

**The Applicability of Mediation in the Resolution of Criminal Disputes in Kenya: A
Case for Restorative Justice in the Criminal Justice System**

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DECLARATION

I, ALICE KAHITHE MUGO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Mr. Harrison Mbori

ABSTRACT

The purpose of carrying out this study is to discover whether mediation can be applied in the resolution of criminal disputes in Kenya and specifically, to find out at what point of the trial process criminal cases can be referred to mediation; whether mediation by itself, is sufficient for the resolution of criminal disputes; and the contribution that mediation can make to the offender's rehabilitation. The research methodology for this study entails the use of journals and other secondary sources from Strathmore University's online library resources, and international legal instruments. This study begins with the research proposal under which the problem, the research questions, and the purpose of the study are introduced. Chapter 2 deals with the theoretical framework, consisting of three interrelated theories, and the views of different authors are encompassed under the literature review. Chapter 3 entails a critical interrogation into the applicability of mediation in criminal cases. Chapter 4 is an examination of the international legal framework in place to deal with mediation of criminal matters. The last chapter contains a summary of the main findings of this study, in addition to the conclusion and recommendations. The main findings of this study are the following: mediation can be used to resolve criminal disputes; mediation can be introduced prior to the presentation of the case before court, after a guilty verdict but before sentencing, or after sentencing; and mediation can lead to a positive outcome for the case and a positive change on the offender's behaviour. The major recommendations of this study are that mediation should be applied in Kenya in the resolution of criminal cases and that a legislation on criminal mediation would be necessary and would have to address three key areas- the conditions of referral of cases to mediation; the training and qualifications of mediators; and the outcome of cases after mediation.

LIST OF ABBREVIATIONS

ACR: Association for Conflict Resolution

ADR: Alternative Dispute Resolution

BARJ: Balanced and Restorative Justice

CoE: Council of Europe

COK: Constitution of Kenya

DPP: Director of Public Prosecutions

ECOSOC: Economic and Social Council

TDRM: Traditional Dispute Resolution Mechanism

US: United States

UN: United Nations

UNCCPCJ: United Nations Congress on Crime Prevention and Criminal Justice

UNCPCTO: United Nations Congress on the Prevention of Crime and the
Treatment of Offenders

UNGA: United Nations General Assembly

VOM: Victim-Offender Mediation

LIST OF CASES

Republic v Mohamed Abdow Mohamed [2013] eKLR

Dry Associates Limited v Capital Markets Authority & 3 others [2014] eKLR

Stephen Kipruto Cheboi and 2 others v Republic [2014] eKLR

LIST OF STATUTES

KENYAN STATUTES

Industrial Court Act (Act No. 20 of 2011)

Judicature Act (Act No. 27 of 2015)

Land Registration Act (Act No. 3 of 2012)

Marriage Act (Act No. 4 of 2014)

SOUTH AFRICAN STATUTE

Child Justice Act (Act No. 75 of 2008)

CHAPTER ONE: RESEARCH PROPOSAL

1.1.BACKGROUND OF THE PROBLEM

Mediation is defined by the Association for Conflict Resolution Mediator Certification Task Force, *Report and Recommendations to the ACR Board of Directors* (March 31, 2004) as:¹

A process of dispute resolution in which one or more impartial third parties intervenes in a conflict or dispute with the consent of the participants and assists them without coercion or the appearance of coercion. In mediation, the decision-making authority rests with the participants themselves and strongly values the parties' exercise of their self-determination. Recognizing participants' needs, cultural differences, and variations in style, the mediation process allows participants to define and clarify issues, reduce obstacles to communication, explore possible solutions, and, when desired, reach a mutually satisfactory agreement. Mediation presents the opportunity to express differences and improve relationships and mutual understanding, whether or not an agreement is reached.²

From the above definition, it is clear that at the heart of mediation is voluntariness, confidentiality and self-determination.³ It can be argued that neither party can be forced to attend a mediation process if they are not willing to do so which requires that the disputants should have access to the courts if they so decide.⁴ Indeed, the very concept of access to

¹ Settle J, *the Advocate's Practical Guide to Using Mediation*, Dewey Publications, 2005, 1.

² Settle J, *the Advocate's Practical Guide to Using Mediation*, 1-2.

³ Self-determination is essential in any mediation process and it denotes that the disputants are free to leave the process at any point, with or without settlement, and without coercion. See Hedeem T, 'Coercion and Self-Determination in Court Connected Mediation: All Mediations are Voluntary, but some are More Voluntary than Others' 26 *the Justice System Journal* (2005), 273.

⁴ Hedeem T, 'Coercion and Self-Determination in Court Connected Mediation', 273.

justice requires that the courts of law should be open to all irrespective of their status, social or otherwise, in society.⁵

In Kenya, case backlog and congestion in pre-trial detention facilities, including police stations and remand homes, have been cited as some of the main challenges to the effective operation of the criminal justice system.⁶ In respect to case backlog, a case audit exercise carried out by the Judiciary in 2014, revealed that as of June 2013; there were a total of 8,052 criminal backlog cases in the High Court, 32,392 in the Magistrates courts and a total of 1,632 in the Court of Appeal.⁷

Litigation is the method that is commonly used in criminal matters in Kenya. When it comes to adjudication of criminal disputes, courts and prosecutors tend to favour custodial sentences over noncustodial ones.⁸ Punitive noncustodial sentences include fines, forfeiture, and deportation; rehabilitative noncustodial sentences include conditional and unconditional discharge, probation, and police supervision; and restitutionary non-custodial sentences include compensation, restitution, extramural penal employment, and reconciliation.⁹ This has only fostered the congestion problem existing in Kenyan prisons and pre-trial detention facilities.

⁵ Article 48, *Constitution of Kenya* (2010); Muigua K, Kariuki F, 'ADR, Access to Justice and Development in Kenya' 1 *Strathmore Law Journal* (2015), 6.

⁶ 'Human Rights Report: The Impact of County By-Laws on the Prisons and Pre-Trial Remand Facilities in Nairobi and Nakuru Counties' *The Kenyan Section of the International Commission of Jurists*, July 2014, 9.

⁷ 'Judiciary Case Audit and Institutional Capacity Survey (Volume 1)' *the Judiciary of Kenya*, August 2014, 20-23.

⁸ 'Human Rights Report: The Impact of County By-Laws on the Prisons and Pre-Trial Remand Facilities in Nairobi and Nakuru Counties', 9.

⁹ Vyas Y, 'Alternatives to Imprisonment in Kenya' 6 *Criminal Law Forum* (1995), 73, 'Human Rights Report: The Impact of County By-Laws on the Prisons and Pre-Trial Remand Facilities in Nairobi and Nakuru Counties', 9-10.

It can be said, therefore, that litigation of criminal cases leans more towards retributive justice. This may be attributed to the fact that inherent in criminal law is the idea that the rights infringed by crime are not those of the victim alone but are held in common socially and as a result, the criminal justice process should have the power to signify public disapproval and to inflict shame upon the offender.¹⁰

This is the retributive justice approach and it centres on meting out punishment to offenders that is proportionate to the harm caused.¹¹ On the other hand, mediation, encompassing the attributes of restorative justice, focuses on repairing the harm caused to the victim and making the offender accountable for their crime(s).¹² Thus, mediation takes a holistic approach towards the resolution of disputes given that it includes the victims, offenders and the community in the dispute resolution and in so doing, it also manages to repair broken relationships.¹³

To satisfy the aims of criminal law mentioned above, Zedner suggests that the mediation process may be opened to observation by the public or the media may be permitted to report on both process and outcome.¹⁴ Therefore, the offender's offence will be publicly known and condemned. In so doing, however, there is a danger of removing the confidentiality that is inherent in any mediation process. Such confidentiality is important as it offers anxiety

¹⁰ Zedner L, 'Reparation and Retribution: Are they Reconcilable?' *57 the Modern Law Review* (1994), 241.

¹¹ 'Alec Walen: Retributive Justice' *The Stanford Encyclopedia of Philosophy*, Fall edn 2014

<<http://plato.stanford.edu/archives/fall2014/entries/justice-retributive/>> on 27 January 2016.

¹² 'Alec Walen: Retributive Justice' *The Stanford Encyclopedia of Philosophy*, <<http://www.justice.govt.nz/policy/criminal-justice/restorative-justice> > on 27 January 2016, Kariuki F, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR' *2 Chartered Institute of Arbitrators Alternative Dispute Resolution Journal* (2014), 212-13.

¹³ Kariuki F, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya', 205, 'Dennis Otieno Oricho: Understanding the Traditional Council of Elders and Restorative Justice in Conflict Transformation' *Social Justice and Ecology Secretariat* <<http://www.sjweb.info/sjs/pjnew/pjshow.cfm?PubTextID=8449>> on 17 February 2016.

¹⁴ Zedner L, 'Reparation and Retribution: Are they Reconcilable?', 242.

reduction about participating.¹⁵ Alternatively, the mediator may be elevated from the position of go-between in a bilateral negotiation to that of a third party representing the public interest.¹⁶

When mediation is applied in the resolution of criminal cases, it “provides interested victims of primarily property crimes and minor assaults the opportunity to meet the juvenile or adult offender, in a safe and structured setting, with the goal of holding the offender directly accountable for his or her behaviour while providing important assistance and compensation to the victim.”¹⁷

With the help of a trained mediator, the victim is able to inform the offender of the effects that the crime has had on his/her life, to receive answers to questions, and to be directly involved in creating a compensation plan for the offender to be accountable for the losses incurred by the victim.¹⁸ On his/her part, the offender is able to take full responsibility for his/her actions, learn of the full impact of these actions on the victim, and is able to come up with a plan to make amends to the victim.¹⁹

Article 159 (2) (c) of the 2010 Constitution of Kenya recognizes mediation as one of the forms of alternative dispute resolution.²⁰ Despite being so acknowledged, efforts have only

¹⁵ Settle J, *the Advocate's Practical Guide to Using Mediation*, 3-4.

¹⁶ Zedner L, ‘Reparation and Retribution: Are they Reconcilable?’, 242.

¹⁷ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’ 22 *Conflict Resolution Quarterly* (2004), 279.

¹⁸ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 279.

¹⁹ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 279.

