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Beyond Punishment: Moving towards the Application of Conciliatory Justice in the Canadian Context

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Continual shifting of the moral grounding for punishment reflects a fundamental uneasiness with the institution... .As the justification of punishment comes full circle back to the most ancient idea of all, that harming offenders is good, it is worth reexamining our commitment to the institution.1

I. The Criminal Justice System

A. Introduction

The criminal justice system in force in Canada is not adequate to deal with the social repercussions and relationships that have evolved as a result of crime. It fails to rehabilitate the offender, often victimizing the victim yet again. It encourages retribution and adversarial relationships with little benefit to the overarching social structure that it functions in. Clearly, an alternative system of justice is required. This system should involve the victim, the offender, and the community2.

The goal of the justice system should be, at the very least, to restore society to the state it was in before the offence occurred. Restorative justice reaches, and often exceeds, this goal by improving the social context in which the crime was committed. Restorative justice is best implemented through an alternate stream of justice that involves mediation between the offender, the victim, and others that are affected by the criminal offence.

1 D. Golash, "Punishment: An Institution in Search of a Moral Grounding" in **U.** L. Sistare, ed.,

Punishment: Social Control and Coercion (New York: Peter Lang Publishing, 1996) at 1l.

2M Jackson, "In Search of Pathways to Justice: Alternate Dispute Resolution in Aboriginal Communities" (1992) Sp. Issue U.B.C.L. Rev. 147 at 147.

Facilitated discussion between the offender and those they have harmed has been implemented into the criminal justice system in several cultures. While each culture has unique circumstances and needs, concepts can be gleaned from the experience of others to develop a model of criminal justice that includes mediation in place of the adversarial approach. The goal of this system is progress, not punishment. This paper will analyze truth and reconciliation commissions in such a context, with a view to developing a workable model for the Canadian justice system to implement.

B. **Theoretical Underpinnings**

1. Retribution

The theoretical basis for the criminal justice system has historically been retribution. The normative assumption of this view is that there should be serious punishment for serious harm.3 A premise of retributive justice is that, upon committing an offence, one forfeits the right to a full moral standing, as full liberty would result in harm to others.4 However, "merely pointing to the fact that the offender has

violated someone's rights is insufficient for showing that he has forfeited his right not to be made to intentionally suffer."5 This removal of full liberty and inflicting of suffering should not form the bedrock of Canadian criminal law.

3 See the discussion *of Jus Talionis, a* concept essential to any retributive theory, in M. Davis, *To Make the Punishment Fit the Crime* (Boulder: Westview Press, 1992) at 41-42. This describes the general principle of retributive justice that requires a wrongdoer to suffer in proportion to the amount that they have made someone else to wrongfully suffer.

4An application of this philosophy, for example, would lead to the conclusion that if one breaches a contract this means that they should be make to suffer by forfeiting their own right to contract. See A. H. Goldman (1982), "Toward a New Theory of Punishment," *Law Philosophy,* 1 in A. Duff, ed., *Punishment* (Aldershot:

Dartmouth, 1993) 177 at 188.

5 R.W. Burgh (1982), 'Do the Guilty Deserve Punishment?' The Journal of Philosophy, 79 in Duff, *id.* at 108.

In the view of retributionists, the underlying philosophy of criminal law is that the offender should be punished in order to prevent further criminal acts.6 Punishment should utilize the most efficient means of preventing future harmful activity, at the lowest possible cost, in the most humane way.7 Retribution assumes that punishment is the only way to achieve the goal of deterrence. This view, however, omits all concern for the victim, reparation, reconciliation, and reintegration of the offender into society.

2. *Reparation*

A more progressive view of the criminal justice system is that based on reparation. An analogy to tort law is often used, where the only concern is that the offender should be forced to restore the victim to the state they were in before the offence was committed. The core notion of reparation is "making a gesture that acknowledges responsibility for the harm inflicted and expresses regret"8 in order to overcome the alienation that results from socially unacceptable behavior. Examples of such an expression of regret are pecuniary compensation and apologies to victims and communities.

6DM Farrell (1985), "The Justification of General Deterence" *The Philosophic Review* 12, in Duff, *id.* at 215. See also W. Cragg, *Practice of Punishment: Towards a Theory of Restorative Justice* (London: Ruteledge, 1992) at 33, 34.

7W.B. Common, Q.C. & A.W. Mewett, *The Philosophy of Sentencing and the Disparity of Sentences* (Foundation For Legal Research in Canada, 1969) at 2.

This espouses the Utilitarian view of justice that punishment should advance human welfare to some significant extent in order to be justified. It argues for a humanitarian focus, with meritorious responses that benefit society instead of mere revenge. Harm is used as an objective guide to determine the seriousness of the offence. Punishment of the offence prevents a recurrence of future harmful activity. See W. Cragg, *id.* at 31, *33-35.*

Hart, however, believes that there is justification for unequal punishment for equal offences. This will occur by focusing on the offender and not the offence. Society is justified in punishing those who break the law voluntarily so that penalties can be used as a threat which induces people to conform to the law. The same punishment would not be justified for someone who involuntarily committed the same offence,

because there is no need to threaten them into future conformity with the law. See the opinion of H.L.A. Hart in H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) at *25-27.*

8 Cragg, *supra* note 6 at 171.

Where reparation is offered to display regret and acknowledge responsibility, this reparation has the same characteristics as the enforcement functions of sentencing. It demonstrates a desire to live by the law and accept responsibility for ones actions. It shows willingness to correct past wrongs. This, in turn, rebuilds society by rebuilding trust. Such a practice is diametrically opposed to the inherently coercive system of punishing the accused.9

There are, however, several problems with a reparative model of justice. It is often difficult to compensate for intangibles, such as loss of peace of mind. It is difficult to quantify the loss to such things as institutions and social relations.'0 Reparation is also dependant on the ability of the accused to pay, often making complete monetary compensation impossible. The amount offered by the offender may be offensive because of its inadequacy. Victims may be of the opinion that money can not make everything right." As a result, a model of justice based only on reparation is incomplete. Instead, reparation should be a mere element of the complete model of justice. This model is based on reconciliation.

9 Id. at 171,174.

10 Id. at 172. "H. Reeves "The Victim Support Perspective" in Wright and Galaway, eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (London: Sage, 1989) at 47.

3. Reconciliation

Conciliatory justice has a holistic approach to dealing with crime. It redefines justice "primarily as psychological and material restoration rather than as retribution."12 Restoration focuses on the whole body of needs - emotional, spiritual, and physical - of the offender, victim, and others affected by the harm of the offence. It returns society to the state it was in before the offence occurred, often even improving it. To implement such a model, there is a need to change statutory laws, jurisprudence, and psyche of society.13

According to the model of reconciliation, "justice occurs when the offender has taken responsibility for his of her past behavior, the victim has moved beyond the victimization event, and the anxiety in the community has subsided."14 Reconciliation necessarily involves discussion between the offender and the victim, recounting the past offence as part of their joint history.15 The power of the personal encounter breaks down many stereotypes and previous hostilities. Many victims will, in turn, offer some type of acceptance of an apology or extend forgiveness to the offender.16

12 DE Peachey, "The Kitchener Experiment" in Wright and Gaflaway, *Id.* at 18.

13 Bayda, C.J., "The Theory and Practice of Sentencing: Are They on the Same Wavelength?" (1996) 60 Sask .L. Rev. 317 at 330.

