeal can arise from a decision of the District Court of Session	No appeals can arise from the <i>Lok Adalat</i> as the settlement is considered voluntary and is binding on both parties.



### 3.10 Success of ADR in Hindu law

In India, the backlog of cases is a problem of catastrophic proportions. It is not unheard of for litigants to wait twenty years or more for their case to come to trial.<sup>457</sup> Shockingly, the oldest case in India was finalised on 3 March 2013 after being on the court roll for 76 years and involved a claim of 807 rupees (around R200).<sup>458</sup> At any given time, the lower courts in India carry a case load of nothing less than 26 million cases.<sup>459</sup> Understandably, other avenues had to be sought to address this issue and to bring speedy justice to the people. According to Bail,<sup>460</sup>

*Lok Adalats* have under the umbrella of conciliatory and consensual dispute resolution, evolved into mechanisms for prompt disposal of vast numbers of petty civil and criminal cases.

Between 27 February 2013 and 3 March 2013, a period of five days, a mega *Lok Adalat* was held across all districts in the province of Jharkhand India. The entire district *Lok Adalats* coordinated their dates so that they could all sit simultaneously during this five-day period. A total of 15 140 cases was finalised by ADR across the province during those five days.<sup>461</sup> Likewise, a *Lok Adalat* chaired by Justice Bedi on 2 March 2002 successfully settled 620 cases in a single sitting in a single district.<sup>462</sup> On 23 November 2013 a national *Lok Adalat* was held throughout India, which meant that every *Lok Adalat* in the country sat simultaneously on that day, and amicably resolved 2.7 million cases.<sup>463</sup> All these cases had been transferred to the *Lok Adalat* from the district and subordinate courts. As on 30 September 2013 the lower courts carried a case load of over 27.5 million cases.<sup>464</sup> Hence the *Lok Adalat* in one day, reduced the district and subordinate court case load by approximately ten percent.

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<sup>457</sup> Bail and Kotte August 2014 *Gram Nyayalayas and Access to Justice in India* www.academia.edu 5-7.

<sup>458</sup> Singh 2013 *The Indian Express* 4.

<sup>459</sup> Data issued by the Supreme Court of India in Court News Volume VII, Issue Number 2 April – June 2012.

<sup>460</sup> Bail and Kotte August 2014 *Gram Nyayalayas and Access to Justice in India* www.academia.edu 5-7.

<sup>461</sup> Nyaya Dagar *Fifth and Sixth Day Mega Lok Adalat* 57.

<sup>462</sup> Anon date unknown www.tribuneindia.com.

<sup>463</sup> Bail and Kotte August 2014 *Gram Nyayalayas and Access to Justice in India* www.academia.edu 5-7.

<sup>464</sup> Bail and Kotte August 2014 *Gram Nyayalayas and Access to Justice in India* www.academia.edu 5-7.

In November 2016, a national *Lok Adalat* was held at every district across India. On a single day, the *Lok Adalat* settled 1.8 million cases.<sup>465</sup> On 8 April 2017, 600 000 cases were settled on a single day at the second national *Lok Adalat* held for the year.<sup>466</sup> Cases settled in these *Lok Adalats* included matrimonial disputes, partition suits, motor accident claims, bank loan cases, dishonoured cheques, petty criminal cases and other civil matters.<sup>467</sup>

According to Khan,<sup>468</sup> since the inception of *Lok Adalats* in 1987, millions of cases have been amicably resolved at this forum. Justice Thakur announced on 10 November 2015 that the *Lok Adalats* in India had settled well over 82 million cases in a twenty-year period.<sup>469</sup> Noticeably, the figures are self-evident and the *Lok Adalat* is a success story in its own right.

### **3.11 Conclusion**

This chapter focused exclusively on ADR in Hindu law from ancient times up to today. Upon closer inspection of the development of ADR it certainly becomes evident that the mechanisms and systems employed played a vital role in resolving disputes over the years. Three noteworthy pieces of legislation from India were scrutinised and discussed. These Acts will be the point of departure in drawing a comparison between ADR as practised in India and South Africa and will be discussed further in the next chapter.

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<sup>465</sup> Daksh *Deccan Chronicle* 2016.

<sup>466</sup> Mishra *Live Law India* 1.

<sup>467</sup> Mishra *Live Law India* 1.

<sup>468</sup> Khan *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism* 121-122.

<sup>469</sup> Thakur *The Indian Express* 1.

## CHAPTER 4: A CRITICAL ANALYSIS OF THE SOUTH AFRICAN AND HINDU ADR SYSTEMS RELEVANT TO CRIMINAL LAW

### 4.1 Introduction

It is acknowledged that conventional law courts play a vital role in dispensing justice. However, it must be emphasised that litigation is not the only means to arrive at fair and just outcomes. In fact, there are many instances where ADR will be a more appropriate option to achieve that end. Earlier in this research paper, a case of fraud, alternatively theft in the town of Sasolburg was discussed.<sup>470</sup> Justice was not realised for the complainant who withdrew the case because the accused was her daughter. She lost a significant amount of money with no restitution. This case exposed the South African criminal justice system's shortcomings regarding ADR,<sup>471</sup> as this option was and is still not available to complainants in cases such as these, which are taken seriously by the NPA. The reasons were explained in chapter one.<sup>472</sup>

Should the mother have had the option of ADR available to her, as practised in India, with the remedies detailed in the previous chapter,<sup>473</sup> the outcome would certainly have been different.<sup>474</sup> It is an accepted fact that justice and fairness are universal concepts, which should be applicable to all in equal measure. In as much as the precise principles and application thereof differ from one society and country to another, the overall intention supporting these concepts remains the same.

Within the context of the Sasolburg case, it is submitted that choices and options must be available to all, especially victims, for informed decisions to be made, with more control over the outcome of disputes that would satisfy justice. There is a need for more creative ways of settling criminal disputes in South Africa and this should form part of the judicial reforms of a young

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<sup>470</sup> Refer to paragraph 1.1 in chapter 1.

<sup>471</sup> Paragraph 2.2.13 in chapter 2 discusses this lacuna within criminal law in South Africa in detail.

<sup>472</sup> Paragraph 1.1 in chapter 1 details the circumstances as well as the reasons why the complainant chose to withdraw the charge against her daughter. Paragraph 1.1 also sets out the limited options, which were available to the complainant. It must be noted that she had only two choices, either to proceed with prosecution, which could result in her daughter being convicted and imprisoned, or withdraw. She chose to withdraw.

<sup>473</sup> Refer to paragraph 3.9 in chapter 3, which sets out all the ADR options available in India in respect of criminal cases.

<sup>474</sup> The discussions in chapter 3 at paragraph 3.9 have relevance. The case could have easily been resolved through ADR in India.

democracy. It has been demonstrated in chapter two<sup>475</sup> that ADR has an invaluable role to play in resolving criminal disputes in South Africa and throughout the world. As averred by Mwenda:<sup>476</sup>

ADR processes have in their own way, endeavoured to bring justice to parties in dispute.

Therefore, ADR should not just be regarded as a mechanism that is "nice to have", so to speak, but should be an integral feature in the quest for justice.<sup>477</sup>

Although ADR is practised around the world, the basic concept remains the same everywhere and its application and usage are shaped and influenced by various factors.<sup>478</sup> The aim of this chapter is to demonstrate how ADR in South African criminal law both resembles and differs from that as practised in Hindu law in India. Therefore, this chapter concerns itself with a critical analysis of the two ADR systems. Similarities and differences are discussed and reforms suggested where necessary. Additionally, and most importantly, best practices and lessons from India will be highlighted, with the intention of incorporating similar systems and mechanisms into the South African criminal justice domain.<sup>479</sup>

## **4.2 A bird's eye view**

Chapter two sketched an outline of the nature and scope of ADR in South Africa. It looked at the practice of ADR within traditional communities before the arrival of the Dutch in 1652,<sup>480</sup> and traced its progress and development to present-day legislation. Chapter three presented the ADR scenario in India with emphasis on its application in criminal law. It cast an overview of the traditional systems of ADR from pre-historic times to present legislation, illustrating its growth and development.<sup>481</sup>

At this point, similarities and differences between the two legal systems are highlighted and discussed. In as much as there are salient similarities, when

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<sup>475</sup> Refer to paragraph 2.1.13 in Chapter 2, which discusses this concern.

<sup>476</sup> Mwenda *Paradigms of Alternate Dispute Resolution and Justice Delivery in Zambia* 22.

<sup>477</sup> Genn 2012 *Yale Journal of Law and the Humanities* 401-403.

<sup>478</sup> Martinez Cardozo *Journal of Conflict Resolution* 807.

<sup>479</sup> Chapter 5 will provide an overview of lessons learnt from India, as well as recommendations on improving ADR legislation in criminal law in South Africa.

<sup>480</sup> Refer to paragraph 2.1.4 in Chapter 2, which explains this aspect in detail.

<sup>481</sup> Refer to chapter 3, and specifically paragraph 3.9 which provides a detailed account of the traditional Indian systems of ADR.

providing a semblance of cohesion and solidarity between the two legal systems, the differences are striking and deserve scrutiny. As illustrated in preceding chapters,<sup>482</sup> the attitude and approach towards ADR in respect of criminal cases in India, as compared to South Africa are clear and well-defined. As such, they merit further exploration.

### 4.3 *uBuntu and dharma*

The first connection that merits discussion revolves around the concepts of *ubuntu* and *dharma*. As previously explained,<sup>483</sup> *ubuntu* is a timeless African concept which has many interpretations but primarily expresses itself as humanity and compassion. *Dharma*<sup>484</sup> is an ancient Sanskrit concept, which means righteousness. At first glance, the concepts of *ubuntu* and *dharma* appear vague and unrelated. However, upon closer inspection and deeper inquiry, they seem almost similar. As demonstrated in the previous chapters,<sup>485</sup> these concepts must prevail for ADR to succeed within the Indian and African mechanisms of ADR. Not only do both these concepts represent the collective consciousness of the people, but they also promote virtue, solidarity, morality and compassion. India has its *dharma* which supports and restores while South Africa has *ubuntu* which stands for the same and more.<sup>486</sup> Both concepts are characterised by an innate sense of righteousness and justice.<sup>487</sup>

The quest for justice is an eternal one. Everything that upholds, and is good, moral, truthful and just, can in a sense be declared as justice.<sup>488</sup> Indeed, justice should not only take place within the sphere of applying and enforcing laws, but rather and as well as in the manifestation of collective human conscience and morality, as demonstrated by *dharma* and *ubuntu*.<sup>489</sup> It is more than retribution, restoration, reformation, forgiveness, condemnation and punishment. Law, justice, *dharma* and *ubuntu* are

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<sup>482</sup> Chapter 2 at paragraph 2.1.3 set out the ADR mechanisms as practised in South Africa; Chapter 3 at paragraph 3.9 detailed the ADR practices in India.

<sup>483</sup> The concept of *ubuntu* featured in Chapter 2 at paragraph 2.1.5, paragraph 2.1.6 and paragraph 2.1.7. It was explained sufficiently hence it will not be explained further herein.

<sup>484</sup> Paragraph 3.6 in chapter 3 provides an explanation of the concept of *dharma*.

<sup>485</sup> Refer to paragraph 2.1.5 in chapter 2 as well as paragraph 3.6 in chapter 3 for further elaboration on the concepts of *ubuntu* and *dharma* respectively.

<sup>486</sup> Mokgoro 1998 *PELJ* 2-5.

