THE RIGHTS OF VICTIMS OF CRIME IN SOUTH AFRICA

by

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DECLARATION

I, ZINGISILE WISEMAN NKUKWANA (STUDENT NUMBER: 59313670), declare that the work presented in this dissertation has not been submitted before for any degree or examination and that all the sources I have used or quoted have been indicated and acknowledged as complete references. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the Magister Legum Degree in Criminal Justice.

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SUMMARY

There is a perception among victims of crime, and people in general, in South Africa that the country's laws favour and protect offenders. These people believe that offenders have more rights than victims which are derived from the Constitution of the country, and other legislative Acts of parliament. This view may sometimes lead to vigilantism and a total disregard of the law. The study will show that victims do have rights in the country's legislations. The study briefly explains the sources of such laws, like the Constitution, the Victims Charter and selected provisions of some Acts of parliament.

It is a fact that the section 35 of the Constitution provides in detail, the rights of the arrested, detained and accused. It is also submitted persons that there is no specific provision that talks about the rights of the victims of crime. However, that does not mean that such victims do not have rights in terms of the constitution. The rights of victims of crime are seen during the courts' interpretation and application of rights mentioned in the Bill of Rights. The use of words like "everyone" and "any person" in the Bill of Rights also refers to victims of crime.

Therefore, the Constitution is not victim-biased and offender-friendly. The Constitution protects everybody because it seeks to uphold the values of human dignity, equality, freedom and the African concept of *ubuntu*.

The study discusses briefly the rights of victims as adopted by the Victims' Charter. The Charter lists these rights, but does not explain how such rights are to be achieved. South Africa also developed a document called the Minimum Standards for Services for Victims of Crime which indicates how each right is to be achieved. The study also shows that South Africa had developed some Acts of parliament even before the adoption of the Victims Charter.

South Africa claims that the Victims' Charter is compliant with the Constitution and the United Nations Declaration of Basic Principles of Justice Abuse of Power of 1985. It is submitted that this statement is not entirely correct, especially with regards to the

provision that deals with compensation. South Africa did not define compensation as defined by the United Nations Declaration. This can be seen as a dismal failure by South Africa to abide by the United Nations Declaration and this has resulted in more harm suffered by victims of crime.

The study also discusses how rape victims benefit through the use of Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007. This begins with the changing of the definition of rape. The Act also deals with how rape victims can access antiretroviral drugs to prevent HIV/Aids infection. It explains limitations on the right to privacy of the accused, especially to compel him or her to undergo an HIV test. The HIV positive status of the accused can be used as an aggravating factor during sentencing in terms of UNAIDS policies. *S v Nyalungu* 2005 (JOL) 13254 (T) is a leading case in South Africa showing compliance with UNAIDS policies.

Restorative justice mechanisms have been discussed to show positive movement by South Africa from a retributive justice system to a restorative justice system. The advantages of such mechanisms for victims have been discussed.

The study also describes briefly some selected provisions of the Criminal Procedure Act of 1977 and how these provisions benefit victims of crime. These include sections 153, 170A, 297, 299A, 300 and 301.

The study highlights some challenges that still exist and what innovations can be made. This includes recommendations which can be made to benefit victims of crime further. For example, an apology can be used as one of the important principles in the restorative justice system. It is submitted and recommended that truth and apology go hand in glove and the basic elements of forgiveness. South Africa can pride itself with regards to this approach especially during the Truth and Reconciliation Commission which was established in post-apartheid South Africa.

The study concludes by saying that South Africa should set up a victim-compensation scheme. It is submitted that South Africa can afford such a scheme despite the problems identified.

CHAPTER ONE
INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 INTRODUCTION

Crime in South Africa has reached alarming proportions, leaving scores of people as victims. This is revealed by the Victims of Crime Survey which indicates the different crime levels of crime committed in South Africa.[1] The most prevalent crimes are housebreaking, home robbery; street robbery; pick-pocketing or bag snatching; murder; sexual offences (including rape) and assault (including domestic violence).

Davis and Snyman define a "victim" as a person who suffers harm or loss or injury inflicted by another individual.[2] The term "victim" also refers to the immediate family or dependants of the direct victim and also includes people who have suffered harm in trying to assist the victims in distress or to prevent victimization.[3] This means that crime not only affects the person against whom it has been committed directly, but also those connected to that victim. This is clearly seen in the Marikana Massacre where families and dependants of those killed suffer the consequences of losing their breadwinners or family members.[4]

Lay persons and victims of crime argue that perpetrators of crime have rights which are protected. This is true especially if the provisions of the Constitution, such as section 35 of the Constitution, which deals with the rights of the arrested, detained and accused persons, are considered. There is no specific provision in the Constitution that refers to victims' rights. Victims do have rights in the Constitution, but these are not explicitly stated like the rights of arrested, detained and accused persons. The study will show that the rights of victims in fact exist.

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1 Victims of Crime Survey http:/www.statssa.gov.za/publications/PO3412012.

2 Davis and Snyman *Victimology in South Africa* (2008) 8.

3 United Nations General Assembly A/RES/40/34 (1985) 3.

4 "Marikana Massacre" *South African History online* (2012-08-16) http://www.sahistory.org.za/article/marikanamassacre (accessed 2014-06-03).

Victims' rights are therefore derived from the Constitution and Victims Charter.[5] Victims of crime also have rights which are contained in provisions of some existing legislation, which among others include, the Criminal Procedure Act[6] and the Criminal Law (Sexual and Related Matters) Amendment Act.[7] The above sources of victims' rights will be discussed to show that victims of crime do have rights in South Africa. In this research the legislative provisions aimed at protecting the victims will be set out, which indicates the commitment of government to protect these rights.

1.2 FORMS OF VICTIMISATION

The Democratic Alliance argues that victims of crime complain that they are victimised twice, firstly by the criminal,[8] referring to the unlawful act or conduct committed against the victim by the accused, and secondly, by the criminal justice system, which relates to the ways in which the court applies the legal processes.

It will be argued that there is a third type of victimisation which is not taken seriously by the authorities. This form of victimisation is evident in the conduct by the South African Police Services. This is confirmed by reports that police conduct has caused more than 720 deaths of civilians between 2011 and 2012.[9] This is supported by the view that negligent police management, poor training, disrespect for law and order, criminal activity within the police ranks and blatant disregard for internal disciplinary procedures are the main causes of police brutality.[10]

Citizens and victims of crime expect a high degree of safety and protection from the police, but instead they become victims of police brutality. The following three recent scenarios depict police brutality which contributes to victimization:
Firstly, the killing of Andries Tatane (an activist from Ficksburg in the Free State Province) by the police members. He was shot by members of the SAPS during a

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5 Service Charter For Victims of Crime In South Africa, http://www.doj&cd.gov.za.

6 51 of 1977.

7 32 of 2007.

8 Democratic Alliance Discussion Document *The Rights of Victims of Crime* (2007) 2-3.

9 "Police conduct caused more than 720 Deaths " SABC News (2013-04-11), http://www.sabc.co.za/news (accessed 2013-07-29).

10 Hosken "Why SA cops are Brutal" http://www.csvr.org.za/index.php/media-articles/latest-csvr-in-the-media/2494-why-sa-cops-are-so-brutal (2013-07-29).

peaceful service delivery protest.[11] The court acquitted all the suspected police members accused of killing him because they could not be identified by state witnesses, as they were wearing helmets. Tatane's family has been left scarred, with only a civil claim against the Police Ministry and no knowledge of the identity of his alleged killers.

Another example is the case of Mido Macia, who was dragged behind a police vehicle through the street in February 2013 and later died in Daveyton police holding cells.[12] Macia had immediate family like Tatane and once again police conduct resulted in the suffering of victims. All the SAPS members have now been convicted of murder.

A third example is the Marikana Massacre, which was still the subject of a Commission of Inquiry. During the massacre, members of the police killed 34 striking mineworkers and wounded dozens more.[13]

1.3 AIMS OF THE RESEARCH

The research will show that, indeed victims of crime do have rights contained in various legislative instruments. This will dispel the view that the Constitution only protects the perpetrators and not the victims of crime. Recommendations that will further promote the plight of the victims will be put forward.

1.4 METHODOLOGY

The research will be based on a literature study. Different types of legislation will be cited to show that victims do have rights. In examining this, cases will be used to indicate the application of the legislative provisions. The study will also reveal some recommendations that can be made to benefit the plight of crime victims.

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11 "Courts acquit police officers in Andries Tatane case" http://en.bdlive.co.za/national/2013/03/28/court-acquits-police-officers-in-andries-tatane(accessed 2014/02/04.

12 "Mido Macia Case taking too long" http://ewn.co.za/2013/07/17macias-family-struggle-with-slow-pace (accessed 2014-06-03).

13 "Marikana Massacre" *South African History online* (2012-08-16) http://www.sahistory.org.za/article/marikanamassacre (accessed 2014-06-03).

1.5 OUTLINE OF CHAPTERS

This chapter sets out the introduction to the study, sources of victims' rights and indicates how victimization takes place. It also gives an overview of subsequent chapters.

Chapter Two reveals how the Constitution and Victims Charter address the issue of victims' rights.

Chapter Three deals with services made available to crime victims in rape cases through the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It will also evaluate the importance of restorative justice mechanisms for victims of crime.

Chapter Four briefly sets out victims' rights as provided in some provisions of the Criminal Procedure Act of 1977 as amended. These include sections 153, 170A, 297, 299A, 300 and 301 of the said Act.

Chapter Five deals with the conclusion of the research and provides recommendations to expand and protect victims' rights.

CHAPTER TWO

VICTIMS' RIGHTS IN THE CONSTITUTION AND VICTIMS' CHARTER

2.1 INTRODUCTION

Although the Constitution does not contain specific provisions pertaining to the rights of victims, victims do have rights. These rights are not specifically spelt out like the rights of the arrested, detained and accused persons in section 35 of the Constitution. Von Bonde[14] argues that victims' rights in the Constitution are given in broad and general terms, without indicating how these rights should be protected. Von Bonde also mentions that the broad and general nature of victims' rights leads to the popular view that the Constitution protects the criminal and not the victim.[15] Schoeman also supports this view and argues that the Constitution does not specifically mention the rights of victims.[16] The researcher believes that the broad and general inclusion of victims' rights does not mean that victims do not have rights. Instead, they are in fact protected by the Constitution. This means that there is no discrimination against the victims in terms of the Constitution.

Victims are also afforded rights in the Victim's Charter. The Charter was specifically developed to cater for victim's rights. Some of the provisions in the Charter are derived from the Constitution. This means that the plight of victims had been attended to before the Charter was published. This chapter will explore the rights of the victims in the Constitution and the Victims Charter.

2.2 THE CONSTITUTIONAL INTERPRETATION OF THE RIGHTS OF VICTIMS

2.2.1 VICTIMS' RIGHT'S IN TERMS OF THE CONSTITUTION

It is important to start by showing how the courts apply the constitutional rights relating to the plight of victims before one can talk of victims of crime. It is suggested that this needs an analysis and an interpretation of the Bill of Rights. The use of the words

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14 Von Bonde "Redress For Victims of Crime in South Africa: A Comparison with Selected Commonwealth Jurisdiction" Criminal Law Doctoral Thesis Nelson Mandela Metropolitan University 23 October (2006) 2.

