SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 87

PROJECT 94

COMMUNITY DISPUTE RESOLUTION STRUCTURES

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).
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The project leader responsible for this project is Judge Jan Steyn. The researcher is Ms GMB Moloi who prepared this draft discussion paper with the assistance of Professor RT Nhlapo.

PREFACE

This discussion paper (which reflects information gathered up to the end of February 1999), has been prepared by the research staff of the Commission to elicit responses and together with those responses, to serve as a basis for the Commission's deliberations. The discussion paper, which includes guidelines for legislation (see Annexure A), is published so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission. The views, conclusions and recommendations which follow should not at this stage be regarded as the Commission's final views.

The Commission will assume that respondents agree to reference by the Commission to responses received and the identification of respondents, unless representations are marked confidential. Respondents should be aware that the Commission may be obliged to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996, pursuant to the constitutional right to freedom of information.

Respondents are requested to submit written comments, representations or requests to the Commission by 31 October 1999 at the address appearing on the previous page. The researcher will endeavour to assist you with any particular difficulties that, you may have. Comments already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Ms GMB Moloi. The project committee acknowledges the participation of Professor RT Nhlapo who was co-opted to lead this aspect of the project.

SUMMARY OF RECOMMENDATIONS

The following recommendations are made in this Discussion Paper:

1. Because community-based dispute- resolution structures (hereinafter called "community forums") serve a useful purpose in meeting the needs of the majority of the South African population for accessible justice, these structures must now be recognised and supported by law (See par 3.3.4.3, 3.3.4.6).

2. Reference to these structures as "community courts" is misleading and a new name should be found for them. Community forums should not be considered to be "courts" but dispute-resolution and peacemaking structures which provide "first aid" justice for local communities. To call them "courts" confuses the issue because it pre-empts many questions including those of jurisdiction, training of personnel, voluntariness of participation and the binding nature of decisions (See par 4.1, 4.4.3).

3. Recognition of community structures should be based on an Act of Parliament setting out their status, role, function, jurisdiction, procedure and other related matters (See par 4.2).

4. Any such legislation should be drafted only after careful investigation and consultation and should take the form of creating a broad framework which is flexible enough to accommodate the different kinds of community structures that exist in the country whilst setting out a set of minimum standards for the operation of these structures (See par 4.2, 4.6).

5. Attendance at any community forum should be entirely voluntary at the inception of each attempt to resolve a dispute, as well as for the duration of the dispute-resolution process (See par 4.3.2).

6. In view of paragraph 5 above, decisions of a community forum are binding on the parties only if they have agreed beforehand to be bound by such decisions. Certain levels of community forum should not have decision-making powers at all, their task being mainly

to facilitate reconciliation between the disputants (See par 4.3.3).

7. Where a community forum arrives at a decision that the parties have agreed to be bound by, the role of the law should be to make sure that the agreement or settlement is respected (See par 4.3.3).

8. In the legislation, care must be taken to ensure that community forums remain informal and flexible in their procedures, inexpensive in their operations; accessible, non-alienating and responsive to the needs of the communities in which they operate (See par 4.3.1).

9. Since community forums do not stand in a hierarchical relationship to the formal courts, there should be no question of appeal from these structures to the formal courts. If a matter remains unresolved, the parties retain their rights as citizens to pursue the dispute in any other forum of their choice (See par 4.3.4).

10. Separation from the formal justice system should not mean the insulation of community courts from supervision or accountability. A system of regional (or provincial) ombudsmen should be established to oversee the work of community forums and to enforce uniform standards (See par 4.2).

11. Community forums shall function at all times within the laws and the Constitution of the Republic of South Africa (See par 4.7).

12. Where there is a functioning customary court in a rural area, a community forum should not be introduced. Duplication of functions should be avoided, even though in exceptional cases there might be such a mixed population in a particular area that the claims of the community to a choice of forums should be respected (See par 4.4).

13. Training in various aspects of leadership, mediation and the ideas of restorative justice must be given to the individuals who operate community forums in order to empower them (See par 4.5).

The Commission requests comment on the following issue:

1. Community forums do not distinguish between civil and criminal jurisdiction. They deal with disputes, however complex, and try to resolve them. They focus far more on relationship between the disputants, and what the wrongful act has done to the relationship or to peaceful co-existence in the community. The danger of splitting civil cases from criminal cases is that the community forums might lose legitimacy in the eyes of the community if their role in deterring criminal behaviour is drastically restricted. With a loss of legitimacy may come a reduction in effectiveness, because it should be remembered that these structures perform simultaneously social-support and social- control roles. To weaken one is to weaken the other.

Yet it is true that criminal jurisdiction is the one that poses constitutional problems for the operation of community forums. Most of the abuses of human rights in the operation of these structures are associated with excesses committed in the context of the zeal to fight crime. There will inevitably be a great deal of public interest in how any statute recognising community forums proposes to deal with the issue of criminal jurisdiction for these structures.

1.1 Should community forums have criminal jurisdiction?

1.2 If so, what restrictions, if any, should be placed on such jurisdiction?

CONTENTS

PAGE

CHAPTER 3

WORKSHOP PROCESS

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

BIBLIOGRAPHY

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CHAPTER 1

INTRODUCTION

1.1 A brief history of the arbitration project

1.1.1 On 29 August 1994 the Minister of Justice approved the inclusion of an investigation entitled "Arbitration" in the Law Commission's programme of law reform. The investigation was initiated by the Association of Arbitrators in South Africa (represented by Professor DW Butler from the University of Stellenbosch) which made representations to the Law Commission. The Alternative Dispute Resolution Association of South Africa (ADRASA) had submitted a similar proposal to the Department of Justice. A project committee[1] was established by the Law Commission for the purpose of assisting the Commission with the investigation.

1.1.2 This investigation initially dealt with international and domestic commercial arbitration only. On 8 July 1996 at the request of the Minister of Justice, the project was broadened to include an investigation into alternative dispute resolution(ADR) at all levels. The project committee was also expanded for this purpose.[2]

1.1.3 An Issue Paper, dealing with all aspects of ADR, was published for information and comment in May 1997 to a broad spectrum of interested persons, organisations and institutions - both government and non-governmental. The return date for comments was 15 July 1997.

1.1.4 At the second meeting of the Project Committee on Alternative Dispute Resolution held in Cape Town on 18 October 1997, the Committee resolved that the investigation should be divided into three sections and that the Committee should work towards the development of three separate Discussion Papers in these areas. The areas identified were:

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1 Which consisted of Judge Jan Steyn as Chairperson and Professors Butler and Christie, Advocate Jeremy Gauntlett SC (representing the Commission), Advocate Choudree and Judge S Meer as members. Judge Meer has since resigned, and Prof DA Ailola, Judge JM Hlophe, Ms S Pather, Mr CM Sardiwalla and Mr N Singh SC have been appointed.

2 By the inclusion of Ms Nombulelo Mkefa, Mr Albertus Jooste, Advocate Paul Pretorius SC and Advocate Barbara Hechter. Professor Nhlapo, a member of the Commission was co-opted onto the committee to co-ordinate the work of the expanded committee in relation to the investigation into "community courts".

(a) ADR and the civil law;

(b) Family mediation; and

(c) Community courts.

1.1.5 In the Issue Paper in which these areas were discussed a number of aspects under the topic "community courts" were highlighted for comment:

- To what extent the state should administer and regulate the courts, or lend its support to private initiatives in the field.

- What the functions of the community courts (as they were provisionally called) should be:
  - (a) to address some of the failures of the Roman-Dutch system in its attempts to deliver justice to the poor communities?
  - (b) to participate actively in the policy formulation on issues of justice?
  - (c) to rebuild the social fabric of society?
  - (d) to assist in transforming the formal structures by introducing indigenous models?
  - (e) to strengthen popular justice further by introducing alternative dispute resolution models?
  - (f) or to assist the State in working towards a cheap and effective justice system?
- How to avoid the perception that community courts are offered as poor people's justice for black people.

- Whether community courts should deal with both criminal and civil cases.

- The interaction, if any, between traditional courts and community courts.

- What the jurisdiction of community courts should be in so far as area, persons and subject matter are concerned.

- What procedure should be followed : mediation, arbitration, conciliation or adjudication.

- What role witnesses, the community, lawyers and family should play.

- Whether these courts should be courts of record.

- How to deal with the question of judgements and orders.

- How to deal with the question of appeal and review.

1.2 Introduction to the problem

1.2.1 Over the years, South Africa's formal legal system has been perceived by certain sections of the population, notably black South Africans as illegitimate (because of its association with the apartheid government), as repressive (through its implementation by the police force) or as an expensive process in which the cost of justice is prohibitive. For many, a foreign, dominant, Western legal system, is seen to be superimposed on an intuitive, indigenous legal system.[3] It is seen as alien, inaccessible and inappropriate for dealing with conflict which most South Africans experience in their daily lives.[4] This invariably prevents meaningful access to courts: even those who have access are often victims of delay. Many Black communities have actively rejected this system which has been seen as intricately linked to their oppression.

1.2.2 The inability to meet the needs of the ordinary citizens was however not merely due to the content of the substantive law, but also because the structure and procedural requirements of the courts meant that many people were denied access to the courts.[5] Many of the peculiar problems facing the black community stemmed from the largely ineffective administration of the justice system in black areas. The legal problems as well as problems of social adjustment encountered by urban blacks were not being solved. It is therefore not strange that people

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3 Van Niekerk GJ 'People's courts and people's justice in South Africa- new developments in community dispute resolution' (1994) 1 **De Jure** 19.

4 Van der Merwe H and Mbebe M **Informal Justice: The Alexandra justice centre and the future of interpersonal dispute resolution** (1994) Centre for Applied Legal Studies Working Paper No. 21 2.

5 Grant B & Schwikkard P 'People's Courts' (1991) 7 **SAJHR** 304.

resorted to self-help in the form of unofficial or folk institutions. In urban areas different forms of community courts were instituted.

1.2.3 "Community courts" has become the contemporary term used when referring to popular justice structures, or the many types of informal tribunals existing outside the formal legal structures,[6] such as street committees and yard, block or area committees operating in urbanised African townships and informal settlements**.** Mncadi and Citabatwa[7] refer to these justice systems as being informed by African traditional law, urban popular justice practices and religious law. They do not include uncontrolled mob action or 'self-help' violence which imposes brutal sentences. Community courts are not unique to South Africa, but are a common phenomenon in societies undergoing profound transformation.[8]

1.2.4 In most stable, organised communities there are at present street committees and civic structures that are functional. Indigenous township structures are more than merely courts. They are an integral part of the communalised world-view which underpins the efforts of residents to compensate for the inadequacy and inappropriateness of state structures. This world-view is based on the principle of reciprocity. People obey because they know that they are going to need their peers at some future date. Family, tribe or village solidarity is often a *sine qua non* for survival. In addition to being courts these structures are surrogate welfare, child care and support systems, burial societies and savings clubs, to name but a few functions. They thus form an integral part of organic township life throughout the country, be it Cape Town, Port Elizabeth, Soweto, Alexandra or Kwa-Zulu Natal.

1.2.5 In contrast to the Roman Dutch legal system based on retributive justice, where the object is to establish blame and administer punishment, the informal structures attempt to promote healing and enforce community values by using social pressure. Restorative justice and reiterative shaming are two of the most important tools of the enforcement process. The approach and reasoning used are elements which echo indigenous African procedures. They echo the practice of *makgotla, tinkundla, ibunga* and *imbizos* where members of the community directly participate

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6 W Schärf 'The role of people's courts in transition' in Hugh Corder (ed) **Democracy and the Judiciary** (1989) 167.

7 Mncadi and Citabatwa 'Exploring community justice' **Imbizo** 1996 Community Peace Foundation

8 W Schärf op cit fn 4 at 169.

in questions and decisions. These popular justice systems have evolved and and their practices have been adapted to urban circumstances.

1.2.6 Community courts should be distinguished from the kangaroo courts which existed within a political context in the 1980s, when "mob justice" was meted out by people who did not represent structures which ordinarily would deal with justice issues in those communities, and which earned popular justice an unsavoury reputation.

1.2.7 During the last few years many government and non-governmental organisations have been striving at different levels to provide affordable and appropriate dispute resolution institutions and procedures in different communities of society. This has been done in order to promote more effective access to justice for all the people of South Africa. Organisations such as the Community Dispute Resolution Trust, the Community Peace Foundation in the Western Cape, the Urban Monitoring Awareness Committee in the Eastern Cape, Community Conflict Management and Resolution and others all come to mind.

1.2.8 Effective government is largely dependent on a legal system that is respected by those it is intended to serve.[9] The challenge facing the democratic state is therefore to ensure that the justice system is acceptable and accessible to the larger community. A great need exists to create an alternative but uniform system where the resolution of community disputes can be handled much more effectively and in less time than in the formal courts. The purpose would be to deliver justice in the community in an informal, cost-effective and speedy way.

1.3 Consultation

1.3.1 Once it was decided that the investigation into the viability of community courts and other community structures is one of the components of this investigation, the project committee decided to dispense with an issue paper dealing specifically with these structures, and to venture directly into the consultation process instead.

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9 Carpenter G 'Public opinion, the judiciary and legitimacy' (1996) **South African Public Law** 110.

1.3.2 Professor Thandabantu Nhlapo, who is a full-time member of the South African Law Commission, was requested to drive the "community courts" section of this investigation since he also heads the Commission's ongoing investigation into customary law, a section of which deals with the future position of traditional courts in South Africa.