14 M. Chupp, "Reconciliation Procedures and Rationale" in Wright and Galaway *supra* note 11 at 68.,

15 P. Kerans, *Punishment vs. Reconciliation; Retributive Justice in the Light of Social Ethics* (Kingston: Queen's Theological College, 1982) at 6-7.

16Chupp, *supra* note 14 at 61.

Reconciliation brings with it increased responsibility for socially unacceptable actions. Offenders see their victim as a real person - and victims change their stereotypes about offenders through personal contact. This results to a more human approach.17

Reconciliation may or may not bring with it monetary restitution. It is possible to reconcile, even where restitution is not feasible, through the meeting of emotional and mental needs. Restitution is not the goal of victim and offender reconciliation, but a component of it.18 An apology may be more practical and acceptable than monetary restitution.

The current law purports to solve the matter of criminal responsibility itself. It puts the state between the accused and the victim. This is meant to protect procedural safeguards for the offender. However, it works to isolate offenders, interfering with the possibility of making reparation. It takes away from the individual the determination of how much harm the accused has caused them or their community. In doing so, the law denies restorative justice.19 It imposes a barrier between the victim and the offender, making restoration impossible.

Donald J. Fleming suggests that the adversarial process should be replaced with a communal one. There should be a focus on compensation to victims of crime and communal reintegration, instead of retribution and punishment that is based on a medieval legal fiction that all crime threatens the safety and security of the crown.20 This new focus has been applied in several cultural contexts through the use of truth and reconciliation commissions. Much of the truth and reconciliation model can be adapted to fit into Canadian criminal law to implement a more complete system of justice.

17 Peachey, *supra* note 12 at 18. See also *Id.* at 63.

18 Chupp, *supra* note 14 at 64.

19 Cragg, *supra* note 6 at 172, 173.

20 DJ Fleming, "Aboriginal Criminal Justice: A Commentary on Coughlan and Domareki" *(1993) 42* U.N.B. Law Journal 281 at 288-289. See also footnote *25* at 288.

II. Truth and Reconciliation Commissions

A. Theoretical Underpinnings

In Western society, with retribution as the focal point of its understanding of justice, the concept of a truth and reconciliation commission appears foreign and illogical. Under the retributive assumption,2' penal sanctions have moral, autonomous, and obligatory characteristics.22 The quest for reconciliation is overwhelmed as justice is equated with retribution and punishment.

Truth commissions remain consistent with the rule of law. They have their foundation, however, in human psychological needs, as opposed to the penalties and retribution western society is accustomed to. Social repudiation of past wrongs - one of the most important aspects of criminal sanctions - continues to be achieved.23 The goals of reconciliation and truth take priority over the tradition of prosecution as the main form of justice.

21This concept is illustrated by Kant, when he argues that retribution should be carried to the extent that criminals should be punished even by a society living on an island that decides to dissolve itself: I. Kant, *Die Metaphysik Der Sitten* (F. Nicolovious Koenisberg ed., 1797) in N. J. Kritz, ed., *Transitional Justice,* vol. 2 (Washington: United States of Peace Press, 1995) at 486.

22 J Correa, "Dealing With Past Human Rights Violations: The Chilean Case After Dictatorship" (1992) 67 Notre Dame L. Rev. 1455 at 1474.

23 Id at 1476.

B. Needs of Victims

Punishment demonstrates a moral repudiation of crime. It is a means for society to express its disapproval of criminal activities. However, using punishment as the sole form of justice denies the need of those affected by the crime to be reconciled with their offender. This reconciliation can only be achieved when the offender must take responsibility for their actions and the victim grants pardon. Society requires the courage to bring about justice in this manner.24

Victims of crime that were studied by the Chilean Truth Commission simply asked for justice: they did not desire vengeance. All that mattered to them was to know the truth, that the memories of their loved ones would not be denigrated or forgotten, and that the past would not repeat itself.25 A relative of a victim of the revolution in Chile said that "even though it won't do me any good, even though it might look useless, I need to know why they killed him; what happened, what he was doing, how they caught him. Anything to put my mind at ease."26 Retribution was not a priority; all the victims desired was peace of mind.

Jorge Correa felt that victims were not necessarily seeking revenge, but an acknowledgement of the wrongs that were done to them:

24 SECRETARIA DO COMISION Y CULTURA, MINISTERIO SECRETRIA ORAL. DE GOB IERNO, *Report of the National Commission for Truth and Reconciliation* 785 (1991) *at* 824.

25 *Report of the Chilean National Commission on Truth and Reconciliation 5-6* (P.E. Berryman, trans., (1993) *at* xxxiii [*Report].*

26 Id., at 784.

I'm not sure if they wanted them in jail, but they wanted them cornered and pressed and suffering. They just wanted them facing the responsibility for what they had done.27

This shows the heart of a society crying out for reconciliation, not a vengeful plea for retribution. Truth commissions provide for the needs of victims that are neglected by the Canadian justice system.

Instead of forcing retribution on criminals, alternative measures are needed to enforce law and order. Truth and reconciliation commissions take "a step towards justice - the truth but not punishment." They are a viable alternate method to deal with crime.

Jose Zalaquett, a commissioner on the El Salvador truth and reconciliation commission, gives three defining factors of the duties of a truth and reconciliation commission. These are: an official publication of the truth of past events, popular ratification, and that the commission and the remedies it offers are consistent with international law.28 Such commissions have traditionally been implemented in countries emerging from periods of civil unrest. They are used to bring healing to a torn society, often where there is no functional judicial system or the new government lacks the strength to enforce criminal sanctions. Although the examples that will be cited represent emergency situations that have forced the hand of the government to provide such measures, the principles that have been applied are useful to an analysis of Canadian criminal law.

27Correa, *supra* note 22 at 1492.

28Zalaquett, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations" (1992) 43 Hastings L. J. *1425* at 1430-143.

C. Vehicle for Reconciliation

1. Psychological Impact

A truth and reconciliation commission has an important psychological impact on people. It puts people on the road to healing emotional wounds. Such a commission tells the truth to people that are used to lies and deceit. They are no longer forced to keep their suffering to themselves because of fear of further abuse.

A nation emerging from a period of civil strife is often more interested in being heard than in retribution. Thomas Buergenthal, a Commissioner of The Commission For the Truth in El Salvador stated that the use of the suggested model "removed the biggest obstacle on the way to national reconciliation: the denial of the terrible truth that divided the nation and haunted its consciousness."29 Acknowledging the past and finding reconciliation can be a major step in the successful regeneration of a nation torn by crime.

