Integrating Alternative Dispute Resolution into South African Criminal Jurisprudence: An Urgent Need for Law Reforms

Prince Pius Imiera
http://orcid.org/0000-0001-9217-6561
University of South Africa, College of Law
Institute for Dispute Resolution in Africa
pius4me1964@gmail.com

Abstract

This article argues for the inclusion of alternative dispute resolution (ADR) into the criminal justice administration of South Africa, which will ultimately result in the comprehensive legal transformation of the country's justice system. Non-traditional dispute resolution processes, which fall within the context of ADR, are globally accepted and have been implemented in different dispute contestations. The argument whether ADR should be applied in a criminal justice context, poses normative questions concerning the function of the justice system, and sociological questions concerning the nature of criminals and crimes. Crime rates in South Africa are high and the criminal justice system may be unable to cope with the floodgates of formal litigation. In this context the article argues for the integration of ADR into the South African criminal justice system. Two major research problems are addressed through reviewing existing literature and doing desktop research. The first aspect concerns the integration of ADR into the South African criminal justice system with a view to effecting law reforms. Second, the question regarding the roles of traditional rulers in resolving criminal disputes is explored. The conclusions reached relate to the need for law reformation in South Africa, particularly in respect of the integration of ADR into criminal jurisprudence, in order to become aligned with other jurisdictions the world over.

Keywords: ADR; criminal justice system; South Africa; criminal jurisprudence

UNISA university of south africa PRESS

Politeia
https://upjournals.co.za/index.php/Politeia
Volume 38 | Number 2 | 2019 | #4611 | 21 pages

https://doi.org/10.25159/0256-8845/4611
ISSN 0256-8845 (Online), ISSN 0256-8845 (Print)

Introduction

> The quality of our lives depends not on whether or not we have conflicts, but on how we respond and resolve them. (Crum n.d.)

Thomas Hobbes (cited in Elahi 2005, 1), one of the advocates of the social contract theory, argues that, in the state of nature, our "natural rights" will always be in conflict with other people's natural rights. As a result, conflict makes our lives "solitary, poor, nasty, brutish, and short." With that being said, conflict is a universal phenomenon; it is present in all social and human relations, and more particularly in all societies. In addition to that, in many conflicts the methodologies and procedural strategies adopted by the warring parties with a view to resolving the conflict vary considerably in the way the conflict is addressed and settled. Furthermore, the resolution of the conflict has different outcomes, both tangible and intangible. However, people in conflict have a number of procedural options to choose from to resolve their differences. In most jurisdictions of the world, the Western method and traditional way of settling conflict is through the instrumentality of the court system. As a result, the use of traditional dispute resolution processes in criminal matters, commonly called alternative dispute resolution (ADR), has been relegated.

Consequent upon the above, ADR in the criminal justice context contains little or no reference to its use in the criminal justice administration; therefore, most criminal law text books and scholarly works that deal with criminal procedures and processes do not make use of ADR terminology (Lewis and McCrimmon 2005, 4). The said authors argued that the factor responsible for the foregoing claim is that ADR is principally perceived as a method of resolving disputes between parties without resorting to formal court-based adjudication.

Traditional theories of criminal justice, on the other hand, view criminal offending to a large extent as a matter of conflict between the offender and the state (Sarre and Tomaini 2004, 144–145). Consequently, the use of ADR processes in criminal matters is not known to most African traditional communities (Chukwunweike, Obi-Ochiabutor, and Okiche 2013, 215). It is noted that the increased interest in the application of ADR processes to the criminal justice system is due to the general dissatisfaction with Western adversarial methods of dispute resolution, a practice where crime victims lose their cases to the state (Lewis and McCrimmon 2005, 4). In addition, the criminal justice system is bedevilled with myriads of criticisms: first, the criminal justice is seen as unsuccessful in reducing rates of recidivism, and it may even increase the likelihood of reoffending for particular groups, such as juveniles and indigenous people; secondly, the criminal justice system ignores the victims of crime and fails to recognise crime as a form of social conflict (Kift 1996, 71).

One of the renowned advocates of the application of ADR methodologies to criminal "disputes" is Christie, who claims that "conflicts become the property of lawyers and formal legal processes rob individuals of the right to full participation in the dispute resolution process" (Christie 1977, 4). Consequent upon the foregoing, the idea that a criminal offence represents not just a violation or infraction of a state's laws but also a community conflict which requires resolution between crime victims and the criminal offender is rapidly gaining ground, and this has led to increased support for the use of non-traditional criminal justice methods (Lewis and McCrimmon 2005, 4).

Conceptual Framework of ADR

Between 1970 and 1980 when the ADR movement began in America as a response to the need to find a more efficient and effective alternative to litigation (Shamir 2003, 4), several means of dispute resolution processes like mediation, conciliation, and arbitration, all of which come under ADR, gained acceptance and popularity as alternatives to traditional litigation (Victor 2007, 5). The adoption and use of ADR in different dispute contexts have grown incredibly and ADR has been institutionalised in some jurisdictions with the introduction of legislative frameworks and development of professional bodies, which have encouraged and promoted the use of ADR processes (Australian Law Reform Commission 1998, 2.5–2.9).[1]

The National Alternative Dispute Resolution Advisory Council (NADRAC) of Australia defines ADR to mean the "processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them" (NADRAC 2002). This definition constitutes the recognition of the fact that ADR is the general term used to define a set of approaches and techniques aimed at resolving disputes in a non-confrontational way, ranging from negotiation between the two parties, a multi-party negotiation through mediation, consensus building, to arbitration and adjudication (Shamir 2003, 1). Additionally, it covers approaches that involve party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, arbitration and adjudication (where an external party imposes a solution).