1.3.3 Issue Paper 8 (though concerned with alternative dispute resolution in general) elicited 15 written responses on the question of community courts (see Annexure B). In a separate investigation of the Law Commission an Issue Paper was published on the simplification of the criminal procedure, and the researcher on that investigation included questions on community courts. An additional 17 written comments on community courts were received in response to this Issue Paper (see Annexure C).

1.3.4 From the comments received on both Issue Papers it is clear that community courts are regarded as an accepted part of life, but that issues such as jurisdiction and whether , and to what extent, the state should administer and regulate these courts are still hotly debated.

CHAPTER 2

CURRENT SOUTH AFRICAN SITUATION

Introduction

2.1 Article 166(e) of the Constitution,[10] in its definition of courts, provides for:

"any other court established or recognised by an Act of Parliament,[11] which may include any court of status similar to either the High Courts or the Magistrates' Courts."

It further states in Article 170:

"Magistrates Courts and all other courts may decide any matter determined by an Act of Parliament ..." and precludes these courts from enquiring on constitutional issues or on the conduct of the State President.

2.2 The Constitution quite clearly states that for other courts to have legal status an Act of Parliament would have to be passed. However, a person does have the right to have "... any dispute that can be resolved by application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum".[12]

2.3 The Assessors Co-ordinating Committee discussion paper,[13] in support of the establishment of community courts, distinguishes between three types of informal court structures:

- Customary courts, which adjudicate on indigenous law, headed by traditional leaders.
- Peoples' courts, which adjudicate on violations of the social norms of a particular community, and which are managed by the civic organisation of the area. These are essentially found in urban areas.
- Religious courts, which adjudicate primarily on religious personal and family laws and which are headed by religious leaders of the particular faith. These are found essentially amongst the Muslims, Hindus, Jews and Catholics.

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10 See chapter 8-Courts and Administration of Justice at 68.

11 See also Article 103 (1) of the Interim Constitution which provides: "The establishment, jurisdiction, composition and functioning of all other courts shall be prescribed by or under a law".

12 Article 34 of the Constitution of the Republic of South Africa 1996.

13 Assessors Co-ordinating Committee Discussion Document for Community Courts Ministry of Justice, 1995.

2.4 Community forums as a phenomenon within the South African justice arena and as a social institution are accepted as a reality. Opinions differ as to whether these structures are courts and if so to what extent the state should administer and regulate them or lend state support to private initiatives in the field.

Community forums as courts of law?

2.5 The view that community forums should be accepted as courts of law departs from the premise that community forums organically began addressing problems that should have been addressed by the formal courts. This was caused by the fact that the formal courts were not meeting the needs of the people. Community justice then evolved parallel to the formal system. With the advent of a new democracy the need to make justice accessible to all is one of the state's priorities. A proliferation of dual systems has been an apartheid legacy. A transformed justice system that meets the needs of the people would ensure that perpetuation of parallel systems is avoided. The creation of a unitary system as part of the transformation of the judiciary would also ensure a more efficient utilisation of resources.

2.6 The following challenges of a transformation process are identified:

1. A justice system that is acceptable and accessible to all.
2. A system that incorporates the concept of restorative justice as one closer to indigenous approaches to dispute resolution.

2.7 With the implementation of community forums the state may hope to reclaim their space in the area of justice, regulate all forms of justice systems in the country, work towards a unitary system that will dispense justice, extend the arm of justice in order to be more effective, bring justice closer to the people and make the justice system more accessible and friendly.

2.8 Seen from the view point of communities, the objectives will be to secure recognition for organic community forums and popular justice concepts which had evolved in the communities over the years, to actively participate in the policy formulation on issues of justice, to work towards having uniformity in different sections of the communities, to rebuild the social fabric

of society and to recognize the restorative justice model as an alternative to retributive justice.

2.9 Proposals and discussion documents suggest three models of community forums:

- *Status Quo*: community forums remaining informal and community run.
- Community forums regulated and controlled by the state.
- "The middle road": combining the best elements of indigenous and western justice.

Community forums as Alternative Dispute Resolution (ADR) forums

2.10 Alternative Dispute Resolution (ADR) is defined in different ways. One definition covers all alternatives to litigation as a method for resolving disputes. That definition includes arbitration. It is however more common to restrict ADR to non-adjudicative forms of dispute resolution, excluding both litigation and arbitration.

2.11 The present system of justice is based predominantly on one approach of resolving disputes, namely the adjudicative approach. As mentioned above there is another approach where parties resolve their own disputes through a process of reconciling their different interests: those needs, concerns, desires and fears that underlie and shape the positions they have adopted. This approach is more about restoring harmony between the parties in dispute than about deciding which of the parties is right or wrong. It is about constructing resolutions to disputes which allow the interests of both parties to be met as opposed to deciding the dispute on the basis of one of the parties winning and the other losing. When dealing with crimes, this approach is focused on

principles of restorative justice[14] as opposed to principles of retributive justice.[15]

2.12 Proponents of community forums as ADR forums believe that community disputes are a complex mix of interests, culture and values. These disputes are more effectively resolved through conciliatory conflict resolution mechanisms.

2.13 Objectives of ADR:

- to relieve court congestion, as well as undue cost and delay;
- to provide more effective dispute resolution by enhancing community involvement in the dispute resolution process;
- to facilitate access to justice.

2.14 Community justice can only be accomplished with active community participation. The resolution of community conflicts is a process that requires people to take responsibility for building or sustaining their community. The community takes responsibility for reintegrating offenders who show remorse.

A holistic system of justice

2.15 Proponents of a holistic system of justice advocate an additional tier to the administration of justice, driven by and based on the reconciling of interests. This is not a proposal for an alternative system of justice for disputes issues that occur in poor communities that can be dealt

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[14] 'Restorative justice' represents a way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems which caused the conflict. It is also, more widely, a way of dealing with crime generally in a rational and problem-solving way. Central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control. Restorative justice is therefore in the first instance, a form of criminal justice based on reparation.

[15] 'Retributive justice' is a form of criminal justice based on response to crime primarily by punishing offenders, yet virtually ignores the victims and communities hurt by crime.

with outside of the formal system in order to lighten the load on the formal system. The proposition is that a tier be developed that would complement a restructured adjudicative tier and as a result, enhance the administration of justice. It is proposed that a sophisticated system of justice that is able to accommodate effectively the full range of disputes experienced by citizens be constructed. A choice of approaches to resolving those disputes, either by having a third party, like a judge or magistrate decide the dispute or allowing disputants to resolve their own disputes with the assistance of a third party such as a mediator, be created. This is not suggesting that the two approaches operate in an "either/or" manner.

2.16 To ensure that the system is effective, care must be taken to note that there are advantages and limitations to both approaches. A structured relationship between the two is necessary to ensure that disputes that are not resolved because of the limitations of one of the approaches could be referred to the institutions based on the other approach. This relationship between the two approaches or tiers needs to be carefully explored.

2.17 These conciliatory conflict resolution mechanisms would have to receive full state recognition and support as institutions of justice with certain powers, functions integrated with state agencies such as the courts, police and social welfare services. They cannot operate in isolation and in competition with other related services. Information would have to shared and referral processes linking these agencies have to be developed.

"One Stop Shop" Model

2.18 A less complex model is that of community justice centres that are situated within a network of community services provided by different practitioners, both from the state and civil society (Non-Governmental Organisations (NGOs), Community Based Organisations (CBOs) and university services), under one roof. The justice component of these services would solve problems using dispute resolution mechanisms such as negotiation, conciliation, mediation and, in appropriate instances, arbitration.

2.19 The proposed model is similar to the United States "multi-door court houses". The difference between the US model and the one proposed, is that in the American example parties

are directed to state institutions under the auspices of the formal justice system, to the most appropriate form of dispute resolution for their particular dispute.

Legal status of informal community forums

2.20 Community forums and other popular justice structures have always been more than courts. They are an integral part of the life of the communities in which they function. This is illustrated by the way in which their role changes as determined by the social or political circumstances prevailing.

2.21 Within the justice arena, both formal and informal, community forums and other popular justice structures have been afforded varying degrees of recognition. Before the democratic dispensation the state and the courts were aware of their existence. In ***S v Mayekiso and Others 1988 (4) SA 738 (W)***[16] the charge and detailed indictment listed the aims and objectives of the Alexandra Action Committee as to:

> "organise, unite the residents of Alexandra into yard, block or street committees;
> to form their own courts - so-called people's courts; to form a group known as marshals and comrades to act as functionaries of the people's court and impose and enforce discipline on behalf of these courts...".

2.22 The state in this instance charged that the popular justice initiatives were unlawful and charged the accused with treason and sedition. The state perceived this kind of organising as a threat to the state.

2.23 Democracy has created avenues for people to address their needs and to channel their activities accordingly. Community Policing Forums and community forums often work closely in addressing issues that threaten stability and harmony within the community. In Guguletu, Cape Town, the formal courts[17] work closely with community forums and safety forums.[18]

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[16] See also **S v Zwane and Others** (1) 1987(4)SA 369(W).

[17] The Mitchell's Plain Magistrates Courts have sought the assistance of the Guguletu Community Court in cases that they believed needed the involvement

2.24 Proposals from communities and NG0s have been forwarded to the Ministry of Justice for the "recognition"[19] and "support" of community forums. The Ministry itself has through the Planning Unit developed proposals and business plans for community forums.

2.25 The tension however still lies between the sections of the Bill of Rights which guarantees citizens the right to exercise their culture or religion[20] and on the other hand the equality, due process, and privacy provisions that seem to disqualify the community forums from being formally incorporated into the state system without losing the style on which their effectiveness is based.

2.26 Prof Wilfried Schärf believes that the two systems are fairly compatible as long as the community forums stay within the realm of dispute resolution, where parties agree to the decision-making and agree to honour the agreed outcome.[21]

Some proposed approaches

2.27 There have been suggestions that the Small Claims Act, No 61 of 1984 be amended to provide an umbrella for the operation of community dispute resolution structures. The following is proposed:

- That the Act be renamed "Community Courts Act" with its aim being:

  "To provide for courts for the adjudication of small civil claims, minor offences and breach of the peace."

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of the community to restore harmony.

18 The National Crime Prevention Strategy provides the mind-set and the organisational framework in which strategic partnerships could be forged, and in terms of that strategy, the suggestions for the establishment of Community Safety Forums are growing stronger daily. The Community Safety Forums launched in Nyanga promises to be a good example of partnerships between government departments and organisations of civil society.

19 During this investigation clarity is being sought as to what communities mean by "recognition" and "support".

20 Section 30 and Section 3 1(1) of the Constitution of South Africa.

21 Position Paper, Commissioned by the Planning Unit, Ministry of Justice, South Africa, May 1997.

8. That the relevant sections of the Act be amended.
9. That new sections be added to Chapter III after section 24 to confer jurisdiction to preside over the hearing of minor offences.

The following offences are listed:

1. breach of the peace in terms of the provisions of Section 384 of Act 56 of 1955;
2. assault;
3. theft including stock theft where the value of the goods stolen does not exceed R3000;
4. malicious injury to property where the amount of damages does not exceed R3000;
5. cruelty to animals;
6. trespass in terms of Act 6 of 1959, as amended;
7. public disturbance or nuisance;
8. *crimen injuria;*
9. public drunkenness.

2.28 It is also proposed that the Criminal Procedure Act, No 51 of l977 be amended to confer criminal jurisdiction on the proposed community forum. Such jurisdiction must be restricted to so-called minor offences.

2.29 In **Specialist Courts and Community Courts**[22] Schärf states: "The choice thus boils down to one between effective social control and social support on the one hand, and due process, coupled with a splitting of civil and criminal matters on the other. The first would have to remain

outside of the state's family of courts because it cannot squeeze into existing legal categories, the other becomes a state-sponsored lower tier of courts".

2.30 The three models mentioned above in 2.9 have their merits and demerits:

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[22] Position Paper, Commissioned by the Planning Unit, Ministry of Justice, South Africa, May 1997.

(i) Benefits of the *status quo*[23]

(a) It allows for social conditions to organically determine the life of the courts, creating space for them to adapt to conditions and be responsive to community needs.

(b) Communities take an active part in organising their lives and participating in governance and safety issues.

(c) It preserves a cultural phenomenon which has demonstrated social benefits for the poor.

(d) It maintains a plurality of ordering structures that allows for shopping for the type of justice that suits particular needs.

(e) No problem is too trivial.

(f) It avoids potential embarrassment to the formal system if abuses persist even after the structures are incorporated into the formal system.

(g) It avoids potential flooding of the courts if the other options are tried without success.

(h) It keeps thousands of cases out of the formal system with minimum cost to the state.

(i) It allows for the blend of policing, decision-making and crime prevention to continue without splitting those functions.

(ii) The disadvantages of the *status quo* are:

(a) Because these structures are inadequately resourced their potential for growth, development and the benefits that access to resources can bring will be limited and will affect the quality of service that they can deliver.

(b) If they remain informal it will be difficult for the formal system to ensure that there are controls to protect citizens. The short-term cost-saving might be costly politically in the long run and onerous on the security services.

(iii) Benefits of Community Forums regulated and controlled by the state:

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[23] The situation where community forums remain informal and community run.

(a) this ensures a unitary justice system

(b) it provides for easy referrals and cross-referrals

(c) officials are made accountable

(d) it ensures that judgements are enforceable.

(iv) Disadvantages of this model:

(a) The basis on which these courts acquire their support and legitimacy will change.