2. Timeliness

A truth commission is often the only timely alternative available that will provide quick and immediate healing until an impartial and competent judiciary can be put in place.30 Healing is needed before the time required to have a proper trial has elapsed. Truth commissions, therefore, may be a precursor to judicial action.31

29. Buergenthal, "The United Nations Truth Commission for El Salvador" (1994) 27 Vanderbuilt J. Transnat'l L. 497 at 539.

30 Correa, *supra* note 22 at 123.

31 M.P. Scharf, "The Case for a Permanent Truth Commission" (1997)7 Duke J. Comp. & Int. L. 375 at 380.

Truth commissions investigate abuses of the past. However, they also contribute to the future by making specific recommendations for reform.32 This plays an important transitional role.

D. **Model Truth and Reconciliation Commissions**

1. Forerunners of the Truth and Reconciliation Movement

The contemporary surge of Truth and Reconciliation commissions began in Argentina, after the country's defeat in the Faulkiand Islands War and the military's subsequent retreat from political power.33 The report of the commission was entitled *Nunca Mas* ("Never Again").34 It documented the cases of almost 9,000 people that had disappeared.35

Truth commissions have occurred in Uganda, Bolivia, Uruguay, Zimbabwe, the Philippines, Chad, Germany, Ethiopia and Rwanda.36 The commissions in Chile and in El Salvador are perhaps the best

recognized earlier truth commissions. The recent South African model, on which this paper will focus, built on the experiences of the above commissions.37

32S. Ratner and J. Abrams *Accountability for Human Rights Atrocities in International Law* (Oxford: Clarendon Press, 1997) at 197.

33Human Rights Program, Harvard Law School and the World Peace Foundation *Truth Commissions: A Comparative Assessment: an interdisciplinary discussion held at Harvard Law School in May 1996* (Cambridge: Harvard Law School Human Rights Program, 1997) at 7.

34zalaquett, *supra* note 28 at 1427.

35P. Hayner, "Fifteen Truth Commissions - 1979 to 1994: A Comparative Study" (1994) 16 Hum. Rts. Q. 597 at *615.*

36 at 60 1-603.

37K. Cavanaugh, "Emerging South Africa: Human Rights Response in the Post-Apartheid Era" (1997) 5 Cardozo J. Comp. & Int. L. 291 at 320-323.

2. The Chilean Commission

a. Political circumstances

The Chilean Rettig Commission was one of the first truth and reconciliation commissions. It was implemented at a time when a new democracy lacked the power to process human rights violators through a formal justice system. As a result, the government was forced to simply acknowledge the wrongs of offenders, while remaining incapable of punishing them.38

The commission ran for nine months, taking advantage of the optional three month extension. It investigated seventeen years of military government.39 The Rettig Commission used the truth to achieve three moral objectives: building a barrier against future human rights violations, compensation for the most severely damaged survivors, and national reconciliation.40 The recovery of the dignity of the victims, through the admission of wrongdoing and acceptance of responsibility by offenders, was one of the chief goals of the commission.41

b. Outcome

The commission published a general report that gave a broad view of the past. It used individual cases only as examples to illustrate the general history of repeated offences. There were 2,279 cases where a moral conviction was achieved.42 In many instances, this was the only time these cases were looked into because there was no further judicial action taken.43

38Correa, *supra* note 22 at 1457.

39 Id. at 1473.

40 Id. at 1458.

41Ministry of the Interior Decree No. 355, *Diario Oficial* (May 9, 1990).

The Report explained the conditions that were present in society that made the human rights violations possible.44 It included a section with personal statements from the relatives of victims that described their suffering.45 These personal revelations were an important step in restoring the dignity of the victims of the atrocities.46

The Rettig Commission failed to achieve the reconciliation between offenders and their victims, along with the rest of the community, that it had intended. Violators refused to cooperate,47 making reconciliation impossible. However, it implemented new concepts and ideas that were later built upon by other nations in developing a model that substitutes reconciliation for punishment.

3. The Salvadoran Commission

a. Political circumstances

The Commission on the Truth for El Salvador was established on 15 July 1992, pursuant to the Salvadoran Peace Accords.48 It investigated a twelve year war, in which seventy-five thousand lives were lost in a country of only five million. The hate and mistrust built up over the years required a confidence-building arrangement, including a mechanism to permit an honest accounting of the terrible deeds.49 The commission was to function as a part of the attempt to transform Salvadoran society from a country of upheaval to that of a reconciled and peaceful community.50

42Correa, *supra* note 22 at 1466-1467.

43 Id. at 1465.

44Report, supra note *25 at* 33-104.

45 Id. at 766-785.

46Correa, *supra* note 22 at 1465.

47 Id. at 1468.

48Chapultepec Agreement, The Peace Agreement, Jan. 16, 1992, ch. 1, para. 3, at 49.

The commission investigated violent acts that occurred between 1980 and 1991. It emphasized those acts with a broader impact on general society. Its overarching goal was the promotion of national reconciliation.51 The *Mexico Agreements52*- a peace plan for several Latin American Countries - mandated the Commission on the Truth for El Salvador to recommend legal, political, or administrative measures which could be inferred from the results of the investigation. In these agreements, the Salvadoran government agreed to accept the results of the commission as binding.53

b. Outcome

On 15 March 1993, Boutros Boutros-Ghali, the Secretary General of the United Nations, made public the *Report of the Commission on the Truth for El Salvador: From Madness to Hope.54* This report named over one hundred military officers as being guilty of having committed offences.55 It held the insurgents responsible for the same violations of human rights as would be binding on the state under international law.56 The Report addressed the need for an independent judiciary, democracy, and the end of the death squads. It did not call for trials or recommend amnesties, but demanded the dismissal from office of many

violators and for new judges to be elected to the Supreme Court. It also recommended measures to increase national reconciliation, such as a monument to be erected in honour of the victims and a national holiday."

49Buergenthal, *supra* note 29 at 503.

50M. Ensalaco, "Truth Commissions for Chile and El Salvador: A Report and Assessment" (1994) 16 Hum. Rts. *Q. 656* at 661.

51Buergenthal, *supra* note 29 at 500.

52Mexico Agreements, April 27, 1991.

53 Id. at 31.

The Salvodoran commission, like the Chilean commission, had difficulty finding offenders to testify as to what they had done. The government simply lacked the power to compel them to come forward. Even victims and witnesses of crimes were extremely cautious about testifying because of the mistrust of the institution of justice that had been bred into them in recent years.58 Without the voluntary participation of both offenders and victims, there was little productive reconciliation.

54Report of the Commission on the iruth for El Salvador: From Madness to Hope, U.N. SCOR, 48th Sess., Annexes, U.N. Doc. S/25500 Annexes (1993) (English Version).

55Beurgenthal, *supra* note 29 at 517.

56 Id at 527; Ensalaco, *supra* note 50 at 662.

57Buergenthat, *supra* note 29 at 535, 536.

58 Id at 513.

E. The South African Model

1. Mandate

The commissions in the past two decades had attempted to provide an alternative to a criminal justice system. This was, however, an ineffective means of implementing a potentially powerful mechanism. In order for mediation to work in the criminal justice regime, it must be married to the current system of criminal justice. The two must be separate, but one, with independent functions in an interconnected model.