Also included in these approaches to ADR is mediation, a process involving a neutral third person who helps and aids the disputants to resolve and reach an amicably agreed solution (Shamir 2003, 2).

[1] Australian Capital Territory Crimes Restorative Justice Act 2004.

Differentiating between ADR Concepts

Negotiation

Goldberg, Sander, and Rogers (1992, 53) define negotiation as:

> communication for the purpose of persuasion. Negotiation is a process in which parties to a dispute discuss possible outcomes directly with each other. Parties exchange proposals and demands, make arguments, and continue the discussion until a solution is reached, or an impasse declared.

In negotiations there are three approaches to resolving the dispute, each with a different orientation and focus—interest-based, rights-based, and power-based—and each can result in different outcomes.

Mediation

> Mediation is a process that employs a neutral/impartial person or persons to facilitate negotiation between the parties to a dispute in an effort to reach a mutually accepted resolution. Mediation is a process close in its premises to negotiation: mediation is an assisted and facilitated negotiation carried out by a third party. (Shamir 2003, 23)

Mediation has many advantages, particularly when the disputants have an existing relationship that must continue after the dispute is resolved, since the agreement is by consent and none of the disputants should have reason to feel they have lost anything whatsoever.

To this end, mediation is therefore useful in disputes between family members, neighbours, business partners, and adjacent political entities, as well as in disputes that involve labour relations. Mediation creates a foundation for resuming the relationship after the particular issue has been resolved.

Additional advantages of mediation are: it assists in identifying the true issues of the dispute; it settles some or all of the matters in issue; it may result in conclusive agreement on all or part of the issues of the dispute; it may ensure that the needs and interests of the parties are met partially or comprehensively; it assists the parties to reach an understanding of the true cause of the dispute; it provides the possibility of preserving the relationship; and it gives an opportunity for an improved relationship.

Adjudication

According to Shamir (2003, 2), “adjudication is the process by which a conflict is presented to a judge, or a third party appointed by the judge (a panel of judges, a jury, and so on), for a legal decision that is binding and enforceable.” Adjudication is the

traditional way of resolving disputes by rendering a decision. The decision is made according to a legal precedent and an application of relevant laws, which requires that the issues in the dispute be narrowly focused. The judge or jury as a third party imposes the solution upon the parties in the dispute. This is the process most known in societies all over the world, where the court appoints a judge who has the power to decide.

The parties to the dispute employ lawyers to present their clients' arguments and evidence, and the judge makes a ruling and imposes a solution to the dispute. The parties to the dispute do not have control over the content or the process, and the result is usually a "win-or-lose" situation.

Arbitration

This is a process wherein parties to the dispute agree to submit their dispute to a neutral party, who will decide their case. Arbitration is a form of dispute resolution that is closest to adjudication. The parties agree on a third neutral party or a panel, to whom they present their case.

The arbitrator has the power of decision in the dispute. It is a private and less formal process than litigation in court. There are several varieties of arbitration; it may be binding or non-binding, and the arbitrator's decision may be with or without a written explanation or opinion. The arbitrator meets with the parties to a dispute, hears presentations from each side, and renders a decision. The arbitrator may be a professional who is familiar with and knowledgeable about the issues involved. The arbitrator will hear the facts and arguments of both sides and give a verdict on the basis of the applicable laws and procedures. The parties have the freedom to choose the arbitrator who will handle the dispute. This process is very often faster and less formal than the judicial process. The results may be binding or non-binding; however, this depends on a prior decision and local laws and, when such decision becomes binding, leave to appeal to a higher court may not be granted.

Conciliation

Conciliation is a process in which a third party brings together all sides of the conflict for discussion among themselves. Conciliators do not usually take an active role in resolving the dispute, but may help with agenda-setting, record-keeping, and other administrative concerns. A conciliator may act as a go-between when parties do not meet directly, and act as a moderator when joint meetings are held.

Facilitation

A third party offering his or her good offices in order to bring the parties together and encourage them to continue their negotiation is called a facilitator. Such third party will

assist the parties to continue the negotiation, reach consensus and move towards an agreement. This third party should be an honest peace-broker who offers good offices in order to bring the parties together. The third party does not get involved in the issues of the dispute, only in the process.

The Advantages of Mediation under ADR

Mediation as a means of resolving disputes has its advantages, most especially when the disputants have an ongoing relationship that may continue in the aftermath of the dispute. Beyond this, insofar as the parties' agreement to mediate was obtained by consent, none of the disputants should have the feeling of being a loser. Based on the foregoing, it is argued that mediation is useful in resolving disputes between neighbours and in criminal cases and a crime situation where the offender hurt the feelings of the crime victims. To this end, mediation provides the foundation for re-establishing the relationship after the particular issue has been resolved. More advantages of mediation are examined below.

Flexibility

The traditional Western forms of litigation have two principal drawbacks that do not apply to mediation (Radford 2001, 247). One drawback is that the Western form of resolving disputes assumes a result in which either the criminal or the crime victim (in criminal cases) or the claimant or defendant (in civil cases) is successful. Another drawback is that the Western form of dispute resolution places restrictions or limitations on the results to strict legal alternatives (Moss cited in Otiso 2017, 104).[2] On the other hand, mediation gives the disputants the freedom to proffer and design solutions that suit their peculiar needs, without necessarily adhering to legal technicalities and principles (Gary 1997, 431).[3] The parties can come to a conclusion that does not fall within the confines of a typical judicial ruling and pronouncement. Additionally, the flexibility of mediation further permits the parties to formulate a resolution they consider as equitable, just and fair, which in the final analysis proves more satisfying compared to a formalistic and legalistic resolution.