(b) In communities where unemployment is high, competition for jobs will cause conflict.

(c) Bureaucratisation will affect the court's ability to be responsive to community needs.

(d) Low criminal jurisdiction might rob the court of its influence and power in civil matters.

(e) Procedures may be beyond the reach of ordinary people.

(f) Potential exists for communities to continue forming new structures that suit their needs, parallel to the ones now enjoying state support.

(g) There is likely to be a focus on individual cases rather than inter-linking issues that constitute the problem.

(h) The blend of policing, decision-making and crime prevention performed by the community forums presently will be lost.

(v) Benefits of the “Middle road” model:

(a) It enables a model that has strong community building and crime prevention potential to operate organically but also provides measures of control.

(b) It brings the best elements of indigenous justice into a manageable articulation with state structures in a way that is likely to avoid atrocities.

(c) Creates the opportunity to ease court congestion.

(d) It bonds community members into a particular value system and preserves a form of social organisation that is dear to the communities.

(e) Provides better access to justice than was the case previously.

(f) It is a cheaper option than incorporating the courts into the formal system.

(vi) Disadvantages of the model:

(a) Community forums remain outside the formal system and the constitutional fold.

(b) It does provide state services such as serving summons arrests or sales in execution.

(c) Participants remain volunteers who have to rely on their own resources to operationalise the court.

(d) Poor people with low literacy still have difficulty accessing a state forum for their problems.

CHAPTER 3

WORKSHOP PROCESS

3.1 Decision to hold workshops

3.1.1 The Commission believes that the most effective way of securing the legitimacy of its recommendations is to ensure the widest possible consultation with the people likely to be affected by new laws, and to this end the Commission views the polling of opinions across the country as an important component of its working methods.

3.1.2 In addition, this investigation in particular is of such a nature that community involvement in the formulation of general principles is crucial. The project committee therefore decided to consult with all relevant stakeholders, especially people at grassroots level, through a series of workshops and meetings, particularly as the subject matter of the investigation does not readily lend itself to other forms of research. It was decided that the full consultation process would consist of two high-profile workshops to be held in the bigger urban centres, where people involved in the formal administration of justice and leaders in informal community structures would be invited. In addition nine workshops, one in each province, were to be held.

3.1.3 The purpose of the workshops was essentially information-collection on the part of the Law Commission; the workshops would also afford communities through their representatives the opportunity to address the issue of community justice. These workshops were intended to enable people at grassroots level to feel that they "own" the process from its early stages. It was decided that an audit of the existing structures had to be undertaken to establish precisely how many informal community forums exist, where they are located and on what basis they are being run. Their role in resolving disputes and their needs, interest and goals were to be observed. It would also be important to ascertain why people use these structures; is it to seek retribution, or do the people derive some benefits from them? Finally, the development of these structures had to be tracked, and their effectiveness evaluated.

3.1.4 It had originally been intended to launch the workshop process at a national forum in Alexandra township. Alexandra is a black township in Johannesburg where extensive field research on popular justice and the development of institutions of alternative dispute resolution has been done.[24] In the 1950s, in the early days of apartheid, the dwellers lost their rights over the

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[24] Nina Daniel **Re-thinking Popular Justice: Self-regulation and Civil Society in South Africa** (1995) Community Peace Foundation, Cape Town.

land. This conditioned their struggle against the apartheid regime as one to maintain their right to remain as a community. From its early stage, the community of Alexandra developed a culture of struggle and resistance against the regime. The rising crime and political protest during the height of the struggle, which reached their peak in 1985-1986, could not be dealt with satisfactorily by the state police and judicial institutions, which increasingly came to be regarded as illegitimate in the eyes of the majority of the inhabitants. Formal courts were regarded as instruments of the apartheid regime and access to justice became increasingly difficult. People then resorted to self-help in the form of unofficial institutions. It is in this township where the state exercised its authority for the first time and arrested the leadership that was involved in the establishment of people's courts.[25] Locating the forum in a place like this could provide a vehicle for legitimation of the Commission's fact finding mission. Unfortunately the organisers were unable to secure a venue in Alexandra but instead a venue was obtained at Vista University in Soweto, which proved accessible and convenient.

3.2 Participants

Invitations were extended to all parties with an interest in community forums including the relevant government departments, local government representatives, community networkers, social workers, magistrates, state prosecutors, law societies, the South African Police Services (SAPS), Community Police Forum (CPF), academics, churches, traditional leaders, the business community, Non-Governmental Organisations (NGOs) and Community Based Organisations (CBOs). To maximize inclusivity and ensure that a diverse pool of knowledge and experience would be represented, while keeping numbers at a manageable level, 550 invitations were sent out in the expectation that a maximum of 250 participants would respond. Eventually, the forum opened with some 120 participants coming from all the provinces in the Republic.

3.3 Consultation process

3.3.1 First legal forum

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[25] **S v Mayekiso** 1988 (4) SA 738 (W) and **S v Zwane and Others** (3) 1989 (3) SA 253 (W).

3.3.1.1 A national consultative process on **"Access to Justice: Community Structures"** was embarked upon. This process began with the national launch of the workshops, which took place in Soweto on 11 March 1998. Judge Jan Steyn attended as Chairperson of the project committee and welcomed the participants.

3.3.1.2 A representative of the department of Justice officially opened the forum on behalf of the Minister by saying that a great need existed to create an alternative but uniform system where the resolution of community disputes could be handled much more effectively and in less time than in the formal courts.[26] This need is identified in the Department's Justice Vision 2000 where the Department aims to achieve an adequate network of accessible and service-oriented courts and other judicial and quasi-judicial institutions for all communities. This would be done by developing and implementing policy and institutional frameworks for community courts (including traditional courts), and specialist courts that provide alternative dispute resolution (ADR), so that they can play a meaningful role in providing efficient, fair and equal access to justice.

3.3.1.3 An overview of community justice structures as well as principles, problems and possibilities relating to community courts was presented by one of the leading scholars on the subject of community courts, Professor Wilfried Schärf.[27] He described community courts as those different kinds of courts run by the community in African townships and villages, for example, local neighbourhood structures like 'makgotla' and more recently, the 'people's courts'. Community courts are found mainly in the poorer sections of the African townships and squatter camps all over the country and focus far more on the relationship between the contestants, and what the offending act has done to the relationship.

3.3.1.4 Under the chairmanship of Professor Thandabantu Nhlapo, the forum moved to the second session whose aim was to offer community organisations and other individuals and bodies involved in community justice structures an opportunity to recount their experiences.

3.3.1.5 Delegates were given insight into the work of the Community Disputes Resolution Trust

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[26] Speech by Mr MM Tshishonga for the Ministry of Justice on 11 March 1998 Vista University, Soweto campus.

[27] Head of the Institute of Criminology, University of Cape Town.

(CDRT)[28] and how it was established. Due to the fact that the South African legal system had been viewed as inaccessible and often inappropriate for solving conflicts experienced by the black communities, the legal system had been mostly rejected. The communities then resorted to other options to resolve their conflicts. This led a group of lawyers and other interested parties to establish CDRT in the early 1990s. The main component of dispute resolution services are the Justice Centres. The meeting was told that the Justice Centres operate on a voluntary basis, and are sometimes linked to existing civic structures in a particular community. The name 'Justice Centre' itself implies that members of the community who use the services are accessing justice to some degree. The Justice Centres receive in the region of three thousand[29] visits from the community members per year. Of these visits about one thousand five hundred cases are mediated. Evidence exists that not only is there a need for community forums but also that mediation can be considered a viable and appropriate mechanism to resolve conflict. These courts could also be arenas where juvenile justice could be dealt with in a more people-friendly manner than in the formal courts. They could serve to keep youthful offenders away from the "adult world" of the higher courts.

3.3.1.6 The representative from the Community Peace Programme (CPP)[30]recounted their experience in the townships of Western Cape. The Community Peace Programme has developed a pilot project in Zwelethemba, a black township near Worcester. The main focus of the pilot project is community safety and peace building, designed to mobilize community resources in order to resolve security problems before they arise. The idea is to take pressure off the criminal justice system. The project is designed to develop structures and courses to mobilize community resources in ways that complement and assist the criminal justice process by stepping in to defuse problems before they escalate. The objective of the project is to develop mechanisms that will facilitate community resources and knowledge to promote security and resolve disputes. These mechanisms are designed to be operated under community direction, within the limits of law and the Constitution. The aim is to use resources that are already available within the community, such as the experience of people that are involved in dispute resolution, sharing such experience and

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28 Mr Kevin Lancaster representing CDRT.

29 Community Mediation Update April 1996 Issue No 10 at 14.

30 Mr Mbuyiselo Dyasi of the Community Peace Programme.

teaching others that people themselves are capable of solving their own problems.

3.3.1.7 The story of the Eastern Cape Initiative was delivered by Mr Andile Matshele.[31] He told the meeting about the Eastern Cape Urban Monitoring and Awareness Committee's (UMAC) project on community conciliation systems. According to the project, community dispute resolution is a civic function essential to a democratic society. Community conciliation systems are designed to receive disputes before they become so emotionally charged or intractable that they require justice agency attention. In turn community conciliation systems facilitate the resolution of disputes by the parties themselves, and, in so doing, enable persons to express the nature and causes of their conflict and to reduce the tensions and hostilities which surround the dispute. The actual resolution of the dispute is the responsibility of disputants as they make use of a conciliation service. From this perspective, community conciliation systems are informal, citizen-based 'courts of first resort' and a community's primary justice system in a democratic society.

3.3.1.8 Speaking on family courts, the Family Advocate[32] stressed the need for alternative dispute resolution in family law. She stated that a public education programme on alternative dispute resolution should be instituted and should involve a broader range of stakeholders: she also believed that the present court structure of dividing and fragmenting the issue of family disputes should be abolished in favour of an all-inclusive family courts. A family court should be based on more informal processes, specifically mediation.

3.3.1.9 The representative of the South African Local Government Association (SALGA)[33] told the delegates that the organization supported the views of Premier Dr Mathole Motshekga[34] on community courts. He said that councillors are confronted with crime and issues of access to justice on a daily basis. The justice system must form a linkage with community leaders and civic

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31 Representing Urban Monitoring and Awareness Committee operating in the Eastern Cape.

32 Advocate Barbara Hechter, the Chief Family Advocate.

33 Councillor Collin Matjila Chairperson of SALGA.

34 The Premier of Gauteng Province.

associations to avoid the flaws that existed before 1994. Community courts should not operate like the formal courts; they should allow for nation-building and by facilitating reconciliation when giving out sentences. The community must learn about 'pay back' for wrongs committed. This concept could be viewed as 'asymmetrical reciprocity' acting as a sort of social glue which expresses and symbolizes human social interdependence. Community courts and municipal courts could deal with clearly defined social problems of communities with municipal courts 'doubling up' as bodies of appeal from community courts. Elected councillors and municipal police could take part in the running of the community courts.

3.3.1.10 South African National Civic Organisation (SANCO)[35] gave its perspective as a pressure group on local government. The meeting heard how people were arrested in the late 1980s and charged with treason or alternatively sedition, in that they openly resisted, challenged, or disobeyed the state, conspired with the African National Congress (ANC) and other organisations to subvert the authority of the state by conducting anti-crime campaigns, setting up people's courts etc. The delegates were told about how people were forbidden to sing freedom songs at mass meetings, night vigils and mass funerals, which was an expression of their anger, frustration and opposition to the so-called system of apartheid, as well as a way of honouring those whom they regarded as their leaders. SANCO, acting in concert with the community, assisted the residents of the township to take their complaints to the people's court instead of the police.

3.3.1.11 According to the Congress of Traditional Leaders of South Africa (CONTRALESA), which discussed the experience in the rural areas, indigenous African customary courts apply a form of restorative justice. In the rural areas the way in which restorative justice works allows disputing families to reconcile. It teaches the communities the values of responsibility, respect, caring and knowledge. The way in which our society is structured limits the alternatives available for the righting of wrongs. Within many indigenous communities throughout South Africa, a philosophy of reconciliation is practised. This philosophy ultimately replaces vengeance with forgiveness, alienation with healing, and punishment with education. Today, chiefs and headmen may sit for both civil and petty criminal offences; however, serious offences which range from

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[35] Represented by Mr Omar Peers.

murder and rape to witchcraft, do not fall within their jurisdiction (although they might have done in the past). Community life also involves interdependence among its members and great emphasis is placed on sharing and mutual support.[36]

3.3.1.12 At all these sessions there was also an opportunity for the delegates to ask questions. Another opportunity for the participants to take part in the proceedings was provided in the forum's fourth session, which was the determination of the agenda for subsequent workshops by the participants. In this session the participants were encouraged to set down the agenda for the forthcoming workshops and in this way they were able to ensure that interests unique to their region would be on the national agenda. The forum ended on a high note.

3.3.2 Workshops

3.3.2.1 The workshops on **Access to Justice: Community Structures** generated intense discussion in all the nine provinces where they were held during March, April and May.

3.3.2.2 At the workshops either Professor Thandabantu Nhlapo, Ms Nombulelo Mkefa or Advocates Barbara Hechter and Rajesh Choudree would give a brief outline of the functioning of the Commission and its working methods. Workshops were facilitated where possible by local conveners with whom the audience could identify through language, lifestyle and race. Members of the project committee also attended the workshops and fora. As members are familiar with the contents of the issue paper, this ensured that direct feedback would be conveyed to the project committee. Each workshop was conducted over the course of a single day.