²⁰ This Article provides that “in exercising judicial authority, the courts and tribunals shall be guided by the following principles -alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.”

been made to apply mediation in the resolution of civil and commercial matters, yet, the wording of Article 159 (2) (c) does not limit the use of mediation to these disputes.²¹

Furthermore, the use of mediation in criminal matters has also received international recognition with the adoption of a set of recommendations on the use of mediation procedures in criminal matters in 1999 by the Council of Europe so as to guide member states in using mediation in such matters.²²

Thereafter, the United Nations Congress on the Prevention of Crime and the Treatment of Offenders (now United Nations Congress on Crime Prevention and Criminal Justice) considered restorative justice in its plenary sessions and as a result developed a draft proposal, “United Nations Basic Principles on the Use of Restorative Justice Programs in Criminal Matters” in a 2000 meeting.²³ These proposed principles encourage the use of restorative justice programmes by member states at all stages of the criminal justice process, emphasize the voluntary nature of participation in such programmes, and recommend initiating the establishment of standards and safeguards for the practice of restorative justice. This draft proposal was adopted by the United Nations in 2002.²⁴

Given that the law promotes the use of mediation and considering all its merits, it is conceivable that mediation can be applied in the Kenyan criminal justice system in order to mitigate the shortcomings of litigation. Nevertheless, this is a conclusion that can only be undoubtedly drawn upon conducting a thorough analysis of the research questions of this study.

²¹ Section 15(1), *Industrial Court Act* (Act No. 20 of 2011), Section 95(1), *Land Registration Act* (Act No. 3 of 2012), Sections 64 and 68(1) (2), the *Marriage Act* (Act No. 4 of 2014).

²² Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 282.

²³ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 282.

²⁴ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 282.

1.2.STATEMENT OF THE PROBLEM

The problem is that litigation of criminal disputes has failed to reduce the case backlog presently facing the judiciary and consequently, it has nurtured the congestion crisis in remand facilities, which are already few in numbers, and it has been unable to dispense with justice expeditiously contrary to the requirement of Article 47(1) of the COK. Another problem is that the preference of custodial sentences to non-custodial ones has encouraged the courts to disregard the underlying interests of the victims and the perpetrators which may include the need for greater closure, reparation, and accountability.

1.3.PURPOSE OF THE STUDY

The purpose of this study is to discover whether mediation can be applied in the resolution of criminal disputes in Kenya. Furthermore, the specific objectives of this study are to find out:

- i. At what point of the trial process mediation can be applied in the resolution of criminal disputes;
- ii. Whether these disputes can in fact, be resolved solely through mediation without referring the case to litigation; and
- iii. The purpose that mediation of such disputes will serve in the rehabilitation of the offender.

1.4.RESEARCH QUESTIONS

This study will try and answer the following interrelated research questions:

- i. Why should mediation be considered as a form of resolving criminal disputes in Kenya?
- ii. Can all crimes be resolved through mediation?

- iii. What features of litigation make it retributive rather than restorative?
- iv. What happens to custodial sentences when criminal disputes are mediated?
- v. What kind of legal framework can be created to govern mediation of criminal disputes?

1.5.HYPOTHESES

This research proceeds on the following presumptions:

- i. Mediation can be utilized in the resolution of criminal disputes.
- ii. All crimes may be resolved through mediation.
- iii. The outcome of the mediation may do away with custodial sentencing.
- iv. Litigation of criminal disputes has fostered the case backlog problem in the Judiciary.
- v. Mediation of criminal disputes may dispense with justice more expeditiously than litigation.

1.6.JUSTIFICATION OF THE STUDY

This study is important on the basis that even though litigation of criminal disputes in Kenya incorporates the public symbolic processes of criminal justice- a trial that is open to the public, the shaming of the defendant, and the attribution of guilt-²⁵ it has left certain needs of victims, offenders and the community unmet and its retributive nature has helped to foster the congestion in remand facilities and as a result, mediation of criminal disputes can ensure the efficient operation of the criminal justice system by remedying these problems.

²⁵ Zedner L, 'Reparation and Retribution: Are they Reconcilable?', 240.

Furthermore, the lack of efforts in recognizing other alternatives to criminal dispute resolution disregards the fact that there are crime victims who would derive greater benefit from receiving compensation and repairing a broken relationship than they would from having a court of law establish the offender's blame or guilt. In this regard, therefore, it is important to research on mediation as an alternative to litigation in criminal dispute resolution.

1.7.RESEARCH METHODOLOGY

Information for this study will be gathered through the use of the library especially through the online library resources of Strathmore University such as Lexis Library, Wiley Online Library, Oxford Open and Hein Online. The library research will seek to scrutinise and interpret the scholarly writings on the restorative use of mediation in resolving criminal disputes arising between victims and their perpetrators; the Economic and Social Council basic principles on the use of restorative justice programmes in criminal matters; the United Nations General Assembly basic principles of justice for victims of crime and abuse of power; and recommendations by the CoE. Moreover, Jurisdictions such as South Africa, Canada, and the United States, which are using mediation to settle criminal matters, will be referred to throughout this study as countries of best practice.

CHAPTER TWO: THEORETICAL FRAMEWORK AND LITERATURE REVIEW

2.1. THEORETICAL FRAMEWORK

This study is grounded on three theories which will be elaborated below and their application to this study demonstrated.

2.1.1. THERAPEUTIC JURISPRUDENCE

Therapeutic jurisprudence is the study of the role of the law as a “therapeutic agent.”²⁶ It views legal rules, legal procedures, and the roles of legal actors, such as lawyers and judges, as social forces that often create inevitable, and at times negative, consequences for the mental well-being of those affected.²⁷ Therapeutic jurisprudence, therefore, appeals for the detection of these consequences and thereafter conducting an investigation to determine whether the law’s antitherapeutic effects can be reduced, and its therapeutic potential enhanced, without discounting due process and other justice values.²⁸

Therapeutic jurisprudence began in the late 1980s as an interdisciplinary academic approach in the areas of mental health law.²⁹ It criticized several features of mental health law for generating antitherapeutic consequences for the people that the law was intended to help.³⁰

Therapeutic jurisprudence has now spread beyond the area of mental health law to other

²⁶ Winick BJ, ‘the Jurisprudence of Therapeutic Jurisprudence’ in Wexler DB and Winick BJ (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence (Carolina Academic Press Studies in Law and Psychology)*, Carolina Academic Press, 1996, 645-646, Waldman EA, ‘The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence’ 82 *Marquette Law Review* (1998), 158.

²⁷ Winick BJ, ‘the Jurisprudence of Therapeutic Jurisprudence’, 645-646, Waldman EA, ‘The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence’, 158.

²⁸ Winick BJ, ‘the Jurisprudence of Therapeutic Jurisprudence’, 645-646, Waldman EA, ‘The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence’, 158.

²⁹ Wexler DB, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent*, Carolina Academic Press, 1990, 3-4, Winick BJ, ‘Therapeutic Jurisprudence and Problem Solving Courts’ 30 *Fordham Urban Law Journal* (2002), 1062.

³⁰ Winick BJ, ‘Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of *Zinerman v Burch*’ 14 *International Journal of Law and Psychiatry* (1991), 172, Winick BJ, ‘the Jurisprudence of Therapeutic Jurisprudence’, 645-646.

areas of legal analysis, and has emerged as a mental health approach to law generally.³¹ While earlier commentary urged the creation of laws that would function therapeutically, more recent works have considered how the present law might be construed and applied in a therapeutic manner.³²

Waldman argues that the mediation movement largely signifies a reaction to the psychological brutality of the traditional criminal justice system.³³ In light of this, mediators seek to provide a less distressing means of resolving conflict.³⁴ Recognizing that the court process and the result can leave parties dissatisfied, mediation strives to ensure that disputants emerge from their dispute feeling that they received what they needed rather than a third party's assessment of what was required.³⁵ In 1990, Marshall and Merry found that "...one of the most prevalent needs of [victims] is that of putting 'closure' on the offence, a point in time after which a victim can say 'it is all over and done with now,' and that psychological moment is often defined by the experience of the offender's remorse and the act of forgiving."³⁶ Mediation of criminal disputes is designed to fulfil the victim's need for 'closure' and among other things, facilitate reconciliation between the offender and the victim.

³¹ Winick BJ, 'The Jurisprudence of Therapeutic Jurisprudence' 3 *Psychology, Public Policy and Law* (1997), 184; Waldman EA, 'the Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence', 159.

³² Waldman EA, 'the Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence', 159.

³³ Waldman EA, 'the Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence', 160.

³⁴ Milne A, 'Mediation- A Promising Alternative for Family Courts' 42 *Juvenile Family Court Journal* (1991), 63; Waldman EA, 'the Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence', 160.

³⁵ Waldman EA, 'the Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence', 160-161; Meadow CM, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law od ADR"' 19 *Florida State University Law Review* (1991), 7.

³⁶ Marshall TF and Merry S, *Crime and Accountability*, 1990, 182.

Following the commission of a crime on their person, many victims' lives are usually dominated by fear and a crippling sense of powerlessness. They become filled with anxiety, confusion, loss of appetite, and loss of trust in others.³⁷ Litigation of criminal disputes ignores these psychological effects of the crime on the victim and only sets out to establish the offender's culpability. In doing so, the law acts as an antitherapeutic rather than a therapeutic agent. The victims are left with personal trauma that can persist for weeks, months and even a lifetime which is left unacknowledged by the traditional criminal justice system.³⁸ Mediation, unlike litigation, seeks to address these psychological repercussions thus impacting positively on the victim's well-being.

Initial studies in the therapeutic jurisprudence literature demonstrate that disputants perceive a judicial process as fair when they are able to adduce evidence, express their own views, and/or share in the decision-making process.³⁹ The process of mediation is designed to provide better disputant participation and to guarantee dignity as well as to foster trust between the mediator and disputants.⁴⁰ When mediating criminal disputes this means encouraging the active participation of the victim whilst maintaining the dignity of both the victim and the offender. Further, mediation encourages disputants to work together to

³⁷ Benjamin C, "Why is Victim/Offender Mediation Called Restorative Justice?" Restoration for Victims of Crime Conference, Melbourne, September 1999, 3-4 <http://www.aic.gov.au/media_library/conferences/rvc/benjamin.pdf> on 9 May 2016.

³⁸ Benjamin C, "Why is Victim/Offender Mediation Called Restorative Justice?", 4.

³⁹ Waldman EA, 'the Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence', 161, Lind EA, Earley PC, Kanfer R, 'Voice, Control, and Procedural Justice: Instrumental and Non-Instrumental Concerns in Fairness Judgments' 59 *Journal of Personality and Social Psychology* (1990), 952-959.