The commission in South Africa chose this approach. Offenders were allowed access to the South African Truth and Reconciliation Commission only following an admission of guilt. Their crimes must not have been for personal gain and must have been for the furtherance of a political objective.59 The commission did not supplant the courts, but worked hand in hand with them to bring reconciliation to a nation tom by unrest and mistrust.

South Africa strove to restore the honour and dignity of the victims and to give effect to reparation.6° To advance reconciliation and reconstruction, amnesty was only granted "in respect of acts, omissions, and

offences committed with political objectives and committed in the course of conflicts of the past."6' Its goal was to reconcile not only individual offenders and victims, but the entire nation.

59Research Department of the South African Truth and Reconciliation Commission *interim Report of the South African Truth and Reconciliation Commission* (Capetown, 1996), http://www.truth.org.za/reports/rep1all.htm; *Republic of South Africa Promotion of National Unity and Reconciliation Act,* 1995, No. 34 at http://www.truth.org.za/back/act9534.txt, art 21 *National Unity Act].*

60D Omar, "Justice in Transition" March 26, 1998, http://www.truth.org.za/back/justice.htm.

61Co,~tjtution of the Republic of South Africa, 1993, http:\\www.truth.org.zalbacklsacon93 .txt [*Interim Constitution].*

The commission investigated both sides of the conflict within the time limits that it was to canvas. Nelson Mandela, the current President of South Africa, has stated that "we want those who defended apartheid to enjoy the same indemnity as those who fought apartheid."62 This gave the investigation an air of legitimacy by revealing its willingness to be objective in its decisions regarding perpetrators of all ethnic and political backgrounds.

2. Political Circumstances

In 1964, Nelsen Mandela wrote:

I have fought against white domination and I have fought against black domination. I have cherished the ideal of a democracy and a free society in which all persons will live in harmony and with equal opportunities. This is an idea which I hope to live for and achieve.63

February, 1990, began the end of the apartheid era and signaled the release of Mr. Nelson Mandela from twenty-seven years of incarceration. In 1994, Nelson Mandela, himself a victim of apartheid, was elected president. He faced the seemingly unsurpassable task of dismantling apartheid. Mandela attempted to resolve the conflict of balancing the need for justice for the black majority against the recognition of fears of the recently misplaced white minority.64 He replaced the iron fist of unforgiving punishment with facilitated discussions between the offender and the community which lead to reconciliation.

62R Dunn, "Mandela to Seek Out Apartheid Criminals," *The Agew* (Melbourne) (17 August 1994) at 11, *available in* LEXIS, MDEAFR Library, *as cited in* Cavanaugh, *supra* note 37 at 317.

63State Department's Human Rights Report: Hearing of the International Security, International Organizations, and Human Rights Subcommittee of the House Foreign Affairs Committee, quoted by Assistant Secretary of State, Timothy Writh (1994) *as cited in* Cavanaugh, *id.* at 333.

64Cavanaugh, *supra* note 37 at 292.

Jose Zalaquett, a commissioner on the Chilean Truth Commission, posed this -hypothetical in 1992, before the South African Truth and Reconciliation Commission was contemplated in the *Interim Constitution:*

What would happen if Nelson Mandela were to gain political power....Such a hypothetical government's policies would likely emphasize disclosing the full truth about apartheid, preserving the collective memory of the odious past, seeking compensation for the victims of the greatest abuses and perhaps investigating some particularly heinous crimes.65

Nelson Mandela's response to the end of apartheid was inevitable and in sync with political and social expectations of the newly democratic South Africa.

The *Promotion of National Unity and Reconciliation Act,66* based on the final clause of the 1993 *Interim Constitution,67* was signed on July 19, 1995. The purpose of this Act was to provide a mechanism to promote genuine reconciliation and nation building.68 The Minister of Justice, Mr. Dullah Omar, called the commission "a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation."69 Spurred by these goals, and the sound backing of the legislation, the South African Truth and Reconciliation Commission was formed.

65Zalaquett, *supra* note 28 at 1429.

66National Unity Act, supra note59 at 164.

67lnterim Constitution, supra note 61.

68Statement issued by the Ministry of Justice, Dullah Omar, on 20th October on the SAPA PR Wire Service: *Statement of the Promotion of National Unity and Reconciliation Bill,* BBC Monitoring Service (22 October *1995) available in* LEXIS, MDEAFR Library *as cited in* Cavanaugh, *supra* note 37 at 301.

69D Omar, press release at http://www.truth.org.za/back/index.htm

3. Powers of the Truth and Reconciliation Commission

The Truth and Reconciliation Commission was composed of three committees. The Reparation Committee could award urgent interim reparation to victims and assist them in accessing existing social assistance programs. The Hearing Committee heard statements from victims. The Amnesty Committee facilitated the granting of amnesty to persons who made full disclosure of acts associated with a political objective.70

South Africa provided that those who refused to appear before the commission, or to answer the panel's questions, could be sentenced to two years in prison.7' In this way it implemented both the mainstream justice system and a parallel system of reconciliation. Appeals were made in the press for victims and their families to come to the hearings of their perpetrators, as well as for perpetrators to attend when the case was made out against them.72 This allowed for the maximum amount of reconciliation, through personal contact, that was possible in the limited time and budget constraints of the truth and reconciliation commission.

The South African Commission chose to make use of maximum media exposure. The hearings of the truth commission were open to the press. This in itself aided in national reconciliation. The hearings reached 1.2 million television viewers every week, in addition to the press and radio. A high percentage of white Africans now say that they were unaware of the extent of the crimes of apartheid.73 Exposing the horrors of the past to this audience allowed for reconciliation that would not otherwise have been possible.

70 These actions must have occurred between 10 March 1960, and 5 December 1993, and fall within the boundaries of the *Promotion of National Unity Act.* See *National Unity Act, supra* note 59, art.2.

71B. Drobin, "Tutu to Head South African Panel on Apartheid-Era Crimes" *L.A. Times,* (30 November

1995) as cited in Cavanaugh, *supra* note 37, at 323.

72See Press Release, March 12, 1998, http://www.truth.org.za/pr/p98b312b.htm. where the killer of a taxi driver requested amnesty and the press called for his family to attend the amnesty hearing.

The public exposure of the truth was a painful but necessary exercise in national healing. It was the only practical way an offender could take responsibility for their actions in front of the entire community. Hearings were open to the public, unless it was in the interest of justice for it to be closed or there was a possibility of harm to any person as a result of the proceedings.74

In addition to the amnesty hearings of perpetrators, Mrs. Mary Burton, a commissioner on the Truth and Reconciliation Commission, established a register for people who did not commit human rights violations themselves but who want to express their regret for not doing more to prevent such violations. She states that "guilt for wrongdoing needs to be translated into a positive commitment to building a better society.. .the healthiest and most productive form of atonement."75 This increased positive communication instead of encouraging condemnation and shifting of blame.