3.3.2.3 The substance of the workshops varied from province to province. This is a reflection that different communities have different problems, different types of conflicts and different values regarding how these conflicts should be handled. In the same way that rural areas have their own mechanisms of ordering society which are obviously different from those of urban societies, community forums would be specifically tailored to reflect the needs and differing conditions of their neighbourhood.

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[36] Speech by Mofumahadi MP Mopeli of the House of Traditional Leaders - Free State representing CONTRALESA.

3.3.2.4 The workshops were all inter-sectoral in nature and they involved local government representatives, community workers, traditional leaders, political parties, social workers, magistrates, state prosecutors, the South African Police Services (SAPS), Community Police Forum (CPF), academics, foreign researchers, Non-Governmental Organisations (NGOs), and Community Based Organisations (CBOs). The responses received represent the views from these various participants, many of which are involved with the various community initiatives that are currently informally in place throughout the country.

3.3.2.5 In all the workshops a questionnaire was used to assist the researchers to extract as much information as possible in response to the Issue Paper on Alternative Dispute Resolution so as to test public opinion on the various issues and thereby strengthen the foundation for the Discussion Paper.

Western Cape

3.3.2.6 In the Western Cape the workshop was held at the Lutheran Youth Centre in Athlone, Cape Town. The workshop was attended by:

- Community representatives including CBOs.
- NGOs working with conflict resolution, safety, security and justice issues.
- Representatives from the Department of Justice.
- Representatives from academic institutions.

3.3.2.7 The areas from which participants came were urban and peri-urban. The urban areas were predominantly represented by township communities, their organisations and the NGO

sector. Peri-urban areas such as Stellenbosch were represented by organisations of farm communities in the winelands.

3.3.2.8 The meeting was chaired by a local person, Sipho Citabatwa. Professor Thandabantu Nhlapo represented the Commission and Nombulelo Mkefa, as facilitator also represented the

project committee.

3.3.2.9 In the first session discussion focused on access to justice and the role of community forums. An attempt was made to arrive at a common understanding/ definition of "access to justice". Consensus was reached on the fact that access to justice was not adequate and that in most townships there was no access at all. Reasons identified were:

- Formal structures were inaccessible because they were situated at great distance from popular centres.
- People did not have resources to reach the facilities that were available.
- Officials were not sensitive to local communities and attitudes towards disadvantaged persons had not changed - stereotyping often informed how officials dealt with people.
- Communities still distrusted officials because of corrupt practices and inefficiency.
- The police particularly are perceived not to take cases seriously and are said to be dismissive of people's complaints or charges.
- Lack of education and knowledge of rights hampered communities from claiming services to which they were entitled.

3.3.2.10 In most areas the functions of community forums are determined by the priorities of the community in which they operate. In areas where there is a problem with gangsters and crime, community-based organizations jointly with policing bodies work on strategies toward securing a safe environment. In townships, street committees are active in resolving disputes between residents. The role of the street committees also fluctuates between policing and dispute resolution. There is a close link between these structures and the local Community Policing Forum. In Guguletu a "community court" presided over by representatives of street committees solves disputes that are referred from street committees where these could not be resolved.

3.3.2.11 Ownership of these structures rests with the communities through the leadership of their organisations. The street committees do not have access to any resources. Participation is voluntary and costs incurred, such as the hire of venues are carried by the community.

3.3.2.12 The question arose whether structures such as street communities were only viable

within Black townships. In the "Coloured" areas Neighbourhood Watches operated. In historically "white" suburbs schemes such as "Rent-a-Cop" and "OBSWATCH" were to be found, where police reservists were used. When it came to disputes, courts were resorted to.

3.3.2.13 At the workshop there were differing views on whether these structures were perceived in a positive light. Fears of kangaroo courts were articulated and the structures' vulnerability to political manipulation, abuse of power and falling foul of the Constitution and the Bill of Rights. The workshop, however, agreed that the "community forums" or structures of popular justice were an accepted reality. Training and resources were identified as important and urgent needs of these structures. Another problem identified was the fact that these structures operated in a legal vacuum. Their "decisions" were unenforceable and they were not recognised in other forums. This meant that if somebody moved out of the area, nothing could be done to get that individual to comply.

3.3.2.14 The Western Cape workshop was one of the first in the consultation process. Subsequent areas benefited from the lessons learnt at this workshop. How best to use the questionnaire to get the information desired and balancing that with what people wanted to talk about was a challenge. In Cape Town there also was no "traditional leader" context to address.

Eastern Cape

3.3.2.15 The Eastern Cape workshop was hosted in East London. Professor Nhlapo represented the Commission, Ms Mkefa the project committee and the researcher, Ms Maureen Moloi took care of the logistics.

3.3.2.16 Participants came from as far afield as Umtata, Stutterheim, Humansdorp Cathcart (with 80 surrounding farms), Fort Beaufort and East London. Because of budgetary constraints only one workshop was planned for the Eastern Cape. (In such a vast province there should have been at least three workshops).

3.3.2.17 Registration of participants was slow as people had to travel long distances. This meant that the bulk of representation came from the various government departments, such as

Justice, SAPS, Welfare, traditional leaders, local government representatives, SANCO and the NGO community.

3.3.2.18 The workshop was chaired by Mr. Andile Matshele who welcomed participants. Professor Nhlapo on behalf of the Commission, gave a brief background on The South African Law Commission, its work, and the project on which consultation was being sought, and then assisted in facilitating the different group discussions. Ms Mkefa facilitated the workshop and using the questionnaire guided the plenary report-backs from the group discussions.

3.3.2.19 Participants from Umtata felt that they did not have adequate access to justice. The explanation given was that the justice structures are located far from where they live, not all get assistance from advice offices, within the informal system there is confusion, corruption, lack of training and abuse of power. Participants from East London felt that people did not have access to justice because they do not know their rights. Access to formal or informal justice in Fort Beaufort is not adequate. People are poor and therefore have no access to attorneys. As far as informal justice is concerned there are no guidelines from the Department of Justice and abuse of power by some structures is rife. Participants from Cathcart felt that people regarded the justice system as discriminating against them and therefore they did not have confidence in it. All in all, the Eastern Cape boasts community structures such as community forums, traditional courts, mediation centres, street committees, yard committees and advice centres.

3.3.2.20 The relationship between customary courts and other community forums was discussed. Many participants believed that these structures should form a single Community Justice System which would be able to attract the trust of the community. Traditional courts should specialize on customs and traditions, and should keep records. Inkosi Nonkonyana[37] joined the workshop briefly and his input was valuable as concern was raised about the absence of representation from the traditional leaders.

3.3.2.21 Participants were forced to leave the workshop early because they had to undertake long journeys back in rainy conditions.

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[37] Chairperson of the Constitutional Committee of the House of Traditional Leaders - Eastern Cape.

Northern Province

3.3.2.22 In the Northern Province the workshop was held in Pietersburg, and was attended by representatives of the Department of Justice, traditional leaders, welfare societies, community leaders, South African Police Services, Community Police Forum, South African National Civic Organisation representatives and lecturers and students from the universities.[38] Areas which were represented in the workshop were Pietersburg, Thohoyandou, Seshego, Lebowakgomo, Ritavi, Malamulela, Potgietersrus, Ga-Marishane and Mankweng. The areas represented were a mixture of peri-urban and rural, in what appeared to be a true reflection of the Northern Province.

3.3.2.23 The workshop was chaired by a local person, Advocate Nelson Rapetsoa and Advocate Barbara Hechter, as facilitator, represented the project committee. The meeting began with each participant introducing him/herself and a brief discussion of his/her interest in community justice. The discussion sometimes focused specifically on mediation and, at other times, on the role of traditional courts in settling disputes.

3.3.2.24 As to the question whether there is adequate access to justice, the answer was that there is no adequate access to formal and informal justice. The right to justice in this province is impeded by many factors such as:

- Ignorance of the law (be it civil or customary) as well as illiteracy among the majority of members of the community
- Long distance travel to the courts resulting in wasted time for people who have other pressing survival chores to attend to.
- Financial limitations: people are not employed.
- Formal courts use procedures that are seen as complicated and intimidating.
- In the case of witchcraft the magistrates do not understand the culture of the people of the province.
- It is sometimes culturally and socially inappropriate to use formal court structures,

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[38] Universities of the North and Venda.

particularly in relation to domestic disagreements.

3.3.2.25 There exists only partial access to justice in traditional courts because these courts still discriminate against women. In rural areas traditional courts serve as structures for resolving community disputes. There are no advice centres in the rural areas but civic organisations can now be found in rural areas since the introduction of the new local government system.

3.3.2.26 In peri-urban and rural areas these structures are known as Community Police Forums in peri-urban areas as civics and in every village and mostly in rural areas of the Northern Province as traditional courts or courts of chiefs and headmen. There seem to be very few informal structures in the urban and peri-urban areas of Northern Province.

3.3.2.27 The chiefs and their councillors (bakgomane) are in charge of traditional courts in rural areas, while in urban areas civic organisations, Community Based Organisations, "comrades",[39] Community Police Forums, local pastors, and senior members of the family are in charge of the informal justice structures. The structures are financed by the Tribal Authorities which generate funds from tribal fines and levies. Grants are also received from the provincial government.

3.3.2.28 There is no interaction between the civic and traditional leaders. There exists instead a power struggle between the two institutions. It is generally perceived that the civics do not want to interact with the chiefs and this results in conflict. In the rural areas there is interaction between the chiefs, headmen and the formal justice structures.

3.3.2.29 The main functions of these structures in the Northern Province are-

- To solve civil and customary law problems.
- To give basic legal advice and support services to the community.
- To mediate family disputes and also disputes between members of the community.

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[39] 'Comrade' refers to members of the self-appointed bodies which emerged in the townships who set themselves the role of "keeping order" in their neighbourhood. Though youth-based and ostensibly "political", their methods mirrored those of conservative vigilante groupings.

- To create peace in the neighbourhood and to fight crime.
- To refer matters to the justice system.
- Tracking down offenders for the police in serious offences like sexual abuse against children and murder.
- To provide for welfare services by female elders.

3.3.2.30 There is mixed reaction to these structures: they are effective in performing their functions, but they have limited resources and authority. Participants from the justice system (mainly white magistrates) maintained that these structures provide only second-class justice for the poor and uneducated black people. If cases are deemed to be serious, they are always referred to the formal structures which follow clear legal procedures with safeguards for the accused. Informal structures serve as filters for less serious crime. The majority of cases handled by the informal structures are domestic disputes, disputes between neighbours and friends. The other concern expressed by the justice group was that these structures have limited effectiveness due to the refusal of the 'accused' to co-operate or to appear for hearings. On the other hand the rural communities saw the structures in a positive way and believed them to be appropriate because of their faith in traditional leaders. The structures are regarded in a positive light in that they are acceptable to the communities and assist in enhancing the customary and traditional values of the people. Traditional courts and CPFs have become effective agents against crime.

3.3.2.31 As far as the jurisdiction of these structures is concerned, the people felt that community forums should not be allowed to hear serious matters, such as murder, rape and sexual offences against children. They should not be allowed to impose punishment which is contrary to the Constitution and they should be restricted to hearing domestic and neighbor complaints. A view was also expressed that the establishment of courts/tribunals run by the city or town council to deal with violations of bye-laws (e.g. parking offences and any other matters over which they are granted jurisdiction) will improve access to justice at community level in urban and peri-urban areas.

3.3.2.32 There is a need for community forums in the Northern Province for the following reasons -

- Traditional courts place great emphasis on community participation in the process of dispute-settlement and restoring harmonious relations within the community. With restorative justice the role of the community court is to create the conditions most favourable to the reconciliation of both offender and victim. It influences community building and serves as a reminder of interdependence of life in the community. The street committees also practice the restorative justice philosophy which has a direct link to the *tinkundla* and indigenous approaches to dispute resolution.
- The formal courts are based mainly in urban areas which means that the people of the province do not have access to justice, as the province is mainly rural. People have to travel to the nearest towns to attend court, and one has to pay a lot of money for transport.

4. The general functioning of traditional courts involves court hearings that take place regularly during times suitable for community members to attend - in the evenings or over week-ends, and in a language which the participants understand.

- Community forums will ease the load on the formal justice system particularly in the magistrates office - magistrates will now concentrate on more serious offences.
- Such structures command the respect of the community members because they are more than just courts . The community's young also are aware of the interdependence in the community. They know that every adult is responsible for the upbringing of any child in the community. Where a child has been disobedient, it is the responsibility of the adults to report the matter to the relevant people, and together they will work out a solution. This in their way is a form of juvenile justice where the youths are diverted away from the criminal justice system.

North West Province

3.3.2.33 Mmabatho, a mixed community in the centre of the North West province, was selected as the place to hold the workshop. Locating the workshop in Mmabatho made it easier to arrange transportation because it is accessible and convenient. Areas which were represented in the workshop were Mmabatho, Montshioastad, Khunoana, Pudumoe township, Mabopane, Ditsobotla, Mogwase, Mothibistad, Taung, Ottosdal, Potchefstroom, Vryburg, Rustenburg, Lehurutshe, Temba, Phokeng and Odi. It should be mentioned here that the province is primarily rural and traditional. Organisations that participated through representatives were the Department of Justice, traditional leaders, welfare societies, farm workers, community leaders, media, provincial departments, South African Police Services, Office for the Status of Women and Bafokeng Women's Club. There was concern that there was no representative from the universities.