[2] Moss (1998) describes the advantages of early mediation as follows: Disputes are usually more likely to be settled through mediation when mediation is recommended early. For example, when a dispute arises between a fiduciary and a beneficiary involving interpretation of the trust agreement, there is a high probability of success if the parties attempt to have their disagreement mediated before a lawsuit is filed. The parties should be able to compromise before either side becomes too inflexible in the "rightness" of their position.

[3] Gary (1997, 431) argues that research in family law has shown that mediation costs less than litigation in resolving cases.

Efficiency

Mediation under ADR, in comparison to formal litigation, reduces the cost of proceedings (Wissler 1997, 565). The informality in the mediation process gives the opportunity for meetings to be held as quickly as possible and for decisions to be reached, if not during the mediation session itself, then soon thereafter, which ultimately results in decreased legal charges.

It is noted that mediators may receive fees for services rendered by them during the mediation proceedings; however, many mediation programmes provide for few fee structures, and in some cases mediators provide services on a pro bono basis.

Although efficiency and low cost are usually considered as benefits in mediation proceedings, Stulberg (1998, 922) reasons that caution must be exercised, lest these benefits become "goals" and override the basic fairness of mediation processes. In addition, Stulberg argues that "the pressure to be efficient may cause a mediator to restrict the parties' participation in the mediation session, favoring legal counsel (over the parties themselves) due to the attorneys' training in presenting issues in a concise and 'efficient' manner." Moreover, as regards the issue of flexibility in time and cost, mediation is convenient, which may be of paramount importance for working parties or for parties who may not have access to private means of mobility. It is also argued that mediation proceedings are not limited to a specific *locus inquo* or courtroom at a specific date and time, but instead consider the availability and needs of the participants (Schmitz 1998, 76).

Controls over the ADR Procedure

In ADR processes, specifically mediation, the disputants have significant control over the procedure and outcome of the case. Consequently, the disputants design a suitable resolution by themselves, which, more often than not, results in success.

Additionally, the confidentiality and informality of mediation allow the parties to handle the emotional issues involved in the case.[4] In disputes in any context where ADR is used as a medium of resolving issues, the aim may be no more than achieving an emotional

[4] For example, the Indiana ADR rules provide that ADR processes will be subject to the same degree of confidentiality as is set out in Evidence Rule 408 and state additionally that mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation but rather such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by the parties, and an objection to the obtaining of testimony or physical evidence from mediation may be made by any party or by the mediators.

result. For instance, an apology or an opportunity to vent anger over a situation that the parties deem to be unfair, may lead to emotional outcomes.

One of the disadvantages of Western means of litigation under common law principles is that it falls short of public policy and expectation in that it does not guarantee privacy or confidentiality in settlement discussions. Most litigations and court proceedings are open-door procedures, and members of the public can observe the proceedings. But the legislative framework of some jurisdictions provides that ADR rules require mediations and other forms of ADR proceedings to be treated confidentially.

African Dispute Resolution Mechanisms

Dispute resolution in African societies is directed at repairing social relationships and restoring broken harmony (Kariuki 2017, 30). In most African societies, many frameworks are put in place for the resolution of conflicts; these frameworks also prevent further violence, which may threaten the social ties (Fayemi 2009).

One way of resolving disputes in an African setting is through the institution of elders. For example, in Rwanda, the conflict and problem resolvers are the headmen of the lineages or the eldest males or patriarchs of families. These elders settle disputes by sitting on the grass and discussing a settlement that will result in restoring social harmony by seeking the truth, punishing offenders and compensating crime victims (Ingelaere 2008, 33).

Velthuizen (2017, 161) states as follows:

> The opinion of elders and the interpretation of ritual symbols as well as sacrifices play an important role in dispute prevention. Leadership by consensus is the essence of African dispute resolution where the traditional leaders rule through arbitration to reconcile people and to maintain harmony …. The elders of the clan consider the social context, using an approach of "warp" and "weave."

In Botswana, the native people of Tswana use the customary methods to resolve a dispute which is in *pari materia* with the formal justice system; conflict resolution is premised on consultation and open discussions between the parties—a process that gives effect to the proverb: *ntwakgolo ke ya molomo* (great battles are fought verbally) (Ngcongco 1989, 42). In the Tswana community, there are different representatives during dispute resolution, depending on the social organisation being represented. For instance, at a family level, representatives are the *batsadi ba lolwapa (*family leaders). Dispute resolution starts at the *lolwapa* (household) level, and if the dispute is not resolved at this level, it is taken to the *kgotlana* (extended family level) where elders

from the extended family sit and listen to the matter in dispute. At every level, a *bo-ralekgotla* (council of elders) assists in advising the decision-maker.

South Africa, like every other African nation, has a pluralistic legal system, a system that has permitted the use of customary law in the traditional courts in accordance with the customs and practices of the people (Rautenbach 2014, 289–90). South Africa's colonial powers allowed African traditional communities to settle disputes within structures that were familiar with their systems of personal law, based on their idea of justice. The major objective of the traditional courts is to settle disputes in a manner that restores social equilibrium. The main actor in the traditional justice system is the traditional leader of the community, who is often an elder.