73B. Hamber "Reflecting on the Truth: Has Media Coverage of the Truth and Reconciliation Commission Changed the Way the Public Sees Itself, Its History and Its Responsibility?" March 26, 1998, http://www.wits.ac.zalwits/csvr/artrcros.htm.

74National Unity Act, supra note *59,* art.34. Where there was a risk of harm to someone that was involved the proceedings became closed to all but victims with an interest in the proceedings (art.34(l)(b)(ii)). If there was a threat to someone's safety because of the testimony they were expected to give, they could be put under the protective custody of the commission (art.36). As well, all information and evidence obtained by the investigating unit was confidential (art.3 l(3)(a)).

75M. Burton, March 26, 1998, http://www.truth.org.za/register.htm.

4. Conclusions

The South African Truth and Reconciliation Commission presented its completed report to President Nelsen Mandela on October 29, 1998.76 It had achieved what no other truth commission had been able to do: the peaceful settling of a nation's differences after emerging from an extended period of civil strife. Offenders were brought face to face with victims and acknowledged responsibility for their actions. Justice was meted out, with a noticeable absence of punishment as the primary focus. The goal of peaceful settlement had been voiced at the onset of the commission by Justice Minister Dullah Omar in his statement that:

I want to give assurance to those who may have perpetrated human rights violations to join reconciliation. This in respect of politically motivated crimes there will be no Nurnberg-type trials, no vengeance, no witch-hunts, no revenge and no humiliation of any person...[but] there will be no suppression of the truth.77

Pulma Gobodo-Madikizela, a member of the Human Rights Committee of the Truth Commission, says that "amnesty was never meant to diminish the trauma that families and individuals go through."78 Amnesty was viewed as justice only by seeing justice through a restorative lens. It is a justice concerned with restoring broken relationships and correcting power imbalances - with "healing, harmony, and reconciliation."79 Such restorative justice does not seek revenge nor does it seek impunity.80

76Truth and Reconciliation Commission, *Report of the Truth and Reconciliation Commission,* vol. 1, www.truth.org.za/final/lchapl.htm *TRC Report).*

77"Omar Says No Amnesty Without Disclosure of Crime" *Reuters News Service* (27 May 1994) *available in* LEXIS, MDEAFR Library *as cited in* Cavanaugh, *supra* note 37 at 320.

78 P Gobodo-Madikizela, "On Reconciliation and Reflecting on the Truth Commission" December, 1996, http://www.org.zalreading/gobodo.96.htm.

Following the example of South America, states can recognize varying forms of investigation, punishment and compensation when dealing with crime.8' Standards can be developed for limiting prosecutions. The South African commission accommodated these varying forms by allowing offenders that maintained their to proceed through the courts.82 Amnesty was available for those who admitted their guilt, not those who maintained their innocence.83

III. Modelfor Reconciliation in Canadian Criminal Justice

A. Mediation as a Means to Achieve Reconciliation

1. Building on South African 's Success

Truth alone does not mean transformation.84 Truth, however, was all that the truth and reconciliation commissions could realistically achieve with the limited time and resources they were allotted. Truth lead to the two major successes of the commissions: addressing the emotional need of victims to be recognized and offenders taking responsibility for their crimes.' Both of these were vital to having a successful system of justice. Both can be achieved through the use of mediation. A sophisticated system, entrenched in the everyday justice of a country, could facilitate mediation between the offender and those that were harmed instead of a merely attaining an admission of guilt.

79 TRC Report, supra note 76 at para 35.

80 Truth and Reconciliation Commission, *Report of the Truth and Reconciliation Commission,* vol. *5,* www.truth.org.za/final/5Chap9.htm.

81 Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Restraints" (1990) 13 Hastings L.R. 623 at *635-636.*

82 See, for example "Tutu for Little Secrecy in South Africa Truth Commission" *Reuters News Service* (30 November *1995) available in* LEXIS WORLD Library *as cited in* Cavanaugh, *supra* note 37, at 324, which names General Magnus Malan as one such example.

83 Cavanaugh, *id.* at 325.

84 B. Hamber, "Truth: The Road to Reconciliation?" http://www.wits.ac.zalwits/csvr/artcant.htm.

Mediation has been referred to as "helping people have difficult conversations."85 This is precisely what the South African Truth and Reconciliation Commission focussed on. The healing in society that occurred as a result of this mediation is evidenced by the peaceful state of the country today.

Mediation need not focus only on financial settlement of the parties: reparation by the offender for the harm they have caused. This traditional focus of mediation is being usurped by an emphasis on transformed relationships. In these relationships, people are assisted in recognizing the others' situation and settlement is merely a happy by-product.86

The South African Truth and Reconciliation Commission used a facilitator to guide the parties towards a transformed relationship. Previously hostile races talked face to face in an attempt to reconcile. Transformation similar to that which took place in South Africa is desirable in dealing with crime in any society. A facilitated discussion between the victim and the offender will aid in healing relationships and restore - or improve - the state of society.

85G Gartner, Lecture (Alternate Dispute Resolution Seminar, University of Saskatchewan, 10 November 1998) [unpublished].

86 Id.

The truth and reconciliation commissions, however, spoke to only the most urgent needs of victims and offenders. A conciliatory model of justice should be developed that will surpass the achievements of the truth commissions. It should speak to the interests of the parties beyond the mere vindication of victims upon hearing an admission of guilt from their offender. Mediation is the proper vehicle through which these interests may be properly addressed and the relationship improved between the parties.

2. Addressing the Needs of Victims

Due to the primary focus on offenders, Professor Allen M. Linden, of the University of Toronto, has described victims of crime in Canada as the Cinderella of criminal law.87 The victim is so completely represented by the state that their existence is almost forgotten. They are unable to voice their own anger and frustration, often being entirely ignored. It is difficult for such a victim to be left with the impression that justice has been done.88

There is, however, a need to retain some state control In the criminal process. This control was originally implemented to protect offenders from vengeful victims and their relatives. This protection must be balanced with the need for empowerment of victims.89

87A.L. Linden, "Restitution, Compensation for Victims of Crime and Canadian Criminal Law" in Law Reform Commission of Canada, *Community Participation in Sentencing* (Ottawa: Minister of Supply and Services Canada, 1976) at 7 *Community* Participation.

88Northern Law Reform Committee, *Mediation and the Criminal Justice System, Report No. 1 7A* (Government Printer of the Northwest Territories, 1996) at 3.

89Reeves, *supra* note 11 at 47.

Communities must work together to provide for the needs of victims, making justice the responsibility of everyone, not just the professionals.90

To meet the needs of the victim, reconciliation is needed. Reconciliation between the victim and the offender must focus on three elements: facts, feeling, and restitution.9' Of these three elements, only restitution has been recognized in many jurisdictions.

New Zealand and the United Kingdom, in 1964, were the first to implement victim financial assistance programs. In 1967, eight Canadian provinces followed suit, with programs that run separately from the rest of the criminal process.92 Although these programs address restitution, the other two elements of reconciliation - facts and feelings - are ignored. These non-pecuniary elements will be best addressed through a mediation program.