⁴⁰ Waldman EA, 'the Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence', 161.

develop options for resolution.⁴¹ For example, mediation of criminal cases can result in a compensation plan for the offender to be accountable for the losses incurred by the victim.⁴²

By addressing the needs of the victims and offenders and promoting procedural fairness, mediation could lead to agreements that better cater to the needs of the parties through a process that produces therapeutic effects.⁴³ It has been argued that the mediation agreement is only secondary to the importance of the dialogue between the parties which enables the victim to empathise with the offender and also fulfils the emotional and informational needs of the victim both of which are significant in their healing.⁴⁴

2.1.2. REINTEGRATIVE SHAMING THEORY

Inflicting shame upon the offender has for a long time being considered as a mode of controlling crime. Nevertheless, stigmatisation increases the risk of recidivism by the shamed offender.⁴⁵ Unlike stigmatisation, reintegrative shaming is a shaming mechanism that prevents crime.⁴⁶ Reintegrative shaming occurs when disapprobation of the offender's actions is expressed whilst maintaining a relationship of respect with the offender. The shaming is concluded by the offender offering an apology and by the interested party/parties forgiving him/her. It is the deed and not the person that is labelled as evil.⁴⁷ On the other

⁴¹ Folberg J and Taylor A, *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation*, Jossey-Bass, 1984, 49-51.

⁴² Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 279.

⁴³ Waldman EA, 'the Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence', 163, McEwen CA and Maiman RJ, 'Small Claims Mediation in Maine: An Empirical Assessment' 33 *Maine Law Review* (1981), 256-257.

⁴⁴ Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 280.

⁴⁵ Braithwaite J, 'Reducing the Crime Problem: A Not So Dismal Criminology' 25 *Australian & New Zealand Journal of Criminology* (1992), 3.

⁴⁶ Braithwaite J, 'Reducing the Crime Problem: A Not So Dismal Criminology' 3.

⁴⁷ Braithwaite J, 'Reducing the Crime Problem: A Not So Dismal Criminology' 3.

hand, stigmatisation is impolite, embarrassing shaming where the offender is not reaccepted following his degradation but is instead labelled as an evil person and cast out permanently.⁴⁸

This theory was developed by John Braithwaite, one of the world's prominent experts on restorative justice, and it was first introduced in 1989 in his book *Crime, Shame and Reintegration*.⁴⁹ In developing this theory Braithwaite was "influenced by the restorative nature of various Asian policing and educational practices...and by the restorative nature of socialisation in Western families that succeed in raising law abiding children."⁵⁰ Shaming, he opines, could be as formal as criminal trials and as elusive as raising an eyebrow.⁵¹

Reintegrative shaming can be oppressive unless it is combined with a normative theory applied only where it is morally right to do so.⁵² One such normative theory is the republican theory of criminal justice which rejects shaming where the consequence of doing so is to reduce republican liberty (also called dominion).⁵³ The theory claims that criminal justice policies should be structured in such a way as to take full advantage of dominion. This theory derives its origins from thought of intellectuals such as Montesquieu and eighteenth century politicians such as Jefferson.⁵⁴

Dominion is only enjoyed by one who lives in a social world that affords him/her a set of subjective assurances of liberty. For one to fully enjoy dominion, they must have equality of

⁴⁸ Braithwaite J, 'Reducing the Crime Problem: A Not So Dismal Criminology' 3.

⁴⁹ Braithwaite J, *Crime, Shame and Reintegration*, Cambridge University Press, 1989.

⁵⁰ Braithwaite, 'Restorative Justice: Theories and Worries' (Resource Material Series No. 63, 123rd International Senior Seminar Visiting Experts' Papers) 47 <http://www.unafei.or.jp/english/pdf/PDF_rms/no63/ch05.pdf> accessed 10 February 2016.

⁵¹ Braithwaite J, 'Reintegrative Shaming, Republicanism and Policy' in Hugh D Barlow (ed), *Crime and Public Policy: Putting Theory to Work (Crime and Society)*, Westview Press, 1995.

⁵² Braithwaite J, 'Reintegrative Shaming, Republicanism and Policy.'

⁵³ Braithwaite J, 'Reintegrative Shaming, Republicanism and Policy', 195.

⁵⁴ Braithwaite J, 'Reintegrative Shaming, Republicanism and Policy', 195.

liberty prospects with others.⁵⁵ This republican theory states that conduct should be shamed only when doing so will increase dominion. It further asserts that those who threaten dominion through their shaming should also be shamed.⁵⁶

Reintegrative shaming can take place during mediation of the criminal dispute. The dialogue of the consequences of the crime usually results in shaming (that is, the remorseful offender offers an apology and the victim forgives him/her) which is organised and directed to avoid unproductive stigmatisation. The misconduct of the offender is disapproved without casting him/her out of the community.⁵⁷

2.1.3. FEMINIST LEGAL THEORY

According to Criminological orthodoxy, feminists began interfering in issues of crime and criminal justice in the 1970s. During this period, their contributions influenced the restructuring of the criminal justice system of England and Wales.⁵⁸ Anne Logan, in the book *Feminism and Criminal Justice: A Historical Perspective*,⁵⁹ argues that campaigns and action which seek to challenge gender inequality are an aspect of feminism. The feminist and reformist concerns of women taking part in activism and charitable work gave birth to the 'feminist-criminal-justice reform network.'⁶⁰ Logan contends that feminists contributed significantly in the advocacy for progressive approaches to crime and criminal justice that focused on changing the person rather than punishing their crimes.⁶¹

⁵⁵ Braithwaite J, 'Reintegrative Shaming, Republicanism and Policy.'

⁵⁶ Braithwaite J, 'Reintegrative Shaming, Republicanism and Policy.'

⁵⁷ Gabbay ZD, 'Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices' 2 *Journal of Dispute Resolution* (2005), 384.

⁵⁸ Seal L, 'Feminism and Criminal Justice: A Historical Perspective' (Book Review) 20 *Twentieth Century British History* (2009), 578.

⁵⁹ Logan A, *Feminism and Criminal Justice: A Historical Perspective*, Palgrave Macmillan, 2008.

⁶⁰ Seal L, 'Feminism and Criminal Justice: A Historical Perspective', 579.

⁶¹ Seal L, 'Feminism and Criminal Justice: A Historical Perspective', 579.

This is because feminists were concerned that the criminal justice system places too much focus on punishing the offender while disregarding clemency, victim healing and social services, and eradication of socio-economic causes of crime.⁶² The emphasis that criminal law places on right versus wrong and winners versus losers makes it inhospitable to concerns of sensibility, tolerance, and understanding that are otherwise achieved through mediation initiatives.⁶³ Feminists, therefore, supported psychiatry interventions with juvenile delinquents and encouraged the substitution of corporal punishment for probation.⁶⁴

Discussions on restitution for the victim began in the 1950s when Margery Fry first suggested and campaigned for state compensation for criminal injuries. Her proposal influenced the establishment of the Criminal Injuries Compensation Board in the UK in 1964.⁶⁵ The feminist thought on victimhood focused solely on powerless and vulnerable victims such as abused women and children.⁶⁶ This set the pace for the now worldwide Victims' Rights Movement which is concerned with the care and needs of crime victims.⁶⁷ The feminist thought on this area made the problems present in the formal justice system more glaring and led to discussions that paved the way for restorative mediation and other programmes which strive to address the rights of victims of crime.⁶⁸

⁶² Martin DL, 'Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies' 36 *Osgoode Hall Law Journal* (1998), 153, Gruber A, 'Rape, Feminism, and the War on Crime' 84 *Washington Law Review* (2009), 614.

⁶³ Henderson L, 'Without Narrative: Child Sexual Abuse,' 4 *Virginia Journal of Social Policy & the Law* (1997), 508, Gruber A, 'Rape, Feminism, and the War on Crime', 615.

⁶⁴ Seal L, 'Feminism and Criminal Justice: A Historical Perspective', 579.

⁶⁵ Seal L, 'Feminism and Criminal Justice: A Historical Perspective', 580.

⁶⁶ Seal L, 'Feminism and Criminal Justice: A Historical Perspective', 580.

⁶⁷ Benjamin C, "Why is Victim/Offender Mediation Called Restorative Justice?", 3.

⁶⁸ Benjamin C, "Why is Victim/Offender Mediation Called Restorative Justice?", 3.

2.2. LITERATURE REVIEW

This section will review the literature written in the area of this study by authors such as Mark Bradshaw, Lucia Zedner, and Mark Umbreit among others.

Mark Bradshaw and Mark Umbreit use data from the Post-Mediation Victim Interview Schedule to carry out a study that shows that satisfaction with the mediator, the fairness of the restitution agreement and meeting the offender explain a large portion of the variance in satisfaction with mediation.⁶⁹ The results highlight the significance of the interpersonal, face to face meeting and negotiation between the victim, offender and mediator.⁷⁰

The authors argue that the results of this study add to the growing body of empirical research that supports juvenile court use of the victim-offender mediation process that regularly employs the humanistic discourse driven model of mediation.⁷¹

The authors' study is very victim-focused thereby failing to factor in the benefits that offenders can derive from the mediation process. Furthermore, the victims that are the subject of this study are those who are involved in mediation with juvenile offenders. Thus, the study disregards the fact that mediation could also be used to resolve criminal disputes wherein the offenders are adults. As a result, this paper will underscore the benefits that both the offender, whether juvenile or adult, and victim can derive from mediation.

Lucia Zedner points out that behind the concept of reparative justice is the belief that penal sanctions should be replaced with compensation orders and she goes on to question whether

⁶⁹ Bradshaw W, Umbreit MS, 'Crime Victims Meet Juvenile Offenders: Contributing Factors to Victim Satisfaction with Mediated Dialogue' *Juvenile Family Court Journal* (1998), 20-21.

⁷⁰ Bradshaw W, Umbreit MS, 'Crime Victims Meet Juvenile Offenders: Contributing Factors to Victim Satisfaction with Mediated Dialogue', 22-23.

⁷¹ Bradshaw W, Umbreit MS, 'Crime Victims Meet Juvenile Offenders: Contributing Factors to Victim Satisfaction with Mediated Dialogue', 23.

compensation orders are oppressive to poor offenders.⁷² She forgets that where mediation takes place in the criminal justice system, it could very well serve to mitigate the sentence of the offender rather than divert him/her from prosecution.⁷³ Thus, this paper will illustrate that mediation of criminal disputes does not supplant the need for penal sanctions and also that compensation need not be in monetary form.

