

**THE ROLE OF THE VICTIM IN THE SOUTH AFRICAN SYSTEM OF PLEA
AND SENTENCE AGREEMENTS: A CRITIQUE OF SECTION 105A OF
THE CRIMINAL PROCEDURE ACT**

BY

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The logo of the University of the Western Cape, featuring a classical building facade with columns and a pediment, rendered in a light blue color. Below the building, the text "UNIVERSITY of the WESTERN CAPE" is written in a light blue, serif font.

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**PREPARED UNDER THE SUPERVISION OF
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DECLARATION

I, Megan Bronwynne Rodgers, hereby declare that this dissertation is original and has never been presented to any other University or institution. I also declare that secondary information used has been duly acknowledged in this dissertation.

Student: Megan Bronwynne Rodgers

Signature: _____

Date: _____



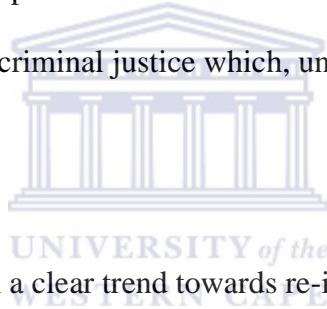
Supervisor: Dr Raymond Koen

Signature: _____

Date: _____

ABSTRACT

Crime victims once played a prominent role in the criminal justice system. Historically, victims who sought to bring their wrongdoers to justice conducted their own investigations and argued their own cases or employed others to do so. As time passed, a distinction was drawn between offences against the social order and disputes between individuals. Crime control became a function of government and the state increased its responsibility for the investigation and punishment of criminal conduct. Gradually, the victim was removed from the proceedings and relegated to serving as a witness for the state. The assumption was that the state, whilst representing the interests of society, would represent the interests of the victim also. This fallacy provided the foundation for a criminal justice which, until recently, encouraged victim exclusion.



In recent years, there has been a clear trend towards re-introducing the right of victims to participate in the criminal justice process. This international trend has been labelled the 'return of the victim'. In South Africa, the Constitution and, in particular, the Bill of Rights contained therein underscore the move towards procedural rights for victims of crime. Moreover, the South African government has taken significant legislative steps to ensure that victims have formal rights in criminal justice proceedings. However, to date, comparatively little attention has been paid to the question of whether or not victims should be allowed a meaningful role in the process of plea and sentence negotiations. One of the aims of this study is to determine whether victims' rights are properly understood, defined and implemented within the criminal justice system. In particular, this study aims to clarify the rights of victims who find

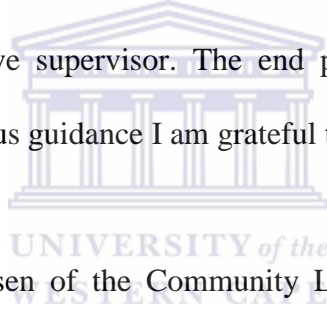
themselves affiliated with a specific stage of criminal prosecution, namely, negotiated justice.

Negotiated justice has been introduced formally by the statutory amendment contained in section 105A of the Criminal Procedure Act and accepted as a facet of criminal procedure in South Africa. This practice represents a movement away from the traditional adversarial system which requires that the conflict between the state and the accused be settled through verbal confrontation before an impartial adjudicator. Instead, negotiated justice proposes that the conflict be settled through negotiation and compromise, largely between the state and the accused. However, a criminal offence is not only a violation of the laws established by the state but also a conflict which has arisen between the accused and the victim. Although statutory plea and sentence agreements make provision for victim participation during the negotiation and sentencing stages, there are qualifications to such participation. This study examines these qualifications in an effort to establish whether the measure of victim participation proposed by section 105A is adequate, in the light of South Africa's commitment to the development of justiciable victims' rights.

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Thank you to Mrs Jill Claasen of the Community Law Centre and Mr Suleiman Tarkey of the Law Library at the University of the Western Cape who weaned me off ‘Google’ and sent me on more appropriate research paths.

Lastly, a special thanks to all my friends and family who motivated me daily and who by now know far more about victims’ rights than they bargained for!

DEDICATION

The Undefended Victim

*For me, no gavel, hammers The Scales were never weighted.
My Crime was that of a victim, My life, was the price I paid.
And when my life was taken, Why weren't my rights read?
And the Statement, "overruled" When they pronounced me dead?
I'll never hear my rights, Nor take the witness stand,
No attorney to defend me, My fate was in a killer's hand.
Now the courtroom's crowded As the defendant pleads the case.
With just the glimmer of a tear, Cold eyes on a straight face*

*But oh, if I could take the stand... If they could witness my last breath,
Could they live with the terror that I went through in death?
If they could hear my pleading cries, and see the hatred in that face,
Then At last, we'd know, the scales had "Been balanced" in this case.*

*If I could, I'd tell the jury exactly how it was,
The fear and pain that I went through, Struck down without a cause.
Did the jury carefully weigh it all as they listened to the plea?
There were no emotions, showing now, just the hope of going free...
The final verdict now is in as the defendant stands in tears,
If only I had done as well... Given ten to twenty years.*

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Just another bereaved mother...

This dissertation is dedicated to those who have suffered needlessly and whose suffering is unnecessarily prolonged because of ignorance about crime victims and a lack of commitment to them.

KEYWORDS

1. Circumlocutory rights
2. Informal Plea Agreements
3. Negotiated Justice
4. Plea and Sentence Agreements
5. Plea and Sentence Negotiations
6. Secondary Victimisation
7. Section 105A of the Criminal Procedure Act
8. Statutory Plea and Sentence Agreements
9. Victim Impact Statements
10. Victims' Rights



LIST OF ABBREVIATIONS

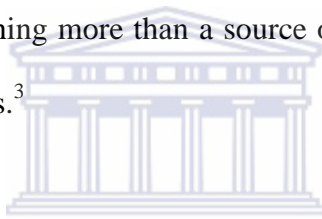
ANC	African National Congress
CPA	Criminal Procedure Act 51 of 1977
DA	Democratic Alliance
DPP	Director of Public Prosecutions
HC	High Court of the Republic of South Africa
NDPP	National Director of Public Prosecutions
PMG	Parliamentary Monitoring Group
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission
SCA	Supreme Court of Appeal of the Republic of South Africa
TRC	Truth and Reconciliation Commission
UN	United Nations
USA	United States of America
VRWG	Victims' Rights Working Group

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

The commission of a crime produces at least two victims, namely, society which suffers a violation of its laws, and the actual victim who suffers an injury to his person, property or personality interest.¹ Yet, the criminal justice system allows only the state to play a meaningful role in the prosecution of crime.² While the state, representing the interests of society, takes centre stage in criminal proceedings, the victim traditionally is viewed as nothing more than a source of information and routinely is relegated to the role of witness.³



Commentators have observed that despite the importance of their cooperation, both in reporting offences and in assisting with the prosecution of crimes, victims largely are excluded from the criminal justice process.⁴ The victim is an outsider to the legal process from the moment the decision is made to prosecute to the end of the criminal trial, when the sentence may be imposed. According to Christie, this is because the victim is so thoroughly represented by the state that he is pushed out of the arena.⁵

Until recently, the South African criminal justice system had afforded little attention

¹ Kennard (1989: 417).

² See Christie (1977: 7) who explains that it is the Crown that comes into the spotlight, not the victim, it is the Crown that describes the losses and not the victim and it is the Crown that gets a chance to talk to the offender, not the victim. See also Camerer (1996: 3) who states that 'in effect the state is allowed to "steal" the conflict from the victim and the offender making crimes committed crimes against the state.' Camerer's view finds support by referring to section 179(2) of the Constitution which provides that the prosecuting authority has the power to institute criminal proceedings *on behalf of the state* (emphasis added) and to carry out any necessary functions incidental to instituting criminal proceedings.

³ See Meintjies-van der Walt (1998: 163) and Snyman (2005: 3).

⁴ Kennard (1989: 417).

⁵ Christie (1977: 3).

to victims of crime.⁶ For decades the focus was on the conduct and rights of the accused.⁷ This excessive concern for the accused not only frustrated crime victims but also intensified the movement towards empowerment of victims.⁸

The demand for procedural rights for victims of crime has gained momentum over the last decade. The advent of democracy and the Bill of Rights contained in the South African Constitution accelerated the acknowledgement, in South African legal discourse, that crime violates the human rights of victims.⁹ The South African government purports to acknowledge the vulnerability of victims and has committed to protecting them, through ratification of international instruments and the development of national policies and legislation.¹⁰ In 2001, the government identified the fight against crime and victimisation as areas of concern and increased the annual expenditures for the safety and justice sectors. Also, measures such as the Service Charter for Victims of Crime in South Africa (Victims' Charter) have been introduced in accordance with the Constitution, to promote the recognition of victims' rights in the criminal justice process.¹¹

⁶ Snyman (2005: 3).

⁷ Snyman (2005: 3). See further Camerer (1996: 3).

⁸ The feminist movement which emerged in 1960 and the establishment of the World Society of Victimology in Germany initiated the global movement towards empowerment of victims. See Clarke, Davis & Booysen (2003: 43) and also Snyman (1992: 473) for their discussions of the victims' rights movement for the last two decades. See further Camerer (1996: 3) for her discussion of the frustrations felt by victims of crime.

⁹ See Snyman (2005: 3).

¹⁰ Artz & Smythe (2005: 131). Policies such as the Integrated Victim Empowerment Policy and legislation such as the Domestic Violence Act 116 of 1998 have been developed to protect victims.

¹¹ Section 234 of the Constitution provides that Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

1.2 Focus and significance of the study

The acknowledgement that crime violates the rights of victims is in itself insufficient. To be effective, this acknowledgement must be reflected appropriately in legislation. On 14 December 2001 plea and sentence agreements obtained statutory recognition in South Africa.¹² Section 105A, which makes provision for negotiated justice, was inserted into the Criminal Procedure Act (CPA) by the Criminal Procedure Second Amendment Act.¹³ The amendment is significant because it proposes a measure of victim participation at the negotiation and sentencing stage of the agreement. The main question that this study will attempt to address is: Does section 105A of the Criminal Procedure Act adequately recognise the rights of victims in the light of South Africa's commitment to victims' rights?

There are many facets of negotiated justice worthy of academic discussion, as the practice is an important part of our criminal justice system.¹⁴ It is a movement away from the traditional adversarial trial system.¹⁵ However, the defined focus adopted in this study is significant because, in addition to the acceptance of these agreements, there is the recognition that crime is not only a violation of the interests of society in the abstract, but also an injury or wrong inflicted on the victim.¹⁶ It is estimated that

¹² See Government Gazette of the Republic of South Africa No. 22933 of 14 December 2001. The amendment was assented to on 7 December 2001.

¹³ Section 105A was inserted by section 2 of Criminal Procedure Second Amendment Act 62 of 2001.

¹⁴ De Villiers (2000: 153).

¹⁵ See *North Western Dense Concrete CC and Another v DPP (Western Cape)* 1999 (2) SACR 669 (C) at 678 paragraph c-d where the court explained that these agreements are a movement away from the traditional theory of settling the *lis* between the state and the accused through verbal confrontation before an impartial adjudicator. Instead, the *lis* is settled through negotiation and compromise between opposing parties.

¹⁶ See the preamble to The Service Charter for Victims of Crime in South Africa. This recognition is not exclusive to South African jurisprudence. See, for example, the publication by Kennard (1989: 417).

there are more than one billion victims of crime each year.¹⁷ Despite these numbers, victims are still treated as the forgotten persons of the criminal justice system and little has been done to improve their predicament. Negotiated justice has the potential to further the trend towards alienating victims from the criminal justice system. It is, therefore, important that the role of victims be identified and defined in this context.

This study is limited to the rights of victims in plea and sentence agreements. It does not intend to provide a general analysis or historical overview of victims' rights. It is not limited to certain categories of victims based on age, gender, ethnicity or the like. Instead, it considers the rights of all victims who find themselves affiliated with a specific stage of the prosecution, namely, the plea and sentence agreement.

1.3 Literature review

There is, in the available literature, a discernible failure to examine the role of the victim in the context of South African plea and sentence agreements. The main reason for the failure arguably lies in the fact that the victims are denied a prominent role in the prosecution of crime.¹⁸ Since the emphasis is primarily on the rights of the offender, it is not surprising that, upon codification of plea and sentence agreements in South Africa, the accused should remain the centre of academic discourse.

Most of the work done in this area has placed emphasis on the impact of plea and sentence agreements on the rights of the accused, or on the role of the prosecutor and defence counsel. Furthermore, the legality of these agreements sparked heated debate among academics and this contributed towards the failure to consider the role of the

¹⁷ See the World Society of Victimology report to the United Nations Commission on Crime Prevention and Criminal Justice on 27 April 2006.

¹⁸ Clarke, Davis & Booysen (2003: 43). See also Meintjies-van der Walt (1998: 158).

victim in this context.¹⁹ South African victimologists continue to focus on the general role of the victim in the criminal justice system or on certain categories of victims, without due consideration for their specific role in negotiated justice.²⁰

1.3.1 Bekker: 'Plea bargaining in the United States of America and South Africa' (1996) & 'American plea bargaining in statutory form in South Africa' (2001)

The 1996 contribution by Bekker compares plea and sentence agreements in the United States of America (USA) with the then informal plea agreement system in South Africa.²¹ These agreements are practised extensively in the USA.²² It is predictable, therefore, that when South African scholars discuss the practice they rely to a large extent on the developments in the USA.²³

According to Bekker, a victim of crime in the American criminal justice system has two main interests. The first is restitution and the second is retribution.²⁴ He explains that a victim can protect these interests by participating in plea negotiation.²⁵ He notes that some states and the federal government of the USA have recognised victims' interest in plea negotiations and have granted victims a right to participate in the

¹⁹ See, for example, Burchell (2005: 16). See also De Villers (2004: 244) and further Clarke (1996: 143). See chapter 3 below for an analysis of the academic debate regarding the legality of these agreements.

²⁰ See, for example, the recent compilation by Davis & Snyman *Victimology in South Africa* and further the article by Clarke, Davis & Booyens (2003: 43). Both works were compiled after the enactment of section 105A, yet the authors fail to consider the role of the victim in the context of plea and sentence negotiations.

²¹ Bekker (1996: 168). See chapter 3 below for discussion of the informal plea agreement system in South Africa.

²² Uphoff (1995: 74) explains that over 90% of all criminal convictions in the USA are based on plea and sentence agreements.

²³ De Villers (2000: 244).

²⁴ Bekker (1996: 208).

²⁵ Bekker (1996: 208). The author uses the term 'plea negotiation' to denote both plea and sentence negotiation.

negotiation process.²⁶ To facilitate this right to participate, Bekker approves of the following proposal made in the context of USA plea negotiation: the prosecutor should be required to notify the victim, at least ten days before the plea bargaining hearing, of the proposed terms of the plea bargain.²⁷ In addition, the prosecutor should advise the victim of his right to participate at the hearing by being present or filing a sworn statement.²⁸ This study aims to determine, *inter alia*, whether the South African prosecutor should have a positive duty to notify the victim of the intended agreement and thereby afford the victim the opportunity to make representations regarding the contents of the agreement.

Bekker's 1996 article provides a useful example of the role of the victim in the context of plea and sentence agreements. However, it was written prior to the enactment of section 105A. The 2001 article, which was written after the South African Law Reform Commission²⁹ proposed the enactment of section 105A, is essentially a repetition of the 1996 article.³⁰ The later article omits a discussion of the role of the victim in favour of a discussion of the proposed enactment of section 105A. One of the objectives of this study is to address this omission. This will be achieved by comparing critically Bekker's 1996 contribution with the provisions of section 105A insofar as victim participation in the negotiation process is concerned.

²⁶ Bekker (1996: 208).

²⁷ Bekker (1996: 209).

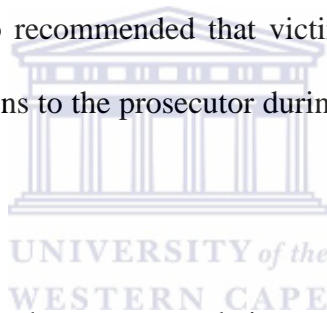
²⁸ Bekker (1996: 209).

²⁹ In 2002 the Judicial Matters Amendment Act amended the South African Law Commission Act 19 of 1973 to alter the Commission's name from the South African Law Commission to the South African Law Reform Commission.

³⁰ Bekker (2001: 319-321).

1.3.2 The South African Law Reform Commission (SALRC)

The SALRC has made significant contributions towards improving the role of victims in the criminal justice system. In its *Issue Paper on Sentencing: Restorative Justice* the SALRC proposes that victim impact statements be admissible at sentencing hearings.³¹ The proposal was repeated in the SALRC's Draft Sentencing Framework Bill (Sentencing Framework Bill).³² According to the SALRC, it found sufficient justification for the formal recognition of victim impact statements at sentencing.³³ The Bill requires the prosecutor to produce a victim impact statement when addressing the court on the appropriate sentence to impose.³⁴ This proposal could be classified, easily, as the most significant work in the area of victims' rights in South Africa. The SALRC has also recommended that victims or their representatives be allowed to make representations to the prosecutor during the negotiation of a plea and sentence agreement.³⁵



This study critically assesses the recommendations made by the SALRC and the extent to which they have been incorporated into section 105A. In addition, this study will seek to determine whether the SALRC recommendation on the use of victim impact statements can be incorporated into the structure of negotiated justice.

³¹ SALRC (2000) *Project 82: Issue Paper 7* paragraph 4.7.

³² SALRC (2000) *Project 82: Issue Paper 7* paragraph 4.7. See further SALRC (2000) *Project 82: Discussion Paper 91* Appendix B Part 1 paragraph 4.7.

³³ SALRC (2000) *Project 82: Report* paragraph 3.4.24.

³⁴ SALRC (2000) *Project 82: Report: The Draft Sentencing Framework Bill 2000* clause 47.

³⁵ See SALRC (2001) *Project 73: Fourth Interim Report* paragraph 6.33.

1.3.3 The South African Human Rights Commission (SAHRC)

Prior to its enactment, the SAHRC evaluated section 105A from a victim's perspective.³⁶ It recommended that the section be used to promote a victim-centric approach to the criminal justice system in South Africa. This recommendation is motivated with reference to the rights contained in the Victims' Charter.

The SAHRC states unequivocally that victims must be allowed to participate in plea and sentence negotiations.³⁷ To ensure victim participation, it recommended that section 105A place a positive duty on the prosecutor to provide the victim with an opportunity to be involved in the negotiations. The SAHRC opined that if the prosecutor has discretion to receive representations from the victim then the rights contained in the Victims' Charter fail to be recognised.³⁸ According to the SAHRC, there are only two instances in which victim participation in negotiated justice may be excluded, namely, where the victim does not want to participate in the process or where the victim is not available to participate.³⁹

This study will add to the SAHRC's contribution by interrogating critically the recognition of victims' rights in negotiated justice.

³⁶ SAHRC (2001: 1).

³⁷ SAHRC (2001: 5).

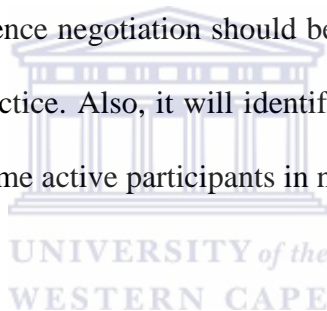
³⁸ SAHRC (2001: 5).

³⁹ SAHRC (2001: 5).

1.3.4 Du Toit *et al*: *Commentary on the Criminal Procedure Act*

The authors of the *Commentary on the Criminal Procedure Act* view section 105A as a section which promotes victim participation.⁴⁰ They emphasise that victim participation in the negotiation process will cultivate and strengthen society's acceptance of plea and sentence agreements.⁴¹ The work stresses that this kind of participation is necessary to promote the acceptance of the idea that an adversarial trial can be replaced by a plea and sentence agreement as contemplated in section 105A.⁴²

In the light of this submission, this study will assess critically whether victim participation in plea and sentence negotiation should be conceptualised as a means to achieve acceptance of the practice. Also, it will identify and assess the type of rights which victims require to become active participants in negotiated justice.



1.3.5 Davis & Snyman: *Victimology in South Africa*

The recent work by Davis & Snyman places victimology in South Africa in its proper context. Their contribution consists of a compilation of writings by authors considered to be experts in the field of victimology.⁴³ This compilation incorporates a number of issues ranging from defining and analysing key concepts in victimology to specific forms of victimisation and the future of victimology.

Secondary victimisation is analysed in the context of the South African criminal justice system and the need for victim participation in the criminal justice process is

⁴⁰ Du Toit *et al* (2006: 15-12). This loose-leaf publication is revised and updated regularly in accordance with changes made to the CPA.

⁴¹ Du Toit *et al* (2006: 15-12).

⁴² Du Toit *et al* (2006: 15-12).

⁴³ See the preface to Davis & Snyman (2005).

emphasised throughout the work.⁴⁴ However, none of the contributors considers secondary victimisation and the need for victim participation in the context of section 105A. Therefore, this research will analyse critically the application of the general guidelines provided by the authors in the circumscribed context of plea and sentence agreements.

1.3.6 Du Toit & Snyman (2001) ‘Plea-bargaining in South Africa: The need for a formalized trial run’

This work was compiled by the authors pursuant to a workshop on plea negotiation held by the University of the Free State.⁴⁵ Despite having been written prior to the enactment of section 105A, the article provides useful guidelines insofar as the role of the victim in plea and sentence negotiation is concerned. According to the authors, the victim frequently is neglected in the process of plea negotiations and, as a result, may harbour understandable objections towards the practice.⁴⁶ In addition to indicating approval of a dispensation which enables victims to voice their opinion to the trial judge prior to the acceptance of a plea agreement, the authors list the following suggestions:

- a) that the victim be afforded an opportunity to be heard;
- b) that the victim be informed of the planned plea bargaining proceedings and the possible contents of those proceedings, as well as his/her right to be heard;
- c) that should that right be disregarded, a complaint can be lodged; and
- d) that the victim will have no right of appeal against the decision of the court in accepting or rejecting the plea agreement.⁴⁷

The viability of these suggestions will be compared critically with section 105A.

⁴⁴ Bruce (2005: 102) and especially Louw & Pretorius (2005: 76).

⁴⁵ Du Toit & Snyman (2001: 144).

⁴⁶ Du Toit & Snyman (2001: 154).

⁴⁷ Du Toit & Snyman (2001: 154).

1.3.7 International works

The works of authors such as Welling and Kennard provide a useful foundation for this study. Welling's work identifies the right to participate in the plea agreement decision as the most significant right which might be accorded to victims in the context of negotiated justice.⁴⁸ Kennard discusses the nature and extent of a right to participate. She also proposes that victims have a right to veto a plea and sentence agreement.⁴⁹

While earlier work done by academics focused on crime and the victim's role in it, a new focus for the study of victims has taken shape. Davis rightly argues that we have come a long way since the first seminal works of von Hentig and Mendelsohn in the 1940s and 1950s which dealt primarily with victim precipitation.⁵⁰ South Africa is currently in a sharp developing curve as crucial issues such as the key concepts and the scope of victims' rights are debated.⁵¹ The theoretical framework which has resulted from these debates is valuable in determining the rights of victims during their encounters with the criminal justice system.

1.4 Research methodology

A critical-analytical approach will be adopted in this research. Reliance will be placed on primary and secondary sources relating to victimology and the practice of plea and sentence agreements. This literature-based study will be accompanied by a normative analysis of section 105A of the CPA.

⁴⁸ Welling (1987: 307).

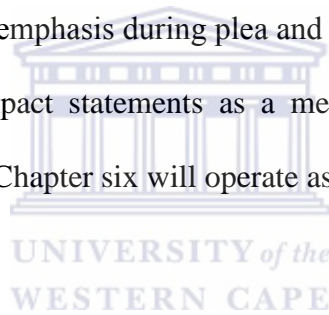
⁴⁹ Kennard (1989: 438).

⁵⁰ Davis (2005: 352).

⁵¹ Snyman (2005: 3).

1.5 Overview of chapters

The study consists of six chapters. This chapter provides the framework for the study. It outlines the basis and structure of the study. The second chapter will provide an overview of key concepts which are to be used throughout this study. It will provide also a basic introduction to the victims' right movement in South Africa and it will analyse critically the status of victims' rights under the South African Constitution. Chapter three will analyse the development of plea and sentence agreements. In this regard, the informal plea agreement system will be considered as well as the recommendations made by the SALRC for codification of this system. Thereafter section 105A will be evaluated. The fourth chapter will identify and analyse those victims' rights which require emphasis during plea and sentence negotiations. Chapter five will consider victim impact statements as a means of improving the role of victims in negotiated justice. Chapter six will operate as a conclusion to the study.



CHAPTER TWO

SETTING THE SCENE: AN OVERVIEW OF BASIC CONCEPTS AND OF THE VICTIMS' RIGHTS MOVEMENT IN SOUTH AFRICA

2.1 Introduction

This chapter commences by defining the key concepts which are to be used throughout the research. This is followed by a basic introduction to the victims' rights movement in South Africa. It will reflect upon the rampant victimisation experienced during the apartheid era and upon the importance of South Africa's transition from apartheid to a democracy for victims' rights. The legal platform for the development of victim-based legislation and policies provided by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the South African Constitution will be discussed. In this regard, the fight for constitutionally recognised procedural rights for victims of crime will be considered.

The chapter will conclude with an analysis of government's response to the need for victim-based legislation, namely, the adoption of the Service Charter for Victims of Crime in South Africa and Minimum Standards on Services for Victims of Crime. The significance and effectiveness of these instruments will be analysed.

2.2 Definitions and basic concepts

2.2.1 Negotiation

Negotiation has been defined as a process whereby opposing parties attempt to resolve their dispute by reaching an agreement on a course of action which serves their conflicting interests.¹ In the context of plea and sentence negotiations the opposing parties are the state and the accused. Here the negotiation is aimed at finding a solution which is satisfactory to both parties.²

Bargaining is used often as a synonym for negotiation. However, the word ‘bargain’ is rich in connotation and provides a frequent source of misunderstanding of the negotiation process.³ The public perception of a bargain is associated with its ordinary meaning, namely, ‘a thing obtained cheaply’.⁴ Bargaining is interpreted, therefore, to mean that justice may be bought, and cheaply to boot.⁵ It may suggest also that the criminal justice system condones the conduct of the offender because it has reduced his accountability.⁶ The fact that it may reduce the current backlogs in criminal courts often is overlooked when this concept is used. Instead, bargaining with an accused is perceived as a sign of weakness in the criminal justice system. The cumulative effect of these misconceptions leads to the inference that bargaining reduces the worth of justice and is the result of an inadequate criminal justice system. The word is,

¹ Bekker (1996: 173).

² See *North Western Dense Concrete CC and Another v DPP (Western Cape)* 1999 (2) SACR 669 (C) at 674 paragraph c. The court describes negotiation as a mutually acceptable compromise.

³ Bekker (2001: 310). The author describes the word ‘bargain’ in the phrase plea bargaining as misleading, inflammatory and pejorative, rather than descriptive of what actually occurs.

⁴ *The Oxford Dictionary and Thesaurus* (1996: 36).

⁵ Du Toit & Snyman (2001: 152). See also Bekker (2001: 310) who states that the word bargain suggests the idea of bargain basement justice and white sales day at the courthouse. See further SALRC (2001) *Project 73: Fourth Interim Report* paragraph 5.9. The SALRC opines that the term ‘plea bargaining’ is not an appropriate description of the process because justice is seen to be something that can be purchased at a bargaining table.

⁶ Bekker (2001: 311).

therefore, an unfortunate choice to describe a process in which both the state and the accused make concessions.⁷

The term 'negotiation' is preferred and used in this study, because it averts the inference of weakness or condonation on the part of the state. Furthermore, it defines more accurately a situation in which opposing parties could benefit from the compromise reached.⁸

2.2.2 Plea and sentence negotiation

A definition of the concept of plea negotiation has not been settled.⁹ Attempts to explicate the term have resulted in a number of definitions and, in some cases, noticeable contradictions.¹⁰ This divergence is illustrated in the SALRC's *Discussion Paper 94* where no fewer than four possible definitions are listed.¹¹ Thus, a plea negotiation may denote:

1. any agreement by the accused to plead guilty in return for the promise of some benefit,¹²
2. the exchange of official concessions for the accused's act of self-conviction,¹³
3. any agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a course of action,¹⁴ and
4. the practice of relinquishing the right to go to trial in exchange for a reduction in charge and/or sentence.¹⁵

⁷ Bekker (1996: 173).

⁸ Bekker (1996: 173). See also *North Western Dense Concrete CC and Another v DPP (Western Cape)* at 674 paragraph c.

⁹ Bekker (2001: 310).

¹⁰ See, for example, Bekker (1996: 172) who explains that given the central importance of plea bargaining in the administration of criminal justice in the USA, it is surprising to find divergence and confusion over what constitutes plea bargaining.

¹¹ SALRC (2001) *Project 73: Discussion Paper 94* paragraphs 2.3 - 2.6. In this discussion the SALRC uses the term plea bargaining as opposed to plea negotiation.

¹² Alshulser (1979: 5) as cited in SALRC (2001) *Project 73: Discussion Paper 94* paragraph 2.4

¹³ Law Reform Commission of Canada (1975) *Criminal Procedure: Control of the Process Working Paper 15* at 45, as cited in SALRC (2001) *Project 73: Discussion Paper 94* paragraph 2.4.

¹⁴ SALRC (2001) *Project 73: Discussion Paper 94* paragraph 2.5.

It is submitted that none of the above definitions accurately defines plea negotiation because each fails to give effect to the proper meaning of the concept. Firstly, since the negotiation precedes the actual agreement, to refer to plea negotiation as an agreement obviously is flawed. Hence, the definitions quoted by the SALRC fail to distinguish between the term 'plea negotiation' (referred to as plea bargaining) and the term 'plea agreement'. Secondly, plea negotiation is not a synonym for sentence negotiation. As is demonstrated below, they are distinct concepts.

A suitable starting point for any definition of plea negotiation would be to acknowledge that it entails a negotiation of the charge against the accused and the plea to be entered by the accused.¹⁶ In a plea negotiation the legal representative of the accused uses a guilty plea as his negotiating tool while the prosecutor uses his discretion to reduce the charge against the accused as his negotiating tool. The accused may offer additional benefits to the prosecutor, such as restitution to the victim, providing information to the police or testifying against others.¹⁷ At this stage both parties have knowledge of the facts set out in the police docket, as well as of their respective likelihoods of success should the matter go to trial.¹⁸ The legal representative of the accused may offer a guilty plea to a less serious charge, with or without the additions mentioned above, subject to the prosecutor dismissing the more

¹⁵ Isakow & Van Zyl Smit (1985: 173) as discussed by the SALRC (2001) *Project 73: Discussion Paper 94* paragraph 2.6 and approved by Uijs AJ in *North Western Dense Concrete CC and Another v DPP (Western Cape)* at 679 paragraph e.

¹⁶ SAHRC (2001: 4).

¹⁷ Bekker (2001: 315).

¹⁸ Du Toit & Snyman (2001: 146). See further *Shabalala v Attorney-General of Transvaal & others 1995 (2) SACR 761 (CC)* at 790 paragraph c. In this case the Constitutional Court held that an accused person is entitled to have access to the documents in the police docket which are exculpatory (or which are *prima facie* likely to be helpful to the defence) unless, in very rare cases, the state is able to justify the refusal of such access on the grounds that it is not justified for the purposes of a fair trial. Prior to this decision information contained in a police docket was privileged in favour of the state.

serious charge. By contrast, the prosecutor will attempt to secure a guilty plea to a charge embodying the moral blameworthiness of the accused's unlawful conduct.¹⁹

Thus, the term 'plea negotiation' is used in this study to denote negotiations regarding the charge against the accused and the plea to be entered by the accused. Although this may influence the sentence finally imposed, plea negotiation does not include any reference to sentence negotiation.²⁰

Sentence negotiation differs from plea negotiation. In a sentence negotiation, the accused would offer a guilty plea in exchange for the prosecutor recommending leniency when sentencing is considered by the court. Alternatively, the accused may offer his guilty plea subject to the court imposing the sentence negotiated between the parties.²¹ The latter finds application when the negotiation is aimed at concluding a statutory plea and sentence agreement provided for in section 105A of the CPA.²² It is important to note that the court is not bound by a negotiated sentence because sentencing is regarded as the domain of the courts. The court therefore retains its sentencing discretion.²³

While sentence negotiation is generally an accompaniment to plea negotiation, there may be instances where the charge against the accused is not reduced. A reduction in charge may not occur if the state aims to secure a guilty plea in exchange for its lenient sentence recommendation, or where the accused aims to secure a non-

¹⁹ Du Toit & Snyman (2001: 146).

²⁰ See, for example, Bekker (2001: 318) who states that in most instances a guilty plea will be viewed as a sign of remorse and will in itself lead to some reduction in sentence.

²¹ Bekker (2001: 313).

²² See chapter 3 below for discussion of section 105A agreements.

²³ See SALRC (2001) *Project 73: Discussion Paper 94* paragraph 3.23 and also Clarke (1996: 162).

custodial sentence or a specified term of incarceration in exchange for his guilty plea. These negotiations would not necessarily include negotiating a reduction in charge.

2.2.3 Plea and sentence agreements

In this study the term ‘plea agreement’ is used in its strictest sense. It denotes the agreement finally concluded between the state and an accused whereby the accused enters a guilty plea in exchange for being able to plead to a reduced charge.²⁴ As explained above, the agreement may include additional benefits for the state such as the accused compensating the victim, providing information to the police or giving testimony against other accused.²⁵

The SALRC has identified two types of sentence agreements.²⁶ The first involves the prosecutor, in exchange for a guilty plea, undertaking to recommend a particular sentence to the court or agreeing not to oppose the sentence proposed by the defence.²⁷ The second entails the accused agreeing to plead guilty provided that the sentence negotiated between the parties is accepted by the court.²⁸ The second type of sentence agreement is regulated by section 105A of the CPA. The difference between the two types of agreements lies in the consequences of rejection by the court. If the court ignores the recommendation or proposal in the first agreement, and instead imposes a sentence it considers just, then the accused may not withdraw his guilty plea.²⁹ However, if the court rejects the second agreement the accused will be

²⁴ SAHRC (2001: 2).

²⁵ Bekker (2001: 315).

²⁶ SALRC (2001) *Project 73: Discussion Paper 94* paragraph 5.16.

²⁷ SALRC (2001) *Project 73: Discussion Paper 94* paragraph 5.16. See also Bekker (2001: 313 & 323).

²⁸ SALRC (2001) *Project 73: Discussion Paper 94* paragraph 5.17.

²⁹ SALRC (2001) *Project 73: Discussion Paper 94* paragraph 5.16.

informed thereof.³⁰ The accused then has a choice. Either he may withdraw his plea and a trial will commence *de novo* before a different presiding officer, or he may abide by his plea and accept the sentence which the court intends to impose.³¹

South African courts have developed a concise and combined definition of plea and sentence agreements. According to the courts, plea and sentence agreements may be summarised as:

The practice of an accused relinquishing the right to go to trial by offering a plea of guilty in exchange for a reduction in both charge and sentence.³²

This definition is both acceptable and accurate because it incorporates all the facets of plea and sentence agreements explained above.