Before the incursion of the British colonial masters in South Africa, South African communities resolved their disputes in accordance with the customs and practices of the various tribal settings. However, after colonisation, the South African white rulers passed the Black Administration Act 38 of 1927 (South Africa 1927), which, in sections 20(a)(i)(ii)(b), provides, inter alia, that:

> (1) The Minister may – (a) by writing under his hand confer upon any Black chief or headman jurisdiction to try and punish any Black who has committed, in the area under the control of the chief or headman concerned – (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; and (ii) any statutory offence other than an offence referred to in the Third Schedule to this Act, specified by the Minister: Provided that if any such offence has been committed by two or more persons any of whom is not a Black, or in relation to a person who is not a Black or property belonging to any person who is not a Black other than property, movable or immovable, held in trust for a Black tribe or a community or aggregation of Blacks or a Black, such offence may not be tried by a Black chief or headman; (b) the Minister may at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph (a), by writing under his hand confer upon a deputy of such chief jurisdiction to try and punish any Black who has committed, in the area under the control of such chief, any offence which may be tried by such chief.

Although the Act has undergone several repeals and its amendments permit both civil and criminal powers to be vested in traditional leaders who use customary law to resolve disputes, it is argued that this Act is selective in its application, and therefore requires South African judicial and legislative intervention and interpretation.

Is ADR Appropriate in the Criminal Justice Context in South Africa?

It has been reasoned and argued that the major objective of conferencing in mediation processes is to attempt to reconcile conflicting objectives. It is also suggested that there

is little evidence to show that reconciliation of the offender with the victim and the community endures beyond the conferencing process (Carroll 1994, 177).

Additionally, there is the question whether there is a criminological basis for the introduction of ADR in criminal justice processes, especially in a country like South Africa where the crime rate is very high (Businesstech 2017).

Many years ago, similar fears were expressed in respect of the question whether ADR is appropriate in the criminal justice context, especially in Nigeria, a common-law jurisdiction whose criminal justice apparatus is founded on accusatorial or adversarial procedures.

ADR in criminal matters? That is not possible. This seems to be the opinion of many in the common-law jurisdictions, perhaps including South Africa. The question is whether there are any instances of criminal cases where ADR has been used.

Although a High Court in Nigeria has answered the above question in the negative, indicating that arbitration and other forms of ADR are restrictive in civil matters, it is argued that ADR has been used in criminal cases in Nigeria. Therefore, it is my humble submission that ADR can be used in South Africa in a similar manner as it is being used in Nigeria.

Advocates of the use of ADR in a criminal justice context have stated that, irrespective of the position of the Nigerian judiciary, ADR is not applicable to criminal cases, but the fact remains that ADR is integrated into the Nigerian criminal justice system. The reason for this is that the concept of ADR is indigenous to the various peoples of the Nigerian State. Obiego (1978, 28) argues that the different ethnic nationalities that predated modern Nigeria used forms of modern ADR.

In addition to what has been said, ADR in criminal justice is incorporated into Nigeria's criminal justice system. For instance, plea bargaining has been legislated into the criminal justice system of Lagos State.

Other laws have also been expressly incorporated into ADR in the Nigerian juvenile criminal justice system. The Economic and Financial Crimes Commission (EFCC), the equivalent of the HAWKS in South Africa, is empowered by the Act which established it to compound offences in order to obtain practical restitution. The EFCC has recovered from corrupt Nigerian individuals over 199 assets to the value of 190 billion Nigerian naira (equivalent to 6.3 billion South African rand) through the plea-bargaining process.[5] If the use of ADR in a criminal justice context has worked in Nigeria, then it

[5] *FRN v Cecilia Ibru* (FHC/L/297C/2009).

is argued that it will also function well in South Africa's criminal justice administration if applied judicially.

The Need for Justice Reforms in South Africa to Incorporate ADR in a Criminal Context

South Africa is a country that is known for its law reformation; it has continuously reformed its laws in several areas. For example, it introduced the Traditional and Khoi-San Leadership Bill [B 23–2015] (TKLB), which was made public in September 2015. The national Department of Traditional Affairs published a notice in the Government Gazette on 18 September 2015 and noted that the Minister of Cooperative Governance and Traditional Affairs would introduce the Bill in Parliament. To make his promise good, on 23 September 2015, Parliament announced that the Bill had been introduced by the Minister and that it had been referred to the Portfolio Committee on Cooperative Governance and Traditional Affairs.

Although there are laws on traditional leadership in South Africa, the Department of Traditional Affairs is credited to have said that the TKLB is needed for two main reasons (Land and Accountability Research Centre 2016, 1):

a) To put the various traditional leadership laws that currently exist into a single law, while at the same time solving problems that exist in the current laws, and;

b) To provide recognition to Khoi-San communities, leaders and councils—since this recognition has been absent until now.

The polemic attack surrounding the non-effectiveness of this Bill is that there are concerns that the South African government has ulterior motives for creating the TKLB. Some of these concerns are the following:

- There is an attempt to head off the kind of opposition that saw the closely related Communal Land Rights Act, Land and Accountability Research Centre, Faculty of Law, All Africa House, University of Cape Town struck down by the Constitutional Court, resulting in Parliament being unable to pass the Traditional Courts Bill.
- There has been such widespread failure to meet the few protections contained in the Traditional Leadership and Governance Framework Act 41 of 2003 that there is the fear that many traditional councils are not validly constituted.

In 2012 there was a policy development regarding the comprehensive transformation of state legal services in South Africa (Klaaren 2015, 481). Additionally, in February of the same year, the South African Minister of Justice and Constitutional Development made public the "Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State" (Radebe 2012, February 28).

As a consequence of the foregoing, the South African Department of Justice and Constitutional Development (2012, March 26) released the terms of reference for an assessment on how the decisions of the Constitutional Court could advance social transformation and the reconstruction of the South African jurisprudence in general.

