National Library of Canada
Acquisitions and Bibliographic Services Branch
395 Wellington Street
Ottawa, Ontario
K1A 0N4

Bibliothèque nationale du Canada
Direction des acquisitions et des services bibliographiques
395, rue Wellington
Ottawa (Ontario)
K1A 0N4

Your file Votre référence

Our file Notre référence

NOTICE

The quality of this microform is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

AVIS

La qualité de cette microforme dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

Canada

IMAGES OF PEOPLE'S JUSTICE IN A CHANGING SOUTH AFRICA

by

Danielle Horwitz

B.Soc.Sc.(SW)Hons., University of Cape Town, 1983

THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF ARTS

in the School
of
Criminology

SIMON FRASER UNIVERSITY

February 1992

ISBN 0-315-83677-6

Approval

Name: Danielle Horwitz

Degree: Master of Arts

Title of Thesis: Images of People's Justice in a Changing South Africa

Examining Committee:

Chair: John Lowman, Ph.D.

Robert J. Menzies, Ph.D.
Associate Professor
Senior Supervisor

Brian E. Burtch, Ph.D.
Associate Professor

Stuart Farson, M.A.
External Examiner
Sessional Instructor
Department of Political Science
Simon Fraser University

Date Approved: February 26, 1992

PARTIAL COPYRIGHT LICENSE

I hereby grant to Simon Fraser University the right to lend my thesis, project or extended essay (the title of which is shown below) to users of the Simon Fraser University Library, and to make partial or single copies only for such users or in response to a request from the Library of any other university, or other educational institution, on its own behalf or for one of its users. I further agree that permission for multiple copying of this work for scholarly purposes may be granted by me or the Dean of Graduate Studies. It is understood that copying or publication of this work for financial gain shall not be allowed without my written permission.

Title of Thesis/~~Project/Extended Essay~~

Images of People's Justice in a Changing South Africa

Author:

(signature)

Danielle Horwitz

(name)

28 February 1992

(date)

Abstract

This thesis explores images of people's justice within the context of revolutionary South Africa. Informed by a reading of the contemporary neo-Marxian literature on formal and revolutionary legal structures, four categories of justice intrinsic to South Africa are outlined: state justice, African customary law, popular justice, and populist justice. The experience of the people's courts, which emerged in the black townships during the mid-1980s, is traced and located against the background of recurrent cycles of state repression and popular resistance. People's justice in South Africa is portrayed as a reaction to, and in dialectical relation with, the state's hierarchical legal apparatus. The law itself is regarded as a product, site, and vehicle of both South Africa's apartheid regime and the liberation struggle. To explore these themes, 40 semi-structured, open-ended interviews were conducted in July and August 1990 in the Greater Cape Town area with 42 legal, paralegal, and public respondents representing a range of political allegiances and sociodemographic attributes. Participants' conceptions were elicited on the subjects of people's justice, the operations of the people's courts, and visions of legality and justice in a liberated South Africa. Consonant with apartheid ideology, conservative and pro-government interviewees endorsed traditional African courts and rejected community-based structures which threaten the status quo. They emphasized the lawless activities of the people's courts to undermine the progressive notion of people's justice and its relevancy in the post-apartheid era. In contrast, some liberal and all progressive participants situated the people's courts within the

context of an oppressive and repressive regime. Distinguishing between popular and populist manifestations of justice, they advocated the initiation of popular community courts in the 'new' South Africa, but insisted on the inclusion of rigorous checks and balances. The notion of people's justice was expanded by progressive respondents to include popular participation, a culture of rights and democracy, a Bill of Rights embracing affirmative action, a restructured state justice system, and an extension of the paralegal domain. Overall, the findings of this thesis substantiate the transformative potential of law embraced by neo-Marxian theory, whilst underlining the dual imperatives of formal and distributive justice in forging a legal apparatus for a post-apartheid South Africa.

Acknowledgements

I am most grateful to the following people:

The 42 South Africans who participated in the study, for sharing their 'images' of people's justice.

Robert Menzies, my Senior Supervisor, for his enthusiasm, insight, guidance, and ongoing support.