<sup>487</sup> Refer to paragraph 2.1.5 in chapter 2, which deals with the principle of *ubuntu* and its relevance to ADR; Refer to paragraph 3.6 in chapter 3 which expound on the concept of *dharma*.

<sup>488</sup> Barkan and Bryjak *Fundamentals of Criminal Justice* 1.

<sup>489</sup> Sharma Date Unknown <http://www.bhu.ac.in>.

perceptibly interlinked. This profound connection between them is nothing more than a collective validation of the virtues of goodness, truth, mercy, equality and fairness.<sup>490</sup> These concepts are vital for ADR to succeed.

With ADR in the context of *dharma* principles being applied successfully in criminal cases in India, surely, it is conceivable that the same success can be achieved in the sphere of South African criminal law against the backdrop of *ubuntu*. At this point, links between the traditional leader and the *panchayat* system will be explored.

#### **4.4 Traditional leadership and the panchayat council**

Another institution that is common to both the Indian and African legal systems is its traditional forms of dispute resolution.<sup>491</sup> A South African traditional leader is responsible for dispute resolution in traditional African societies.<sup>492</sup> The *panchayat* council is accountable for resolving disputes at grass roots level in traditional communities in India.<sup>493</sup> Despite the African and Indian systems being separated by a huge geographical divide, their traditional systems appear to have developed simultaneously and there are many parallels between the two systems in so far as traditional leadership and the *panchayat* system are concerned.<sup>494</sup>

##### **4.4.1 Similarities**

The methods of conflict resolution employed within the Indian and African traditional systems are similar and many common features are seen in both systems. A few pertinent similarities will be discussed hereunder.

##### **4.4.1.1 Ancient origins**

Choudree<sup>495</sup> affirms:

The use of alternative methods of conflict resolution by the traditional societies of South Africa is deeply rooted in the customs and traditions of the various tribes of the sub-continent.

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<sup>490</sup> Sharma date unknown <http://www.bhu.ac.in>.

<sup>491</sup> Refer to paragraph 2.1.4 in chapter 2, which deals with traditional ADR mechanisms in South Africa, as well as paragraph 3.9 in chapter 3, which deals with traditional ADR systems in India.

<sup>492</sup> Refer to paragraph 2.1.4 in chapter 2.

<sup>493</sup> Refer to paragraph 3.9.1 in chapter 3.

<sup>494</sup> Refer to paragraph 3.9 in chapter 3.

<sup>495</sup> Choudree 1999 *AJCR* 2.

As described in the previous chapter,<sup>496</sup> both the *panchayat* council as well as the traditional leader utilise custom and tradition to settle disputes. Both the *panchayat* council as well as the traditional leader systems developed from ancient practices. These time honoured, tried and tested methods of resolving disputes are steeped in antiquity and can never be underestimated.<sup>497</sup> It is unfortunate that the exact origin of the practice of the *panchayat* system<sup>498</sup> or the traditional leader cannot be traced.<sup>499</sup> But there is no doubt as to their ancient origins.<sup>500</sup> There is also no doubt that these seemingly antiquated and outdated methods have stood the test of time and may prove more valuable today in our conflicted and litigious society, than ever before.

#### 4.4.1.2 Customs and traditions

Both the *panchayat* council as well as the traditional leader utilise custom and tradition to settle disputes.<sup>501</sup> Each village, tribe or community had their own set of norms, values, customs and traditions, which the traditional leader and the *panchas* use as authority to settle disputes.<sup>502</sup> These established social standards in the community are literally supported by law and is binding on all citizens in their specific traditional communities.<sup>503</sup> These customs, traditions, norms and values form the basis of unwritten laws<sup>504</sup> which the traditional leader and the *panchas* employ to regulate conduct and behaviour in their respective regions.<sup>505</sup>

#### 4.4.1.3 From the community

Whereas customary South African societies utilised their traditional leader to settle disputes, the Hindus sought justice in the *panchayat* system,<sup>506</sup> or

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<sup>496</sup> Refer to paragraph 3.9.1 in chapter 3 for a broader explanation on the *panchayat* system.

<sup>497</sup> Carneiro date unknown [www.springer.com](http://www.springer.com) 13.

<sup>498</sup> Zamora *A Historical Summary of Indian Village Autonomy* 262-263.

<sup>499</sup> Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 9.

<sup>500</sup> Khunou *A Legal History of Traditional Leadership in South Africa, Botswana and Lesotho* 9.

<sup>501</sup> Bennett *A Sourcebook of African Customary Law in Southern Africa* 115; Singh *Tribal Ethnography, Customary Law and Change* 33; Bennett *Customary Law in South Africa* 1.

<sup>502</sup> Bennett *A Sourcebook of African Customary Law in Southern Africa* 115; Singh *Tribal Ethnography, Customary Law and Change* 33.

<sup>503</sup> Hund 1998 *ARSP* 420-433.

<sup>504</sup> Museke *The Role of Customary Courts in the Delivery of Justice in South Sudan* 48.

<sup>505</sup> Museke *The Role of Customary Courts in the Delivery of Justice in South Sudan* 48.

<sup>506</sup> Refer to paragraph 3.9.1 in chapter 3, which provides an overview of the *panchayat* system.

the village council to settle disputes and to administer their region consisting largely of communal societies.<sup>507</sup>

In traditional African society, the traditional leader is one of their very own. Appointed by succession, the chief or headman enjoys the status as the most important, revered and respected person in his community.<sup>508</sup> Similarly, with the *panchayat* system of justice, the community elects its own *panchas* from amongst their own to form the *panchayat* council.<sup>509</sup> Neither the chief nor the *panchas* are outsiders.<sup>510</sup>

The notion of a "trial by peers" so to speak, is particularly significant. When the adjudicators or arbitrators are from the same community they serve, they are absolutely familiar with all aspects of the customs, traditions, belief systems and practices of their people, and they also, conform to the general practices and ideals of that community. They have the added advantage of being aware of troublemakers and irritants.<sup>511</sup>

This social bond between the traditional leader, the *panchas* and the people they serve is significant in resolving a dispute and for the ultimate acceptance of the outcome by all parties. Because all the parties to the dispute, including the adjudicators come from the same community, and share everyday life, they are certainly more inclined to work amicably towards a dispute resolution and move forward to heal relationships<sup>512</sup> rather than adding to the conflict and possible creation of future problems.<sup>513</sup> It is also more likely that the disputing parties will be inclined to accept a verdict from one of their own, rather than an outsider.

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<sup>507</sup> Soyapi 2014 *PELJ* 2-4.

<sup>508</sup> Gluckman *Order and Rebellion in Tribal Africa* 159.

<sup>509</sup> Refer to paragraph 3.9.1 for elaboration hereon.

<sup>510</sup> Mitchell *The Yao Village: A Study in the Social Structure of the Nyasaland Tribe* 123.

<sup>511</sup> Snook, Nohria and Khurana *The Handbook for Teaching Leadership: Knowing, Doing and Being* 260-264.

<sup>512</sup> An interesting example which was cited by Choudree 1999 *AJCR* 2, is a case that was heard by the traditional leader in Gugulethu Township in the Western Cape Province in which a man was charged with harassment and stabbing of a woman. After hearing all the evidence, the traditional leader sentenced the offender to a fine, a period of community service in Gugulethu, and attendance of counselling sessions. This sentence demonstrates a retributive aspect but also reflects conciliation by way of a fine, as well as reconciliatory approach by way of community service. To draw a comparison, had this case appeared in a conventional magistrate's court, the accused would have probably been sentenced to a term of imprisonment, emerged from prison a hardened criminal with no skills or job possibilities, and possibly a bitter and angry individual. This sentence by the traditional leader reflects a holistic approach to dispute resolution.

<sup>513</sup> Bennett 1991 *Acta Juridica* 34.



#### 4.4.1.4 Jurisdiction

In terms of geographical jurisdiction, the *panchayat* as well as the traditional leader, may preside over disputes in their areas of administration.<sup>514</sup> An important aspect of both systems is the public nature of the hearings with all community members allowed to attend the proceedings. This makes justice easily accessible and convenient to all.<sup>515</sup>

Of further interest is that both the *panchayat* and the traditional leader preside over a wide range of civil and criminal matters. This jurisdiction is varied and all-encompassing, from land issues and boundary matters, to family disputes, succession cases, and more.<sup>516</sup>

#### 4.4.2 Differences between the traditional systems of dispute resolution with African and Indian societies

A few notable differences between the traditional leader and the *panchayat* exist, as illustrated in the table below.

**Table 2: Differences between the traditional leader and the *panchayat***

Aspect	African system	Indian system
Presiding officer	Usually, it is the chief or the headman assisted by councillors and other members of the community. <sup>517</sup>	A fully-fledged council made up of at least five members from the community. <sup>518</sup>
Determination of authority	The chief or the headman is born into the position, which is acquired solely by birth right and succession and not through democratic election. <sup>519</sup>	The council members are elected by the community <sup>520</sup> and not by succession. <sup>521</sup>
Position	The chief or headman occupies an exalted position in the community, he is also the head	The position of <i>pancha</i> is purely administrative. <sup>523</sup> Ceremonial duties are

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<sup>514</sup> Refer to paragraph 3.9.1 and 3.9.2 in chapter 3.

<sup>515</sup> Soyapi 2014 *PELJ* 4.

<sup>516</sup> Refer to paragraph 2.1.4 in chapter 2 as well as paragraph 3.9.3.1 in chapter 3.

<sup>517</sup> Hoexter and Olivier *The Judiciary in South Africa* 24.

<sup>518</sup> Ghosh *Indian Local Government and Politics* 290-295.

<sup>519</sup> Hinz and Pateman *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Experience* 15-17.

<sup>520</sup> Ghosh *Indian Local Government and Politics* 290, 293.

<sup>521</sup> Refer to paragraph 3.9.1 in chapter 3 for further elaboration.

<sup>523</sup> Ghosh *Indian Local Government and Politics* 284.

	priest and engages in ceremonial duties related to births, deaths, harvests and marriages. <sup>522</sup>	allocated to dedicated priests in the community. <sup>524</sup>
Length of service	The position of chief or headman is for life or until it is usurped. <sup>525</sup>	The period of service of a <i>pancha</i> is predetermined and can last anything from one to five years. <sup>526</sup>
Position of women	The position of chief or headman is generally confined to males, as African society was generally patriarchal in nature. Although the situation is changing, the majority of chiefs and headmen in South Africa are still male. <sup>527</sup>	Women can be elected to serve on the <i>panchayat</i> council. <sup>528</sup> In recent times, a quota system of 33.3% positions for women has been introduced to ensure sufficient inclusion of women. <sup>529</sup>

#### 4.5 Traditional courts in South Africa v ADR courts in India

Here follows a comparison between the traditional courts in South Africa and the ADR courts in India, with specific reference to the *Gram Nyayalayas*, the *Nyaya Panchayat* as well as the *Lok Adalat*.

##### 4.5.1 Procedure

Traditional courts in South Africa, as with the designated ADR courts in India, have a major advantage over formal courts, in that their procedures are informal and simple to follow.<sup>530</sup> The fact that all parties are acquainted with each other, sets the tone for a more relaxed experience with minimum stress and everyone knows what to expect. The procedure is not foreign,

<sup>522</sup> Claassens *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* 253-257.

<sup>524</sup> Narayan 2005 *Journal of Hindu-Christian Studies* 2.

<sup>525</sup> Hinz and Pateman *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Experience* 217-218.