15 *Ibid.*

16 Schoeman "Editorial: Restoring the Rights of Victims of Crime" *Acta Criminologica* 25 (1) 2012.

“everyone” or “every person” mentioned in the Bill of Rights also refers to the victims of crimes. Section 12(1)(c) of the Constitution talks about freedom and security of the person and to be free from all forms of violence from either public or private sources. It is suggested that this section also refers to victims of crime. This means that victims of crime are also protected against anyone who causes any violence against them.

Schoeman is of the opinion that victims of crime have the following rights:

- The right to life, human dignity and freedom and security of the person, which includes the right to be free from all forms of violence either from public or private sources.
- The right to be equal before the law.
- The right to have his or her case heard.
- The right to make use of public services.
- The right to receive information.[17]

It is submitted that the above list of rights is not exhaustive, depending on the Constitutional interpretation of rights. Section 38 of the Constitution is an example of the non-exhaustive list of victims’ rights. This section says that anyone acting as a member of, or in the interests of a group or class of persons, can approach the court if his/her right in the Bill of Rights is infringed or threatened.

This provision has been applied in the *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape.*[18] In this case, three individual applicants challenged the decision of the Eastern Cape administration, which had the effect of suspending their welfare grants without any form of warning or prior notice or consultation. The applicants sought relief, not only for themselves but, on behalf of all other recipients in the same position as themselves. The High Court gave an order permitting the applicants to litigate as representatives on behalf of anyone in the whole of the Eastern Cape Province whose disability grants had been cancelled.[19] The applicants in this matter acted as members or in the interests of a group of people. This is not a criminal

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17 *Supra* 17 iii.

18 2001 (2) SA 609.

19 Currie and De Waal *The Bill of Rights Handbook* (2005) 88.

case, but it shows the practical application of the victims' rights as contained in the Constitution.

2.2.2 JUDGMENTS IN FAVOUR OF VICTIMS OF CRIME

Victims of crime benefit through court decisions and during constitutional interpretation of relevant human right violations. During the interpretation process, courts do not only consider the rights of the accused or offender, but also consider victims' rights. The following are just a few cases, amongst many, that benefited victims of crime

The case of V*an Eeden v Minister of Safety and Securit*[20] dealt with a claim for damages based on the breach of a duty of care by the state.[21] The appellant was a 19 year old woman who was sexually assaulted, raped and robbed by a dangerous criminal and a serial rapist, who had escaped from police custody due to negligence by police, who did not lock the security gate.[22] The court held that it was the duty of the state to protect people against violent crime and that the state had a duty of care towards the victim.[23] The court also held that the state was obliged to protect individuals by taking active steps to prevent violations of the constitutional right to freedom and security of the person as mentioned in section 12 of the Constitution.[24] The court declared that the conduct of the police was wrongful and that the state as the employer of the police was liable to the appellant for damages that she was able to prove.[25] The state was also ordered to pay the costs of an action and fees of two counsels.[26] This was another victory for victims of crime.

In *S v Chapman*[27] the appellant appealed against his convictions on three counts of rape by a Regional Court and the resultant sentence of seven years imprisonment in

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20 2003 (1) SA 389 (SCA).

21 *Ibid.*

22 Madonsela and Maluleke "Women and the Law in South Africa: Gender Equality Jurisprudence in Landmark court decisions" Department of justice and Constitutional Development.

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 *Ibid.*

27 1997 (3) SA 341 (SCA).

respect of each count.[28] He appealed to a full bench of the Cape Provincial Division, but his application was dismissed. He then appealed to the Supreme Court of Appeal and this appeal was also dismissed. The Supreme Court of Appeal held that rape constituted a humiliating, degrading and brutal invasion of the privacy, the dignity of the victim. It held that women are entitled to these rights which are basic rights in terms of the Constitution.[29]

The third example is the unreported case of Freddie Gordon who has been jailed for forty years by the Port Elizabeth Regional Court.[30] He locked up his wife, Avril, at their Forest Hill flat, chained her, burnt her, beating her with wooden planks and raped her with sharp objects.[31] Avril had to undergo numerous reconstructive surgeries on her mutilated face and body.[32] The court viewed all the acts by Gordon as violating the victim's rights to dignity and privacy in a humiliating and degrading manner. The long jail term shows that the criminal justice system is serious about the rights of victims of crime. The chaining, burning and raping with sharp objects symbolise torture on the part of Gordon. The victim had been dehumanised by her husband who is supposed to protect her.

These cases clearly indicate that the South African criminal justice system is not biased against the victims. This shows that the fundamental values of dignity, equality and freedom that underpin our Constitution also apply to victims of crime. Importantly, our courts view the rights of victims as seriously as the rights of offenders. This means that the view that the Constitution favours offenders and does not protect the victims, is not entirely correct.

2.3 VICTIMS' CHARTER

This charter is also known as the "Service Charter for Victims of Crimes in South Africa" and is an important document dealing with victims' rights. The then Minister of Justice

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28 *Ibid.*

29 *Ibid.*

30 "Gordon jailed for 40 years" (2014-03-07) *Herald* www.heraldlive.co.za/monster-husband-gets-40-years.

31 *Ibid.*

32 *Ibid.*

and Correctional Development, Bridget Mabandla, stated that the Charter was compliant with the spirit of the South African Constitution and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985.[33]

The Minimum Standards for Services for Victims of Crime[34] was developed to further victims' rights as contained in Service Charter and it makes provisions of the rights a reality.[35] Both the Victims Charter and the Minimum Standards intend to provide the victims with information to show the commitment by government to improving service delivery for victims of crime.[36] The Minimum Standards supply detailed information of each right to enable the victim to exercise their rights and to enable service providers to uphold victims' rights as explained in the Victims Charter. It assists the victim to hold anyone involved in the criminal justice system accountable and making sure that victims receive appropriate assistance and services as outlined in the Victims Charter.[37] This document needs promulgation to the general public. It is now the duty of victims of crime to demand such rights and services.

This is crucial for victims of crime because the Charter is now no longer a document hanging in the air that does not have any value for victims. The Charter is fully supported by the Minimum Standards in the application of victims' rights. Although the Minimum Standards document details every right, it does not have any limitation clause to all the rights enunciated in it. This could be problematic because all rights in the Bill of Rights in the Constitution of the country are limited in terms of section 36. One should remember that the Victims' Charter is a document addressing the rights of victims of crime but obviously, it is subject to the Constitution of the country which is the supreme law of the land. This implies that the Victims' Charter and the Minimum Standards are subject to the limitation clause in the Constitution.

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33 Service Charter for Victims of Crime in South Africa 3 http://www.doj&cd.gov.za.

34 Hereinafter referred to as the "Minimum Standards".

35 Minimum Standards for Victims of Crime in South Africa: For implementing the Service Charter for Victims of Crime in South Africa also known as Minimum Standard ii.

36 *Ibid.*

37 *Ibid.*

The Charter was adopted for the following reasons:[38]

- To eliminate secondary victimization in the criminal justice system;
- to ensure that victims of crime remain central to the criminal justice system;
- to clarify the service standards that can be expected by victims and be given to them through the South African criminal justice system; and
- to make provisions for victims' recourse in cases where the standards cannot be met.

The main provisions of the Victims' Charter are the following:[39]

2.3.1 THE RIGHT TO BE TREATED WITH FAIRNESS, DIGNITY AND PRIVACY

- Victims have the right to be attended to promptly and courteously, treated with respect, dignity and privacy by all members of the departments, institutions, agencies, or organisations which provide these services.
- The police, prosecutors, court officials and other service providers will take measures to minimize any inconvenience to victims by, among other things, conducting interviewers in the victims' language of choice and in private, if necessary.
- These measures will prevent them from being subjected to secondary victimization.

Victims of crime can expect the following to be done if a crime has been reported to the police that:[40] the police will respond immediately to the victim's report by taking a statement and complete necessary forms to register the crime; the crime will be investigated; the victim will be referred for medical attention, treatment and counselling by trained staff to assess the physical, emotional and psychological state of the victim's mind, if required; a victim of sexual crime will be interviewed in private by a member of the police; the interview will be conducted in the language understood by

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38 Service Charter for Victims of Crime in South Africa 4-5.

39 Service Charter for Victims of Crime in South Africa 6-9.

40 *Ibid*.

the victim; if the interviewer does not understand the victim's language, an interpreter will be provided and the victim may also ask to be interviewed by a member of the police who is of the same sex with him or her.

The above considerations may help to restore a person's dignity, especially if the interview is conducted in the language of the victim. The victim will be able to express himself or herself freely and properly because he is not afraid of poor language usage. Again, the victim's dignity will be protected, especially if a person of the same sex interviews the victim. Victims will be able to provide a good narrative of the criminal act committed against him or her if interviewed by a person of his or her sex. It is not easy for rape victims to give full and precise narrative of events if the interviewer is a person of the opposite sex. For example in rape cases, women may not feel comfortable to re-live the crime of rape perpetrated against her to a male police officer. This is because the victim will have to explain everything in the finest detail. This interview will help prevent the secondary victimisation by the police or criminal justice system.

The privacy of the victim will also be protected if a victim of sexual violence is interviewed in private by a member of the Police Service. This will prevent secondary victimisation. In the past, it was easier to interview rape victims in the presence of other persons in the police station or charge office. This was a bad approach regarding the taking of statements from the victims of crime.

Arrangements for a victim to undergo counselling also ease the trauma that victims of crime are faced with. Victims of crime will benefit greatly from this service, because some victims cannot afford to pay for private counselling services. If all these services are offered to the victims, it means victims have been treated with the fairness and dignity that they deserve.

If a criminal matter goes to court, the victim can expect the following from the prosecutor:[41] in cases of sexual and domestic violence, the matter will be handled by one prosecutor throughout the trial, he will notify the victim of any delays in the case

[41] *Supra* 40 6.

and if there are any, the victim will be allowed to refresh his or her memory and be allowed to read his or her statement.

2.3.2 THE RIGHT TO OFFER INFORMATION

- Victims have the right to offer information during the criminal investigation and trial.
- The police, prosecutor and correctional services official will ensure that any contribution that they wish to make to the investigation, prosecution and parole -hearing is heard and considered.
- This right means victims can participate if necessary and where possible in the criminal justice proceedings, by attending the bail hearing, the trial, sentencing proceedings and or Parole Board hearings.
- It means that victims will have the opportunity to make a further statement to the police if they see that their statement is incomplete. They may also, where appropriate, make a statement to the court or give evidence during the sentencing proceedings, to bring the impact of the crime to the attention of the court.
- They can make written applications to the Chairperson of the Parole Board to attend the parole hearing and submit a written input.

The above provision entails that if the matter goes to court, the prosecutor will among other things do the following;[42] take the interests of the victims into consideration in deciding whether or not to prosecute, will allow the victim to disclose any relevant information regarding the release of the accused on bail by allowing the victim to give information whether the accused will interfere with the evidence or intimidate the victim, will consult the victim prior to acceptance of a lesser sentence, the victim will be allowed to explain how the crime has affected him or her and if the accused is to be granted parole, the victim will be allowed to make submissions to the chairperson of the Parole Board regarding the release of the accused on parole.

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42 *Supra* 40 8-9.

2.3.3 THE RIGHT TO RECEIVE INFORMATION

- Victims have to be informed of their rights and how to exercise them.
- They can ask for an explanation in their own language if there is anything that they do not understand.
- They have the right to receive information and be informed of all relevant services available to them by service providers.
- They will be informed of their role in the case and of the approximate duration of the case
- They can request to be informed regarding the status of the case - whether or not the offender has been arrested, charged, granted bail, convicted or sentenced.
- They may request reasons for a decision to prosecute or not to prosecute.