Brian Burtch, my Committee Member, for his encouragement and constructive criticism.

George Lai Thom, British Columbia Unit (Branch) Head of the African National Congress, for his comments and suggestions.

Sybil and Wilfred Horwitz, my parents, for their strength and quiet inspiration.

Philip Moses, my partner, for his invaluable friendship.

Stuart Farson, my External Examiner, for his challenging responses and questions.

Table of Contents

List of Tables

Introduction

People's justice is a burgeoning concept within the context of the South African struggle against the apartheid system. People's justice implies an alternative to the current state-monopolized legal and judicial apparatus. The concept evokes a range of contradictory images and reactions. South Africans appear alternatively to romanticize the revolutionary potential of people's justice, or conversely to reject the practice as barbaric. While the term is frequently employed in legal and public discourse, there is a lack of clarity and consensus regarding its conceptualization, parameters, and implementation.

Community dispute resolution mechanisms are an integral part of traditional African society, and, furthermore, have existed within South Africa's black[1] townships and squatter areas since their inception. Past South African socio-legal studies (Bapela, 1987; Burman and Scharf, 1990; Scharf, 1989b; Scharf and Ngcokoto, 1990; Seekings, 1989; Suttner 1986a; Moses, 1990) tend to equate people's justice with people's courts. They devote particular attention to the people's courts which developed in many black townships in the mid-1980s, during a period of heightened conflict between the mass democratic movement and the regime. These structures were a product and vehicle for the struggle against apartheid, but were subsequently suppressed by the state.

---

[1] I conventionally refer to South Africans in terms of their colour. The concept of colour in South Africa is a way of life and not merely a category.

This study explores legal, paralegal and public conceptions of people's justice in contemporary South Africa. The concept is expanded to include media and forums of people's justice beyond the sphere of people's courts. The study examines perceptions of the rationale, ideals, practices and outcomes of the people's courts of the mid-1980s. Visions of people's justice in a post-apartheid South Africa are explored. A range of possibilities, preferences and precautionary measures are proposed. The role of law as a site of struggle is a pivotal theme.

It follows that community-based justice mechanisms are viewed as one manifestation of a people's justice. In contrast to much of the prevailing literature which focusses on the distinctions between formal and informal systems (see Abel, 1981, 1982a, 1982b; Matthews, 1988; Moses, 1990), I argue that the ideology of popular justice is best understood in the complex and reflexive reaction between state-based and community justice organisations and practices. So-called informal apparatuses may have formal established rules and procedures. Simultaneously, elements of informality pervade the legal apparatus of the South African state.

People's justice is viewed within the context of a changing South Africa. The fieldwork data were collected in South Africa in 1990 and analysed in 1991. This was a period characterized by both *toenadering* ('gettingtogetherness') and conflict. Pressured by the mass democratic movement, the international community and economic necessity, the South

African government under President F.W. de Klerk initiated a process of legal and structural change. In 1990, the bans were lifted on key liberation movements, namely, the African National Congress (ANC), the South African Communist Party (SACP), and the Pan Africanist Congress (PAC)[2]. Nelson Mandela and select other political prisoners were released, and many exiles were granted permission to return home. Media restrictions and the State of Emergency were lifted. Some apartheid laws were subsequently abolished. Many of these changes were demanded by the mass democratic movement as prerequisites to a potential process of negotiation. 'Talks about talks' commenced between the De Klerk government and the ANC in 1990. Other political forces have since been included in the deliberations. Many community organisations, academic institutions, and commercial enterprises have expressed their commitment to working towards a 'new South Africa.' Efforts to establish a Patriotic Front to address common agendas were initiated by the ANC and PAC in October 1991. Formal negotiations began on December 20, 1991 with the Convention for a Democratic South Africa.