<sup>526</sup> Ghosh *Indian Local Government and Politics* 284.

<sup>527</sup> Bekink 2006 <http://www.dspace.up.ac.za> 279.

<sup>528</sup> Buch *From Oppression To Assertion: Women and Panchayats in India* 3

<sup>529</sup> This quota was introduced under the Constitution of India Article 243D, which instructs the minimum representation of one third of panchayat positions for women. Article 243D(2) (Reservation of seats) "Not less than one third of the total number of seats reserved under clause 1 shall be reserved for women".

<sup>530</sup> South African Law Commission *Issue Paper 82 Project 90 2*; Ghosh *Indian Local Government and Politics* 284.

unfamiliar and overwhelming as it could be in formal courts.<sup>531</sup> Most importantly, the entire process encourages equal participation of the parties which is certainly less intimidating than an ordinary court. To this may be added the aspect of flexibility.<sup>532</sup> As described previously herein,<sup>533</sup> no rigid rules apply.

#### 4.5.2 Location

Both the court of the traditional leader, as well as the *panchayat* council are located within the community they serve. It has been mentioned that the court of the traditional leader is often set up in an open and central location, easily accessible and within walking distance.<sup>534</sup> Apart from court hearings, this *makgotla*, *kgotla* or *lekgotla*<sup>535</sup> is usually a central meeting place for other assemblies in the village<sup>536</sup> and travel inconvenience is minimised. The central positioning of these structures conforms to the basic right of access to justice.<sup>537</sup>

Essentially South African traditional courts and the ADR courts in India are community or peoples' courts, and are crucial for settling disputes in the environment where the conflicts originated.

#### 4.5.3 Jurisdiction relating to offences

In terms of jurisdiction, traditional courts in South Africa<sup>538</sup> can and do preside over civil and criminal disputes,<sup>539</sup> but offences of a more serious nature such as murder, rape, robbery and treason are excluded.<sup>540</sup> This is

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<sup>531</sup> South African Law Commission *Issue Paper 82 Project 90 2*; Ghosh *Indian Local Government and Politics* 290.

<sup>532</sup> South African Law Commission *Issue Paper 82 Project 90 2*; Ghosh *Indian Local Government and Politics* 284, 290-295.

<sup>533</sup> Refer to paragraphs 3.9.1 and 3.9.2 in chapter 3.

<sup>534</sup> South African Law Commission *Issue Paper 82 Project 90* vii.

<sup>535</sup> Generally, a play on the same word, different dialects in southern Africa spelt and pronounced the word differently although the meaning is the same.

<sup>536</sup> According to the Collins English Dictionary, the word *lekgotla* has its origins in the Sesotho and Setswana languages and can refer to either a meeting place or a gathering of people.

<sup>537</sup> Mathew *Panchayati Raj in India: An Overview: Status of the Panchayati Raj in India* 3-9.

<sup>538</sup> SAHRC *Submission to the National Council of Provinces* 15 February 2012 12.

<sup>539</sup> South African Law Commission *Issue Paper 82 Project 90* ix.

<sup>540</sup> Section 20 of the *Black Administration Act* 38 of 1927: Powers of chiefs' headmen and chiefs' deputies to try certain offences, "(1)(a)(i) any offence at common law or under black law and custom other than an offence referred to in the third schedule of this Act".

similar to the *Nyaya Panchayat*, *Gram Nyayalayas* and *Lok Adalats*.<sup>541</sup> The table below lists the type of offences, which each court has jurisdiction over.

**Table 3: Jurisdiction of courts per offence type**

Aspect	Traditional courts in South Africa	<i>Nyaya Panchayat</i>	<i>Gram Nyayalayas</i>	<i>Lok Adalat</i>
Jurisdiction	Civil and criminal. <sup>542</sup>	Civil and criminal. <sup>543</sup>	Civil and criminal. <sup>544</sup>	Civil and criminal. <sup>545</sup>
Criminal offences	Any offence under common law or customary law except treason, public violence, sedition, murder, culpable homicide, rape, robbery, assault with intent to commit murder, indecent assault, arson, bigamy, <i>crimen injuria</i> , abortion, abduction, incest, extortion, perjury, fraud. <sup>546</sup>	Assault, <i>crimen injuria</i> , provocation, confining a person, theft, breach of trust, receiving stolen property, swindling, fraud, cruelty to animals, trespass, adultery, intimidation. <sup>547</sup>	Theft, receiving stolen property, insults, domestic violence, maintenance, trespass, house-breaking. <sup>548</sup>	Assault, insults, trespass, adultery, defamation disturbing the peace, intimidation.
Civil offences	Can hear any civil dispute arising from customary law, provided the parties reside within the geographical area	Recovery of debt, damages relating to grazing or trespass, rent claims, boundary	Disputes about property and pasture, water and irrigation, village and farmhouses, water channels,	Disputes involving contracts, commerce, trade, familial and matrimonial

<sup>541</sup> This aspect of jurisdiction of the ADR courts in India was covered in detail in chapter 3 under paragraph 3.9.

<sup>542</sup> Corporative Governance and Traditional Affairs 2002 <http://www.cogta.gov.za>

<sup>543</sup> Refer to paragraph 3.9.3.1 in chapter 3 for a detailed account of the criminal jurisdiction of the *nyaya panchayat*.

Refer to paragraph 3.9.4.1 for further elaboration on the jurisdiction of *Gram Nyayalayas*.

<sup>545</sup> Paragraph 3.9.5.3 in chapter 3 sets out the types of cases, which can be heard in the *Lok Adalat*.

<sup>546</sup> Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 279.

<sup>547</sup> Refer to paragraph 3.9.3.1 which sets out the criminal jurisdiction of the *Nyaya Panchayat*.

<sup>548</sup> Refer to paragraph 3.9.4 in chapter 3.

	of the chief's jurisdiction. <sup>549</sup>	disputes, custody and maintenance issues, public nuisance, pollution, damages to property. <sup>550</sup>	wells, payment of wages, money lending, cultivation. <sup>551</sup>	disputes, road accident claims, consumer related claims, disputes arising between neighbours friends and family. <sup>552</sup>
Maximum value of civil claims	No limit is imposed.	25 000 rupees. <sup>553</sup> This limit can be waived if both parties agree to submit to the jurisdiction of the <i>Nyaya Panchayat</i> . <sup>554</sup>	No specific pecuniary limits have been set. Should the parties agree to the jurisdiction of the <i>gram nyayalayas</i> , the case will be heard there. <sup>555</sup>	Up to twenty-five lakh rupees, which equates to roughly, R500 000.
Penalty	Cannot impose a sentence of death, corporal punishment, or imprisonment. <sup>556</sup>	Cannot hear a case if it carries a term of imprisonment.	Can impose a maximum penalty of one year imprisonment.	No fine or imprisonment can be imposed.

<sup>549</sup> Section 12(1)(a) of the *Black Administration Act* 38 of 1927: "The Minister may authorise any black chief or headman recognised or appointed under sub-section (7) or (8) of section two to hear and determine civil claims arising out of black law and custom brought before him by blacks against blacks, resident within his area of jurisdiction".

<sup>550</sup> Section 13(1) of the *Gram Nyayalayas Act* 4 of 2009.

<sup>551</sup> Paragraph 3.9.4.1 in chapter 3 details the jurisdiction and authority of the *Gram Nyayalayas*.

<sup>552</sup> Refer to paragraph 3.9.5 in chapter 3.

<sup>553</sup> This converts to approximately R5 000 as at August 2017.

<sup>554</sup> Paragraph 3.9.3.1 in chapter 3 sets out the civil jurisdiction of the *Nyaya Panchayat*.

<sup>555</sup> Refer to paragraph 3.9.4 in chapter 3 for further elaboration on this aspect.

<sup>556</sup> Section 20(2) of the *Black Administration Act* 38 of 1927 states that: "Provided that in the exercise of the jurisdiction conferred upon him, or her, a chief, headman or chief's deputy may not inflict any punishment involving death, mutilation, grievous bodily harm, or imprisonment or impose a fine in excess of R100 or two head of large stock or ten head of small stock or impose corporal punishment".

#### 4.5.4 Recognition

Traditional courts<sup>557</sup> in South Africa are not formally recognised as courts of law<sup>558</sup> in the same manner as the Magistrates Courts, High Courts and Appeal Court for example.<sup>559</sup> Nevertheless, it is submitted that they have legal standing because they operate under section 12 and 20 of the *Black Administration Act*,<sup>560</sup> which empowers the traditional leader to preside over certain categories of criminal and civil offences. Similarly, the *Nyaya Panchayat*, *Gram Nyayalayas* and *Lok Adalat* are legally recognised as courts in India.<sup>561</sup>

#### 4.5.5 Access to justice

Access to justice denotes the ability of every individual to invoke justice, and to have access to legal remedies, irrespective of their social, economic, educational, or geographical position.<sup>562</sup> Moreover, access to justice also implies a choice of tribunals before which a case could be heard.<sup>563</sup> Importantly, this includes a wider approach to justice whereby alternate dispute resolution is not only encouraged, but remains the ultimate objective. Considering these features, it is submitted that the courts of the traditional leader<sup>564</sup> as well as the ADR courts in India meet the requirements relating to access to justice.

#### 4.5.6 Process of the hearing

The procedure followed in the traditional courts in South Africa, as well as in the ADR courts in India is informal and bound solely by custom and tradition, rendering the process straightforward and easy to understand.<sup>565</sup>

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<sup>557</sup> It has been argued that this aspect of the traditional courts is a contentious issue and until such time that the *Traditional Courts Bill* is passed, there will be no certainty on this issue. Some people however do regard traditional courts as sui generis courts, see *South African Law Commission Issue Paper 82 Project 90 viil*.

<sup>558</sup> Rautenbach "Traditional Courts as Alternative Dispute Resolution (ADR) Mechanisms in South Africa" 290.

<sup>559</sup> Soyapi 2014 *PER*. Also see the *Traditional Courts Bill* which does not particularly categorise a traditional court as being part of the formal courts of country.

<sup>560</sup> 27 of 1938.

<sup>561</sup> As per the explanation on the legislation pertaining to all three of these courts in chapter 3.

<sup>562</sup> Nyenti 2013 *De Jure* 905.

<sup>563</sup> South African Law Commission *Issue Paper 82 Project 90 vii*.

<sup>564</sup> South African Law Commission *Issue Paper 82 Project 90 2*.

<sup>565</sup> Refer to paragraphs 3.9.3.2, 3.9.4.2 and 3.9.5.1, which sets out the procedure followed in the *Nyaya Panchayat*, *Gram Nyayalayas* as well as the *Lok Adalat*.

In both courts flexibility and informality feature prominently.<sup>566</sup> No rigid rules apply to either the process or the outcome, and each case is decided on its own merit and circumstances<sup>567</sup> and follows the old traditional systems of dispute resolution. It is thus possible to observe how different communities, villages and areas utilise their own unique methods, based on the environment and its people, of resolving disputes within these courts.<sup>568</sup>

#### 4.5.7 Legal authority

Interestingly, the Indian<sup>569</sup> and African traditional systems<sup>570</sup> do not have specific written laws or rules that serve as a guide to dispensing justice, but depend on cultural and traditional norms, standards and practices, together with the morals and values that inform their societies.<sup>571</sup> Both systems rely heavily on unwritten<sup>572</sup> customary law and traditional principles for the administration of justice.<sup>573</sup>

#### 4.5.8 Language

The languages used in the ADR courts in India and the traditional courts in South Africa are those predominantly spoken and understood by all community members.<sup>574</sup> Language plays a crucial role in a fair trial and its importance cannot be overlooked. Misunderstandings, innuendos and misinterpretations are generally avoided and the services of interpreters can be dispensed with when all parties speak and understand the same language.