This provision entails that a victim will be informed of the following:[43] his or her rights, telephone numbers of the investigating officer handling the case, police case number, the arrest of the suspect, whether to attend an identification parade, date of bail hearing, the outcome of the bail proceedings, the progress and investigation of the case, whether to attend court proceedings, date of such court proceedings, the date of sentencing, whether the Director of Public Prosecutions has decided to prosecute or not, the medical examination and treatment to be performed on him or her, and whether to attend the Parole Board hearing and all this information will be communicated in the language of the victim.

This aims to make all court processes and procedures understandable to the victim. This prevents secondary victimisation because in most cases victims are not aware of these benefits. Anything to do with courts is stressful for victims of crime. This is because the victim is going to see the accused, the accused's family and friends. So familiarisation with the court processes, procedures and court rooms will play an important role to ease the stress that the victim is faced with.

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43 *Supra* 40 9-11.

2.3.4 THE RIGHT TO PROTECTION

- Victims have the right to be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse. If they are witnesses, they must report such threats to the police or senior prosecutor.
- If they comply with certain requirements, the police will apply for any victim to be placed in a witness protection programme. These victims will be protected from all forms of undue influence, harassment or intimidation

The above right aims to protect a victim of crime especially if the victim is a witness. If the victim believes that he or she is not safe, the victim should make a report to the police. The victim will have to sign an agreement with the Witness Protection Unit so that the victim is placed under Witness Protection Programme.[44] Under this Programme, the victim will be placed in a safe-house and his or her name and address will not be given to anybody.[45]

South Africa has complied with this provision through its Witness Protection Act.[46] Among its functions is to place any witness, who believes that his own safety is endangered, under protection.[47]

South Africa had also developed the *Domestic Violence Act*[48] which provides the issuing of protection orders with regard to domestic violence.[49] Section 3 of the Act states that a peace officer may arrest any respondent at the scene of a domestic violence incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against the victim.[50]

This is another benefit for victims of crime and family violence. Before the formation of this Act, females were victims of family violence from males without the fear of any

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44 *Supra* 40 11.
45 *Supra* 40 12.
46 Act 112 of 1998.
47 Protection as defined in s 1 of Act 112 of 1998.
48 Domestic Violence Act 116 of 1998.
49 *Ibid.*
50 *Ibid.*

law. The situation has changed because those who commit such criminal acts will be convicted and face a term of imprisonment.

2.3.5 THE RIGHT TO ASSISTANCE

- Victims have the right to request assistance and, where relevant, have access to available social, health and counseling services, as well as legal assistance.
- The police will assist them by explaining police procedures, informing them of their rights and making the appropriate referral to other relevant service providers.
- The prosecutor will ensure that special measures are taken in cases such as of sexual offences, domestic violence, child support or maintenance matters are heard in specialised courts.

The above right means that the police may assist the victim in the following ways; by making referrals to other service providers for the necessary support which will provide counselling services, and victim support, making all sexual offences cases to be heard in specialised courts.[51] South Africa has already created mechanisms to deal with sexual offences and violent crimes in the form of an intermediary and a closed circuit television link.[52] Social, health and counselling will also be provided to victims of crime. All these mechanisms will be discussed in detail in Chapter three of this treatise.

South Africa has legal assistance through the Legal Aid South Africa Act.[53] This act aims at the following: to render or make legal aid and legal advice available, to provide legal representation to persons at state expense and to provide education and information concerning legal rights and obligations as envisaged in the Constitution.[54]

This is also another victory for the victims of crime. Now in terms of the Legal Aid South Africa Act, legal assistance is available to both the offenders and victims. For instance, the victims of the Marikana Massacre could not afford to pay for their legal

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51 *Supra* 40 13.

52 *Ibid*.

53 39 of 2014.

54 S 3 of the Legal Aid South Africa Act 39 of 2014.

representation. They then approached the Johannesburg High Court through their attorneys in order to be granted legal assistance at the state's expense. Then, the Johannesburg High Court ruled in favour of the victims that the Legal Aid Board South Africa must pay for the victims' legal costs.[55]

2.3.6 THE RIGHT TO RESTITUTION

- Victims have the right to restitution in cases where they have been unlawfully dispossessed of goods or property or where their property has been unlawfully damaged.
- "Restitution" refers to cases where the court, after conviction, orders the accused to return property that has been taken unlawfully or to repair the property or goods that have been unlawfully damaged in order to restore the goods into the condition they were in before the offence.
- The prosecutor will inform them what restitution involves and the clerk of the court will assist them in enforcing this right.

This right implies that a victim of crime will be informed by the prosecutor that: he or she may request the offender to make fair restitution to the victim or his or her family or dependants, such a restitution will involve the return of property or goods or reparation of damaged property or goods, and this request can be enforced by the court.[56] This right will be dealt with in detail in Chapter four.

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55 South Africa: "Legal Aid must fund Marikana miners" (2013-10-15) *SAPA* http://www.allafrica.com/stories/20130151180html.

56 *Supra* 40 16.

2.3.7 THE RIGHT TO COMPENSATION

- Victims have the right to be compensated for the loss of, or damage to, property suffered due to a crime being committed against them.
- They can request to be present at the court on the date of the sentencing of the accused and the prosecutor to apply to the court for a compensation order in terms of Sections 297 and 300 of the Criminal Procedure Act.[57]
- "Compensation" refers to an amount of money that a criminal court awards to the victim who has suffered loss or damage to property, which includes money as a result of the act or omission by the person convicted of committing the crime.
- They can institute a civil action against the accused where the criminal court did not grant a compensation order.

This right includes the following: the court may suspend sentencing of the accused on condition that the accused compensate the victim for his or her loss or damage suffered to property as a result criminal activities of the offender, the victim may be informed that he or she may institute a civil claim against the victim especially in cases where the court did not grant a compensation order.[58]

The above mentioned right will be discussed in detail in Chapter Four. It will be also shown that although South Africa claims that the Victims Chapter is compliant with the United Nations Declaration, this is not the case with regards to compensation.

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57 51 of 1977.

58 *Supra* 40 15.

CHAPTER THREE
THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007 AND OTHER RESTORATIVE JUSTICE MECHANISMS

3.1 INTRODUCTION

This chapter will explore how the South African criminal law has been developed to benefit victims of crime. The benefits that Criminal Law (Sexual Offences and Related Matters) Amendment Act brought about for crime victims will be discussed.[59] South Africa had to develop this legislation due to shortcomings in the previous legislative instruments. The Sexual Offences Act is an important milestone in the approach to crimes of sexual nature. Victims of sexual offences benefit from this Act, as sexual offences are re-defined and codified. Common law sexual offences were repealed by the Sexual Offences Act.[60]

Furthermore, the importance of restorative justice mechanisms as a benefit to victims of crime will be discussed. Restorative justice mechanisms will be briefly discussed to indicate how it benefits victims of crime as an alternative to retribution as the aim of sentencing. These mechanisms include victim support, victim empowerment, the role of Thuthuzela Care Centres and victim offender dialogue.

3.2 SELECTED PROVISIONS OF THE SEXUAL OFFENCES ACT

3.2.1 THE NEW DEFINITION OF RAPE

The Sexual Offences Act introduced fundamental changes which seek to protect victims of sexual offences. Previously, rape was defined as unlawful and intentional sexual intercourse by a man with a woman without her consent.[61] In terms of this definition, rape was gender based, as only females could be victims of rape.[62] This

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59 Hereinafter referred to as the "Sexual Offences Act of 2007".

60 *Ibid.*

61 Snyman *Criminal Law* (2008) 355.

62 Artz "Criminal Law (Sexual Offences) Amendment Act (32 of 2007) Reforms, Risks and Revelation" Open Society foundation for South Africa (2010) 3.

definition excluded raping of a male victim by another male. In terms of this definition, sexual intercourse was done vaginally by a man against a woman. An act of sexual intercourse beyond this was not regarded as rape. This common-law definition had created some problems because it was gender- biased against females.

South Africa had maintained this definition until the case of *Masiya v Director of Public Prosecutions.*[63] In this case the accused, Mr Masiya, wrongfully and unlawfully had sexual intercourse with a nine-year old female child without her consent. He had anally penetrated the child. He was originally convicted of rape in the Regional Court. On appeal the Constitutional Court substituted the conviction of rape with one of indecent assault of indecent assault.[64] This decision was based on the definition of rape because it excluded anal penetration. The Constitutional Court extended the common-law definition of rape to include non-consensual anal penetration of females.[65] This extension still perpetuated female victimisation and disregarded male victimisation.

There was a need for reform regarding the common-law definition of rape.[66] The legislature had to develop a law that would deal with the problems highlighted above and other shortcomings created by common-law definition of sexual acts. This led to the birth of Sexual Offences Act being promulgated which replaced the common-law crimes with statutory crimes.[67]

The new rape definition in terms of section 3 of Sexual Offences Act refers to, a person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B") without the consent of "B".[68]

This definition is now gender neutral because it refers to "person" and against the "complainant". In addition, it refers to sexual penetration, not sexual intercourse. Sexual penetration is defined in Chapter 1 section 1 of the Sexual Offences Act to

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63 2007 (5) SA 30 (CC).

64 *Ibid* par 74.

65 Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* (2013) 315.

66 Kemp *et al Criminal Law in South Africa* 316.

67 *Ibid*.

68 Sexual Offences Act Chap 2 20.

include; any act of penetration by a person using genital organs, mouth and any part of the body of an animal into or beyond the genital organs of another person, mouth, anus and genital organs of an animal.[69]

The new definition protects the victims of rape in cases where a person rapes another person in the mouth or anus and any part of the body. Any person found guilty of such criminal conduct may be now convicted of rape. It also protects the victims against penetration on any part of the body of a person or animal. This means that the category of victims has been broadened to include victims penetrated anally, orally or any part of the body.

The object used to penetrate is no longer the penis only as was with the case with the common-law definition, but the Act refers to genital organs. A genital organ is described as the whole or part of the male or female genital organs and further includes surgically constructed or reconstructed genital organs.[70] Penetration also includes the insertion of any object resembling or representing the genital organs of a person or animal.[71] For example, the Gordon scenario provides a clear picture on the use of objects to rape his wife.[72]

3.2.3 SERVICES FOR VICTIMS OF SEXUAL OFFENCES AND COMPULSORY HIV TESTING OF THE ALLEGED SEX OFFENDERS

Rape is prevalent in South Africa and in many instances rape victims have become the carriers of the virus that causes AIDS. This leads to more trauma and further victimisation when rape survivors discover that they have been infected with the HIV-virus. Some rape offenders know their HIV positive status, but continue raping other people. If somebody knows his or her HIV status, but does not disclose it and infect other people, his or her actions fall under a wilful or intentional or deliberate transmission.[73]

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69 Sexual Offences Act Chap 1 s 1 16.

70 Kemp *et al Criminal Law in South Africa* 320.

71 Sexual Offences Act Chap 1 s 1 16.

72 "Gordon jailed for 40 years" (2014-03-07) *Herald* see page 8 par 2.