2.2.4 Negotiated justice

The term 'negotiated justice' may be used to denote plea and sentence negotiations as well as plea and sentence agreements.³³ Due to its versatility it may be used when the negotiation or agreement pertains to:

- a guilty plea to a lesser charge and a reduced sentence recommendation, or
- a guilty plea to a lesser charge without a reduced sentence recommendation, or
- a reduced sentence recommendation without a reduction in charge.

³⁰ Section 105A(9)(a).

³¹ Section 105A(9)(b) read with subsections (c) and (d). For discussion see SALRC (2001) *Project 73: Discussion Paper 94* paragraph 5.17.

³² See *North Western Dense Concrete CC and Another v DPP (Western Cape)* at 670 paragraph c and also *S v Armugga & Others* 2005 (2) SACR 259 at 265 paragraph b.

³³ See, for example, Isakow & Van Zyl Smit (1985: 173-174).

2.2.5 Victimology

Victimology is the scientific study of victims of crime.³⁴ It is defined by the World Society of Victimology as:

The scientific study of the extent, nature and causes of criminal victimisation, its consequences for the persons involved and the reactions thereto by society, in particular the police and the criminal justice system as well as voluntary workers and professional helpers.³⁵

The systematic study of victims began only in the late 1940s, rendering victimology a relatively young discipline.³⁶ This may be attributed to the fact that the criminal justice system for decades had focused on offenders.³⁷ In 1956 Mendelsohn coined the term 'victimology'.³⁸ The first twenty years of the new discipline was restricted to the victim's contribution to the commission of the crime. In other words, most research between 1940 and 1960 was founded on the notion of victim precipitation.³⁹ This position was vigorously attacked by the feminist movement which emerged during the 1960s.⁴⁰ The feminist movement and establishment of the World Society of Victimology shifted the focus of this discipline from victim precipitation to that which forms the foundation of this thesis, namely, the promotion of victims' rights in the criminal justice system.

³⁴ Schurink (1992: 5).

³⁵ Snyman (2005: 4).

³⁶ Schurink (1992: 7). In 1948, Von Hentig's *The Criminal and his Victim* put the study of the victim in the spotlight. This publication paved the way for victimology discourse and is today regarded as the seminal text in the development of victim studies.

³⁷ See Karmen (1994: 8) who opines that at that time the main current within criminology was offenderology.

³⁸ Karmen (1994: 10). See also Snyman (2005: 5). However, it should be noted that Fattah (2000: 2) disagrees with most authors. He claims that the American psychiatrist, Wertham, first coined the term victimology.

³⁹ Schurink (1992:9).

⁴⁰ O'Connor (2004: 2). See also Zedner (2003: 4).

2.2.6 The general concept of the victim

The term 'victim' has undergone a fascinating metamorphosis over the centuries.⁴¹ According to Karmen, its original meaning lies in the religious notion of sacrifice, the term being used to refer to a person or animal put to death to satisfy a supernatural power or deity.⁴² Over the centuries 'victim' came to have additional meanings when the ideas of personal injury, loss and suffering developed.⁴³ Interestingly, the definition in the *Oxford English Dictionary & Thesaurus* reflects both the original meaning and the expansion thereon in that it defines a victim as 'a person injured, killed or made to suffer or a creature sacrificed to a god'.⁴⁴ It may be concluded, therefore, that the historical meaning has been retained. However, contemporary society places emphasis on the notion of the victim as one who suffers personal injury or loss as opposed to one who is sacrificed in accordance with religious rituals.

The explanation above renders the concept exceptionally broad. It permits indiscriminate use of the term because it includes multifaceted categories of victims.⁴⁵ These categories include, *inter alia*, victims such as cancer victims, accident victims, holocaust victims and even hurricane victims.⁴⁶ It is, therefore, necessary to state that hereinafter reference to the term 'victim' will be limited to victims of crime or the so-called 'crime victim', as defined below.

⁴¹ Schurink (1992: 5).

⁴² Karmen (1994: 2). See Schurink (1992: 5) for discussion.

⁴³ See Schurink (1992: 5).

⁴⁴ *The Oxford Dictionary and Thesaurus* (1996: 570).

⁴⁵ O'Connor (2004: 1). According to the author, all these usages have in common an image of someone who has suffered injury and harm by forces beyond his or her control. This statement demonstrates the broad nature of the term.

⁴⁶ O'Connor (2004: 2).

2.2.7 The victim of crime

This concept has multiple definitions and selecting a suitable definition is not an easy task. Victims of crime are defined by the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Declaration) as:

Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.⁴⁷

The UN Declaration further states that:

A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.⁴⁸

The UN definition is broad in that it includes next of kin, descendants, direct and indirect victims. Yet, at the same time it identifies and defines the victim as the one who has suffered harm either directly or indirectly, and the offender as the one who has inflicted the harm unlawfully.⁴⁹

The SALRC, with the exception of moderate adjustments, has relied on the UN definition in its discussion of compensation for victims of crime.⁵⁰ According to the SALRC:

Victims are persons who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions

⁴⁷ Article 1 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by the General Assembly resolution 40/34 of 29 November 1985. The UN Declaration has been ratified by the South African government. Thus, reliance on the provisions contained therein is not imprudent.

⁴⁸ Article 2 of the UN Declaration.

⁴⁹ Article 1 of the UN Declaration.

⁵⁰ SALRC (1997) *Project 82: Issue Paper 7* paragraph 1.7.

that are in violation of criminal laws. The term therefore includes direct victims (the person who was directly prejudiced by the commission of the crime) as well as indirect victims (persons who were not directly involved in the crime, but who were directly prejudiced as a result thereof, for example, the family of a victim of a murder).⁵¹

Against this background and for the purposes of this study, a victim of crime may be defined as a person who has suffered harm directly or indirectly as a result of the commission of a crime.

2.2.8 Victimization

Victimization is a broad concept in that, like the term ‘victim’, it permits a multifaceted and inclusive understanding of the range of persons within its parameters.⁵² For the purposes of this study, the scope of victimisation will be limited to crime victims as defined above. The definition provided by Pretorius & Louw reflects this restricted scope:

Victimization refers to the process whereby a person suffers harm through the violation of national criminal laws or internationally recognised norms relating to human rights.⁵³

By identifying four stages which determine whether victimisation has occurred, Snyman clarifies the ‘process of victimisation’ referred to by Pretorius & Louw.⁵⁴ The first stage of this process requires that the individual suffer an injury which has been caused by a person or institution.⁵⁵ The second stage requires that the injured view his suffering as unjust and unwarranted.⁵⁶ The injured therefore views himself as victim. In the third stage the injured looks towards the criminal justice system for recognition

⁵¹ SALRC (1997) *Project 82: Issue Paper 7* paragraph 1.7.

⁵² Snyman (2005: 7).

⁵³ Pretorius & Louw (2005: 74).

⁵⁴ Snyman (2005: 9).

⁵⁵ Snyman (2005: 9).

⁵⁶ Snyman (2005: 9).

of the fact that he has become a victim.⁵⁷ The final stage requires the recognition and acknowledgement of the community that the injured has been victimised.⁵⁸ According to Snyman, victimisation is apparent if the injured proceeds through all four stages.⁵⁹

It is beyond the scope of this thesis to provide a detailed critique of the four stages of victimisation when the injury to the victim is inflicted by the offender. This is known as primary victimisation. Instead, the study focus is on the potential injury to the victim caused by the criminal justice system and, more specifically, the injury caused by victim exclusion in the context of negotiated justice. This is known as secondary victimisation.



2.2.9 Secondary victimisation

In addition to the victimisation caused by the conduct of the offender, victims often experience distress in their encounters with the criminal justice system and criminal justice officials.⁶⁰ Difficulties, such as insensitive treatment by criminal justice officials and being kept on the periphery (because criminal cases are conducted as a matter between the state and offender), are frequent sources of distress for the victim.⁶¹ Often, therefore, victims are victimised twice, first by the offender and then by the criminal justice system.⁶² Secondary victimisation denotes the additional wound inflicted upon the victim by the criminal justice system.⁶³

⁵⁷ Snyman (2005: 10).

⁵⁸ Snyman (2005: 10).

⁵⁹ Snyman (2005: 9).

⁶⁰ Meintjies-van der Walt (1998: 163).

⁶¹ Meintjies-van der Walt (1998: 163). See also Bruce (2005: 102) and further Camerer (1996: 2)

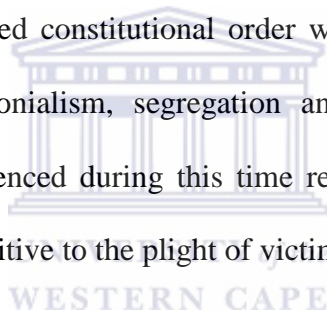
⁶² Snyman (2005:3).

⁶³ Meintjies-van der Walt (1998: 163). See further Bruce (2005: 102).

2.3 South Africa's transition to constitutional democracy

South Africa's transition from apartheid to a constitutional democracy provided the impetus for the establishment of victims' rights.⁶⁴ In order to develop a proper appreciation of the victims' rights movement in South Africa, a basic understanding of the origin of the movement is required.

Under the apartheid state the criminal justice system served as an instrument of oppression against most South Africans.⁶⁵ Far-reaching laws such as the Group Areas Act⁶⁶ and Immorality Act⁶⁷ shaped the most intimate forms of social interaction, including where one lived and whom one married.⁶⁸ The 1993 Constitution brought an end to the racially-qualified constitutional order which had accompanied nearly three hundred years of colonialism, segregation and apartheid.⁶⁹ However, the rampant victimisation experienced during this time rendered a newly democratised South Africa particularly sensitive to the plight of victims of crime.



In the aftermath of apartheid, South Africa diligently focused on the gross human rights violations associated with the former repressive regime.⁷⁰ During 1995 the Truth and Reconciliation Commission (TRC) was established.⁷¹ One of the functions of the TRC would be to provide amnesty to the perpetrators of human rights violations in exchange for full disclosure of the crimes they had committed.⁷² During

⁶⁴ See Artz & Smythe (2005: 131) and further Bruce (2005: 100).

⁶⁵ Bruce (2005: 101).

⁶⁶ Act 41 of 1950.

⁶⁷ Act 5 of 1927.

⁶⁸ See Artz & Smythe (2005: 132) for discussion.

⁶⁹ Act 200 of 1993. See Currie & de Waal (2005: 2).

⁷⁰ Garkawe (2003: 334).

⁷¹ Garkawe (2003: 334). According to the author 'the establishment of truth commissions is a dominant means by which states "in transition" and the international community have dealt with perpetrators of gross violations of human rights'.

⁷² Garkawe (2003: 334).

this process victims and their families were allowed an opportunity to communicate the effect of the harm inflicted by the perpetrator. Though it is outside the scope of this thesis to analyse the TRC proceedings, it must be acknowledged that the TRC gave prominent recognition to victims of crime in South Africa and raised the rights of crime victims from a secondary consideration to the forefront of the criminal justice system.⁷³

The transition to democracy, combined with the momentum created by the TRC process, spawned a new trend in South African victimology. For the first time, victimologists were able to use the law to address both primary and secondary victimisation.⁷⁴ They relied on the Constitution and the government's ratification of international instruments such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. It was argued that these instruments provide a legal platform for the development of victim-based legislation and policies.⁷⁵

2.4 The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

The UN Declaration is regarded as the most important victim-orientated international instrument ratified by South Africa.⁷⁶ It is based on the philosophy that victims should be treated with compassion and respect for their dignity, and that they are entitled to access to the criminal justice system and to prompt redress for the harm which they have suffered.⁷⁷

⁷³ Garkawe (2003: 334). See further Snyman (2005: 6).

⁷⁴ Artz & Smythe (2005: 132).

⁷⁵ Artz & Smythe (2005: 132).

⁷⁶ Artz & Smythe (2005: 134).

⁷⁷ See Article 4 of the UN Declaration and for discussion see Pretorius & Louw (2005: 78) and further Snyman (2005: 5).

It instructs States Parties to develop judicial and administrative processes which facilitate a responsive criminal justice system.⁷⁸ Article 6 explains that a responsive criminal justice system is achieved by keeping victims informed of the progress of the matter, allowing their views and concerns to be presented and considered at appropriate stages, and by providing proper assistance to victims throughout the legal process.⁷⁹ Pretorius & Louw summarise the rights contained in the UN Declaration as follows:

In an effort to facilitate the establishment of minimum service standards for victims, the UN Declaration emphasises the following victims' rights, namely,

- the right to be treated with respect and dignity,
- the right to offer and receive information,
- the right to legal advice,
- the right to protection,
- the right to restitution and
- the right to compensation.⁸⁰

It should be emphasised, however, that the UN Declaration does not confer rights on crime victims. Instead, it places emphasis on the identification and affirmation of victims' rights which exist already in the state's criminal justice system.⁸¹ States Parties, such as South Africa, were required to develop their legal process in accordance with the principles established by the UN Declaration. Thus, South Africa's ratification of the UN Declaration placed a duty on the state to act in fulfilment of the obligations contained therein.⁸²

⁷⁸ See Article 5 of the UN Declaration. For discussion see Pretorius & Louw (2005: 79).

⁷⁹ See Article 6(a), (b) & (c) of the UN Declaration.

⁸⁰ Pretorius & Louw (2005: 78).

⁸¹ See Snyman (2005: 5) who explains that despite the foundation that the UN Declaration provides for the development of victimology internationally it does not bestow rights.

⁸² See Artz & Smythe (2005: 133). Section 231 of the Constitution provides, *inter alia*, that the Republic is bound by international agreements which have been ratified by the national executive.

2.5 The role of the South African Constitution in determining the rights of victims

The Constitution of the Republic of South Africa is regarded by many as the most ambitious and liberal constitution in the world.⁸³ In its founding provisions the Constitution describes the Republic of South Africa as a sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.⁸⁴ Section 7 states that the Bill of Rights, contained in chapter 2 of the Constitution, is the cornerstone of democracy because it enshrines the rights of the people and affirms the democratic values of the state.⁸⁵ The phrase ‘the rights of the people’ is significant because the Bill of Rights goes on to entrench rights of certain groups of people such as women, children, employees, employers and accused, arrested and detained persons. The victim of crime does not feature in these groups.⁸⁶ Hence, the Constitution does not contain a specific provision dedicated to determining the rights of crime victims. It is significant that, notwithstanding its classification as ambitious and liberal, the Constitution fails to establish basic rights for victims of crime.

2.5.1 Circumlocutory rights

The absence of a dedicated constitutional provision for victims has caused some to look to provisions from which the constitutional rights of victims may be construed.⁸⁷

⁸³ See, for example, Kgosimore (2000) paragraph 2.

⁸⁴ Section 1(a).

⁸⁵ Section 7(1).

⁸⁶ See Kgosimore (2000) paragraphs 2 & 3.

⁸⁷ See, for example, Pieterse (2002: 27). At 34 the author, states that the rights to life, dignity and freedom and security of the person are interdependent because the state’s duty to prevent victimisation may be construed from all of these rights.

In this regard, the constitutional rights to equality,⁸⁸ human dignity,⁸⁹ life⁹⁰ and freedom and security of the person⁹¹ have been viewed as circumlocutory rights⁹² for victims of crime.

The right to equality is premised on the idea that every person possesses equal human dignity and is entitled to equal protection of the law.⁹³ In its report on a new sentencing framework, the SALRC explained that equal protection of the law, promised by section 9(1) of the Constitution, means that the rights of victims must be reflected in criminal justice procedures.⁹⁴ The Constitutional Court has stated that the right to dignity provides the foundation for the right to equality.⁹⁵ In the groundbreaking decision of *Makwanyane*, O' Regan J explained that the right to dignity entails the right to be treated as worthy of respect and concern.⁹⁶ Inherently, both primary and secondary victimisation entails an absence of respect and concern for the victim. Thus, all acts of victimisation are infringements of the right to dignity. In addition to the above, all too frequently, acts of violence destroy the victim's constitutional right to life.⁹⁷

⁸⁸ See section 9(1) of the Constitution which provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

⁸⁹ See section 10 which provides that everyone has inherent dignity and the right to have their dignity respected and protected.

⁹⁰ See section 11 which provides that everyone has the right to life.

⁹¹ See section 12(1)(c) which provides that everyone has the right to freedom and security of the person which includes the right to be free from all forms of violence from either public or private sources.

⁹² For the purpose of this study the term 'circumlocutory rights' is used to explain the constitutional rights of victims of crime.

⁹³ De Waal, Currie & Erasmus (2001: 232).

⁹⁴ SALRC (2000) *Project 82: Report* paragraph 1.4.

⁹⁵ See *National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)* at paragraph 30, *S v Makwanyane 1995 (3) SA 391 (CC)* at paragraph 144 and also De Waal, Currie & Erasmus (2001: 230) for their discussion of the central role of human dignity in the Constitution.

⁹⁶ See *S v Makwanyane* at paragraph 328.

⁹⁷ See, for example, Combrinck (2005: 173-174) who discusses the provisions in the Bill of Rights which are infringed by acts of violence against women.

The right to freedom from all forms of violence, contained in section 12, is viewed as particularly appropriate for victims.⁹⁸ According to Artz & Smythe the scope of this right extends beyond a due process guarantee against arbitrary arrest and detention, to a more substantial guarantee applicable to victims of crime.⁹⁹ This ‘substantial guarantee’ is classified by Pieterse as a justiciable right which is capable of enforcement not only against the state but also against private individuals.¹⁰⁰ Pieterse explains that, in terms of this provision, both the state and its citizens have a duty to refrain from violent behaviour.¹⁰¹ This is because the provision is violated by acts of violence or omissions to prevent acts of violence.¹⁰² Thus, the right to be free from all forms of violence provides a fundamental basis for victims’ rights.

The Constitution places a further duty on the state in relation to victims of crime. Section 7(2) requires the state to respect, protect, promote and fulfil the rights contained in the Bill of Rights. The significance of this section was acknowledged by the Supreme Court of Appeal (SCA) in *Minister of Safety and Security v Van Duivenboden*.¹⁰³ The SCA stated that while there might be no similar constitutional

⁹⁸ Combrinck (2005: 173). See also Artz & Smythe (2005: 135), the authors’ state that the South African constitution is unique in its inclusion of this right and the inclusion of the words ‘private’ violence.

⁹⁹ Artz & Smythe (2005: 135). See also Combrinck (1998: 683) who explains that the wording of section 12(1)(c) may be seen as ‘eliminating any suggestion that the right to security should only apply in a due process context’. This has been also the approach of the Constitutional Court. In *Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)* paragraph 47, the court explains that the right to freedom and security of the person is additional to and not a substitute for the due process guarantee.

¹⁰⁰ Pieterse (2002: 28).

¹⁰¹ Pieterse (2002: 31). See also 28 where the author states that ‘section 12(1)(c) seems to create positive duties which are enforceable directly against both the state and private individuals’.

¹⁰² Pieterse (2002: 31). The author adds that ‘it would be safe to assume that courts would be called upon to vindicate this right after physical violation thereof had already occurred’. Thus, vindication or rather the enforcement of section 12(1)(c) occurs *ex post facto*. For an example of state omissions to prevent violence see *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) & 2003 (2) SA 656 (C)*.

¹⁰³ *Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA)*. The significance of this section for victims of crime has been acknowledged by authors such as Pieterse (2002: 29), Combrinck (1998: 683) and Artz & Smythe (2005: 135).

imperatives in other jurisdictions, in this country the state has a positive constitutional duty to act in protection of the rights in the Bill of Rights.¹⁰⁴ Combrinck argues, convincingly, that the section actually expands the ambit of constitutional rights well beyond the immediate implication that the state (and its organs) should refrain from committing acts of violence.¹⁰⁵ It also imposes a duty on the state to be proactive and take steps to ensure the realisation and protection of these rights.¹⁰⁶ The state, therefore, has a constitutional duty not only to respect but also to protect, promote and fulfil the victim's right to equality, human dignity, life and freedom and security of person.¹⁰⁷

The conclusion that victims of crime have constitutional rights is evident from the discussions above. However, the problem with a theoretical argument which supports the notion that victims' rights are included in the Constitution by implication is that it loses substance when translated into practice. The argument is inadequate when applied to victims who encounter the criminal justice system on a daily basis. A more meaningful approach to constitutional rights for victims requires an express declaration of such rights.

¹⁰⁴ *Minister of Safety and Security v Van Duivenboden* at paragraph 20.

¹⁰⁵ Combrinck (2005: 174). See also Artz & Smthye (2005: 136).

¹⁰⁶ Combrinck (2005: 174). See also Pieterse (2002: 28-29) who states that legislative steps should be taken to enforce section 12(1)(c).

¹⁰⁷ Section 7(2) read with sections 9, 10, 11 and 12.

2.5.1 The fight for procedural rights

There is a lack of ambition to entrench procedural rights for crime victims. The human rights order created by the Bill of Rights entrenches several procedural rights which apply to detained, arrested and accused persons.¹⁰⁸ Yet, it does not contain procedural rights for victims of crime.¹⁰⁹ This has resulted in the realisation that, within the criminal justice system, there is an imbalance between the rights of the victim and those of the accused.¹¹⁰

Whereas the Bill of Rights provides the accused with an instrument with which to claim his right to justice, it has failed to ensure the same for victims of crime. Some authors believe that this omission is due to the constitutional framers taking the position that allowing victims constitutional rights will infringe on the rights of accused persons.¹¹¹ This position is not justifiable because it contradicts the promise of equality before the law. Equality is not a principle which lives in abstraction.¹¹² It requires comparison.¹¹³ For example, if the Constitution had entrenched organisational rights of employees without considering the rights of their adversaries, the employers, there would have been discrimination against the latter.¹¹⁴ Similarly, the rights of the victim should be taken into account and catered for when providing for the rights of an offender. Failure to extend the notion of equal treatment to victims

¹⁰⁸ See section 35 and also SALRC (2003) *Project 107: Discussion Paper 102* at paragraph 40.3.1 the Project Committee states that section 35 entrenches a plethora of rights to arrested, detained and accused persons.

¹⁰⁹ See, for example, Camerer (1999: 1). After discussing the rampant criminality in South Africa, the author states that 'ironically, while our Constitution contains two-and-a-half pages on the rights of suspects and the accused, it is silent on the rights of victims of crime'.

¹¹⁰ Camerer (1997: 4) See also Kgosimore (2000) paragraph 2 where the author classifies the Constitution as 'offender-friendly'.

¹¹¹ Kgosimore (2000) paragraph 2.

¹¹² See Van Wyk (1994: 196).

¹¹³ Van Wyk (1994: 196).

¹¹⁴ See section 23 of the Constitution and Kgosimore (2002) paragraph 2 for discussion.

of crime has caused a visible imbalance between the rights of the victim and those of the offender.

The need to rectify this imbalance is apparent and is motivated, further, by the fact that South Africa is considered to be one of the most violent societies in the world.¹¹⁵

The transition to democracy has been characterised by rising crime levels.¹¹⁶ This has resulted in the belief that fundamental rights and freedoms facilitate criminal conduct.¹¹⁷ Meintjies-van der Walt explains that, in some quarters, there is a belief that the victimisation being experienced today is a consequence of the new human rights order.¹¹⁸ The author warns that this is a dangerous fallacy because the very essence of human rights demands that the law be respected.¹¹⁹ Although academics like Meintjies-van der Walt have presented sound legal arguments to counter these beliefs, their arguments have not stemmed the growing perception that the criminal justice system places undue emphasis on the rights of suspected criminals while displaying insufficient concern for the rights of law-abiding people who become crime victims.¹²⁰

It is submitted that the constitutional imbalance between the rights of the accused and those of the victim can be rectified only by amending the Constitution. The

¹¹⁵ Meintjies-van der Walt (1998: 157).

¹¹⁶ Camerer (1997: 1). At 2 the author explains that the increase in crime in South Africa is consistent with other countries undergoing similar transitions to democracy.

¹¹⁷ Meintjies-van der Walt (1998: 158).

¹¹⁸ Meintjies-van der Walt (1998: 158).

¹¹⁹ Meintjies-van der Walt (1998: 158).

¹²⁰ See Camerer (1997: 2). The author states that 'since the enactment of the interim Constitution and the consequent promulgation of the final Constitution, both of which entrenched several procedural rights of detained, arrested and accused persons, there has been the public perception that there is undue emphasis on the rights of suspected criminals'. See also the SAHRC (2001: 8). According to SAHRC there is a perception amongst the public that human rights and the criminal justice system favour the criminal at the expense of the victim and by excluding the victim from the criminal justice process, the perception is further enhanced.

amendment should provide for the constitutional recognition of procedural rights for victims of crime. The need for a constitutional amendment which entrenches the rights of victims combined with the enactment of appropriate victim-based legislation is patent. In this regard, the proposal recently submitted by Naude to the Parliamentary Monitoring Group (PMG) is useful.¹²¹ According to Naude, victims' rights which require constitutional recognition include the right to be treated with dignity and respect by the criminal justice system, the right to receive protection, assistance and treatment, the right of access to information about the criminal proceedings, the right to receive restitution and compensation, and the right to submit a victim impact statement to court which would draw judicial attention to the harm suffered.¹²² It was recommended that the PMG Constitutional Review Committee refer the proposal to the relevant Portfolio Committee to consider the appropriate amendment.¹²³



The African National Congress (ANC) has objected to the proposal. According to the ruling party 'this is a policy decision and a political matter and not a subject for constitutional amendment'.¹²⁴ It is difficult to find merit in the ANC's objection. Firstly, the issue of victims' rights cannot be dealt with adequately by policies. Policies are effective only if the purpose is to buttress a law or right which is certain. Hence, they are a means with which to enforce victims' rights and not a means with which to establish such rights. Secondly, classifying victims' rights as 'a political matter' is absurd. The need for pre-announced, clear and general rights for victims of

¹²¹ See PMG Constitutional Review Committee Minutes of a meeting held on 15 August 2008.

¹²² See PMG Constitutional Review Committee Minutes of a meeting held on 15 August 2008.

¹²³ See PMG Constitutional Review Committee Minutes of a meeting held on 15 August 2008. The state's legal advisor, Advocate Adhikarie, supported the appeal by recommending that victims' rights be under a specific heading and not generally included in the Constitution.

¹²⁴ See PMG Constitutional Review Committee Minutes of a meeting held on 15 August 2008.

crime to be enforced in accordance with fair procedures is not a political issue. It is a legal issue which requires legislative intervention. It is, therefore, inappropriate to classify the issue of victims' rights as matters of policy and politics.

For the time being, politicians have succeeded in relegating the issue of constitutional rights for crime victims to the political battlefield.¹²⁵ It is apparent that transformation in the area of victims' rights is dependent on transformation in the political arena. Strong leadership and political will are needed to move the issue of victims' rights from the policy and political sphere to the constitutional and legislative sphere.

2.6 The Service Charter for Victims of Crime and Minimum Standards on Services for Victims of Crime

South Africa's international obligations, created by the UN Declaration, combined with its need to realise constitutional guarantees, resulted in the adoption of the Victims' Charter.¹²⁶ The Charter was adopted in accordance with section 234 of the Constitution. In terms of this section Parliament may adopt Charters of Rights consistent with the provisions of the Constitution in order to deepen the culture of democracy established by the Constitution.

The Charter is a consolidation of rights and services to be provided to victims of crime.¹²⁷ It aims to ensure that victims become central to the criminal justice process.

¹²⁵ See, for example, the speech delivered by Helen Zille of the Democratic Alliance at the Victims of Crime Imbizo held in Durban on 2 August 2008 and also the Democratic Alliance (2007) discussion document on the rights of victims of crime in comparison to the ANC's approach to victims' rights.

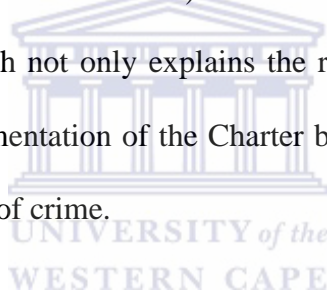
¹²⁶ The Victims' Charter was signed and accepted by Parliament in November 2004. Countries such as the United Kingdom, Canada, New Zealand, Wales, Jamaica, Australia and Hong Kong have adopted similar Charters in compliance with the UN Declaration.

¹²⁷ See the preamble to the Victims' Charter.

The Charter proposes that this be achieved by eliminating secondary victimisation, clarifying the standards of service to be accorded to victims and providing recourse when these standards are not met.¹²⁸ It identifies seven rights¹²⁹ which may be demanded by victims in their encounter with the criminal justice system, namely:

- the right to be treated with fairness and with respect for dignity and privacy,
- the right to offer information,
- the right to receive information,
- the right to protection,
- the right to assistance,
- the right to compensation, and
- the right to restitution.¹³⁰

The content of the rights is elaborated in the Minimum Standards on Services for Victims of Crime (Minimum Standards).¹³¹ The Minimum Standards is an informational document which not only explains the rights contained in the Charter but also facilitates the implementation of the Charter by specifying in detail how the state must respond to victims of crime.



2.6.1 Assessing the effectiveness of the Victims' Charter

Despite the Charter representing an important aspirational shift in the state's approach to victims, its effectiveness has been questioned. For example, Artz & Smythe state that 'the extent to which it will shift entrenched criminal justice attitudes and practices is arguable'.¹³² The authors explain that their main reason for being somewhat sceptical is that the guidelines contained in the Charter already exist in a range of

¹²⁸ See the website of the Department of Justice and Constitutional Development for its discussion on the Victims' Charter.

¹²⁹ The rights listed in the Victims' Charter are identical to those contained in the UN Declaration. See section 2.4 of the text above.

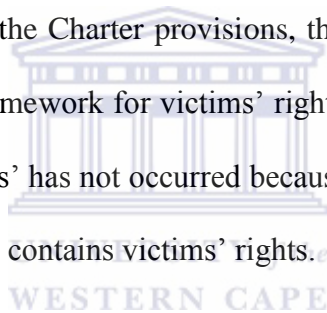
¹³⁰ Articles 1-7 of the Victims' Charter. For further discussion see Artz & Smythe (2005: 137) and Hubschle (2007: 2).

¹³¹ See the website of the Department of Justice and Constitutional Development for its discussion on the Minimum Standards on Services for Victims of Crime.

¹³² Artz & Smythe (2005: 137).

sector-specific policies and regulations.¹³³ They state that ‘it is unlikely that reiteration of these guidelines in the Charter and Minimum Standards document will result in increased compliance’.¹³⁴

In response to the concern raised by Artz & Smythe, it is submitted that an important distinction exists between sector-specific policies and the Charter. Sector-specific policies are directed towards justice officialdom, such as the police or prosecution, who encounter victims of crime. A sector-specific policy cannot confer rights on victims. Instead, it specifies the manner in which victims are to be treated by the officials concerned. Although, sector-specific policies may contain guidelines which are the same as or similar to the Charter provisions, the Charter is unique because it provides the philosophical framework for victims’ rights.¹³⁵ It is submitted, therefore, that a ‘reiteration of guidelines’ has not occurred because the Charter does not contain victim treatment guidelines. It contains victims’ rights.



A more legitimate concern has been raised by the SAHRC. According to the SAHRC, to invoke and fully appreciate the nature of their rights, victims would have to gain sufficient knowledge of the Charter.¹³⁶ A victim who lacks knowledge of the Charter will not demand that the rights contained therein be observed. Thus, the effectiveness of the Charter may be questionable where the victim lacks knowledge of his Charter rights.

¹³³ Artz & Smythe (2005: 137). The only sector-specific policy the authors use to support their view is the minimum standards expected from the South African Police Service for investigation of sexual offences contained in the National Instruction No.22/1998, Sexual Offences: Support to Victims and Crucial Aspects of the Investigation. This instrument includes guidelines for investigation of rape cases and treatment of rape victims. It specifies that such victims should be given immediate attention, be treated with respect and courtesy, provided with information and referred to victim services.

¹³⁴ Artz & Smythe (2005: 137).

¹³⁵ See Hubschle (2007: 1).

¹³⁶ SAHRC (2001: 4).

It is submitted that the enforcement of victims' rights undoubtedly requires victim awareness. In addition, consistent implementation at the various stages of criminal proceedings is required. However, these factors do not render the Charter ineffective. Firstly, in an attempt to facilitate victim awareness it is required that copies of the Charter and Minimum Standards be available at institutions likely to encounter victims of crime.¹³⁷ Secondly, the victim's ability to educate himself about the basic rights to which he is entitled should not be underestimated. Insofar as consistent implementation of victims' rights is concerned, Karmen explains that the more victims become aware of their rights and begin to exercise them, the more they will be accepted and honoured by the criminal justice system.¹³⁸

2.6.2 Significance of the Victims' Charter and Minimum Standards

The Charter and Minimum Standards have been described as South Africa's first attempt to empower victims by redesigning the criminal justice system.¹³⁹ These instruments constitute an important aspirational shift in South African criminal procedure because they require the justice system to be responsive to an interest which is separate from the 'amorphous public interest', namely, the interest of the victim.¹⁴⁰

¹³⁷ The Victims' Charter lists the following institutions: Courts, Offices of the Department of Correctional Services, Offices of the Directors of Public Prosecutions, Prisons, Police Stations and Investigation Units, Offices of Social Services or agencies, Offices of the Metropolitan Police Service and Public Health Facilities.

¹³⁸ Karmen (1994: 330). Karmen adds that this will encourage victims and their allies to raise new demands for further rights.

¹³⁹ See paragraph 1 of the Victims' Charter Consultative Draft.

¹⁴⁰ See Goldstein (1984: 247) who opines that effective victim-orientated legislation requires the prosecutors and judges to be responsive to an interest now being separated from the amorphous public interest and deserving special consideration. It is submitted that the Victims' Charter and Minimum Standards comply with the legislative profile envisioned by Goldstein.

The Charter is particularly significant because the rights contained therein are justiciable.¹⁴¹ Victims, therefore, are able to enforce these rights to combat secondary victimisation which may result from their encounter with the criminal justice system. If used optimally, the Charter not only provides recognition to the role of victims in the criminal justice system, but also allows the victim to play a more meaningful role in the prosecution of crime. The latter may be achieved where the victim, for example, invokes his rights to offer and receive information. In addition, both the Charter and Minimum Standards are weighty instruments because they provide a definite measure against which to test existing and future legislation. More specifically, these instruments, arguably, provide the only standard by which to assess critically the role of victims in section 105A agreements.

The Charter and Minimum Standards may be classified, therefore, as significant documents. However, this does not necessarily mean that they offer sufficient protection to and recognition of victims' rights. The legislature should not become complacent in the field of victims' rights. Although these documents are encouraging, they would be more meaningful and carry more weight if victims' rights were reflected in the Constitution and if the purpose of the Charter and Minimum Standards were to protect the victim's constitutional rights.¹⁴²

¹⁴¹ This is apparent because, firstly, the Victims' Charter repeatedly advises victims that they are entitled to exercise the rights contained in the Charter. Secondly, it provides that where the victim's rights have not been observed he may appoint a lawyer of his choice and at his own expense. These are indications that the rights contained in the Charter are capable of enforcement. See also Hubschle (2007: 3) who explains that the Charter seeks to advise victims of the recourse available when their rights are not observed.