3.3.2.34 As in other provinces one of the reasons for lack of access to formal justice is the use of foreign language in the courts. The participants decided that they were going to use the language they understand (Setswana) with the help of an interpreter. Fortunately the chairperson[40] had made provision for a court interpreter to be present.

3.3.2.35 There is no adequate access to formal justice and in the more remote areas of the province there is no access to justice at all. The reasons advanced were that there is too much illiteracy on the part of the community, the courts are far from the townships and rural areas, the procedure used is too difficult to follow and the magistrates do not use the language of the community living within the jurisdiction of that court.

3.3.2.36 There are community forums in some townships but most of the time their functions are not clearly defined and as a result confusion exists. The community is not even aware that such structures exist. There is partial access to informal justice in chiefs' and headmen's courts in rural areas. The province has a few community forums with conflicting mandates. There exist Community Police Forums in peri-urban and rural areas. These serve as peacekeepers for the communities. In Ga-Rankuwa there is a community law centre which gives basic legal advice and

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[40] Mr Mpho Sejanamane from the Regional Office: Mmabatho.

support services to the community. Makgotla[41] are found in peri urban areas, mining towns and farm areas and they handle labour disputes, domestic and neighbourhood disputes. There is also an advice centre in Taung, which is attached to the tribal authority office at the Royal Kraal. Traditional courts or courts of chiefs and headmen are located in every village and mostly in rural areas of the North West. A mediation centre for juveniles is found in Ottosdal.

3.3.2.37 As to whether the structures have any contact or inter-action with each other the participants were told[42] that all disputes start before family elders, then they are referred to the headmen, if not solved they are referred to the king sitting with his advisers. This according to him indicates co-ordination between the structures. Disputes are screened by the advice centre before they are referred to the criminal justice system when a settlement/agreement has not been reached or one of the parties does not want to appear before the traditional court.

3.3.2.38 The structures are regarded in a positive way and as legitimate. The community believes in their existence and feel that they are doing a good job. They are regarded as important because in their process they involve all members of the community in the decision-making concerning the offender and his/her actions and what is to be done about them. They emphasise the process of dispute settlement and the restoration of interpersonal harmony. The participants were told that the future of traditional courts is guaranteed in the Constitution and these courts are respected by communities and regarded as pillars of their culture. What can be done is to train traditional leaders in human rights and change a few conservative community values like those which exclude women from attending court proceedings.

3.3.2.39 The state should only be involved in the community forums in so far as financial support and overall monitoring of the structures are concerned. The state must not impose on creative community-driven processes and should not interfere with the characteristics of a

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41 The term 'makgotla' derives its meaning from its singular form 'kgotla' which originally referred to a traditional gathering or meeting, especially in rural areas, and now sometimes carries the meaning of "court". Used in its plural form, 'makgotla' refer to a variety of bodies and activities ranging from informal networks of neighbours protecting their property, to vigilante groups: somewhere in between are the more legitimate dispute-resolution organisations which operate in conjunction with the ward committees of the community council system.

42 Kgosi Sam Mankuroane of Taung.

community/traditional structure.

3.3.2.40 The reasons advanced for the need to preserve community forums were:

- Community justice is about rebuilding the community through a restoration of personal and community relationships and healing the rifts caused by conflict. Community justice is therefore more ambitious than the existing formal system in tackling social problems.
- By resolving disputes at an early stage informal structures can reduce the overall level of social antagonism and many potential conflicts can be avoided.
- The process where community members come together to tackle justice issues is empowering and it is an expression of the right to self-determination for these communities.
- The main denial of access to justice in the province is the language barrier. The problem has not really been solved by the widespread use of interpreters.
- The formal courts are based mainly in urban areas as opposed to rural areas, which means that the people of the province do not have access to justice, as the province is mainly rural. People have to travel to the nearest towns to attend court, and one has to pay a lot of money for transport.

3.3.2.41 As far as the jurisdiction of these structures was concerned the participants decided that in civil matters, as long as the parties agree, there should be no limit to jurisdiction. In criminal matters the community will always determine whether the chief or headman can decide on a matter. Since the nature of decisions is always restorative and not something which may humiliate people or break down the relationships in the community the structures can deal with criminal cases.

Gauteng

3.3 2 42 There was a tremendous interest on the part of those active in community justice in Gauteng to participate in the workshop on **"Access to Justice: Community Structures"**. All the organisations which are involved in community justice in Gauteng were represented. However, because of the need to limit expenditure and to ensure that the workshop was both manageable and productive, it was necessary to restrict the number of participants to the workshop. In spite of efforts to keep the number at a manageable level, there were still 59 participants in attendance.

3.3.2.43 The workshop was held at the Chris Hani Baragwanath Hospital in Soweto on 7 April 1998 and was chaired by Mr Ayanda Njozela. Areas which were represented were Katlehong, Roodepoort, Dobsonville, Eldorado Park, Westdene, Randfontein, Mohlakeng, Diepsloots squatter camps, Midrand, Soshanguve Atteridgeville, Mamelodi, Pretoria, Vereeniging, Alexandra and Kibler Park. The representatives in Gauteng were from urban, peri-urban and the informal settlements. The urban group included both the white suburbs and the townships. The representation was quite diverse compared to the other provinces. The participants decided not to break into groups for the final session as a lot of time was wasted in the groups. The group chose a facilitator[43] to run the final process of the workshop in the plenary session.

3.3.2.44 In Gauteng people have only partial access to both formal and informal justice for the following reasons-

- People face many social, welfare and legal problems in the peri- urban areas and squatter camps where there is no one to assist them.
- The formal structures are also insufficient for the needs of the communities.
- People cannot afford attorneys' fees.
- Long distances to courts inhibit the participation of poor people.
- The formal justice system is overburdened.
- There is a lack of coordination and overemphasis on control of informal justice structures by political parties.
- Formal structures not always appropriate to deal with community or personal issues; yet

[43] Advocate Dali Mpofu from the General Council of the Bar of South Africa.

informal structures sometimes operate in an unprofessional manner.

- There are no set policies and guidelines for the informal structures and as a result people are not committed to the outcome.
- Sometimes people do not know which informal structures exist in their area.

3.3.2.45 There are community forums in most of the townships and squatter camps in Gauteng, but the majority of the community is not aware of their existence. Some of these are:

- Justice Centres found in Roodepoort, Braamfontein and Duduza;
- Camp committees located in Dobsonville and Mandela Park Informal Settlement;
- Street committees found in Robertsham, Freedom Park, Alexandra, Bekkersdal and Kagiso;
- Makgotla in most of the hostels in Soweto, Thokoza, Vosloorus and Katlehong;
- Community courts in Mamelodi, Ivory Park and Midrand;
- Advice Centres found in Diepkloof, Ennerdale and Rockville;
- Community Law Centres in all the poorer sections of Johannesburg, as well as in Soweto and Katlehong.
- Yard committees are mostly found in the informal settlements of Krugersdorp and Alexandra;
- Youth Conflict Managers Association are in Diepsloot informal settlement;
- Fellowship centre in Wilgerspruit;
- Muslim Judicial Councils in Lenasia; and
- Women for Peace in Lenasia.

3.3.2.46 The functions of these informal structures are-

- Predominantly resolving conflict through mediation and peace building.
- Assisting in defending communities against exploitation, repression and violations of human rights.
- Furnishing basic legal advice and support services.
- Dealing with social issues that affect the community.
- Assisting to refer justice matters to other appropriate structures.

- In Mamelodi members of the community court track down offenders for the police.[44] Their reason is that in most cases the police do not care to investigate an alleged offence. The police are recruited from other provinces; they do not know the place or the people of Mamelodi.
- Handling labour disputes.
- Running workshops on human rights and on how to resolve conflict without the use of physical force.
- Counselling children and parents in cases of abuse and violence.
- Youth managing peer-mediation and practising restorative justice at schools and in the community.

3.3.2.47 Various sectors of the community, civic leaders or SANCO , community-based organisations and non-governmental organisations, priests, "comrades" and students' organisations, or in certain areas the communities themselves, have control over these structures. These structures are mostly funded by donors, local and international, and sometimes a fee (around) is charged at advice centres for consultation. In the townships a member of the community volunteers to host a meeting at his /her house as a contribution, or members of the community are requested to raise funds voluntarily. The business community also contribute some money to these structures to assist in their running.

3.3.2.48 The structures that belong to SANCO have interaction between them; they are linked through zones or committees and they have to report to each other regularly. In other structures there is no cooperation and this results in conflict as these bodies are affiliated to different political parties.

3.3.2.49 As to whether these informal structures should handle criminal cases the participants decided that the basis should be one of choice. Fatalities and rape and cases involving forensic or sophisticated investigations should not be dealt with by informal structures.

3.3.2.50 The following reasons were advanced by participants why they needed community

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[44] Advocate Mpho Mphehlane from Mamelodi community court.

forum-

- Community forums have a role to play in resolving disputes through mediation within the communities.
- A cheaper and speedier method of resolving disputes would be available to all citizens.
- The courts' roll will be less congested, allowing the formal structures to deal with serious matters which require forensic evidence.
- The communities would be given more control over their lives by providing them with an effective method of resolving their disputes.
- The community forums are seen to deal with the problems and look to the future- ie healing the relationships that have been ruptured.

KwaZulu-Natal

3.3.2.51 The workshop in KwaZulu-Natal was held at the University of South Africa hall in Durban on 15 April 1998. The areas which were represented were Durban, Port Shepstone, Pietermaritzburg, Amanzimtoti, Mbumbulu, Izingolweni, Esikhawini, Umdloti, Phoenix, Impendle, Hanover,and Dannhauser. The representatives at the workshop were from urban, peri-urban and rural areas. The informal settlements were also represented. The workshop was chaired by a local person, Mr Themba Mnyandu.

3.3.2.52 The participants felt that people in KwaZulu-Natal have no adequate access to justice, whether formal or informal, for the following reasons-

- The language used in the courts is alienating and there are no information desks at the courts.
- People do not know their rights.
- There is widespread inefficiency on the part of the officers of the criminal justice system.
- There is no proper coordination between informal structures that exist.
- Where infrastructure and resources exist they are not shared.
- There is a problem with geographic demarcation: most large rural areas are served by one magistrate who cannot be reached by these communities, or in the case of informal structures they are concentrated in the urban areas.

- There is no inter-relationship between government and non-governmental organisations and community-based organisations.

3.3.2.53 The existing community structures were divided into:

Urban

- Advice centres
- Community Policing Forums
- South African National Civic Organisation
- Women's groups
- Support Centres (victims, women, children and the disabled)
- Youth Clubs
- Church Structures
- Business Initiatives
- Community Resources Centre
- Ratepayers' Association
- Mosque

Rural

- Advice Centres
- Community Policing Forum
- Tribal Authorities
- Development Committee
- Support Centres (victims, women, children and the disabled)
- Tribal legal advice office at Empangeni
- Community Law Centres.

3.3.2.54 Some of the names under which these structures are known are appropriate and others are not. The Ratepayers' Associations are situated in the metropolitan areas, the peri-urban areas as well as in the townships. Community Police Forums are found in urban, rural and peri- urban areas. Victim support centres for victims of abuse are found both in rural and urban areas. Community law centres and advice centres are predominantly in rural areas. Civics/SANCO and street committees are township structures. Traditional/tribal courts/authorities are rural structures.

Business Against Crime is a metropolitan structure introduced by the business community to curb violence and assist to the justice system in bringing criminals before the courts.

3.3.2.55 The functions of these structures are:

- To encourage members of the community to pay rent and to pay for services.
- Dealing with domestic violence, counselling of victims of crime.
- In rural areas, to act as mouth-piece of the tribe and provide legal advice and support services.
- Resolving disputes in the community.
- Mediating family matters and mediating between members of the same church
- Assisting in the referral of cases to the justice system.
- Handling labour disputes.
- Teaching the community about human rights.

3.3.2.56 These structures are led variously by volunteer residents, the king, chiefs, headmen, elders of the community, business community, civic leaders, religious leaders, community based organisations and non-governmental organisations, political leaders and paralegals.

3.3.2.57 As to whether the structures have any contact or interaction with each other participants were told that coordinators of the legal resources centres meet once a month in Pietermaritzburg, while the advice desks always refer victims to the relevant body for help. There exists an interaction between social workers and the police.

3.3.2.58 These structures can be strengthened and made more approachable by a change in the attitude of the people who run them and by training them in dispute resolution and human rights. In the case of victim support centres they are only focusing on women and children; the focus should be broadened to include everybody. Amakhosi (chiefs) should be educated on the developments brought about by the Constitution so that abuse of rights can be avoided. The roles played by these structures should be clearly defined and their functions should be integrated with state agencies such as the courts, police and social welfare services. Minimum standards should be laid down. They cannot operate in isolation or in competition with other related services.

There would have to be a carefully developed information-sharing and referral process linking these structures.

3.3.2.59 The structures are regarded in a positive light and are considered as legitimate. They are seen to be doing a good job but they are only used by those who are aware of the services they provide. Because they are not fully recognised by the law they are used to a limited extent. Their processes strive to be participatory and empowering, thereby maintaining or helping to produce positive relationships among the parties. On the other hand some of the participants were concerned about the power imbalances in community forums. These structures we seen by some as incapable of protecting the weaker party, especially women. Gender inequality is a problem which affects informal justice mechanisms and for this reason some community members do not view them favourably.