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<sup>566</sup> Museke *The Role of Customary Courts in the Delivery of Justice in South Sudan* 11.  
<sup>567</sup> Paragraph 2.1.4 in chapter 2 explains the traditional systems of dispute resolution as practiced by the traditional communities in South Africa; paragraph 3.9.1 in chapter 3 sets out the ADR processes as followed by ancient Hindu communities using the panchayat system.

<sup>568</sup> Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 18-19.

<sup>569</sup> Derrett *Essays in Classical and Modern Hindu Law* 34-35.

<sup>570</sup> South African Law Commission *Issue Paper 82 Project 90* ix; Dlamini *The Role of Chiefs in the Administration of Justice in KwaZulu* 125.

<sup>571</sup> Museke *The Role of Customary Courts in the Delivery of Justice in South Sudan* 10.

<sup>572</sup> In as much as the bulk of customary law is unwritten and has been passed down from one generation to the next through practice and word-of-mouth, some of the customs in South Africa have been legislated. The example that is cited in Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 19 is that of the custom of *lobola*, which is now legislated in the *Recognition of Customary Marriages Act* 120 of 1998.

<sup>573</sup> South African Law Commission *Issue Paper 82 Project 90* 2.

<sup>574</sup> South African Law Commission *Issue Paper 82 Project 90* 3.

Of the use and promotion of indigenous languages in courts, Nqayi<sup>575</sup> said:

To develop a culture of understanding, tolerance and dialogue in courts and to improve delivery of justice.

Collier<sup>576</sup> affirmed this by adding:

Using a language in court is one of the most effective ways to keep a language alive and restore its status.

The above reiterates the use of indigenous languages in these tribunals as a major advantage not only in resolving a dispute speedily and effortlessly, but also to achieve justice.

#### 4.5.9 *Restorative justice*

The ADR mechanisms of mediation, conciliation and negotiation feature prominently in both systems of traditional dispute resolution.<sup>577</sup> Restorative justice remains the main focus of dispute resolution and frequent use is made of mechanisms such as negotiation, mediation, conciliation and reconciliation.<sup>578</sup> Restitution, goodwill, reparation, compensation, forgiveness and settlement are the goals. The courts of the traditional leaders as well as the ADR courts in India are united in striving to rectify harm done, heal relationships, and restore peace.<sup>579</sup> The emphasis is on re-establishing the *status quo*. In support of this observation, Choudree<sup>580</sup> asserts:

In the exercise of their jurisdiction as mediators, the courts of the chiefs and headmen are similar to the *Lok Adalats* and *Panchayats* of India.

#### 4.5.10 *Position of women*

Most traditional societies are typified by a patriarchal nature which is manifested in the unequal treatment of their women.<sup>581</sup> However, custom and customary law are regarded as flexible and dynamic, as identified by

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<sup>575</sup> Den Hartigh 12 March 2009 <http://www.brandsouthafrica.com>.

<sup>576</sup> Den Hartigh 12 March 2009 <http://www.brandsouthafrica.com>.

<sup>577</sup> Mwenda *Paradigms of Alternate Dispute Resolution and Justice Delivery in Zambia* 62; *South African Law Commission Issue Paper 82 Project 90* 18. Also refer to paragraph 3.8 in chapter 3.

<sup>578</sup> Soyapi 2014 *PELJ* 3.

<sup>579</sup> *South African Law Commission Issue Paper 82 Project 90* 1. Also refer to paragraph 3.9 in chapter 3.

<sup>580</sup> Choudree 1999 *AJCR* 3.

<sup>581</sup> Inglehart and Norris *Rising Tide Gender Equality and Cultural Change* 202-204.



Judge van der Westhuizen in the *Shilubana*<sup>582</sup> case: "[it] develops over time to meet the changing needs of the community". Cornell<sup>583</sup> who declared that *Shilubana* is indeed "a big step forward in the respect for customary law and its powers to change", further supports this assertion. The changing nature of society as well as the promotion of gender equality impact positively on the position of women in traditional societies in India and South Africa. Many advances within the legal sphere reflect this changing attitude, which is a validation of the equal rights stipulation of the *Constitution* of South Africa.<sup>584</sup>

The *Shilubana*<sup>585</sup> case was a landmark Constitutional Court decision in South Africa and changed the long-established conventional approach to male succession under traditional leadership. This case reiterated the notion of gender equality in traditional leadership. Briefly, the details are as follows. The chief of a traditional community in Limpopo died without leaving a male heir. The court declared that in as much as it was custom and a centuries-old practice for a male heir to succeed his father as chief, customary law must be allowed to evolve and develop, even if that development results in a deviation from usual and established traditions.<sup>586</sup> The court thus ruled that the daughter of the deceased chief succeeded her father, conferring upon her the same responsibilities as those of a male leader.<sup>587</sup> This decision paved the way for the appointment of women as traditional leaders in South Africa.

In India, a parallel can be drawn to women's empowerment regarding the *panchayat* councils and their representation in the *Gram Nyayalayas*, *Nyaya Panchayat* and *Lok Adalat*.<sup>588</sup> Article 243D of the *Constitution of India* reserves a quota of one third of the positions on *panchayats* for women.<sup>589</sup> In addition to this, special women's courts known as *Parivarik Mahila Lok Adalat* exist in India. These courts were created to deal with specific issues

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<sup>582</sup> *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 35.

<sup>583</sup> Cornell 2009 *Constitutional Court Review* 407.

<sup>584</sup> Section 9(3) of the *Constitution of the Republic of South Africa*, 1996: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language and birth".

<sup>585</sup> *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

<sup>586</sup> *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

<sup>587</sup> Mmusinyane 2009 *PELJ* 138.

<sup>588</sup> Buch *From Oppression To Assertion: Women and Panchayats in India* 3

<sup>589</sup> Refer to the footnote at 4.4.2 which explains this aspect.

relating to women.<sup>590</sup> This forum is a complete female version of the *Lok Adalat*, staffed entirely by women<sup>591</sup> and presided over women.<sup>592</sup>

The progressive attitude and legal reforms concerning the position of women in African and Indian society bode well for the general upliftment and development of women and society in general. As Swami Vivekananda<sup>593</sup> stated:

The best thermometer to the progress of a nation is its treatment of women

and

There is no chance for the welfare of the world unless the condition of women is improved".<sup>594</sup>

These statements certainly echo the quest for equal rights for women, as reflected in the legal reforms of India and South Africa.

The above section focused on an analysis of key aspects within the traditional ADR systems of South Africa and India and there are at least ten fundamental similarities between the Indian ADR courts and the courts of the traditional leader in South Africa. These similarities are significant and they indicate that the basic structures, attitudes, intention and principles supporting ADR within the criminal justice system already exist in South Africa. It now becomes imperative to legalise this aspect of ADR within criminal law.

#### **4.6 Similarities in court congestion, delays and backlogs**

Both the Indian and South African legal systems present similarities in terms of the challenges relating to caseload, congestion and backlogs. As indicated previously in this research,<sup>595</sup> South African crime rates rank amongst the highest in the world. For the period 1 April 2015 to 31 March 2016 a total of 863 444 criminal cases were enrolled in South Africa's

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<sup>590</sup> Murthy *Womens Global Health and Human Rights* 21.

<sup>591</sup> Bhattasali 24 January 2013 [www.bbc.com](http://www.bbc.com).

<sup>592</sup> Luxmikanth *Governance in India* 11.

<sup>593</sup> Swami Vivekananda was an Indian spiritual leader, a reformist and a revivalist who lived from 1863-1902 and is chiefly credited for disseminating the teachings of Sri Ramakrishna on interfaith awareness, practical Vedanta and the interconnectedness of humanity.

<sup>594</sup> These quotations are taken from the *Complete Works of Swami Vivekananda, Volume 8* which is a report on a lecture delivered by him on 23 September 1893 entitled *Women of the East in Chicago USA*.

<sup>595</sup> See paragraph 1.2 in chapter 1.

approximately 1 600 lower courts throughout the country.<sup>596</sup> Of this figure, a total of 309 838 cases were finalised with a verdict during that same period. This accounts for only 35% of the entire court roll and results in a figure of 553 606 cases which were not finalised by a judgement. This is cause for concern as the number of undecided cases has increased. In addition to the figures above, a total of 107 347 cases were withdrawn by prosecutors during the same period. This figure does not include cases, which were struck from the roll.<sup>597</sup> It goes without saying that many of these cases could have been concluded successfully through ADR, had the option been available in South Africa.

The Indian situation regarding backlogs was described in the previous chapter.<sup>598</sup> As at November 2016, there were 30 million cases pending in India's courts.<sup>599</sup> This situation is troublesome and is exacerbated by an extensive vacancy rate of judicial officer posts. Whereas a rate of fifty judicial officers per one million people would be the norm, the current totals reflect a mere seventeen per million.<sup>600</sup> Surveys reveal that India needs a further 70 000 judicial officers to properly serve its population of over a billion people.<sup>601</sup> Despite this shortfall, the community is receiving justice through ADR as described in the previous chapter. This greatly alleviates the burden on the courts by dispensing rapid and simple justice for lesser cases.<sup>602</sup>

#### **4.7 Criminal legislation on ADR in India and South Africa**

At this stage of the research, it is now well-established that South African criminal law presents a considerable *lacuna* as far as ADR is concerned. As stated in chapter two,<sup>603</sup> apart from the *Child Justice Act*,<sup>604</sup> no other criminal legislation on ADR exists. The challenges and uncertainties facing prosecutors who must perform "informal mediations" without legislation, was also highlighted in chapter two.<sup>605</sup> The absence of legislation has led to

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<sup>596</sup> National Prosecuting Authority of South Africa 2015/2016 Annual Report 93.

<sup>597</sup> National Prosecuting Authority of South Africa 2015/2016 Annual Report 94-95.

<sup>598</sup> Refer to paragraph 3.10 in chapter 3.

<sup>599</sup> Prakash *Hindustan Times* 1.

<sup>600</sup> Prakash *Hindustan Times* 1.

<sup>601</sup> Prakash *Hindustan Times* 1.

<sup>602</sup> This was described in chapter 3 under paragraph 3.10.

<sup>603</sup> Refer to paragraph 2.2.13 in Chapter 2, which elaborates upon the lack of criminal legislation on ADR.

<sup>604</sup> 75 of 2008.

<sup>605</sup> Refer to paragraph 2.2.13.1 which clarifies this aspect.

inconsistencies in the manner in which these "informal mediations" are conducted and finalised in criminal courts in the country.<sup>606</sup>

In comparison to South Africa, which possesses at least fifty-two different pieces of legislation permitting ADR in one or other situation, India has fewer laws but it does govern a wide array of ADR scenarios. In chapter two of this research, a few pertinent Acts, which successfully deal with ADR in South Africa, were discussed.<sup>607</sup> They included the *Mediation in Certain Divorce Matters Act* 24 of 1987, the *Labour Relations Act* 66 of 1995 as well as the *National Credit Act* 34 of 2005. None of these Acts however, deals with ADR in criminal law.