¹⁴² See, for example, Kgosimore (2002) paragraph 2.

2.7 Conclusion

This chapter has provided a basic introduction to the victims' right movement in South Africa by analysing the origin of the movement. It has accredited the TRC with raising the rights of victims from a secondary consideration to the forefront of the criminal justice system.

This study accepts that the Constitution does not contain a dedicated constitutional provision for victims of crime. The absence of such provision has caused some to identify existing provisions from which constitutional rights of victims may be extrapolated. In this regard, it was submitted that a more meaningful approach to constitutional rights for victims requires a clear expression of such rights; that the Constitution be amended to provide for constitutionally recognised procedural rights for victims of crime; and that such amendment is necessary to uphold the principle of equality and remedy the noticeable imbalance between the rights of victims and the rights of offenders.

The legal platform provided by the general provisions of the South African Constitution, combined with the obligations created by the UN Declaration, resulted in the South African government adopting a Victims' Charter. An analysis of the Charter and the accompanying Minimum Standards document reveals that these instruments constitute an important aspirational shift in South African criminal justice. However, a constitutional amendment is encouraged still because these instruments would be more meaningful if their purpose were to protect the victim's constitutional rights.

Whereas the Victims' Charter does not provide adequate recognition of and protection to victims' rights, it does constitute a basic standard against which to assess whether section 105A of the CPA provides adequate recognition to the rights of victims in negotiated justice. However, this assessment needs to be preceded by a consideration of the development and operation of plea and sentence agreements in the South African criminal justice system.



CHAPTER THREE

THE DEVELOPMENT AND OPERATION OF PLEA AND SENTENCE AGREEMENTS IN THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

3.1 Introduction

This chapter commences with an assessment of the informal plea agreement system. In this regard, the categories of informal plea agreements and recognition of this form of negotiated justice are discussed. This is followed by a detailed account of the recommendations made by the SALRC in which it proposes codification of sentence agreements. Thereafter, section 105A of the CPA, which provides statutory recognition to both plea and sentence agreements, is introduced.

The procedural regime of the statutory enactment may be divided into two stages: firstly, the negotiation procedure; secondly, judicial scrutiny and approval of the agreement. At the negotiation stage the reader's attention is drawn to the procedure prescribed by section 105A and the Directives issued by the National Director of Public Prosecutions (NDPP) which supplement this procedure. The judicial scrutiny stage examines the role of the presiding officer. The chapter concludes with discussions of the differences between informal negotiated justice and statutory negotiated justice, as well as the controversy surrounding these forms of negotiation.

3.2 Informal plea agreements

3.2.1 Categories of informal plea agreements

There are various categories of informal plea agreements. The most common is where the prosecutor and accused negotiate a guilty plea to an offence which may be a competent verdict for the offence charged or an alternative charge.¹ Thus, an accused charged with murder may offer a plea of guilty to culpable homicide.² Alternatively, the accused may offer a guilty plea to the main charge but on a different basis to that alleged by the state. An example would be where an accused charged with murder committed with *dolus directus* offers a plea of guilty on the basis of *dolus eventualis* instead.³ Here the agreement is aimed at reducing the moral blameworthiness of the accused. A reduction in moral blameworthiness would serve as a mitigating factor when the court considers the sentence to impose.⁴

A further category of informal plea agreements may find application where there are two or more co-accused. Where there are two co-accused, an agreement could be reached wherein one of the accused agrees to plead guilty in return for the withdrawal of the charge against the other.⁵ The prosecution would be inclined to conclude such an agreement when there is doubt as to the guilt of one accused but the other is undoubtedly guilty.⁶

¹ Bekker, Geldenhuys *et al* (2003: 199). The authors use the term ‘traditional plea bargaining’ to denote informal plea agreements.

² Bekker, Geldenhuys *et al* (2003: 199).

³ Bekker, Geldenhuys *et al* (2003: 199).

⁴ See *North Western Dense Concrete CC and Another v DPP (Western Cape)* 1999 (2) SACR 669 (C) at 673 paragraph d.

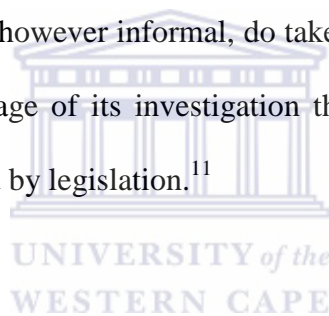
⁵ *Supra* at 673 paragraph j.

⁶ *Supra* at 674 paragraph a.

In all categories of informal plea agreements the prosecutor and the accused reach an agreement on the facts to be placed before the court. This is aimed at justifying a conviction on the basis agreed to by the parties.⁷

3.2.2 Recognition of informal plea agreements

In the decade or so which preceded the enactment of section 105A, authors analysed, criticised and some categorically denied the existence of informal plea agreements.⁸ The uncertainty surrounding the legality of these agreements resulted in most commentators regarding the practice with disfavour.⁹ However, the SALRC, as part of its investigation into the simplification of criminal procedure, concluded that plea negotiations and agreements, however informal, do take place in South Africa and are considered legal.¹⁰ At this stage of its investigation the SALRC recommended that these agreements be regulated by legislation.¹¹



3.2.3 Judicial recognition

Subsequent to the SALRC investigation, judicial recognition was afforded to informal plea agreements in the case of *North Western Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape)*.¹² In this case the first applicant (a close corporation) and the second applicant (a member of the close corporation), as well as one Mostert (the production manager of the close corporation), had been charged in the regional court.¹³ The applicants were charged with culpable homicide

⁷ Supra at 673 paragraph h.

⁸ For analysis see Bekker (1996: 222). For criticism see Clarke (1996: 141). For denial see Trichardt & Krull (1987: 444).

⁹ See Kriegler & Stafford (1993: 259).

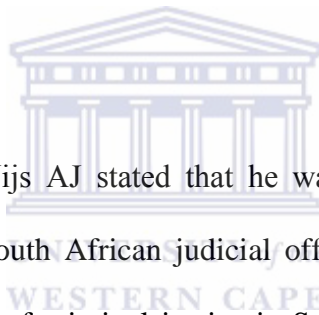
¹⁰ SALRC (2001) *Project 73: Discussion Paper 94* at paragraph 5.7. See also SALRC (2001) *Project 73: Fourth Interim Report* at paragraph 5.1.

¹¹ See SALRC (2001) *Project 73: Fourth Interim Report* at paragraph 5.1.

¹² *North Western Dense Concrete CC and Another v DPP (Western Cape)* at 673 paragraph h.

¹³ Supra at 671 paragraph c.

as well as further substantive and alternative charges, while Mostert was arraigned on a charge of culpable homicide only.¹⁴ The legal representative of the applicants advised the prosecutor that Mostert would plead guilty to culpable homicide if the respondent agreed to withdraw all the charges against them.¹⁵ The prosecutor, after having being authorised to do so by the respondent, accepted the deal and Mostert was duly convicted.¹⁶ Then an undisclosed third party applied to the respondent for a certificate *nolle prosequi*.¹⁷ The respondent considered the application but decided instead to reinstitute the charges against the applicants.¹⁸ In response to this, the applicants sought an order directing that the respondent abide by the terms of the plea agreement, as well as an order interdicting the respondent from proceeding with the prosecution against them.¹⁹

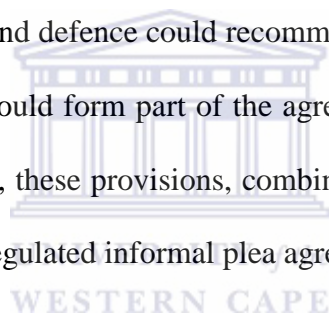


In this landmark decision, Uijs AJ stated that he was not ‘filled with joy’ at the prospect of being the first South African judicial officer to acknowledge that plea bargaining is an integral part of criminal justice in South Africa.²⁰ According to the court, the process of negotiating a plea takes place daily and at every level of the criminal justice system.²¹ The court concluded that plea negotiations are entrenched in South African law, to the extent that the criminal justice system would probably break down if the procedure were not followed because of judicial disapproval.²² It was held, further, that a basic rule of the procedure was that the state abides by the undertaking

¹⁴ Supra at 671 paragraph f.
¹⁵ Supra at 671-672 paragraphs i-a.
¹⁶ Supra at 672 paragraphs b-d.
¹⁷ Supra at 672 paragraph d.
¹⁸ Supra at 672 paragraphs e.
¹⁹ Supra at 672 paragraphs f-g.
²⁰ Supra at 683 paragraph f.
²¹ Supra at 674 paragraph e.
²² Supra at 676 paragraph f and 678 paragraph c.

given during negotiations leading to the plea agreement.²³ The court, accordingly, granted the orders sought by the applicants.

It should be noted that the court disagreed with the SALRC finding that legislation was needed to regulate informal plea agreements.²⁴ Instead, the court held that section 112 of the CPA is ‘virtually tailor-made for such agreements’.²⁵ In terms of section 112(2), an accused may submit a written statement to the court wherein he sets out the facts on which he bases his guilty plea. The subsection further provides that the court may then convict the accused on the strength of this statement. Section 112(3) makes provision for evidence to be led or a statement to be made with regard to sentencing. At this stage, the prosecutor and defence could recommend the sentence they consider just. This recommendation would form part of the agreement concluded between the parties. According to Uijs AJ, these provisions, combined with the constitutional law of South Africa, adequately regulated informal plea agreements.²⁶



Despite disagreeing with the SALRC recommendation, it is probable that the *North Western Dense* decision motivated the finalisation of section 105A.²⁷ Notwithstanding the decision by Uijs AJ, uncertainty as to the legality of this form of negotiated justice still prevailed.²⁸ The problem with the judgment in *North Western Dense* is that section 112 regulates guilty pleas and not plea agreements. To say that a plea agreement may be regulated by procedural rules which govern guilty pleas is to deny

²³ Supra at 670 paragraphs f-g.

²⁴ Supra at 677 paragraph f. See section 2.2.2 above for the initial recommendation made by the SALRC.

²⁵ Supra at 677 paragraph c.

²⁶ Supra at 677 paragraph f.

²⁷ Du Toit *et al* (2006: 15-6).

²⁸ Scholars such as Burchell (2005:16) and De Villers (2004: 255) continue to question the legality of plea and sentence agreements.

the true nature of this type of agreement. It denies the existence of negotiations and concessions made by the state and the accused which preceded and, in most cases, motivated the guilty plea. In addition, it is submitted that the agreement in *North Western Dense* would not have been the subject of judicial scrutiny were it not for the state attempting to renege on its undertaking. In other words, the fact that Mostert's guilty plea was the result of a plea negotiation would never have formed part of the official court record if the state had upheld its undertaking. Thus, section 112 clearly fails to provide transparency and hence legal certainty to the practice of informal plea agreements.

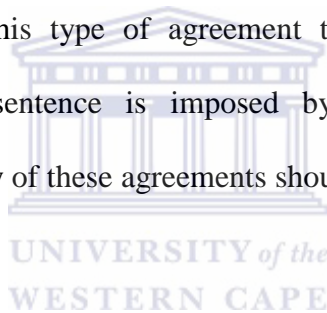
3.3 The SALRC recommendation

In its report on the simplification of criminal procedure, the SALRC, noticeably influenced by the *North Western Dense* decision, found that informal plea agreements were sufficiently provided for in the CPA.²⁹ According to the SALRC, these agreements 'did not require regulation since there is no evidence of abuse of these provisions'.³⁰ However, perhaps there was no record of abuse because the practice was not regulated. The negotiating parties were under no obligation to disclose that an informal plea agreement had been concluded, much less the manner in which such agreement had been reached. It is difficult, therefore, to establish a source of the supposed lack of 'evidence of abuse' referred to by the SALRC.

²⁹ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 4.15. The SALRC had initially recommended that informal plea agreements be regulated by legislation (see section 2.2.2 of the text above). Subsequent to the *North Western Dense* case, the SALRC revised its initial recommendation.

³⁰ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 4.15. The 'provisions' referred to by the SALRC are undoubtedly those contained in section 112 of the CPA.

On the basis of its conclusion, the SALRC limited its study to sentence agreements.³¹ It identified and considered two types of such agreements.³² In the first type, the prosecutor undertakes to recommend a specific sentence to the court, or agrees not to oppose the proposal of the defence.³³ The SALRC stated that this type of agreement is known in our law and, because it did not require any particular action from the court, it did not require regulation.³⁴ The court could implement or ignore the agreement, and the accused would be sentenced accordingly. It is submitted that this type of agreement generally accompanies an informal plea agreement and is made possible by section 112(3), as explained above.³⁵ The second type of sentence agreement identified by the SALRC could not be negotiated in accordance with the informal plea agreement system.³⁶ With this type of agreement the accused pleads guilty on condition that an agreed sentence is imposed by the court.³⁷ The SALRC recommended that the legality of these agreements should be confirmed and regulated by legislation.³⁸



The recommendations made by the SALRC for codification of sentence agreements played a significant role in the drafting of section 105A.³⁹ Ultimately, most of the recommendations were incorporated into section 105A.⁴⁰

³¹ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 4.15.

³² SALRC (2001) *Project 73: Fourth Interim Report* paragraph 4.16.

³³ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 4.15. See section 2.2.3 of the text above.

³⁴ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 4.17.

³⁵ See section 2.2.3 of the text above.

³⁶ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 4.17 and further SALRC (2001) *Project 73: Discussion Paper 94* paragraph 5.15.

³⁷ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 4.17

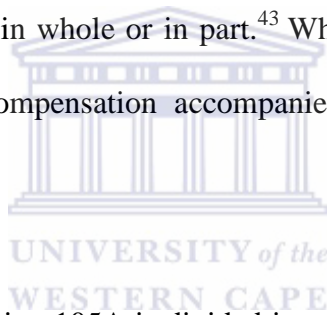
³⁸ SALRC (2001) *Project 73: Discussion Paper 94* paragraph 5.17.

³⁹ See appendix B below for the SALRC recommendations.

⁴⁰ See, for example, De Villiers (2004: 244) where the author confirms that the recommendations contained in the SALRC *Fourth Interim Report* found their way into section 105A. A comparison between Appendix A and B demonstrates that recommendations (m) and (i) were the only ones omitted from section 105A.

3.4 Section 105A: statutory plea and sentence agreements

The enactment of section 105A, on 14 December 2001, resolved the uncertainty surrounding the legality of plea and sentence agreements in South Africa. In terms of section 105A(1)(a), a prosecutor, authorised thereto in writing by the NDPP, and a legally represented accused may negotiate and conclude a plea and sentence agreement. However, the agreement must be concluded before the accused is asked to plead.⁴¹ In the plea component of the agreement the accused must agree to plead guilty to the offence charged or any offence which may be a competent verdict for the charge.⁴² The sentence agreement must be in respect of at least one of the following: the sentence to be imposed by the court, the postponement of sentencing, or a sentence which is suspended in whole or in part.⁴³ Where applicable, it may also be agreed that an award for compensation accompanies one of the aforementioned sentences.⁴⁴



In the explanation below, section 105A is divided into two broad categories, namely, the negotiation procedure and judicial scrutiny and approval of the agreement.

3.4.1 The negotiation procedure

There are formal requirements which must be met before a plea or sentence agreement may be concluded. These requirements are contained in section 105A and in the Directives issued by the NDPP in accordance with section 105A(11).

⁴¹ Section 105A(1)(a).

⁴² Section 105A(1)(a)(i) and Du Toit *et al* (2006: 15-8) for their commentary on this provision.

⁴³ Section 105A(1)(a)(ii) and further Du Toit *et al* (2006: 15-8).

⁴⁴ See section 105A(1)(a)(ii), where the use of the word 'and' indicates that an award for compensation, as provided for in section 300 of the CPA, can only be an accompaniment to the other sentences listed in the subsection. See also Du Toit *et al* (2006: 15-8).

3.4.1.1 The requirements contained in section 105A

Most of the requirements contained in section 105A place duties on the prosecutor. However, there are certain requirements which must be fulfilled by both the prosecutor and the legal representative of the accused.

3.4.1.1.1 Duties of the prosecutor

Section 105A(1)(b)(i) requires that the prosecutor consult with the investigating officer before concluding an agreement.⁴⁵ In *Commentary on the Criminal Procedure Act*, the authors state that this pre-agreement consultation ensures that the prosecutor makes an informed decision with regard to the desirability and necessity of concluding a plea and sentence agreement.⁴⁶ Furthermore, they view this requirement as a means to ensure that members of the police services do not gain the impression that the results of their investigative efforts can be ignored by the prosecution for the sole purpose of avoiding a trial.⁴⁷ However, in terms of section 105A(1)(c) the pre-agreement consultation may be dispensed with if the prosecutor is satisfied that the consultation would not only delay the proceedings, causing substantial prejudice to the prosecution, accused, complainant or his representative, but also adversely affect the administration of justice. The prosecutor exercises discretion in determining whether the envisaged consequences would result. However, this discretion is not unfettered. Section 105A(4) renders the decision to dispense with a pre-agreement consultation subject to judicial scrutiny.⁴⁸

⁴⁵ Section 105A(1)(a) & (b)(i).

⁴⁶ Du Toit *et al* (2006: 15-10).

⁴⁷ Du Toit *et al* (2006: 15-10). The authors state that this requirement is not meant to blur the distinction between the duties of those who investigate crime and those who must decide whether to prosecute or not. The purpose of a pre-agreement consultation is to provide a subtle form of 'internal accountability' between the parties.

⁴⁸ See section 3.4.2 of the text below for discussion.

The second requirement to be fulfilled by the prosecutor is contained in section 105A(1)(b)(ii). In terms of this subsection, the prosecutor, before entering into an agreement, must take into account the nature of and circumstances relating to the offence, the personal circumstances of the accused, the previous convictions of the accused, if any, and the interests of the community. According to Du Toit *et al*, the fact that this provision is couched in fairly wide terms is entirely acceptable because prosecutorial discretion and not legislative prescriptions should govern the decision to conclude the agreement.⁴⁹ Also, an established principle in our law is that the prosecutor has discretion in deciding whether or not to accept a guilty plea on the main, alternative or competent charge.⁵⁰ This discretion extends to the decision to enter into plea and sentence negotiations.⁵¹ It is submitted, therefore, that although the factors contained in section 105A(1)(b)(ii) may guide the prosecutor in determining whether to conclude the agreement, they do not constitute a *numerus clausus*. The strengths or weaknesses of the prosecution's case or the risk that certain evidence might be excluded by the trial court, for example, may be decisive factors in the decision to enter into negotiations.⁵²

In addition to the above, section 105A(1)(b)(iii) provides that, where the circumstances permit, the prosecutor should afford the complainant the opportunity to make representations regarding the contents of the agreement and the inclusion of a compensation order.⁵³ This requirement is qualified by the words 'where it is

⁴⁹ Du Toit *et al* (2006: 15-11). In support of their view the authors cite *S v Esterhuizen 2005 (1) SACR 490 (T)* at 494 paragraphs c-h, where the court concluded that the prosecuting authority needs a fair measure of latitude in order to negotiate and reach plea and sentence agreements.

⁵⁰ See *North Western Dense Concrete CC and Another v DPP (Western Cape)* at 676-677 paragraphs j-d and further Du Toit *et al* (2006: 15-11).

⁵¹ See further directive 4 of the Directives issued by the NDPP on 14 March 2002 in accordance with section 105A(11) which confirms this principle .

⁵² Du Toit *et al* (2006: 15-11).

⁵³ Section 105A(1)(b)(iii). See further Appendix B, recommendation (k).

reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant'.⁵⁴ Although the prosecutor determines whether victim participation would be reasonable, his decision to exclude the victim from negotiations is subject to judicial scrutiny.⁵⁵

3.4.1.1.2 Combined duties

In terms of section 105A(2) the accused, before entering into the agreement, must be informed that he has the right to be presumed innocent, to remain silent and not to be compelled to give self-incriminating evidence.⁵⁶ By entering into an agreement the accused waives these rights and a right can be waived only if the holder knows and understands what he is waiving.⁵⁷ Thus, by requiring that the accused be informed of his rights, the legislature sought to ensure that plea and sentence agreements are not attained at the expense of the constitutional rights of the accused.⁵⁸ However, the provision fails to indicate whether the prosecutor or legal representative of the accused is responsible for ensuring that the accused is informed of his rights before entering into the agreement.

According to Du Toit *et al*, the legal representative of the accused is primarily responsible for ensuring that his client has been informed of his constitutional rights.⁵⁹

⁵⁴ Du Toit *et al* (2006:15-12).

⁵⁵ See section 105A(4)(a)(ii) and section 3.4.2 below for discussion.

⁵⁶ Section 105A(2)(a).

⁵⁷ See Schwikkard & van der Merwe (2002: 222-223). According to the authors, although the decision of the accused to waive the exercise of his rights must be an informed one, he need not be aware of all the factual details or all the details of the charge. The emphasis should be on the reality of the total situation having an impact on the accused's understanding and appreciation. It is submitted that the 'reality' which must be explained to an accused in the context of negotiated justice is that by entering into the agreement he relinquishes his right to go to trial and offers full disclosure in exchange for leniency.

⁵⁸ Du Toit *et al* (2006: 15-13). These rights are contained in section 35(3)(h) & (j) of the Constitution of South Africa.

⁵⁹ Du Toit *et al* (2006: 15-13).

Yet, they submit that while the prosecutor is under no duty to inform the accused of these rights, a prosecutor should not sign the agreement unless he has been given an assurance by the accused's legal representative that these rights have been explained to the accused.⁶⁰ It should be added that, in order to avoid judicial disapproval of the agreement, it would be in the state's best interest to ensure that the accused is aware of his constitutional rights before the agreement is finalised.

Section 105A(2) also requires that the agreement be in writing and be signed by the prosecutor, the accused and his legal representative.⁶¹ In addition, the terms of the agreement should be established and stated in the agreement.⁶² In this regard, the substantial facts on which the plea is based and all other facts relevant to the sentence agreement, as well as any admissions made by the accused, must be determined between the parties and included in the agreement.⁶³ This is regarded as a crucial requirement because the purpose of negotiated justice is to circumvent a conventional trial, and in order to do this sufficient information must be placed before the court to secure judicial approval of the negotiated plea and sentence.⁶⁴

3.4.1.2 The Directives issued by the NDPP

In addition to the requirements prescribed by section 105A, the prosecutor must comply with the directives issued by the NDPP in accordance with section 105A(11), which provide that:

The National Director of Public Prosecutions, in consultation with the Minister, shall issue directives regarding all matters which are reasonably necessary or expedient to be prescribed in order to achieve the objects of this

⁶⁰ Du Toit *et al* (2006: 15-13).

⁶¹ Section 105A(2)(c).

⁶² Section 105A(2)(b).

⁶³ See section 105A(2)(b).

⁶⁴ Du Toit *et al* (2006: 15-14).

section and any directive so issued shall be observed in the application of this section.

The directives referred to above were issued by the NDPP on 14 March 2002.⁶⁵ The use of the words ‘any directive so issued shall be observed’ permits the reasonable inference that non-compliance with the directives may render an agreement defective.⁶⁶

The need for the directives is apparent. As far as the negotiation between the prosecutor and defence counsel is concerned, section 105A is non-prescriptive with regard to the types of offences which may be negotiated and the manner in which these negotiations are to be initiated.⁶⁷ The directives therefore supplement the procedure prescribed by section 105A by regulating its application. In this regard, directive 2 contains the first form of clarification. It provides that:

Section 105A is to be utilized for those matters of some substance, the disposal of which will actually serve the purpose of decongesting or reducing the court rolls without sacrificing the demands of justice and/or the public interest.

The fact that section 105A may be utilised only when a matter is of ‘some substance’ means that the nature of the offence determines the eligibility of an accused to negotiate an agreement. However, neither section 105A nor the directives issued by the NDPP provide a closed list of offences which may or may not be negotiated. It is submitted, therefore, that the determination of whether a matter is of ‘some substance’

⁶⁵ Du Toit *et al* (2006: 15-24). See also De Villers (2004: 244). The first draft had to be submitted to Parliament within four months of the commencement of section 105A.

⁶⁶ Du Toit *et al* (2006: 15-22).

⁶⁷ Du Toit *et al* (2006: 15-7).

and thus capable of being negotiated is left to the discretion of the prosecuting authority.⁶⁸

Directive 17 makes provision for the manner in which section 105A negotiations are to be initiated. The directive reads:

Where it is clear that a legal representative of an accused has expressed a firm intention to enter into formal negotiations with a view to a s105A agreement, the prosecutor must request a written offer to negotiate (which shall include the accused's proposals) be submitted to him/her at least 14 days before the intended trial date. Where the decision to prosecute is that of a Senior Public Prosecutor, the written offer is to be submitted to that Prosecutor and the period for submissions may be lengthened particularly where the Senior Public Prosecutor is at a centre removed from the court.

The discussion prompted by this directive pertains to the distinction between formal and informal negotiations. On a strict interpretation of directive 17, it would appear that the legal representative of the accused, as opposed to the prosecution, must initiate formal negotiations by submitting a written request to negotiate. This interpretation is supported by section 105A(1)(a), as well as by directives 5, 6 and 7.

In terms of section 105A(1)(a) a prosecutor may enter into plea and sentence negotiations if he has obtained the written authority of the NDPP.⁶⁹ It is submitted that for the prosecutor to obtain such authority he will be required to produce the

⁶⁸ This submission is supported by directive 4 which provides that the established principle, in terms of which it is within the discretion of the prosecutor to decide whether or not to consider accepting a plea of guilty on the main, alternative or competent charge, applies.

⁶⁹ See De Villiers (2004: 245) who states that the NDPP has to date afforded all the directors, deputy directors and certain chief and senior prosecutors the authority to negotiate. See also *S v Sassin 2003 4 All SA 506 (NC)* at paragraph 10 where the court held that proof of the prosecutor's authority to negotiate and enter into an agreement with the accused was an essential pre-requisite in terms of section 105A(1)(a). The prosecutor then tended a certificate from the NDPP which confirmed that he had been authorised to negotiate and conclude the agreement. However, see Watney (2006 :225) who argues that, although section 105A(1)(a) clearly stipulates that a prosecutor authorised thereto in writing by the NDPP may conclude a plea and sentence agreement, the maxim *omnia praesumuntur rite esse acta donec probetur in contrarium* (presumption of regularity) operates in favour of the prosecutor. He argues that the court's interpretation in *S v Sassin* is unnecessarily strict and submits that it is unnecessary for the prosecutor to prove the delegated authority to a court as prerequisite for the prosecutor to participate in the agreement.

written offer to negotiate. In addition, directive 5 specifies that the prosecutor must refer a written offer to negotiate to the senior prosecutor. Directives 6 and 7 further provide that unless authorisation has been obtained from the Director of Public Prosecutions (DPP), section 105A cannot be applied where the accused has a previous conviction, or where the DPP has instructed that the accused be prosecuted. As authorisation can be sought only after the defence submits a request to negotiate, it follows that formal negotiations can be initiated only by the defence.

Yet, in *Commentary on the Criminal Procedure Act* the authors opine that ‘the prosecutor *or* the legal representative of the accused may initiate the process of negotiation’.⁷⁰ They also state that ‘in practice much will depend upon each party’s assessment of the probable outcome of the case and the bargaining power available to him’.⁷¹ Although this appears to contradict a strict interpretation of directive 17, it is important to note that the authors are actually referring to initiating informal negotiations. This is clarified toward the end of their discussion where they state that ‘once initial and tentative discussions have taken place and the defence has expressed an interest, directive 17 should be followed’.⁷² From this statement it can be inferred that informal negotiations usually precede formal negotiations. It can be inferred also that nothing prevents a prosecutor from initiating informal negotiations with the aim of concluding a section 105A agreement. However, the effect of directive 17 means that undertakings made during informal negotiations cannot bind the state until the defence requests that formal negotiations commence. If the NDPP or his authorised agents refuse the request, the state would not be bound by the undertakings made by the prosecutor during the informal negotiations.

⁷⁰ Du Toit *et al* (2006: 15-8). Original emphasis.

⁷¹ Du Toit *et al* (2006: 15-9).

⁷² Du Toit *et al* (2006: 15-9).

It is submitted, therefore, that formal negotiations, aimed at concluding a section 105A agreement, can be initiated only by the defence, whereas informal negotiations may be initiated by either the prosecutor or the defence. This approach complies with the intended purpose of the directives, namely, to ensure that the office of the NDPP and DPP maintains a measure of control over statutory agreements.

3.4.2 Judicial scrutiny and approval of section 105A agreements

The court does not control or participate in the negotiations.⁷³ According to the SALRC, such participation would be difficult to reconcile with the court's role as an impartial adjudicator because it could create the impression that the judicial officer, as a person in a position of authority, is exerting undue influence to exact a guilty plea.⁷⁴ However, judicial scrutiny and approval of the agreement concluded are required.⁷⁵ The duties of the presiding officer may be divided into three stages, namely, verification before plea, consideration of the plea agreement and consideration of the sentence agreement.⁷⁶

3.4.2.1 Verification before plea

Before the accused is required to plead, the prosecutor must inform the court that a written agreement has been negotiated.⁷⁷ The court is required then to verify two aspects of the agreement. Firstly, the court must ask the accused to confirm that such an agreement indeed has been concluded.⁷⁸ Secondly, it must satisfy itself that the

⁷³ Section 105A(3). See further Du Toit *et al* (2006: 15- 6) and further Appendix B, recommendation (1).

⁷⁴ SALRC *Discussion Paper 94* paragraph 4.8.

⁷⁵ See section 105A(4) – (8).

⁷⁶ See, for example, De Villiers (2004: 248).

⁷⁷ Section 105A(4)(a). See further appendix B, recommendation (a).

⁷⁸ Section 105A(4)(a)(i).

prosecutor has consulted with the investigating officer and, where it was reasonable to do so, has heard representations from the complainant.⁷⁹

The second verification requires consideration. As explained in section 3.4.1.1.1 above, the prosecutor may enter into the plea and sentence agreement only after he has consulted the investigating officer.⁸⁰ However, section 105A(1)(c) provides that the pre-agreement consultation may be dispensed with if the prosecutor is satisfied that the consultation would not only delay the proceedings, resulting in substantial prejudice to the prosecution, accused, complainant or the latter's representative, but also would affect adversely the administration of justice. According to Du Toit *et al*, it would seem that the pre-agreement consultation may be dispensed with if the prosecutor alone is satisfied that such a consultation would result in the envisaged consequences.⁸¹ However, the authors quickly reject this interpretation.⁸² In their view the fact that the prosecutor was satisfied that he had grounds for dispensing with a pre-agreement consultation cannot relieve the court of its duty to satisfy itself that the requirements of section 105A(1)(b)(i) have been met.⁸³ In this regard, Du Toit *et al* submit that the court should satisfy itself that the prosecutor has advanced adequate grounds for dispensing with the pre-agreement consultation.⁸⁴

It is submitted that this approach should extend also to the prosecutor's consulting the victim. Even though section 105A(1)(b)(iii) requires that the prosecutor determine

⁷⁹ Section 105A(4)(a)(ii) provides that the court shall satisfy itself of compliance with the requirements of subsection (1)(b)(i) and (iii) have been complied with. See further De Villiers (2004: 248).

⁸⁰ Section 105A(1)(b)(i).

⁸¹ Du Toit *et al* (2006: 15-10).

⁸² Du Toit *et al* (2006: 15-10). The authors opine that, as a rule, a prosecutor must consult the investigating officer.

⁸³ Du Toit *et al* (2006: 15-10).

⁸⁴ Du Toit *et al* (2006: 15-10).

whether it is reasonable to allow victim participation this cannot relieve the court of its section 105A(4) duty in respect of the victim. The court must determine, therefore, whether the prosecutor had adequate grounds for excluding victim participation.

If the court is not satisfied that the agreement complies with the requirements of sections 105A(1)(b)(i) and (iii), the court must inform the prosecutor and the accused of the reasons for its finding.⁸⁵ The parties will then be allowed an opportunity to comply with the requirements.⁸⁶ If, however, the court is satisfied that the agreement complies with the requirements, the court will require the accused to plead and order that the contents of the agreement be disclosed.⁸⁷

3.4.2.2 Judicial scrutiny of the plea agreement

Once the accused has entered his guilty plea and the contents of the agreement have been disclosed, the court must question the accused to ascertain whether he confirms the terms of the agreement and the admissions he has made therein.⁸⁸ With regard to the recorded facts of the case, the court must establish from the accused whether he admits the allegations in the charge to which he has agreed to plead guilty.⁸⁹ Thereafter, the court will require the accused to confirm that the agreement was entered into freely and voluntarily.⁹⁰

If, after this inquiry, the court is not satisfied that the accused is guilty of the offence in respect of which the agreement was reached, the court must record a plea of not

⁸⁵ Section 105A(4)(b)(i).

⁸⁶ Section 105A(4)(b)(ii).

⁸⁷ Section 105A(5).

⁸⁸ Section 105A(6)(a)(i).

⁸⁹ Section 105A(6)(a)(ii).

⁹⁰ Section 105A(6). See further Appendix B, recommendation (e).

guilty and the trial will begin *de novo* before a different presiding officer.⁹¹ However, if the court is satisfied with the plea agreement, it will proceed to consider the sentence agreement.⁹² It should be noted that the court will not convict the accused until it has scrutinised the sentence agreement. A formal conviction of the accused can follow only if the court is satisfied with the sentence agreement.⁹³

3.4.2.3 Judicial scrutiny of the sentence agreement

When considering the sentence agreement, the court may hear evidence, direct relevant questions to both the prosecutor and accused, and accept a statement from the accused or complainant.⁹⁴ Where applicable, the court must have due regard to the minimum penalty prescribed for the offence.⁹⁵

If the court is satisfied that the sentence agreement is just, the accused will be found guilty and the agreed sentence imposed.⁹⁶ However, where the court is of the opinion that the sentence agreement is unjust, the prosecutor and accused must be informed of the sentence which the court considers just.⁹⁷ It should be noted that the court may regard a sentence as unjust because it is too harsh or too lenient. Where the court has decided that it will impose a different sentence it must first inform the parties thereof.⁹⁸ If the parties accept the sentence which the court intends to impose, the court must convict the accused and impose the sentence. Alternatively, either party

⁹¹ Section 105A(6)(c).

⁹² Section 105A(7).

⁹³ Du Toit *et al* (2006: 15-17).

⁹⁴ Section 105A(7)(b)(i). See further De Villiers (2004: 249).

⁹⁵ Section 105A(7)(b)(ii).

⁹⁶ Section 105A(7) and (8). See further Appendix B, recommendation (h).

⁹⁷ Section 105A(9)(a).