Moreover, in 2012, the National Policy Conference of the African National Congress (African National Congress 2012), which took place at Gallagher Estate, Midrand, Johannesburg, June 26–29, 2012 approved and supported the recommendation that:

> The ANC reaffirms the position that the branches of the state are co-equal parties entrusted with distinct constitutional powers in their quest to realise the ideals of a democratic South Africa. Each branch of the state must therefore observe the constitutional limits on its own power and authority and that no branch is superior to others in its service of the Constitution.

Closely following on the above, the South African National Assembly, in November 2012, passed the Constitution's Seventeenth Amendment Act of 2012. This Act provides for the constitutional change of the structure of the South African judiciary (Hlongwane 2012).

As part of South Africa's relentless efforts to reform laws, the South African Law Reform Commission (SALRC) compiled a report on sexual offences and adult prostitution (SALRC 2017), exploring the need for law reform in relation to adult prostitution against the backdrop of some of the complex realities confronting South Africa. The major reason and objective of this reform was that, within the present South African context, public opinion about adult prostitution, both at local and international levels, has been complicated by the global economic recession, high levels of unemployment, crippling poverty, increase in the influx of migrant and illegal foreign job seekers, high levels of violence (specifically sexual violence against women), the HIV/AIDS epidemic, drug and substance abuse, and the targeted exploitation of women engaging in prostitution by third parties, unethical authorities and buyers (Kelly, Coy, and Davenport 2009, 5.2).

The SALRC's Issue Paper 19 (SALRC 2002) and Discussion Paper 1 (SALRC 2009) respectively reviewed the fragmented legislative framework that regulates adult

prostitution in South Africa within the larger framework of all statutory and common-law sexual offences. Additionally, the SALRC Project 107 (SALRC 2017) and other laws cited above considered the need for law reform in relation to adult prostitution. The SALRC also identified alternative policy and legislative responses that might regulate, prevent, deter or reduce prostitution. The corollary to the foregoing claim is that, as there is a range of legal responses to prostitution in open and democratic societies, it is essentially a matter of policy to decide which legislative model agrees and aligns with particular governments' goals and strategies (Meyerson 2004, 153). This is the major rationale behind the call for the integration of ADR into the South African criminal jurisprudence.

At present, land issues are being debated intensely in South Africa as part of the country's law reforms and there are a number of interesting new developments: a pending Restitution Amendment Act, the High-Level Panel report to parliament; a new Communal Tenure Bill; and a land audit by AgriSA. (AgriSA is a South African agricultural industry association. It is a federal organisation, promoting the interests of its members—which it identifies as the sustainable profitability and stability of commercial agricultural producers and agribusinesses—through its involvement and input in various national and international policy-making fora. It represents more than 70,000 small- and large-scale commercial farmers).[6]

South Africa's new President, Mr Cyril Ramaphosa, has specifically addressed land issues on a few occasions since he assumed office in December 2017. The President, following a resolution at an African National Congress conference, raised the possibility of expropriation of white-owned land without compensation as well as radical socio-economic transformation in relation to land: "The land question," the President said, "must be resolved. … Land needs to be brought back to its rightful owners. We must find solutions" (Bateman 2018).

Essentially, based on the foregoing evidence of various law reforms in South Africa, it can be said that the country is known for comprehensive law reforms. It will therefore not be out of place if South African authorities consider reformation and amendment to the relevant statutes to reflect the incorporation of ADR mechanisms in its criminal law administration.

As part of the call for law reform with a view to incorporating ADR into South Africa's criminal justice administration, the concluding remarks in the *Terms of Reference for the Assessment of the Impact of the Decisions of the Constitutional Court and the Supreme Court of Appeal on the South African Law and Jurisprudence* (Department of

[6] https://www.en.wikipedia.org/wiki/AgriSA (accessed April 17, 2018).

Justice and Constitutional Development 2012) will in no small measure lend credence to this call. This document states inter alia that the goals of the decisions of the Constitutional Court and the Supreme Court of Appeal in regard to South African Law and Jurisprudence are to:

(a) establish the extent to which such decisions have contributed to the reform of South African jurisprudence and the law to advance the values embodied in the Constitution;

(b) assess the evolving jurisprudence on socio-economic rights with a view to establishing its impact on eradicating inequality and poverty and enhancing human dignity;

(c) assess the impact on the development of a South African jurisprudence that upholds and entrenches the founding principles and values as espoused in the Constitution and how such jurisprudence contributes to and is enriched by the development of jurisprudence in the Southern African Development Community (SADC) region, the continent and globally; and;

(d) assess the extent to which South Africa's evolving jurisprudence has transformed and developed the common law and customary law in South Africa as envisaged by the Constitution.

It is argued that South Africa needs to learn from other jurisdictions examined in this article about the impact and advantages of legal transplantation on national or domestic jurisprudence. The concept of legal transplants is associated with the legal historian Alan Watson[7] (Watson 1993, 21) who defines legal transplantation as the phenomenon of "moving of a rule … from one country to another, or from one people to another" and who claims that "this is the most common way of legal change." The concept of legal transplantation has particular relevance in comparative legal studies.

ADR: The Nigerian Experience

ADR in Nigeria has not found a resting place in the hearts of the Nigerian judiciary. For this reason, the Nigerian courts have upheld the fact that arbitration and other concepts of ADR are within the confines of civil litigation. On top of that, the Nigerian Court of Appeal (2003) has ruled as follows:

> It is trite that disputes which are the subject of an arbitration agreement must be arbitrable. In other words, the agreement must not cover matters, which by the law of the state are not allowed to be settled privately or by arbitration usually because this will

[7] Alan Watson is a distinguished research professor and Ernest P. Rogers Chair at the University of Georgia. He is regarded as one of the world's foremost authorities on Roman law, comparative law, legal history, and law and religion.