When one considers the way in which ADR is legislated in South Africa, it seems that the approach adopted up to this point entails the legislation of specific acts, procedures and circumstances within which ADR can be considered or applied.<sup>608</sup> On the other hand the Indian approach appears to be extensive and all-encompassing, by having fewer and wider-ranging legislation dealing with more extensive provisions and scenarios specifically encouraging ADR.<sup>609</sup>

In South Africa different fora for ADR exist, for example the CCMA for labour related matters, the Office of the Family Advocate for mediations in divorce cases where children are involved and debt counsellors or mediators for cases of debt mediation, in terms of the *National Credit Act*.<sup>610</sup> In Indian law, three main fora exist, the *Gram Nyayalayas*, the *Nyaya Panchayat* and the *Lok Adalat* and their jurisdiction is all encompassing, covering among others, divorces, labour, land, civil and criminal cases of a lesser nature.<sup>611</sup>

As elaborated upon previously in this research, apart from the *Child Justice Act*,<sup>612</sup> which specifically deals with minors in conflict with criminal law, no other South African legislation authorises or accepts ADR as an outcome or

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<sup>606</sup> Paragraph 2.2.13.1 explains the differing attitudes and interpretations of prosecutors towards the NPA Policy guidelines, which has led to inconsistencies in their manner of application in different courts in the country.

<sup>607</sup> Refer to paragraphs 2.2.9 – 2.2.12 in chapter 2.

<sup>608</sup> The different Acts dealing with ADR refer - they are far too many to mention, suffice to state that there are 52 pieces of legislation that authorise ADR in South Africa.

<sup>609</sup> The *Nyaya Panchayats Act* of 2009, *Gram Nyayalayas Act* 04 of 2009 and *Legal Services Authorities Act* 39 of 1987 as discussed in detail in chapter 3, refers.

<sup>610</sup> 34 of 2005.

<sup>611</sup> Refer to paragraph 3.9 in chapter 3.

<sup>612</sup> 75 of 2008.

result in criminal cases.<sup>613</sup> Consequently, it is very clear that the Indian scenario not only recognises ADR in criminal matters, but has been legislated extensively as well as encouraged.

By way of comparison, had the Sasolburg case example appeared in a court in India, it would have been transferred to the *Lok Adalat*<sup>614</sup> either with the consent of both parties or at the discretion of the presiding officer. At the *Lok Adalat*, both mother and daughter would have been entitled to cost-free legal representation, and the judicial officer would have ensured that all relevant documentation relating to the crime were available as evidence.

Most importantly, the *Lok Adalat* bench is made up of at least three independent and impartial individuals, whose main objective is to steer the parties towards an amicable resolution, as demanded by section 22(c)(5),<sup>615</sup> utilising social workers should the need arise. A *Lok Adalat* version of the Sasolburg case could resemble the following. Dialogue and engagement between the mother and daughter would have been actively encouraged. The case could even have been extended to allow the parties' time to consider the conciliation efforts and terms of agreement. As the parties are related, with the mother having no desire to saddle her daughter with a criminal record or serving a jail term, the *Lok Adalat* would have been inclined to negotiate with the daughter regarding an agreement towards reimbursement of the money. Once the mother was satisfied with the payment arrangement, this would have become a legal and binding court order, and justice would have prevailed without compromising the mother's property or her relationship with her daughter.

Should the daughter at any stage renege on her part of the order, the mother would still have had recourse to civil judgement for reimbursement. However, as was stated in chapter one, this case was withdrawn, leaving the contestants with neither justice nor reimbursement.

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<sup>613</sup> S 52(1)(g) of the *Correctional Services Act* 111 of 1998 allows mediation between a sentenced offender and the victim in the process of reintegrating the offender back into society and to accept responsibility for the harm suffered. In this situation, the offender would have gone through the normal adjudication process, declared guilty and sentenced to a term of imprisonment.

<sup>614</sup> As the Sasolburg case involved fraud or theft in excess of R 100 000, this amount would be beyond the jurisdiction of both the *Nyaya Panchayat* or the *Gram Nyayalayas*, hence the appropriate forum for ADR would be the *Lok Adalat*.

<sup>615</sup> Section 22(c)(5) of the *Legal Services Authorities Act* 39 of 1987 specifically states that "the *Lok Adalat* shall conduct conciliation proceedings and assist the parties in their attempt to reach an amicable settlement".

If one considers the avenues open to justice through the *Gram Nyayalayas*, *Nyaya Panchayat* and *Lok Adalat*, it is evident that there are more advantages than disadvantages. India has developed an effective and practical legal system based on the foundations of ancient Hindu law.<sup>616</sup> The time may be ripe for South Africa to follow suit to advance its own ADR laws in the criminal justice sector.

#### **4.8 Conclusion**

This is a comparative study of the legal systems of India and South Africa, with special reference to ADR in the criminal justice system. Similarities between the traditional leader and the *panchayat* council were identified. Comparisons were drawn between the courts of the traditional leader and the ADR courts in India. Many significant similarities were noted but also the fact that in contrast, certain aspects in South African criminal law trail behind as far as ADR is concerned. There is a continued need to narrow this gap. A significant *lacuna*, which should be bridged, was identified to bring it on par with other developed and developing countries, as India has shown. This critical aspect, which has been neglected and seemingly overlooked, needs to be addressed for the benefit of all, and particularly, the disadvantaged in this country. All that is needed is straightforward and simple legislation.

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<sup>616</sup> Refer to paragraph 3.9 in chapter 3.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.1 Introduction

From the previous chapters of this research paper it can be concluded that the Indian position on ADR in criminal cases is innovative and progressive, compared to South Africa. ADR is not a new concept in either India or South Africa, yet the Indian legal system creates the impression that it has fully grasped its benefits.<sup>617</sup> India implemented ADR laws unique to its own people and environment, something the South African criminal justice system has yet to accomplish. It is obvious that ADR has firmly established itself in the criminal justice sphere in India. In support of this, Rao<sup>618</sup> has declared that ADR in India is not only structured scientifically, it is also defined by clear and exact terms, and therefore the ADR mechanisms are promoted extensively.<sup>619</sup> The same approach should be adopted in South Africa.

Having regard to the above, it must be stated that South African criminal laws regarding ADR are not entirely absent. Undoubtedly, the CJA is a ground-breaking piece of legislation in South African criminal law<sup>620</sup> which recognises and promotes ADR in criminal cases, albeit only for minors in conflict with the law.<sup>621</sup> This Act endeavours to empower victims of crime by urging and supporting them to play a vital role in the legal process.<sup>622</sup> It was also demonstrated how Section 61<sup>623</sup> provides for family group conferences and mediation with the offender. Similarly, section 62<sup>624</sup> sets out the victim-offender mediation process. These restorative justice provisions in the CJA clearly indicate that not only is the community open to the concept of ADR in criminal cases, but that there is a need and a niche for ADR in South Africa. Correspondingly, in Section 52 of the *Correctional Services Act* which deals with community corrections, the sentenced offender may be ordered to participate or subject himself/herself to victim offender mediation or family group conferencing as part of reintegration into society .

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<sup>617</sup> Refer to paragraph 3.10 in chapter 3 which discusses the positive effect ADR has had on the Indian legal landscape.

<sup>618</sup> Rao and Sheffield *Alternatives to Litigation in India* 27.

<sup>619</sup> Rao and Sheffield *Alternatives to Litigation in India* 27.

<sup>620</sup> Refer to paragraph 2.2.12 in chapter 2 which explains this aspect of the *Child Justice Act*.

<sup>621</sup> Refer to paragraph 2.2.12 in chapter 2 which clarifies this aspect.

<sup>622</sup> Van Der Merwe 2013 *De Jure* 43.

<sup>623</sup> Refer to Chapter 2 which contains this paragraph verbatim, specifically paragraph 2.1.3.3.1 in chapter 2 which describes this process.

<sup>624</sup> Refer to paragraph 2.1.1.2 in chapter 2 which contains this section of the Act.

In chapter three, it became evident that ADR in the Indian legal system has significant advantages when it comes to the application of criminal ADR.<sup>625</sup> It is possible for South Africa to glean experience from India's successes. Surely, the CJA which initiated the machinery for ADR in criminal matters can also form a point of reference for future enactments on ADR in criminal cases.

This, the final chapter reviews and summarises this research.

## **5.2 Summary**

It is reiterated that chapter one,<sup>626</sup> together with chapter four,<sup>627</sup> elaborated upon the dilemma that the complainant in the Sasolburg case was exposed to, namely that the mother had no ADR options available to her, and that this played a role in the withdrawal of the charges against her daughter. Using the Sasolburg case as a point of departure, the significance, outline, objectives and aims of this study were set out in chapter one. Moreover, key concepts and terms unique to this study were stated and clarified.

A discussion on the scope and application of ADR in South African law followed in chapter two. An analysis of the ADR systems, as established and practised in South African and Indian criminal justice would not have been complete without exposing some of the traditions, cultures and beliefs of the people and communities who designed and influenced these ADR mechanisms. Hence, chapter two highlighted the traditional roots of ADR within indigenous African communities as well as traditional dispute resolution mechanisms that are practised. The chapter also explored the concepts of negotiation, conciliation, mediation and arbitration as being the basis of ADR and detailed some legislation incorporating ADR in South Africa. This chapter emphasised that, apart from CJA and the *Correctional Services Act*, there is an absence of ADR in the criminal justice realm.

A discussion on the scope and application of ADR in Hindu law, tracing its religious origins to current legislation, practices, successful outcomes and present application formed the focal point of chapter three.

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<sup>625</sup> Paragraph 3.10 in chapter 3 sets out the success recorded in India since the implementation of its ADR laws to criminal cases.

<sup>626</sup> Refer to paragraph 1.1 in chapter one, which described the issues in the example of the Sasolburg case.

<sup>627</sup> Refer to paragraph 4.1 in chapter 4 which also addresses this dilemma.



Chapter four opened with the example of the Sasolburg case and went on to demonstrate how the outcome of this case could have been different, had it come before an ADR court in India.<sup>628</sup> It further detailed the valuable ADR traditions as presented in Indian and traditional South African systems, and provided a critical analysis of the differences and similarities between the two legal systems pertaining to ADR and its criminal application. Crucial lessons were identified and cited as examples which could be followed under South African criminal law. The flexibility and choices provided by the Indian system was deliberated upon and the disparity in the South African system emphasised.

In this, the final chapter, proposals are made and the way forward is considered.

The time for growth, development and transformation of South African criminal laws furthering ADR has arrived. Recommendations concerning the applicability of ADR in the discipline of criminal law should receive attention, so as to provide and enhance justice in the most fitting and proper manner to all citizens. At this point, ADR in criminal law will be reflected upon, to reiterate its value, importance, characteristics and objectives.

### **5.3 ADR in criminal law and procedure**

Many scholars are of the opinion that ADR, as applied in criminal law, is not a new phenomenon, primarily because ADR has its roots in indigenous communities and in ancient practices where no distinction was made between civil and criminal cases.<sup>629</sup> These ADR practices have evolved and developed over centuries to reach their present form.<sup>630</sup> Although ADR has been successful in the civil law of many jurisdictions, especially in labour law disputes, family law issues and contract law,<sup>631</sup> it has not always been available in criminal cases.<sup>632</sup> Lewis<sup>633</sup> contends that a reason for this could be that in criminal cases, the state, being the actual complainant, is not a tangible party. That being the case, it follows that mediation and negotiation

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<sup>628</sup> Paragraph 4.7 in chapter 4 further expands on this point.

<sup>629</sup> McBride *Alternative Dispute Resolution* 85.

<sup>630</sup> Alamin 2015 *Journal of Research in Humanities and Social Science* 68.