⁹⁸ See Appendix B. This demonstrates the rejection of SALRC recommendation (i) which provides that if the court is of the view that it would have imposed a *lesser sentence* (emphasis added) than the agreed sentence then it may impose the lesser sentence.

may reject the court's proposed sentence and withdraw from the agreement, in which event the trial will start *de novo* before a different presiding officer.⁹⁹

When a trial is set to start *de novo*, section 105A dictates that the parties may not enter into a plea and sentence agreement in respect of a charge arising out of the same facts.¹⁰⁰ However, it must be noted that once an attempt to conclude a statutory agreement has failed, the parties are not prevented from concluding an informal plea agreement in respect of the same charge.¹⁰¹ In accordance with the rules of interpretation, it is presumed that the legislature does not intend to alter the common law.¹⁰² Thus, where an enactment does not explicitly provide for its repeal, it is assumed that the common law remains intact.¹⁰³ As the Criminal Procedure Second Amendment Act¹⁰⁴ does not expressly provide for the repeal of informal plea agreements, it would be reasonable to conclude, and it is therefore submitted, that two independent systems of negotiated justice exist in South African criminal procedure, namely, informal plea agreements and statutory plea and sentence agreements.

3.5 The effect of judicial non-compliance

Compliance with the provisions of section 105A is required from the negotiating parties as well as the presiding officer. While the consequences of non-compliance by negotiating parties are provided for in the section, it is silent about judicial non-compliance.¹⁰⁵

⁹⁹ Section 105A(9)(b), (c) and (d). See further Appendix B, recommendation (j).

¹⁰⁰ Section 105A(10)(b).

¹⁰¹ Bekker, Geldenhuys *et al* (2003: 199). See also Anderson (2005: 28-29).

¹⁰² De Ville (2000: 170-172).

¹⁰³ De Ville (2000: 171).

¹⁰⁴ Section 105A was inserted into the CPA by section 2 of the Criminal Procedure Second Amendment Act 62 of 2001.

¹⁰⁵ See section 105A(4) for the consequences of non-compliance by the negotiating parties and section 3.4.2.1 above for discussion. Of the SALRC recommendations contained in Appendix B, recommendation (m), which specified that the offender should have a right of review as opposed to a right of appeal, was not incorporated into section 105A.

In the *Solomans* case the Cape High Court considered the effect of judicial non-compliance.¹⁰⁶ The court stated that the plea bargaining regime constitutes a fundamental departure from the adversarial system and, as a result, the legislature sought to make the provisions of section 105A preemptory.¹⁰⁷ From the record of the proceedings, the High Court detected three irregularities which raised questions as to the overall legality of the proceedings in the lower court.¹⁰⁸ The first irregularity was that the admissions made by the accused constituted a repetition of the allegations contained in the charge, whereas according to the court, section 105A(6)(a)(ii) requires the accused to confirm the facts upon which those admissions are based.¹⁰⁹ All the elements of the crime must be admitted in the facts presented by the accused so that the court may draw the conclusion that the accused had in fact committed the crime to which he pleads guilty. The court cannot reach this conclusion where the admission constitutes a mere repetition of the allegations against the accused. The second irregularity was that there was no indication that the accused had entered into the agreement freely and voluntarily as required by section 105A(6)(a)(iii).¹¹⁰ The final irregularity arose from the fact that the magistrate had rejected the negotiated sentence but failed to disclose this to the parties.¹¹¹ The magistrate then proceeded to impose a harsher sentence without affording the parties an opportunity to withdraw from the agreement, as required by section 105A(9)(a).¹¹²

¹⁰⁶ *S v Solomans* 2005 (2) SACR 432 (C). See for discussion Du Toit *et al* (2006: 15-8) and Cowling (2006: 239).

¹⁰⁷ *Supra* at 435 paragraph d-e.

¹⁰⁸ Cowling (2006: 241).

¹⁰⁹ *S v Solomans* at 435 paragraph h.

¹¹⁰ *Supra* at 436 paragraph a.

¹¹¹ *Supra* at 436 paragraph e.

¹¹² *Supra* at 436 paragraph e.

Taking into account these irregularities, the High Court set aside the conviction and sentence and remitted the matter to the magistrates' court to be heard, *de novo* before a different presiding officer.¹¹³ However, the court failed to indicate whether any single irregularity or the cumulative effect of the three irregularities motivated its decision.¹¹⁴ It is submitted that this would be dependent on the facts of each case. For example, Cowling states that, with regard to the second irregularity, if from the overall documentation, it was clear that the accused freely consented, this should be sufficient for the purposes of section 105A(6)(a)(iii).¹¹⁵ Thus, the second irregularity on its own would be insufficient to set aside the conviction. By contrast, the third irregularity constitutes a material non-compliance.¹¹⁶ Where the court does not intend to impose the negotiated sentence it is required to disclose the sentence it considers just, prior to convicting the accused.¹¹⁷ This constitutes one of the core provisions of section 105A, because the parties must be allowed the opportunity to withdraw from the agreement before the court may proceed to impose the sentence it considers just. Non-compliance in this instance constitutes a gross irregularity in the application of the section 105A procedure. It is possible therefore to set aside a conviction based upon judicial non-compliance with a single but material provision contained in section 105A.

¹¹³ Supra at 437 paragraph d.

¹¹⁴ See Cowling (2006: 242) who states that 'the fact that the court did not give any indication as to whether these factors were measured cumulatively or whether they were weighted in any way, is to be regretted'.

¹¹⁵ Cowling (2006: 242).

¹¹⁶ Cowling (2006: 242).

¹¹⁷ See section 105A(9)(b).

3.6 The differences between informal and statutory negotiated justice

3.6.1 Sentence agreements

The main difference between informal negotiated justice and statutory negotiated justice is that sentence agreements were not recognised in South African law prior to the passage of section 105A.¹¹⁸

The prosecutor and accused cannot reach an agreement with regard to the sentence to be imposed in an informal plea agreement because this would require the co-operation and the participation of the presiding officer.¹¹⁹ At most, the parties can reach an agreement in terms of which the prosecutor undertakes to recommend that a reduced sentence be imposed.¹²⁰ Hence, informal plea agreements are not dependent upon the court's acceptance of the prosecutor's sentence recommendation. Thus, where the court imposes a sentence which is more or less severe than that recommended by the prosecutor, this would not constitute a ground upon which either party could withdraw from the agreement.

Notwithstanding the above, in *North Western Dense* the court defined informal plea agreements as 'the practice of relinquishing the right to go to trial in exchange for a reduction in charge and/or sentence'.¹²¹ The inaccuracy of this definition is obvious. However, Uijs AJ reasoned that because the South African prosecutor is *dominus litis*, the court cannot prevent the state from accepting a plea, and once the factual basis of a guilty plea has been accepted by the prosecutor, the court is bound to sentence the

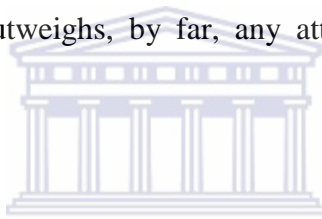
¹¹⁸ Bekker, Geldenhuys *et al* (2003: 200). See also SAHRC (2001: 2).

¹¹⁹ See de Villiers (2004: 253).

¹²⁰ This recommendation may be made in accordance with section 112(3) of the CPA.

¹²¹ *North Western Dense Concrete CC and Another v DPP (Western Cape)* at 670 paragraph c.

accused on the basis of those facts.¹²² An informal plea agreement therefore curtails the sentencing discretion of the court, in that the court is obligated to sentence the accused on the basis of the facts which the accused has admitted and the prosecutor has accepted. Thus, even though the parties are unable to bind the court to a negotiated sentence, the plea agreement in effect manipulates the sentencing discretion of the court to the extent that the sentence finally imposed is usually the sentence preferred by the parties. However, the counter-argument to this is that the court does not have to accept a guilty plea. If, after questioning the accused about the recorded facts, the court is not satisfied with a guilty plea, the court must record a plea of not guilty and order that the prosecutor proceed with the trial.¹²³ The court's ability to exercise this discretion outweighs, by far, any attempt made to manipulate its sentencing discretion.



By contrast, statutory negotiated justice includes sentence agreements. According to Du Toit *et al*, a plea agreement on its own is insufficient to activate section 105A. There must be a sentence agreement also.¹²⁴ However, it must be noted that the prosecutor and accused still cannot bind the court to a negotiated sentence. This was confirmed in the case of *Yengeni*, in which the appellant, a former Member of Parliament, filed an appeal against his sentence on the basis that he had concluded a

¹²² Supra at 677 paragraph c.

¹²³ Section 113(1) of the CPA provides that 'if the court at any stage of the proceedings under section 112(1)(a) or (b) or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty shall stand as proof in any court of such allegation.' This section demonstrates that the court is not compelled to accept the factual basis of a guilty plea even if the prosecutor has accepted the plea.

¹²⁴ Du Toit *et al* (2006: 15-8).

non-custodial sentence agreement with the NDPP.¹²⁵ The court held that even if such an agreement had been reached it would be fundamentally unenforceable.¹²⁶ Any attempt to fetter the court's discretion on sentence or to seek to subject the court's sentencing function to a prior agreement would be in conflict with the constitutionally protected independence of the judiciary.¹²⁷ The sentence agreement in terms of section 105A is therefore better understood as a recommendation made to the court.

Nevertheless, there remains an important distinction between a statutory sentence recommendation and the sentence recommendation made in accordance with an informal plea agreement. Should the court reject the sentence agreement concluded in terms of section 105A, the parties may withdraw from the agreement and the trial will commence *de novo* before a different presiding officer, where the accused may enter a plea of not guilty.¹²⁸ The court's rejection of a sentence recommendation made in accordance with an informal plea agreement would not entitle the parties to withdraw from the agreement, and thus the accused will not be allowed to withdraw his guilty plea.¹²⁹

3.6.2 Victim participation

A fundamental difference between informal and statutory negotiated justice lies in the victim's participation in the negotiation process. Little is known of how often victims have been allowed to participate in informal plea negotiations and hence the extent to which such participation influenced the negotiations is also unknown. Traditionally,

¹²⁵ *S v Yengeni* 2005 (3) SACR 1306 (T) at 1308 paragraph c.

¹²⁶ *Supra* at 1310 paragraph e.

¹²⁷ *Supra* at 1310 paragraph e.

¹²⁸ Section 105A(9)(b)(ii) read with subsection (9)(d).

¹²⁹ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 4.17.

victims have no formal or recognised rights in the process of plea negotiations.¹³⁰ In addition to this, the uncertainty surrounding the legality of these agreements further entrenched the neglect of the victim. By contrast, statutory plea and sentence agreements make provision for victim participation.¹³¹ Whether the provision allows for adequate recognition of the developing rights of the victim is examined in the next chapter.

3.6.3 Transparency

Further differences between informal and statutory negotiated justice would include, but are not limited to, the issues of transparency in procedure and judicial scrutiny. With informal plea agreements the parties need not disclose that such an agreement has been concluded. Furthermore, the court need not be advised of the contents of the agreement because the guilty plea tendered by the accused is accepted as a plea submitted in accordance with section 112. Thus, transparency and judicial scrutiny are clearly absent from informal plea agreements.

With section 105A agreements the court must be notified that the prosecutor and accused have concluded a plea and sentence agreement. In addition, the contents of the agreement must be disclosed in court.¹³² Furthermore, the presiding officer is

¹³⁰ Bekker (1996: 208).

¹³¹ See section 105A(1)(b)(iii). Although it is beyond the scope of this study to assess the role of the victim in informal plea agreements, it is submitted that section 105A, which makes provision for victim participation, provides a constitutional challenge to the operation of informal plea agreements. In a statutory agreement the prosecutor has a duty to consider whether victim participation would be reasonable. In addition, where the prosecutor decides to exclude the victim from the negotiations, the court assesses whether the prosecutor can advance adequate grounds for his decision. Yet, in informal plea agreements the prosecutor is under no obligation to consider victim participation and the court does not scrutinise the reasons for excluding the victim. Thus, victims in informal plea agreements are treated differently from victims in statutory agreements. This differentiation is unlikely withstand the constitutional challenge.

¹³² Section 105A(5).

required to verify that all procedural requirements set out in the section have been satisfied. Thus, when statutory agreements are concluded the entire agreement is subjected to judicial scrutiny. By prescribing stringent guidelines, which provide a controlled legal context for negotiations, section 105A promotes a transparent system of negotiated justice.¹³³

3.7 The controversy surrounding plea and sentence agreements

Plea and sentence agreements remain a controversial subject among academics. It has not enjoyed undivided academic support.¹³⁴ Both its supporters and detractors present sound arguments to support their views.

3.7.1 Supporters

Supporters view negotiated justice as a means to exchange the truth for a reduction in charge and, where applicable, a reduction in sentence.¹³⁵ It has been described as a handsome alternative to lengthy and costly criminal trials and the *sine qua non* for the efficient administration of justice.¹³⁶ The supporters of negotiated justice place emphasis on the benefits of negotiation for the accused, the state and the victim.

For an accused, the main objective of a plea and sentence agreement is to influence the sentence which may be imposed.¹³⁷

¹³³ See Isakow & van Zyl Smit (1985: 174) who predicted that South African courts might soon be faced with the realities of negotiated justice and suggested that the issue be confronted squarely and that positive guidelines be developed to provide a controlled legal context for the negotiation of pleas.

¹³⁴ See Steyn (2007: 207).

¹³⁵ Combs (2005: 130).

¹³⁶ Du Toit & Snyman (2001: 144).

¹³⁷ Du Toit & Snyman (2001: 154).

Du Toit & Snyman explain that the primary aims of such an agreement are:

- a) to minimise the ambit of the sentence through the negotiation of a reduction in the number or severity of charges; and
- b) to determine the exact type of sentence as far as it is possible, in advance.¹³⁸

Where the accused has negotiated a reduction in charge, this is usually accompanied by a shorter term of imprisonment or even a non-custodial sentence.¹³⁹ Insofar as non-custodial sentences are concerned the directives issued by the NDPP stipulate that:

Negotiating a plea and sentence agreement is not to be understood as meaning the bargaining away of a sentence of imprisonment for a non-custodial sentence. Where the interest of justice and/or public interest requires an effective sentence of incarceration that is the stance to be taken.¹⁴⁰

Thus, plea and sentence negotiations cannot be viewed as means of avoiding incarceration. Yet, a shorter term of imprisonment is viewed as an intrinsic benefit of negotiated justice.¹⁴¹ A further benefit for the accused is that he could plead to what may be perceived as a 'morally condonable' or 'softer' offence. For example, a motorist charged with culpable homicide agrees to plead guilty to reckless or negligent driving. The alternative offence would result not only in a lesser sentence but also, because of the curtailed stigma attached to the offence, re-integration of the offender into the community is facilitated.

For the state, negotiated justice is viewed as a means of easing the overburdened criminal justice system and facilitating the achievement of an effective and efficient system.¹⁴² A plea and sentence agreement can be reached swiftly, thus saving the time and the expense involved in a lengthy criminal trial with all its evidentiary risks.¹⁴³ If

¹³⁸ Du Toit & Snyman (2001: 155).

¹³⁹ Du Toit & Snyman (2001: 155). See further Snyman & Du Toit (2000: 191 & 196).

¹⁴⁰ Directive 3 of the Directives issued by the NDPP on 14 March 2002.

¹⁴¹ See, for example, *S v Esterhuizen* at 495 paragraph c and further Snyman & Du Toit (2000: 197).

¹⁴² SAHRC (2001: 1).

¹⁴³ Bekker, Geldenhuys *et al* (2003: 199).

used optimally, it could reduce awaiting-trial prisoner numbers, as well as the caseloads of criminal justice personnel such as the police, justice centre attorneys, magistrates and prison officials.

For the victim who has been traumatised by the offence, negotiated justice is viewed as a means to prevent reliving the experience by having to testify at trial and undergoing cross-examination.¹⁴⁴ In addition, the anxiety which accompanies lengthy criminal trials (usually the result of numerous delays) may be avoided by the swift outcome associated with negotiated justice.

3.7.2 Critics

Negotiated justice is practised extensively in the USA and most South African critics base their views on the evident flaws within the American criminal justice system.¹⁴⁵ These flaws include, *inter alia*, the overzealous prosecutor who would systematically charge an accused with multiple and more serious offences so as to increase his bargaining power in the negotiation process.¹⁴⁶ This situation is aggravated then by the incompetent defence counsel who, due to his overwhelming caseload, manipulates his client into an ill-advised agreement in order to dispose of the case quickly.¹⁴⁷ Furthermore, the presiding officer may be motivated to accept the plea agreement in order to avoid a lengthy trial. Critics have labelled the above ‘the problems concerning the motivations of the actors’ in negotiated justice.¹⁴⁸

¹⁴⁴ Du Toit & Snyman (2001: 154).

¹⁴⁵ De Villiers (2004: 250). See also Bekker (1996: 195) who notes that over 90% of all criminal convictions in the United States of America are based on plea agreements.

¹⁴⁶ Combs (2005: 127). See also Du Toit & Snyman (2001: 153).

¹⁴⁷ Uphoff (1995: 78). See also De Villiers (2004: 251).

¹⁴⁸ See De Villiers (2004: 240) and further Fletcher (1995: 191) who states that ‘the very idea that the authorities cut special deals with particular defendants offends the rule of law’.

The foremost criticism levelled against negotiated justice is that it undermines the values of the criminal justice system.¹⁴⁹ The criminal justice system contains explicit rules for the determination of guilt and the punishment of the guilty.¹⁵⁰ Negotiated justice is viewed as a circumvention and manipulation of the established legal rules because the rigorous standards of due process and proof beyond a reasonable doubt are avoided.¹⁵¹ Detractors further argue that these agreements are procedurally unfair because the guilt of the accused is determined by weighing the chance of success at trial against a full investigation, the leading of evidence and impartial fact-finding.¹⁵² They submit that these procedural safeguards are our main assurance of equal protection of the law.¹⁵³

In addition, a section 105A agreement may be concluded only when an accused is legally represented.¹⁵⁴ Hence, it is only available to a small percentage of accused persons. De Villiers poses the following question: 'Why are unrepresented accused deemed to be competent to plead guilty in the conventional manner but not to participate in section 105A proceedings?'¹⁵⁵ If an accused is deemed fit to plead guilty in terms of section 112 of the CPA while not being represented, he should be able also to negotiate an agreement in accordance with section 105A while not being represented.¹⁵⁶ To deny the accused an opportunity to conclude a plea agreement because he does not have the means to appoint a legal representative or has waived

¹⁴⁹ Snyman & Du Toit (2000: 195).

¹⁵⁰ Snyman & Du Toit (2000: 195).

¹⁵¹ Snyman & Du Toit (2000: 195). See also Piccinato (2004: 2) and further De Villiers (2004: 251).

¹⁵² Snyman & Du Toit (2000: 197) See De Villiers (2004: 251) and further Bekker (1996: 210).

¹⁵³ De Villiers (2004: 252).

¹⁵⁴ Section 105A(1)(a).

¹⁵⁵ De Villiers (2004: 254).

¹⁵⁶ De Villiers (2004: 255).

his right to legal representation is not defensible, and it is doubtful whether this limitation will survive constitutional scrutiny.¹⁵⁷

Critics also express concern for the innocent accused who may be induced to plead guilty.¹⁵⁸ The pressure placed on an innocent accused to conclude a plea agreement may originate from a lack of confidence in the criminal justice system or in the competence of defence counsel. In addition, the harsher sanctions associated with conviction after trial may provide a prosecutor with significant bargaining power.¹⁵⁹ Thus, an accused may fear harsher punishment should he attempt to contest the charges levied against him.¹⁶⁰ Furthermore, the prospect of incarceration may be especially unnerving to an innocent accused, rendering him willing to agree to almost anything if the agreement guarantees a non-custodial sentence.¹⁶¹ Critics therefore conclude that the most serious concern with negotiated justice is that innocent persons may be induced to plead guilty to offences which they did not commit or for which they have a valid defence.¹⁶²

Linked to the above is the criticism most dear to public concern, namely, that a guilty accused will receive a lenient sentence if he enters into a plea and sentence agreement.¹⁶³ The reduction in sentence is almost inevitable. In *Esterhuizen* the court stated that the price for such agreements may be that the sentence which normally would flow from the commission of the crime is lower than might otherwise have

¹⁵⁷ De Villiers (2004: 254).

¹⁵⁸ Snyman & Du Toit (2000: 197). See also Piccinato (2004: 2) and Steyn (2007: 207).

¹⁵⁹ Piccinato (2004: 3).

¹⁶⁰ Snyman & Du Toit (2000: 197).

¹⁶¹ Uphoff (1995: 130).

¹⁶² Piccinato (2004: 3).

¹⁶³ Snyman & Du Toit (2000: 197).

been imposed.¹⁶⁴ Although a reduction in sentence may be unacceptable to most victims and is arguably the reason why the public disapproves of the practice, it does not mean that justice has not been served.¹⁶⁵ In *Esterhuizen* the court held that as long as the sentence bears an adequate relationship to the crime, justice has been served.¹⁶⁶

However, according to De Villiers, section 105A undermines the deterrent effect of our criminal justice system because the criminal now knows that even if he is caught, the struggling system will offer him a plea to a lesser offence and agree to a lesser sentence in order to cope with its caseload.¹⁶⁷ Thus, negotiated justice fails to address and possibly entrenches the problem of repeat offenders.¹⁶⁸ De Villiers asserts that, instead of addressing the real causes of the decline in the efficiency of the criminal justice system, much effort has been put into the implementation of a measure which accelerates the criminal justice process.¹⁶⁹ It is argued that even though prompt and efficient procedures are state interests worthy of cognisance, the criminal justice system embodies values higher than expediency and efficiency.¹⁷⁰

Despite the cogent arguments made by critics, negotiated justice has been introduced formally and accepted as a facet of criminal procedure in South Africa. Thus, arguments pertaining to the legitimacy of the practice have become obsolete to a large extent. However, these arguments are likely to be revived in critical assessments of the procedures followed in pursuit of negotiated justice.

¹⁶⁴ *S v Esterhuizen* at 495 paragraph c.

¹⁶⁵ Snyman & Du Toit (2000: 197) and *S v Esterhuizen* at 495 paragraph d.

¹⁶⁶ *S v Esterhuizen* at 495 paragraph e.

¹⁶⁷ De Villiers (2004: 251).

¹⁶⁸ De Villiers (2004: 255).

¹⁶⁹ De Villiers (2004: 252).

¹⁷⁰ De Villiers (2004: 251) for his discussion of *Santobello v New York* and further Burchell (2005: 16) who states that 'plea bargaining has little to do with justice, fairness and principle. It is all about the expeditious handling of criminal cases'.

3.8 Conclusion

There are clearly two independent systems of negotiated justice in South African criminal procedure, namely, statutory negotiated justice and informal negotiated justice. Although it is beyond the scope of this study to consider the role of the victim in informal negotiated justice, this should not detract from the importance of such consideration. Certainly, it is anticipated that this research, *inter alia*, will provide a foundation for testing the constitutionality of the distinction between victim participation in informal negotiated justice and victim participation in statutory negotiated justice.

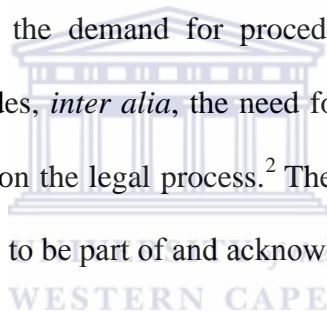
Statutory negotiated justice makes provision for victim participation at significant stages of the proceedings. Section 105A(1)(b)(iii) allows for victim participation at the negotiating stage, while section 105A(7)(b)(i)(bb) allows for victim participation at the sentencing stage. However, these provisions do not guarantee the victim a right to participate. Participation at the negotiating stage is subject to the prosecutor finding that it would be reasonable to allow the victim to participate and the victims' input at sentencing is subject to judicial discretion. Although these provisions constitute a manifest attempt to promote victim participation, their sufficiency in the light of South Africa's commitment to victim protection requires critical assessment.

CHAPTER FOUR

THE SCOPE AND CONTENT OF VICTIMS' RIGHTS DURING PLEA AND SENTENCE NEGOTIATIONS

4.1 Introduction

Although the need to give victims their rightful place in the criminal justice system is apparent, the manner in which this should be done is not. Ultimately, one must be guided by the demands made by victims and their families. These demands have been identified and may be divided into two broad categories, namely, the demand for restitution and services, and the demand for procedural rights.¹ The demand for restitution and services includes, *inter alia*, the need for compensation in some form and the need for information on the legal process.² The demand for procedural rights is based on the victim's desire to be part of and acknowledged in the legal process.³



This chapter identifies and analyses those victims' rights which require emphasis in the context of negotiated justice. This is followed by a critical evaluation of section 105A(1)(b)(iii) CPA. Although the section has been classified as one which seeks to promote victims' rights in the context of negotiated justice, the critical evaluation will draw the reader's attention to its inadequacies.⁴

¹ SALRC (2003) *Project 107: Discussion Paper 102* at paragraph 40.1.1.

² SALRC (2003) *Project 107: Discussion Paper 102* at paragraph 40.1.1.

³ SALRC (2003) *Project 107: Discussion Paper 102* at paragraph 40.1.1.

⁴ See, for example, Du Toit *et al* (2006: 15-12).

Thereafter, a proposal for amendment of the section is provided. The amendment proposed is aimed at remedying the identified inadequacies. The chapter concludes by anticipating and addressing some of the possible objections to the proposal.

4.2 Victims' rights in negotiated justice

In her article, *Victim Participation in Plea Bargains*, Welling focuses on the rights of victims in the American plea agreement system.⁵ She identifies three specific rights which require emphasis in the context of negotiated justice, namely:

- the right to be informed of the agreement,
- the right to be present when the agreement is presented to the court, and
- the right to participate in the agreement.⁶

The South African Victims' Charter does not focus on the rights of victims within negotiated justice. However, it does offer a legal framework for the rights identified by Welling.⁷ In combination, then, Welling's submission and the relevant provisions of the Charter constitute a tool-kit with which to assess victims' rights in the context of section 105A agreements.

In the discussion which follows the need for and scope of the victims' rights in respect of information, presence and participation will be analysed.

⁵ Welling (1987: 301). The American criminal justice system is divided into federal law and state law. Welling does not distinguish between the rights of victims in the federal plea agreement system and those in the state plea agreement system. Instead, she identifies a set of basic rights common to both systems of law.

⁶ Welling (1987: 305). See further Bekker (1996: 204). Bekker's discussion of the role of the victim in plea negotiations was based on Welling's articulation of the potential rights which may be accorded to victims.

⁷ Articles 2 and 3 of the Victims' Charter provide that the victim has the right to receive and offer information. These articles provide a basis for the rights which, according to Welling, require emphasis in negotiated justice.

4.2.1 The right to be informed of the agreement

4.2.1.1 The victim's need for information

The need for information is the need most often expressed by victims.⁸ There are numerous arguments which found the need to provide victims with a right to information. Bruce summarises the various arguments into three basic positions:

Firstly, the victim is the person likely to have reported the case. Were it not for his or her victimisation there would be no case to investigate. In a sense the case 'belongs' to the victim more so than it does the agencies of the criminal justice system. While these agencies are administering the investigation and prosecution of it, the victim has a reasonable claim (potentially a right) to be kept up to date with developments relating to the case.

Secondly, it is argued, providing information along with other victim support or empowerment measures is part of basic professional practice.

Thirdly, providing information to victims is necessary in order for them to cooperate with and assist the criminal justice system at key points.⁹

In addition to the above, it is submitted that providing the victim with information facilitates his psychological recovery.¹⁰ The trauma inflicted by victimisation should not be ignored.¹¹ Victims encounter the criminal justice system after being exposed to a traumatic event. In most cases such an event forces victims to confront their own mortality and this may lead to significant feelings of, *inter alia*, distress, powerlessness and fear about safety.¹² Batley explains that we derive much of our

⁸ See Pretorius & Louw (2005: 75-76). According to the authors the primary needs of the victim are emotional and practical needs, the need for information, acknowledgement and understanding as well as the need to interact with the criminal justice system. See further paragraph 3 of the Victims' Charter Consultative Draft.

⁹ Bruce (2005: 105-106).

¹⁰ See Pretorius & Louw (2005: 75).

¹¹ See, for example, Williams (1999: 52) who explains that case studies have revealed that after the act of victimisation victims may feel jumpy and easily startled. Some are physically ill and often find it difficult to sleep and to concentrate. There are also long-term reactions such as depression and post-traumatic stress syndrome which may occur.

¹² Williams (1999: 52). See also Henderson (1985: 957-958). The author explains that victimisation shatters the assumption that 'crime happens to others and it won't happen to oneself' and the lack of control that a victim feels during the victimisation deprives him not only of his belief in his invulnerability but also of his sense of autonomy in the world.

sense of safety from a sense of control.¹³ During the commission of a crime the accused has control over the life of the victim and reclaiming that control becomes vital to the victim's psychological recovery.¹⁴ Victims are unable to reclaim their sense of security and control if the criminal justice system, which is designed to protect them, alienates them instead. There is, therefore, a rational basis for the victim's need for information.

4.2.1.2 The scope and application of the right to information

According to Pretorius & Louw, victims often want to know whether the perpetrator was caught, whether he is in custody or out on bail, what the charges were, when the court appearance will be, whether they have to give evidence in court, whether the accused was convicted and, if so, what sentence was imposed.¹⁵ The Victims' Charter caters for such concerns. It provides that victims have the right to receive information and can request to be informed of the status of the case, that is, whether or not the perpetrator has been arrested, charged, granted bail, indicted, convicted or sentenced.¹⁶

Welling submits that, in the context of negotiated justice, the right to be informed means that the prosecutor must inform the victim of the terms of the agreement before it is presented to the court.¹⁷ In the first part of her submission, Welling identifies the scope of the victim's right to be informed as the right to be informed of the terms of

¹³ Batley (2005: 121).

¹⁴ Batley (2005: 120). Batley explains that this loss of control is demoralising and affects one's sense of safety, identity and well-being.

¹⁵ Pretorius & Louw (2005: 76).

¹⁶ See article 3 of the Victims' Charter.

¹⁷ Welling (1987: 306).

the agreement.¹⁸ In the second part of her submission she states that this right finds application before the agreement is presented to the court.¹⁹ This implies that the victim's right to be informed of the agreement comes into effect after the agreement has been concluded.

Du Toit & Snyman offer a different view of the timing of the right to be informed.

They argue that:

In order to establish a healthy dispensation in South African courts the victim should be informed of the planned plea bargaining proceedings and the possible contents of those proceedings.²⁰

Du Toit & Snyman are suggesting that the victim be informed of the prosecutor's intention to conclude an agreement with the accused. Article 3 of the Victims' Charter supports their suggestion. It provides that the victim has the right to receive information and hence can request to be informed of the status of the case.²¹ The victim can invoke this right at any stage of the proceedings. Thus, where a prosecutor intends to negotiate a plea and sentence agreement he would be obliged to inform the victim of his intention, at that stage, if the victim has invoked his right to be informed of the status of the case.

Therefore, on the basis of article 3 of the Victims' Charter, the South African victim, unlike his American counterpart, could enjoy the right to be informed of the agreement before and after it has been concluded. Yet, the stage at which the right to receive information may find application does not affect the substance of the right.

¹⁸ Welling (1987: 306).

¹⁹ Welling (1987: 306).

²⁰ Du Toit & Snyman (2001: 154).

²¹ See article 3 of the Victims' Charter.

The victim still enjoys only a right to be informed of the agreement or, at best, a right to be informed of the state's intention to enter an agreement.

4.2.1.3 The practical implications argument against the right to information

The practical implications argument is based on the premise that allowing victims a right to information will place an insurmountable burden on the criminal justice system.²²

Bruce poses the following questions about the practical implications of the victim's right to information:

If victims have a "right" to information, how much information how often does this right entitle them to? What lengths should be gone to and what costs should be entered into to ensure that this right is upheld? And what if one of the costs is placing further demands on criminal justice officials who feel they are already overextended?²³

According to Bruce, victims may not necessarily be satisfied with being informed about events or decisions.²⁴ They may want to know why those events are taking place and why those decisions were made.²⁵ He adds that providing victims with information regarding the progress of the case may be reasonable, but it does not necessarily contribute towards the credibility of the criminal justice process.²⁶ In his view, the obligation to provide victims with information will contribute towards the credibility of the criminal justice system only if the obligation is combined with improvements in the effectiveness of the system.²⁷ Thus, according to Bruce, if the obligation to provide information simply places an additional strain on already over-

²² See, for example, Bruce (2005: 105).

²³ Bruce (2005: 106).

²⁴ Bruce (2005: 106).

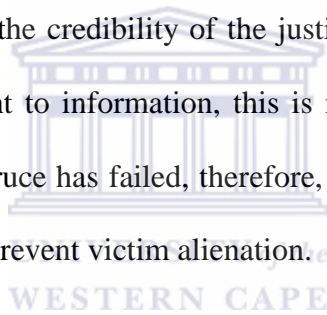
²⁵ Bruce (2005: 106).

²⁶ Bruce (2005: 106).

²⁷ Bruce (2005: 104).

extended justice officials, it will be unlikely to contribute to either greater credibility or effectiveness of the criminal justice system.²⁸ He, therefore, disapproves of allowing victims a right to information if such right places an additional strain on criminal justice officials.

There are at least two flaws in the practical implications argument presented by Bruce. Firstly, he assumes, incorrectly, that providing victims with information will improve the credibility of the criminal justice system. In this regard, it is submitted that the credibility of a criminal justice system does not depend upon its ability to provide information to victims, but rather upon its ability to administer justice fairly. It must be emphasised that although the credibility of the justice system might be improved by fulfilling the victim's right to information, this is not the purpose but rather the consequence of such right. Bruce has failed, therefore, to observe that the purpose of the right to information is to prevent victim alienation.



A second flaw in the practical implications argument is that it endorses the theory that victims are better kept on the periphery until the systemic problems of the criminal justice system are resolved.²⁹ The argument therefore endorses secondary victimisation. Thus, the practical implications argument, as presented by Bruce, should be abandoned because it does not make a legitimate case for denying victims a right to information.

²⁸ Bruce (2005: 106).

²⁹ See, for example, Bruce (2005: 106) who quotes the following controversial submission by Morgan & Sanders: 'Telling a victim that their case will be dropped, for example, leads many victims onto the obvious question of "why?". If this question is not answered, many victims end up less satisfied than they would have been if they had been kept in the dark.'

4.2.2 The right to be present

4.2.2.1 The need for victim presence

The second right which Welling identifies is the victim's right to be present when the agreement is presented to the court.³⁰ According to Hagan, a victim's attendance at court serves two purposes.³¹ Firstly, it is a way in which the victim can have contact with, and involvement in, the criminal justice process.³² Secondly, the victim gains knowledge of the disposition of the case by attending court proceedings.³³ Hagan's empirical study also reveals that victims' demand for severity in sentencing is reduced by court attendance.³⁴ He concludes, therefore, that victims should be encouraged to attend court because attendance decreases the victim's assessment that criminal sanctions are too lenient.³⁵

4.2.2.2 The scope of the right to be present when the agreement is presented to the court

In the context of negotiated justice, the victim's right to be present entails the right to attend the court's scrutiny and verification of the plea and sentence agreement.³⁶

The right to be present during court proceedings is an inherent facet of South African criminal procedure. In terms of section 152 of the CPA, as a general rule, criminal

³⁰ Welling (1987: 305).