> be contrary to the public policy. Thus, a criminal matter, like the allegation of fraud raised by the respondent in this case, does not admit of settlement by arbitration as was clearly stated by the Supreme Court.

Irrespective of the verdict of the Nigerian judiciary that ADR is not applicable in criminal litigations or disputes in Nigeria, it is my humble opinion that ADR is incorporated into the Nigerian criminal justice administration. The reason for my stance is that, fundamentally, ADR is known and indigenous to the various ethnic nationalities in Nigeria. The people of Nigeria practised forms of ADR prior the formation of Nigeria in 1914 by Lord Lugard.

In the Igbo society, the notion of *omenala* is encapsulated in what is called and known in present-day usage as ADR. In the northern parts of Nigeria, the notions of *sulh* and *ad takhim* are entrenched in ADR. In the north-central region of Nigeria, the notions of *jir* and *tar* are equivalents of present-day ADR (Bohannan 1957, 2). These indigenous practices are still noticeable and functional notwithstanding the official criminal justice system in Nigeria.

One good example of ADR in Nigeria's criminal justice system is the provision for plea bargaining; which has been legislated into the criminal justice system of Nigeria's Lagos State's Law on Criminal Justice Administration No. 10 of 2007 (Nigeria, Lagos State 2007). The Child's Rights Act 2003[8] also clearly makes provisions for ADR in the juvenile criminal justice system. The Economic and Financial Crimes Commission (EFCC)[9] is empowered to compound offences in order to obtain practical restitution.

In some cases involving financial misappropriation by some individuals in Nigeria, the EFCC, through the plea-bargaining process was able to recover significant sums of money (Ogbonna and Anosike 2010, 10).

Furthermore, the Nigerian government amnesty programme, which was designed for the former Niger-Delta militants, provides evidence of ADR in the Nigerian criminal justice system—the militants, despite the atrocities and the mayhem they inflicted on innocent Nigerians and foreigners alike, received pardon before any arrests or trials. As a result, the amnesty programme prevented further crimes, rehabilitated the criminals, made restitutions to direct victims or family members of the victims, and restored the militants to the Nigerian society as responsive and responsible human beings. There are no longer recidivisms. That is ADR in action. The militants involved could have been tried for serious crimes and treason, but the cases were managed and handled by

[8] Cap. C 50, Laws of the Federation of Nigeria 2004, sections 151, 204, 208, 209 and 223.
[9] Section 14 of the Economic and Financial Crime Commission Establishment Act of 2004.

alternative means, for good reason and with good results. The various scenarios examined above, I argue, are nothing short of ADR in practice in Nigeria.

Integrating ADR into the South African Criminal Justice Administration: Lessons from Other Jurisdictions

Germany, a civil law jurisdiction, has ADR in its criminal justice system; this means that ADR is accepted in the German criminal justice system, particularly in mediation. This claim is supported by Trenczek (2001, 1) who reasons that:

> Although mediation is often presented as an alternative to the adversarial court process, it operates within the shadow of the law. This is especially true for mediation schemes within the criminal justice context. Unlike in other countries, especially common-law jurisdictions, mediation in Germany is most frequently used not in the civil law but within the criminal justice field by Victim Offender Mediation programs.

In Germany, the *Tater-Opfer-Ausgleich* (offender victim balancing) operates and is integrated into the German criminal code. Furthermore, Germany operates over four hundred ADR programmes that are community based, and these programmes are funded by the state, with about two-thirds operating within the juvenile justice context.

In New Zealand, conferencing builds on victim-offender mediation programmes. Conferencing ensures that it brings under one roof not just the criminal offender involved in the criminal offence but also the families of those affected by the crime and the entire community. In this sense, family members of victims and offenders are regarded as secondary victims (Condliffe 2004, 192)[10].

In addition to the foregoing, Australia and New Zealand outshine every other jurisdiction because both countries have sustained statutory-based schemes that are better than those in other jurisdictions. For instance, New Zealand took the lead in that it was the first country to enact a statutory-based conferencing scheme. In Australia, the conferencing model has a connection with the theory of re-integrative shaming, a theory that was developed by Braithwaite (1989). Braithwaite believes that where criminals are engaged in constructive dialogue with victims and community members about their criminal conduct, the offenders are more likely to restore their self-esteem and self-worth and move closer to reintegration within the community.

[10] New Zealand passed the Children, Young Persons and Their Families Act in 1989. The legislation was largely in response to concerns that the welfare model applied to juvenile justice was inimical to Maori traditions and values, leading to a disproportionate number of Maori children being removed from their families.

In the ADR process, the main objective of conferencing is to develop responses to criminal offending that meet the needs of victims and to make offenders accountable for their criminal conduct by giving them a more active role in the process. The reason for this is that it is more difficult for offenders to deny the harm they have caused or to offer excuses when they appear before their victims, and that such encounters are more likely to induce remorse (Hayes 2005, 78–79).[11]

Conclusion

For many years, several African studies on African communities have in one way or another assisted in establishing essential features of dispute resolution processes in both traditional and Western settings. These studies have highlighted specific culturally imbued legal concepts and have shown at the same time that there are different ideas of justice across diverse legal cultures. The concern in contemporary times seems to be the application of ADR in criminal legal concepts within the confines of national jurisprudence of African states. The idea of integrating ADR into formal state-administered legal systems was the pivotal discourse of this article.