3.3.2.60 As far as jurisdiction is concerned, the view was expressed that all types of cases should be heard by the rural community forums (traditional courts), even murder cases. The urban view was that the offences of rape, murder, major theft and arson should be referred to the police (with some of these offences, reference to the police is an insurance requirement). The view from the traditional leaders was that they have long mastered the art of dispute resolution even though they have never been to school.[45] The mechanism they used in the resolution of disputes commanded more respect from their communities than the present formal court system does. Traditional structures can thus handle all the disputes except those involving forensic investigation , and they could refer the dispute to the formal courts if they cannot resolve it. Domestic disputes, matters involving witchcraft should be handled by the community forums (formal courts have little understanding of these matters).

3.3.2.61 With regard to the relationship between community and traditional courts, the participants felt that mutual trust must exist between the two and that where there is conflict in cultures, mediators from both sides should be called to resolve the conflict. It was interesting to find that the white participants preferred to be under the jurisdiction of the king and that their disputes should be resolved in traditional courts, rather than in those urban structures run by civic

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[45] Inkosi WT Mavundla of the House of Traditional Leaders, KwaZulu- Natal.

organisations.

3.3.2.62 In KwaZulu-Natal participants felt that the establishment of municipal courts will relieve the district courts of the overload of cases. The jurisdiction of these municipal courts should be restricted to minor offences like traffic offences, dog licences etc. Violations of bye-laws should be decriminalized and be handed over to the community forums, (this will only apply in the cities). Their functions would be administrative rather than judicial. The intention of the establishment of such courts would be to build a partnership between the residents and the judicial system.[46]

3.3.2.63 The meeting concluded that community forums were necessary for the following reasons:

- The community forums would be more accessible than the formal structures.
- Community justice is something that can be achieved with the active participation of the community.
- The community forums possess flexibility as an essential feature. This includes flexibility in location, procedure and culture, allowing for variation from community to community.
- The culture of traditional courts in their restorative and compensatory justice derives from the old customary law which sought to restore the position of the aggrieved party to the status quo. The mechanism of conflict resolution derives not from educational skills and expertise, but from the court's daily practices and experiences. These are organic skills embodied in the minds of the court personnel and they are intrinsically linked to their attitudes and perceptions of life, which they share with the community in which they live.

5. These structures will ease the work-load of the magistrates' courts.

Mpumalanga

3.3.2.64 The workshop on "**Access to Justice: Community Structures**" was held at the Drum

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[46] Mr Richard Parsons from Durban Chamber of Commerce and Industry.

Rock Conference Centre in Nelspruit on 21 April1998 and was chaired by a local person, Mr David Ngobeni. The areas which were represented were Nelspruit, Witbank, Middleburg, Hartebeeskop, Daantjie, Siyabuswa, Emphakeni, Bushbuckridge, Piet Retief, White River, Standerton, Eerstehoek and Wakkerstoom. This was the best attended workshop in all the provinces. The organisations that participated were the Department of Justice, traditional leaders, South African Police Services, Office of the Status of Women, House of Traditional Leaders, farm workers and community leaders. The traditional leaders in this area voiced their appreciation that they were included in the fact- finding mission of the Commission on legislation which will affect them and their communities.[47]

3.3.2.65 There is no adequate access to formal and informal justice and in the more remote areas of the province there is no access to justice at all for the following reasons-

- Rural communities regard the formal system as class-based agencies serving the rich and white, while ignoring the poor and black, in other words formal justice is discriminatory.
- Access to representation is restricted because of poverty and the predominance of an adversarial system of adjudication which produces either winners or losers appears inappropriate.
- Formal justice is slow and cumbersome, built on a very old and incomprehensible procedure that cannot be understood by black communities.

3.3.2.66 Traditional chiefs' and headmen's courts offer the black community of Mpumalanga partial informal access to justice. There are very few non-traditional informal structures in the province; only two advice centres were identified.

3.3.2.67 On the question of whether the participants would like to see change in the functions of the structures, the response was as follows:

6. The state should introduce legislation to regulate these structures so that communities can utilise them with confidence.

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[47] Chief Bheki Yende from Traditional Affairs, Mpumalanga.

7. Such structures tend to dispense justice that is favourable to some, while prejudicing others like women, juveniles and "outsiders".

- Training of leaders should to be provided by the state.
- State departments like Justice, Correctional Services, Housing and Police should interact with these structures in such a manner that it will bind them in a positive working mode.
- The state' should not be so involved as to interfere with the essential characteristics of a community or a traditional structure.

Free State

3.3.2.68 The workshop was held at the university of the Orange Free State in Bloemfontein on 23 April 1998. The areas which were represented in the workshop were Bloemfontein, Bethlehem, Parys, Bohlokong, Fouriesburg, Bultfontein, Thaba Nchu, Hennenman, Phutaditjhaba, Ladybrand, Boschof, Qwaqwa, Winburg, Fauresmith, Lindley, and Vrede. The areas represented are a mixture of peri-urban and rural communities and this is a true reflection of the Free State. Representation from the white community was overwhelming, as well as their support for these community forums. It was also interesting to note that the workshop was conducted largely in Afrikaans. Organisations represented were the traditional leaders, the department of Justice, farm workers, community leaders, media, premier's office, South African Police Services, Community Police Forums and the Welfare department. Even though the workshop was held at the university of the Orange Free State there was no one representing the university. The workshop was chaired by a local person, Mr Joe Raulinga.

3.3.2.69 There is basically no adequate access to formal or informal justice in the province, and in the most remote areas of the province there is absolutely no access to justice. The reasons are the same as in the other rural provinces. There exists partial informal access to justice in traditional and headmen's courts, also in the street committees in the townships around Bloemfontein. In some areas it is alleged that the are no justice structures at all, whether formal or informal.

3.3.2.70 There are community forums in some townships but they are poorly resourced, they are not always accessible to the entire community where they are situated. In most instances the

community is not even aware that such structures exist. In rural areas traditional courts serve as structures for resolving community disputes. The names under which they are known are traditional courts or courts of chiefs and headmen and they are situated in all villages in the rural areas of the Free State, mainly in Qwaqwa and Thaba Nchu. Community Police Forums are in urban, peri-urban and rural areas. Advice centres are found in both rural and urban areas. One example is Sun'n Rise advice centre in Parys. Street committees attached to SANCO are found in urban and peri-urban areas and the townships.

3.3.2.71 The functions of these structures are-

- Resolving disputes in the community or between members of the family.
- Creating harmony in the neighbourhood and fighting crime.
- Investigating allegations, mediating and offering solutions to correct an injustice.
- Solving farm workers' problems relating to eviction.
- In rural areas a further function has been to address the underlying factors which lead to offending behaviour, such as boredom, lack of employment and recreational opportunities and loss of culture. Leaders have had to run youth camps, and organised sporting occasions and develop employment opportunities.

3.3.2.72 Community based organisations, non-governmental organisations, headmen, chiefs, respected elders of the community, civic leaders and political leaders are in charge of these structures. They receive financial assistance from donors in the case of advice centres, traditional courts receive funds from the tribal levy and some do not have funds at all.

3.3.2.73 The view was expressed that the time is not yet ripe to do away with traditional courts. Many people in the rural areas prefer these courts for a number of reasons-

- The language in which proceedings are conducted is understood by all the participants, the procedure followed is very simple and it does not intimidate ordinary members of the society.
- The chief is recognised by the community as their cultural leader who uses cultural and traditional methods of preserving social harmony and relies on extended kinship and clan

ties to resolve disputes.

These courts therefore play a major role in dispute resolution, a role that shows no sign of diminishing.

3.3.2.74 Some of the participants view the structures as lawless organs which have lost the support of the people because of insufficient monitoring and control as well as the kind of punishments they impose. According to this view these structures have in fact deteriorated into organs of human rights abuse and criminal gangs, and the result is that some members of the community regard them in a negative way.

3.3.2.75 It was also observed that while informal structures are important to the viability of the legal system, they need to be designed in a way that will address the needs of the average citizen and utilise the skills and experience of community resources. Therefore, the government should provide training for the people who work in these organisations. Some of the participants were of the view that such structures should be state-controlled from national level. The motivation behind this was that regulation is necessary to prevent abuses and ensure observance of the Bill of Rights.

3.3.2.76 It was stressed that these informal structures should not be allowed to hear serious matters such as murder, nor should they be allowed to impose punishment which is contrary to the Constitution (some community structures still impose corporal punishment). They can only deal with domestic and neighbour complaints.

Northern Cape

3.3.2.77 The workshop in the Northern Cape was postponed from 28 April 1998 to 12 May 1998 due to lack of response from the stakeholders in that province. The workshop was eventually held at the city council hall in Kimberley and was attended by representatives of the Department of Justice, magistrates courts, welfare organisations, community leaders, farm workers, South African Police Services, Community Police Forum, South African National Civic Organisation representatives, the premier's representative and religious leaders. There are no

traditional leaders in the Northern Cape. The premier has arranged for a meeting with the Griquas to discuss the issue of traditional leaders. Areas which were represented in the workshop were Kimberley, De Aar, Victoria West, Barkly West, Britstown, Petrusville, Marydale, Roodepan and Galeshewe. The areas represented were a mixture of peri-urban, rural and semi-rural in what appeared to be a true reflection of the Northern Cape. Advocate Barbara Hechter and Ms Nombulelo Mkefa, as facilitators, represented the project committee. Registration of participants was very slow as people travelled long distances in very cold weather. The last part of the workshop was conducted practically by the participants. Ms Mkefa chose people to participate in a role-play depicting a community forum. The result was an understanding by the participants of the differences between the procedure used by the formal structures and the informality in which the community forums conduct their hearings. This was very beneficial to those participants from rural areas who did not know what was meant by informal structures of justice.

3.3.2.78 Participants felt that they did not have adequate access to formal or informal justice in the Northern Cape, for the following reasons:

- The limited availability of Legal Aid.
- The geographical distribution of the courts.
- People are poor and therefore have no access to attorneys.
- Illiteracy on the part of the majority of the people in the Northern Cape.
- Rural people travel long distance to the courts and a lot of time is wasted.
- The language that is used in the formal courts is foreign to the uneducated members of the community.

6. Delays in court proceedings.
7. Perceived and actual racial bias on the part of judicial officers.

3.3.2.79 Few informal structures exist in the urban, peri-urban and semi-rural areas of Northern Cape. These are mediation centres, street committees, yard committees and advice centres. In peri-urban, rural and semi-rural areas these structures are known as Community Police Forums, civics and street committees. In Kimberley the premier has established an institution called a "one stop shop"to assist the people of Northern Cape with information on the justice system. The structures are financed by the provincial government, ie the premier and donations from the

church congregations or foreign funders.

3.3.2.80 The main functions of these structures are:

- Resolving conflict between families and neighbours.
- Fighting crime.
- Giving basic legal advice and support services to the community.
- Assisting farm workers with labour disputes.

3.3.2.81 On the question of whether the participants would like to see change in the functions of the structures, the response was as follows:

- There should be more coordination between the structures and the department of Justice to enable both the structures and the department to function better for the benefit of community.
- They should be revived and reformed, to increase public confidence in them, instead of ignored.
- They should also be legally recognised so that proper control can be maintained.
- Training of their functionaries in conflict resolution and mediation is essential.
- Mediation, peace-making or dispute resolution should not be influenced by political affiliation of the leaders of these structures.

3.3.2.82 The state must offer training on the Constitution to the police, prosecutors, prisons officials and welfare officers. Through financial support the state could be involved, but should not have absolute control. Maximum community control and involvement must be sought and ensured.

3.3.2.83 The participants felt that the establishment of courts/tribunals run by the city or town council to deal with violations of bye-laws - eg parking offences and any other matters over which they are granted jurisdiction, would improve access to justice at community level, particularly in urban communities.

3.3.2.84 Community forums were seen as necessary for the following reasons:

- They would facilitate access to justice by providing low-cost dispute resolution institutions and procedures.
- Communities would be empowered and mobilized through the organization of mechanisms of dispute resolution in the community.
- The courts are based mainly in urban areas as opposed to rural areas, which means that the majority of people in this province do not have access to justice, as the province is mainly rural. People have to travel to the nearest towns to attend court, and one has to pay a lot of money for transport.

3.3.3 Final legal forum

3.3.3.1 The final forum on "Access to Justice: Community Structures" presented a unique opportunity for a range of stakeholders in the field of community justice across the Republic of South Africa to come together to discuss issues of common interest and to begin to network. Invitations were extended to all interested parties and the relevant role players in a particular area.

3.3.3.2 The actual event took place over the course of two days in Pretoria. Participants met on the morning of Thursday 02 July 1998. The reports from all the provinces were delivered after an opening plenary session in which the Minister of Justice, Dr AM Omar MP, addressed the forum. After a plenary session explaining what is expected from the breakaway groups, participants went to their assigned locations to begin the work that would shape the design, development and implementation of an action plan for promoting community forums in South Africa.

3.3.3.3 On the second day reports on the work of the groups were noted and synthesized in a plenary session to reveal issues on which consensus could be reached and those which remained contentious. Consensus issues included principles upon which any future initiatives should be grounded as well as concrete recommendations for specific tasks to advance those recommendations.

3.3.4 Issues that emerged

3.3.4.1 It emerged from the consultation process that there are informal community forums in existence in most of the townships, but these are mainly found in urban areas and to a limited extent in peri-urban areas. In rural areas traditional courts function as structures which assist in resolving disputes for communities.

3.3.4.2 There is no funding for most of the structures: some are run voluntarily by members of the community, others receive funds from overseas donors.