These changes are valuable, but the material reality of the disenfranchised majority remains the same: unemployment, poverty, and homelessness are rife. Headway has been made in pursuit of formal equality, but substantive inequality is still the order of the day. The country has been experiencing an escalation of violence, crime, political conflict, and economic inflation. It has been estimated that between August 1990 and August 1991, an

---

[2] Key players in the contemporary South African political arena are identified in Appendix B.

average of 25 South Africans were killed each day. The annual death toll was reputed to be 3 000. While the violence has been ascribed to inherent tribal warfare, black-on-black hostility, and tension between the ANC and Inkatha, the role of counterrevolutionary forces has become increasingly evident. Cycles of resistance and repression are further compounded by provocations from the ultra-right wing which is fervently opposed to both the Nationalist Party and the liberation movements. The bilateral peace pact signed between the ANC and Inkatha in January 1991 and the peace accord endorsed by the regime, the ANC, and Inkatha in September 1991 have proved futile. The failure of the government and its military machinery to crush the violence coupled with state financial support rendered to Inkatha, and evidence of trained hit squads, cast doubt upon the sincerity of De Klerk's stated intentions. They substantiate suspicions about state efforts to debilitate and discredit the ANC. While the government realizes that the ANC has mass support and must be drawn into negotiation, it would prefer to meet with a weakened movement. De Klerk himself has emphasized that he has no intention of negotiating himself out of power. The slogan that "They want to negotiate over our dead bodies" is frequently uttered in the black townships of South Africa.

Against this background of political struggle and transformation, the thesis explores the existing body of knowledge on law as a site of struggle and vehicle for change. Specifically, it addresses and evaluates the prospects for establishing popular, democratic, alternatives to centralized, professionalized systems of justice. It is hoped that the research will highlight relationships,

opinions, concerns, and aspirations in the current debates on law and justice in transitional South Africa.

To reflect on existing knowledge and introduce key concepts and themes, Chapter 1 reviews select literature on the transformative potential of law and on global experiences of community-based justice. An overview of five dialectically related types of justice in contemporary South Africa is presented in Chapter 2. Chapter 3 outlines research methods and questions. Respondents' interrelated conceptions, perceptions and visions of people's justice and people's courts are explored and analysed in Chapters 4, 5, and 6 respectively.

Chapter 1

Theorizing Transformations through Law

This chapter provides a theoretical framework which outlines Neo-Marxian perspectives on law as a potential vehicle for social change. The concepts of formal and informal justice, and their dynamic inter-relationship, are explored. While this thesis is historically and materially specific to revolutionary South Africa, other experiences of 'people's justice' are respected as insightful. Practices of informal justice in both advanced capitalist societies and revolutionary settings are evaluated. The chapter closes with a discussion of the process of legal change in the post-liberation era.

1.1 Law 'From Above' as a Vehicle for Change

Pivotal to this thesis lies the question: "Is law a potential vehicle for social change?" Although I concentrate on Neo-Marxian theories, I begin with the perspectives of Durkheim and Weber who are acclaimed pioneers in the sociology of law. Durkheim (1933) maintains that law is necessary to maintain 'social solidarity' and that its function and content reflect the norms of the status quo. He does, however, recognise that the 'collective conscience' and morality of the populace may not always be consistent with the existing

law. In the following passage, he voices his support for the use of 'force' to change the legal system if it fails to further the interests of the society:

> . . . force, instead of letting itself be regulated by the law, would overturn it to create a new version of it. This is what happens in all coups d'états and revolutions; we shouldn't always condemn this deployment of force in the name of an abstract principle. The law is not something holy, it is a means to an end. It only has value when it fulfills its function well, that is to say when it guarantees the continued vitality of society. If it interferes with this it is natural that force intervenes to take its place (Durkheim, 1887, p. 55 cited in Pearce, 1989, p. 107).

Durkheim endorses the view that the state and its apparatuses must be subject to 'the rule of law.' It is clear that he defines law as primarily coercive and restraining. However, in his substantive writings, Durkheim recognises that law may play a constitutive and enabling role. Laws may designate societal roles and powers and ensure accountability (Pearce, 1989, pp. 183-187).