3. Responsibility for Actions

Offenders in the current Canadian system of justice rarely face the human impact of their crimes. They do not have to face the reality of the damage their actions have caused to others. This philosophy is mirrored in the underpinnings of the entire criminal justice system, where victims are overlooked by both the offender and the state.93

Restorative justice requires that the offender take responsibility for their actions. This responsibility must involve some sort of restitution and reintegration of the offender into their community. Punishment through incarceration negates responsibility.94 Formal, court imposed punishment may seem like a practical alternative to the offender in comparison to being held responsible in the eyes of their community. Jail becomes an escape from responsibility - due to lack of accountability - instead of an acceptance of it.95

90M.R. Volpe and T.F. Christian, eds., *Problem Solving Through Mediation, Dispute Resolution Papers Series No. 3* (American Bar Association, 1984).

91 Chupp, supra note 14 at 61.

92Community Participation, supra note 87 at 7.

93Chupp, *supra* note 14 at *56.*

C. Existing Mediation in **Canadian Criminal Law**

1. Victim and Offender Reconciliation Programs

a. State involvement in victim and offender reconciliation

Conflict permeates every society. It is in the efforts to deal constructively with conflict that society is able to progress.96 The measure of society is reflected in how it deals with these conflicts within its criminal justice system.97 The current judicial model - due to its cost, formalism, and remoteness - is not effective in dealing with today's complex social relations.98 This system must be updated to keep time with the needs of modern society.

A system of mediation is needed. This system - where the offender and the victim meet face to face - would focus on the needs of the parties. It would encourage responsibility and reparation in an informal, low cost atmosphere. Such a model has been developing in Canadian criminal law.

94D. Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 Sask. L. Rev. *153* at *165.*

95 Jackson, *supra* note 2 at 207-208.

96African Center for Constructive Resolution of Disputes, *State Sovereignty and Responsibility: African Solutions to African Problems* (July, 1998) http://www.accord.org.za

97Baycla, C.J., *supra* note 13 at 336.

98J.P. Bonafe-Schmitt, "Alternatives to the Judicial Model" in Wright and Galaway, *supra* note 11 at

179.

Recent amendments to the *Criminal Code of Canada,99* through provisions allowing for "alternative measures,"100 foreshadow such a model. The implementation of these provisions should be done in light of the restorative justice model. Mediation could be used in the application of these provisions.

The sentencing process currently involves a limited amount of discussion between the crown and the offender in pre-sentence reports. There is clearly room for mediation in order to devise a sentence that is acceptable to both the offender and the crown)101 Discussion could be expanded to include a greater amount of mediation. The sentencing phase, however, is often too late to implement effective reconciliation between the victim and the offender.

The state is the appropriate vehicle through which victim and offender mediation can occur.102 It is the only instrument that can offer sufficient incentive to the offender to become involved in the reconciliation process. The backing of the state would make such programs more effective, as well as provide the impetus for a change in the underlying assumptions of the criminal law by a shift of emphasis from retribution to reconciliation.

99The Criminal Code of Canada R.S.C. 1985, c. C-46, s. 722 [C*riminal Code]*.

at s. 717. This section was recently interpreted by the Supreme Court of Canada in *R. v. Gladue,*

S.C.J. No. 19 (Q.L.).

101Cragg, *supra* note 6 at 192-193.

There are those that argue that mediation has no part in the criminal justice system. The court is not a neutral mediator. Criminal disputes are with the law itself, therefore agents of the law can not claim to be disinterested mediators. Mediation in criminal law must be an alternative to the law, not a part of it, because the dispute is with the law itself. See Bonafe-Smith, *supra* note 98 at 180-181. This paper, however, argues for mediation as an integral part of a conciliatory criminal justice system that operates parallel *to* the current justice system.

b. The Kitchener experiment

Programs aimed at the reconciliation of victim and offender through mediation were piloted in Canada in 1974. The experiment in Kitchener, Ontario, is recognized as the forerunner of programs where the offender and the victim meet in an attempt to reconcile. This program was initiated with two young offenders who had vandalized two private homes, two churches, and a liquor store. Their actions resulted in $2189.04 in damage. The young offenders went and spoke with all the available victims and paid for any of the damage they had caused that insurance did not cover.103

The experiment with the young offenders developed into Community Mediation Services. This service dealt with offenders before they ever went to trial. It was later organized to include a Victim Services program. However, this service was discredited when an Ontario Court of Appeal judge, in *R.* v. *Hudson104* stated that a judge cannot delegate the sentencing powers of the court to persons outside of the court system.105

In Australia, experiments with the victim and offender mediation programs have met with some success. Reconciliation has been the greatest advantage that they produced. 106 There have also been programs similar to the one in Ontario in England, Japan, and Europe)107 These programs have been quite

successful. In areas such as Japan they have developed in to a separate track of criminal justice, as opposed to the Canadian system where they are simply tacked on at the sentencing stage.

103 Peachey, supra note l2 at 14-16.

104 Regina v. *Hudson* (1982) Ontario Court of Appeal, Oral Judgement, Jan.7, as cited in Peachey, *id.* at 22.

105 Peachey, *supra* note 12 at 20-22.

106 Northern Law Reform Committee, *supra* note 98 at 11.

197 See generally J. Harding, "Reconciling Mediation with Criminal Justice" in Wright and Galaway *supra* note 11 at 27-43 for a description of the experiments with the Home Office in Great Britain; J.O.Haley, "Confession, Repentance and Absolution" in Wright and Galaway *supra* note 11 at 195-211 for a discussion of the informal track of the criminal justice system in Japan; Northern Law Reform Committee, *supra* note 106, for details of the Australian program.

2. Sentencing circles

a. Aboriginal approach

The plea for an alternative form of justice has been voiced the loudest by the aboriginal community in Canada. The aboriginal approach to justice is so fundamentally different from the western approach that to enforce the adherence to one "almost automatically requires a breach of the other."°8 Aboriginal tradition deals with the whole web of society and intertwined actions; western tradition restricts itself to the individual offender and resulting offence. Aboriginal tradition teaches the healing of the offender and the victim; western tradition encourages their continuing their alienation from each other, which is often the underlying cause of the offence. The aboriginal community attempts to go to the root of the impact on all relationships of the offender and deal with the emotional, mental, spiritual, and physical health of all that are affected109

b. Need for aboriginal alternate dispute resolution techniques

The sentencing circle is a method of facilitated discussion in the criminal justice system that has been used among Canadian aboriginal people. It recognizes the needs of victims that are overlooked in the mainstream criminal justice system. The focus is shifted from punishment to rehabilitation, with a shared responsibility in the entire process.

108R. Ross, "Exploring the Aboriginal Paradigm" (1995) 59 Sask. L. Rev. 431 at 432.