73 Criminal Transmission of HIV http:www.avert.org/criminal-transmission.htm page 1 (accessed 2013/04/04).

At the moment, South Africa does not have legislation that criminalises HIV/Aids infections. There are criticisms against such legislation. For example; Cameron[74] argues that HIV is a virus, not a crime.[75] So if two people consent to sex and one is HIV-positive, but did not know his or her HIV positive status, the HIV positive person has not committed a crime. Now, the question should be, how can the HIV-positive partner be charged with committing a crime? Again, a person can infect the other person with tuberculosis bacteria but that person is not criminally charged. The question is again, why is HIV infection singled out against other infectious diseases? That is why Cameron argues that prosecutions for HIV transmission and exposure create an idea that HIV is a shameful disgraceful and unworthy condition which requires isolation and ostracism.[76]

There are countries that criminalise wilful HIV infection, like Canada. For example, in *R v Mabior*[77] and *R v D.C,*[78] the Supreme Court of Canada decided that people living with HIV have a legal duty, under the country's criminal law to disclose their HIV-positive status to their sexual partners before having sex which poses a realistic possibility of transmission. Such people are convicted of aggravated sexual assault.[79] What if a person does not know that he or she is living with HIV/Aids? This means that such a person will not be convicted because he or she lacks the legal duty to disclose the HIV positive status. The above cases show that the Canadian approach is discriminatory towards people who know their HIV positive status.

Arguments against criminalisation of HIV/Aids are contained and confirmed by the conclusions and recommendations of the South African Law Commission Report.[80] Among the conclusions of the Commission against criminalisation, they include the

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74 Cameron, former Justice of the Constitutional Court of South Africa "HIV is a virus, not a crime" 1 Http://www.aidsmap.com/HIV-is-a-virus-not-a-crime/page/1442076/ (accessed 2013/04/12).

75 HIV and AIDS Information:- "HIV is a virus, not a crime" http:www.aidsmap.com/HIV-is-a-virus-not-a-crime/page/144 2076 (accessed 2013/04/12).

76 *Ibid.*

77 2012 SCC 47.

78 2012 SCC 48.

79 Canadian HIV/Aids Legal Network, HIV non-disclosure and the criminal law: An analysis of two recent decisions of the Supreme Court of Canada*, R v Mabior,* 2012 SCC 47 and *R v D.C.* SCC 48 1.

80 Treatment Action Campaign: South Africa Law commission Report on Criminalisation of HIV Transmission, Project 85, Fifth Interim Report on Aspects of the Law Relating to Aids, http;//www.tac.org.za. 20 November 2011.

following: that the codification of existing common law crimes may have the effect of promoting exceptionalism in dealing with HIV and AIDS, there is no scientific, empirical or even informal evidence that the behaviour to be targeted occurs to such an extent that it demands HIV-specific legislation, one needs to look at the social costs involved when creating an HIV-specific legislation and this can be balanced against the already overburdened criminal justice system and such a legislation will infringe the right to privacy of the rape offenders.[81]

The above points confirm the confusion that a specific HIV-legislation will create. Criminalisation will create more problems, instead of solving them. The Commission recommends that the present legal position should be maintained, which means that persons who transmit HIV to others or expose others to HIV may under certain circumstances be prosecuted under the existing common law crimes.[82]

In dealing with HIV infections in rape cases, South Africa has a different approach, which is the provision of services to rape victims in terms of the Sexual Offences Amendment Act as follows:

Section 28(i)(a) of the Act[83] provides for areas of HIV intervention namely:

- Post-Exposure Prophylaxis (PEP) for rape victims;
- free medical advice surrounding the administering of PEP; and
- supply of a prescribed list of accessible public health institutions where victims can access PEP.

This section is a significant step to the protection of rape victims. They can now access PEP at the state's expense. Previously, there was no PEP available to those who could not afford it. This meant that raped victims who had been infected had to live with the HIV virus until they experience some complications in their health status. This means that they were double victimised, firstly, by being raped and secondly, by knowing that they have been infected.

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81 *Ibid*.

82 *Ibid.*

83 S 28 of the Sexual Offences Act Chap 5 38-40.

The introduction of PEP which is antiretroviral drug treatment has greatly impacted positively for rape victims. Ramjee [84] argues that antiretroviral drugs provide a longer life span for victims of crime and that HIV/AIDS is no longer a death sentence but rather a chronic disease.[85]

It is therefore important to look at the benefits that ARV's provide to raped victims. If victims of rape can live longer, it means that secondary victimisation has been reduced. Victims of rape can now live a normal life like a person who has a sugar diabetes. This is because such people live longer lives especially if they take their medication in the prescribed manner.

Section 28(i)(b) deals with the order the magistrate grants for the alleged rape offender to be tested for HIV at the State's expense. This is another victory against rape offenders because their HIV status will be revealed. This means a limitation on the right to privacy of the rape offender. This is because an order of the court by a magistrate has to be respected by the offender.

Section 28(3)(a) of the Sexual Offences Act deals with the importance of obtaining PEP for HIV infection within 72 hours after exposure to HIV. Fong states that PEP works effectively if started within one or two hours of exposure[86] but does not dispute the 72 hour period. The only hindrance in section 28(2) is the condition that the section makes to victims of rape. The condition says that a victim will receive PEP provided he or she lays a charge with the South African Police Services. It is suggested that this section should be made flexible to include a report by a victim to a healthcare facility as well as medical proof that the victim was indeed raped so to access PEP immediately. The condition of laying a charge to the police would delay access to antiretroviral drugs. It will be worse in rural areas where health facilities are not easily accessible.

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84 Snyders Professor in HIV research shares the importance of ARVs 1 http://www.afroaidsinfor.org.

85 *Ibid*.

86 Fong "Post-Exposure Prophylaxis for HIV Infection after Assault, When is it indicated?" 18 2001 *Emergency Medical Journal* 242-244.

Sections 30(1-4) of the Sexual Offences Act deals with the application by a victim or interested person for HIV testing of an alleged sex offender.[87] This is one of the important provisions because it gives the victim the right to apply for the HIV testing of the offender. The HIV results will be made known to the victim or interested person and the alleged offender.[88] As already mentioned, the offender cannot refuse to be tested and his or her HIV status will then be known. An interested person is described as any person who has a material interest in the well-being of a victim.[89] Such a person is important because his aim is to assist the victim of rape. For example, somebody else may have knowledge of the rape of a mentally challenged person, such a person can utilise the above-mentioned section by applying for the testing of the alleged sex offender.

Section 32 provides for application by an investigating officer for the HIV testing of the alleged offenders.[90] Roehrs argues that the South African Police Services (SAPS) will struggle to implement the functions mentioned in the act because HIV testing is a complex process for the following reasons:[91]

- Compulsory HIV testing will significantly increase the workload of the police officers dealing with sexual offences. This means that the police cannot cope with such a huge task given the fact that they are understaffed and under-resource.
- The compulsory testing of the offender requires a comprehensive and in-depth training of all relevant members of the SAPS regarding HIV related issues and taking of blood samples from the offender.

Roehrs also maintains that it is unrealistic to expect members of the SAPS to deal with public health matters like HIV testing and administering of PEP. Instead, they should be trained to provide answers to rape victims regarding sexual offences such as; HIV

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87 S 30(1)-(4) Sexual Offences Act Chap 5 40-42.

88 Sexual Offences Act s 30(1)(a)(i).

89 Artz "Criminal Law (Sexual Offences) Amendment Act (32of 2007) Reforms, Risks and Revelations, Open Society foundation for South Africa (2010) 29.

90 S 32(1)-(5) of the Act Chap 5 44-46.

91 Roehrs "Half-Hearted HIV-Related Services for Victims" in Artz and Smythe *Should we consent? Rape Law Reform in South Africa* (2008) 195.

transmission, PEP, compulsory HIV testing and communication skills because they are dealing with sensitive issues coupled with trauma from victims.

UNAIDS urges governments to limit criminalisation of HIV transmission to cases of intentional transmission where a person knows his or her HIV positive status but acts with the intention to transmit HIV and indeed transmits it.[92] The UNAIDS Policy Brief states that where a violent offence like rape or other sexual assault results in transmission of HIV or created a significant risk of transmitting, then the positive status of the offender may be considered as an aggravating factor in sentencing, only if the offender knew that he/she was HIV positive prior to committing a crime.[93] Importantly, this UN policy statement does not refer to consenting parties to sexual intercourse where the other party knows his or her HIV positive status. This creates a problem because a partner may know his or her status but does not disclose it to his/her partner. Failure to disclose should be taken as deliberate or intentional transmission[94] and such a person should be dealt with in terms of UNAIDS legislation mentioned above.

South Africa applies the above UN approach as seen in the case of *S v Nyalungu.*[95] Nyalunga was sentenced to life imprisonment for infecting a woman with the HIV-virus in 2005 knowing that he was HIV-positive.[96] He was also charged with attempted murder. The HIV positive status was used as an aggravating factor. Unfortunately the woman in this case refused to be tested.

Another HIV transmission scenario in South Africa is the unreported case of a 36-year old Bloemendal man in Port Elizabeth in the Eastern Cape Province who is facing attempted murder and a life sentence for allegedly infecting his niece with the virus.[97] This accused repeatedly raped the victim since she was six years old. We expect to

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92 UNAIDS Criminalisation of HIV Transmission 1 http://www.unaids.org/sites/default/files/en/media/unaids.

93 UNAIDS POLICY BRIEF "Criminalization of HIV Transmission 2 http://www.unaids.org/sites/default/files/en/media/unaids.

94 Criminal Transmission of HIV 1 http://www.avert.org/criminal-transmissio..htm (accessed 2013/04/04).

95 2013 (2) SACR 99 (T).

96 *S v Nyalungu* 2005 (JOL) 13254 (T).

97 "HIV rape: Uncle faces life sentence" (2013-04-07) *Herald*.

see a similar sentence due to the doctrine of judicial precedence, because the offender has infected the young girl knowing that he is HIV-positive.

3.3 RESTORATIVE JUSTICE MECHANISMS BENEFITING VICTIMS OF CRIME

3.3.1 THE CONCEPT OF RESTORATIVE JUSTICE

Restorative justice refers to the restoration of victims, offenders and the community.[98] It emphasises the repair of harm which has been caused as a result of crime and also includes the repair of harm to relationships.[99] This concept embraces the idea that victims, offenders and communities should be involved in the criminal justice system. It aims to balance the needs of the victims, offenders, community groups and other institutions of civil society.[100] If the needs of the victims are taken seriously, the criminal justice system will add value to the plight of the victims. Predominantly it has been the plight of offenders which has taken the centre stage in the criminal justice system. Things have now changed because the plight of victims of crime is viewed seriously.

Brathwaite argues that victims need to be restored on the following; property loss, injury, security, dignity, empowerment, deliberative democracy, harmony and restoring social support.[101] This is what restorative justice is all about. This is because society needs peace and harmony. The offender should repair the harm he has caused. Putting offenders in jail does not help the victim. By restoring the victim to the position he or she was in before, may be of help to the victim. Social support may also involve emotional and psychological support.

Neser states that restorative justice represents a return to traditional responses to crime, which involves victim reparation as a basic premise.[102] This means a paradigm shift from a formal criminal justice system to a community-based system.[103] Mqeke

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98 Strang *Repair or Revenge: Victims and Restorative Justice* (2002) 44.

99 *Ibid.*

100 *Ibid.*

101 Strang *Repair or Revenge: Victims and Restorative Justice* 45.

102 Neser "Restorative Justice as Reaction to Crime: Development and Conceptualisation" Vol 2 No 2 April 2001 *Crime Research in South Africa* 1.