Whereas Durkheim focusses on legal function and content, Weber devotes more attention to formal legal properties (Pearce, 1989, p. 112). Weber (1954) presents the concept of 'legal domination' as an ideal type, and argues that political power in the modern capitalist state derives its legitimacy from a system of rational legal rules. To protect their economic and social interests, in the ideal, people accept political authority which is exercised according to clearly defined laws (Cotterrell, 1983, pp. 69-93). Legal domination is bureaucratically structured. Weber views bureaucracies as an essential means for organising large-scale heterogeneous societies. According to Weber, legal domination can only be changed by a charismatic leader who introduces new

legal values which ultimately stabilize into traditional or rational existence. Cotterrell criticizes Weber's ideal conception of formal logical law for underplaying substantive realities, societal values, human choice and struggle. In contrast, conflict theorists who draw upon Weber's (1954) analysis stress the three forms of power he identifies in the struggle between competing interest groups, namely, power derived from economic class, social status, and political party affiliation (Caputo, Kennedy, Reasons, and Brannigan, 1989, p. 5).

Related Marxist theorizing has primarily concentrated on the role of law in securing the status quo. Marx himself had equated the concept of 'equal right' with 'bourgeois right.' For Marx, the 'form' of law, namely equal right, cannot be separated from its content, substantive inequality (Fine, 1979, p. 39).

By focussing on the relationship between legal content and the structure within which that content is developed, Pashukanis (1978) transcends the instrumentalists' pre-occupation with the content of the law. Moreover, by acknowledging both consensual and coercive aspects of law in capitalist societies, he avoids the reductionist tendency to perceive law as merely a coercive weapon of the ruling class. According to Pashukanis, the material basis of the form of law in capitalist society is shaped by commodity relations. Legal content may therefore also be influenced by the economic structure. Consequently, Pashukanis maintains that the extinction of bourgeois relations of production would lead to the 'withering away' of law.

Considering the link between law and commodity production, Pashukanis does not perceive a need for legality within the context of socialist societies.

Instrumentalism and economic reductionism pervaded Marxist legal analyses in the 1960s and 1970s (see Bankowski and Mungham, 1975; Cleaver, 1968; Miliband, 1969; Quinney, 1974). The instrumentalists dogmatically regard law in capitalist societies as superstructural, and maintain that change can only be achieved in the economic base. They interpret law as a tool of the capitalist ruling class, and thus consider the doctrine of the 'rule of law' as an ideological disguise of ruling class interests. Consequently, the instrumentalists negate the principle of 'equality of all before the law,' and renounce formal legal rights for having no substance (Brickey and Comack, 1987, pp. 98-100).

The instrumentalists are criticized for neglecting to account historically for laws which do not further the 'objective interests' of the capitalist class (Beirne, 1979). Anti-trust laws, laws protecting trade unions and their right to strike, laws restricting the length of the working day, legislation regulating health and safety in the workplace, and laws aimed at protecting civil rights and the environment do not serve the interests of only the capitalist class. The implementation of these laws may in fact be the outcome of struggle. Although law is primarily coercive and repressive, it at least potentially embraces liberating and legitimating elements.

In contrast to the instrumentalists, proponents of the structuralist perspective, for example, Althusser (1971, 1977) and Poulantzas (1973), maintain that state-based judicial and legal institutions exhibit a degree of autonomy from ruling class manipulation. As described by Althusser, components of the superstructure, for example law, ideology, the state and politics, have a 'relative autonomy' and a 'specific effectivity.' In other words, superstructural elements have a measure of independence from the economic base and a degree of power to influence the economy as well as other superstructural components. The structuralists contend that the 'rule of law' is a powerful means for creating the impression of equality. This facade legitimates economic inequality and facilitates capital accumulation. 'Relative autonomy' allows the state to countermand the interests of individual capitalists and secure the long-term entrenchment of capital. Thus, instead of acting at its 'behest,' the state acts on 'behalf' of capital (Panitch, 1977, pp. 3-4). The limitations of individual rights and liberties encapsulated in the 'rule of law' are thus emphasized. Althusser and similarly-inclined critical theorists view rights as ideological smokescreens, and dismiss rights struggles as bourgeois, reformist, or irrelevant to revolutionary strategy (Thompson, 1978). Since the legal system is perceived as pro-capitalism, gains achieved by the dominated classes are interpreted by the structuralists as subject to inclusion, co-optation or domination by the capitalist system (Brickey and Comack, 1987, pp. 100-101).