³¹ Hagan (1982: 323). The author conducted his study in Toronto, Canada. It focused on two types of victims' responses within the criminal justice process, namely, victims' responses to sentences imposed by the court generally, and victims' responses to the specific person charged.

³² Hagan (1982: 323).

³³ Hagan (1982: 323).

³⁴ Hagan (1982: 327).

³⁵ Hagan (1982: 327).

³⁶ See sections 3.4.2.1-3.4.2.3 in the text above for the discussions on the process of judicial scrutiny and approval of section 105A agreements.

proceedings must take place in open court.³⁷ In addition, the Victims' Charter provides that the victim has the right to attend the bail hearing, the trial, sentencing proceedings and the Parole Board hearing if necessary and where possible.³⁸ An exception to the victim's right to attend court proceedings relates to the victim as witness. In this instance, the rules of evidence would require that the victim wait outside the courtroom before being called upon to testify.³⁹

Plea and sentence agreements do not constitute an exception to the general rule contained in section 152. Section 105A does not stipulate that such agreements be presented to the court behind closed doors. In addition, the court will not hear testimony from the victim because there is no trial. Hence, the rules of evidence would not be compromised by the victim's presence during the court's scrutiny and verification of the agreement. Section 152 and the provisions of the Victims' Charter would apply, therefore, when the agreement is presented to the court. Thus, it would appear that the victim's right to be present is provided for adequately by the CPA as read with the Victims' Charter.

4.2.3 The significance of the right to information and of the right to be present

Most of the available literature emphasises the significance of a victim's right to information and the right to be present during court proceedings. The SAHRC, for example, views the right to receive information as particularly significant in the context of negotiated justice.⁴⁰ It states that:

³⁷ Section 153 of the CPA contains the exceptions to this general rule.

³⁸ Article 2 of the Victims' Charter.

³⁹ See Schwikkard & van der Merwe (2002: 401). At 508 the authors explain that this is done to ensure that a witness is not influenced by what he hears from other witnesses who testify in his presence.

⁴⁰ SAHRC (2001: 4).

By failing to inform the victim that the charge has been altered, to entice a plea agreement from the accused, the victim is denied the right to receive information pertaining to his case. The alteration of a charge and subsequent failure to notify the victim thereof constitutes an infringement of the victim's right to dignity.⁴¹

Support for the SAHRC's submission is found in Henderson's article titled *The Wrongs of Victims' Rights*.⁴² According to Henderson, failing to inform the victim of the agreement could be viewed by the victim as an invalidation of the victimisation he has experienced.⁴³ She explains that satisfying the informational needs of the victim is definitely the first step towards resolving the problem of victim alienation which is associated with negotiated justice.⁴⁴

Bekker also addresses the significance of the victim's right to information and the right to be present when the agreement is presented to the court.⁴⁵ He endorses various recommendations, made by American authors, which accommodate these rights in plea negotiations.⁴⁶ One of the recommendations requires the prosecutor to notify the victim of the proposed terms of the agreement at least ten days before the agreement is presented to the court.⁴⁷ To this Bekker adds that the prosecutor's notification should include advising the victim that he has the right to be at hand when the agreement is presented to the court.⁴⁸

⁴¹ SAHRC (2001: 5).

⁴² Henderson (1985: 981) states that although the prosecutor represents the state, rather than the individual victim, courtesy and common sense would seem to dictate that the prosecutor treat victims with respect by informing them of the plea bargaining options.

⁴³ Henderson (1985: 981).

⁴⁴ Henderson (1985: 980) opines that in order to solve the problem of victim alienation associated with plea bargaining, prosecutors could simply provide more information to victims.

⁴⁵ Bekker (1996: 205).

⁴⁶ Bekker (1996: 205).

⁴⁷ Bekker (1996: 205). Other recommendations endorsed by Bekker include requiring a prosecutor to consult with the victim before a plea proposal is made to the accused and allowing the victim a right to participate at the hearing by expressing his views to the trial court before the agreement is accepted. These recommendations are reiterated, to a large extent, by Du Toit & Snyman (2001: 154).

⁴⁸ Bekker (1996: 205).

Welling raises doubts about the practical value of the right to information and the right to be present. She opines that:

The right to be informed of the agreement and the right to be present at the hearing are relatively insignificant rights because the victim remains a spectator and has no opportunity to affect the outcome of negotiation.⁴⁹

She adds that, to a large extent, the general public currently enjoys these rights and that victims therefore already are entitled to these rights.⁵⁰

In response to Welling's concerns, it is submitted that the rights in question are not intended to be participatory in nature as this would simply overreach the scope of such rights. Thus, the victim's remaining a spectator throughout the proceedings corresponds to the scope and nature of these rights. The rights to information and to be present, like all other rights, have limitations, but this should not detract from their significance. Neither should the fact that the rights in question are enjoyed by the general public undermine their value to victims. Indeed, the general public's enjoyment of the rights in question could be interpreted to mean that such rights are inherently significant. Therefore, Welling's submission is understood better not as an assault upon the rights themselves but as demonstrating the need to combine these rights with a participatory right.

⁴⁹ Welling (1987: 306) states that the value of these rights is diminished by the timing involved. She explains that in the American criminal justice system the right to information arises relatively late in the process. The problem of timing of the right to information also impairs the victim's right to be present because the victim will not get information on the hearing schedule in time to implement the right to be present.

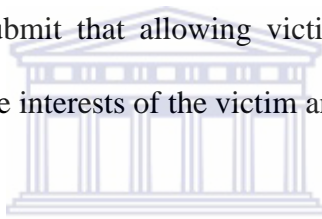
⁵⁰ Welling (1987: 305-306).

4.2.4 The right to participate

The victim's participation right has been defined as a right to be heard.⁵¹ According to Welling, this is a significant right which may be accorded victims because it encompasses the right to be informed and the right to be present when the agreement is presented to the court.⁵² A natural consequence of allowing victims a right to participate is that they will have to be notified of the intention to enter into an agreement and, as a result, would gain knowledge of their right to be in attendance when the agreement is presented to the court.

4.2.4.1 The need for victim participation

Both Welling and Bekker submit that allowing victims the right to participate in negotiated justice promotes the interests of the victim and the interests of society.⁵³



4.2.4.1.1 The interests of the victim

According to the authors, the victim has at least two interests which could be protected by his participation in negotiated justice.⁵⁴ The first interest is financial.⁵⁵ Welling explains that a victim will have a financial interest in negotiated justice if he is eligible for compensation.⁵⁶ In the plea agreement the victim's interest lies in ensuring that the accused pleads to a charge which is sufficiently linked to the damage

⁵¹ Welling (1987: 355).

⁵² Welling (1987: 307).

⁵³ See Welling (1987: 308) and Bekker (1996: 204).

⁵⁴ See Welling (1987: 308) and Bekker (1996: 204).

⁵⁵ Welling (1987: 307).

⁵⁶ Welling (1987: 307).

or loss he has suffered.⁵⁷ Alternatively, the victim could advocate that an award of compensation be included as a component of the sentence agreement.⁵⁸

Welling's view, although based on the American plea agreement system, finds support in South African criminal procedure. In terms of section 300 of the CPA, the charge on which the accused is convicted determines the extent to which the victim will be compensated by the state.⁵⁹ Thus, a victim who is eligible for compensation will have an interest in ensuring that the negotiated plea reflects the loss he has suffered.

The victim's second interest, according to Welling, is retribution.⁶⁰ She argues that because the victim's interests have been violated, he feels that the punishment of the accused should be severe.⁶¹ Thus, in the plea agreement the victim would want the accused to plead guilty to a serious charge and in the sentence agreement the victim would want a significant sentence imposed.⁶² However, Kennard strongly opposes this analysis. According to her, Welling's view is based on the 'Myth of Victim Retributiveness'.⁶³ Kennard opines that, although observers may assume that victims are motivated by a desire for retribution, there is no evidence which supports this

⁵⁷ Welling (1987: 307). The compensation which may be awarded by a criminal court is limited to the damage or loss caused to property. The victim would have to pursue a civil action against the accused should he wish to claim for the infringement of personality interests.

⁵⁸ Welling (1987: 307).

⁵⁹ Section 300 of the CPA provides that 'where a person is convicted by a superior court, a regional or a magistrates' court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on instructions of the injured person, forthwith award the injured person compensation for such damage or loss.'

⁶⁰ Welling (1987: 307). See also Bekker (1996: 209).

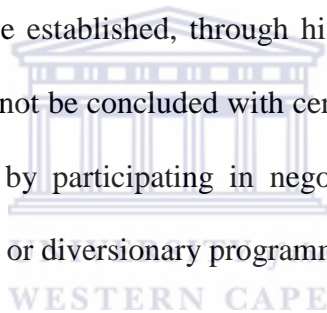
⁶¹ Welling (1987: 306).

⁶² Welling (1987: 308).

⁶³ Kennard (1989: 446).

assumption.⁶⁴ She adds that empirical studies have proved the contrary, in that most victims have demonstrated reservations about sending perpetrators to prison because they believe that prison conditions are brutalising and encourage criminal behaviour.⁶⁵

Obtaining a real understanding of victims' interests is a complex process. Victims are not a homogeneous group and generally will have a variety of views, interests and perspectives.⁶⁶ Often the most marginalised victims have the least access to debates about such issues and the voices of certain victims would not necessarily reflect the interests of all victims.⁶⁷ Thus, a proper conclusion can be reached only if the victim concerned is allowed an opportunity to be heard. In that way the interests which the victim seeks to protect can be established, through his participation, without undue assumption. Therefore, it cannot be concluded with certainty that victims will seek to protect a retributive interest by participating in negotiated justice. They may, for example, favour rehabilitative or diversionary programmes.⁶⁸



⁶⁴ Kennard (1989: 447).

⁶⁵ Kennard (1989: 447) refers to empirical research conducted by Heinz & Kerstetter (1979: 349). The authors conducted a field experiment in Dade County, Florida in which court personnel were required to hold pre-trial conferences at which the victim, the accused and arresting officer were allowed an opportunity to express their opinions. At 359 they state that, contrary to the expectations of some observers, the victims involved did not demand the maximum authorised punishment. Instead they were usually supportive of the disposition proposed by the attorneys. A similar study was conducted by Henderson & Gitchoff (1981: 226). At 230 the authors state that victims have demonstrated that they are quite willing to move away from a position of retribution if given viable alternatives.

⁶⁶ See the website of the Victims' Rights Working Group for its discussion of the interests of victims. VRWG is a non-profit organisation which seeks to promote the rights and interests of victims before the International Criminal Court. See also Williams (1999: 51) who states that reactions to victimisation are individual and unpredictable. He explains that while there may be some discernible patterns, it can never be assumed that a particular offence will have predictable consequences for an individual victim.

⁶⁷ See VRWG website.

⁶⁸ See, for example, Leggett (2005: 111). According to the author, victims are not as single-mindedly retributive as many would believe. He states that some of the most victimised South Africans in the country (those who reside in inner-city Johannesburg) are still open to more creative approaches to resolving criminal incidents. See also Karmen (1994: 335).

4.2.4.1.2 The interests of society

Welling and Bekker opine that allowing the victim a right to participate in negotiated justice promotes the interest of society.⁶⁹ There are at least three arguments which motivate this opinion.

Firstly, the criminal justice system relies on the co-operation of victims.⁷⁰ According to Kennard, the continued functioning of the criminal justice system depends on victim co-operation both in reporting offences and in assisting the prosecution of crime.⁷¹ The theory is that if victims are not allowed to participate in the plea and sentence negotiation and hence feel alienated and irrelevant, they will not co-operate in the reporting and prosecution of crime.⁷² Kennard explains that when victims are dissatisfied they show their dissatisfaction by not reporting crimes, by failing to appear in court and, at times, by resorting to vigilantism.⁷³

Secondly, within the confines of plea and sentence negotiation, victim participation would enhance the negotiating ability of the prosecutor. According to Welling, allowing the victim the right to participate will result in more information being provided to the prosecutor and the court, and more information, theoretically, results

⁶⁹ Welling (1987: 308) and Bekker (1996: 205).

⁷⁰ See Strijdom (1983: 65-66). The author explains that although some may argue that the police are the 'gatekeepers' of the criminal justice system, this is not the case. He states that it must be borne in mind that crimes are normally reported to the police by the victims. As the police can act only after a crime is reported, victims can be regarded rightly as the primary gatekeepers of the criminal justice system.

⁷¹ Kennard (1989: 417).

⁷² This point has been made repeatedly. See Bekker (1996: 205) and Welling (1986: 308).

⁷³ Kennard (1989: 417). See further Pretorius & Louw (2005: 77) who favour the view that the treatment of victims by authorities indirectly influences their obligation to obey the law. This view is based on the premise that authorities, by treating victims fairly and as valued members of society, can reinforce the perceived obligation to obey the law and thereby elicit law-abiding behaviour.

in better decisions.⁷⁴ By contrast, victim alienation offers no apparent benefits. Instead, it may deepen the frustration of the victim and entrench a practice of secondary victimisation in negotiated justice.⁷⁵

The third argument is presented by Du Toit *et al.* They state that:

Victim participation in the negotiation process is, especially in the context of present criticism of our criminal justice system, an important step which can cultivate and strengthen society's acceptance of plea and sentence agreements as a method of avoiding a traditional adversarial trial.⁷⁶

Thus, according to the authors, if the public is aware that the victim's views have been incorporated in the agreement, society would feel more confident that justice has been done.⁷⁷ Their view is based on the premise that victim participation will enhance the legitimacy and transparency of negotiated justice.⁷⁸

4.2.4.2 The scope of victim participation

From studies conducted by legal scholars as well as sociologists, it is possible to identify at least two policy frameworks which influence the scope of victim participation.⁷⁹ For the purposes of this study, these are labelled veto participation and non-veto participation.⁸⁰

⁷⁴ Welling (1987: 308).

⁷⁵ See the Research Report prepared for the Canadian Department of Justice by Verdun-Jones & Tijerino (2002) at paragraph 6.0. According to the authors victim participation effectively minimises the deleterious effects of secondary victimisation.

⁷⁶ Du Toit *et al* (2006: 15-12). Bekker (1996: 206) shares this sentiment. The author states that if the problems facing the victim in the plea bargaining process are addressed, the whole process would gain legitimacy with the general public.

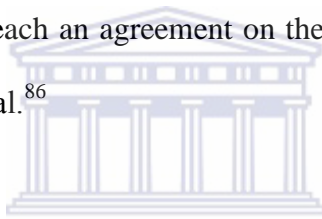
⁷⁷ See Garkawe (2003: 334). The author uses a similar rationale when discussing society's acceptance of the TRC proceedings. He states that 'with the increasing awareness of and attention paid to crime victims it is commonly recognised that any mechanism established to deal with perpetrators must have the confidence of victims if it is to be accepted by the community'.

⁷⁸ Du Toit *et al* (2006: 15-12). Although the authors endorse and emphasise the importance of victim participation they fail to acknowledge the inadequacy of section 105A in this regard.

⁷⁹ See, for example, Goldstein (1982: 515). Goldstein suggests that victim participation entails the victim being a party to the prosecution for limited purposes. See also Gittler (1984: 176)

4.2.4.2.1 Veto participation

Veto participation extends the scope of victim participation to a right which the victim may exercise over the prosecutors' office.⁸¹ Kennard explains that with veto participation the victim, after reviewing the offer and the prosecutor's justification for the offer, would be asked to sign a release form that permits the prosecutor to present the offer to the accused.⁸² Victims who find the offer too punitive or too lenient could refuse to give their consent and thereby exercise a veto.⁸³ Where the victim has rejected the offer in this manner the prosecutor would be required to formulate a new offer and present it to the victim.⁸⁴ This process would continue until the victim and the prosecutor agree on the contents of the offer.⁸⁵ Alternatively, the case would proceed to trial if failure to reach an agreement on the offer threatens to infringe the accused's right to a speedy trial.⁸⁶



4.2.4.2.2 Non-veto participation

By contrast, non-veto participation limits the scope of the victim's input to approving or opposing the agreement and commenting on the terms of the agreement. This form of participation exposes the criminal justice system to the victim's views by allowing him an opportunity to communicate his opinion of the agreement.⁸⁷ However, the victim is not placed in a position to countermand the prosecutor's decision to

who endorses Goldstein's recommendation. See further Fletcher (1996: 247-248). At 250 Fletcher argues that victims should be given the power to approve or disapprove the negotiated agreement. He also reveals his approval of German criminal procedure which allows the victim to join the proceedings as a private prosecutor.

⁸⁰ See Welling (1987: 345-353) and Goldstein (1982: 515) as examples of non-veto participation and Kennard (1989: 437-438) as well as Fletcher (1996: 247-248) for their proposals on a victim's veto in negotiated justice.

⁸¹ See Kennard (1989: 437-438).

⁸² Kennard (1989: 438).

⁸³ Kennard (1989: 438).

⁸⁴ Kennard (1989: 438).

⁸⁵ Kennard (1989: 438).

⁸⁶ Kennard (1989: 438).

⁸⁷ See Welling (1987: 346).

conclude the agreement. Thus, should the victim disapprove of the agreement, his disapproval will not prevent the prosecutor from concluding the agreement, nor will it prevent the court from accepting the terms of the agreement.⁸⁸ Similarly, where the victim approves of the agreement, the prosecutor would not be obliged to conclude the agreement and the court would not be obliged to accept the agreement, based solely on the victim's approval thereof. Thus, non-veto participation merely allows the victim an opportunity to be heard, and those who are required to listen are not obliged to give effect to the views expressed by the victim.⁸⁹

4.2.4.2.3 The scope of section 105A participation

Section 105A(1)(b)(iii) of the CPA represents a form of non-veto participation. According to the provision, the victim may be allowed an opportunity to make representations to the prosecutor regarding –

- (aa) the contents of the agreement; and
- (bb) the inclusion in the agreement of a condition relating to compensation.

It limits the scope of the victim's participation to representations on the contents of the agreement and a condition relating to compensation. Thus, although the provision allows the victim an opportunity to express his opinion on specific aspects of the agreement, the victim's opinion will not countermand the decision taken by the prosecutor. Hence, section 105A(1)(b)(iii) is based on the policy framework of non-veto victim participation in the dispensation of negotiated justice.

⁸⁸ Welling (1987: 350) who explains that the victim's participation right would be a right to be heard by the trial court; the court would not be bound to act in accordance with the victim's views but only to listen to them.

⁸⁹ Welling (1987: 349).

4.3 Section 105A(1)(b)(iii) and victims' rights

It must be determined now whether the inclusion of the victim, in terms of section 105A(1)(b)(iii), is adequate. Its adequacy will be determined by evaluating critically whether the section gives effect to the victim's rights to be informed of the agreement, to be present when the agreement is presented to the court, and to participate in concluding the agreement. The underlying principle for this evaluation is that section 105A(1)(b)(iii) may be classified as adequate only if these basic rights are embodied therein. However, before commencing the evaluation of the current provision, consideration will be given to the SALRC's proposed version of section 105A(1)(b)(iii) as well as the SAHRC's evaluation of this provision in the draft Amendment Bill.⁹⁰



4.3.1 The SALRC proposal

In its recommendation that the Criminal Procedure Act be amended to provide for plea and sentence agreements, the SALRC submitted the following provision to define the role of the victim in negotiated justice:

The prosecutor, if reasonably feasible, shall afford the complainant or his or her legal representative the opportunity to make representations to the prosecutor.⁹¹

An intriguing debate is reported by the SALRC regarding the inclusion of this provision. One commentator proposed that the words 'if reasonably feasible' be deleted.⁹² He argued that it is vital that victims of crime be involved to a greater extent in the plea negotiation phase as it would strengthen the prosecutor's hand in

⁹⁰ See SALRC (2001) *Project 73: Fourth Interim Report* and SAHRC (2001: 2).

⁹¹ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 6.33.

⁹² SALRC (2001) *Project 73: Fourth Interim Report* paragraph 6.34 for the comment by van Vuuren.

these negotiations.⁹³ By contrast, the Director of Public Prosecutions (DPP), Witwatersrand argued that the subsection be removed because, in his view, the aim of these negotiations is to shorten proceedings and the proposed provision would slow down the entire process.⁹⁴ Thus, the DPP would have preferred the victim to be removed completely from the negotiations. Others argued that the provision is superfluous because victim consultation is not compulsory.⁹⁵ In a notably brief submission, the SALRC stated ‘there is a clear division of opinion on the matter and it is impossible to reconcile the conflicting points of view’.⁹⁶ Without adding anything new to the debate, it recommended that the provision remain as it was because it placed the onus on the victim to make representations.⁹⁷ It concluded that ‘to be more or less prescriptive does not appear to be justified’.⁹⁸

The SALRC proposal is significant because the phrase ‘if reasonably feasible’ suggests that the objective test of reasonableness be applied to determine the role of the victim at the negotiating stage. This test would find its way into the final Amendment Act.

4.3.2 The SAHRC submission

Notwithstanding the SALRC recommendation, the legislature produced the following provision in the Criminal Procedure Second Amendment Bill:

⁹³ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 6.34.

⁹⁴ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 6.36.

⁹⁵ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 6.36 for the comment by Levitt.

⁹⁶ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 6.40.

⁹⁷ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 6.40.

⁹⁸ SALRC (2001) *Project 73: Fourth Interim Report* paragraph 6.40.

The prosecutor may only enter into an agreement if the circumstances permit, after affording the complainant or his or her representative the opportunity to make representations to the prosecutor.⁹⁹

The SAHRC, in its investigation of the role of the victim in plea and sentence negotiations, scrutinised this provision. In its analysis, the SAHRC found the phrase ‘if the circumstances permit’ too vague because it was unclear under which circumstances the prosecutor would be entitled not to consult with the victim.¹⁰⁰ According to the SAHRC, this provision allowed the prosecutor a broad discretion and, as a result thereof, the provision failed to recognise the rights of victims.¹⁰¹ It explained that the provision was intended to allow the victim the opportunity to participate in plea and sentence negotiations. Yet, the discretion afforded to the prosecutor meant that the victim may be denied this opportunity.¹⁰² It found this discretion to be contrary to then provisions of the draft Victims’ Charter.¹⁰³

The draft Victims’ Charter provided the following guarantee to victims: ‘the prosecutor assigned to your case, will provide you with the opportunity for meaningful consultation prior to major case decisions’.¹⁰⁴ The SAHRC stated that ‘from a victim’s perspective plea and sentence negotiations would in many instances amount to a major case decision’.¹⁰⁵ Thus, the draft Charter would require the prosecutor to consult the victim regarding the agreement. There was, therefore, a contradiction between the proposed section 105A(1)(b)(iii) and the draft Charter insofar as the victim’s right to participate was limited by the prosecutor’s discretion.

⁹⁹ See the section 105A(1)(b)(iii) of the Criminal Procedure Second Amendment Bill published in Government Gazette No 22582 on 17 August 2001.

¹⁰⁰ SAHRC (2001: 4).

¹⁰¹ SAHRC (2001: 3).

¹⁰² SAHRC (2001: 3).

¹⁰³ SAHRC (2001: 3).

¹⁰⁴ See paragraph 92 of the Victims’ Charter Consultative Draft.

¹⁰⁵ SAHRC (2001: 4).

The SAHRC concluded that allowing the prosecutor discretion to consult the victim did not recognise the rights of such victim.¹⁰⁶ It recommended that the words ‘if the circumstances permit’ be removed from the proposed provision.¹⁰⁷ According to the SAHRC, this would be in line with the victim’s Charter rights because prosecutorial discretion would then be replaced with a prosecutorial duty to consult the victim.¹⁰⁸

The SAHRC’s conclusion is strengthened when it is compared to the provisions of the Victims’ Charter as enacted. In terms of the Charter a victim has the right to offer information, which includes the right to make any contribution he wishes to make, to the prosecution.¹⁰⁹ Thus, if the proposed Amendment Bill had been enacted its provisions would have been contrary to the provisions of the Charter.

4.3.3 A critical evaluation of section 105A(1)(b)(iii) as enacted

When section 105A was finally enacted, it was neither the SALRC proposal nor the provision contained in the Second Amendment Bill which constituted section 105A(1)(b)(iii). The legislature, instead, decided to formulate the provision in a manner which had not been considered by either the SALRC or SAHRC. In terms of the enacted section:

The prosecutor may enter into an agreement contemplated in paragraph (a) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstance of the offence and the interest of the complainant, the opportunity to make representations to the prosecutor.

¹⁰⁶ SAHRC (2001: 3).

¹⁰⁷ SAHRC (2001: 5).

¹⁰⁸ SAHRC (2001: 5).

¹⁰⁹ Article 2 of the Victims’ Charter.

Du Toit *et al* have classified this provision as ‘one which seeks to promote victim participation’ in the course of plea and sentence negotiations.¹¹⁰ The authors are correct. The provision could be comprehended as a legislative attempt to include the victim in negotiated justice. However, from a theoretical and practical perspective, there is a significant difference between a provision which attempts or seeks to promote victims’ rights and a provision which actually promotes victims’ rights. A provision which seeks to promote the rights of victims but does not achieve the intended result has failed. There are at least two indications that section 105A(1)(b)(iii) is a futile attempt to promote victims’ rights.

4.3.3.1 The omission of the right to information

Firstly, the provision does not require that the victim be informed of the agreement either before or after it has been concluded. Victimologists have advised repeatedly that the need for information is the need most often expressed by victims.¹¹¹ It is to be expected, therefore, that legislation seeking to include victims in criminal justice procedures would give effect to this most basic need of victims. Yet, section 105A fails in this regard, rendering it difficult to defend the provision as one which really does incorporate the victim in negotiated justice.

4.3.3.2 The qualified inclusion of the victim

Secondly, victim participation is qualified by the criterion of reasonableness. Section 105A(1)(b)(iii) makes the conclusion of a plea and sentence agreement contingent upon the prosecutor affording the victim, or his representative, an opportunity to make

¹¹⁰ Du Toit *et al* (2006: 15-12).

¹¹¹ See Karmen (1994: 177-178) and Pretorius & Louw (2005: 75-76) as well as Camerer (1997: 1). At 2 Camerer opines that victims have a right to expect timely information about the matters which concern them.

representations regarding the intended agreement. However, the opportunity to make representations is qualified by the words ‘where it is reasonable to do so and taking into account the nature and circumstances of the offence and the interest of the complainant’. These words have replaced the terms ‘if reasonably feasible’¹¹² and ‘if the circumstances permit’¹¹³ contained in the SALRC proposal and the Second Amendment Bill respectively.

This study contends that the provision does not confer discretion on the prosecutor to allow the victim to participate. Hawkins has defined discretion as the space between legal rules in which legal actors may exercise choice.¹¹⁴ In giving effect to section 105A(1)(b)(iii), the prosecutor cannot exercise choice in the sense used by Hawkins. Instead he is required to test whether victim participation is objectively reasonable. The test of reasonableness, combined with factors which must be objectively determined, such as the nature and circumstances of the offence and the interest of the complainant, have therefore replaced the prosecutorial discretion of the Second Amendment Bill.¹¹⁵ This type of qualification is similar to the qualification contained

¹¹² See section 4.3.1 of the text above.

¹¹³ See section 4.3.2 of the text above.

¹¹⁴ Hawkins (1995: 10) explains that he uses the term legal actor to refer not only to ‘judges, lawyers and prosecutors but also to those many other officials, such as the police, regulatory inspectors, probation officers, social workers and the like, whose work involves extensive decision-making in the implementation of a legal mandate’.

¹¹⁵ Apart from the wording of section 105A(1)(b)(iii), the absence of prosecutorial discretion in deciding whether the victim can make representations is evident from the directives issued by the NDPP. The directives aim to regulate the prosecutor’s discretion during plea and sentence negotiations (see section 3.4.1.2 in the text above). A point of note is that when dealing with the victim, the directives specify who should be consulted as opposed to whether or not they can be consulted. For example, directive 10 provides that ‘where a child under the age of 18 is the complainant, such child is to be consulted in the presence of a person *in loco parentis*. Where such child is the victim and a person *in loco parentis* the complainant, the latter is to be consulted’. Directive 11 provides that ‘in the case of a homicide, the relatives of the victim are to be consulted’. Whether or not these victims can be consulted and allowed to make representations is determined by the test of reasonableness and not prosecutorial discretion, hence the directives do not regulate this aspect of the negotiations.

in the SALRC proposal because it is not prosecutorial discretion but rather an objective standard which determines the role of the victim at the negotiating stage.¹¹⁶

Classen defines 'reasonable' as that which is moderate or fair.¹¹⁷ He explains that reasonableness means considering the matter as a reasonable person normally would and then deciding as a reasonable person normally would decide.¹¹⁸ This objective standard for determining the role of the victim is, arguably, an improvement on the subjective standard entailed in prosecutorial discretion. Yet, the problem with rendering victim participation subject to the test of reasonableness, combined with the other objective factors, is that it begs the question: Is it ever reasonable to exclude victims from the criminal justice process? The answer has to be no. The wisdom of including victims is evident from the following submission by Welling:

Making victims feel that their contribution is important, regardless of its actual value, will motivate those victims (and others) to report crimes and cooperate in the investigation and prosecution.¹¹⁹

This point has been made repeatedly.¹²⁰ It should be added that applying a test of reasonableness to determine whether or not victims are allowed to participate in negotiated justice is inherently problematic. This is because victim exclusion amounts to secondary victimisation. The victim who is refused the opportunity to participate, in effect, is being victimised by the criminal justice system. Thus, denying the victim an opportunity to make representations regarding plea and sentence negotiations simply cannot be justified as reasonable. In fact, the converse is true. It is

¹¹⁶ See section 4.3.1 in the text above.

¹¹⁷ Classen (1997) issue 9 at R9.

¹¹⁸ Classen (1997) issue 4 at R16. The Appellate division cases of *Vanderbijlpark Health Committee v Wilson* 1950 (1) SA 447 (A) at 458 and *Johannesburg LLB v Kuhn* 1963 (4) SA 666 (A) at 671 support Classen's submission.

¹¹⁹ Welling (1987: 309).

¹²⁰ See Du Toit *et al* (2006: 15-12) and Bekker (1996: 209).

unreasonable to exclude the victim from such negotiations, especially where the right to be exercised by the victim is of a non-veto nature.

It is submitted, therefore, that in this context the test of reasonableness is an instrument of victim oppression because it facilitates the trend toward excluding the victim from the criminal justice system. There is no rational basis for refusing victims an unqualified right to be heard.

4.3.4 Rectifying the inadequacy of section 105A(1)(b)(iii)

The victim's right to information, to be present when the agreement is presented to the court and to participate in the negotiation process have been identified as rights which require emphasis in the context of negotiated justice.¹²¹ If the purpose of section 105A(1)(b)(iii) is to include the victim in negotiated justice then the legislature's silence with regard to informing the victim of the agreement and the qualification of victim participation renders the section inadequate. If, as argued above, the provision does not allow the prosecutor a choice in allowing victim participation, then it is impossible to establish prosecutorial guidelines to regulate victim participation in negotiated justice. The rational solution to removing the inadequacy of section 105A(1)(b)(iii) is to amend it.

¹²¹ See section 4.2 above. As stated in section 4.2.2.2 in the text above the right of presence is adequately provided for by section 152 of the CPA and article 2 of the Victims' Charter.

4.4 A proposal for the amendment of section 105A(1)(b)(iii)

It is submitted that the amendment to section 105A(1)(b)(iii) should be two-fold. Firstly, the test of reasonableness should be removed from the section so that victims are allowed an unconditional right to be heard. This is achieved by removing the words ‘where it is reasonable to do so and taking into account the nature of and circumstance of the offence and the interest of the complainant’.

Secondly, provision should be made for the victim’s representation to be reduced to writing and submitted to the court. This is achieved by inserting the words ‘and where such representations have been made they shall be submitted to the court’.

Accordingly, the amended section would read:

- 105A(1)(b) The prosecutor may enter into an agreement contemplated in paragraph (a) - (iii) after affording the complainant or his or her representative the opportunity to make written representations to the prosecutor regarding -
- (aa) the contents of the agreement; and
 - (bb) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.
- and where such representations have been made they shall be submitted to the court.

The victim’s representations could be reduced to writing by the victim, his representative or the prosecutor on the victim’s behalf.¹²² The written representations place the court in a position to make an informed decision as to whether the

¹²² In the case of *S v Muggels* (unreported CPD decision) case number SS3/2002 an affidavit from the mother of the deceased was annexed to the plea and sentence agreement. The affidavit was prepared by the prosecutor. Similarly, in the case of *S v Vlok & Others* (unreported TPD decision) case number SS 15/2007 the views of the victim, Reverend Frank Chikane, were included in the written agreement presented to the court. The aim of this proposal is to ensure that the approach adopted in these cases becomes the norm.

agreement should be accepted.¹²³ Welling explains that victim participation through the court is preferable because, by its very nature, such participation diminishes the prosecutor's power.¹²⁴ Thus, having to consider the interests of the victim is viewed as a disincentive for prosecutors.¹²⁵ It is difficult to establish the link between victim participation and a reduction in the prosecutor's power and this is, arguably, not the best explanation for the disincentive referred to by Welling. It is submitted that a better explanation for the disincentive is that, when considering the interests of the victim, prosecutors have to take cognisance of the victim's expectations for the outcome of the case. Hence, the prosecutorial disincentive lies in the fact that once the prosecutor has been exposed to the victim's expectations he cannot isolate himself or the case from such expectations. Victim participation through the court is preferable because the role of the prosecutor is to represent the interests of society.¹²⁶ By contrast the victim represents only himself.¹²⁷ The interests of society and those of the victim are not always identical and should conflict arise between these interests, the prosecutor must give priority to the interests which he represents.¹²⁸ Unlike the prosecutor, the court has assumed the role of adjudicating competing interests to achieve a just result. Hence, adding an additional interest, namely, that of the victim would not conflict with the court's defined role.¹²⁹

¹²³ See, for example, Goldstein (1984: 232) where the author, in considering the need for consultations with the victim, concluded that the prosecutor should be obligated not only to consider the victim's views but also to convey these views to the court, particularly when the victim's views differ from those of the prosecution.

¹²⁴ Welling (1987: 347).

¹²⁵ Welling (1987: 347).

¹²⁶ Welling (1987: 347). The author, furthermore, states that exposing the prosecutor to the victim's information could only enhance the prosecutor's ability to seek justice on behalf of society.

¹²⁷ Welling (1987: 347).

¹²⁸ Welling (1987: 347). But, see Davis, Kunreuther & Connick (1984: 505) who state that the victims' views may not always be identical to those of the community, but they probably are often closer to the public's sentiments than those of courthouse professionals.

¹²⁹ Welling (1987: 347).

It should be emphasised that this proposal by no means allows the victim a right to veto the agreement. It merely aims to ensure that all victims are allowed an opportunity to draw judicial attention to their individual interests.¹³⁰ Thus, the scope of victim participation would be limited still to the victim commenting on the contents of the agreement and, if applicable, the inclusion of a compensation order.