103 *Ibid*.

states that restorative justice is in line with the indigenous African traditional legal system which places importance on the restoration of the disturbed social justice within the community.[104]

The introduction of restorative justice has improved the plight of the victims. This is because the criminal justice system is mostly based on retributive model of state-centred justice which focuses on punishing the offender.[105] Bazemore argues that the justice needs of the victims cannot be met merely by punishment or the treatment of offenders.[106] In this way the criminal justice system does not bring solutions or any benefit to the victims of crime. Instead, the victims are left traumatised, humiliated and more vulnerable.

It is also argued that restorative justice symbolises a traditional and a non-western reaction to crime.[107] It embodies the idea that traditionally, crimes and disputes between individuals were seen as belonging to the group and should be settled without interference by the state.[108] It also acknowledges that members of the community are injured as a result of crime and that restoration of the relationships, reconciliation between parties and reparation to the victim is necessary.[109]

Neser states that the indigenous law of some African traditional legal systems aim at the following, that:

- it concentrates on settling relationships between individuals in a mutual manner and not between the individual and the state;
- it aims to achieve harmony in the community;
- it is premised on communal interests as opposed to the more individualistic western law;
- it seeks to mediate rather than prosecuting in the courts; and

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104 Neser "Restorative Justice as Reaction to Crime: Development and Conceptualisation" 2.
105 Strang *Repair or Revenge: Victims and Restorative Justice* 43.
106 Strang *Repair or Revenge: Victims and Restorative Justice* 44.
107 Neser "Restorative Justice as Reaction to Crime: Development and Conceptualisation" 1.
108 *Ibid*.
109 *Ibid*.

- lastly, it aims at restitution of the injured party.[110]

All the above aims indicate the importance of restorative justice which can be infused in the current criminal justice system. The African traditional law system is not based on incarceration of the offender and is also designed to restore the offender to his or her personhood. Restorative justice therefore benefits both the offender and the victim.

3.3.2 RESTORATIVE JUSTICE AND *UBUNTU*

Mbingi argues that Ubuntu is premised on the following values:[111]

- Group solidarity;
- conformity to group values;
- compassion;
- respect;
- human dignity; and
- collective unity.

The above values depict what Ubuntu really means. Group solidarity, conformity to group values and collective unity implies community cohesion. Compassion and respect implies love for the community that one lives in. Human dignity implies that *Ubuntu* treats human beings as more important and if someone takes away the human dignity, the person is worthless.

"Ubuntu" is an acknowledgement of the idea that each individual is an integral part of a community, and that his or her relationships and connections with others in the community are an essential aspect of being an individual.[112] Ubuntu instils the responsibility on each individual to take care of his or her community in a humble, respectful and sincere manner.[113] *Ubuntu* requires togetherness among community

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110 Neser "Restorative Justice as Reaction to Crime: Development and Conceptualisation" 2.

111 *Ibid.*

112 Khunu and NthaiDiedrich "The Contribution of Ubuntu to the Development of Constitutional Jurisprudence in a Democratic South Africa" in Diedrich *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 51.

113 *Ibid.*

members even in difficult times.[114] *Ubuntu* embraces an inner feeling for other people and what others feel about you. It is based on the idea that crime is a crime against the community because a person is an integral part of the society. So if a person wrongs another person in the community, *Ubuntu* implies that the person has also wronged the whole community.

It is an accepted view that *Ubuntu* and restorative justice overlap with regards to agreement.[115] This is because both concepts are based on agreement. This agreement must be reached by victims, offenders and the community.[116] All these stakeholders should find a common understanding about crime and come up with resolutions.[117] Agreement is about finding a common understanding about the crime committed and how to resolve such a crime.[118] The agreement involves an undertaking by the offender to commit himself or herself as to how he or she will amend the harm that he or she has done. The agreement also entails the integration of the offender back into the community.[119]

Louw argues that *Ubuntu* is also premised on consensus and reconciliation.[120] He also speaks of African democracy which does not simply refer to majority rule, but democracy in the form of discussions.[121] The discussions take place at *indaba* which means open discussion by a group of people with some or other common interest, at *lekgotla* which refers to discussions at a secluded place, or at *imbizo* which refers to mass congregation for discussing issues of national interest.[122] All these discussions are aiming at resolving criminal disputes. They therefore resemble some of the restorative justice discussions like, family group conferencing, victim offender mediation and peace-making circles.[123]

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114 *Ibid.*

115 Louw "The African Concept of Ubuntu and Restorative Justice" in Sullivan and Tifft *Handbook of Restorative Justice* (2006) 162.

116 *Ibid*.

117 *Ibid*.

118 *Ibid.*

119 *Ibid.*

120 *Ibid*.

121 *Ibid.*

122 *Ibid.*

123 *Ibid.*

The interpretation of the Constitution of the Republic of South Africa also involves *ubuntu* in some cases, as one of the fundamental values that underpin our Constitution. The application of *ubuntu* was first seen in *S v Makwanyane and Another*.[124] This case dealt with the abolition of the death penalty and was the first case to speak about *ubuntu* as one of the fundamental values that underpin the South African Constitution. In this case, Langa J cited *ubuntu* as one of the values to be used in the abolishing of the death penalty and that *ubuntu* should be linked with the right to human life and dignity.[125] Even though the accused in the matter were perceived to deserve the death penalty, their right to life and dignity was perceived to be more important. The death penalty was seen as destroying what a human being is worth of, thus the dignity. Even though they had wronged the state, they deserved to be alive and not be killed in a cruel, degrading and dehumanising manner.

Another scenario that shows the application and observance of *ubuntu* is the Truth and Reconciliation Commission (TRC) in South Africa as a restorative justice mechanism. The Truth and Reconciliation Commission was the first group discussion in South Africa where the perpetrators of violent acts of the apartheid regime and the victims met. In this Commission, the perpetrators had to face their victims and make confessions, and tell the public of their sins for killing and injuring thousands of people in South Africa. What was seen as important during this Commission was to tell the truth about what happened during the apartheid period regarding people who went missing, others who had died at hands of apartheid perpetrators, and others who had been maimed or injured. Simpson[126] states that the Truth and Reconciliation Commission embraced the process of granting amnesty to perpetrators with the purpose of establishing the truth about past human rights abuses.

If amnesty could be granted to apartheid perpetrators after telling the truth, it meant that victims could forgive their perpetrators as well. It is submitted that truth should be recognised as one of the fundamental values of the South African Constitution. This

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124 1995 (3) SA 391 (CC).

125 Currie and De Waal *The Bill of Rights Handbook* 5th ed (2005).

126 Simpson "*A Brief Evaluation of South Africa's Truth and Reconciliation Commission: Some lessons for Societies in Transition"* 5 http://wiredspace.wits.ac.za/bitstream/handle/10539/8084/HWS-383.pdf.

is because truth contributes positively to the victim's plight. Montville confirms that by revealing the truth, justice is a form of healing.[127]

3.3.3 VICTIM SUPPORT AND VICTIM EMPOWERMENT

Victims of crime need support and to be empowered in a number of respects.[128] Victims need support because they are not only affected physically and financially, but they also have to deal with practical and emotional consequences of the crime.[129] Louw and Pretorius argue that not all crime victims develop post-traumatic stress disorder (PTSD).[130] The majority of victims often experience short-term emotional reactions for example anger, fear, exaggerated startle responses and nightmares.[131] Victim support is very important to help them deal with the above-mentioned effects. Therefore the objectives of victim support are, to:[132]

- reduce the psychological shock and trauma that victims have suffered by providing emotional support and practical assistance immediately or shortly after the incident;
- identify symptoms of post-traumatic stress and to refer victims to counselling and other professional services;
- prevent or reduce secondary victimisation by the criminal justice system by providing information in matters like the status of the investigation, the functioning of the court system and the rights of victims within the system; and
- prevent repeat victimisation by advising and guiding the individual towards a preventative lifestyle and by creating awareness among the public of the risks involved.

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127 Avruch and Vejarano "*Truth and Reconciliation Commission: A Review Essay and Annotated Bibliography*" 2001 41 www.humiliationstudies.org/documents/Avruch TRC.

128 Louw and Pretorius "Victim Empowerment and Support in South Africa" in Davis and Snyman *Victimology in South Africa* (2005) 75.

129 *Ibid.*

130 *Ibid.*

131 Louw and Pretorius "Victim Empowerment and Support in South Africa" in Davis and Snyman *Victimology in South Africa* (2005) 77.

132 *Ibid.*

The idea of victim support led to the creation of victim support rooms in South Africa.[133] These centres are established at various places like courts, police stations, health facilities and in some non-governmental organisations offices.[134]

Victim empowerment, on the other hand reflects the idea that people can actually manage and control their own lives.[135] It can also be seen as a philosophy or approach to facilitate access to and delivering a range of services to people who have individually or collectively suffered harm or trauma.[136] It also implies a greater role for victims in the criminal justice system process and makes victims become survivors and to leave the crime behind with as little lasting effect as possible.[137] This is very important for victims of crime because the effects of crime may still be vivid in their minds and they will not make peace with themselves.

Victim empowerment provides the following functions:[138]

- Any crime victim who approaches the SAPS will receive a more victim friendly service incorporating the four basic elements of victim empowerment and support, namely emotional support, practical support, information and referral support service.
- The police or health or welfare or justice officials will inform the victims of services available to them.
- The police will keep the victim informed of the progress made in investigation of cases.
- If the offender is imprisoned, the victim and his or her family will be informed by the Department of Correctional Services of parole hearing dates, conditions of parole and/or the possible death or escape of the prisoners.

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133 Bruce "Challenges of the Criminal Justice System in Addressing the needs of Victims and Witnesses" in Davis and Snyman *Victimology in South Africa* (2005) 102.

134 *Ibid.*

135 Louw and Pretorius "Victim Empowerment and Support" in Davis and Snyman *Victimology in South Africa* (2005) 77.

136 *Ibid.*

137 *Ibid*.

138 Louw and Pretorius "Victim and Empowerment and support" in Davis and Snyman *Victimology in South Africa* (2005) 84-85.

- Victims are encouraged to first approach the multidisciplinary one-stop crises centres which is open 24 hours. These one-stop crisis centres are also called one-stop trauma centres or violence referral centres or Thuthuzela Rape Care Centres.[139] They are located at local hospitals, clinics or housed in community. Victims of sexual offences, domestic violence and child sexual abuse receive medical-legal assistance, emotional support and trauma counselling from these centres.[140]

3.3.4 THE ROLE OF THUTHUZELA CARE CENTRES

Thuthuzela is a Xhosa word which means "comfort". Thuthuzela Care Centres were introduced as part of the national anti-rape strategy to provide rape survivors with a range of integrated services from the moment they report the crime.[141] These centres help restore dignity and justice for children and women who are victims of sexual violence.[142] The goal of the centre is to: address the medical and social needs of sexual assault survivors, reduce secondary victimisation, improve conviction rates and reduce delays in cases.[143] They are linked to sexual offences courts, which are staffed by specialised prosecutors, social workers, investigating offices, magistrates, health professionals, Non-Governmental Organisations and police, and are located in close proximity to the centres.[144] They are available 24-hours a day. They operate within the National Prosecuting Authority's Sexual Offences and Community Affairs Unit.

Thuthuzela Care Centres offer the following services for rape victims:

- Welcome and comfort from a site co-ordinator or nurse.
- An explanation of how the medical examination will be conducted and what clothing might be taken for evidence.