Whereas the abolition of private ownership of the means of production is central to Marxists, the anarchists primarily strive to achieve

non-controlling organisation. In Bankowski's (1983, p. 288) words, "The dictatorship of the proletariat might improve the society in many ways but it would still leave people as slaves and anarchists want a society where people can be truly human." Bankowski (1983, pp. 286-288) urges anarchists to seek alternatives to the bourgeois form of law as a means of incorporating justice and objectivity into social life. He describes the *modus operandi* of 'generic' law as the domination by few of many. Increasing community participation in conflict resolution is not necessarily seen as the solution. Ironically, certain informal justice initiatives have served to increase state and professional control. According to Bankowski, organisation, for the purpose of empowering and liberating human subjects, is the anarchists' prime objective.

In contrast, Kinsey (1983, pp. 11-42) credits Renner's work for devoting attention to the role and function of law in the transition to socialism and the concept of socialist legality. Renner steers away from sole concentration on the pro-capitalist interests encapsulated in the form and content of bourgeois law. He opposes Pashukanis's (1978) belief in the 'withering away' of law and state in a post-capitalist society, and refuses to equate socialist society and its apparatuses with consensus. Instead, Renner promotes the Austro-Marxist conception of socialism and advocates a socialist jurisprudence. He emphasizes the need for legal regulation and the 'conscious exercise of political power' to guide law and its enforcement in a socialist society. The application of a political concept of law is viewed as essential to the socialist mode of production (Kinsey, 1983, p. 37). The following statement by

Sugarman (1983, pp. 2-3) echoes Renner's plea: "The ruthless tenacity of fascist regimes and the horrors of Stalinism and other Eastern bloc oppression have heightened the need to limit the exercise of ordering and organization in society by means of the law and processes of democratic accountability."

Brickey and Comack allude to the 'democratic' and 'juridical' aspects of the law distinguished by Mandel (1989, pp. 305-315). The 'democratic' characteristics correspond with E.P. Thompson's emphasis on the application of rules to restrict official power, and signify equality and freedom. In contrast, the 'juridical' features resemble Pashukanis's description of factors reinforcing the status quo.

In his historical analysis, E.P. Thompson (1975, p. 264) describes the rule of law as 'complex and contradictory.' Thompson recognizes that the law mediates class relations in favour of the rulers. Simultaneously, he emphasizes the liberative or at least protective elements of law. Thompson describes law as 'an unqualified human good,' since it '. . . imposes effective inhibitions upon power' and protects the citizen '. . . from power's all-intrusive claims' (Thompson, 1975, pp. 264-266). He writes:

> The rhetoric and rules of a society are a great deal more than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true relations of power, but, at the same time, they may curb that power and check its intrusions (Thompson, 1975, p. 265).

Thompson's perspective on law is based on his belief in the democratic potential of the legal aspects of state power. He regards the entrenchment of civil liberties in socialist societies as essential.

Fine (1979, pp. 30-31) acknowledges Thompson's contention that the rule of law places restrictions on power. However, he stresses that law is not the only potential inhibitor of power. The organisation of the working class exemplifies an alternate means of limiting the power of capital and the bourgeois state. Fine (1979, pp. 29-45) addresses the class character of the rule of law and its links with capitalist productive relations. He maintains that the class character of bourgeois law is revealed when the links between the form and content of the law are considered. Consequently, he credits Pashukanis for addressing legal form and content as interrelated concepts.

Between the extreme stances of negating the bourgeois form of law as a mask and appreciating it as an unqualified good, Fine (1979, p. 31) contends that we need to explore: (a) how law serves as a form of domination, (b) the social basis whereupon this form of power arises and survives, and (c) the contradictory functions it carries out for both capital and labour. Fine (1979, pp. 43-45) regards legal relations as objective social relations, rather than merely a tool of state control or an ideologically useful vehicle for the ruling class. In a specific historical context, the social relations of production, and not the exchange of commodities per se, condition the legal form. Forms and functions of bourgeois law thus change in accordance with changing social relations of production.