<sup>631</sup> Go *Mediation as Practiced in Criminal law: The Present, the Pitfalls, and the Potential* 2.

<sup>632</sup> An example has been cited in the 2012 *European Judicial System report* issued by the European Commission for the Efficiency of Justice that of the 51 European states, only 29 allowed ADR in criminal cases.

<sup>633</sup> Lewis and McCrimmon "The Role of ADR Processes in the Criminal Justice System: A view from Australia" 5.

will be impossible, as there is no broken relationship to restore. Notwithstanding, Lewis<sup>634</sup> maintains that the focus of ADR in criminal matters ought to rest more on its restorative justice aspect, on addressing victims' needs, and the prevention of re-offending. It is evident that the approaches to ADR in criminal cases are quite different and unique when compared to any other area of the law.<sup>635</sup>

In India, the origin of ADR in criminal cases evolved from ancient Hindu scriptures and focused on *dharma*, maintaining harmonious relations, redressing harm suffered, and accountability for wrongdoing.<sup>636</sup> Additionally, the right of access to justice, speedy trials and taking courts to the people are also addressed. These developments have not been part of South African criminal law although the ADR practices within traditional African and Indian communities are comparable. The current focus in South African criminal law, as it has been for the past few centuries, remains retribution and punishment. However, if ADR in the sphere of criminal law is to be expanded, these aspects should be addressed and reconsidered.

The added advantage of adopting ADR in criminal matters is its positive impact on Case Flow Management (CFM). CFM refers to the efficient and expeditious movement of cases on a criminal court roll, from the point of enrolment to finalization.<sup>637</sup> Settling criminal cases through ADR at the earliest opportunity would decongest a court roll and allow for more serious and appropriate cases to be adjudicated speedily.

#### **5.4 A change in attitude in the legal sector**

South Africa's formal legal system has its foundations in Roman Dutch law, with litigation taking place in a court of law, which eclipsed and overtook ADR to become the recognised means of resolving criminal disputes. Although traditional leaders and traditional courts have a valuable role to play in dispute resolution, the prevailing attitude in South Africa is to seek justice in formal courts.<sup>638</sup> The crime, the criminal, the punishment and the court process tend to overshadow the victim who plays a minor role, such

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<sup>634</sup> Lewis and McCrimmon "The Role of ADR Processes in the Criminal Justice System: A view from Australia" 7.

<sup>635</sup> Lewis and McCrimmon "The Role of ADR Processes in the Criminal Justice System: A view from Australia" 9.

<sup>636</sup> Yadav *International Journal of Law* 2017 59.

<sup>637</sup> Department of Justice and Constitutional Development *A Practical Guide to Court and Case Flow Management* 2.

<sup>638</sup> Mlambo *Access to Justice* 1.

as testifying in court, if called upon.<sup>639</sup> From the time of arrest, to the accused's first appearance in court, and finally up to the point of sentencing, the entire focus is on the accused and his or her rights. There are many who believe that punishment by incarceration does not necessarily benefit the offender, the victim or the community at large. The focus needs to shift to the offender accepting responsibility, redressing the harm, restoring the *status quo* as well as making social amends.<sup>640</sup>

Current global trends indicate that the retributive aspect of criminal law is making way for more innovative and holistic methods of resolving lesser criminal cases.<sup>641</sup> ADR therefore, can benefit and enhance the development of the criminal justice system, particularly when it comes to access to justice, addressing backlogs, prevention of lengthy and costly litigation, speedy resolution of cases, accentuating a victim-driven approach and overall satisfaction with the process.<sup>642</sup>

Grace<sup>643</sup> adds that:

Various forms of criminal ADR have developed, including victim-offender panels, victim assistance programs, community crime prevention programs, sentencing circles, ex-offender assistance, community service, school programs and specialists courts.<sup>644</sup>

Grace's assertion is indicative of the fact that criminal conflicts can be resolved through ADR mechanisms and that the required change in attitude towards the application of ADR in criminal cases, has indeed taken place with great success in some jurisdictions.<sup>645</sup> There needs to be an overall change in attitude towards criminal ADR, not only in the legal sector but also in civil society. The benefits of ADR as well as its restorative justice aspect particularly, need to be emphasised and promoted. Irrespective of the policies or legislation formulated, no meaningful development and progress of ADR in criminal cases in South Africa will be possible if, policy makers,

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<sup>639</sup> Sangroula 2016 *Katmandu School of Law Review* 5

<sup>640</sup> Grace 2010 *Vermont Law Review* 585.

<sup>641</sup> Odoh 2015 *Journal of Law, Policy and Globalization* 92.

<sup>642</sup> Lewis and McCrimmon "The Role of ADR Processes in the Criminal Justice System: A view from Australia" 8.

<sup>643</sup> Grace 2010 *Vermont Law Review* 566.

<sup>644</sup> Grace submitted the above article entitled *Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms* as a student at the University of Maryland in USA in 2011. Taking the article in context, it will appear as if the ADR situation in the US criminal justice system is referred to, particularly the use of plea bargains which is rooted in the US criminal justice system.

<sup>645</sup> The Indian inclusion of ADR as formal laws is one such example.

legal professionals and civil society in general does not change the outlook towards the application of ADR in criminal cases.

## **5.5 Suggestions for reform**

There are considerable benefits to be had by emulating innovations from those who have implemented ADR successfully. In general, formal ADR mechanisms have gained momentum the world over in a relatively short period.<sup>646</sup> The positive impact of this was already dealt with in this dissertation.<sup>647</sup> Despite its progress, there is still great potential for reform in the criminal law sphere in South Africa. Some suggestions and recommendations are set out below. If implemented, they have the potential of altering the course of ADR in criminal law in South Africa.

### *5.5.1 Education and training of legal professionals on criminal ADR mechanisms*

For ADR to become fully established in the South African criminal justice system, it is imperative that appropriate education and training are provided. It should not be assumed that a legal degree would confer the necessary ADR knowledge. Specific skills and techniques are essential for the process of dispute resolution. Formal education and training are required, with the emphasis on ADR mechanisms, negotiation and bargaining skills.<sup>648</sup> South African universities do not currently offer ADR-specific criminal law modules and it is imperative that the subject be formally integrated into university curricula. Course content should include conventional ADR methods such as mediation, negotiation and arbitration. Apart from theoretical instruction there must be practical training for law students, who should have the opportunity to observe and participate in mediation in less serious criminal cases in courts and mediation centres. Furthermore, the inclusion of ADR in university modules will benefit all legal professionals who will certainly require essential negotiation and mediation skills at some stage in their profession. Regular training sessions should also be made available to legal professionals who have not had the benefit of acquiring ADR skills at university.

All prosecutors, judicial officers as well as attorneys and advocates, even paralegals, should receive training in all aspects of criminal ADR to improve

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<sup>646</sup> Goddard *Substantial Justice: An Anthropology of Village courts in Papua New Guinea* 9.

<sup>647</sup> Refer to paragraph 3.10 in chapter 3 for elaboration on this point.

<sup>648</sup> Streib *The State of Criminal Justice* 139.

their understanding of the concept and to allow them to apply it in deserving cases. Justice College<sup>649</sup> has been mentoring and training prosecutors, judicial officers and other legal professionals employed in the public service in South Africa for many years. It is suggested that the College can be utilised effectively to train legal professionals. No extra funding will be required as resources and structures at Justice College are already in place.

### 5.5.2 *Appropriate acknowledgement of traditional courts*

Traditional institutions are not utilised to their full potential in South Africa, which is unfortunate, as the courts of the chiefs and headmen have an important role to play in applying ADR in criminal cases within their jurisdictions.<sup>650</sup> There are many advantages attached to traditional courts, such as accessibility, lower costs, language consistency, simplicity and informality.<sup>651</sup> For traditional courts to be fully functional, their leaders should receive further training for ADR to be regulated properly at national level.<sup>652</sup> This will be over and above the training that is detailed in terms of article 17(1)(j) of the TCB and must focus specifically on dispute resolution in criminal cases.<sup>653</sup>

Furthermore, there must be consistency in the way in which all traditional courts operate in so far as their approach to ADR in criminal matters is concerned.<sup>654</sup> Consequently, a proper model needs to be agreed upon and implemented. In addition, these courts need to be promoted by government institutions and supported by communities in order to achieve its purpose. The TCB, once legislated, will provide guidelines for and recognition of traditional courts and leaders in South Africa.

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<sup>649</sup> Justice College is essentially a State Academy of the Department of Justice and Constitutional Development. The main purpose of this institution is to provide post-graduate training to staff appointed in the public sector, including prosecutors, state advocates, family advocates, legal advisors and judicial officers. Although the College is based in Pretoria, the facilitators, lecturers and trainers regularly offer training courses at all major cities in South Africa.

<sup>650</sup> Refer to paragraph 2.1.4 at chapter 2.

<sup>651</sup> Paragraph 2.1.4 in chapter 2 deals with this issue.

<sup>652</sup> Refer to paragraph 5.5.1 above which explains the need for training.

<sup>653</sup> Article 17(1)(j) of the *Traditional Courts Bill* "The Minister must make regulations regarding the following: the training of traditional leaders and persons designated by traditional leaders to convene traditional courts."

<sup>654</sup> Currently, traditional courts in South Africa do not operate uniformly. Different regions and different groups of indigenous people practice different customs and traditions, which shape the rulings of their courts.

### 5.5.3 *Legislative framework on ADR within the criminal justice system: proposals for change*

To address the *lacuna* in ADR in South Africa, the only viable option would be to enact new laws or amendments to existing legislation. It has been indicated previously herein how prosecutors in South African courts practice ADR by way of "informal mediations", yet there is no legislative structure allowing this procedure.<sup>655</sup> This has caused irregularities in the way ADR is practised in courts in the country.<sup>656</sup>

The crafting of new legislation authorising criminal ADR, can be a lengthy and cumbersome process.<sup>657</sup> The author believes that a simpler procedure could be followed. One option would be for ADR mechanisms to be incorporated into existing legislation by way of amendments. Until proper ADR legislation in criminal law is passed, amendments to current legislation can bridge the gap. The CPA is the cornerstone of the criminal justice system in South Africa. All major processes and procedures relating to criminal law are embodied in the CPA. One of the simplest methods of legislating ADR within criminal law will be to broaden the ambit of the CPA to cover ADR in criminal cases. A starting point would be to extend the ambit of section 105A of the CPA, which currently deals with plea bargaining.<sup>658</sup>

#### 5.5.3.1 Plea bargaining

The plea bargaining or plea agreement approach can be utilised effectively by prosecutors to address ADR in criminal cases by building ADR and restorative justice elements into the plea agreement. A prosecutor has direct control over a plea agreement, which takes place between the state and the accused through the prosecutor. The process requires that the accused agrees to plead guilty, often to a lesser charge, or to one of many charges (thereby circumventing a trial) and in return receives a lenient sentence. For example, where an accused is charged with three counts of malicious injury to property, he or she can negotiate with the prosecutor to plead guilty to one count only, have the other two counts withdrawn, yet agrees in the plea agreement to compensate all the victims fully in respect

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<sup>655</sup> Paragraph 2.2.13.1 in chapter 2 sets out the parameters within which prosecutors implement informal mediations in certain criminal cases.

<sup>656</sup> The inconsistencies are clarified and explained in paragraph 2.2.13.1 in chapter 2.

<sup>657</sup> The *Traditional Courts Bill* is one example. The first version of this Bill was presented in 2008, yet to date, it has not been passed into law.