Zedner also argues that mediation places additional burdens in terms of time, energy and goodwill on the victim.⁷⁴ This argument only considers mediation in the context where it is carried out after litigation but it does not take into account that a criminal dispute could be resolved through mediation at the pre-trial stage. This study will examine the possibility of using mediation as an alternative to litigation of criminal disputes where the parties decide to settle the matter in such a manner.

Mark Umbreit, Robert Coates and Betty Vos examine the results of different studies carried out across the US with relation to; the types of people who participate in VOM and their reasons for doing so, participant satisfaction, costs, recidivism, diversion, and restitution stemming from VOM. The article, however, focuses on the application of VOM in property crimes and minor assaults and is silent on the impact of VOM in violent crimes.⁷⁵ This paper will investigate whether mediation can be used in the resolution of all criminal disputes from the minor crimes to the most severe ones.

Carmel Benjamin argues that many restorative justice programmes, including mediation of criminal disputes, require the offender to take responsibility for the wrongdoing before

⁷² Zedner L, 'Reparation and Retribution: Are they Reconcilable?', 240.

⁷³ Schijndel RAMV, *Confidentiality and Victim-Offender Mediation*, 28.

⁷⁴ Zedner L, 'Reparation and Retribution: Are they Reconcilable?', 237.

⁷⁵ Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 280.

entering the programme and this “admission of guilt” is a major concern for the offender and/or his or her defence counsel.⁷⁶ The author then proposes that this can be resolved through the accused admitting the act but not legal guilt in order to be admitted into the program.⁷⁷

The problem with this proposition is that it fails to differentiate between ‘admission of the act’ and ‘admission of guilt.’ It is inconceivable how an offender can admit the act without incriminating him/herself. This paper will inquire into whether mediation of a criminal dispute requires the offender to admit to guilt and if it does, whether there are any safeguards that can be put into place to ensure that there is no self-incrimination on the part of the offender.

⁷⁶ Benjamin C, “Why is Victim/Offender Mediation Called Restorative Justice?”, 8.

⁷⁷ Benjamin C, “Why is Victim/Offender Mediation Called Restorative Justice?”, 8.

CHAPTER THREE: MEDIATION AND CRIMINAL LAW

3.1. THE USE OF MEDIATION IN RESOLVING CRIMINAL CASES

3.1.1. INTRODUCTION

When applied in criminal cases, mediation takes two forms- Victim-Offender Mediation Programmes and case-management mediation.⁷⁸ In VOM programmes, the victims of mainly property crimes and minor assaults and the offender meet in a safe environment and, with the assistance of the mediator, they discuss the crime and its impacts.⁷⁹ Case-management mediation is concerned with ending proceedings in order to provide further options to escape trial.⁸⁰ Case-management mediation is also known as Voluntary Settlement Conferencing.⁸¹

The aim of case-management mediation is to preserve limited government funds by reducing case backlog and increasing the probability of pre-trial plea bargains.⁸² In this form of mediation, the prosecutor, accused, counsel of the accused, and a mediator all meet for plea negotiations.⁸³ Supporters of case-management mediation argue that the presence of a mediator during the negotiations restricts the possibility of abuse in plea-bargaining.⁸⁴ In most case-management mediations, judges act as mediators and this has raised “concerns about judicial coercion and undue influence.”⁸⁵

⁷⁸ Leonard TC, ‘Pressure to plead: how case-management mediation will alter criminal plea-bargaining’ 2014 *Journal of Dispute Resolution* (2014), 167.

⁷⁹ Leonard TC, ‘Pressure to plead: how case-management mediation will alter criminal plea-bargaining’, 167, Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 279.

⁸⁰ Leonard TC, ‘Pressure to plead: how case-management mediation will alter criminal plea-bargaining’, 167.

⁸¹ Leonard TC, ‘Pressure to plead: how case-management mediation will alter criminal plea-bargaining’, 168.

⁸² Leonard TC, ‘Pressure to plead: how case-management mediation will alter criminal plea-bargaining’, 168.

⁸³ Leonard TC, ‘Pressure to plead: how case-management mediation will alter criminal plea-bargaining’, 168.

⁸⁴ Leonard TC, ‘Pressure to plead: how case-management mediation will alter criminal plea-bargaining’, 168.

⁸⁵ Leonard TC, ‘Pressure to plead: how case-management mediation will alter criminal plea-bargaining’, 168.

VOM programmes were originally referred to as victim-offender reconciliation programmes in the mid-1970s and 1980s and some programmes still go by this name to date.⁸⁶ In some jurisdictions, VOM programmes are also called “victim-offender meetings” or “victim-offender conferences.”⁸⁷

VOM programmes focus on a restorative justice approach to the law as opposed to a retributive justice approach which dominates traditional criminal law.⁸⁸ Retributive justice focuses on meting out punishment to the offenders which is proportionate to their intentionally committed harms.⁸⁹ This makes retributive justice a rights-based or deserts-based justice system.⁹⁰ Contrariwise, restorative justice has three fundamental ideals: personalism, reparation, reintegration, and participation.⁹¹ A VOM programme is considered to represent the driving force of restorative justice if it tries to incorporate all four ideals.⁹²

In the area of criminal law, mediation outcomes such as meeting needs, empowering victims and offenders, recognition, and reintegration are what make justice restorative.⁹³ Therefore, the main aim of VOM programmes is to make justice more healing and transformative for those most affected by the crime- the victim(s), offender and the community- by allowing

⁸⁶ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 279.

⁸⁷ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 279.

⁸⁸ Leonard TC, ‘Pressure to plead: how case-management mediation will alter criminal plea-bargaining’, 167.

⁸⁹ Carlsmith KM, Darley JM, ‘Psychological aspects of retributive justice’ 40 *Advances in Experimental Social Psychology* (2008), 194.

⁹⁰ Gerkin PM, ‘Participation in victim-offender mediation: Lessons learned from observations’ 34 *Criminal Justice Review* (2009), 227.

⁹¹ Gerkin PM, ‘Participation in victim-offender mediation: Lessons learned from observations’, 226.

⁹² Gerkin PM, ‘Participation in victim-offender mediation: Lessons learned from observations’, 226.

⁹³ Gerkin PM, ‘Participation in victim-offender mediation: Lessons learned from observations’, 227.

them to seek a solution that provides healing, reparation and reintegration, and reduces the likelihood of re-offence.⁹⁴

VOM programmes enable the victim “to share their suffering and receive answers to their questions” and the offender is able “to take direct responsibility for his or her actions.”⁹⁵ In this way VOM serves as a therapeutic tool for the victim and helps them to hopefully obtain closure.⁹⁶

3.1.2. VICTIM-OFFENDER MEDIATION

3.1.2.1. THE VOM PROCESS

In general, a preparation meeting or a premediation session normally takes place prior to the mediation.⁹⁷ This meeting consists of personal, face-to-face contact with the victim and the offender by either the actual mediator or some other worker from the VOM programme. Such a meeting may even be carried out via telephone.⁹⁸ A national survey carried out in the US in 1999 found that participants in VOM received at least one preparation meeting.⁹⁹

A 2009 study described the premediation session used in a VOM programme offered by a Balanced and Restorative Justice Centre in the US.¹⁰⁰ According to the author’s findings, once a case is scheduled for the programme, the participants are required to attend a premediation session with the assigned mediator on the same day as their mediation.¹⁰¹ These

⁹⁴ Zehr H and Gohar A, *The little book of restorative justice*, Good Books, Pakistan, 2002, 40, Tshela B, ‘The restorative justice bug bites the South African criminal justice system’ 17 *South African Criminal Law Journal* (2004), 7.

⁹⁵ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 279.

⁹⁶ Leonard TC, ‘Pressure to plead: how case-management mediation will alter criminal plea-bargaining’, 168.

⁹⁷ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 284-285, Gerkin PM, ‘Participation in victim-offender mediation: Lessons learned from observations’, 231.

⁹⁸ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 285.

⁹⁹ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 284.

¹⁰⁰ Gerkin PM, ‘Participation in victim-offender mediation: Lessons learned from observations’, 230.

¹⁰¹ Gerkin PM, ‘Participation in victim-offender mediation: Lessons learned from observations’, 231.

sessions are held individually and then the participants are brought together to start the mediation. The purpose of these sessions, on one hand, is to allow the mediator to explain the process, to lay down the rules and to identify the needs of the parties. On the other hand, the parties are given the opportunity to explain their side of the story and to ask questions about the process, restorative justice, their case, or any concerns.¹⁰²

A different study that reported on a Canadian programme working with violent crimes described the preparation stage as involving the videotaping of the offenders and victims in conversation about the offence with programme staff followed by sharing of these videos with their counterparts.¹⁰³

VOM is a dialogue driven rather than a settlement driven form of mediation, with an emphasis on healing of victims, accountability of offenders and restoration of losses.¹⁰⁴ Consequently, the form of mediation used in many VOM programmes is transformative mediation whose main goals include changing how parties relate to each other, healing and reconciliation of relationships, and restorative justice.¹⁰⁵

Generally, this form of mediation requires reframing the mediator's role from being settlement driven to enabling dialogue; arranging separate Preliminary Conferences with each party; building rapport and trust with each party without taking sides; detecting the strengths of each party; using a nondirective technique of mediation that produces a safe setting for dialogue and assessing the strengths of the parties; and recognising and employing

¹⁰² Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 231.

¹⁰³ Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 285.

¹⁰⁴ Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 280.

¹⁰⁵ Alexander N, 'The mediation metamodel: understanding practice', 26(1) *Conflict Resolution Quarterly* (2008), 115.

the power of silence.¹⁰⁶ In majority of the programmes, this dialogue occurs face-to-face, but some programmes employ shuttle mediation whereby a third party conveys information back and forth between the involved parties.¹⁰⁷ Mediation that takes place through a face-to-face meeting between the victim and the offender is called direct mediation while shuttle mediation is referred to as indirect mediation.¹⁰⁸

In order to facilitate discourse between the parties, therapeutic mediation, a type of transformative mediation can be used. Therapeutic mediation has rigorous processes which aim to get the parties involved in a dialogue with transformative or reconciliation goals.¹⁰⁹

Nevertheless, transformative mediation has a number of disadvantages. Firstly, transformative forms of mediation require a higher time investment than other models of mediation.¹¹⁰ Secondly, weaker and less empowered parties have fewer protective mechanisms in transformative mediation than in other mediation models.¹¹¹ Thirdly, if not conducted well, transformative forms of mediation can be time-wasting and they can take parties into areas where neither they nor the mediator is skilled enough to handle the underlying issues and anxieties that may arise.¹¹² Lastly, the use of transformative forms of mediation can make the dispute (as separate from the underlying conflict) more difficult to settle, as superfluous issues are presented at mediation.¹¹³

¹⁰⁶ Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 280.