Once the victim has been allowed the unconditional right to be heard, the onus rests on him to exercise the right. The victim may respond to such right in one of two ways. He may choose not to submit a written statement to the prosecutor, in which event his inaction could be construed as a waiver of his right to be heard.¹³¹ Alternatively, the victim may seek to exercise his right by submitting a written statement to the prosecutor. This statement should then form part of the plea and sentence agreement.¹³² In the statement the victim could agree to or oppose the contents of the agreement and, where applicable, his request for compensation would be included. Since the victim does not have a veto right, the prosecutor would be entitled to conclude the agreement even where the victim has expressed his disapproval thereof. This also means that when the agreement, which now includes the victim's written approval or disapproval, is presented to the court, the presiding officer would be bound only to consider the victim's views and need not necessarily act in accordance with such views. By implication, this proposal places a positive duty on the prosecutor to notify the victim of the agreement. Thereby, it gives effect to the victim's right to information.

¹³⁰ See, for example, *S v Vlok & Others* at paragraph e, where the complainant stated that while he was satisfied with the plea agreement it was extremely important for him to have the true facts surrounding the attempt on his life disclosed.

¹³¹ See Welling (1987: 348).

¹³² Welling (1987: 348).

It is anticipated that this proposal will draw some substantive criticism. The discussion below seeks to address some of the anticipated objections.

4.5 Possible objections to the proposed amendment

The criticisms that may be levelled at the proposal may be grouped into two categories, namely, interests which may be impaired by the proposed amendment and the practical implications which such amendment may have for an already overburdened criminal justice system.

4.5.1 Interests which may be impaired by the proposed amendment

4.5.1.1 The interests of the accused

Meintjies-van der Walt warns that victims' rights should not be promoted at the cost of curtailing the fundamental rights of accused persons.¹³³ Opponents of victim participation in negotiated justice may object to the proposed amendment of section 105A(1)(b)(iii) on the grounds that the accused is not able to confront the victim regarding his written statement nor may he lead evidence to contradict such statement. In this regard, Welling submits that victim participation will not affect the confrontational rights of the accused.¹³⁴ This is because, by entering a guilty plea, the accused admits his guilt and waives his right to cross-examine the victim.

A further interest which the accused may have is obtaining the court's acceptance of the agreement.¹³⁵ Critics may argue that victim participation renders plea and sentence agreements a less attractive option to accused persons because it increases the risk

¹³³ Meintjies-van der Walt (1998: 159).

¹³⁴ Welling (1987: 311).

¹³⁵ Welling (1987: 312).

that the court might reject the agreement.¹³⁶ Welling responds to this type of criticism by explaining that, although the court's acceptance of the agreement may be a practical interest of the accused, the accused has no right to have the court assess the agreement on less than the total amount of information available.¹³⁷ Hence, the accused has no legitimate interests which would be impaired by the proposal.

4.5.1.2 The interests of the prosecutor

There are no legitimate prosecutorial interests which would be slighted by the proposal.¹³⁸ Exposing the prosecutor to the victim's information will improve the prosecutor's ability to meet his primary goal, namely, to negotiate justice on behalf of society.¹³⁹ Prosecutors may fear that mandatory consultations with victims will undermine their prosecutorial discretion. This assumption is invalid. The victim's right to be heard cannot be extended to or interpreted as a victim's right to control the prosecution of the case. The proposal merely provides victims with an opportunity to be heard, giving them a voice and not a veto.

4.5.2 The practical implications for an overburdened criminal justice system

Critics may argue that the proposed amendment of section 105A(1)(b)(iii) is not feasible given the existing constraints of an already overburdened criminal justice

¹³⁶ Welling (1987: 312).

¹³⁷ Welling (1987: 312).

¹³⁸ See, for example, Welling (1987: 310) who states that 'the prosecutor's responsibility is to seek justice on behalf of society and victim participation will not interfere with this goal'.

¹³⁹ Welling (1987: 310).

system.¹⁴⁰ They may argue that the proposal will result in additional strain on already over-extended justice officials.¹⁴¹

It may be argued also that victim participation will lengthen the proceedings or slow down the negotiations.¹⁴² It is submitted that these fears are based on assumptions which have found no support in empirical research.¹⁴³ Furthermore, even though prompt and efficient procedures are interests worthy of cognisance, the criminal justice system embodies values higher than expediency and efficiency.¹⁴⁴ Thus, the need for administrative efficiency should not determine the structure of our criminal justice system.¹⁴⁵

Having to notify and consult the victim regarding the agreement is undoubtedly an additional administrative burden. However, this additional burden is not insurmountable and is easily justified in relation to the importance of granting victims adequate recognition in negotiated justice.¹⁴⁶

¹⁴⁰ See Kennard (1989: 438) where this is listed as a possible criticism which may be levelled at her proposal for a victim's veto in negotiated justice.

¹⁴¹ See Erez (1991: 5). See also the practical implications argument present by Bruce (2005: 106) and dealt with in section 4.2.1.3 in the text above.

¹⁴² During the negotiations surrounding the enactment of section 105A, the DPP of Witwatersrand incorrectly stated that the aim of these negotiations is to shorten proceedings and victim participation would slow down the entire process. See section 4.3.1 of the text above for discussion.

¹⁴³ In fact, the contrary has been proved. See Heinz & Kerstetter (1979: 358) who state that one of their concerns, while conducting a field experiment, was the amount of time that the conferencing with the victim might add to the disposition of cases. They found that the sessions averaged approximately ten minutes and only five percent took more than twenty minutes. The authors concluded that these conferences did not increase substantially the time attorneys and prosecutors devoted to case dispositions.

¹⁴⁴ See De Villiers (2004: 251).

¹⁴⁵ See Welling (1987: 311).

¹⁴⁶ See, for example, Du Toit & Snyman (2001: 154), Kennard (1989: 450) and Welling (1987: 306).

4.6 Conclusion

This chapter has identified three specific victims' rights which require emphasis in the context of negotiated justice, namely, the right to be informed of the agreement, the right to be present when the agreement is presented to the court and the right to participate in the agreement. It was established that the recognition of these rights is essential both to the victim and for the continued functioning of the criminal justice system. Adequate recognition not only would enhance the transparency of negotiated justice but also would eliminate the possibility of secondary victimisation in this context.

An evaluation of section 105A(1)(b)(iii) of the CPA demonstrates that the rights of the victim are not catered for adequately. The provision requires that an objective standard be applied to determine whether it would be reasonable to allow the victim to fulfil any role in the negotiations. The peculiar manner in which this test would have to be applied was identified by the simple question: Is it ever reasonable to exclude the victim? It was concluded that victim exclusion is never reasonable as this constitutes secondary victimisation. It was submitted, accordingly, that amendment is necessary to remove the inadequacies of section 105A(1)(b)(iii).

The amendment proposed seeks to ensure that the criminal justice system does not inflict a second wound upon the victim. This is achieved by allowing the victim an unconditional non-veto right to participate in the negotiations. Although a proposal for this form of participation ensures that the victim's basic rights are implemented, it was acknowledged that the proposal may raise some objections. Accordingly, some of the possible objections to the proposal were addressed in the latter part of the chapter.

In addition to victims being endowed with an unconditional right to participate in plea and sentence negotiations, it is desirable that victims be given a voice when the court considers the sentence agreement concluded between the state and the accused. The next chapter, therefore, considers the role of the victim when the court scrutinises the sentence agreement.



CHAPTER FIVE

VICTIM PARTICIPATION AT SENTENCING: THE USE OF VICTIM IMPACT STATEMENTS IN NEGOTIATED JUSTICE

5.1 Introduction

Sentencing represents the official evaluation of the seriousness of the harm inflicted by the offender and there are two lives which are shaped profoundly by this evaluation, namely, that of the offender and that of the victim.¹ Yet, the offender has a right to address the court before the sentence is determined and the victim does not.² A neglected aspect of the criminal justice system is the impact of crime on victims. Empirical research reveals that the effect of the crime on the victim is seldom considered in the context of negotiated justice.³

It has been argued that, in the interest of fairness, victims should be awarded the right to address the court when it considers a suitable sentence.⁴ Internationally, victim impact statements have been identified as the primary method for implementing such a right.⁵ South African law, at present, contains draft legislation proposing the use of victim impact statements. This chapter considers the legal and practical aspects of these statements in the context of negotiated justice. It commences by analysing the role of presiding officers during sentencing and the sentencing principles which apply when a suitable sentence is determined. Thereafter, sentencing and the role of the

¹ See Karmen (1994: 202).

² Karmen (1994: 202).

³ See Van der Merwe (2007: 11) who records that this occurs in 16 out of 30 sexual offences.

⁴ Van der Merwe (2007: 11).

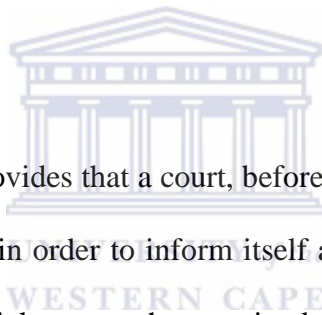
⁵ See Meintjies-van der Walt (1998: 166) who explains that countries such as the USA, Canada, Australia and New Zealand have enacted legislation requiring courts to consider victim impact statements before sentencing.

victim in this context will be considered. Importantly, this chapter will canvass the need for the court to be exposed to a victim impact statement in the context of negotiated justice.

5.2 Sentencing

5.2.1 An introduction to sentencing

Sentencing has been defined, most accurately, as ‘the judicial determination of a legal sanction upon a person convicted of an offence’.⁶ It has been described as a public ritual of symbolic as well as practical significance because it is the moment when the court, speaking on behalf of society, declares the appropriate penalty for the unlawful conduct of the offender.⁷



Section 274(1) of the CPA provides that a court, before passing sentence, may receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The quasi-inquisitorial approach contained in this provision places the presiding officer at the centre of the sentencing process.⁸

The sentencing process entails determining the weight evidence in mitigation and aggravation should be afforded.⁹ During this process the presiding officer exercises a wide discretion. Discretion has been described as the pillar of the law of sentencing.¹⁰ Its main advantage is that courts can adapt their sentences to provide for the slightest

⁶ John Howard Society of Alberta (1999: 10).

⁷ SALRC (2000) *Project 82: Report* paragraph 1.1.

⁸ See SALRC (2000) *Project 82: The Draft Sentencing Framework Bill 2000* at paragraphs 3.4.8 and 3.4.15.

⁹ SALRC (2000) *Project 82: The Draft Sentencing Framework Bill 2000* at paragraph 3.4.8.

¹⁰ See Du Toit (1981: 127).

differences between cases.¹¹ This is also a disadvantage, in that the same case can be heard by two different presiding officers and there may be a substantial difference in the sentences that are imposed.¹² Despite this disadvantage, it is accepted generally that sentencing requires a flexible approach.

5.2.2 The role of the presiding officer

The role of the presiding officer at sentencing is to determine and then impose the sentence which he considers suitable.¹³ Determining a suitable sentence may be viewed as the ‘presiding officer’s most difficult task’.¹⁴ To assist in determining a suitable sentence, South African courts have established three factors, the triad as enunciated in *Zinn*, which the presiding officer has to consider. They are: the nature and seriousness of the offence, the interests of the community and the personal circumstances of the accused.¹⁵ Bekker, Geldenhuys *et al* explain that these considerations must then be converted into a sentence of some kind and some extent.¹⁶

5.2.3 The sentencing triad and the interests of victims

The triad does not mention specifically the role of the victim during sentencing and for this reason victim rights advocates view the situation at sentencing as unbalanced. Meintjies-van der Walt argues, with approval by some, that the traditional triad causes

¹¹ Bekker, Geldenhuys *et al* (2003: 262).

¹² Bekker, Geldenhuys *et al* (2003: 262).

¹³ For the meaning of the term ‘suitable sentence’ see *S v Rabie* 1975 (4) SA 855 (A) at 862 paragraph g where the court held that punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. See also SALRC (2000) *The Draft Sentencing Framework Bill 2000* paragraph 3.1.3. The SALRC explains that a sentence will be regarded as constitutionally acceptable, and thus suitable, if the punishment imposed is not grossly disproportionate to the crime committed.

¹⁴ See Bekker, Geldenhuys *et al* (2003: 260).

¹⁵ *S v Zinn* 1969 (2) SA 537 (A) at 540 paragraph g.

¹⁶ Bekker, Geldenhuys *et al* (2003: 260).

victim exclusion at the sentencing stage.¹⁷ In support of her argument she relies on the dictum in *Zinn* to the effect that ‘what has to be considered at sentencing is the triad which consists of the crime, the offender and the interests of society’.¹⁸ According to the author, this dictum demonstrates the exclusion of victims’ interests because the triad leaves no room for such interests to be considered.¹⁹

It is submitted that, although Meintjies-van der Walt’s analysis of the *Zinn* dictum is correct, it is possible to reach a different conclusion about the role of the victim under the sentencing triad. The definitive aim of the sentencing process is for the presiding officer to decide and impose a suitable sentence by making a value judgment.²⁰ The principle which underlines this process is that a value judgment may be made only, and thus a sentencing discretion may be exercised only, after the presiding officer has heard sufficient factual information.²¹ By comparison, the *Zinn* dictum, as analysed by Meintjies-van der Walt, creates the impression that there are limitations to the ambit of the triad. The impression created is that the court may consider only facts surrounding the crime, the offender and the interests of society. If these delineate the ambit of the triad then they also delineate the ambit of the presiding officer’s discretion at sentencing. This cannot be the correct interpretation as sentencing is considered a matter pre-eminently for the discretion of the court.²² For this reason alternative interpretations of the ambit of the triad, with particular regard to the interests and role of the victim, are considered below.

¹⁷ Meintjies-van der Walt (1998: 169). For approval of the author’s argument see Women & Human Rights Project, Community Law Centre, UWC and the Institute of Criminology UCT (1999: 136).

¹⁸ Meintjies-van der Walt (1998: 169) and also *S v Zinn* at 540 paragraph g.

¹⁹ Meintjies-van der Walt (1998: 169).

²⁰ Bekker, Geldenhuys *et al* (1993: 265).

²¹ See Bekker, Geldenhuys *et al* (1993: 266) and further Van der Merwe & Muller (2006: 653).

²² See Du Toit *et al* (1993: 28 -10A). The authors state, further, that a wide discretion is allowed to a trial court in the assessment of punishment except in the case where a minimum sentence is set by statute.

Firstly, when applying the triad, a presiding officer could have regard to the impact of the crime on the victim when considering the nature and seriousness of the offence and the interests of the community. It has been argued that the triad elements are broad enough to include such consideration.²³ This interpretation avoids the conclusion that victims' interests are excluded by the application of the triad.

Secondly, it is trite that in our law the courts, in considering sentence, are not confined to those facts placed before it by the parties.²⁴ The presiding officer's sentencing discretion can be exercised properly only if all the facts relevant to the matter are considered. It follows, therefore, that a presiding officer has the discretion to consider factors which are relevant but which may fall outside of the ambit of the triad.²⁵ In this regard, it is submitted that a statement made by the victim about the impact of the crime on his life is a relevant fact. Thus, if the ambit of the triad cannot be interpreted as broad enough to include the interests of the victim, then the presiding officer should exercise his discretion outside of the triad and take into account the interests of the victim when determining a suitable sentence.²⁶ Hence, even if the interest of the victim is classified as a factor falling outside of the ambit of the triad, the presiding officer still has the discretion to take it into account. The

²³ See, for example, Women & Human Rights Project, Community Law Centre, UWC and the Institute of Criminology UCT (1999: 137). The authors submit that in order to gauge the seriousness of the offence and the impact of the crime on the interests of the community, it is crucial for the presiding officer to have sufficient information about how the crime affected the victim.

²⁴ See Du Toit *et al* (1993: 15-18) and further *S v Dlamini* 1992 (1) SA 18 (A) at 30 paragraph d and 31 paragraph d.

²⁵ See Van der Merwe & Muller (2006: 653) and further SALRC (2000) *The Draft Sentencing Framework Bill 2000* paragraph 3.4.8. The SALRC explains that the court is in a position to form the correct impressions and make the complex value judgment required for the imposition of a suitable sentence when all the facts relevant to the matter are presented.

²⁶ See, for example, *Mbuyase and Others v Rex* 1939 NPD 228 at 231 where Selke J states that 'to enable a magistrate, or for that matter, anyone exercising judicial functions, to decide upon what is an appropriate sentence in the case of an individual accused, he is entitled to avail himself of many sources of information, and of many circumstances affecting that individual, some of which it would not be proper for him to regard in coming to a conclusion as to whether that accused were guilty or not guilty'.

application of the triad, therefore, should not be interpreted as contributing towards the exclusion of victims at the sentencing stage.

5.3 Sentencing and negotiated justice

Negotiated justice has not altered the sentencing process described above significantly. In negotiated justice the parties reach an agreement on the sentence they consider suitable and they then present that sentence to the court. Notwithstanding the sentence agreement between the parties, section 105A(8) of the CPA requires that the court be satisfied that the sentence presented by the parties is a just sentence.²⁷ Thus, judicial approval of the agreed sentence is required.²⁸ Our courts have held that, in determining whether a sentence agreement is just, the presiding officer must have regard to the nature and seriousness of the offence, the interests of the community and the personal circumstances of the accused.²⁹ In other words, the well established elements relevant in respect of sentencing triad, and the interpretation problems associated therewith, are applicable also where section 105A agreements have been concluded.³⁰

5.3.1 The role of the victim when the court considers the sentence agreement

Section 105A has been described as significant because it seeks to promote victim participation at the sentencing stage of negotiated justice.³¹ This encouraging description could be attributed to section 105A(7) which reads:

²⁷ See Du Toit *et al* (1993: 15-20). According to the authors the provision prevents the parties from subtly usurping the court's sentencing function.

²⁸ See section 3.4.2 in the text above.

²⁹ See *S v Sassin* 2003 (4) All SA 506 (NC) at paragraph 15.5-15.8 and also *S v Esterhuizen* 2005 (1) SACR 490 (T) at 494 paragraph c.

³⁰ See Watney (2006: 227).

³¹ See Du Toit *et al* (1993: 15-12) and also *S v Sassin* at paragraph 11.4.

- (a) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement.
- (b) For purposes of paragraph (a), the court –
 - (i) may-
 - (aa) direct relevant questions, including questions about previous convictions of the accused, to the prosecutor and the accused; and
 - (bb) hear evidence, including evidence or a statement by or on behalf of the accused or the complainant.
 - (ii) must, if the offence concerned is an offence
 - (aa) referred to in the Schedule to the Criminal Law Amendment Act, 1997 (Act 105 of 1997); or
 - (bb) for which a minimum penalty is prescribed in the law creating the offence have due regard to that Act or law.

According to Du Toit *et al*, the fact that the victim, as complainant, is mentioned specifically in section 105A(7) accentuates the importance of victim participation at the sentencing stage.³² Although reference to the court having regard to evidence or a statement made by the victim is notable, the use of the word ‘may’ reveals that the court has discretion in determining whether or not to hear the evidence or receive the statement when considering the sentence agreement.³³ A further issue arising from this provision is whether a victim impact statement may be introduced at this stage of the proceedings.

5.3.2 The relevance of a statement made by the victim

When the court exercises its sentencing discretion the factual information required embraces more than information on the elements of the crime.³⁴ Van der Merwe & Muller submit that if a court is to exercise its sentencing discretion properly, it is

³² See Du Toit *et al* (1993: 15-18).

³³ See SALRC (2001) *Project 107: Discussion Paper 102* at paragraph 40.16.6 where the Project Committee opines that the general approach which should be adopted is that the court be directed to consider information by a victim as to the impact of the crime, rather than allowing the court to use its discretion about whether or not to consider the information.

³⁴ Van der Merwe & Muller (2006: 653).

necessary for the presiding officer to have access to the victim's narrative as well.³⁵ In support of this submission, presiding officers themselves, and with good reason, have expressed a need to be better informed about the impact of the crime on the victim.³⁶

In *Holtzhausen v Roodt*, Satchwell J, in discussing a presiding officer's inability to comprehend the extent of harm caused to a rape victim, stated that:

Rape is an experience so devastating in its consequences that it is rightly perceived as striking at the very fundament of human, particularly female, privacy, dignity and personhood. Yet I acknowledge that the ability of a judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, of both rapist and rape survivor, is extremely limited.³⁷

A submission to the Minister of Justice and Constitutional Development prepared by the Western Cape Consortium on Violence Against Women demonstrates that the victim's experience is not understood by the courts.³⁸ The authors list recent decisions by both the High Court and the Supreme Court of Appeal (SCA) which reveal the court's inability to comprehend the range of emotions and suffering a particular victim may have experienced.³⁹ One of the cases referred to is *S v G*.⁴⁰ In this case the accused was convicted on a charge of raping a ten-year-old girl.⁴¹ The case was referred to the High Court for sentencing. In the High Court, Borchers J stated that even though the accused showed no remorse for his actions, there were substantial and compelling circumstances justifying a departure from the mandatory life sentence. The circumstances referred to by the court include the following: that he was a first

³⁵ Van der Merwe & Muller (2006: 653).

³⁶ See *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 205 paragraph e.

³⁷ *Holtzhausen v Roodt* 1997 (4) SA 766 (WLD) at 778 paragraph h.

³⁸ Western Cape Consortium on Violence Against Women (2005: 12-17).

³⁹ Western Cape Consortium on Violence Against Women (2005: 17). See also Van der Merwe & Muller (2006: 653) who state that it is extremely difficult for any individual, even a highly experienced person such as a magistrate or a judge, to comprehend fully the emotions which the victim may have experienced.

⁴⁰ *S v G* 2004 (2) SACR 296 (W) at 296 paragraph a.

⁴¹ *Supra* at 296 paragraph a - 297 paragraph f.

offender, that he had already been in custody for two years, that the violence he employed ‘was not excessive’ and hence that he did not inflict serious physical injuries on the victim, and that this was not among the worst cases of rape that appear before the courts in South Africa.⁴² Borchers J stated that she felt bound by the decisions of the SCA in *Abrahams*⁴³ and *Mahomotsa*.⁴⁴ In both *Abrahams* and *Mahomotsa* the SCA did not impose life sentences for rape because, according to the presiding officers, the victims were not seriously injured physically and no excessive violence was employed.⁴⁵

The Western Cape Consortium on Violence Against Women raised the following concern about the judgments:

The judges (*sic*) (both the HC and SCA judges) reference to the violence the rapist used as “not excessive” misses the point that rape, by definition, is excessive force. Further, the reliance on the fact that the rape did not inflict “serious physical injuries” also fails to recognise the distinct nature of rape whereas the most serious, yet invisible, injuries are often those to the dignity and psychological well-being of women.⁴⁶

This study accepts that courts (jealously) guard against interference with their sentencing discretion. However, the relevance of the victim’s voice at sentencing is established surely by the presiding officer’s admission in *Holtzhausen v Roodt*. If the express declaration in *Holtzhausen v Roodt* will not suffice, then the cases of *S v G*, *Abrahams* and *Mahomotsa* demonstrate, firstly, the presiding officer’s inability to comprehend the plight of victims and, secondly, the relevance of a victim statement at sentencing. It is crucial, therefore, that the victim be allowed the opportunity to address the court during sentencing. Such statement is especially appropriate in the

⁴² Supra at 299 paragraph e.

⁴³ *S v Abrahams* 2002 (1) SACR 116 (SCA) at 124 paragraph g - 125 paragraph g.

⁴⁴ *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at paragraph 18.

⁴⁵ *S v G* at 299 paragraph d.

⁴⁶ Western Cape Consortium on Violence Against Women (2005: 12), original emphasis.

context of negotiated justice as the court has not been exposed to the victim's narrative. It is clear that section 105A(7) seeks to include evidence on the impact of the crime on the victim and it is submitted, therefore, that the court should not be entitled to exclude a statement from a victim as such statement is relevant to determining whether the sentence agreement is just.

5.3.3 Rectifying the inadequacy of section 105A(7)

It is vital that presiding officers do not have discretion in hearing from the victim. Erez explains that presiding officers employ several justifications in discarding victim input.⁴⁷ The most common justification offered for refusing to hear from the victim is that the input is unreliable because of its subjective or emotional nature.⁴⁸ Erez's response to this is that 'to resist victims' input because, for instance, it is subjective is to suggest that there is an objective way to measure harm or to experience loss, damage and injury'.⁴⁹ What the author is saying is that harm is perceived differently, according to the victim's demographic and personal attributes, and there is no objective way to measure harm without doing an injustice to the experience of the victim in question.⁵⁰ A proper and meaningful assessment of the harm inflicted by the offender is done when his victim is allowed to address the court on the consequences and effect of the harm. To ensure that victims are allowed an opportunity to address the court when it considers the sentence agreement and, furthermore, to ensure that presiding officers comprehend the plight of victims in the context of negotiated justice, the only sensible means to remedy the inadequacy of section 105A(7) is amendment.

⁴⁷ Erez (1999: 554).

⁴⁸ Erez (1999: 554).

⁴⁹ Erez (1999: 554).

⁵⁰ Erez (1999: 555).

5.4 A proposal for the amendment of section 105A(7)

It is proposed that the court's discretion in hearing evidence or receiving a statement from the victim be removed from section 105A(7).

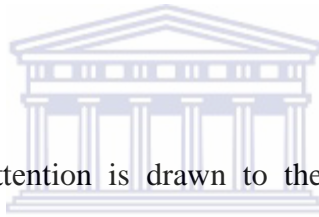
Accordingly, the amended section would read:

- 105A(7)(a) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement.
- (b) For purposes of paragraph (a), the court –
- (i) may-
 - (aa) direct relevant questions, including questions about the previous convictions of the accused, to the prosecutor and the accused; and
 - (bb) hear evidence, including evidence or a statement by or on behalf of the accused.
 - (ii) must, if the offence concerned is an offence
 - (aa) referred to in the Schedule to the Criminal Law Amendment Act, 1997 (Act 105 of 1997); or
 - (bb) for which a minimum penalty is prescribed in the law creating the offence have due regard to that Act or law.
 - (iii) must hear evidence, including evidence or a statement by or on behalf of the complainant where such evidence is available.

By exposing itself to evidence from the victim, the court is able to test the appropriateness of the sentence negotiated between the prosecutor and the accused in the light of the victim's narration of the harm inflicted by the accused. Hence, the court will be equipped better to fulfil its mandate in accordance with section 105A if it considers an impact statement made by the victim. The clause 'where such evidence is available' refers to instances where the victim has elected not to provide a statement. In this regard, it is submitted that the general principles relevant to victim impact statements provide a foundation for the proposed amendment.

5.5 The use of victim impact statements in negotiated justice

A victim impact statement has been defined as a voluntary statement made by a victim of crime in which he expresses the impact which the crime has had upon him and, if applicable, his family.⁵¹ In its *Issue Paper on Sentencing: Restorative Justice*, the SALRC proposed that victim impact statements be admissible at sentencing hearings.⁵² Since then, the SALRC has recommended the introduction of a legislative provision that prescribes the consideration of victim impact statements by the court for sentencing purposes, rather than allowing the court discretion to do so.⁵³ These recommendations not only have revived the victims' right movement in South Africa but also have spawned political debate on the role of victims in the criminal justice system.⁵⁴



At this point the reader's attention is drawn to the rationale, form and content, evidentiary aspects and pending legislative framework of victim impact statements. Thereafter, the academic debate surrounding the use of these statements is considered.

5.5.1 The rationale for the use of victim impact statements

There are a number of acceptable justifications for the use of victim impact statements.⁵⁵ Van der Merwe & Muller list the following theories:

- The improvement of sentencing outcomes, which includes both retributive-proportionate as well as restorative justice (reparation and compensation) arguments.

⁵¹ Clarke, Davis & Booysen (2003: 44).

⁵² SALRC (2000) *Project 82: Issue Paper 7* paragraph 4.7.

⁵³ See SALRC (2000) *Project 82: Discussion Paper 91* paragraph 3.7.23 and also SALRC (2001) *Project 102: Discussion Paper 102* paragraph 40.16.6.

⁵⁴ See, for example, the speech delivered by Helen Zille of the Democratic Alliance at Victims' of Crime Imbizo held in Durban on 2 August 2008 and section 2.5.2 in the text above for discussion.

⁵⁵ Van der Merwe & Muller (2006: 651-652).

- The enhancement of system efficiency and service quality in that the criminal justice system may become more sensitive to the needs of victims, and, in turn, victims are more satisfied with the system because of their participation.
- The benefit for victims in that their contribution will be of therapeutic and cathartic value for themselves.
- The fourth theory focuses on process values, citizenship and victims' rights based on participatory democracy and respect for individual dignity and humaneness.⁵⁶

In addition, they list nine purposes for the use of victim impact statements observed in international literature, namely:

- Providing presiding officers with information about the seriousness of the crime and, to a lesser extent, about the culpability of the offender in order to assist the court in imposing a sentence consistent with the sentencing principles.
- Providing the court with a direct source of information about the victims' needs which may assist in the determination of a more appropriate, reparative sanction.
- Providing the court with information about the appropriate conditions that might be imposed on the offender.
- Providing the victim with a public forum in which to make a statement reflecting his or her suffering.
- Providing the court with an opportunity to recognise the wrong committed against an individual victim.
- Providing the victim with an opportunity to communicate the effects of the crime to the offender.
- Increasing the offender's awareness of the extent of the harm.
- Allowing victims to participate in sentencing, albeit in a non-determinate way.
- Providing the idea that, although crimes are committed against the state, crimes are also committed against individuals.⁵⁷

While these motivations all have merit, simplification is desirable. On the strength of the information provided by Van der Merwe & Muller, it is possible to reduce the purpose of victim impact statements to two principal rationales.

⁵⁶ Van der Merwe & Muller (2006: 651-652). See also Edwards (2001: 39) as cited by Van der Merwe & Muller (2006: 651).

⁵⁷ Van der Merwe & Muller (2006: 652). The international literature referred to by the authors was compiled by Roberts (2003: 371-372).

The first rationale for the use of victim impact statements is that they allow the victim a voice at the sentencing stage.⁵⁸ Thus, the person directly affected by the crime is allowed to address the court during its decision-making process. By according the victim a voice at sentencing, the victim's need for a formal procedural right within the criminal justice context is addressed.⁵⁹ There are a number of supplementary consequences which flow from this. Thus, victims may be more satisfied with the criminal justice system because it acknowledges the personal nature of the crime and the harm they have suffered.⁶⁰ It also allows the victim an opportunity to communicate the effect of the crime to the offender.

The second rationale for the use of victim impact statements has already been mentioned above, namely, by informing the court of the impact of the crime on the victim, these statements serve as a source of information for the court when exercising its sentencing discretion.⁶¹ It not only allows the presiding officer a comprehensive understanding of the impact of the crime on the victim, but also prevents inappropriate assumptions about the effects of the crime.⁶² The ultimate purpose of victim impact statements is to impress upon the court the effect of the offence on the victim.⁶³ It also reminds the presiding officer that behind the crime is a real person, who is the victim. This reminder is especially important in the context of negotiated justice because the court is not exposed to the testimony of the victim. In practice, prosecutors frequently lead evidence on the impact of the crime on the victim during a

⁵⁸ See SALRC (2000) *Project 82: Report* paragraph 3.4.20.

⁵⁹ See Snyman (1999: 31).

⁶⁰ The National Centre for Victims of Crime (2007: 2).

⁶¹ See section 5.2.2 in the text above. See also Van der Merwe & Muller (2006: 653).

⁶² SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.16.5.

⁶³ SALRC (2000) *Project 82: Discussion Paper 91* Appendix B paragraph 4.7

trial.⁶⁴ The absence of a trial when a plea and sentence agreement is presented to the court motivates further the need for victim impact statements in the context of negotiated justice.⁶⁵

5.5.2 Form and content of victim impact statements

Victim impact statements are presented to the court after it has reached a guilty verdict and before the sentence is imposed. Although they are usually written statements, they can take an oral form.⁶⁶ These statements generally include a description of the harm, in physical, psychological and economic terms, which the crime has had, and will continue to have, on the victim.⁶⁷ The idea is that the victim be allowed to say whatever he needs to say, with the emphasis being on the fact that the statement is made in his own words and voluntarily.⁶⁸

Whether a victim impact statement should include the victim's opinion as to the sentence to be imposed is a thorny issue.⁶⁹ The lack of consensus between the SALRC Project Committees is an indication that this is a particularly difficult issue to address. According to the Project Committee on the Draft Sentencing Framework Bill:

⁶⁴ See SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.16.4.

⁶⁵ In fact, the adversarial trial system is circumvented by negotiated justice and as such neither the state nor the accused present any witnesses.

⁶⁶ See SALRC (2000) *Project 82: Report* at paragraph 3.4.2. See also Clarke, Davis & Booysen (2003: 44) who explain that an oral victim impact statement can be submitted by audio, video or other electronic means.

⁶⁷ See SALRC (2000) *Project 82: Report* at paragraph 3.4.21 and further Van der Merwe & Muller (2006: 650). See also Appendix C. Paragraphs 1-14 allow the victim to describe the extent of harm he has suffered.

⁶⁸ Van der Merwe & Muller (2006: 661). See also Clarke, Davis & Booysen (2003: 45) who state that victims should be allowed to discuss their feelings about what has happened to them freely, and as long as the statement is not abusive or offensive in any way, victims should be encouraged to write it as they choose.

⁶⁹ See Van der Merwe & Muller (2006: 656) for their discussion on conflicting international views. See also Appendix C paragraph 15 where provision is made for the victim's opinion on sentencing.

Victim impact statements ought to address the actual physical, psychological, social and financial consequences of the offence on the victim and not the question of an appropriate sentence which ought to be imposed.⁷⁰

By contrast, the Project Committee on Sexual Offences states that:

While the Committee acknowledges the broad discretion which the courts have in determining an appropriate sentence, it believes that complainants should be allowed an opportunity to express their opinion in the victim impact statement on the question of an appropriate sentence, as is permitted in certain other jurisdictions.⁷¹

It adds:

There is no harm in allowing a victim to make recommendations regarding an appropriate sentence to the presiding officer, provided that it is well understood that the presiding officer is under no obligation to follow this recommendation.⁷²

Although the Project Committee on the Draft Sentencing Framework Bill did not provide any reasons for opposing the victim's opinion on sentence, there are at least two reasons which might have been raised. Firstly, it has been argued that victims may find it distressing to have their recommendations ignored by the presiding officer.⁷³ Hence, it may be more damaging to the victim to make a sentence recommendation which may be ignored than not being allowed to make such recommendation. Secondly, the victim's recommendation regarding a specific sentence may be seen by a presiding officer to be inappropriate because the victim usually has no legal background and may simply be seeking revenge.⁷⁴

⁷⁰ SALRC (2000) *Project 82: Discussion Paper 91* Appendix B Part 1 paragraph 4.7.

⁷¹ SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.18.1.

⁷² SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.18.1.

⁷³ Van der Merwe & Muller (2006: 657).

⁷⁴ Van der Merwe & Muller (2006: 657). See also Ashworth (1986: 86-122). At 113 the author demonstrates his disapproval of the victim's opinion on sentence by stating that 'the further step of inviting the victim's views on the appropriate sentence can have little justification. Most victims will lack knowledge of the range of options, normal sentencing level, penal history and the problems of penal policy'.