The article has demonstrated unequivocally that the use of ADR in the criminal justice system is a universal concept and phenomenon. Therefore, the claim made in some quarters that the idea of settling issues by arbitration in criminal matters cannot be supported, is contrary to the findings of this article. For instance, in Nigeria, the amnesty programme of the Nigerian authority is nothing short of applying ADR in the criminal justice system. Additionally, in the Lagos State of Nigeria, plea bargaining has been expressly legislated into the administration of criminal justice law.

All the states and territories in Australia, except Victoria, have statutory-based schemes that provide for conferencing as an element in the hierarchy of responses to youth crime.[12] The overarching purpose of such legislative reforms is to dissuade young people from using the formal justice system (both victims and offenders should use ADR mechanisms), contribute to the development and reintegration of offenders, and develop a response to crime that meets the needs of both victims and offenders using ADR processes. South Africa can borrow a leaf from the Nigerian and Australian experiences. There is a need to bring South African law into conformity with global practice in other jurisdictions where ADR is part of criminal justice mechanisms. Studies of various African communities over the years have helped to establish essential features of dispute resolution processes in traditional settings. While highlighting specific culturally imbued legal concepts, these studies have shown that there are shared

[11] See the Nigerian case of *B. J. Exports & Chemical Processing Co. v Kaduna Refining and Petrochemical Ltd*. FWLR, 2005, pt. 165: 445, 465.

[12] The Young Offenders Act, 1997 of New South Wales.

notions of justice across diverse legal cultures. The concern in contemporary research seems to be with issues of ascertainment, interpretation and application of traditional legal concepts within the rubric of living customary law. Closely linked to this is the prospect of integrating traditional normative systems with formal state-administered legal systems, an issue that informed the subject matter of this article.

References

African National Congress. 2012. "Recommendations from the 4th National Policy Conference" held at Gallagher Estate, Midrand, Johannesburg, June 26–29, 2012. Accessed April 13, 2018. https://www.sahistory.org.za/sites/default/files/2012_anc_national_...

Australian Law Reform Commission. 1998. "Review of the Adversarial System of Litigation: ADR—Its Role in Federal Dispute Resolution." Queensland: Australian Law Reform Commission. https://doi.org/10.3726/978-3-653-03416-5/10.

Bateman, Chris. 2018, March 6. "Bringing Rationality to SA's Land Reform Debate—William Beinart." Accessed April 17, 2018. https://www.biznews.com/thought-leaders/2018/03/06/sa-land-reform-debate.

Bohannan, P. 1957. *Justice and Judgment among the Tiv*. London: Oxford University Press.

Braithwaite, 1989. *Crime, Shame and Reintegration*. Cambridge: Cambridge University Press.

Businesstech. 2017. "South Africa Crime Stats 2017: Everything You Need to Know." Accessed April 11, 2018. https://doi.org/10.4324/9781315223162.

Carroll, M. 1994 "Implementational Issues: Considering the Options for Victoria." In *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?*, edited by C. Alder and J. Wundersitz, 167–80. Canberra: Australian Institute of Criminology.

Christie, Nils. 1977. "Conflicts as Property." *British Journal of Criminology* 17 (1): 1–15.

Chukwunweike, A. O., Clara C. Obi-Ochiabutor, and Ebele L. Okiche. 2013. "Using Alternative Dispute Resolution (ADR) in the Criminal Justice System: Comparative Perspectives." *Bassey Andah Journal* 6: 215.

Condliffe, P. 2004. "Difference difference everywhere." *ADR Bulletin* 6 (10): 192–97.

Crum, Thomas. n.d. "AZ Quotes." Accessed April 9, 2018. https://www.azquotes.com/quote/1265886.

Department of Justice and Constitutional Development. 2012, March 26. Media Statement on the "Assessment of the Impact of the Decisions of the Constitutional Court and the Supreme Court of Appeal on the South African Law and Jurisprudence." Accessed April 13, 2018. https://doi.org/10.1093/he/9780191842832.003.0017.

Department of Justice and Constitutional Development. 2012. "Terms of Reference for the Assessment of the Impact of the Decisions of the Constitutional Court and the Supreme Court of Appeal on the South African Law and Jurisprudence." Accessed April 13, 2018. https://doi.org/10.1093/he/9780191842832.003.0017.

Elahi, Manzoor. 2005. "What is Social Contract Theory?" Sophia Project Philosophy Archives.

Fayemi, A. K. 2009. "Agba (Elder) as Arbitrator: A Yoruba Socio-political Model for Conflict Resolution." *Journal of Law and Conflict Resolution* 1 (3): 60–67.

Gary, S. N. 1997. "Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance." *Wake Forest Law Review* 32 (1): 397–431.

Goldberg, Stephen B., Frank E. A. Sander, and Nancy A. Rogers. 1992. *Dispute Resolution: Negotiation, Mediation and Other Processes*. Boston: Little Brown.

Hayes, Hennessey. 2005. "Assessing Reoffending in Restorative Justice Conferences." *Australian and New Zealand Journal of Criminology* 38 (1): 77–102. https://doi.org/10.1375/0004865054062857.

Hlongwane, S. 2012, November 22. "No 17: A Constitutional Amendment (Almost) Everyone Agrees On." Accessed April 13, 2018. http://www.dailymaverick.co.za/article/2012-11-22-no-17-a-constitutional-amendment-almost-everyone-agrees-on.