¹⁰⁷ Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 283.

¹⁰⁸ Wemmers J, 'What fairness means to crime victims: A social psychological perspective on victim-offender mediation' 2 *Applied Psychology in Criminal Justice* (2006), 103.

¹⁰⁹ Alexander N, 'The mediation metamodel: understanding practice', 116.

¹¹⁰ Alexander N, 'The mediation metamodel: understanding practice', 117.

¹¹¹ Alexander N, 'The mediation metamodel: understanding practice', 117.

¹¹² Alexander N, 'The mediation metamodel: understanding practice', 117.

¹¹³ Alexander N, 'The mediation metamodel: understanding practice', 117.

Mediation sessions are confidential and voluntary and the mediator normally acts as a third-party neutral. It is imperative that the mediator explains the meaning of confidentiality to the victim and the offender. This may be done at the premediation session and/or at the mediation itself.

A mediator is neutral when he or she has no financial, legal or emotional interest in the outcome of the disagreement. Neutrality is also expressed where the mediator tries in every way possible to ensure that all the parties have a fair chance to contribute to discussions. Furthermore, a mediator is neutral when he or she does not take sides.¹¹⁴

VOM is voluntary for both the victim and the offender and should be presented to each participant as a voluntary choice.¹¹⁵ Therefore, the mediator must confirm that the participation by both parties is voluntary meaning, there must be a ““*willingness*” to make an *attempt* at using mediation to resolve disputes and keep an open mind about the process.”¹¹⁶ For instance, in Canada, mediation is a voluntary programme therefore, a young offender may reject an offer to partake in mediation. If this happens, the youth will receive another sanction such as, community service.¹¹⁷

Since mediation sessions are private and confidential,¹¹⁸ confidentiality should be upheld by all parties present in the mediation session, including the mediator. This implies that any notes taken by the mediator during the session for the purpose of understanding the information being shared, should be destroyed once the parties have drafted a settlement

¹¹⁴ Spencer D and Brogan M, *Mediation Law and Practice*, Cambridge University Press, 2006, 3.

¹¹⁵ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 281.

¹¹⁶ Spencer and Brogan, *Mediation Law and Practice*, 4.

¹¹⁷ Wemmers J, ‘What fairness means to crime victims’, 103.

¹¹⁸ Spencer and Brogan, *Mediation Law and Practice*, 6.

agreement or reached an impasse.¹¹⁹ This will ensure that no record is kept of what has been disclosed in the session thus, preventing leakage of information.¹²⁰ Confidentiality also means that the mediator cannot be compelled to testify on behalf of either party in any future legal proceedings.¹²¹

There are some exceptions to mediation confidentiality. Generally, when unreported abuse of an elder or child is revealed during a mediation session, the mediator will report the same to the authorities for further investigation.¹²² Similarly, when threats of harm to person or property come up during a session, the mediator assesses the seriousness of the threats and determines whether or not to report them to the authorities.¹²³ These exceptions apply even in VOM programmes.

A VOM session terminates either when the parties agree on a settlement or when the parties fail to reach such an agreement. Where the parties agree on a settlement, it must be written down on paper, approved and signed by the parties. Once the agreement is signed, it becomes binding on the parties. Copies of the settlement are then distributed to the parties so that implementation can begin.¹²⁴

One of the ends of restorative justice is to allow the victim to obtain compensation from the offender. As a result, the appropriate restitution amounts are normally addressed in the mediated agreements. At the agreement-writing stage of the mediation session, the offender

¹¹⁹ Spencer and Brogan, *Mediation Law and Practice*, 6.

¹²⁰ Spencer and Brogan, *Mediation Law and Practice*, 6.

¹²¹ Spencer and Brogan, *Mediation Law and Practice*, 6.

¹²² Spencer and Brogan, *Mediation Law and Practice*, 6.

¹²³ Spencer and Brogan, *Mediation Law and Practice*, 6.

¹²⁴ Spencer and Brogan, *Mediation Law and Practice*, 73.

commits to honour the contract.¹²⁵ However, in some VOM programmes, the amounts of restitution are not agreed upon during the session but they are set by the judge before the commencement of the VOM session.¹²⁶

Restitution can take numerous forms such as monetary compensation to the victim, community service, work for the victim, and in some jurisdictions, unusual paybacks concocted between victim and offender.¹²⁷ In Canada, a mediated agreement is not limited and “may involve anything from financial reparation to an apology by the offender.”¹²⁸

Some scholars argue that the dialogue between the parties that allows for victim healing and develops victim empathy in the offender is much more important than any signed mediation agreement that may result from a VOM session.¹²⁹ Thus, they consider restitution to be a by-product of bringing the victim and the offender together in a face-to-face meeting.¹³⁰

3.1.2.2. INTRODUCTION OF VOM IN THE TRIAL PROCESS

VOM may take place prior to any court involvement, after the arrest of an offender but before the case is referred to court, after the case is referred to court but before conviction of the offender, after conviction but before sentencing, or after sentencing.¹³¹

¹²⁵ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 289.

¹²⁶ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 283.

¹²⁷ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 289.

¹²⁸ Wemmers J, ‘What fairness means to crime victims’, 103.

¹²⁹ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 280.

¹³⁰ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 290.

¹³¹ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 283.

VOM is commonly applied after sentencing in the case of serious offences, while the offender is imprisoned. When mediation is used before and during a criminal trial, it may influence the course of the proceedings, in that the prosecution may either be terminated (diversion) or the outcome of the mediation process may affect the court's sentencing decision. Mediation programmes that can result in diversion normally deal with minor offences while those that may affect sentencing may address more serious crimes.¹³²

In Canada, for example, VOM is offered to juvenile offenders as a form of diversion, redirecting their cases from the youth courts. In this jurisdiction, VOM is offered as an alternative sanction if a juvenile has committed a minor offence and pleads guilty to the offence.¹³³

Similarly, in South Africa, VOM is one of the restorative justice sentences that is usually considered as an alternative to imprisonment of a juvenile offender.¹³⁴ VOM normally takes place after conviction of the youth offender but before sentencing.¹³⁵ The outcome of the mediation process may influence the sentencing decision of the court. Once the child justice court receives the written recommendations from a mediation session, the court may impose a sentence by confirming, amending or substituting the recommendations.¹³⁶ If the court does not agree with the terms of the plan concluded, it may impose any other sentence provided for in the Child Justice Act 2008 and enter the reasons for substituting the plan with that sentence on the record of the proceedings.¹³⁷

¹³² Schijndel RAMV, *Confidentiality and Victim-Offender Mediation*, Maklu Publishers, 2009, 28.

¹³³ Wemmers J, 'What fairness means to crime victims', 103.

¹³⁴ Section 73(1), *Child Justice Act* (Act No 75 of 2008).

¹³⁵ Section 73(1) (b), *Child Justice Act* (Act No 75 of 2008).

¹³⁶ Section 73(2), *Child Justice Act* (Act No 75 of 2008).

¹³⁷ Section 73(3), *Child Justice Act* (Act No 75 of 2008).

Moreover, the Act allows for sentences to be used in combination so as to promote the objectives of sentencing and to encourage a restorative justice approach.¹³⁸ One can argue that this provision implies that custodial and non-custodial sentences can co-exist therefore; a juvenile offender can choose to participate in VOM even if they are already serving a sentence in prison.

Under the Act, VOM can also be ordered as a diversion option.¹³⁹ Therefore, VOM can be used to terminate court proceedings by dealing with the child outside the formal criminal justice system in appropriate cases.¹⁴⁰ A case is considered for diversion only if the following conditions are met- the child freely acknowledges responsibility for the offence without having been unduly influenced; there is a *prima facie* case against the child; the child and, if available, his or her parent, an appropriate adult or a guardian, consent to diversion; and either the prosecutor or the Director of Public Prosecutions indicates that the matter may be diverted.¹⁴¹

3.1.2.3. PARTICIPANTS IN VOM

The two main participants in any VOM programme are the offender and the victim. The lawyers of the offenders are seldom present or invited to the mediation.¹⁴² In South Africa, for example, VOM involves only the victim and the offender.¹⁴³ This means that family members or other supporters of either party are not allowed to attend the mediation. The 2009 US BARJ centre study observed that both offenders and victims were accompanied by

¹³⁸ Section 69(2), *Child Justice Act* (Act No 75 of 2008).

¹³⁹ Section 53(7), *Child Justice Act* (Act No 75 of 2008).

¹⁴⁰ Section 51(a), *Child Justice Act* (Act No 75 of 2008).

¹⁴¹ Section 52(1), *Child Justice Act* (Act No 75 of 2008).

¹⁴² Leonard TC, 'Pressure to plead: how case-management mediation will alter criminal plea-bargaining', 168.

¹⁴³ Section 62(1) (a), *Child Justice Act* (Act No 75 of 2008).

their supporters at the mediation itself; however, it concluded that victims are far less likely to have supporters present.¹⁴⁴

The participation of the victim and the offender is not only encouraged, but it is a necessary element for VOM to achieve restorative outcomes.¹⁴⁵ The 2009 study also found that in cases where the offender and the victim knew one another and had some kind of social relation before the mediation, the victims exhibited a high level of participation.¹⁴⁶ According to the study, an offender is placed in the high participation category if he or she answers questions and contributes meaningfully to the substance of the mediation, and starts conversations.¹⁴⁷

Furthermore, the study attributed low offender participation levels to victim lecturing which happens when the victim talk down to the offender and addresses the offender as a figure of authority. Victim lecturing includes reprimands and disapproval of what the victims identify as bad behaviour and warnings about repercussions for future bad behaviour.¹⁴⁸

Since restorative justice is a needs-based justice system, participation of both participants is crucial in the mediation session.¹⁴⁹ Therefore, the questions asked by the mediator will determine the parties' levels of involvement in the mediation process. The questions should be structured in such a way that they enable the mediator to determine the underlying interests of the parties.¹⁵⁰ If parties are encouraged to provide their input, especially at the

¹⁴⁴ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 234.

¹⁴⁵ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 226.

¹⁴⁶ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 234.

¹⁴⁷ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 236.

¹⁴⁸ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 235.

¹⁴⁹ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 227.