<sup>658</sup> Section 105A of the CPA deals with plea and sentence agreements which the prosecutor can conclude with the accused.

of all three counts. Section 105A(1) of the CPA sets out the requirements for plea agreements in criminal cases in South Africa as follows:

- (a) A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of:-
  - (i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and
  - (ii) if the accused is convicted of the offence to which he or she has agreed to plead guilty-
    - (aa) a just sentence to be imposed by the court; or
    - (bb) the postponement of the passing of sentence in terms of section 297(1)(a); or
    - (cc) a just sentence to be imposed by the court, of which the operation of the whole or any part thereof is to be suspended in terms of section 297(1)(b); and
    - (dd) if applicable, an award for compensation as contemplated in section 300.
- (b) The prosecutor may enter into an agreement contemplated in paragraph (a)-
  - (i) after consultation with the person charged with the investigation of the case;
  - (ii) with due regard to, at least, the-
    - (aa) nature of and circumstances relating to the offence;
    - (bb) personal circumstances of the accused;
    - (cc) previous convictions of the accused, if any; and
    - (dd) interests of the community, and
  - (iii) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances 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.

In terms of this section, and to finalise the plea agreement, it is incumbent upon the prosecutor to consult with the victim. The prosecutor can use this opportunity to discuss ADR procedures with the victim and to include him/her in the plea agreement, address the terms of the restorative justice and other compensatory aspects which will affect the penalty.

Another option is to bring in a mediator who will work with the victim and the offender to steer them towards a fair plea agreement with a desired outcome. Social workers, probation officers as well as *pro bono* and *pro deo* appointees from LASA<sup>659</sup> and legal clinics<sup>660</sup> can be called upon for this purpose. Alternatively, the prosecutor can direct the process of mediation within the ambit of the plea agreement. The victim and the perpetrator will have the opportunity to communicate with each other about the crime and harm suffered, a suitable redress, and a settlement or apology that could be incorporated into the plea agreement.<sup>661</sup> A simple provision recognising ADR options must be included in section 105A by an amendment to the CPA. The prosecutor's role and responsibility in ADR proceedings are fundamental and will now be examined.

#### 5.5.3.2 Strengthening the capacity of prosecutors to mediate

As is currently the practice in South African courts, albeit unlegislated, prosecutors do control the so-called "informal mediation" process.<sup>662</sup> However, for ADR to be fully functional, it must be carried out within a proper legal structure. It is recommended that provisions authorising ADR be formulated in the CPA, which will legitimise mediation and in so doing, should clearly set out guidelines regarding the following:

- a) The type of cases that will qualify for mediation.
- b) The type of offender who will qualify for ADR.

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<sup>659</sup> Legal Aid South Africa is a public defender system for those who cannot afford legal services.

<sup>660</sup> Most universities in South Africa provide law clinics wherein law graduates and academics offer their legal services to the community at no cost. Some NGO's such as the Ramakrishna Centre of South Africa, Phoenix Branch, offer monthly law clinics at their Centre. Legally qualified and practicing professionals from the congregation serve this law clinic.

<sup>661</sup> Streib *The State of Criminal Justice* 141.

<sup>662</sup> Refer to paragraph 2.2.13.1 in chapter 2 which explains the process of "informal mediations" used by prosecutors.



- c) The categories of prosecutors who will be permitted to conduct or authorise the mediation process.<sup>663</sup>
- d) The process of mediation.
- e) Time frames for each stage of the process.
- f) Guidelines on where and how the mediation should take place.
- g) The way in which the mediation should be conducted.
- h) The persons who will be allowed to be present during the mediation, such as social workers, family members, religious leaders, and attorneys.
- i) The rules on how long and how many postponements can be permitted until conclusion.
- j) The type of compensation.
- k) The rules regarding the recording process of the proceedings.
- l) The approach going forward should the mediation process fail.

#### 5.5.3.3 Role of prosecutors in ADR

In order to facilitate the process in the previous section, provisions setting out exactly which ADR mechanisms and procedures applicable to criminal law will have to be legislated. Similar stipulations as found in Indian legislation on ADR can be incorporated into the CPA.<sup>664</sup> It is suggested that, as in India, the ADR mechanisms of conciliation, mediation, and negotiation are to be emphasised.<sup>665</sup> These mechanisms can be initiated and driven by the prosecutor, as is the current unofficial practice along the *NPA Policy Directives*.<sup>666</sup>

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<sup>663</sup> Various categories or classes of prosecutors are found in the NPA. It is suggested that only experienced and trained prosecutors be allowed to authorise and perform mediations.

<sup>664</sup> Refer to paragraph 3.9 in chapter 3 which sets out in detail these ADR mechanisms.

<sup>665</sup> In paragraph 3.9 in chapter 3, a lengthy discussion on the panchayat system, the *Nyaya Panchayat Act*, The *Gram Nyayalayas Act* as well as the *Legal Services Authorities Act* showcased the various ADR mechanisms legislated and employed in the Indian legal system.

<sup>666</sup> Refer to paragraph 2.2.13.1 in chapter 2 which considers this aspect in detail.

Furthermore, specific provisions can be made allowing accredited mediators in the form of social workers, probation officers or family advocates to provide their input if and when needed. Prosecutors currently play an active role in "informal mediations" in many thousands of minor cases that are mediated in courts annually. However, the challenges they face in this regard were pointed out previously.<sup>667</sup> For ADR to function properly in criminal matters, the role of prosecutors must be clearly defined and supported with appropriate legislation. It starts with reviewing the *NPA Policy Directives* and by creating new legislation.

#### 5.5.3.4 Reviewing the NPA Policy Directives

As alluded to previously,<sup>668</sup> the *NPA Policy Directives* offer guidelines to prosecutors on informal mediations. These *Policy Directives* briefly dictate to prosecutors that in "less serious" criminal cases which can be mediated,<sup>669</sup> the prosecutor drives the informal mediation process, completes the mediation agreement, withdraws the charges in court and sends the docket back to the SAPS charge office.<sup>670</sup> It is hereby proposed that Part 7 of the *NPA Policy Directives* be retracted in total and new guidelines dealing not only with mediations, but all forms of ADR in criminal matters be drawn up. As referred to previously in chapter two, the *NPA Policy Directives* cannot be quoted here verbatim, suffice to say that it states that "informal mediations" can take place in less serious cases and lists a few other criteria. It is recommended that this part of the *NPA Policy Directives* be titled ADR and should read as follows:

1. ADR refers to cases finalised outside of the normal trial process using restorative justice principles. The following ADR mechanisms can be utilised by prosecutors to resolve criminal complaints: mediation, conciliation and negotiation. The most common mechanism employed by prosecutors is mediation.

- 1.1 Mediation refers to the process whereby a prosecutor who has been assigned and authorised by the DPP to perform such, acts

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<sup>667</sup> Paragraph 2.2.13.1 in chapter 2 explains the challenges faced by prosecutors in South African courts regarding this issue of "informal mediations"

<sup>668</sup> Refer to paragraph 2.2.13.1 in chapter 2 which elaborates on "informal mediations" as per the *NPA Policy Directives*.

<sup>669</sup> The *NPA Policy Directives* specifically refers to petty cases, those attracting an admission of guilt fine.

<sup>670</sup> This process is explained in chapter 2 at paragraph 2.2.13.1.

as mediator between the victim and offender to remedy the harm that caused the criminal charge to be laid.

- 1.2 The mediation must be conducted in a fair, professional, just and unbiased manner, allowing the parties to restore the relationship and harm or loss suffered by the victim.
- 1.3 Upon the successful conclusion of the mediation session, a mediation agreement form must be completed by the victim and the offender which will record the full terms of their settlement. Such agreement must be documented in triplicate, a copy of which must be filed in the mediation file, another in the relevant police docket and the original to be handed in to the presiding officer to be attached to the charge sheet as part of the court record. This matter will then be recorded as successfully finalised through mediation in the mediation register.
2. Mediation can be conducted in appropriate criminal cases in accordance with schedule one of the CPA. Mediation cannot be considered in cases of murder, gang rapes, trio crimes, treason, sedition, gang-related offences, or where the accused has multiple charges, previous convictions or has a predisposition to violence.
3. At all times the prosecutor must act within the ambit of the CPA, be mindful that justice is served and that the interests of the community are considered.

The above guidelines, if replaced in the *NPA Policy Directives* and read with the amendment of the CPA regarding ADR, will provide a proper framework for prosecutors to proceed and conclude mediations in criminal courts in South Africa.

Furthermore, it will also be appropriate to identify specific courts, particularly in bigger centres, which can be considered designated or dedicated ADR courts with court personal committed to and interested in steering the ADR process. In smaller courts, such as the one man station courts found predominantly in rural areas, certain days can be assigned specifically for ADR purposes as they are for maintenance and domestic violence.

#### 5.5.3.5 Incorporating ADR provisions in the CPA

Apart from the CJA, there is no legislation in South African criminal law that includes ADR. It is proposed that the following amendments be made to the

CPA which will allow for this. The following addition to the CPA is proposed:<sup>671</sup>

#### Settlement of disputes through ADR

- 1) in suitable criminal cases:
  - a) the prosecutor, upon receiving the docket;
  - b) the judicial officer upon receiving the charge sheet;
  - c) at the request of the victim; or
  - d) at the request of the accused, directly, or through the legal representative;
- 2) and upon determining that the case can indeed be settled by way of ADR, can request:
  - a) the presence of the parties to attempt to resolve the dispute amicably through the process of mediation, conciliation or negotiation;
  - b) if necessary, the case can be postponed to an acceptable date for this purpose;
  - c) the prosecutor must make reasonable attempts to settle that dispute by way of ADR by mediating and negotiating with the parties;
  - d) court appointed conciliators can be called upon if required, to assist the parties in resolving their dispute amicably; and
  - e) if the dispute is settled through ADR, and the presiding officer is satisfied that the agreement is just, fair and reasonable it will be stated in writing and become an order of the court.
- 3) Such a case will be considered as being concluded successfully and the court records, being the charge sheet and the court book as well as the case docket shall reflect this.

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<sup>671</sup> No such section or provision exists. The writer of this provision is the author and proposer of this provision.

- 4) A copy of the order shall be attached to the charge sheet and the police docket.
- 5) If the accused does not comply with the court order, the case can be re-enrolled for trial or, proceed to the civil court for recovery.

The contents of this provision are self-explanatory and deals with some of the issues proposed in paragraph 5.4.3.2 above. Only when such a provision is included in the CPA, ADR will be officially recognised in South African criminal courts.

#### 5.5.3.6 Legislation on victim offender mediation (VOM)

Another possibility is VOM,<sup>672</sup> an internationally accepted ADR mechanism that needs to be legislated in South Africa for it to become fully applicable.<sup>673</sup> VOM encourages candid and open dialogue between the offender and the victim and is an integral aspect of criminal ADR.<sup>674</sup> It must be integrated into criminal law, to enable either the presiding officer, the prosecutor, the accused, the complainant or even the defence council to suggest it as an option at the earliest opportunity. Within VOM, an open conversation regarding the physical and emotional trauma, restoration of harm and reconciliation between the parties takes place. Since the discussion revolves around the wrongdoing by the offender, and how the parties will handle it, the victim is empowered by this "victim-focused" approach, is able to communicate with the offender in a safe and controlled environment, and most importantly, will be able to hold the offender accountable for his or her actions.<sup>675</sup> As with the VOM approach found in the CJA, the same principle can apply to adults if this is provided for in the CPA.