Yet, most of the available literature favours the approach adopted by the Project Committee on Sexual Offences.⁷⁵ Van der Merwe & Muller opine that if victims are advised that presiding officers are under no obligation to follow the sentence recommendation it would not be distressing to have their recommendations overlooked.⁷⁶ They argue that providing victims with even a small degree of control over the accused's fate may help them regain their sense of agency in general.⁷⁷ Furthermore, it may be that, through the recommendation of a lenient sentence, the victim is allowed the opportunity to show mercy to the offender.⁷⁸ It is, therefore, inappropriate to assume that victims, in general, simply will be seeking revenge when recommending a sentence.⁷⁹

The Victims' Charter does not settle the debate between the Project Committees. It simply provides that the victim may make a statement to the court to bring the impact of the crime to the court's attention.⁸⁰ This does not assist with establishing whether the statement should include the victim's opinion on sentencing. By contrast, the Minimum Standards is more suggestive. It provides that:

The prosecutor may submit a victim impact statement or lead further evidence in support of an appropriate sentence, where available and relevant.⁸¹

Van der Merwe & Muller assert that the phrase 'in support of an appropriate sentence' could be interpreted to include a suggestion by the victim regarding sentence.⁸² This would mean that the provision should be understood in the following way:

⁷⁵ See, for example, Van der Merwe & Muller (2006: 657) and Women & Human Rights Project, Community Law Centre, UWC and the Institute of Criminology UCT (1999: 141).

⁷⁶ Van der Merwe & Muller (2006: 657).

⁷⁷ Van der Merwe & Muller (2006: 657). See also Batley (2005: 120) and Henderson (1985: 958) for discussions on the loss of control caused by victimisation and the victim's need to regain that sense of control.

⁷⁸ Henderson (1985: 958).

⁷⁹ It is submitted, however, that if the court does encounter such victim it would not be obliged to give effect to a vengeful sentence recommendation.

⁸⁰ See article 2 of the Victims' Charter.

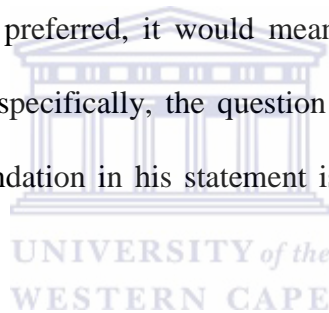
⁸¹ See the paragraph 19 of Minimum Standards on Services for Victims of Crime.

1. The prosecutor may submit a victim impact statement in support of an appropriate sentence; or
2. The prosecutor may lead further evidence in support of an appropriate sentence.

Although interpreting the provision in this manner would allow the victim to suggest an appropriate sentence, it is submitted that an alternative interpretation is possible, namely:

1. The prosecutor may submit a victim impact statement; or
2. The prosecutor may lead further evidence in support of an appropriate sentence.

If the latter interpretation is preferred, it would mean that the content of a victim impact statement and, more specifically, the question as to whether the victim can include a sentence recommendation in his statement is not settled by the Minimum Standards.



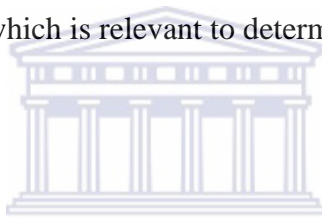
Both the Victims' Charter and Minimum Standards have formulated the position too vaguely. Whether a sentence recommendation by the victim should be included in the victim impact statement should have been addressed more directly by both documents. It is submitted, however, that the approach adopted by the Project Committee on Sexual Offences be preferred. There can be no harm in exposing the court to a victim's sentence recommendation as the court would not be bound to accept such recommendation. In addition, to the motivations put forward by the Project Committee, it is submitted that qualifying the sentence recommendation in this

⁸² Van der Merwe & Muller (2006: 657-658).

manner minimises the perception that there is interference with the sentencing discretion of presiding officers.⁸³

5.5.3 Evidentiary aspects of victim impact statements

Generally, the rules of evidence applying to the merits of the case will also apply to the sentencing procedure. However, South African courts have adopted a liberal attitude with regard to evidence produced during sentencing.⁸⁴ The SALRC warns that this does not mean that all the rules of evidence are to be ignored during the sentencing stage.⁸⁵ Yet, where it is suitable to do so, the SALRC agrees that a strict and technical approach to these rules should not be adhered to since it may result in the exclusion of information which is relevant to determining a suitable sentence.⁸⁶



5.5.3.1 Admissibility

In terms of section 210 of the CPA, ‘no evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings’. The provision states the rule of admissibility in its negative form, namely, irrelevant evidence is inadmissible.⁸⁷ Schwikkard *et al* explain that there are no degrees of admissibility.⁸⁸ Evidence is either admissible or inadmissible.⁸⁹

⁸³ Van der Merwe & Muller (2006: 657).

⁸⁴ See the case of *S v Gqabi* 1964 (1) SA 261 (T) where the court relaxed the rules of evidence at sentencing by allowing hearsay evidence. See also SALRC (2000) *The Draft Sentencing Framework Bill 2000* paragraph 3.4.8 where the SALRC states that ‘in general, the court allows the parties considerable leeway in the presentation of evidence and address on sentencing and are not too strict in this regard’.

⁸⁵ SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.11.3.

⁸⁶ SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.11.3.

⁸⁷ Section 2 of the Civil Proceedings Evidence Act 25 of 1965 contains a similar provision.

⁸⁸ See Schwikkard *et al* (2002: 20).

⁸⁹ Schwikkard *et al* (2002: 20).

The admissibility of evidence is determined by reference to its relevance and in determining relevance the question is ultimately whether the evidence can assist the court. The relevance of hearing from the victim at sentencing has already been established above.⁹⁰ However, it is necessary to re-state the point that exposing the court to the victim's narrative, by means of a victim impact statement, will assist the court in determining a suitable sentence. Victim impact statements may, therefore, be classified as relevant evidence in accordance with section 210 of the CPA.

A further issue affecting the admissibility of a victim impact statement is the constitutionality of such statement. Generally, victim impact statements are accepted as constitutional because the accused's guilt is established before the statement is introduced.⁹¹ Admitting such statements, therefore, would not affect the accused's constitutional right to due process.⁹² However, the United States Supreme Court decision in *Booth v Maryland* has cast doubt on the constitutionality of victim impact statements in certain instances.⁹³ In this case the court stated that:

Victim impact statements are irrelevant to capital sentencing decisions because its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.⁹⁴

There are two crucial distinctions between the South African legal landscape in which these statements would apply and the United States of America. Firstly, South Africa abolished the jury system in criminal cases in 1969 and, secondly, in 1995 the South

⁹⁰ See section 5.3.2 in the text above.

⁹¹ See Kennard (1989: 427).

⁹² See section 35 of the Constitution of the Republic of South Africa for the rights of accused, arrested and detained persons.

⁹³ *Booth v Maryland* 107 S. Ct. 2529-2536 (1987) United States Supreme Court of Appeal. See Kennard (1989: 428) for discussion.

⁹⁴ *Booth v Maryland* at 2533.

African Constitutional Court held that capital punishment was unconstitutional.⁹⁵ Thus, the risks envisaged by the United States Supreme Court do not apply in the South African context.

Notwithstanding its comfortable classification as admissible evidence, the prejudicial effect of written victim impact statements remains a topical issue. According to the SALRC, there must be safeguards against an offender being prejudiced by a written victim impact statement which is inaccurate.⁹⁶ To this end, the SALRC recommends that the victim should be called to testify in support of the victim impact statement where the contents of the statement are challenged.⁹⁷ This recommendation has merit. Relevant evidence can and has been excluded on the basis of its prejudicial effect causing a procedural disadvantage to either of the parties.⁹⁸ It would be appropriate, therefore, for the victim to testify in support of his written statement where there is doubt as to its accuracy. Van der Merwe & Muller, correctly, qualify the SALRC recommendation by adding that a victim who is called upon to testify in support of a statement should be given the choice to withdraw the statement.⁹⁹ This qualification is notable because it conforms to the underlying principle that victim impact statements should always be voluntary.

Finally, it must be emphasised that a victim impact statement is constitutionally admissible evidence. Where such statement is uncontested it will be admissible

⁹⁵ See Abolition of Juries Act 34 of 1969 and *S v Makwanyane & Another* 1995 (3) SA 391 (CC).

⁹⁶ See SALRC (2000) *Project 82: Report* paragraph 3.4.24.

⁹⁷ SALRC (2000) *Project 82: Report* paragraph 3.4.24. See also SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.16.9.

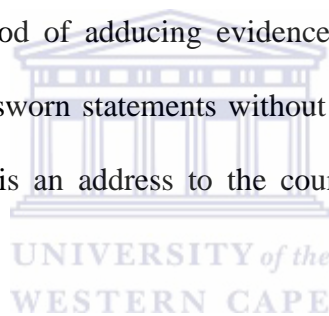
⁹⁸ See *R v Davis* 1925 AD 30. In this case the state sought to produce as evidence certain pornographic materials found at the residence of the accused that had been charged with gross indecent assault. The court held, *inter alia*, that the probative value of the evidence was outweighed by its prejudicial effect.

⁹⁹ Van der Merwe & Muller (2006: 661).

evidence on the production thereof.¹⁰⁰ However, where the written statement is contested for accuracy and thus prejudice, the victim should be given the choice to testify in support thereof. Where the victim elects to testify, the accused would be entitled to cross-examine him.

5.5.3.2 Methods of presenting victim impact statements

One of the ways in which the rules of evidence are relaxed at sentencing involves the methods used to place evidence before the court.¹⁰¹ There are three methods whereby evidence in mitigation or aggravation of sentence may be presented. The first method is the presentation of oral evidence by a witness under oath.¹⁰² Oral evidence is viewed as the primary method of adducing evidence at sentencing.¹⁰³ The second method involves handing in sworn statements without the testimony of a witness.¹⁰⁴ The third and final method is an address to the court by the prosecution and the defence.¹⁰⁵



In some jurisdictions victim impact statements must be made under oath.¹⁰⁶ However, they generally take the form of a written statement which is presented to the court.¹⁰⁷ According to the SALRC, it is important that oral and written statements be permitted.¹⁰⁸ The SALRC explains that some victims may not wish to return to court to be confronted by the accused and possibly be cross-examined by the defence for a

¹⁰⁰ SALRC (2000) *Project 82: Report* paragraph 3.4.25.

¹⁰¹ See *S v Gqabi* at 262.

¹⁰² See, for example, *S v Gough* 1980 (3) SA 785 (NC) at 787 paragraph h and *S v Van Rensburg* 1968 (2) SA 622 (T) at 624 paragraph b.

¹⁰³ See Du Toit *et al* (1993: 28.3-28.4) who explain that, strictly speaking, facts in mitigation and aggravation should be placed before the court by way of evidence given under oath.

¹⁰⁴ Du Toit *et al* (1993: 28.3-28.4).

¹⁰⁵ Du Toit *et al* (1993: 28.3-28.4).

¹⁰⁶ Jurisdictions such as Tanzania, South Australia and the Australian Capital Territory require that victim impact statements be presented orally under oath.

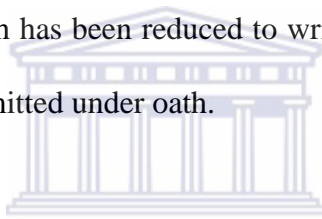
¹⁰⁷ See SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.13.3.

¹⁰⁸ SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.16.8.

second time.¹⁰⁹ Hence, the importance of admissible written victim impact statements lies in the avoidance of secondary victimisation. Written victim impact statements could be categorised conveniently as admissible evidence in terms of the second method of adducing evidence during sentencing.

5.5.3.3 Weight

The general rule is that evidence conveyed by way of written statements will not weigh more than argument.¹¹⁰ However, our courts have held that if the defence agrees to the admission of a written statement then it will carry the same weight as evidence submitted under oath.¹¹¹ Thus, if the defence agrees to the admission of a victim impact statement which has been reduced to writing, then it ought to carry the same weight as evidence submitted under oath.



The issue of drawing an adverse inference in the absence of a victim impact statement is a particularly sensitive issue. Victim impact statements are, by definition, voluntary statements. It would be illogical, therefore, to conclude that the absence of such statement means that no harm, loss or emotional suffering has been experienced by the victim.¹¹² Hence, it is reasonable to conclude that an adverse inference should not be drawn if a victim elects not to make a victim impact statement. Yet, in *S v O* the contrary approach was adopted.¹¹³ In this case the accused pleaded guilty to three

¹⁰⁹ SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.16.8.

¹¹⁰ SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.11.2.

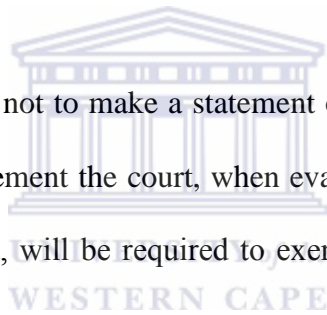
¹¹¹ See *S v H* 1977 (2) SA 954 (A) at 960 paragraph H. See also SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.11.2 and Du Toit *et al* (1993: 28.3). See further Erez (1999: 549) who notes that research has shown that defence counsel, for various reasons; seldom embark on cross-examination of the victim during the sentencing hearing. She states that empirical research has shown that legal professionals agree that a good defence attorney would not challenge the victim impact statement directly and would not cross-examine victims on the contents of their statements.

¹¹² See Van der Merwe & Muller (2006: 660).

¹¹³ *S v O* 2003 (2) SACR 147 (C).

charges of indecent assault and one charge of attempted indecent assault on four boys between the ages of eight and twelve years.¹¹⁴ It is submitted that the court erred in concluding that no harm was suffered by the victims because no evidence was presented on the impact of the assaults on the victims.¹¹⁵ It is submitted, further, that a victim's silence, much like the silence of an accused during a trial, should not result in an adverse inference being drawn with the regard to the harm caused by the crime.¹¹⁶ *S v O* demonstrates the dangers of allowing adverse inferences when a victim has elected not to make a victim impact statement. It is unreasonable to conclude from the absence of a victim impact statement that no harm was caused, as these statements are intended to be voluntary.

Where the victim has elected not to make a statement or he has elected not to testify in support of a contested statement the court, when evaluating the extent of the harm the victim may have suffered, will be required to exercise its discretion 'reasonably and judicially'.¹¹⁷



5.5.4 The legislative framework for the use of victim impact statements

The current legal position in South Africa allows for victim impact statements to be admissible for the purposes of sentencing, even though there is no express legislative provision to this effect.¹¹⁸ Section 274(1) of the CPA provides that, in determining a suitable sentence, the court may call witnesses to give evidence and it may allow the prosecution or the defence to call witnesses at the sentencing stage. This section, thus,

¹¹⁴ Supra at 152.

¹¹⁵ Supra at 161.

¹¹⁶ See, for example, *S v Brown en Andere* 1996 (2) SACR 49 (NC) at 49 where the court held that no adverse inference can be drawn against an accused simply because he has elected to exercise his constitutional right to refuse to testify at his trial.

¹¹⁷ See, for example, *S v Pieters* 1987 (3) SA 717 (A).

¹¹⁸ See SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.16.2.

allows for the victim to be called to adduce evidence on sentence. The SALRC opines that although it may be ideal for facts in mitigation and aggravation of sentence to be placed before the court by the victim testifying under oath, such facts may also be placed before the court by submission of a victim impact statement.¹¹⁹ Thus, according to the SALRC, the use of oral or written victim impact statements is permissible in terms of section 274(1) of the CPA.

Since the SALRC submission, there have been various attempts to provide dedicated legislation to regulate the use of victim impact statements. The Victims' Charter is one such attempt. In terms of the Charter:

Victims may, where appropriate, make a statement to the court or give evidence during the sentence proceedings to bring the impact of the crime to the court's attention.¹²⁰

There are a number of issues which the provision fails to address, such as what the content of the statement should be and who would be responsible for preparing the statement. The Charter does not regulate adequately the implementation of victim impact statements.

Although limited to sexual offences, the Criminal Law (Sexual Offences) Amendment Bill is another attempt to provide for victim impact statements.¹²¹ In terms of clause 17(b):

Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced at criminal proceedings where such offence is tried in order to prove for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.

¹¹⁹ SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.11.2. See further Du Toit *et al* (1993: 28.2-28.3).

¹²⁰ See article 2 of the Victims' Charter.

¹²¹ Criminal Law Sexual Offences Amendment Bill B50 - 2003 published in the Government Gazette of the Republic of South Africa No. 25282 of 30 July 2003.

It is submitted that the most significant attempt, thus far, is the SALCR proposal in the Draft Sentencing Framework Bill.¹²² This Bill has been published and awaits presidential assent.¹²³ The preamble to the Bill sets out that the restoration of the rights of the victim is a factor which must be accommodated in the determination of the sentence to be imposed. Clause 47 of the Bill constitutes formal recognition of the use of victim impact statements in the criminal justice process. In terms of this clause:

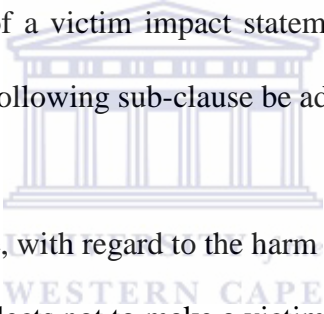
- (1) The prosecutor must, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim and, where practicable, furnish the court with particulars of –
 - (a) damage to or the loss or destruction of property, including money;
 - (b) physical, psychological or other injury; or
 - (c) loss of income or support.
- (2) A victim impact statement may be made by a victim who, as a result of an offence, suffered damage, injury or loss as referred to in subsection (1), or by a person nominated by such victim.
- (3) The prosecutor must seek to tender evidence of a victim impact statement where the victim is not called to give evidence and such a statement is available.
- (4) If the contents of a victim impact statement are not disputed a victim impact statement is admissible evidence on its production.
- (5) If the contents of a victim impact statement are disputed, the victim must be called as witness for the statement to be taken into account by the court.

The significance of this provision is apparent. By regulating the content and use of victim impact statements, it provides a near thorough legislative framework for such statements. There are, arguably, only two issues which clause 47 does not settle, namely, the victim's opinion on sentence and the issue of adverse inferences in the case where the victim does not wish to make an impact statement or where he does not wish to testify in support of a contested statement.

¹²² See SALRC (2000) *Project 82: Report* paragraph 4.5.23 and further SALRC (2000) *Project 82: Discussion Paper 91* Appendix B Part 1 paragraph 4.7. For discussion see Van der Merwe & Muller (2006: 648).

¹²³ The status of this Bill is that it has been approved by the National Assembly and has been published. Hence, all that is required is President's signature and the publication of a proclamation in the Government Gazette which sets out the date the Bill will become an Act of Parliament.

With regard to the first issue, clause 47(1) sets out clearly the content of the victim impact statement and, by way of exclusion, it is anticipated that victims will not be allowed to make recommendations on the appropriate sentence to be imposed. This omission is not detrimental to the successful implementation and operation of victim impact statements. However, it is submitted that there is no harm in allowing a victim to make sentence recommendations, provided that it is well understood that the presiding officer is under no obligation to follow the recommendation.¹²⁴ By contrast, it is imperative that the second issue be addressed before the enactment of the Bill. The decision in *S v O*, combined with the presiding officer's likely inability to comprehend the plight of the victim, means that the possibility of adverse inferences being drawn in the absence of a victim impact statement cannot be ignored.¹²⁵ It is submitted, therefore, that the following sub-clause be added to clause 47:

- 
- (6) No adverse inference, with regard to the harm suffered by the victim, may be drawn if the victim elects not to make a victim impact statement or elects not to testify in relation to a disputed victim impact statement as referred to in sub-clause (5).

This sub-clause will prevent inappropriate assumptions about the effects of the crime in the absence of a victim impact statement. An adverse inference, in this context, cannot be condoned.

¹²⁴ See SALRC (2001) *Discussion Paper 102* paragraph 40.18.1. See also section 5.5.1 in the text above.

¹²⁵ See sections 5.3.2 and 5.5.2.3 above for discussion.

5.5.5 The duty to prepare victim impact statements

Internationally, the approach to determining the party responsible for preparing a victim impact statement is not uniform. Depending on the country concerned, victim impact statements may be prepared by the police, probation officers, victim assistance groups or the prosecutor.¹²⁶

The Victims' Charter adopts a hybrid approach to the preparation of victim statements.¹²⁷ According to article 2 of the Charter, the police, prosecutor and correctional services officers (i.e. probation officers) must take measures to ensure that any statement which the victim wishes to make is heard and considered. By contrast, the SALRC proposes that the prosecution have the ultimate duty to ensure that victim impact statements are available for submission to court.¹²⁸ Clause 47(3) of the Sentencing Framework Bill places an obligation on the prosecutor to produce a victim impact statement where the victim is not called to give evidence. This clause is particularly significant in the context of negotiated justice, as the victim is not called to give evidence when a plea and sentence agreement is concluded. In this instance, the prosecutor is best situated to oversee the preparation of a victim impact statement. However, this does not mean that the preparation of such statement cannot be delegated to other criminal justice personnel and victim assistance organisations. Resource concerns must be taken into account. Preparing a victim impact statement will require notifying and consulting with the victim. If proper procedures are

¹²⁶ See Van der Merwe & Muller (2006: 658). See also Erez (1999: 546) who explains that in countries such as England, Wales, Scotland, Canada and Australia police officers prepare victim impact statements, whereas in countries such as the United States of America and New Zealand, probation officers, victim assistance staff or prosecution staff prepare victim impact statements. See also SALRC (2000) *Project 82: Report* paragraph 3.4.23 where the SALRC states that responsibility for the preparation of victim impact statements can rest with criminal justice personnel, like the prosecutor, police or probation officer, or with an independent organisation, like victim service specialists.

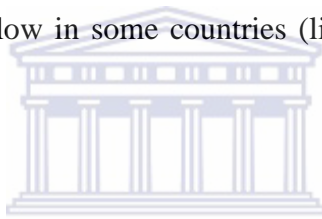
¹²⁷ Van der Merwe & Muller (2006: 658).

¹²⁸ See SALRC (2001) *Project 107: Discussion Paper 102* paragraph 40.19.1.

established and standard form impact statements are made available, the duty to prepare this statement may be delegated.¹²⁹ Thus, even though the prosecutor would be responsible primarily for the preparation of the victim impact statement, resource concerns mandate that alternative agents not be absolved from ensuring that the best possible effort is made to secure the victim's input.

5.6 The controversy over victim impact statements

Victim-orientated reforms, such as restitution, compensation and access to various services, have been adopted by most countries. Generally, these reforms have been accepted and welcomed. However, the reform which incorporates the use of victim impact statements has been slow in some countries (like South Africa) and at times controversial.



Although the use of victim impact statements is viewed favourably by most South African academics,¹³⁰ a fierce debate exists among international academics such as Ashworth and Erez. Ashworth opposes the use of victim impact statements.¹³¹ The major argument he raises to support his objection is that 'victim impact statements are detrimental not only to procedural and substantive justice but also to the victims who provide the input'.¹³² He argues that the movement to incorporate victims in the criminal justice system coincides with the movement towards harsher sentences. Therefore, he views the use of victim impact statements as a ploy to reconstruct sentencing priorities by increasing sentence severity. He explains that a victim impact

¹²⁹ See Appendix C.

¹³⁰ See, for example, Van der Merwe & Muller (2006: 661), Clarke, Davis & Booyesen (2003: 43), Women & Human Rights Project, Community Law Centre, UWC and the Institute of Criminology UCT (1999:139) and also Western Cape Consortium on Violence Against Women (2005: 10).

¹³¹ See Ashworth (1993: 498) and also Ashworth (1998: 4).

¹³² Ashworth (1998: 4).

statement is a call for punishment that satisfies or restores the victim and this undermines consistent and proportionate treatment of offenders.¹³³ It also undermines the penal system in terms of which public interest is the only justification for increased severity of penalties.¹³⁴ Ashworth concludes that using victims to accomplish this goal amounts to ‘victim prostitution which ought to be exposed and opposed’.¹³⁵

In direct opposition to the comments made by Ashworth, Erez has sought to expose the ‘unsubstantiated justifications based on research findings which have been taken out of context’.¹³⁶ She explains that research suggests that the concerns, expressed by opponents of victim impact statements, regarding a possible erosion of adversarial criminal justice principles, rights of the accused and imposition of harsher sentences have not materialised.¹³⁷ By contrast, she points out that these statements make an important contribution to proportionality rather than to severity in sentence.¹³⁸ She acknowledges that in some cases the statement may be redundant because the harm suffered by the victim may be capable of being inferred from the documents before the court.¹³⁹ She then refers to instances where the statement causes the reader to rethink the penalty he had in mind prior to reading the statement. These include instances where the offence was perpetrated in an unusually cruel manner or the victim is perceived as especially vulnerable.¹⁴⁰ Generally, the presence of these characteristics would be aggravating factors, which would mean the sentence imposed

¹³³ Ashworth (1993: 503).

¹³⁴ Ashworth (1993: 506).

¹³⁵ Ashworth (1993: 498).

¹³⁶ Erez (1999: 555).

¹³⁷ Erez (1999: 547) refers to the empirical research she conducted in the United States of America and Australia.

¹³⁸ Erez (1999: 548).

¹³⁹ Erez (1999: 548).

¹⁴⁰ Erez (1999: 548).

was likely to be more severe. However, if the victim disclosed in his victim impact statement that he had made a complete recovery, or that a certain injury had mistakenly been attributed to the crime, this would cause the decision-maker to re-evaluate the extent of the harm initially inferred.¹⁴¹ In this way, Erez makes her point that victim impact statements can make an important contribution to proportionality as opposed to severity in sentence.

Although most South African academics currently favour the use of victim impact statements, it is submitted that a debate about the consequences of these statements is likely to develop once appropriate legislation is enacted. The pursuit of legal certainty will undoubtedly spawn volumes of conflicting research on the effect of victim impact statements and some roads may lead to the Ashworth-Erez debate. Harsher sentences may result from the use of victim impact statements just as lenient sentences may result from its use. This study embraces the fact that victims are not a homogeneous group and their reactions to harm inflicted by offenders will differ. Similarly, their expectations and experiences in an era of victim impact statements will vary. Ultimately, the aim of victim impact statements is to allow the victim a voice if he elects to be heard. Often, it is the cathartic effect of recording the impact of the crime and not the outcome which provides relief to the victim. Scholars in this area have discussed at length the therapeutic advantages of having a voice versus the harmful effects that feeling voiceless and external to the process may have on victims.¹⁴² It is, therefore, difficult to conclude, as Ashworth does, that victim impact statements amount to 'victim prostitution'. Instead, it is submitted that a more reasonable conclusion would be that approaching victims in a paternalistic manner, ignoring their

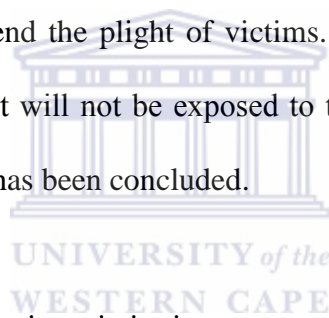
¹⁴¹ Erez (1999: 548).

¹⁴² See Wiebe (1996: 5) and Erez (1999: 554) for summary.

wishes to be heard and then using the harm they have suffered to justify the prosecution and punishment of another amounts to 'victim prostitution'.

5.7 Conclusion

The perception that the criminal justice system is unresponsive to victims of crime has led to the demand that the views and concerns of victims be presented and considered at appropriate stages of the criminal justice system. The victim impact statement, as a mechanism for victims' input into sentencing decisions, is an important reform aimed at satisfying the victim's need to be part of the process. Although courts guard against interference with its sentencing discretion, presiding officers, by their own admission, often are unable to comprehend the plight of victims. This admission is aggravated then by the fact that the court will not be exposed to the victim's testimony when a plea and sentence agreement has been concluded.



In the context of negotiated justice, victim impact statements provide the court with a means to test the sentence agreement concluded by the state and the defence. The current legal position in South Africa already allows victim impact statements to be admissible for the purposes of sentencing, even though there is no express provision to this effect. Thus, nothing prevents the use of victim impact statements in cases of negotiated justice. However, it is conceded that despite the promising draft legislation produced by SALRC, legal certainty and, thus, implementation of these statements have been slow in coming. In anticipation of appropriate legislation to govern victim impact statements, it is predicted that prosecutors will be identified as the party primarily responsible for preparing a victim impact statement. It is also envisaged that the enactment of appropriate legislation will spawn conflicting research on the affect

of victim impact statements, and South African academics may engage in a confrontation similar to the Ashworth-Erez debate. It is hoped that common sense will prevail ultimately and that the victim will finally be accorded a more prominent role in the dispensation of negotiated justice.



CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

Victims may be integrated into the criminal justice system in a number of ways.¹ However, the purpose of this study was to focus on the ways in which victims' rights may be developed in relation to negotiated justice. Central to the study is the assertion that victims have a definite right to participate in the negotiation and sentencing stages of negotiated justice. It is the nature and extent of these rights which this study has sought to clarify. What follows are detailed conclusions and recommendations based on the analyses contained in the previous chapters.

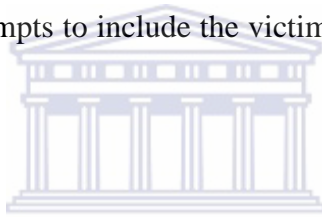
6.2 Conclusions

The South African Constitution does not provide a clear expression of the rights of crime victims. At best, procedural rights for victims can be inferred from general provisions. This study has sought guidance, therefore, in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Victims' Charter. Currently, the Victims' Charter provides the only domestic standard against which to assess whether statutory negotiated justice makes adequate provision for the rights of victims.

It was established that two independent systems of negotiated justice exists in South Africa, namely, informal plea agreements and statutory plea and sentence agreements.

¹ See Van der Merwe & Muller (2006: 648).

Although it was beyond the scope of this study to consider the rights of victims in informal plea agreements, it was noted that a questionable distinction exists between victim participation in informal negotiated justice and victim participation in statutory negotiated justice. Statutory negotiated justice makes provision for victim participation at two significant stages of the proceedings. Section 105A(1)(b)(iii) of the CPA allows for victim participation at the negotiating stage, while section 105A(7)(b)(i)(bb) allows for victim participation, at the sentencing stage. However, these provisions do not provide victims with a clear right to participate. Participation at the negotiating stage is subject to the prosecutor finding that it would be reasonable to allow the victim to participate and the victim's input at sentencing is subject to judicial discretion. These attempts to include the victim in statutory negotiated justice formed the crux of this study.



When considering the role victims should have during the negotiation stage of plea and sentence agreements, it is necessary first to identify the needs of crime victims and thereafter the rights which they should be accorded to satisfy these needs.² This study accepted the finding that in the context of negotiated justice those victims' rights requiring emphasis include the right to information, the right to be present when the agreement is presented to the court and the right to participate.³ The analysis of the nature and extent of these rights established that a natural consequence of allowing victims a right to participate is that they will have to be informed of the

² Welling (1987: 301) and also SALRC (2003) *Project 107: Discussion Paper 102* paragraph 40.1.1 where the SALRC identifies these needs as demands, in particular, the demand for services and procedural rights.

³ See the findings of Welling (1987: 302), Henderson (1985: 980), SAHRC (2001: 4) and Bekker (1996: 205).

intention to enter into an agreement and, as a result, would gain knowledge of their right to be present when the agreement is presented to the court.⁴

Section 105A(1)(b)(iii) of the CPA has been hailed as a provision which seeks to promote victim participation in the course of plea and sentence negotiations.⁵

Although the legislature evidently sought to allow victims a non-veto right to participate, a critical evaluation of the provision revealed at least two indications that it is an ineffectual attempt to promote victims' rights. Firstly, the provision omits the victim's right to be informed of the negotiations by failing to prescribe that such information be relayed to victims. One of the main problems with negotiated justice is that victims often are alienated during the negotiation process. This problem may be solved simply by providing more information to victims. Hence, legislation purporting to include victims in negotiated justice, in an effort to avoid victim alienation, would have to give effect to the victim's right to information. Section 105A does not acknowledge or make provision for this right. Secondly, the victim's right to participate is contingent upon the prosecutor finding that such participation would be reasonable. The consequence of this type of qualified inclusion is detrimental not only to the participatory right of the victim but also to the victim's right to information. If, for example, the prosecutor found that it is unreasonable to allow the victim to participate in the negotiations then he would not be obliged to inform the victim of the plea and sentence negotiations and agreement finally concluded, as the victim has no right, in terms of the section, to such information. Hence, the victim would be completely alienated from the proceedings and section 105A(1)(b)(iii) would not be promoting victim participation after all.

⁴ Welling (1987: 307).

⁵ Du Toit *et al* (2006: 15-12).

Since victim exclusion amounts to secondary victimisation, a victim who is denied the opportunity to participate, in effect, is being victimised by the criminal justice system. Thus, denying the victim an opportunity to make representations regarding plea and sentence negotiations simply cannot be justified as reasonable. In fact, the converse is true. Invariably, it is unreasonable to exclude the victim from such negotiations, especially where the right to be exercised by the victim is of a non-veto nature.⁶ There is a fundamental problem with the objective standard of reasonableness which qualifies victim participation in section 105A(1)(b)(iii). It is submitted that the victim should enjoy an unqualified non-veto participatory right.

The final conclusion reached in this study is that victim impact statements are the primary method of improving the role of the victim during the sentencing phase of negotiated justice. Section 105A(7) provides that presiding officers may have regard to evidence from or a statement made by the victim when considering the sentence agreement. It is presiding officer's duty, at this stage of the proceedings, to determine whether the sentence which the parties have agreed on is just.⁷ It is accepted that in order to fulfil this duty the factual information required by the presiding officer embraces more than information on the elements of the crime.⁸ Whether or not victim impact statements have a direct impact on the sentence, they are intrinsically valuable in the sentencing process. They not only help the victim reach emotional closure but also help the victim to convey personal information to the presiding officer. Hence, a proper and meaningful assessment of the harm inflicted by the offender is achieved when the victim is allowed to address the court on the consequences and effect of the

⁶ A non-veto right to participate is a right to be heard.

⁷ See SALRC (2000) *Project 82: The Draft Sentencing Framework Bill 2000* paragraph 3.4.8 and paragraph 3.4.15.

⁸ See Du Toit *et al* (2006: 15-18) and further *S v Dlamini* 1992 (1) SA 18 (A) at 30 paragraph d and 31 paragraph d. See further Karmen (1994: 202).

harm. This is especially important in the context of negotiated justice, as the court has not been exposed to the victim's testimony. Thus, exposing the court to an impact statement made by the victim both allows for proper fulfilment of the presiding officer's duty at sentencing, and allows for the presiding officer to test the appropriateness of the sentence negotiated between the prosecutor and the accused against the victim's testimony of the harm inflicted by the accused.