¹⁵⁰ Spencer and Brogan, *Mediation Law and Practice*, 63.

agreement-writing stage, then it is likely that the mediated agreement will encompass both the victim's and the offender's needs.¹⁵¹

The offender may be a juvenile or an adult and the victim need not be an adult. The 2009 study, in reaching its findings, observed 14 mediations in which 20 offenders and 16 victims participated. It was found that 18 of the 20 offenders were juveniles and 14 of the 16 victims were adults.¹⁵² The national survey of VOM programmes in the US found that juvenile offenders are more likely to be the main focus of US VOM programmes, with 45% of programmes offering services only to juveniles and only 9% focusing on adults. The study also found that 46% of the programmes served both juveniles and adults.¹⁵³

3.1.2.4. SOURCES OF REFERRAL OF CRIMINAL CASES TO VOM

In the US, cases may be referred to VOM programmes from a variety of sources, namely judges, probation officers, police officers, prosecutors, victim advocates, and offender's counsel.¹⁵⁴ The US national survey found that the main referral sources of criminal cases to VOM are probation officers, judges, and prosecutors.¹⁵⁵

In South Africa, where VOM is offered only in criminal cases involving youth offenders, a juvenile may be ordered to appear at VOM by a magistrate, an inquiry magistrate or child justice court.¹⁵⁶

¹⁵¹ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 238.

¹⁵² Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 234.

¹⁵³ Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 283.

¹⁵⁴ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 227.

¹⁵⁵ Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 284.

¹⁵⁶ Section 53(7), *Child Justice Act* (Act No 75 of 2008).

The 2009 study found that referrals to the BARJ centre are assigned to either a VOM or a family group conference by the centre's director.¹⁵⁷ The director's decision is arrived at by "screening the cases using the police reports, comments from the juvenile court or the arresting officer, and discussion with the victims and offenders over the phone."¹⁵⁸ The director typically considers the following factors in determining assignment- the seriousness of the injury, the amount of restitution, the number of victims and offenders, and the supposed level of preparation required for the participants. The seriousness of the harm and the need for preparation of participants are the most important variables.¹⁵⁹

The US survey also found that 43% of VOM programmes across the US were mostly offered by private, non-profit community-based agencies; churches or church-related agencies were responsible for 23% of the programmes; and several elements of the justice system (such as probation, prosecuting attorney offices, victim services, correctional facilities, and police departments) offered 33% of the VOM programmes.¹⁶⁰ The case is somewhat different in South Africa whereby only probation officers or diversion service providers are authorised to mediate criminal cases and such parties are also allowed to regulate the procedure to be followed at the mediation.¹⁶¹

3.1.2.5. CRIMES WHICH CAN BE REFERRED TO MEDIATION

The 2009 study reported that at least 60% of the cases processed at the BARJ centre are property crimes while the second leading cause of referral is for assaults including young

¹⁵⁷ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 231.

¹⁵⁸ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 231.

¹⁵⁹ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 231.

¹⁶⁰ Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 284.

¹⁶¹ Section 62(4), *Child Justice Act* (Act No 75 of 2008).

children and siblings.¹⁶² According to the study, retail fraud cases, child abuse cases or domestic violence cases are not handled by the centre.¹⁶³ The centre accepts cases in which a child is abusive toward his or her parent(s) or sibling(s). The centre receives requests for mediation of felony cases, although this is a rare occurrence.¹⁶⁴

The US survey found that two-thirds of the cases referred to VOM are misdemeanours, the remaining third are felony cases. The survey concluded that the four most common offences referred, in order of frequency, were vandalism, minor assaults, theft, and burglary.¹⁶⁵

A different study found that property-related offences were considerably more likely to be mediated than personal crimes.¹⁶⁶ Another study found a correlation between victim participation in the mediation session and the type of crime concluding that victims were more likely to participate if the offence was a misdemeanour rather than a felony.¹⁶⁷

In South Africa, diversion options, including VOM, may be ordered in respect of minor offences and serious offences.¹⁶⁸ The DPP is empowered to divert a case involving a serious offence such as murder, rape, treason, among others, in which the culprit is a juvenile, but only in exceptional circumstances.¹⁶⁹

¹⁶² Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 232.

¹⁶³ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 232.

¹⁶⁴ Gerkin PM, 'Participation in victim-offender mediation: Lessons learned from observations', 232.

¹⁶⁵ Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 284.

¹⁶⁶ Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 286.

¹⁶⁷ Umbreit MS, Coates RB, Vos B, 'Victim-Offender Mediation: Three Decades of Practice and Research', 286.

¹⁶⁸ Sections 6(1) and 53 (2), Chapter 6, *Child Justice Act* (Act No 75 of 2008).

¹⁶⁹ Section 52 (3) (a), *Child Justice Act* (Act No 75 of 2008).

Umbreit *et al* argue that VOM programmes in the US have, from time to time, been working with cases involving extreme violence, including murder.¹⁷⁰ They state that handling such cases requires advanced training and a high level of preparation of the parties over many months before a face-to-face meeting can be arranged.¹⁷¹ These authors, however, emphasise that the most widespread application of VOM is in property crimes and minor assaults.¹⁷²

3.2. CRITIQUES OF VOM

Despite the benefits of VOM discussed at the beginning of this chapter, VOM has been criticised on the following grounds:

First, since VOM programmes may be utilized in respect of offences involving severe violence (such as murder or domestic violence),¹⁷³ there is a danger in using VOM with victims of these crimes as it may cause “unintended negative consequences” for example, revictimisation of a victim or their family, if the practices of restorative justice are not applied correctly.¹⁷⁴

VOM programmes offer victims greater involvement in the criminal justice process.¹⁷⁵ This can have certain negative effects. One disadvantage of greater victim involvement is that it may create false expectations which cannot be fulfilled.¹⁷⁶ Victims may present views and/or arguments that are unreasonable or unjust from the offender’s point of view, with the hope

¹⁷⁰ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 279.

¹⁷¹ Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 280.

¹⁷² Umbreit MS, Coates RB, Vos B, ‘Victim-Offender Mediation: Three Decades of Practice and Research’, 280.

¹⁷³ Gumz EL, Grant CL, ‘Restorative justice: a systematic review of the social work literature’ 90 *Families in Society: The Journal of Contemporary Social Services* (2009), 122.

¹⁷⁴ Gumz EL, Grant CL, ‘Restorative justice: a systematic review of the social work literature’, 122.

¹⁷⁵ Garkawe S, ‘Restorative justice from the perspective of crime victims’ 15 *Queensland University of Technology Law Journal* (1999), 48.

¹⁷⁶ Garkawe S, ‘Restorative justice from the perspective of crime victims’, 49.

that their demands will be fulfilled. If they are not fulfilled, then the victim's psychological well-being may be affected and this may leave them worse off than if they had never been involved in the first place. If the unreasonable expectations are fulfilled, however, the process will have failed to protect the offender from vindictive victims.¹⁷⁷

Another criticism of VOM is that it is inappropriate where there exists a power imbalance between the participants.¹⁷⁸ This view is held by majority of the feminist authors who support family conferencing on the basis that it minimises power imbalance since, unlike VOM, it involves more people attending the conference.¹⁷⁹ They assert that there is always a power imbalance whenever a man and a woman attempt to resolve their differences through mediation, particularly, where domestic violence is present.¹⁸⁰

Power imbalance is also brought about by victim lecturing as it allows the victim to exercise his or her dominance over the offender who receives the message that he or she is occupying a subservient status in the mediation process.¹⁸¹ These power differentials within the relationship between the participants, created by victim lecturing, affect the level of participation of the offender, particularly at the agreement-writing stage, since the offender shies away from expressing any of their needs.¹⁸²

Another criticism is that restorative justice is possibly more coercive than the formal criminal justice system.¹⁸³ In support of this argument, proponents of this criticism argue that "a far worse imbalance will emerge with the offender finding himself or herself not only lined up in

¹⁷⁷ Garkawe S, 'Restorative justice from the perspective of crime victims', 49.

¹⁷⁸ Garkawe S, 'Restorative justice from the perspective of crime victims', 49.

¹⁷⁹ Garkawe S, 'Restorative justice from the perspective of crime victims', 49.

¹⁸⁰ Garkawe S, 'Restorative justice from the perspective of crime victims', 49-50.

¹⁸¹ Gerkin PM, 'Participation in victim-offender mediation: Lessons learnt from observations', 235.

¹⁸² Gerkin PM, 'Participation in victim-offender mediation: Lessons learnt from observations', 237.

¹⁸³ Gerkin PM, 'Participation in victim-offender mediation: Lessons learnt from observations', 229.

defence against the state but also against the victims and perhaps some new entity or presence put there to represent the ‘community.’”¹⁸⁴

Arrigo, Milovanovic, and Schehr state that “for victims and offenders, VOM discursive practices only offer the opportunity to locate experiences of pain, hurt, confusion, regret, retribution, and the like, within a *master* discourse.”¹⁸⁵ They claim that limiting the participants within this master discourse means they are denied the opportunity to fully express their experiences with the harm produced.¹⁸⁶ They stress that this does not allow the victim to obtain “authentic healing” since they are unable to “speak their own ‘true’ words.”¹⁸⁷

Lastly, VOM creates a danger of focusing on the victim’s psychological and emotional needs and neglecting the offender’s and community’s needs.¹⁸⁸ The offender’s needs that are mainly taken into account are housing, employment, and education, while their emotional and psychological needs are overlooked.¹⁸⁹ Sullivan and Tifft emphasise that “by focusing on this level of needs alone we do not show the same level of concern for them as those who have been harmed. This is true even when the [offender] might also be suffering from isolation and disorientation, and requires the same psychological care and emotional support that those they harmed require.”¹⁹⁰

¹⁸⁴ Harris MK, ‘An expansive, transformative view of restorative justice’ 7 *Contemporary Justice Review* (2004), 134.

¹⁸⁵ Arrigo BA, Milovanovic D, Schehr RC, *The French connection in criminology: Rediscovering crime, law, and social change*, SUNY Press, 2005, 105.

¹⁸⁶ Gerkin PM, ‘Participation in victim-offender mediation: Lessons learnt from observations’, 228.

¹⁸⁷ Arrigo BA *et al*, *The French connection in criminology: Rediscovering crime, law, and social change*, 106.

¹⁸⁸ Zehr H, *Changing lenses: A new focus for crime and justice*, Herald Press, 1990, 200.

¹⁸⁹ Gerkin PM, ‘Participation in victim-offender mediation: Lessons learnt from observations’, 229.

¹⁹⁰ Sullivan D and Tifft L, *Restorative justice: Healing the foundations of our everyday lives*, Willow Tree Press, 2001, 83.