3.3.4.3 People use these structures for a number of reasons-

13. Community forums serve a useful purpose in meeting the needs of the majority of the South African population for accessible justice.
14. Community forums play a very important role in educating a wrongdoer. Because the structure allows for community participation, peer pressure could help in the process of education and reintegration of the wrongdoer into the community.[48]

- The proceedings in the community court take a simple form, and do not use technical legal procedure. The language used is understood by all parties involved. Proceedings are conducted during evenings on weekdays or during weekends in the afternoon.
- There is no legal representation but any person involved in a dispute is allowed to call upon a friend or anyone for assistance.
- The formal courts are based mainly in urban areas which means that the majority of people in South Africa do not have access to justice. Communities use the structures nearest to them because they facilitate access to justice by providing low-cost peace building and dispute resolution institutions and procedures.

The following issues were common to the provincial workshops:

3.3.4.4 The name 'community courts' is misleading and must be changed.

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[48] Professor Wilfried Schärf at the legal forum in Soweto.

3.3.4.5 What we witness in South Africa at present in the name of community forums is diverse, fragmentary and tentative. There is little in the way of an integrated idea as to what these structures should be, and how to set them up. The lack of integrated idea has several drawbacks. It means that most initiatives are private or individual efforts and they tend to be unfocused, with adopting eclectically of any aims that offer themselves. Projects get subverted to ends other than those with which they started, especially in reaction to the grassroots problems of obtaining funding or state acceptance.

3.3.4.6 The majority of participants felt that it is in the interest of the communities that the quality of the justice system in South Africa be acknowledged and enhanced. This could be addressed by providing low cost, expeditious and appropriate dispute resolution institutions and procedures. The state could then recognize and support these informal community forums.

3.3.4.7 Many disputes at community level are a complex of interests, values and culture, and these disputes are more effectively solved through conciliatory conflict resolution mechanisms. In the main these mechanisms do not exist. Where they do, they are poorly resourced, not formally recognised by the state structures, not always accessible to the entire community within which they are situated, and are open to procedural abuse.

3.3.5 Assessment

3.3.5.1 The workshops were not without their difficulties. Identifying central locations for the workshops in the provinces was difficult, given limited resources**.** Only one workshop was held in each province. People had to travel long distances in the larger provinces. Those who could, came and left early, others could not come as it was too far for communities and organisations who were not subsidised or funded.

3.3.5.2 There was local interest in all the workshops except in the Eastern Cape for reasons mentioned above where only 28 participants including the Commission ‘s staff attended. All the workshops were held on the proposed dates except the workshop in the Northern Cape which was postponed to 12 May 1998 due to lack of response from the stakeholders in that province. As a result of the postponement the closing legal forum was postponed to 2 and 3 July 1998.

3.3.5.3 It proved to be quite a challenge to translate the enthusiasm of participants for their community structures into concrete proposals for the recognition and reform. The dilemma appeared to be between the obvious need for a measure of state involvement in these structures (to ensure funding, common standards etc), on the one hand , and the fear that in the wake of such involvement these structures would lose their most important attributes (flexibility, speed, low cost, informality etc) and consequently become less useful to their communities. The danger existed that these communities would then "vote with their feet" and found yet another series of new structures considered to be more responsive to their needs.

3.3.5.4 The most frequent criticism made about the materials in the binders was that they were not received far enough in advance to allow time to review them before the workshops or forums.

3.3.5.5 In spite of these difficulties, the workshops were a success. The Law Commission appeared less remote than people had previously perceived it to be and there was general approval of the consultation approach. People attending the legal forum were happy at the opportunity to express their thoughts about popular justice. According to them it was the first time that their opinion had been sought on legislation that would ultimately affect them.

Traditional leaders , in particular, welcomed their inclusion and expressed the opinion that they felt that their viewpoint was valued.[49]

As far as networking is concerned most of the participants rated the opportunity for networking during the consultation process as excellent. The process attracted such a diverse group of participants that there was ample opportunity to forge contacts and share ideas.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

[49] Traditional leaders at the workshops and the last forum.

The forum suggested that the issues outlined be debated thoroughly before any particular direction is embarked upon. Based on the outcome of such discussions legislation in respect of the incorporation of community courts may be proposed. The following were recommended:

4.1 New name

The term "community courts" is considered misleading because it pre-empts decisions that have to be made regarding composition, jurisdiction and functioning of these structures, as well as the binding nature of their decisions. There was agreement that a new name should be found. Options raised included:

4.1.1 Community Conflict Resolution Forum

4.1.2 Community Conflict and Arbitration Forum

4.1.3 Community Forum

4.1.4 Community Justice Forum.

The issue was not finalised and it was understood that the search for an appropriate name would continue. On the basis that the word "forum" is itself problematic because it suggests a formal "court-like" structure, the following were also suggested:

4.1.5 Board

4.1.6 Panel

4.1.7 Council

4.1.8 Committee

4.2 Recognition of community structures should be based on legislation

Legislation will be required to enhance and encourage the use of informal structures in the administration of justice. The overriding principle should be the availability of choice. Access to informal structures should not be made compulsory, so that parties will be able to select the most appropriate option for the resolution of their disputes. The state should not initiate and impose a model of community court, taking away from the communities their own initiative and the spontaneity of these structures. Any model adopted will have to be carefully investigated and discussed before legislation is drafted. Provision for training facilities should be included in

legislation. Care should be taken in setting up the necessary monitoring and accounting services. The challenge will be to develop a working relationship that introduces state involvement and authority whilst maintaining community participation, flexibility and creative despatch of cases.

4.3 These structures are not courts but dispute resolution forums

There was a strong consensus that community structures should be dispute resolution forums and not "courts". It was felt that to call them courts would send the wrong message and evoke the passions of yesteryear against the 'kangaroo' structures of that time. To maintain the viability of all options, community structures should be seen as "first aid" for community disputes. As such, these structures will manifest themselves in various forms: urban, rural, secular, religious, indigenous etc. This was a momentous decision because it unblocked bottlenecks that had bedevilled the debate for some years:-

4.3.1 The whole issue of procedures and functions was simplified in that the participants did not have a problem with the informality of these structures. Community courts follow procedures based on resolving conflict through problem-solving. They can mediate, reconcile and arbitrate with the objective of solving a problem. They can make orders of restitution, compensation, or order community tasks to be performed by the offender and even refer matters for advice or hand the issue over to another body as the occasion demands.

4.3.2 The voluntary nature of participation in the work of community structures was confirmed. Attendance at any of the community structures must be entirely voluntary, both in terms of the inception of each attempt to resolve a dispute, as well as for the duration of the dispute-resolution process. This means that at no point can one of the parties compel another to attend or to continue with any conciliation process.

4.3.3 It answered the question as to how binding the outcome of the process should be. The community structures identify responsibilities to meet needs and to promote healing and enforce values by using social pressure. Restorative justice and reiterative shaming are two of the tools used to achieve a solution. The outcome is thus not a "judgement" needing to be enforced; it is an agreement or settlement whose terms need to be "officially" ascertainable.

4.3.4 The question of appeal and review was clarified in the sense that under the new thinking, these structures do not really stand in a hierarchical relationship to the formal courts. They are “first aid”.

4.3.5 Deciding that these structures were not courts also answered the issues of civil and criminal jurisdiction. Community forums do not distinguish between civil and criminal matters but deal with problems. As soon as one labels an act as a crime, it shunts its processing into a “guilty” or “not guilty” mind-frame. Community forums focus far more on the relationship between the disputants, and what wrongful act has done to the relationship or to peaceful co-existence in the community. The community values are preserved by reconciling the parties. The danger of splitting civil cases from criminal cases is that the community forums might lose their power and legitimacy (and therefore their effectiveness) if their role in deterring criminal behaviour is drastically restricted. It should be remembered that these structures are essentially and simultaneously social-support and social- control structures.

4.4 Introduction of community forums where traditional courts are functioning

There was a great deal of debate over the role of community justice structures in the rural areas. Traditional leaders, in particular, were concerned that the introduction of so-called “community courts” in their areas would amount to unwarranted duplication, in addition to usurping their authority. Civic organisations on the other hand raised the issue of a citizen’s right to choose the forum in which his or her matter should be heard.

After much discussion, it was agreed that the matter should be resolved in the following manner:

Where there is a functioning customary court in a rural area, a community forum should not be introduced. Duplication of functions should be avoided, even though in exceptional cases there might be such a mixed population in a particular area that the claims of the community to a choice of forums should be respected.

4.5 Training

In order to empower the individuals who operate community justice structures it is proposed that they be given training in mediation as well as in the ideas of restorative justice. Their capacity to administer their structures should also be enhanced by training, once those structures have been recognised by law.

4.6 Flexibility in the structures seen as a strength

It has been established that different communities have different problems, different types of conflicts and different values regarding how these conflicts should be handled. In the same way rural areas have their own mechanisms of ordering society which are obviously different from those of urban societies. No one model of community structure will suit all communities. Community structures need to be flexible or variable in form. The amount of standardisation should be kept to a minimum so that programmes can fit in with local cultures and local needs. Religious, cultural and civic groupings will, most likely have quite different goals and require different processes, and would therefore want a framework that will not force them into the same mould simply for the sake of uniformity.

4.7 Observance of law and the Constitution

An important aspect of any future model of community forum is the need for these forums to operate according to basic principles of law and respect for the Constitution of the Republic of South Africa. Any model chosen should be framed within a culture of rights and should be used to promote respect for and obedience to the law at local level.[50]

ANNEXURE A

ACCESS TO JUSTICE: COMMUNITY STRUCTURES

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[50] W Schärf at the second legal forum in Pretoria.

MEMORANDUM ON LEGISLATIVE REQUIREMENTS: SOME PROVISIONAL PROPOSALS

1. INTRODUCTION

1.1 The aim of this memorandum is to set out some tentative proposals for the development of legislation providing for the recognition, establishment, status, role, jurisdiction and functioning of dispute resolution structures based at local community level.

1.2 These structures are to be understood widely as meaning any court, committee, association or forum which operates within any local community to make peace, to build peace or to resolve disputes. (Peacemaking refers to the restoration of peace following upon a dispute: peacebuilding has an anticipatory and preventative goal in that it seeks to create an environment in which the other justice processes can be more effective, as elaborated in para 2.1). They must thus be taken to be varied in nature, and to include those that may be described as:

- rural
- urban
- religious
- indigenous
- civic

They must also be taken to include those forums which purport to apply "law," and those that claim to apply common sense or community values in their pursuit of peace and dispute resolution within their communities.

1.3 The legislation envisaged should provide a framework which is capable of accommodating the various types of forum discussed in para **1.2** above. For this reason, the legislation should as far as possible confine itself to matters of broad principle so that issues of detail can be dealt with in Regulations. This should

ensure that differences between these structures are acknowledged and accommodated, and that exceptions are made where appropriate.

2. GENERAL FRAMEWORK

2.1 The legislation should seek to recognise two levels of forum operating within any local community.

- A grass-roots based forum which can be considered as offering "first aid" dispute-resolution and peacemaking within the community. This level of forum, tentatively titled a **Peace Committee** in this memorandum, would function to resolve disputes by facilitating a meeting between the victim and the offender and their respective families, friends, colleagues, and supporters. The participation would be by mutual consent, the outcome negotiated, and the peace committee would have no powers of coercion and no other form of authority. The Peace Committee would also concern itself with the wider, and continuing, task of peacebuilding by engaging in programmes aimed at fostering peaceful co-existence and lasting stability within the community. The authority, mandate and ground rules for a Peace Committee's participation in these peacebuilding programmes would be found in that Peace Committee's Constitution.

- An upper-level forum more in line with most people's perceptions of a "community court." This forum would also entertain complaints from aggrieved members of the community; it would have some authority to pronounce decisions, though participation by both offender and victim would be by consent; its decision would be enforced by the State. This forum is tentatively titled a **Community Forum** in this memorandum and is concerned only with disputes.

2.2 The community forum would have dealings with the Magistrate's Court (referrals in both directions etc) in the ways elaborated below, though the relationship would not be one implying supervision by the Magistrate's Court.

2.3 Both the Peace Committee and the Community Forum would be restorative in approach and would involve themselves in matters that are capable of being resolved by the application in various ways of **authority, capacity** and **knowledge** which are available within the community. The essential difference between them would be that while the Peace Committee relies on the authority of the people around the victim and the offender (parents, teachers, church leaders etc) to generate an outcome, the Community Forum will have authority to go beyond mediation and operate more in arbitration mode, deriving its authority to impose a decision partly from the community and partly from the State, with the offender's and the victim's consent to participate implying, in turn, their consent to abide by the decision.

3. THE PEACE COMMITTEE

3.1 Nature of the Peace Committee

The Peace Committee is a group or organisation of facilitators. They have no inherent authority themselves but they are trained to bring disputing parties together in a process that produces a community-generated outcome. When the victim and the offender, together with their respective supporters, engage with each other in a relationship-repairing process, it is not any authority or power wielded by the facilitators which conduces to a solution: the incentive for finding a peaceful outcome emanates from the authority available **within the group**, people who command respect in the community and in the lives of the disputing parties (parents, other family members, the school headmaster, a church elder, a social worker etc). This might be referred to as the peacemaking circle. The

legislation should reflect this conception of a Peace Committee in the following principles:

3.1.1 The Peace Committee and its members have no authority to use

physical force or any other form of coercion.