109 Id. at 432-435.

Sentencing circles are not a part of the trial process. They occur after a plea of guilty and formal adjudication, but before the sentencing of the offender. In place of the judge considering victim impact and pre-sentence reports, he joins a circle of community members in deciding on the sentence of the offender."2 In this circle, aboriginal people take responsibility for the offender in their community,"3 using their unique philosophy regarding the correction of socially acceptable behavior)114 The sentence is given with a view to rehabilitation and reconciliation.

Sentencing circles are a relatively new idea among the aboriginal community. They incorporate the traditional aboriginal way of thinking with the needs of the time and the current Canadian criminal justice system.115 The offender must plead guilty and/or demonstrate remorse in order to participate.116 This indicates a willingness to cooperate with the reconciliation process. In return, the offender receives reduced incarceration or no incarceration at all.

110 R.G. Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatoon, Punch Publishing, 1998) at 71 *Sentencing Alternatives].* See also Bayda, C.J., *supra* note 13 at 323-324.

111See *Criminal Code, supra* note 101, s. 722, which allows for a statement as to the description of the harm to the victim. This statement is not required in every case, and does not provide a sufficient means of victim recognition. The possibility for the submission of evidence regarding the effect of the offence on the victim is allowed for in ss.735(1.l), *735(1.2).*

112For a detailed description of the composition and formal process of several sentencing circles in Canada, see *Sentencing Alternatives, supra* note 110 at 67-132.

113See R. Schriml, "The State, the Community, and Restorative Justice" (1996) 1 Justice as Healing www.usask.ca/nativelaw.jahschriml.htm; G. Bazemore and C.T. Griffiths "Conferences, Circles, Boards, and Mediation: Scouting the 'New Wave' of Community Justice Decision Making Approaches" www.cjprimer.com/circles.htm.

114 B. Sittler, "The Way to Live Most Nicely Together: Possibilities for Aboriginal Criminal Justice" (1995) 59 S.L.R. 361 at 361.

The focus of aboriginal justice is on restoring peace and equilibrium within the community. This involves reconciliation of the offender with himself, as well as with the victim and the victim's family and relatives.117 The goals of this system are the same as that of the historic Common Law system: deterrence, public condemnation, the restoration of the offender to society, and punishment if necessary.118

The Aboriginal Justice Inquiry of Manitoba recommends that instead of formal adjudication, the reconciliation between offender and victim should be facilitated through the use of traditional aboriginal dispute resolution techniques."9 The fundamental factors in an aboriginal justice system are: responsibility, restoration, reparation, reconciliation, rehabilitation, and the needs of the community.120 These factors parallel alternate dispute resolution techniques based on restorative justice.

A sentencing circle implements the same theoretical basis as a truth and reconciliation commission. It works in conjunction with the criminal justice system to provide an alternative to courtroom formalities in an atmosphere that is conducive to reconciliation through open discussion between the offender, the victim, and the community. The goals of a sentencing circle are: to bring healing to relationships between all the parties, to reduce the rates of incarceration, and to allow the offender to take responsibility for their actions121.

116 Id. at 77.

117 *at* 36.

118 *at* 37-38.

119 public Inquiry Into the Administration of Justice and Aboriginal People, *Report of the Aboriginal*

Justice Inquiry of Manitoba. Volume I: The Justice System and Aboriginal People (Winnipeg: The Inquiry, 1991).

120Jackson, *supra* note 2 at 183.

Jail has not been a means of effectively rehabilitating aboriginal offenders.'22 There is an over-representation of Aboriginals in Canadian prisons.'23 Due to the large proportion of j ails occupied by Aboriginals, they have been described as the "commodities upon which Canada's justice system Aboriginal inmates constitute two percent of the Canadian population, but are ten percent of the federal prison population. There is a greater chance of a sixteen year old aboriginal boy going to prison than to university.'25 In 1994-1995, fifteen percent of Saskatchewan's population was aboriginal, while seventy-two percent of those incarcerated were aboriginal.126 An alternate means of rehabilitation is clearly required.

Aboriginals do not take the view that crime is a wrong against the whole of society, therefore punishment is required.'27 Rather, if the offender and the victim are reconciled, no further punishment is necessary) 28 There is an emphasis on victim compensation)29 There must be full scale change in the criminal justice system130 to accommodate the unique behavior and culture of the aboriginal people)3' This alternative system can be modified to fit all cultures affected by the Canadian justice system.

121 *Alternatives, supra* note 110 at 17.

122 R v *Gingell* (1996), *50* C.R. **(4th)** 326 (Yuk. Ter. Ct.) at 342.

123 RG Green, "Aboriginal Community Sentencing and Mediation: Within and Without the Circle" (1997) *25* Man. L. J. 77 at 77 .

124PA Monture-Okane, "Thinking About Change' (1995) 2 Justice as Healing, www.usask.ca/nativelaw/jah_okane.html.

l25 S.G. Coughian, "Separate Aboriginal Justice Systems: Some Whats and Whys" (1993) 42 U.N.B. Law Journal 159 at 260.

126Canada Center for Criminal Justice Statistics, *Adult Correctional Services in Canada 1994-1995* (Ottawa: Statistics Canada, 1995) at 61.

127 Sentencing Alternatives, supra note 110 at 23.

C. Application of Mediation as a Key to Reconciliation

1. The Lost Function of a Trial

The whole function of a trial is to provide a forum for the crown to convince the jury that an accused is guilty of a certain crime.132 If an offender pleads guilty, the usefulness of a formal trial is lost. What remains to be dealt with is the needs of those affected by the crime, including the offender.

Where reconciliation of the offender and the victim takes place, there may be no need for further punishment. In a justice system whose first priority is to meet needs and to make right the treatment of the offender is quite different from a system with blame and pain at its core.133 The victim may need to surrender their right to see their offender punished before true reconciliation can take place.134 However,

the underlying problems are then dealt with in place of a reprimand and a forgetting.

128 S. Zimmerman, "'The Revolving Door of Despair': Aboriginal Involvement in the Criminal Justice System" (1992) Sp. Issue U.B.C.L. Rev. 367 at 391.

129 Victim compensation was emphasized in the Plains Cree community prior to the imposition of the British System of justice. See *Sentencing Alternatives*, *supra* note 110 at 31.

130E. Pasmeny, "Aboriginal Offenders: Victims of Policing and Society" (1992) 56 Sask L. Rev. 403 at 424.

131 Coughlan, *supra* note 125 at 263.

132 C. Machling Jr. "Borrowing From Europe's Civil Law Tradition" (Jan. 1991) 77 A.B.A. L.J. 59 at 59-60.

133 H. Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Waterloo: Herald Press, 1990) at 211.

2. Need for an Alternate System of Justice

To have voluntary compliance with the law, the law itself must be able to respond to the underlying reasons people have for offending. This involves the offender taking responsibility for their actions. It must then probe deeper to discover the root of the problem that has been causing their behavior. This can not be accomplished through a system of incarceration and punishment.

The *Criminal Code* encourages us to maintain the status quo. However, the status quo is unsatisfactory and cries out for re-structure.135 The implementation of the Canadian justice system is currently incomplete. It ignores the needs that most need to be addressed. The focus on retribution denies healing that must take place.