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139 *Ibid*.

140 *Ibid*.

141 Thuthuzela Care Centres in South Africa http:progress.unwomen.org/thuthuzela-care-centres-in-south-africa (accessed 2014/06/04).

142 UNICEF South Africa-HIV and AIDS- Thuthuzela Care Centers http://www.unicef.org/southafrica/hiv-aids 998.html (accessed 2014/06/04).

143 *Ibid.*

144 *Ibid*.

- A consent form to sign that allows the doctor to conduct the medical examination.
- A nurse in the examination room.
- After the examination, there are bath or shower facilities for the victims to use.
- An investigation officer will interview the survivor and take his/her statement.
- A social worker or nurse will offer counselling.
- A nurse arranges for follow-up visits, treatment and medication for Sexually Transmitted Infections (STI); HIV and AIDS.
- A referral letter or appointment will be made for long term counselling.
- The victim (survivor) is offered transportation home by an ambulance or the investigating officer.
- Arrangements for the survivor to go to a place of safety, if necessary.
- Consultations with a specialist prosecutor before the case goes to court.
- Inform the victim about court preparation of the case and its trial process.[145]

This is another victory for rape survivors because their dignity can now be restored. There might be challenges for these centres regarding their accessibility, but importantly they do exist. The creation of these centres indicates a commitment to the protection of victims' rights. These centres will help reduce secondary victimisation. Victims who cannot afford to pay for private counselling services will have access to them.

3.3.5 VICTIM-OFFENDER DIALOGUE (VOD)

Victim-offender dialogue is a voluntary process where offenders and victims are able to talk about the effects of crime and how, why, when and by whom the crime was committed.[146] The aim of the dialogue is, firstly, to strengthen the current rehabilitation and reintegration programmes of Department of Correctional Services.[147] This will take place by placing the victim at the centre of the correctional process and this

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145 Thuthuzela Care Centers: "Turning Victims into Survivors" National Prosecuting Authority of South Africa 7 http://www.npa.gov.za.

146 SA: Statement by the Department of Correctional Services on Victim-Offender-Dialogue 1 http:www.polity.org.za/Article/sa-statement-by-the-department-of–correctional Services-on Victim-offender dialogue 28112012-2012-11-29.

147 Victim and offender dialogues bring people closer to reconciliation http://www.dcs.gov.za.

process is premised on the principles of restorative justice. Secondly, the aim is to keep offenders away from prisoners through the reconstruction of family units and community support systems as well as victim and community support systems and victim support and empowerment. This was introduced on 28 November 2012 in the Mpumalanga province. A dialogue between offenders and victims is very important because victims will be able to forgive the offenders. Forgiveness is the key to peace. If they can forgive the offenders, that means restorative justice system plays a significant role in the criminal justice system. Forgiveness will lead to closure in the hearts of the victims.

The following two scenarios are examples of VOD:

In September 2013, there was a victim-offender dialogue between the survivors, victim's families and one of the perpetrators of the 1996 Christmas Eve Worcester Bomb attack in the Western Cape.[148] This bomb attack left four people- including innocent children dead and 67 were injured.

The then Minister of Correctional Services, Sbusiso Ndebele addressed this dialogue meeting. He stated that regret, reconciliation, rehabilitation and reintegration are a key to the success of VOD programme.[149]

In a second incident, rape victim, Nwabisa Manyashe hugged her attacker, Kwaulezile Mnyungula during a victim offender dialogue at St Albans Prison in Port Elizabeth.[150] This indicates that the victim has forgiven her attacker.

If the offender regrets his/her actions, then victims are easy to forgive them and it leads to reconciliation. Reconciliation is very important especially when the whole truth is revealed by the offender.

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148 Remorse key to victim-offender-dialogue http://www.sanews.gov.za/South Africa/remorse-key to victim-offender dialogue (accessed on 16/09/2013) 1.

149 *Ibid.*

150 "Victim embraces her rapist: woman breaks down as she forgives man who attacked her after killing his wife" (2014-02-12) *Herald*.

The offender after serving his term of imprisonment is released as a renewed person, completely in charge and in control of his life and makes a meaningful contribution to the building of this country.[151]

3.3.6 VICTIM-IMPACT STATEMENTS

One cannot balance the needs of the victims, offenders and the community without taking into account the victim impact statements. A victim impact statement is a statement made by victims of crime expressing the impact that the crime has had on them and their families.[152] Erez states that victim impact statements show the emotional, physical and the economic effects of crime on the victims from their perceptions.[153] Van der Merwe states that victim impact statements are written documents, compiled at the request of the state, the court or even the defence by a behavioural scientist, usually a psychologist or forensic social worker or criminologist.[154]

Van der Merwe submits that the South African courts are divided over the use of victim impact statements.[155] The reluctance of victims of crime to come forward and report the matter is of grave concern. They are the ones who suffered harm or losses as a result of crime committed by offenders, not the judicial officers.

Some of the judicial officers argue that victim impact statements are just of negative nature and have to be investigated to determine whether they could be believed or not or are just a ploy to exaggerate the case against the accused.[156] This is an unfortunate statement by respected judicial officers within the criminal justice system. This is because victims have really and practically experienced the loss or harm. The

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151 "Statement by the Department of Correctional Services on victim-offender dialogue, SA 1 http:www.polity.org.za/article-by-sa-statement-by-the-department-of-correctional services-on-victim-offender dialogue 2012-11-28 to 2012-11-29.

152 Clarke "A Silver Era for Victims of Crime: Reassessing the role that victim impact statements can play in improving victim involvement in criminal justice procedures" 16(2) 2003 *Acta Criminologica* 44.

153 Van der Merwe "Addressing Victims' Harm: The Role of Victim Impact Reports" 393.

154 Van der Merwe Addressing Victims 394.

155 Van der Merwe Addressing Victims 396.

156 Van der Merwe Addressing Victims 395.

contention is that judicial officers may even reject witness statements against the accused which help the courts.

Therefore, conflicting views about victim impact statements are unfair to the victims because the courts should look at the benefits that such statements offer. Victim impact statements play the following roles in the criminal justice system:[157]

- They provide presiding officers with information about the seriousness of the crime;
- they provide the court with a direct source of information about the victims needs which may assist in determining more appropriate and reparative sanctions;
- they provide the court with appropriate conditions that might be imposed on the offender;
- they provide the victims with a public forum in which to make a statement about their suffering;
- they provide the court with an opportunity to recognise the wrong committed against an individual victim; and
- they also offer an opportunity for the victims to participate in sentencing.

All the above points describe the importance of victim impact statements for the courts. Now it becomes problematic for some of the judicial officers to refuse to make use of them. Instead, one may argue that those who are against them are unwittingly favouring the offenders because offenders know that they have caused harm or loss to the victim.

Another challenge of victim impact statements is that they are used during the sentencing stage of the trial to make an informed sentencing decision.[158]

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157 Van der Merve Addressing Victims 394.

158 *Ibid*.

All the above-mentioned restorative justice mechanisms seek to achieve the following purposes of restorative justice, namely to:[159]

- give attention in a meaningful way to the victims' needs at material, financial, emotional, and social levels;
- enable offenders to accept responsibility for their actions;
- instil community involvement in initiatives that will promote community safety and a crime- free society;
- prevent recidivism and integrate offenders into the community; and
- prevent caseload backlogs in the criminal justice system.

In the next chapter, the existence of some of the rights of the victims of crime as found in selected Criminal Procedure Act will be discussed.[160] This is going to indicate that the rights of victims of crime do exist in some of the legislations of the country. This innovation by South Africa displays the seriousness of the criminal justice towards victims of crime especially in violent crimes.

159 Neser "Restorative Justice as Reaction to Crime: Development and Conceptualisation" 5.

160 51 of 1977 (updated 2012).

CHAPTER FOUR
VICTIMS' RIGHTS AS PROVIDED IN SOME SECTIONS OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

4.1 INTRODUCTION

This chapter focuses on victims' rights as contained in some sections of the Criminal Procedure Act.[161] There are important provisions of this act which benefit victims of crime, for instance, sections 153, 170A, 297, 299A, 300 and 301. These sections will be discussed to indicate that South Africa has indeed developed its legislation to make victims of crime central to the criminal justice system. The chapter will indicate that South Africa has complied with most of the provisions of the Victims Charter regarding compensation and restitution. These two concepts will be discussed in terms of relevant sections of the Criminal Procedure Act.

4.2 SECTION 153 OF THE CRIMINAL PROCEDURE ACT

Section 153 deals with circumstances in which criminal proceedings may not take place in an open court.[162] It provides that such proceedings may take place behind closed doors if there is likelihood that the proceedings may cause harm to any person other than the accused. It also provides that the court may exclude the public or a class of people to be present during such court proceedings. This section protects the victim against testifying in the presence of the accused, against a class of people and the general public.

In most cases, harm is caused by the presence of some of the members of the community, especially in sexual offences cases. For example, a victim of rape may not feel free to testify about her rape ordeal in front of a group of people in open court. The rape victim may not be mentally strong enough to face her rapist or community. This section benefits the victims of crime because it protects the dignity of the victim.

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161 *Ibid*.

162 S 153 of Criminal Procedure Act.

Again, there is harm caused to the child victim, especially giving evidence in open court, where the court is full to capacity by members of the public. This section protects the child victim against such harm. This section differs from section 170A, because it deals with members of the public or a class of people, other than the accused as will be set out below.

4.3 SECTION 170A OF THE CRIMINAL PROCEDURE ACT

This section was amended in the Criminal Procedure Act, because it was felt that children's testimony before the court had some shortcomings. Problems revolved around the adversarial nature of the trial procedure, especially during cross-examination. Cross-examination was seen as being insensitive and unfair to the child witness.[163] This was because a child witness had to undergo the traumatic experience of facing the accused or face cross-examination from the accused's defence team. This was seen as intimidating, aggressive, tormenting and humiliating to the child victim.[164]

Then, the idea of using an intermediary was canvassed as early as 1989 by the South African Law Reform Commission as a result of the above mentioned problems.[165] Thereafter section 170A was enacted.

The section states that a court may appoint an intermediary in cases where witnesses are under the age of eighteen years and allow such witnesses to give evidence through the intermediary.[166] The use of an intermediary may take place if the criminal proceedings will put undue mental stress and suffering of the child witness.[167]

Muller and Tait describe how a separate room where section 170A can be applied and should be structured.[168] They submit that a room should be informally and suitably

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163 Schwikkard *Principles of Evidence* (2008) 375.

164 *Ibid.*

165 Schwikkard *Principles of Evidence* 376.

166 S 170A Criminal Procedure Act 51 of 1977 159.

167 *Ibid*.

168 Muller and Tait "Little Witnesses: A Suggestion for Improving the Lot of Children in Court" 1999 Vol 62 *THRHR* 243.

equipped. A video camera is mounted on a wall of the room and records the proceedings. Both the child and the intermediary are present in this room as evidence is being led in the courtroom. No other person is allowed in the room with the child and the intermediary. The intermediary is provided with earphones which enable him or her to follow the proceedings in the courtroom and relay the questions to the child. Then, the child's answers are captured on the live video and relayed to the courtroom.