3.3. CONCLUSION

Criminal mediation is not a new phenomenon as it has existed for years in various parts of the world alongside the traditional criminal justice system. VOM provides psychological benefits for both the victim and the offender, offers greater victim involvement, allows for the creation of a restitution plan, and it enjoys all the other advantages of mediation such as privacy, confidentiality and party autonomy. VOM can apply in both severe and less serious crimes but, when utilizing it in violent crimes, caution must be exercised. Even though it has several advantages, VOM is not short of drawbacks; therefore, any effective VOM programme should be able to address the shortcomings of VOM while still retaining its benefits.

CHAPTER FOUR: INTERNATIONAL LEGAL FRAMEWORK

4.1. INTRODUCTION

Currently, there is no legal framework in Kenya that governs the use of mediation in criminal cases. This chapter contains an analysis of three legal instruments that have been drafted by organs of the UN namely, UNGA and ECOSOC as well as the CoE in order to guide member states in their application of mediation in criminal matters. The instruments that are studied include the ECOSOC Resolution 2002/12, the UNGA Declaration of basic principles of justice for victims of crime and abuse of power, and the CoE Recommendation on mediation in penal matters. This chapter culminates with a brief conclusion relating this analysis to the Kenyan context.

4.2. ECOSOC RESOLUTION 2002/12

This resolution was adopted by ECOSOC, an organ of the UN, and it contains the “basic principles on the use of restorative justice programmes in criminal matters.” This soft law provides a guide as to the manner in which member states should use, operate and develop restorative justice programmes. Restorative justice programmes are defined as programmes that employ restorative processes in order to achieve restorative outcomes.¹⁹¹ Restorative processes are viewed as including mediation, conciliation, conferencing and sentencing circles.¹⁹² The Resolution states that, subject to national law, restorative justice programmes can be used at any stage of the criminal justice system.¹⁹³

Before restorative processes are used, there must be sufficient evidence to tie the offender to the crime in question and both the victim and the offender must voluntarily consent to such

¹⁹¹ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, E/RES/2002/12, 24 July 2002, 3.

¹⁹² UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 3.

¹⁹³ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 3.

use.¹⁹⁴ During the process, the victim and the offender should be able to withdraw their consent at any stage. Any agreements submitted in the course of the process must have been arrived at voluntarily and they should contain only reasonable and proportionate obligations.¹⁹⁵ The offender's participation in the process should not be used as evidence of admission of guilt in ensuing legal proceedings.¹⁹⁶

Any power imbalances or cultural differences between the parties as well as the parties' safety must be considered before referring a case to, and in carrying out, a restorative process.¹⁹⁷ Restorative justice processes are not suitable or possible in all cases; therefore, in such instances, criminal justice officials should encourage the offender to take responsibility with regard to the victim and affected communities and support the reintegration of the victim and the offender into the community.¹⁹⁸

The Resolution further states that any guidelines and standards established by Member States to govern the use of restorative justice programmes, should address the following: the conditions for the referral of cases to restorative justice programmes; the handling of cases following a restorative process; the qualifications, training and assessment of facilitators; the administration of restorative justice programmes; and standards of competence and rules of conduct governing the operation of restorative justice programmes.¹⁹⁹

¹⁹⁴ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 3.

¹⁹⁵ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 3.

¹⁹⁶ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 3.

¹⁹⁷ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 3.

¹⁹⁸ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 4.

¹⁹⁹ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 4.

Restorative justice programmes and especially, restorative processes should adhere to procedural safeguards that guarantee fairness to the offender and the victim.²⁰⁰ There are four key procedural safeguards that Member States ought to apply. First, both the victim and the offender should have the right to consult with legal counsel concerning the restorative process.²⁰¹ Second, minors should be afforded the right of the assistance of a parent or guardian.²⁰² Third, before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision.²⁰³ Lastly, neither the victim nor the offender should be coerced or unfairly induced to participate in restorative processes or to accept restorative outcomes.²⁰⁴

Discussions in restorative processes that are conducted in private should remain confidential during and after the process unless disclosure of these discussions is allowed by the parties.²⁰⁵ Where the results of agreements arising out of restorative justice programmes are judicially supervised or incorporated into judicial decisions or judgements, the outcome should preclude prosecution in respect of the same facts.²⁰⁶ If the parties do not reach an agreement, the case should be referred back to the established criminal justice process.²⁰⁷

Finally, the role of facilitators is likened to that of facilitative mediators whereby the former are called upon to be impartial and respect the dignity of the parties. The facilitators should ensure that the parties respect each other and the parties should be allowed to find a relevant

²⁰⁰ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 4.

²⁰¹ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 4.

²⁰² UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 4.

²⁰³ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 4.

²⁰⁴ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 4.

²⁰⁵ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 4.

²⁰⁶ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 4.

²⁰⁷ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 4-5.

solution among themselves.²⁰⁸ Facilitators must possess a good understanding of local cultures and communities.²⁰⁹

4.3. DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER

This Declaration was adopted by UNGA resolution 40/34 of 29 November 1985. The Declaration deals with two types of victims- victims of crime and victims of abuse of power. Victims of crime are entitled to access to justice and fair treatment. To this end, the Declaration recognises that criminal disputes are not only resolvable through formal criminal justice system but also through informal mechanisms such as mediation, arbitration and customary justice or indigenous practices. These mechanisms should be used where applicable in order to facilitate conciliation and redress for victims.²¹⁰

Compensation and restitution to the victim are both outcomes that could result from mediation of a criminal dispute. This is acknowledged in the Declaration wherein victims of crime are entitled to compensation either from the offender or from the State only where the compensation is not fully available from the offender or other sources.²¹¹ Offenders should, where appropriate, make fair restitution to victims, their families or dependants. Restitution includes the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration

²⁰⁸ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 5.

²⁰⁹ UN ECOSOC, *Basic principles on the use of restorative justice programmes in criminal matters*, 5.

²¹⁰ UNGA, *Declaration of basic principles of justice for victims of crime and abuse of power*, UN A/Res/40/34 (29 November 1985).

²¹¹ UNGA, *Declaration of basic principles of justice for victims of crime and abuse of power*.

of rights.²¹² These victims should also receive material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.²¹³

4.4. RECOMMENDATION N^o R (99) 19 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING MEDIATION IN PENAL MATTERS

This Recommendation was adopted by the Committee of Ministers of the CoE on 15th September 1999. The preamble of the Recommendation states that mediation should be used in penal matters as a flexible, comprehensive, problem-solving, and participatory option complementary or alternative to traditional criminal proceedings.²¹⁴ The preamble also states that mediation enhances active personal participation in criminal proceedings of the victim, offender, and the affected community.²¹⁵

The general principles contained in the Recommendation echo the principles in the ECOSOC resolution especially in relation to voluntary consent, withdrawal of consent, and the availability of mediation at all stages of the criminal justice process.²¹⁶ The Recommendation adds that mediation services should be given sufficient autonomy within the criminal justice system and that criminal mediation should be a generally available service.²¹⁷

Legislation should facilitate mediation in penal matters and there ought to be guidelines defining the use of criminal mediation.²¹⁸ These guidelines must address the conditions for

²¹² UNGA, *Declaration of basic principles of justice for victims of crime and abuse of power*.

²¹³ UNGA, *Declaration of basic principles of justice for victims of crime and abuse of power*.

²¹⁴ Council of Europe: Committee of Ministers, *Recommendation N^o R (99) 19 of the Committee of Ministers to member states concerning mediation in penal matters*, 15 September 1999, 3.

²¹⁵ Council of Europe: Committee of Ministers, *Recommendation N^o R (99) 19*, 3.

²¹⁶ Council of Europe: Committee of Ministers, *Recommendation N^o R (99) 19*, part II.

²¹⁷ Council of Europe: Committee of Ministers, *Recommendation N^o R (99) 19*, part II.

²¹⁸ Council of Europe: Committee of Ministers, *Recommendation N^o R (99) 19*, para. 6.

the referral of cases to the mediation service and the manner in which cases should be handled following mediation.²¹⁹

Like the ECOSOC resolution, the Recommendation also talks about the procedural safeguards that should be applied to criminal mediation in order to protect the victims and offenders, with special consideration afforded to minors.²²⁰ The criminal justice authorities should have the power of referring a criminal case to mediation as well as assessing the outcome of a mediation procedure.²²¹

Moreover, all the parties involved in mediation must be capable of understanding the meaning of the process before the process can commence.²²² The Recommendation refers to participation in mediation not amounting to an admission of guilt in any legal proceedings that may follow.²²³ Any disparities that may arise from the parties' age, maturity or intellectual capacity must be considered before a case is referred to mediation.²²⁴

There should be a reasonable time limit within which the competent criminal justice authorities must be informed of the state of the mediation procedure.²²⁵ Discharges of mediated agreements must have similar status to judgements and therefore, must preclude prosecution in respect of the same facts.²²⁶

²¹⁹ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 7.

²²⁰ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 8.

²²¹ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 9.

²²² Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 13.

²²³ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 14.

²²⁴ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 15.

²²⁵ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 16.

²²⁶ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 17.

The Recommendation calls for development of standards of competence and ethical rules as well as procedures for the selection, training and assessment of mediators.²²⁷ The requirement of monitoring of mediation services by a competent body is also provided.²²⁸ Recruitment of mediators should not be limited to a specific section or sections of society and mediators must possess a sound understanding of local cultures and communities.²²⁹ Sound judgement and interpersonal skills are a must-have for mediators.²³⁰

Initial training before taking up mediation duties must be complemented by in-service training. This training should provide mediators with a high level of competence, taking into consideration conflict resolution skills, the exact requirements of working with victims and offenders and elementary knowledge of the criminal justice system.²³¹

Mediators should be impartial, respectful of the dignity of the parties, and should ensure that the parties act with respect towards each other.²³² Moreover, it is the responsibility of the mediator to provide a safe and comfortable environment for the mediation.²³³ Mediation must be confidential but if the mediator learns of any imminent serious crimes during the mediation, then he /she should report the same to the proper authorities.²³⁴

Any agreement arrived at by the parties during mediation should be voluntary and should outline only reasonable and proportionate obligations.²³⁵ It is the obligation of the mediator to report to the criminal justice authorities on the steps taken and on the outcome of the

²²⁷ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 20.

²²⁸ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 21.

²²⁹ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 22.

²³⁰ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 23.

²³¹ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 24.

²³² Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 26.

²³³ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 27.

²³⁴ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, paras. 29-30.