There is a need to rediscover individual responsibility for crime, found through objective truth.136 The offender must be given an opportunity to rebuild the trust that has been undermined by their actions. This may be accomplished through the medium of apologies, reparations for damage caused, public compensation, and rehabilitation.137 Mediated solutions between a victim and an offender increases the likeliness of rehabilitation over that of a prison term 138 It allows for compensation of the victim, rehabilitation of the offender, and reconciliation of both.

134 J.E. Jones and J.D. Bonek, *Reconciliation: An Attorney Shows the Way to Healing Relationships* (Casselberry: Promise Publishers, 1983).

135 C.J., *supra* note 13 at 318.

136 J.D. Grano, "Ascertaining the Truth" (1992) 77 Cornell L.J. 1061 at 1066.

137 Cragg, *supra* note 6 at 192.

An alternate stream of justice would fill the void left by retributive justice. This alternative involves a system where entrance is gained by a plea of guilty and willingness to reconcile. The offender is then processed through a system parallel to, but separate from, the formal court system.

3. Proposed Model

a. Practical Application

The proposed model for an alternate system of justice focuses on reconciliation, while implementing several factors extracted from the aforementioned experiments. It has the clout of the truth and reconciliation commission, where failure of the offender to attend has serious repercussions. Unlike the truth commissions, however, with their promises of amnesty, it includes the option of remedial sentences. Like a sentencing circle, it involves all those affected by the crime. However, it carries the power of the state to enforce the terms of reparation and rehabilitation that are decided upon.

An admission of guilt and demonstration of remorse by the offender gains them access to the proposed system. Entrance may be granted before or during the trial process, up to the point where the trial proper begins. The restriction on entrance after the beginning of the trial proper will ensure a voluntary admission of guilt instead of a last-ditch effort to escape liability when the accused finds the decision not going their way.

138 Zimmerman, *supra* note 128 *at* 392.

If the accused chooses to enter into the alternate system, they will embark on a restorative process. The offender will be required to meet with their victim, take responsibility for their actions, and make any reparation - pecuniary or non-pecuniary - that is possible. In exchange for cooperation and an honest desire to reconcile, the offender will receive relief from the system of incarceration.

Mediation is the most effective way to decide on the proper way of dealing with the offender. This allows for honesty and openness of all the parties involved. Instead of placing the offender and the victim in adversarial positions, it will work to rebuild their shattered relationship and promote healing.

A remedial sentence may still be imposed if it is required in the circumstances of the case. This can be determined by the demeanor of the accused during mediation, the sincerity of the remorse shown, the willingness to pursue rehabilitation, and the nature and severity of the crime. The focus of any remedial sentence will be to restore the accused to society - not to inflict punishment.

If at any time the accused wishes to return to the main stream of criminal justice, this option is available to them. However, some of the mediation sessions may be open to the public, as their primary purpose is for the accused to take responsibility for their actions in front of the whole community. As a result, statements made during the conciliatory process may be prejudicial to the accused it they decide to return to the trial process. This prejudice can be avoided, however, by the implementation of legislation which prevents the use of such

evidence.'39 As well, it is unlikely that the accused will return to trial after an admission to guilt, due to the fear of more severe sentence than that which they would be subjected to through the conciliatory process.

One of the major goals of this model is to meet the needs of victims. Despite the benefits of mediation, however, not all victims may desire to speak with their offender face to face. They may perceive this as too traumatic, or even dangerous, to their personal well-being. This, however, should not prejudice the right of offenders to have access to the program.

A representative of the victim may take part in facilitated discussion in the place of the victim. Failing the appearance of a representative, the state could fill the gap by appointing someone to appear in their place.

The state representative could then play the role of the victim in discussions with the offender, instilling in the offender the reality of their actions and the humanness of their crime. This would then become a form of counseling and rehabilitation for the offender.

The mediation sessions should not be limited to the victim and the offender alone. The first session should be private, including only the mediator, the offender, the victim, and anyone they agree should accompany them. Following the initial session, anyone with an interest in the case may participate in a group discussion with the offender. The purpose of such a discussion is the claiming of responsibility by the offender and the healing in the entire community, not the release of anger against the offender.

139See *Criminal Code, supra* note 101,s. 117(3), which states that: "No admission, confession or statement accepting responsibility for a given act or omission make by a person alleged to have committed an offence as a condition of the person being dealt with by alternative measures is admissible in evidence against that person in any civil or criminal proceedings."

b. Consistency with the current law

These alternate measures are consistent with the recent changes to the *Criminal Code of Canada.140* This legislation authorizes alternate measures to deal with offenders, as long as such measures are "not inconsistent with the protection of society,"4' and subject to several conditions, such as authorization by the attorney general of a province.142 It also requires that the offender must consent to the use of these measures'43 and accept responsibility for their actions.

The meaningful implementation of the proposed *Criminal Code* section 717 has the potential to revolutionize the Canadian approach to justice.145 It opens the door to a system of mediation that can transform relationships. The provinces have the power to advantage of these amendments by instituting programs of alternative measures to deal with offenders.

140 Id. at s. 717.

141 Id. at s. 717(1).

142 Id. at s. 717(1)(a).

143 Id. at s. 717(1)(c).

144 Id. at s. 717(1)(e).

145 Gladue, supra note 100 at para. 93, the Supreme Court of Canada gave some meaning to this section.

A judge must evaluate all possible sanctions other than imprisonment and pay particular attention to the needs of Aboriginal offenders. It is intended as a remedial section, that encourages judges to take into account systemic or background factors of an offender. The priority of restorative justice among Aboriginal communities and the needs of the parties involved are recognized. The court comments, however, that "it is unreasonable to assume that Aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation". They refused to acknowledge that Aboriginal offenders should always be sentenced in a way that gives a greater weight to restoration than the aforementioned goals. They start from a model of retributive justice, and make restoration a unique exception to this norm. The Supreme Court appears to have circumscribed this

section to only be implemented in a restricted setting.

There is, however, a fatal flaw in s.717. It fails to mandate consistent programs nationwide. Offenders in one province may have access to an alternative stream of justice while those in a province that chooses not to implement such a program may not. This will lead to unfairness to all involved in the system, as well as hinder the substantial growth of an alternative system of justice for Canada. The *Criminal Code* needs to be further amended to accommodate consistent implementation across Canada.

The preventative function of penal sanctions - a major aspect of the Utilitarian thinking of western cultures - is achieved through the suggested alternative measures to the traditional penal program. If one of the goals of criminal punishment is preventing further offences, then sending violators to jail is not a very effective method of doing so. It will not change the underlying ideology that lead them to commit their crimes in the first place 146 To have a wholesome and functioning society, the justice system must be based on restoration)47 This restoration, best invoked through facilitated discussion between the offender and those they have wronged, should become the foundation upon which our concept of justice is built.

146Correa, *supra* note 22 at 1475.

147 N. Bimba, "Universal Declaration on Human Rights: Returning to Innocence" (Address to the Faculty of Law, University of Saskatchewan, 16 November 1998)

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