Trenczek<sup>676</sup> avers:

VOM is just one, and in the present European context, the most important model of restorative justice.

This assertion further clarifies the proposal that VOM plays a constructive role in criminal ADR. The aim of the above provision is to legislate VOM

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<sup>672</sup> VOM was discussed in chapter 2.

<sup>673</sup> Currently VOM is only mentioned in the CJA as being only applicable to children in conflict with the law. It is not an option available to adults in South African criminal law. Refer to the discussion on VOM in chapter 2 which clarifies this point.

<sup>674</sup> Umbriet *The Handbook of Victim Offender Mediation: An Essential Guide to Practice* 8.

<sup>675</sup> UNODC "National Policy Guidelines for Victim Empowerment" 2.

<sup>676</sup> Trenczek 2005 *ADR Bulletin* 108.

between adults in criminal matters and must be included in the CPA. The provision could read as follows:<sup>677</sup>

#### Victim offender mediation (VOM)

- 1) Victim offender mediation is an accepted ADR mechanism which can take place at any stage of the trial process. It is an informal procedure and does not form part of normal court procedure. It is a voluntary process which must be explained fully to the victim and offender by the presiding officer before commencement.
- 2) The intention of VOM is:
  - a) to allow the victim to confront the offender and engage with him or her about the impact of the crime;
  - b) to restore the relationship between the parties;
  - c) to assist the victim in making sense of the crime;
  - d) to address the needs of the victim;
  - e) to heal emotional wounds and harm suffered;
  - f) to allow the offender to take responsibility for his actions;
  - g) to give the offender an opportunity to restore the damage suffered; and
  - h) to assist him or her in understanding the consequences of their actions, to allow them to express remorse and apologise.
- 3) The VOM must be explained to the victim and only after his or her consent has been obtained can it be recommended by:
  - a) the presiding officer upon determining whether the offence warrants such intervention;
  - b) the prosecutor upon taking all aspects of the case into consideration; and

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<sup>677</sup> The author hereof has drafted this as an example of VOM legislation.

- c) the accused or his or her legal representative.
- 4) The following persons may be present at the VOM:
  - a) the victim;
  - b) the offender(s);
  - c) a police officer;
  - d) an approved mediator;
  - e) a social worker or probation officer;
  - f) the victim's support structure, being family members, religious leaders, friends or members of the community;
  - g) a prosecutor;
  - h) the legal representative of the offender; and
  - i) an interpreter, if required.
- 5) The VOM shall take place under the following circumstances:
  - a) with the consent of both parties;
  - b) if ordered by the presiding officer and if the victim agrees;
  - c) at the recommendation of the prosecutor, the accused or his/her representative, a counsellor, social worker, psychologist or psychiatrist; and
  - d) in the presence of an approved mediator, probation officer, prosecutor, social worker, psychologist, psychiatrist or therapist.
- 6) The VOM is convened and facilitated by an approved mediator, who will determine the date, time and place of the mediation session. The duty of the mediator is:
  - a) to record the proceedings;
  - b) ensure confidentiality and fairness of the proceedings;
  - c) maintain peace and order; and

- d) assist the parties in arriving at a solution.
- 7) After the mediation process, a written agreement between the victim and offender must be drawn up. This should specify the role and responsibility of the offender in addressing the harm suffered by the victim, the manner of compensation with specific details relating to the method, place and date. Any other restorative justice intentions must also form part of this agreement, which must be handed to the presiding officer, after which it becomes part of the case record. Any undertaking made by the offender will be noted as an undertaking arising from the VOM and can be incorporated into a court order. If no agreement can be reached between the victim and offender, the mediator will terminate the VOM and report it in writing to the presiding officer.

If the above section is written into the CPA, the benefits for both victims and offenders will be substantial.

#### *5.5.4 Draft policy promoting ADR in criminal cases*

Meiring<sup>678</sup> alleges that "the general welfare of the citizens of a state, region, province or municipality cannot be promoted if policy is not laid down and implemented". This statement supports the view that policies guide development and transformation in any situation.<sup>679</sup>

Policies are fundamental in changing attitudes and implementing new systems.<sup>680</sup> To effect this change in criminal ADR, a new policy directed at promoting, furthering and effecting ADR must be designed. To support this attitude Ntuli<sup>681</sup> declares that:

African governments are increasingly adopting policies which use ADR to complement the formal justice system thereby promoting access to justice for people who would not have access because of insufficient income or lack of understanding and confidence in the formal justice system.

It is interesting to note that the Australian government, under a body known as the National Alternative Dispute Resolution Advisory Council (NADRAC)

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<sup>678</sup> Meiring *The Nature and Importance of Policy Analysis and Evaluation in the Local Sphere of Government* 1.

<sup>679</sup> Meiring *The Nature and Importance of Policy Analysis and Evaluation in the Local Sphere of Government* 4.

<sup>680</sup> Meiring *The Nature and Importance of Policy Analysis and Evaluation in the Local Sphere of Government* 11.

<sup>681</sup> Ntuli "Policy and Governments' role in constructive ADR developments in Africa" 5.



created a policy document entitled: "Legislating for Alternative Dispute Resolution, a Guide for Government Policy Makers and Legal Drafters".<sup>682</sup> This guide acknowledges the fact that in the absence of concrete policies and legislation, ADR will not be actively promoted and enforced. The 139-page document also sets out the exact processes to be followed when creating ADR provisions and legislation.<sup>683</sup> Likewise, a similar policy can be created and implemented in South Africa. Although the South African Law Commission's report on ADR (Project 94) was issued in 1997, nothing much has been accomplished in the criminal domain by way of ADR. It is a recommendation of this researcher that specific policies promoting ADR usage within criminal law be developed and distributed to relevant stakeholders and institutions for immediate implementation.

#### *5.5.5 Impose a duty on judiciary to enquire about ADR possibilities in appropriate cases*

In India, section 23 of the *Nyaya Panchayat's Act* specifically sets out the duty of the judiciary to make every attempt to settle a dispute amicably.<sup>684</sup> However, the situation in South Africa is quite different as dedicated ADR courts such as those in India do not exist. Despite this, the judiciary cannot play a passive role when presented with a case that has the potential of being resolved by ADR. It is not the intention of the researcher to place a burden on the judiciary to mediate cases. Rather, it would merely be required that all parties be made aware that the possibility of ADR exists and that this must be done by the presiding officer before the case is enrolled for trial. This enquiry must be recorded on the charge sheet as well as on the pre-trial certificate.

#### *5.5.6 Obligatory explanation of ADR to litigants*

Litigants, who are properly notified about various options available to them, will be in a better position to make informed decisions in their best interests. It is highly unlikely that victims and offenders in South African courts will be aware of ADR possibilities in criminal cases, because such legislation does not exist for adults. Because the *NPA Policy Directives* is not a public document and access is limited to prosecutors, very few will be aware of its contents. When new ADR laws have been drawn up, litigants must be

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<sup>682</sup> This document was created by the National Alternative Dispute Resolution Advisory Council in November 2006.

<sup>683</sup> NADRAC 'Legislating for alternate dispute resolution, A guide for government policy makers and legal drafters' 1,4

<sup>684</sup> Refer to paragraph 3.9 in chapter 3 which this aspect is discussed.

informed of the availability of this option and the simplest way of doing so would be via legal practitioners working closely with disputants.

The South African Law Society (SALC) is responsible for regulating the legal profession and issues rules to legal professionals.<sup>685</sup> A similar code of conduct for prosecutors was issued under a *Government Notice*.<sup>686</sup> Furthermore, the National Forum on the Legal Profession set out a code of conduct applicable to all admitted advocates and attorneys in South Africa.<sup>687</sup> None of these documents advocates ADR options in criminal cases or the obligatory explanation of these possibilities to litigants. It is proposed that amendments be made to these documents to include the mandatory explanation of ADR options by legal practitioners to their clients. Clearly, members of SALC, legal clinics, *pro bono* and *pro deo* representatives can play a significant role in recommending ADR to their clients and engaging with the prosecutor on ADR terms and recommendations.

In contrast to the South African situation it is noteworthy to mention that in Nigeria,<sup>688</sup> rule 15(3) of the *Rules of Professional Conduct for Legal Practitioners*<sup>689</sup> renders it compulsory for all legal practitioners to inform their clients about the various ADR options before embarking on litigation. Similar rules should be incorporated into codes of conduct for attorneys, advocates and prosecutors in South Africa.

## **5.6 Conclusion**

The purpose of this research was to draw attention to the fact that South African legislation on ADR in criminal law is not only trailing behind, but is also showing no signs of further development, while in India, the manner in

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<sup>685</sup> Rules for the Attorneys Profession are issued by the South African Law Society. These rules deal with issues governing general practice, accounting, conduct etc. They can be viewed at <http://www.lssa.org.za>

<sup>686</sup> Code of Conduct for Members of the National Prosecuting Authority under section 22(6) of the *National Prosecuting Authority Act*, 1998. Government Gazette Number 33907 of 3 December 2010. This document deals with professional conduct, independence, co-operation with stakeholders, and their role in the administration of justice and similar matters.

<sup>687</sup> The National Forum on the Legal Professions "Code of Conduct" in terms of s 97(1)(b) *Legal Practice Act* 28 of 2014.

<sup>688</sup> No legal comparison of Nigeria has been made and this comment is just made in passing. It has not influenced the reasoning of the author in any way.

<sup>689</sup> Rule 15(3)d of the *Rules of Professional Conduct for Legal Practitioners* 2007 "In his representation of a client, a lawyer shall not fail or neglect to inform his client of the option of alternative dispute resolution mechanisms before resorting to or continuing litigation on behalf of his client."

which criminal cases are resolved, utilising ADR, is markedly different. Not only has India shown considerable progress and development in this regard, it has also incorporated unique features like the *panchayat*, *gram nyayalayas*, *nyaya panchayat* and the *Lok Adalat* into its legislation. These have evolved from ancient practices and beliefs that appeal to the Indian collective, hence its success. The value and benefit of ADR lie in the fact that it can be moulded according to the individual practices and beliefs of any given community.

In the face of a glaring lack of statutory authority on ADR in South Africa, the only option is to create fitting and effective legislation that will empower and authorise ADR in stipulated criminal cases. The scope is wide and the options are many.

The recommendations provided in this chapter could be a point of departure in amending and creating legislative provisions on ADR specific to criminal law in South Africa. It is an established fact that the crime rate in the country is among the highest in the world. Crime analyst Lebone<sup>690</sup> states:

South Africans live with horrific levels of violent crime. The situation is so serious that South Africans are more likely to be murdered than the residents of terror-affected countries.

Similarly, Ndalane<sup>691</sup> states:

Our people are daily tormented by crime which robs them of peace and stability.

The high crime levels impose further strain on South Africa's criminal justice system. It has already been argued that the retributive nature of criminal justice is not appropriate for all cases.<sup>692</sup> Returning to the Sasolburg case as an example, it demonstrates the difficult choice a parent had to make between emotions or letting the law run its course, and how the choice she made prevented justice from being served. This is the type of case in which ADR can and will play a vital role. The time for amending criminal legislation in South Africa, by incorporating ADR is ripe and should be done expeditiously to bring about advances in this sector of the country's law.

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<sup>690</sup> De Swart August 2017 <http://www.heraldlive.co.za>.

<sup>691</sup> Tiva 8 September 2017 <http://www.sabc.co.za>.

<sup>692</sup> The example of the mother in the Sasolburg case scenario.

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