6.3 Recommendations

For the role of victims in negotiated justice to be meaningful, the rights which they are entitled to exercise during the negotiation and sentencing stages of these proceedings must be set out clearly. Concisely worded legislation can help to avoid misconceptions by prosecutors, presiding officers and victims. Well-written statutory language which clarifies the prosecutor's obligations towards victims encourages consistent application of victims' rights. This study has shown that section 105A in its current form does not promote or clarify victims' rights in negotiated justice sufficiently or satisfactorily.

It is recommended that section 105A(1)(b)(iii) be amended to remedy its inadequacies. In its broadest description, the amendment should allow victims a right to comment on the plea agreement. This means that the victim's views on the terms and conditions of the plea agreement should form part of the agreement.⁹ The victim could agree to or oppose the contents of the plea agreement. Since the victim has a non-veto right to participate, his wishes, although important, are not determinative. The prosecutor would be entitled to conclude the agreement even where the victim has expressed his disapproval thereof. Similarly, presiding officers would be bound only to consider the

⁹ See, for example, Van der Merwe & Muller (2006: 653).

victim's views and need not necessarily act in accordance with them. By implication, the proposed amendment places a positive duty on the prosecutor to notify the victim of the agreement. Thus, in addition to giving effect to the victim's right to be heard, the recommendation gives effect to the victim's right to information also.

A further opportunity for victim participation in negotiated justice exists at the sentencing stage. Having established the relevance of a statement made by the victim, this study recommends that the discretion which the court exercises in hearing from the victim be removed from section 105A(7). Since presiding officers cannot comprehend readily the plight of victims it is important that the victim's narrative be presented to the court.¹⁰ It is recommended, therefore, that a victim impact statement form part of the plea and sentence agreement. The statement will allow the victim an opportunity to inform the court of the impact which the crime has had upon him and, if applicable, his family.¹¹ Exposing the court to a victim impact statement will ensure that presiding officers are better equipped to fulfil their mandate in accordance with section 105A. Importantly, victim impact statements are voluntary statements. It is recommended, therefore, that an adverse inference not be drawn if the victim elects not to exercise his right to make a statement or if he elects not to testify in support of a contested statement.

Finally, this study might not have been possible or it might have taken a different path were it not for the constitutional imbalance between the rights of the accused and those of the victim. Regrettably, the precedent set by the Constitution requires that victims be satisfied with fragmented legislation which does not serve their interests or

¹⁰ *Holtzhausen v Roodt* 1997 (4) SA 766 (WLD) at 778 paragraph h.

¹¹ Clarke, Davis & Booysen (2003: 44).

protect their rights adequately. Thus, the final recommendation formulated by this study is that the constitution be amended so as to provide an express foundation for victims' rights in the supreme law of the land.



APPENDIX A

Section 105A of the Criminal Procedure Act 51 of 1977

(Plea and Sentence Agreements)

105A Plea and sentence agreements

(1) (a) A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of –

- (i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and
- (ii) if the accused is convicted of the offence to which he or she has agreed to plead guilty -
 - (aa) a just sentence to be imposed by the court; or
 - (bb) the postponement of the passing of sentence in terms of section 297(1)(a); or
 - (cc) a just sentence to be imposed by the court, of which the operation of the whole or any part thereof is to be suspended in terms of section 297(1)(b); and
 - (dd) if applicable, an award for compensation as contemplated in section 300.

(b) The prosecutor may enter into an agreement contemplated in paragraph (a) -

- (i) after consultation with the person charged with the investigation of the case;
- (ii) with due regard to, at least, the –
 - (aa) nature of and circumstances relating to the offence;
 - (bb) personal circumstances of the accused;
 - (cc) previous convictions of the accused, if any; and
 - (dd) interests of the community; and
- (iii) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding –
 - (aa) the contents of the agreement; and
 - (bb) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.

(c) The requirements of paragraph (b)(i) may be dispensed with if the prosecutor is satisfied that consultation with the person charged with the investigation of the case will delay the proceedings to such an extent that it could –

- (i) cause substantial prejudice to the prosecution, the accused, the complainant or his or her representative; and

- (ii) affect the administration of justice adversely.
- (2) An agreement contemplated in subsection (1) shall be in writing and shall at least–
 - (a) state that the accused, before entering into the agreement, has been informed that he or she has the right –
 - (i) to be presumed innocent until proved guilty beyond reasonable doubt;
 - (ii) to remain silent and not to testify during, the proceedings; and
 - (iii) not to be compelled to give self-incriminating evidence;
 - (b) state fully the terms of the agreement, the substantial facts of the matter, all other facts relevant to the sentence agreement and any admissions made by the accused;
 - (c) be signed by the prosecutor, the accused and his or her legal representative; and
 - (d) if the accused has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that he or she interpreted accurately during the negotiations and in respect of the contents of the agreement.
- (3) The court shall not participate in the negotiations contemplated in subsection (1).
- (4) (a) The prosecutor shall, before the accused is required to plead, inform the court that an agreement contemplated in subsection (1) has been entered into and the court shall then –
 - (i) require the accused to confirm that such an agreement has been entered into; and
 - (ii) satisfy itself that the requirements of subsection (1)(b)(i) and (iii) have been complied with.
- (b) If the court is not satisfied that the agreement complies with the requirements of subsection (1)(b)(i) and (iii), the court shall–
 - (i) inform the prosecutor and the accused of the reasons for non-compliance; and
 - (ii) afford the prosecutor and the accused the opportunity to comply with the requirements concerned.
- (5) If the court is satisfied that the agreement complies with the requirements of subsection (1)(b)(i) and (iii), the court shall require the accused to plead to the charge and order that the contents of the agreement be disclosed in court.
- (6) (a) After the contents of the agreement have been disclosed, the court shall question the accused to ascertain whether –
 - (i) he or she confirms the terms of the agreement and the admissions made by him or her in the agreement;
 - (ii) with reference to the alleged facts of the case, he or she admits the allegations in the charge to which he or she has agreed to plead guilty; and
 - (iii) the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced.
- (b) After an inquiry has been conducted in terms of paragraph (a), the court shall, if-

- (i) the court is not satisfied that the accused is guilty of the offence in respect of which the agreement was entered into; or
 - (ii) it appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge; or
 - (iii) for any other reason, the court is of the opinion that the plea of guilty by the accused should not stand, record a plea of not guilty and inform the prosecutor and the accused of the reasons therefor.
- (c) If the court has recorded a plea of not guilty, the trial shall start de novo before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.
- (7) (a) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement.
- (b) For purposes of paragraph (a), the court –
- (i) may-
 - (aa) direct relevant questions, including questions about the previous convictions of the accused, to the prosecutor and the accused; and
 - (bb) hear evidence, including evidence or a statement by or on behalf of the accused or the complainant; and
 - (ii) must, if the offence concerned is an offence –
 - (aa) referred to in the Schedule to the Criminal Law Amendment Act, 1997(Act 105 of 1997)
 - (bb) for which a minimum penalty is prescribed in the law creating the offence, have due regard to the provisions of that Act or law.
- (8) If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.
- (9) (a) If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just.
- (b) Upon being informed of the sentence which the court considers just, the prosecutor and the accused may –
- (i) abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence; or
 - (ii) withdraw from the agreement.
- (c) If the prosecutor and the accused abide by the agreement as contemplated in paragraph (b)(i), the court shall convict the accused of the offence charged and impose the sentence which it considers just.

- (d) If the prosecutor or the accused withdraws from the agreement as contemplated in paragraph (b)(ii), the trial shall start de novo before another presiding officer:
Provided that the accused may waive his or her right to be tried before another presiding officer.
- (10) Where a trial starts de novo as contemplated in subsection (6)(c) or 9(d) –
- (a) the agreement shall be null and void and no regard shall be had or reference made to –
- (i) any negotiations which preceded the entering into the agreement;
- (ii) the agreement; or
- (iii) any record of the agreement in any proceedings relating thereto, unless the accused consents to the recording of all or certain admissions made by him or her in the agreement or during any proceedings relating thereto and any admission so recorded shall stand as proof of such admission;
- (b) the prosecutor and the accused may not enter into a plea and sentence agreement in respect of a charge arising out of the same facts; and
- (c) the prosecutor may proceed on any charge.
- (11)(a) The National Director of Public Prosecutions, in consultation with the Minister, shall issue directives regarding all matters which are reasonably necessary or expedient to be prescribed in order to achieve the objects of this section and any directive so issued shall be observed in the application of this section.
- (b) The directives contemplated in paragraph (a) –
- (i) must prescribe the procedures to be followed in the application of this section relating to –
- (aa) any offence referred to in the Schedule to the Criminal Law Amendment Act, 1997, or any other offence for which a minimum penalty is prescribed in the law creating the offence;
- (bb) any offence in respect of which a court has the power or is required to conduct a specific enquiry, whether before or after convicting or sentencing the accused; and
- (cc) any offence in respect of which a court has the power or is required to make a specific order upon conviction of the accused;
- (ii) may prescribe the procedures to be followed in the application of this section relating to any other offence in respect of which the National Director of Public Prosecutions deems it necessary or expedient to prescribe specific procedures;
- (iii) must ensure that adequate disciplinary steps shall be taken against a prosecutor who fails to comply with any directive; and

- (iv) must ensure that comprehensive records and statistics relating to the implementation and application of this section are kept by the prosecuting authority.
- (c) The National Director of Public Prosecutions shall submit directives issued under this subsection to Parliament before those directives take effect, and the first directives so issued, must be submitted to Parliament within four months of the commencement of this section.
- (d) Any directive issued under this subsection may be amended or withdrawn in like manner.
- (12) The National Director of Public Prosecutions shall at least once every year submit the records and statistics referred to in subsection (11)(b)(iv) to Parliament.
- (13) In this section sentence agreements means an agreement contemplated in subsection (1)(a)(ii).



APPENDIX B

Extract from
The South African Law Reform Commission Project 73: Simplification of Criminal
Procedure (Sentence Agreements) Fourth Interim Report, paragraph 4.17.

The Commission concluded that sentence agreements should be legalised and regulated subject to what follows:

- a) The agreement must be reached before the plea. In the US the bargain must be struck before the trial. Otherwise practical problems arise. If the court does not accept the agreement the trial will have to restart before another court.
- b) Such an agreement will become binding on both the accused and the prosecution as soon as the plea is entered, but it does not bind the court.
- c) The agreement must be in writing and must contain a preamble, setting out the relevant rights of the accused which have to be explained to him before the agreement is concluded.
- d) If the agreement is reached, the accused pleads guilty and the sentence agreement is then disclosed to the court.
- e) The court, before convicting the accused, has to question the accused to ascertain whether the accused understood his rights, that the agreement was entered into freely and voluntarily and that the plea is in conformity with the facts. In other words, the procedure of sections 112(1)(b) and (2) comes into operation.
- f) This, at the same time, enables the court to assess whether the agreed sentence is appropriate or inappropriate.
- g) The court then accepts or rejects the agreement.
- h) If it accepts it, the accused is found guilty in terms of the plea and the agreed sentence is imposed.
- i) If the court is of the view that it would have imposed a lesser sentence than the agreed sentence, it may likewise find the accused guilty but impose the lesser sentence.
- j) If it rejects the agreement, the accused is so informed. The accused then has a choice: he may abide by his plea and the matter proceeds as usual. He is, however, entitled to withdraw his plea, in which event the matter has to begin anew before another judicial officer. No reference may then be made to the plea agreement or the proceedings before the first court.
- k) The Commission gave consideration to providing victims' input in the negotiations but came to the conclusion that it would be in conflict with the general scheme of the Criminal Procedure Act and would be impractical. The Commission, however, allowed for a provision in terms of which the prosecutor should consider the views of the victim when engaging in negotiations.
- l) The judicial officer should not instigate or take part in any negotiations. To invite the judge to preside over negotiations appears to be fraught with dangers.
- m) Once a person is convicted and sentenced in terms of an agreement, he should not have a right of appeal against either. Review would be the proper remedy in the event of undue influence or the like.

APPENDIX C

Sample Victim Impact Statement

State v _____

Case Number _____

TO ASSIST THE COURT IN ITS EFFORT TO WEIGH ALL FACTORS PRIOR TO IMPOSING SENTENCE, WE REQUEST YOUR VOLUNTARY COOPERATION IN COMPLETING THIS FORM. THIS STATEMENT IS INTENDED TO BE SUBMITTED TO THE PRESIDING OFFICER IMPOSING SENTENCE HEREIN.

Name of victim _____

Address _____

1. Please describe the nature of the incident in which you were involved.

2. As a result of this incident, were you physically injured? Yes or No
If yes, please describe the extent of your injuries.

3. Did you require medical treatment for the injuries sustained? Yes or No
If yes, please describe the treatment received and the length of the time treatment was or is required.

4. Amount of expenses incurred to date as a result of medical treatment received:
R _____
Anticipated (future) medical expenses: R _____

5. Were you psychologically injured as a result of the incident? Yes or No
If yes, please describe the psychological impact which the incident has had on you.

6. Have you received any counselling or therapy as a result of this incident?
Yes or No
If yes, please describe the length of time you have been or will be undergoing counselling or therapy, and the type of treatment you have received.

7. Amount of expenses incurred to date as a result of counselling or therapy received: R _____
8. Has this incident affected your ability to earn a living? Yes or No
If yes, please describe your employment, and specify how and to what extent your ability to earn a living has been affected, days lost from work, etc.

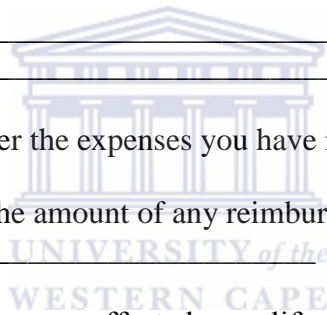
9. Have you incurred any other expenses or losses as a result of this incident?
Yes or No
If yes, please describe.

10. Did any insurance cover the expenses you have incurred as a result of this incident? Yes or No
If yes, please specify the amount of any reimbursements you have received.
R _____
11. Has this incident in any way affected your lifestyle or your family's lifestyle?
Yes or No
If yes, please explain.

12. Are there any other effects of this incident which are now being experienced by you or members of your family? Yes or No
If yes, please explain.

13. Please describe what being a victim has meant to you and your family.

14. What are your feelings about the criminal justice system? Have your feelings changed as a result of this incident? Please explain.



15. Do you have any thoughts or suggestions on the sentence which the court should impose? Please explain and indicate whether you favour imprisonment.

Please remember that the court decides the appropriate sentence to impose and this will not necessarily be the sentence which you have recommended.

The information and thoughts you have provided are very much appreciated.

This form is affirmed by the victim as true under the penalty of perjury.

DATE

SIGNATURE - VICTIM

I certify that the abovementioned signature is the true signature of _____ and that he/she acknowledged to me that he/she knows and understands the contents of the foregoing which was signed and attested to on this _____ day of _____ 2009 in accordance with the provisions of GN R1258 dated 21 July 1972 as amended by Regulation No. 1648 dated 19 August 1977, by GN R1428 of 11 July 1980 and by GN R774 of 23 April 1982.

COMMISSIONER OF OATHS

BIBLIOGRAPHY

Primary Sources

A. Case Law

Booth v Maryland 107 S. Ct. 2529, 2536 (1987) United States Supreme Court of Appeal

Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) & 2003 (2) SA 656 (C)

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)

Holtzhausen v Roodt 1997 (4) SA 766 (WLD)

Johannesburg LLB v Kuhn 1963 (4) SA 666 (A)

Mbuyase and Others v Rex 1939 NPD 228

Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA)

National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)

North Western Dense Concrete CC and Another v DPP (Western Cape) 1999 (2) SACR 669 (C)

Rammoko v Director of Public Prosecutions 2003 (1) SACR 200 (SCA)

R v Davis 1925 AD 30

R v Khumalo & Nkosi 1918 AD 500

Shabalala v Attorney-General of Transvaal & others 1995 (2) SACR 761 (CC)

S v Abrahams 2002 (1) SACR 116 (SCA)

S v Armugga & Others 2005 (2) SACR 259

S v Brown en Andere 1996 (2) SACR 49 (NC)

S v Dlamini 1992 (1) SA 18 (A)

S v Esterhuizen 2005 (1) SACR 490 (T)

S v G 2004 (2) SACR 296 (W)

S v Gough 1980 (3) SA 785 (NC)

S v Gqabi 1964 (1) SA 261 (T)

S v H 1977 (2) SA 954 (A)



S v Mahomotsa 2002 (2) SACR 435 (SCA)

S v Makwanyane & Another 1995 (3) SA 391 (CC)

S v Muggels (unreported CPD decision) case number SS 3/2002

S v O 2003 (2) SACR 147 (C)

S v Pieters 1987 (3) SA 717 (A)

S v Rabie 1975 (4) SA 855 (A)

S v Sassin 2003 (4) All SA 506 (NC)

S v Solomans 2005 (2) SACR 432 (C)

S v Yengeni 2005 (3) SACR 1306 (T)

S v Van Rensburg 1968 (2) SA 622 (T)

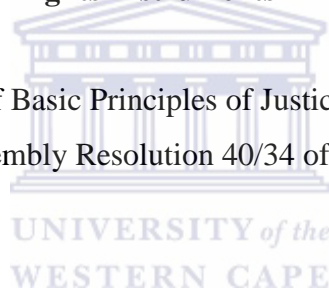
S v Zinn 1969 (2) SA 537 (A)

Vanderbijlpark Health Committee v Wilson 1950 (1) SA 447 (A)

Vlok & Others (unreported TPD decision) case number SS 15/2007

B. International Human Rights Instruments

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power General Assembly Resolution 40/34 of 29 November 1985



C. Statutes and Regulations

Abolition of Juries Act 34 of 1969

Civil Proceedings Evidence Act 25 of 1965

Criminal Law (Sexual Offences) Amendment Bill B50 - 2003 Government Gazette No. 25282 of 30 July 2003

Criminal Procedure Act 51 of 1977

Criminal Procedure Second Amendment Act 62 of 2001

Criminal Procedure Second Amendment Bill Government Gazette No. 22582 of 17 August 2001

Criminal Procedure Second Amendment Bill Government Gazette No. 22933 of 14
December 2001

Group Areas Act 41 of 1950 (repealed)

Judicial Matters Amendment Act 55 of 2002

Interim Constitution of the Republic of South Africa Act 200 of 1993

Immorality Act 5 of 1927 (repealed)

South African Law Commission Act 19 of 1973

National Instruction No.22/1998, Sexual Offences: Support to Victims and Crucial
Aspects of the Investigation

Directives of the National Director of Public Prosecutions issued on 14 March 2002 in
accordance with section 105A(11)

Minimum Standards on Services for Victims of Crime

Service Charter for Victims of Crime in South Africa

D. Supreme Law of South Africa

Constitution of the Republic of South Africa 1996

Secondary Sources

E. Books and Chapters from Books

Artz L, Smythe D (2005) 'South African Legislation Supporting Victims' Rights' in Davis & Snyman *Victimology in South Africa* Van Schaik Publishers: Pretoria

Batley M (2005) 'Restorative Justice' in Davis & Snyman *Victimology in South Africa* Van Schaik Publishers: Pretoria

Bekker P, Geldenhuys T, Joubert J, Swanepool J, Terblanche S, van der Merwe S, (2003) *Criminal Procedure Handbook* (6th edition) Juta and Company Ltd: Cape Town

Bruce D (2005) 'Challenges of the Criminal Justice System in Addressing the Needs of Victims and Witnesses' in Davis & Snyman *Victimology in South Africa* Van Schaik Publishers: Pretoria

Burchell J (2005) *Principles of Criminal Law* (3rd edition) Juta and Company Ltd: Cape Town

Classen R (1997) *Dictionary of Legal Words & Phrases* (2nd edition) volume 4 issue 10, Lexis Nexis (loose leaf compilation): Durban

Combs N (2007) *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* Stanford University Press: Stanford

Currie I, De Waal, J (2005) *The Bill of Rights Handbook* (5th edition) Juta and Company Ltd: Cape Town

Davis L (2005) 'Victimology in South Africa: the Way Forward' in Davis & Snyman *Victimology in South Africa* Van Schaik Publishers: Pretoria

- Davis L, Snyman R (2005) *Victimology in South Africa* Van Schaik Publishers: Pretoria
- De Ville J (2000) *Constitutional and Statutory Interpretation*, Interdoc Consultants: Cape Town
- De Waal J, Currie I, Erasmus G (2001) *The Bill of Rights Handbook* (4th edition) Juta and Company Ltd: Cape Town
- Du Toit E (1981) *Straf in Suid-Afrika*, Juta and Company Ltd: Cape Town
- Du Toit E, De Jager F, Van der Merwe S, Paizes A, Skeen Q, (2006) *Commentary on the Criminal Procedure Act* (bi-annual revision service) Juta and Company Ltd: Cape Town
- Fletcher G (1995) *With Justice for Some: Victims' Rights in Criminal Trials* Addison-Wesley: Massachusetts
- Hawkins K (1995) *The Uses of Discretion*, Clarendon Press: Oxford
- Hawker S, Cowley C (1996) *The Oxford Dictionary and Thesaurus* Oxford University Press: Oxford
- Karmen A (1994) *Crime Victims: An Introduction to Victimology* (2nd edition) Brooks/Cole Publishing Company: California
- Kriegler J, Stafford E (1993) *Hiemstra: Suid-Afrikaanse Strafproses* (5th edition) Butterworths: Durban
- Louw B, Pretorius Z (2005) 'Victim Empowerment and Support in South Africa' in Davis & Snyman *Victimology in South Africa* Van Schaik Publishers: Pretoria
- Olmesdahl M, Steytler N (1983) *Criminal Justice in South Africa: Selected Aspects of Discretion*, Juta and Company: Cape Town

Schurink W (1992) 'Introduction: Victimology as a New and Evolving Field' in Schurink, Snyman & Krugel *Victimisation: Nature and Trends* HSRC Publishers: Pretoria

Schurink W, Snyman I, Krugel W assisted by Slabbert L (1992) *Victimisation: Nature and Trends*, HSRC Publishers: Pretoria

Schwikkard P, van der Merwe S, in collaboration with Collier D, de Vos W, Skeen Q, van der Berg E (2002) *Principles of Evidence* (2nd edition) Juta and Company Ltd: Cape Town

Snyman R (2005) 'Overview of Concepts in Victimology' in Davis & Snyman *Victimology in South Africa* Van Schaik Publishers: Pretoria

Snyman R (1992) 'Victim Support Schemes and a Proposed Model for Rendering Services to Victims of Crime in South Africa' in Schurink, Snyman & Krugel *Victimization Nature and Trends* HSRC Publishers: Pretoria

Strijdom (1983) 'Factors Influencing a Victim's Decision to Report an Offence' in Olmesdahl & Steytler *Criminal Justice in South Africa: Selected Aspects of Discretion*, Juta and Company: Cape Town

Van Wyk D edition (1994) *Rights and Constitutionalism: The New South African Legal Order*, Juta and Company Ltd: Cape Town

Wiebe R (1996) 'The Mental Health Implications of Crime Victims' Rights' in Wexler & Winick *Law in Therapeutic Key* Caroline Academic Press: Durham

Williams B (1999) *Working with Victims of Crime: Policies, Policies & Practices*, Jessica Kingsley Publishers: London

F. Electronic Articles

Alschulser A (1979) 'Plea Bargaining and its History' (1) *Columbia Review*
<<http://www.jstor.org/journals/sic>> [accessed on 8 October 2007]

Ashworth A (1986) 'Punishment and Compensation: Victims, Offenders and the State' *Oxford Journal of Legal Studies* <<http://www.jstor.org/journals/nwu.html>> [accessed on 15 November 2007]

Camerer L (1996) 'A Victim Movement for South Africa?'
<<http://www.ecelle.com/pubs/monographs/no3/victimmovement.html>> [accessed on 10 January 2008]

Camerer L (1997) 'Crime, Violence and Punishment-Putting Victims on the Agenda'
<<http://www.iss.co.za/ASR/6No3/Camerer>> [accessed on 6 February 2007]

Camerer L (1997) 'Victims and Criminal Justice'
<<http://www.iss.co.za/Monographs/No12/Camerer>> [accessed on 31 October 2007]

Camerer L (1999) 'What about the Victims?'
<<http://www.ecelle.com/pubs/monographs/no3/victimmovement.html>> [accessed on 27 August 2007]

Erez E (1991) 'Victim Impact Statements' *Australian Institute of Criminology* No.33
<<http://www.aic.gov.au>> [accessed on 19 April 2009]

Erez E (1999) 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' (July) *Criminal Law Review*
<<http://www.westlaw.uk>> [accessed on 30 October 2008]

- Fattah E (2000) 'Victimology Past, Present and Future' 33(1) *Criminologie*
<<http://www.erudit.org/revue/crimino/2000/v33/n1/004720ar.html>> [accessed on 6 February 2007]
- Garkawe S (2003) 'The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?' 27(2) *Melbourne University Law Review* 334.
www.austlii.edu.au/au/journals/MULR/2003/14.html [accessed on 17 August 2007]
- Gittler G (1984) 'Expanding the Role of the Victim' (11) *Pepperdine Law Review* 117
<<http://www.jstor.org/journal/links>> [accessed on 8 August 2007]
- Goldstein A (1982) 'Defining the Role of the Victim in Criminal Prosecutions' 52 *Mississippi Law Journal* 515 <<http://www.jstor.org/journal/links>> [accessed on 15 November 2007]
- Goldstein A (1984) 'The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982' 14(3) *Law and Contemporary Problems* 225
<<http://www.jstor.org/journal/links>> [accessed on 2 June 2007]
- Hagan J (1982) 'Victims Before the Law: A Study of Victim Involvement in the Criminal Justice Process' 73(1) *Journal of Criminal Law and Criminology* 317
<<http://www.jstor.org/journals/nwu.html>> [accessed on 2 June 2007]
- Heinz A, Kerstetter W (1979) 'Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining' 13(2) *Law & Society Review* 349
<<http://www.jstor.org/journals/lawsa.html>> [accessed on 19 November 2007]
- Hubschle A (2007) 'South Africa's Victims' Charter of Rights- Realistic or Aspirational?' <<http://www.iss.co.za/index.php>> [accessed on 30 October 2007]
- Kennard K (1989) 'The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions' 77(2) *California Law Review* 417
<<http://www.jstor.org/journals/00081221.html>> [accessed on 2 June 2007]

Kgosimore D (2000) 'The Bill of Rights in the Constitution of the Republic of South Africa and its Application within the Criminal Justice System' unpublished MA thesis available electronically at <http://www.crisa.org.za> [accessed on 13 September 2008]

Leggert T (2005) 'Victims' Views: Insights from an Inner-City Victim Survey' <http://www.iss.org.za/monographs/no111/chap4.htm> [accessed on 7 October 2007]

O'Connor P (2004) 'Victimology Theory' <http://www.faculty.ncwc.edu> [accessed on 21 March 2007]

Piccinato M (2004) 'Plea Bargaining: Criticisms of the Practice' <http://www.canada.justice.html> [accessed on 16 August 2004]

Verdun-Jones S, Tijerino A (2002) 'Victim Participation in the Plea Negotiation Process in Canada' <http://www.justice.gc.ca/en/ps/rs/rep/vppnpc> [accessed on 30 October 2007]

Western Cape Consortium on Violence Against Women (2005) 'Submission to the Minister of Justice and Constitutional Development in Response to the Evaluation of the Criminal Law Amendment Act 105 of 1997' <http://www.ghjru.uct.za/parlsubmission/Memorandum-Mandatory-Minimum-Sentencing> [accessed on 15 June 2008]

Women & Human Rights Project, Community Law Centre, UWC and the Institute of Criminology UCT (1999) 'Legal Aspects of Rape in South Africa' Discussion Document Commissioned by the Deputy Minister of Justice <http://www.communitylawcentre.org.za/gender/publications/violence> [accessed on 18 November 2008]

Zedner L (2003) 'Social Dimensions of Crime and Justice' <http://www.oup.com> [accessed on 18 March 2007]

G. Governmental Publications

Department of Justice & Constitutional Development (2005) 'Introduction to the Victims Charter'

<http://www.doj.gov.za/southafrica.info/publicservices/yourrights/update/> [accessed on 27 June 2007]

Parliamentary Monitoring Group Constitutional Review Committee 'Public Submissions on 2008 Constitution Review: Consideration' Minutes of a meeting held on 15 August 2008. <http://www.pmg.org.za> [accessed on 21 November 2008].

The National Centre for Victims of Crime (2007) 'About Victims' Rights'

<http://www.victimlaw.info/victimlaw/pages/victimsRight.jsp> [accessed on 6 January 2008]

Victims' Charter Consultative Draft of 2001

<http://www.doj.gov.za/docs/draftvictimcharter2001> [accessed on 23 February 2007]



H. Journal Articles

Anderson A 'Step by Step Formal Plea and Sentence Agreements' (2005) Issue 445, August *De Rebus* 28

Ashworth A 'Victim Impact Statements and Sentencing' (1993) *Criminal Law Review* 498

Bekker P 'Plea Bargaining in the United States of America and South Africa' (1996) 29(1) *Comparative and International Law Journal of South Africa* 168

Bekker P 'American Plea Bargaining in Statutory Form in South Africa' (2001) 34(3) *Comparative and International Law Journal of South Africa* 310

Christie N 'Conflicts as Property' (1977) 17(1) *The British Journal of Criminology* 7

Clarke C 'Message in a Bottle for Unknowing Defenders: Strategic Plea Negotiations Persist in South African Criminal Courts' (1996) 1 *Comparative and International Law Journal of South Africa* 141

Clarke D, Davies L, Booysen K 'A Silver Era for Victims of Crime: Reassessing the Role that Victim Impact Statements can Play in Improving Victim Involvement in Criminal Justice Procedures' (2003) 16(2) *Acta Criminologica* 43

Combrinck H 'Positive State Duties to Protect Women from Violence: Recent South African Developments' (1998) 20 *Human Rights Quarterly* 666.

Combrinck H 'The Dark Side of the Rainbow: Violence Against Women in South Africa After Ten Years of Democracy' (2005) *Acta Juridica* 171

Cowling M 'Criminal Procedure' (2006) 2 *South African Journal of Criminal Justice* 239.

Davies R, Kunreuther F, Connick E 'Expanding the Victim's Role in the Criminal Court Dispositional Process: The Results of an Experiment' (1984) 75(2) *Journal of Criminal Law and Criminology* 491

De Villiers W 'Negotiated Pleas: Notes About and Towards Effective Assistance by Counsel' (2000) 5 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 153

De Villiers W 'Plea and Sentence Agreements in Terms of Section 105A of the Criminal Procedure Act: A Step Forward?' (2004) 37(2) *De Jure* 244

Du Toit S, Snyman E 'Plea-bargaining in South Africa: The Need for a Formalized Trial Run' (2001) 26(3) *Tydskrif vir Regswetenskap* 144

Edwards 'Victim Participation in Sentencing: The Problem of Incoherence' (2001) 40 *Howard Law Journal* 39

Henderson L 'The Wrongs of Victims' Rights' (1985) 37 *Stanford Law Review* 937

- Henderson J, Gitchoff G 'Using Experts and Victims in the Sentencing Process' (1981) 17 *Criminal Law Bulletin* 226
- Isakow N & van Zyl Smit D (1985) 'Negotiated Justice and the Legal Context' April *De Rebus* 173
- Meintjies-van der Walt L 'Towards Victims' Empowerment Strategies in the Criminal Justice Process' (1998) 11 *South African Journal of Criminal Justice* 157
- Pieterse M 'The Right to be Free from Public or Private Violence after Carmichele' (2002) 119 *South African Law Journal* 27
- Roberts J 'Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings' (2003) 47 *Criminal Law Quarterly* 365
- Snyman E 'The Victim Impact Statement as a Means of Addressing the Victims' Needs for Right' (1999) 8 *Acta Criminology* 30
- Snyman E & Du Toit S 'Defining and Evaluating Plea Bargaining' (2000) 13 *South African Journal of Criminal Justice* 190
- Steyn E 'Plea-bargaining in South Africa: Current Concerns and Future Prospects' (2007) 2 *South African Journal of Criminal Justice* 206
- Trichardt L, Krull W 'A Confession for a Concession' (1987) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 409
- Uphoff R 'The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach' (1995) 2 *Clinical Law Review, Oklahoma* 73
- Van der Merwe A, 'Judicial Perceptions of Harm in Child Sexual Abuse Matters: A Compelling Case for Impact Statements' (2007) 8(1) *Child Abuse Research in South Africa* 11.

Van der Merwe A, Muller K 'Recognising the Victim in the Sentencing Phase: The Use of Victim Impact Statements' (2006) 22(4) *South African Journal on Human Rights* 647

Watney M 'Judicial Scrutiny of Plea and Sentence Agreements' (2006) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 224

Welling S 'Victim Participation in Plea Bargains' (1987) 65(2) *Washington University Law Quarterly* 301

I. Publications by Organisations

Democratic Alliance Address at the Victims of Crime Imbizo held in Durban on 2 August 2008 <<http://www.da.org.za/?p=4>> [accessed on 28 September 2008]

Democratic Alliance 'Discussion Document on the Rights of Victims of Crime' <<http://www.da.org.za>> [accessed on 28 September 2008]

John Howard Society of Alberta (1999) 'Sentencing in Canada' <<http://www.johoward.ab.ca/PUB/C33.html>> [accessed on 13 July 2008]

Law Reform Commission of Canada (1975) 'Criminal Procedure: Control of the Process Working Paper 15' <<http://www.lcc.gc.ca>> [accessed on 5 January 2009]

SAHRC (2001) 'Submission to the Justice & Constitutional Development Portfolio Committee, National Assembly, 12 October 2001' <<http://www.sahrc.org.za>> [accessed on 20 December 2006].

J. South African Law Reform Commission

SALRC (1997) *Project 82: Sentencing: Restorative Justice (Compensation for victims of crime and victim empowerment) Issue Paper 7*

SALRC (2000) *Project 82: Sentencing Restorative Justice Issue Paper 7*

SALRC (2000) *Project 82: Sentencing (A New Sentencing Framework) Discussion Paper 91*

SALRC (2000) *Project 82 Report: A New Sentencing Framework Report*

SALRC (2000) *Project 82: Sentencing (A New Sentencing Framework) The Draft Sentencing Framework Bill 2000*

SALRC (2001) *Project 73: Simplification of Criminal Procedure (Sentence Agreements) Discussion Paper 94*

SALRC (2001) *Project 73: Simplification of Criminal Procedure (Sentence Agreements) Fourth Interim Report*

SALRC (2001) *Project 107: Sexual Offences Process and Procedure Discussion Paper 102*

SALRC (2003) *Project 107: Sexual Offences Discussion Paper 102*

K. Websites

Department of Justice & Constitutional Development www.doj.gov.za

Law Reform Commission of Canada www.lcc.gc.ca

Parliamentary Monitoring Group Constitutional Review Committee www.pmg.org.za

South African Human Rights Commission www.sahrc.org.za

United Nations www.ohchr.org

Victims' Rights Working Group website www.vrwg.org

L. Other material

Ashworth A (1998) 'Victims' Rights, Defendants' Rights and Criminal Procedure' A Paper Presented at the International Conference on Integrating Victim Perspectives in Criminal Justice, in York (17 July 1998).