The child does not see the courtroom or any other person in the courtroom when giving evidence. The courtroom is provided with a television monitor on which the members of the court are able to view the child and the intermediary and hear what is being said. This is a live video activity and members of the court can see and hear that the child and the intermediary as they speak. A video-taped recording is not made of the child giving evidence. The evidence is recorded using the audio-electronic recording system ordinarily used in courts.[169]

The above-mentioned picture portrays a victory for young victims of crime to avoid the traumatic effect of giving evidence in an open court. Child victims are free from such horrific exposure through use of the intermediary. This system also prevents secondary victimisation of the child. Secondary victimisation in this situation refers to the adversarial nature of the trial proceedings and that the child victim has to see his or her rape offender or even be confronted by him or her.

The set-up of the separate room is conducive to an environment whereby evidence by a child victim will be given without fear, because testifying in an open court can affect the child victim psychologically. This may lead to a distortion of the truth. One can imagine a child giving evidence in the presence of the accused that has raped her or murdered her parents. This could lead to far reaching consequences for the child victim.

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169 *Ibid.*

4.4 SECTION 297 OF THE CRIMINAL PROCEDURE ACT

Section 297(1)(a)(i) of Criminal Procedure Act allows a court to postpone the sentencing of the convicted person for up to five years on the following conditions namely:[170]

- Compensation;
- the rendering to the aggrieved person of some specific benefit or service in lieu of compensation for damage or pecuniary loss; and
- the performance without remuneration and outside the prison of sole sentence means that service for the benefit of the community under the supervision or control of an organisation or institution which, to the person who, in the opinion of the court, promotes the interests of the community which is referred to as community service.

Section 297(1)(b)[171] authorises the court to suspend the whole or any part of the sentence for a period not exceeding five years on the same conditions mentioned in section 297(1)(a)(i).

Von Bonde clarifies this section by stating that suspension of the whole sentence means that the process of sentencing is postponed as a whole subject to the conditions mentioned in section 297(1)(a)(i).[172] Then, suspension of any part of the sentence means that the sentence is imposed but execution is suspended on conditions mentioned in section 297(1)(a)(i).[173] This means that a perpetrator is encouraged to effect restitution to the complainant because his/her sentencing has been postponed or suspended.

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170 Criminal Procedure Act 1977 262.

171 Criminal Procedure Act 1977 263.

172 Von Bonde "Redress for Victims of Crime in South Africa: A Comparison with Selected commonwealth Jurisdiction" Criminal Law Doctoral Thesis Nelson Mandela Metropolitan University 23 October 83.

173 *Ibid*.

In the case of *S v Noordien,*[174] the accused was sentenced to six years' imprisonment, which was suspended for five years.[175] The accused was given instructions to establish a trust for the child victim. Suspension of the sentence would enable the accused to establish a trust for the child but if the accused was put in jail, he would not be able to set up the trust. The child would not have benefitted anything.

In *S v Khoza*[176] the practical application of section 297 is seen.[177] The accused, stole R35 000.00 cash from her employer. At first she pleaded not guilty but later on, made formal admissions in terms of section 220 of the Criminal Procedure Act. The state closed its case without leading further evidence.

The accused was sentenced to a fine of R10 000.00 or 36 months' imprisonment which the court suspended for a period of five years on condition that the accused was not convicted of theft or attempted theft, committed during the period of suspension.[178] The court further made a compensation order in terms of this section as follows:

- The amount of R2000.00 be payable on 25/01/2010.
- The balance to be paid in instalments of R500.00 at the end of each month until the balance was paid in full.
- The next payment of R500.00 was due at the end of February 2010.[179]

The matter was taken on review. Clarity was achieved regarding which section should be applicable in the matter as the court a quo granted an order in terms of section 300. It was clarified that an order in terms of section 300 of the Act would be appropriate where the accused has sufficient money or executable assets to compensate the complainant in full or to a large extent. It was clarified that where the accused is able to compensate the complainant in full, an order in terms of this section should not be

174 1990 2 SACR 172 (C).
175 *Ibid.*
176 2011 (1) SACR 482 (GSJ).
177 *Ibid*.
178 *Ibid.*
179 *Ibid.*

made. If an accused is employed and able to repay in instalments, then section 300 could be applied.[180]

The accused in this matter was unemployed as she had lost her job due to theft. That meant that the accused would not be able to comply with the compensation order.

The court on review held that, a compensation order in terms of section 300 should be set aside and the matter should be referred back to the court *a quo* which convicted the accused, to sentence the accused afresh and decide which section is appropriate between section 279 and 300.[181] Section 297 was eventually declared the appropriate section.

In *S v Huhu,*[182] the accused, was charged and subsequently convicted in the Bloemfontein Magistrate's Court of the offences of assault with intent to do grievous bodily harm and malicious damage to property. The court *a quo* made a compensation order in terms of section 300 though the accused was never able to compensate the complainant in full because he did not have sufficient or executable assets.[183]

The High Court on review held that the accused should compensate the complainant in terms of section 297 of the Criminal Procedure Act in the amount of R1300.00. It was also held that such an amount should be payable in instalments of R200.00.[184]

Von Bonde outlines principles that are relevant in the application of section 297, which include the following:[185]

- The objective is to keep the accused out of jail;
- it is to remind the accused of the consequences of his or her actions;

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180 *Ibid.*

181 *Ibid.*

182 www.saflii.org.za.

183 *Ibid.*

184 *Ibid.*

185 Von Bonde *Redress for Victims of Crime in South Africa: A Comparison with Selected Commonwealth Jurisdiction* Criminal (2006) LLD 84-85.

- it is to redress the harm done to the victim as the aggrieved party. This is evident in the above mentioned cases;
- the accused must know that the court ascertains the extent of the loss;
- the assessment of loss takes place after conviction;
- the award is not limited to the amount of the magistrate's criminal fine jurisdictions;
- the ability of the accused to pay must be taken into account. This means payment in instalments should be accepted;
- an agreement between the victim and the accused regarding quantum of the amount for pain and suffering should be accepted; and
- finally, restitution should be ordered on its own without a fine or other penalty being imposed.

Section 297 benefits the victims of crime, because the victim now gets something back in the form of compensation. The sentencing of the offender to a jail term will not benefit the victim. Now, compensation will return the victim to the position he was in before the commission of the crime. In this way, the criminal justice system will reduce the secondary victimisation to the victim. The unfortunate situation is when the offender cannot pay the victim due to being unemployed or impoverished. Therefore, it means that the section favours those who can afford to pay. It implies that offenders who cannot pay will either render a service to the aggrieved person or perform some duties without remuneration to the benefit of the community.

4.5 SECTION 300 OF THE CRIMINAL PROCEDURE ACT

Section 300(1) of this Act authorises a court to make a compensation award against a person who has been convicted of a crime which has caused damage to or loss of property including money belonging to another person- the victim.[186] The order awarded may take the form of returning the damaged property or repair the property that has been damaged. This implies a "restitution" in terms of the definition of the "Victims Charter".

[186] S 300(1) of Criminal Procedure Act, 1977.

The idea behind section 300 is to put the complainant in the position he was before the offence was committed. In terms of section 300, the application for restitution is made by the injured party or prosecutor acting on the instructions of the injured person.

Section 300 benefits victims of crime because some victims of crime may be interested to get back the property, either repaired or replaced. They may not be interested in a jail sentence because it is not going to bring back the damaged or lost property. This is because the offender may be incarcerated for a short term or released on conditions but re-offend. So, the idea of restitution benefits the victims.

4.6 FAILURE BY SOUTH AFRICA TO PROPERLY INTERPRET THE UNITED NATIONS DECLARATION

It is submitted that South Africa has failed to apply the provisions of the United Nations Declaration[187] with regards to "Compensation".[188] Therefore, it cannot be said that the Victim's Charter is compliant with the South African Constitution and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power of 1985. This is the statement by the then Minister of for the Justice and Constitutional Development, Bridgett Mabandla[189] Instead, South Africa incorrectly applied the provision of the UN Declaration. This may be caused by the fact that the state does not want to be responsible to compensate the victims of crime.

Section 12 of the UN Declaration[190] states that if compensation is not fully available from the offender or other sources, states should endeavour to provide financial compensation to: victims who have sustained significant bodily injury or impairment or mental health as a result of serious injury and to the family, in particular the dependants of persons who died or became physically or mentally incapacitated as a result of victimisation. In most cases, offenders are people who cannot afford to pay their victims. This means that the victims may not get the relief they seek from the offenders.

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187 United Nations General Assembly A/Res/40/34 (1985) 4.

188 *Ibid.*

189 Service Charter for Victims of Crime in South Africa 2.

190 United Nations General Assembly A/Res/40/34 (1985) 4

The Declaration also calls for the establishment of a national fund for compensation.[191] This is where South Africa has failed the victims of crime. There was an attempt to consider the possibility of a state-funded victim compensation scheme through the South African Law Reform Commission.[192] The Commission cited the following problem areas for such a failure: costs of establishing such a fund, financial resources of a Compensation Scheme, the mechanisms of such a Scheme and information required in adjudicating the claims.[193] It is submitted that if such a Scheme was formed, the victims of police brutalities would benefit from it.

4.7 SECTION 301 OF THE CRIMINAL PROCEDURE ACT

Section 301(1) of this act deals with cases where the offender is convicted of theft and has sold the property to a person who has no knowledge that the property is stolen. The court, acting on the instructions of innocent purchaser may award him or her compensation for damages caused to him by the accused. Then the Act gives powers to the innocent purchaser of the property to ask for a refund of the purchase price against the offender. In this situation, previously, the innocent purchaser would be regarded of having in possession of stolen goods and be charged as well.

This section benefits the victim because the offender can be ordered to refund the victim. This is because the purchaser was unaware of the stolen property and if it is proved that he or she is bona-fide in his statements, the victim will be refunded. This means a departure from the notion of being in possession of stolen goods, especially when the victim honestly did not know that it was stolen property sold to him or her. Therefore, the accused has to refund the victim and also return the property to the original victim from whom the property was stolen. This section also applies that the refund for damages is to be paid out of money found on the accused at the time of his arrest.

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191 *Ibid*.

192 Project 82 Sentencing (A Compensation Fund for Victims of Crime) 2004.

193 Project 82 Sentencing (A Compensation Fund for Victims of Crime) Pt 1 Chap 5 98.

Von Bonde argues that section 301 limits the amount of restitution to the amount actually paid for the stolen goods.[194] He further argues that this section does not deprive the injured party of his or her civil law rights against the thief.[195] This will help the victim in cases where the victim believes that the amount awarded is less than the value of the property that was stolen.

4.8 SECTION 299A OF THE CRIMINAL PROCEDURE ACT

Section 299A (1) of this Act provides that a court shall inform the complainant about his or her right to make representations with regards to placement of the prisoner on parole in rape, murder sexual assault, robbery, kidnapping and conspiracy or attempt to commit any offence of the mentioned crimes. This provision gives the victims of crime an opportunity to make presentations when a prisoner is to be granted a parole. This implies that the views of the victims are now seen as crucial in the parole hearing.

Victims of crime should utilise this opportunity so that they eventually come to terms in forgiving the offenders. It is an opportunity that should be encouraged to cast away vengeance and retribution. It is a process that ultimately ensures reconciliation especially when victims forgive the offenders.

In the next chapter the conclusion to this study will be drawn and certain recommendations will be made.

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194 Von Bonde *Redress for Victims of Crime* in South Africa: A Comparison with Selected Commonwealth Jurisdiction Criminal Law Doctoral Thesis Nelson Mandela Metropolitan University 23 October (2006) 93.