Ingelaere, Bert. 2008. "The Gacaca Courts in Rwanda." In *Traditional Justice and Conflict Resolution after Violent Conflict: Learning from African Experiences*, edited by L. Huyse and M. Salter, 25–59. Stockholm: International IDEA.

Kariuki, M. 2017. "Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities." *Alternative Dispute Resolution* 3 (2): 30–53.

Kelly, L., M. Coy, and R. Davenport. 2009. "Shifting Sands: A Comparison of Prostitution Regimes across Nine Countries." London: London Metropolitan University.

Kift, S. 1996. "Victims and Offenders: Beyond the Mediation Paradigm?" *Australian Dispute Resolution Journal* 7 (1).

Klaaren, Jonathan. 2015. "Transformation of the Judicial System in South Africa, 2012–2013." *George Washington International Law Review* 47: 481–508.

Land and Accountability Research Centre. 2016. “Notes on the Traditional and Khoi-San Leadership Bill [B23-2015].” Cape Town: University of Cape Town, Land and Accountability Research Centre.

Lewis, Melissa, and Les McCrimmon. 2005. “The Role of ADR Processes in the Criminal Justice System: A View from Australia.” Paper presented at the ALRAESA Conference, Entebbe, Uganda, September 4–5, 2005.

Meyerson, D. 2004. “Does the Constitutional Court of South Africa Take Rights Seriously?” The case of S v Jordan.” *Acta Juridica* 2004 (1): 138–54.

National Alternative Dispute Resolution Advisory Council (NADRAC). 2002. “ADR Terminology: A Discussion Paper.” https://www.ag.gov.au/LegalSystem/Documents/NADRACpublications.aspx.

Ngcongco, L. D. 1989. “Tswana Political Tradition: How Democratic?” In *Democracy in Botswana*, edited by J. Holm and P. Molutsi, 42. Gaborone: Macmillan Botswana.

Nigeria, Lagos State. 2007. “Law on Criminal Justice Administration No. 10 of 2007.” *Official Gazette* No. 21, Ikeja, March 2008.

Nigerian Court of Appeal. 2003. *BJ Exports & Chemical Processing Co v Kaduna Refining and Petrochemical Ltd*, [2003] FWLR (pt.165) 445 at 465; 2003, 24 WRN 74. *Kano State Urban Development Board v Fanz Construction Ltd* [1990] 4 NWLR (pt.142) 1 at 32–33.

Obiego, O. C. 1978. “Igbo Idea of God.” *Lucerna* 1 (1): 26–42.

Ogbonna, A., and P. Anosike. 2010. “Ex-Oceanic Bank MD, Cecelia Ibru, Jailed: To forfeit 199 assets, N190bn.” *The Sun*, October 9, 2010, 12.

Otiso, Justus. 2017. “The Role of Court-Annexed Mediation in Resolving Succession Disputes in Kenya: An Appraisal.” *Journal of Conflict Management and Sustainable Development* 1 (2): 99–107.

Radebe, J. 2012, February 28. Media statement on the occasion of releasing a “Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State.” Accessed April 13, 2018. http://www.justice.gov.za/m_statements/2012/20120228_m_transformation .html.

Radford, Mary F. 2001. “Advantages and Disadvantages of Mediation in Probate Trust and Guardianship Matters.” *Pepperdine Dispute Resolution Law Journal* 1 (2): 247.

Rautenbach, C. 2014. “Traditional Courts as Alternative Dispute Resolution (ADR) Mechanisms in South Africa.” In *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition*, edited by F. Diedrich, 288–329. Hamburg: Verlag Dr Kovac.

SALRC (South African Law Reform Commission). 2002. *Sexual Offences: Adult Prostitution*. Project 107. Issue Paper 19. Pretoria: SALRC.

SALRC (South African Law Reform Commission). 2009. *Sexual Offences: Adult Prostitution*. Project 107. Discussion Paper 1. Pretoria: SALRC.

SALRC (South African Law Reform Commission). 2017. *Project on Sexual Offences: Adult Prostitution*. Project 107. Pretoria: SALRC.

Sarre, R., and J. Tomaini, eds. 2004. *Key Issues in Criminal Justice*. Adelaide: Australian Humanities Press.

Schmitz, Suzanne J. 1998. “Mediation and the Elderly: What Mediators Need to Know.” *Mediation Quarterly* 16 (1): 71–84. https://doi.org/10.1002/crq.3890160108.

Shamir, Yona. 2003. “Alternative Dispute Resolution Approaches and Their Application.” Accessed June 29, 2018. https://unesdoc.unesco.org/ark:/48223/pf0000133287.

South Africa. 1927. Black Administration Act 38 of 1927. http://www.justice.gov.za/legislation/acts/1927-038.pdf.

Stulberg, Joseph B. 1998. “Fairness and Mediation.” *Ohio State Journal on Dispute Resolution* 13 (3): 909–45.

Trenczek, T. 2001. “Victim-Offender Mediation in Germany: ADR under the Shadow of the Criminal Law.” *Bond Law Review* 13 (2): 1–17.

Velthuizen, Andreas. 2017. “Surviving the Past, Coping with the Present, Hoping for a Future of Justice: The Dispute Resolution Practices of the Marrons of Suriname.” *African Identities* 15 (2): 159–70. https://doi.org/10.1080/14725843.2016.1227693.

Victor, Wenona. 2007. *Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review*. Ontario: Canadian Human Rights Commission.

Watson, Alan. 1993. *Legal Transplants: An Approach to Comparative Law*. 2nd ed. Athens, GA: University of Georgia Press.

Wissler, Roselle L. 1997. “The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts.” *Willamette Law Review* 33: 565.