²³⁵ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 31.

mediation.²³⁶ Finally, the Recommendation urges the criminal justice authorities and mediation services to regularly consult with each other in order to develop common understanding.²³⁷

4.5. CONCLUSION

Kenya is a member state of the UN but not a member state of the CoE. Hence, if in the future, Kenya decides to enact a legislation governing the application of mediation in criminal cases, she should refer to the ECOSOC and UNGA principles discussed herein. The fact that Kenya is not a member state of the CoE should not deter the drafters of this legislation from borrowing from the 1999 Recommendation at their discretion. This legislation would be considered exhaustive if it deals with the following key areas as addressed in the above instruments: standards of competence and ethical rules required from mediators; the mediated agreement; how cases will be dealt with after mediation; confidentiality and voluntariness of mediation; the procedural safeguards to be followed; and the conditions of referral of cases to mediation. In order to make the legislation appropriate in the Kenyan context, the drafters may make note of the role of customs in the text as well as invite members of the public to share their views so that the text reflects the diverse interests prevailing in our society.²³⁸

²³⁶ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 32.

²³⁷ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, para. 33.

²³⁸ See Article 10, *Constitution of Kenya* (2010) on national values and principles of governance specifically, public participation.

CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION

5.1. INTRODUCTION

This chapter begins with a discussion of the main findings of the study, followed by a brief conclusion. The chapter ends with recommendations on the areas in which any future legislation on mediation of criminal cases in Kenya should address.

5.2. FINDINGS

Mediation of crimes usually gives victims closure, it helps them to find out the reasons behind the offender's crime in the latter's own words.²³⁹ Following mediation, some victims are able to let go of the hate and rage they may be consumed with, forgive the offender, and move on with their lives.²⁴⁰ Another benefit of criminal mediation is that it offers the victims an opportunity to claim restitution from the offender. Offenders are able to see and understand the impact that their crime has had on the victim which may deter them from reoffending.²⁴¹

In some jurisdictions, mediation can be used as a dispute resolution mechanism in respect of all crimes regardless of their severity. In these jurisdictions, it is common for both adult and juvenile offenders to be referred to mediation. In other jurisdictions, mediation applies to all crimes- from the less serious crimes to those involving severe violence- in which the offender is a juvenile. This implies that in these jurisdictions adult offenders do not have the ability to participate in criminal mediation. Furthermore, there are jurisdictions in which mediation is only offered to juvenile offenders who have been accused of less serious offences such as, property crimes and minor assaults, and their victims. Therefore, the application of mediation

²³⁹ Umbreit MS *et al*, 'Victim-Offender Mediation: Three Decades of Practice and Research', 288.

²⁴⁰ Umbreit MS *et al*, 'Victim-Offender Mediation: Three Decades of Practice and Research', 288.

²⁴¹ Umbreit MS *et al*, 'Victim-Offender Mediation: Three Decades of Practice and Research', 288.

in criminal disputes may vary from one jurisdiction to the next. Furthermore, the sources of referral of cases to mediation may also differ from jurisdiction to jurisdiction.

As discussed above, the procedure followed in VOM is similar to the conventional mediation process which begins with the preparation stage and concludes with a mediated agreement or an impasse. The form of mediation used in many VOM programmes is transformative mediation which normally incorporates tactics used in therapy in order to encourage dialogue between the parties and to create a safe environment for both parties to share their feelings, without fear of revictimisation or incarceration. The attempt to make the process therapeutic for the parties involved is a unique addition to the traditional procedure employed in mediation.

However, transformative mediation has certain disadvantages as highlighted in this study, some of which can be overcome by having mediators who have not only completed a 40 hour mediation module but also have additional VOM training to conduct a VOM process.²⁴² This additional training will ensure that the mediator is able to deal with any underlying anxieties that may arise during the session as well as enable him or her to prevent the discussion of superfluous matters that will only serve to prolong the process.

To encourage participation of offenders in VOM, the mediator must ask the victim to refrain from victim lecturing every time the victim engages in such practice. The mediator may also consider laying this out in the ground rules in his or her opening statement. The questions that the mediator asks the offender may also determine his or her level of participation in the

²⁴² Gerkin PM, 'Participation in victim-offender mediation: Lessons learnt from observations', 232.

process. Thus, it is crucial for the mediator to ask questions that are geared towards uncovering not only the victim's underlying interests but also the offender's needs.

Recognising the growing practice of mediation of penal matters, certain organs of the UN as well as the CoE came up with guidelines that member states can implement in their national laws in order to streamline the criminal mediation process and most importantly, to safeguard the rights of the participants. The manner in which these instruments can inform the drafting process of a legislation dealing with similar subject matter in Kenya, has been elaborated in the previous chapter.

5.3. CONCLUSION

In Kenya, mediation is recognised in various statutes as a form of ADR for dealing with intergovernmental disputes,²⁴³ disputes between spouses,²⁴⁴ industrial disputes,²⁴⁵ and land disputes.²⁴⁶ Additionally, in the past, mediation has been applied in the area of politics to deal with the social tension that arose after the 2007 general elections.²⁴⁷ The mediation process that was carried out in 2008 was aimed at settling the conflict that had surrounded the country and restoring peace and harmony.²⁴⁸

In theory, with the recognition of ADR under Article 159 (2) (c) of the COK, a victim of crime can choose to have their dispute resolved under the formal or informal system. In reality, however, courts have only recognised the use of one form of ADR in the resolution of

²⁴³ Article 189 (4), *Constitution of Kenya* (2010).

²⁴⁴ Sections 64 and 68, *Marriage Act* (Act No. 4 of 2014).

²⁴⁵ Sections 15(1) and (4), *Industrial Court Act* (Act No. 20 of 2011).

²⁴⁶ Section 95(1), *Land Registration Act* (Act No. 3 of 2012).

²⁴⁷ Kariuki F, Muthoni L, 'Development and practice of alternative dispute resolution in Kenya', 4 *Dutch-Flemish Mediation and Conflict Management Journal* (2014), 17.

²⁴⁸ Kariuki F, Muthoni L, 'Development and practice of alternative dispute resolution in Kenya', 17.

criminal disputes- traditional dispute resolution mechanisms.²⁴⁹ This may be attributed to the fact that TDRM is the only form of ADR that has been attempted in the area of criminal law. The COK does not limit the application of mediation, or any other form of ADR for that matter, to any particular disputes which begs the question whether the application of mediation in Kenya is in need of expansion especially, for the purpose of supplementing the formal criminal justice system which is overwhelmed with cases.

This study has shown that the application of mediation in criminal cases in Kenya is indeed possible. Perhaps it is time to re-evaluate the ‘eye for an eye’ approach encouraged by retributive justice which only leads to prison congestion as offenders are given their “just desserts” which more often than not takes the form of imprisonment. It might be time to move away from publically inflicting shame upon the offender to what Braithwaite calls reintegrative shaming, that is, shaming in a private space that does not disrespect or lead to the stigmatisation of the offender.

Changing the mind-set of Kenyans- who have relied on litigation for the past fifty three years to resolve criminal disputes- may be challenging at first, but if they are made aware of the restorative outcomes of the voluntary process called VOM, then they may be willing to try this alternative method. However, we will never truly know the response that such a programme will receive in Kenya until we actually give it a try.

²⁴⁹ Kariuki F, Muthoni L, ‘Development and practice of alternative dispute resolution in Kenya’, 22-23. In the case of *Republic v Mohamed Abdow Mohamed [2013] eKLR*, the court set aside a murder case once it was informed that the dispute had been settled using Somali traditional justice mechanism. However, in *Stephen Kipruto Cheboi and 2 others v Republic [2014] eKLR*, the court refused to quash the appellants’ conviction and sentence on account that the use of ADR for felonies is neither in the best interest of the public nor in the best interest of justice.

5.4. RECOMMENDATIONS

This study recommends the application of mediation in the resolution of criminal disputes in order to fulfil various purposes namely, to reduce the case backlog before the judiciary, to reduce congestion in prisons, and to realise the restorative and therapeutic outcomes discussed above. If VOM becomes a reality in Kenya, legislation or regulations will be useful in streamlining the process in Kenya. These guidelines would need to critically address three key areas: the conditions for referral of cases to VOM, the handling of cases after VOM, and the qualifications, training and assessment of mediators.

The conditions of referral of cases may be informed by the type of the crime, age of the offender, the sources of referral and the frequency of re-offence. The legislation may prescribe that all crimes or only less serious crimes (such as property crimes and minor assaults) may be referred to mediation. In respect of the age of the offender, the legislation could specify that only juvenile offenders or both adult and juvenile offenders will be eligible to attempt to resolve their criminal disputes through mediation.

Another condition that might be imposed is that only cases referred by certain sources such as magistrates, or the offenders' advocates, or probation officers, among others can be mediated. It is important to note that referral of cases to mediation by probation officers, social workers, police officers, and prosecutors in the course of their ordinary work may defeat the very purpose of the legislation. This is because it is difficult for the law to police mediation conducted following such referral and as a result, this referral could be subject to bias and abuse.²⁵⁰ This would clash with the aim of the legislation which is streamlining the mediation of criminal cases nationally. Lastly, the frequency of re-offence can also be a

²⁵⁰ Council of Europe: Committee of Ministers, *Recommendation N° R (99) 19*, 8-9.

condition of referral for example, by limiting referral to cases involving only first-time offenders.

The legislation should also specify the manner in which cases will be handled upon the conclusion of a VOM process. If the magistrate will have the discretion to impose a custodial sentence even where parties have reached a mediated agreement; this should be specified. In other words, the effect that mediation would have on custodial sentences, if any, should be provided. The circumstances in which mediation of criminal cases may act as a diversion should also be outlined.

The final area that will need to be discussed in the legislation concerns the qualifications, training, and assessment of mediators. The minimum qualifications that mediators should possess in order to mediate criminal disputes must be set out and the training institutions qualified to train mediators in handling criminal disputes should also be listed. There may be need to create new institutions that offer training on VOM. Alternatively, the training institutions that are already in existence may expand the scope of the services they offer to include special training for conducting VOM processes. Mediators qualified to handle criminal cases must be aware of the various local cultures and traditions existing in the country so that even persons from diverse backgrounds are able to access VOM programmes.

Informal mediation, which may not require the use of writing, should not be ignored in that, the legislation should not focus solely on formal, court-mandated mediation, which is a process adopted from the West, and overlook the more common traditional or informal mediation.²⁵¹ Therefore, the courts should be required to treat cases which have been

²⁵¹ Muigua K, 'Court sanctioned mediation in Kenya- an appraisal' Unpublished PhD Thesis, University of Nairobi, March 2015, 4, 12.

mediated informally for example by a Council of elders, in the same way as those which have undergone court-mandated mediation.

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