195 *Ibid.*

CHAPTER FIVE
CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This chapter will briefly show some of the challenges that still face the victims of crime. It will also suggest some innovations that can be used to further protect victims of crime. The treatise has indeed discussed the rights of victims and the sources of such rights. This chapter will therefore briefly explain the challenges in the Victims Charter, restorative justice programmes and suggest that the victims would be better off if there were to be a state-funded compensation scheme in South Africa. There are no convincing reasons as to why South Africa does not have such a scheme. The issue lies with the failure of the state to properly interpret "compensation" in terms of the United Nations Declarations as already discussed. Therefore, it cannot be said that the Victims Charter is compliant with the United Nations Declarations when it fails to protect the victims of crime regarding compensation.

5.2 VICTIMS CHARTER

The adoption of the Victims Charter in South Africa was a major step towards protecting the victims of crime and to making them central in the criminal justice system. The Charter was designed to take care of the victims and make them as its central beneficiaries.[196] The Charter seeks to reduce secondary victimisation, consolidate the standards of service that victims can expect and to provide recourse when such standards are not met.[197] The Charter sets out strategies and pledges to minimise victimisation at each stage of a victim's interaction with the criminal justice system.[198] This is done through the Minimum Standards document which provides a detailed account of how the rights mentioned in the Victims' Charter can be realised as discussed in chapter two of the treatise. It is important to note that the majority of

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196 Democratic Alliance Discussion Document on the Rights of Victims of Crime 2007 4 pmg-assets.s3-website-eu-west-1amazonaws.com/docs/070622 da.doc.

197 Faull and Mphuthing *Victim Support* 127 www.issafrica.org/crimehub/uploads/CIC-6pdf.

198 *Ibid.*

victims' rights in the charter and services offered by Minimum standards, which were discussed in Chapter 2, are currently being used by the courts.

The Charter has also some shortcomings, namely, that the rights mentioned in it are at times vague, qualified and limited.[199] For example, Frank submits that the charter places the *onus* on the victim to request services whereas it should be the government and service providers to offer such services.[200] Faull and Mphuthing argue that the charter offers an excuse for any public servant who fails to act in the interests of the victims.[201] The Democratic Alliance argues that the victims' rights will not be properly implemented due to financial and skills constraints.[202]

One of the shortcomings of the charter is its failure to make provision for a state fund to compensate all victims of crime.[203] The charter has failed the victims of crime especially with regards to compensation. It fails to define "compensation" in the light of the United Nations Declaration of Basic Principles of Justice for victims of Crime and Abuse of Power.[204] Instead, the charter defines "compensation" as an amount of money that a criminal court may award to a victim who has suffered loss or damage to property which may include money, as a result of a criminal act or omission by the person convicted of committing a crime.[205] It is submitted that this failure has contributed to the non-establishment of a state-funded victim compensation scheme in South Africa. This means that victims of crime have now no legal basis to demand compensation from the state. This implies that victims will have to lodge a civil claim against the state as was explained in the Tatane situation.

A state-funded compensation scheme would benefit the victims of crime especially when offenders cannot afford to compensate and offer restitution to the victims. Again, the scheme would benefit victims of crime especially if one looks at the victimisation which is perpetrated by members of the South African Police. This means that the

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199 Democratic Alliance Discussion Document on the Rights of Victims of Crime 2007 4.

200 Faull and Mphuthing *Victim Support* 128.

201 *Ibid.*

202 Democratic Alliance Discussion Document on the Rights of Victims of Crime 2007 4.

203 *Ibid.*

204 United nations General Assembly A/Res/40/34 4 http:/www.un.org/documents/ga/res/40/a40r034.ht (accessed 2013/09/03.

205 Service Charter for Victims of Crime in South Africa 14.

scheme would benefit the victims of the Marikana massacre. Instead, the victims of the Marikana massacre have a civil claim option against the state and among its recommendations there is no recommendation for victim compensation by the state.[206] One can think of the amount of victimisation that victims of the Marikana massacre are still experiencing. The Rhodes University Journalism Review highlights few statements from the victims of the massacre.[207]

The above victim statement shows the grief and the impact that the massacre has had on the victim. The option of a civil claim is also not an easy one because they have to approach attorneys and advocates for legal representation. This is a painstaking exercise to the already vulnerable victims. The question at issue is who is going to look after the victim families in terms of their needs.

It is the duty of the state to protect its citizens against crime but, unfortunately in the massacre and other killings by the police, the state is responsible for the deaths occurred and misery caused to victims. So this means the state is the offender through the criminal activities of the police force. It is submitted that there is not much difference between the killings during the apartheid era and the post 1994 era because people have suffered harm and losses respectively. The state should be held responsible in terms of the legality theory,[208] which is based on the premise that the state should compensate the victims of crime for all damages and losses suffered as a result of the commission of criminal offences. The legality theory also states that the state is considered liable for allowing the crime to have been committed.[209] Therefore

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206 Nicolson "Marikana report: Key findings and recommendations" (2015/06/26) *Daily Maverich* 1 http://www.dailymaverick.co.za/article/2015/06/26-marikana-report-key-findings-and recommendations (accessed 2015/07/19).

207 Rhodes Journalism Review (2013) 33. The following is an extract from one of the women who are family members of men killed in the Marikana Massacre. This workshop was organised by the Khulumani Support Group from 19 - 20 May 2013 while they attended the Marikana Commission of Inquiry in Rustenburg. Ntombizolile Mosebetsane "I'm Mrs Mosebetsane, I am Ntombizolile Mosebetsane from the Eastern Cape, Lusikisiki district, in Luquqweni village. As you know, I am here because of my husband who passed away during the Marikana massacre.

As of now I do not feel well because he was the breadwinner, and he left me with a child. The child asks me every day, 'Mom, where is my father?' I don't have any answers to that question. All in all I can't express myself, I can't forget and forgive what happened, because I ask myself: 'How am I going to be a breadwinner now as I am unemployed?"

208 South African Law Reform Commission Project 82, Sentencing (A Compensation Fund for victims of Crime) Report, Part iii chapter 9 (2004) 278.

209 *Ibid.*

the state should be made responsible for allowing crime to be committed by offenders and by some members of the South African Police Force through their criminal conduct as seen in the Tatane, and Macia cases and the Marikana massacre.

5.3 VICTIM SUPPORT AND VICTIM EMPOWERMENT

It was explained in chapter three that the idea of victim support had led to the creation of victim support centres in South Africa. These centres, sometimes referred to as "victim-friendly rooms", have been established in all police stations in the country for the purpose of taking statements from people who have been traumatised as a result of criminal conduct by offenders.[210] The establishment of these centres shows that South Africa takes the plight of victims very seriously.

These centres also reveal some problems, like being staffed by non-governmental trained volunteers.[211] Faull and Mphuthing submit that these volunteers are just trained to calm and contain the victim and to offer referral information on how to access the needed services.[212] This means that they are not trained to counsel the victims. Therefore, failure to offer the required counselling services impacts negatively on the victims who are psychologically traumatised. The volunteers may try to offer *ad hoc* counselling services, but the fact of the matter is that they are not trained.[213]

Faull and Mphuthing also submit that the South African Council for Special Service Professionals has criticised the use of the volunteers and argue that counselling from individuals without recognised qualifications and supervision could be damaging to the victims.[214] The institution suggests that the volunteers are not bound by a code of ethics and could also violate the victim's confidentiality.[215] It suggests further that victim support centres should be professionalised and the services of the volunteers be regulated.[216] It has been submitted that the government should employ qualified

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210 Faull and Mphuthing *Victim Support* 129.
211 *Ibid.*
212 *Ibid.*
213 *Ibid.*
214 *Ibid.*
215 *Ibid.*
216 *Ibid.*

counsellors who are trained in counselling services and do away with volunteers. The reason is that counselling involves sensitive issues especially in rape and assault cases.

Victim empowerment was also discussed as a process that enables victims to control their lives. One of the challenges identified was the idea that the one-stop crisis centres which are also called trauma centres or violence referral centres or Thuthuzela Rape Care centres are located at local hospitals, clinics and even housed in communities. It is submitted that these centres should also be located in all police stations so that victims immediately get access them when they have come to report the crime. It is also submitted that mobile units be made available in rural and remote areas of the country.

Victim empowerment programmes face challenges such as of lack of funding, and human resource capacity.[217] This could mean that these centres will fail to function properly and the objective of establishing them will not be realised. Lack of funding implies that they will not be available throughout the country, and this will be to the detriment of the victims.

5.4 RESTORATIVE JUSTICE PROGRAMMES

Restorative justice programmes, like victim-offender dialogue or mediation, benefit the victims of crime because victims' voices are heard and offenders take responsibility for their actions. They offer a process of healing on the part of the victim as well as offenders. This is because they bring emotional restoration to both groups especially when the truth has been told. Truth should be accompanied by an apology. Tavuchis argues that an apology entails the acknowledgement of the legitimacy of the violated rule, admission of guilt and responsibility for its violation and an expression of genuine regret and remorse for the harm done.[218] Some victims may forgive their offenders especially when the offenders reveal the genuine truth about their criminal acts. South Africa used the victim-offender dialogue during the Truth and Reconciliation

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217 Democratic Alliance Discussion Document on the Rights of Victims of Crime 5.

218 Strang *Repair or Revenge: Victims and Restorative Justice* 21.

Commission and it was where some victims wanted to know what had happened to their missing sons and daughters during the apartheid era. When the truth came out, some of the offenders were granted amnesty.

Regarding victim impact statements it is submitted that the use of such statements during sentencing is once again unfair to the victims. These statements can also be used as evidence during evidence in chief and cross-examination stage of the trial. In cases of murder, it is clear that the victim may have suffered a loss, and the deceased may even have been the breadwinner. Importantly, there should be no reluctance to use them.

It is now an established fact that victims of crime do have rights in terms of the Constitution, the Victims' Charter and in some legislative instruments. What remains a challenge is the legal education and training of the public to know and access their rights. Restorative justice programmes should be used by our courts to further centralise the plight of the victims. This is because these programmes teach victims a lesson that retribution and vengeance against offenders are not the only solutions. Instead, acceptance of the truth and an apology may heal the wounded hearts and help them to move on with their lives peacefully.

It is submitted in conclusion that South Africa can afford a state-funded victim compensation scheme, because there are financial resources in the country which are misused and misdirected. It is also submitted that if South Africa can afford to have the touted health insurance scheme which will benefit everybody in the country, it means that it can also afford a compensation scheme for victims of crime. South Africa can use any of the Commonwealth countries' compensation schemes as discussed by Von Bonde[219] or the United States of America.[220] For example, the majority of the United States of America reimburses the victims for their out-of-pocket expenses relating to crime, a surviving spouse or affected family is allowed to claim for a limited compensation for medical, counselling, funeral expenses and lost wages.[221] In South

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219 Von Bonde "Reddress for Victims of crime in South Africa: A Comparison with Selected Commonwealth Jurisdiction" 2006.

220 Victim Law-Victims Right, office of Justice Programs' http://www.victimlaw.org/victimlaw/pages/victim-right.

221 *Ibid.*

Africa, there are no such expenses and victims and their families incur all the expenses. A compensation scheme would better the lives of the victims. The Law Reform Commission states that compensation could provide an important symbolic recognition of a victim's suffering and loss.[222]

[222] South Africa Law Reform Commission Project 82 Sentencing (A Compensation Fund for Victims of Crime) Report 2004 34.

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