3.1.2 Participation in the peacemaking process is thus entirely voluntary and is based on the consent of the victim and the offender.

3.1.3 For the same reason, the Peace Committee can only employ capacities existing within the community at the time.

3.1.4 The Peace Committee are merely the facilitators: they can not impose a decision on the disputing parties. The decision must come from the negotiations within the peacemaking circle.

3.1.5 The Peace Committee and the people involved in its processes shall at all times work within the Constitution and the laws of the Republic of South Africa.

3.2 Procedures of the Peace Committee

It is important that the procedures of the Peace Committee should reflect the culture and ethos of the local community. They should as much as possible be flexible, informal and conducted in the language of the people who live in the community. In pursuance of this ideal, the legislation should embody the following principles:

3.2.1 There should be no formal legal representation of any of the disputing parties in any of the Peace Committee's processes. (This is a prohibition on attorneys and advocates plying their trade in community structures. It does not preclude the participation in the peacemaking process of a legally qualified person who is a member of the community and attends the discussions as such, nor does it preclude the appearance of friends or family in support of one of the parties or the other).

3.2.2 It should be spelt out that these forums are in the business of peacemaking where conflict has arisen and peace-building for the future, and that their approach is restorative.

3.3 Operation and control of Peace Committee

The operations of the Peace Committee should be monitored to ensure accountability and responsibility, yet it is undesirable to so hedge them in with regulations that they become just another bureaucracy. This balance should be kept in mind when setting out the rules regulating the functioning of Peace Committees, especially in relation to finance and general supervision. The centralised control of the Department of Justice should not be exercised directly, but through a number of ombudsmen, not necessarily as many as one for each province. The legislation should include the following:

3.3.1 Each Peace Committee should operate in terms of a Constitution and a Code of Conduct adopted by it in consultation with the local ombudsman.

3.3.2 The local ombudsman should also have further powers to regulate the affairs of Peace Committees, to audit their performance, to receive complaints, to impose financial accountability and to ensure compliance with the law and the Constitution. (A more detailed proposal for the implementation of this principle is found in para 4.4 below).

3.3.3 The State, through the local ombudsman, should provide funding for the operations of Peace Committees, taking into account the need for substantial infrastructural support (especially in the initial stages of these operations), on the one hand, and the importance of allocating as much as possible to the programmes of Peace Committees rather than to wages, office rentals etc.

3.3.4 There should be a possibility in every community for a Peace Committee to link up with other Peace Committees to form a Peace Association, under whose umbrella not only the peacemaking, but also the peacebuilding, functions of Peace Committees would be co-ordinated.

3.3.4 The framework for the recognition of the Peace Committees should be flexible enough to accommodate other first-level peacemaking and dispute resolution forums located in places other than squatter camps and black townships, whether their operating ethos is religion-based, or based on common law or on customary law.

4. THE COMMUNITY FORUM

4.1 Nature and procedures of Community Forum

The Community Forum is to be the second level in community peacemaking. It exhibits some fundamental differences from the Peace Committee. Whereas the latter facilitates a solution by the people themselves, the Community Forum has some attributes of a "court" in that if mediation fails or is inappropriate it is an arbitrator external to the disputing parties and can impose a solution on them: however, they have both voluntarily consented to be there and have agreed to be bound by the decision. For this reason, the decision (whether it is that the offender should make restitution, or do community service etc.) can be enforced by the State. Although it is described as a second-level forum, disputants can use it as a forum of first resort if they so choose. It is called second-level only because it has more power than a Peace Committee, and it may enforce community values, or religious law, or customary law etc in a way that is quite different from the negotiations facilitated by a Peace Committee. It does not stand in an appellate relationship to the Peace Committee: if the latter's processes have failed to produce a solution, the dispute remains alive and the disputants can exercise their right to choose where the matter should go next. The legislation

should reflect this conception of the Community Forum in the following principles:

4.1.1 Appearance before a Community Forum should be entirely by consent of the disputants.

4.1.2 Such consent should also constitute an agreement to be bound by the decision of the forum if the dispute cannot be resolved by mediation.

4.1.3 Parties to a dispute can approach the Community Forum directly without having to go through a Peace Committee.

4.1.4 The decision of the Community Forum can be enforced by the State: the Community Forum itself has no power to use physical force or any other form of coercion.

4.1.5 No formal legal representation should be allowed.

4.1.6 The Community Forum shall function at all times within the Constitution and the laws of the Republic of South Africa.

4.1.7 Each Community Forum shall operate in terms of a Constitution and a Code of Conduct adopted by it in consultation with the local ombudsman.

4.2 Composition and personnel of Community Forum

At the level of the Community Forum, the issue of composition and personnel arises sharply. This is the level, it is envisaged, that will provide the framework for the operation of other community-based tribunals as well: religious family courts etc. The criteria for selection must thus ensure a uniform standard for

appointment to a Community Forum. This is not to say that these tribunals should all be identical in composition: differences and exceptions should be acknowledged, as stated in para **1.3.** The uniformity must relate to the level of competence to perform the task at hand, and to the credibility and support enjoyed by forum personnel within their communities. There should also be uniform criteria for financial remuneration, if any. The legislation should reflect the following principles:

4.2.1 Criteria should be set to guide the composition of community forums. These can be broad guidelines leaving the actual details to be worked out in the Regulations.

4.2.2 Various options should be explored in the Regulations, including the use of:

- **Volunteers**
- **paralegals as convenors or clerks**
- **people trained by the Department of Justice**
- **people with the experience of working in Peace Committees**
- **a panel comprising any or all of the above.**

4.2.3 The Regulations should also set out the criteria for the remuneration of members of a Community Forum, keeping in mind the need to encourage the spirit of volunteerism and to avoid the creation of a new elite within the community. It might be appropriate for the Regulations to link remuneration to training by providing that entitlement to remuneration will follow upon successful completion of a course of training by the member concerned.

4.3 Transfer of cases and relationship with Magistrates Court

The Community Forum level is also crucial in another sense: it has the potential to enjoy some kind of relationship with the Magistrates Court. Ideally, this relationship should ease the transfer of cases between the two tribunals without the Magistrate enjoying such wide powers of supervision over the Community Forum that it loses its character as a flexible, informal and inexpensive arena for resolving disputes. The need for accountability without the rigidifying effects of too close an association with the courts of the formal justice system has been met in the proposals set out in para **4.4** below. Here we confine ourselves to the structural relationship between the Community Forum and the Magistrate's Court, and how the two tribunals may work together. Withholding the right of appeal from a Community Forum to a Magistrate's Court is recommended for two weighty reasons. Firstly, Community Forums would lose the advantages of despatch and informality if their decisions were to be subject to appeal to a magistrate. With all Forums, but particularly in the case of religious family tribunals, an additional loss would be that of autonomy. Secondly, the practical implications of appeal are that these Forums would have to become courts of record, a further inroad into informality, flexibility and despatch. Experience with customary courts has shown that in the absence of a written record an appeal simply becomes a retrial. Since the citizen's right to approach the Magistrate's Court directly is left intact by these proposals, no constitutional harm is done to any party's interest by the absence of a right of appeal. Principles which might be observed in the legislation are:

4.3.1 There should be no appeal from a Community Forum to a Magistrate's Court (ie. the Magistrate does not stand in an appellate relationship to the Community Forum).

4.3.2 The local ombudsman shall be able to review decisions of the Community Forum on grounds of procedural or administrative irregularity.

4.3.3 A party to a dispute may approach the Magistrate's Court

directly without going through either a Community Forum or a Peace Committee.

4.3.4 A Community Forum may, with the consent of the parties, refer a matter to a Magistrate's Court if, in the opinion of the Forum, it is a matter suitable to be heard in such court: provided that the Magistrate's Court can refuse to entertain the matter if, in the opinion of the Clerk of Court, it is not a matter suitable for the Magistrate's Court.

4.3.5 Upon receiving a matter under para 4.3.3 above, a Magistrate's Court may, with the consent of the parties, transfer a matter to a Community Forum if, in the opinion of the Clerk of Court, it is a matter suitable for hearing in such court.

4.3.6 The absence of appeal procedures between the Community Forum and the Magistrate's Court, the rules regarding the transfer of cases between the two tribunals, and the limited grounds of review by the local ombudsman should be made clear to the parties at the point at which they indicate their intention to take their dispute to the Community Forum.

4.4 Control of Community Forums and Peace Committees

1. As argued in para **4.3** above, a new paradigm is required, shifting emphasis away from the automatic assumption that community structures are necessarily the lowest tier in the formal justice system, and that any relationship between them and a Magistrates Court is one in which the latter exercises supervisory powers over the former. Community structures should be seen as satisfying a need for justice and peace at community level without necessarily being adjuncts to the formal justice system. A structural relationship between the two systems is

inevitable, but their internal logic is different and they should be kept apart as far as possible. However, the concern that community structures should come under strict controls to ensure accountability, efficiency and compliance with the constitution is a legitimate concern. There simply exist good reasons why such controls should not be located in the Magistrates Court, not the least of which is the fact that the new independent magistracy is shedding agency, and other non-judicial, functions and is unlikely to welcome additional duties.

- This section addresses the problem by borrowing a concept used successfully in many African countries for the control and management of customary courts. This is the office of the Judicial Commissioner, which is responsible for the whole customary courts system: appointments, remuneration, complaints, audits, buildings etc. This memorandum proposes the establishment of offices of regional ombudsmen tentatively titled the **Ombudsman for Community Forums and Peace Associations** to be reflected in the legislation according to the following principles:

4.4.1 There shall be established an office to be called the Office of the Ombudsman (Regional or Provincial) for Community Forums and Peace Associations, with a secretariat and all necessary support staff.

4.4.2 The legislation shall provide for the method of appointment, qualifications, powers and duties, functions, remuneration, dismissal etc of the Ombudsmen, and other matters incidental to the setting up of their offices and ensuring their smooth functioning.

4.4.3 The Ombudsmen shall have, among other functions in relation to Community Forums and Peace Associations, the functions of:-

- **reviewing decisions on grounds of procedural or administrative irregularity**

- **auditing the performance of community structures**
- **receiving, and acting upon, complaints**
- **developing and controlling a budget to support the work of community structures**

4.4.4 The Ombudsman shall have a level of autonomy and independence guaranteed in the legislation, but shall report to the Minister of Justice.

4.4.5 The legislation shall also set out fully the paradigm and ethos (informal, community-based, restorative etc) within which community structures must operate, and which the Ombudsman should be duty-bound to protect and promote.

4.5 Miscellaneous provisions

It is envisaged that the three most prominent versions of a Community Forum will be:-

- Customary courts in rural areas other than the courts of chiefs and headmen which are governed by different legislation
- Community dispute-resolution tribunals in locations, townships and informal settlements
- Religious (especially family) courts for adherents of a particular religion.

In other words, some of these structures will operate within a defined geographical area while others may enjoy a geographical base but may, in addition, have extra-territorial jurisdiction over persons. Such diversity calls for certain miscellaneous provisions in the legislation to ease acceptance of the uniform framework by bodies whose interests are not necessarily identical, and by sceptics who equate "community" to mob justice:

4.5.1 The Regulations should be used extensively to preserve the unique flavour of each version of Community Forum.

4.5.2 The name "Community Forum", though an umbrella label for this level of tribunal, may be appropriate only for the non-rural secular forums. Those that dispense religious law or customary law may need to retain their names (or have them accommodated in the umbrella label) to make it clear what it is they do.

4.5.3 The legislation recognising or establishing Community Forums should be flexible enough to refer to or to incorporate other enactments where such enactments provide for any aspect of the operation of Community Forums.

ANNEXURE B

LIST OF RESPONDENTS TO THE ISSUE PAPER ON ALTERNATIVE DISPUTE

RESOLUTION

1. Society of Advocates of Natal–prepared by Adv GO van Niekerk
2. Community Conflict Management and Resolution (CCMR)
3. Daniel Nina (Community Peace Foundation)
4. Business Plan, Justice Vision 2000
5. Community Peace Foundation: Proposal for community courts
6. Community Peace Foundation: Street Committees: Gugulethu
7. Deon Bosman
8. Afrikaans Handels Instituut
9. Venn Nemeth & Hart
10. Family Life Centre
11. Urban Monitoring and Awareness Committee (UMAC)
12. Secretariat: Department of Safety and Security
13. Director General, Department of Justice
14. National Democratic Lawyers
15. Professor Faris, UNISA

ANNEXURE C

LIST OF RESPONDENTS TO THE ISSUE PAPER ON SIMPLIFICATION OF THE CRIMINAL JUSTICE SYSTEM

1. PB Monareng, Regional Court President, North West
2. Dr Murdoch Watney, RAU
3. M C de Wit, Regional Court Magistrate, Pretoria
4. Wendy Clark, Senior Public Prosecutor, Verulam
5. V R Ball, Regional Court Magistrate, Evander
6. AM Moleko, Practising Attorney, Pietermaritzburg
7. Advocates JA Swanepoel & JWS de Villiers, Office for Serious Economic Offences
8. C Wagner, Department of Welfare and Population Development
9. M Pothier, Catholic Commission for Justice and Peace
10. J Raseroka & L Muzame, National Institute for Public Interest Law and Research (NIPILAR)
11. Law Society of the Cape of Good Hope
12. The Centre for the Study of Violence and Reconciliation
13. Lawyers for Human Rights
14. NCPS Programme Team on Victim Empowerment
15. Woodroffe & Kleyn
16. A M Bluhm
17. J Short