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

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The use of non-traditional dispute resolution processes, falling within the rubric of Alternative Dispute Resolution (ADR), is now widely accepted in a variety of dispute contexts. In recent years, similar processes have been adapted and applied in a criminal justice context as part of an overall package of criminal justice reforms. In jurisdictions of the world, a number of ‘alternative’ methods for dealing with criminal offenders have been developed. The debate as to whether alternative methods can or should be applied in a criminal justice context raises normative questions as to the role of the justice system, sociological questions as to the nature of criminal offending and the relationship between the individual, the community and the state, and descriptive questions as to the adequacy of particular justice practices.

Alternative Dispute Resolution in the criminal justice context contains little or no reference to its use in the criminal justice context, and as a corollary, most criminal law texts dealing with processes such as conferencing do not utilise ADR terminology. The reason for this is because ADR is most often than not seen as a method of resolving disputes between parties without resorting to formal court-based adjudication. In addition to what has been said, traditional theories of criminal justice, on the other hand, view criminal offending as largely a matter between the offender and the state. Furthermore, the use of ADR processes in criminal matters is a relatively new in Western countries, and it is my humble view that if South Africa will reform its laws to reflect or integrate ADR into its criminal law, it will go a long way to enhance the growth of its national and domestic laws.

In part, the increased interest in the application of ADR processes to the criminal justice system was borne from a general dissatisfaction with traditional adversarial methods of dispute resolution. However, the criminal justice system has attracted a particular set of criticisms: it is seen as unsuccessful in reducing rates of recidivism (and even may increase the likelihood of reoffending for particular groups, such as juveniles and Indigenous persons); it ignores the victims of crime and fails to recognise crime as a form of social conflict.

One important proponent of the application of ADR techniques to criminal ‘disputes’ was Nils Christie, who asserted that ‘conflicts become the property of lawyers’ and that formal legal processes rob individuals of the right to full participation in the dispute resolution process. The proliferation of the idea that a criminal offence represents not just a violation of state but also a community conflict which requires resolution between individuals has led to increased support for the use of non-traditional criminal justice methods.

Christie noted that the key element in a criminal proceeding is that the proceeding is converted from something between the concrete parties into a conflict between one of the
parties and the state … The one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena … She or he is a sort of double loser; first, vis-à-vis the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important encounters in life. The victim has lost the case to the state.

In the light of the above, the proposal seeks to argue for the integration of ADR into the South African criminal justice system with a view to providing a statutory backing for its integration by the SA authorities. Additionally, the paper will advocate how the South African traditional rulers can participate and/or handle criminal issues within the confines of community setting.

Finally, the paper will strongly debate the urgent need for law reforms in this aspect of South African jurisprudence in order to reflect current positions as obtained in other jurisdictions of the world.