Brickey and Comack (1987, p. 104) highlight a previously mentioned tension in the law: the law serves as a vehicle of both coercion and consent. The law ideologically legitimizes capitalist social relations, and is concurrently legitimized by an ideological base. According to Collins (1982), law is shaped by and expresses the dominant ideologies derived from the relations of production. Ideologies fluctuate in accordance with changes in the social practices in productive relations. Collins (1982, pp. 85-89) considers legal rules to be part of the superstructure because they articulate the needs of the dominant ideologies. However, law may operate in the material base, since in reality the legal system comprises, defines and endorses the relations of production.

Gramsci (1971) discusses law within the context of class conflict. He too distinguishes between rule based on coercion and rule based on consent or persuasion, and concentrates on the latter. The legal system plays a key role in attaining ideological hegemony by articulating and disseminating the dominant ideology (Collins, 1982, p. 50). In a 'normal' bourgeois democratic state, the coercive apparatuses of the state are only invoked if consensual methods fail. Law is seen to contribute to political and ideological hegemony by uniting the ruling class, and securing the compliance of the masses (Cain, 1983, p. 101):

> It is a problem of the education of the masses . . . this is precisely the function of law in the state and in society; through "law" the State renders the ruling group "homogeneous," and tends to create a social

> conforming which is useful to the ruling group's line of development (Gramsci, 1971, p. 101).

Consciousness is thus regarded as a site of ideological and political struggle. According to Gramsci, control over consciousness is as important as control over the forces of production (Walters, 1986, p. 136). "The revolutionary task in civil society is therefore very much a struggle for the control of law, that is, a struggle to achieve authoritarian, norm creating positions" (Cain, 1983, p. 103). Both the working class and the ruling class engage in 'a war of position.' The hegemonic class periodically makes compromises to secure consent in order to protect and perpetuate its status (Simon, 1982, pp. 22-24).

Brickey and Comack (1987, pp. 97-117) also explore the potential role of law as a vehicle for substantive social change. Emphasizing the socio-historic context and the social nature of law, Brickey and Comack advocate a dialectical, historical materialist approach to law. They focus on the role of social participants in the compilation and maintenance of the legal system. Consequently, they regard the legal domain as a potential site of struggle, involving people with diverse class and political status (Brickey and Comack, 1987, p. 102).

Recognition of the need to protect the oppressed, for example women, racial minorities and victims of bureaucracy in general, has contributed to a dismissal of 'withering away' theory and a reaffirmation of the significance of rights and general rules, even in socialist society. Hirst (1980) consequently argues for independent legislative and adjudicative structures, and a system

of checks and balances to control potential abuse of power by the state, mass organisations and 'comrades' courts.'

Sumner (1981) recognizes that the notion of right emanates from commodity relations, but argues that rights have additional substance. Rights and rights struggles are indicators and assertions of power and in Sumner's (1981, p. 68) words, they are ". . . key moments and weapons in the development of the working class as a many-sided, international, democratic, humane force for socialist progress." By providing a basis for struggle, rights and rights struggles politicize and mobilize people. The negation of rights undervalues the rights struggles of workers, women, youth, prisoners, racially and other oppressed groups. Furthermore, rights incorporate ethics which, as suggested by Sumner, should energize popular struggles. In the final instance, the significance of a rights struggle is a reflection of historical and material conditions. The realization of substantive rights and a rule of law depend upon the destruction of capitalism and democratic social transformation (Sumner, 1981, p. 89).

Brickey and Comack (1987, p. 105) explore the legal forms and principles that should be introduced to facilitate a socialist transformation. They support the development of a 'jurisprudence of insurgency' as a means of achieving change. Borrowing Tigar and Levy's definition, they describe 'jurisprudence of insurgency' as "a certain kind of jurisprudential activity in which a group challenging the prevailing system of social relations no longer seeks to reform it but rather to overthrow it and replace it with another."

Based on the notion that socialist legality is dialectically related to capitalist legality, Brickey and Comack (1987, p. 106) emphasize the need to identify the contradictions within bourgeois legal ideology, and to achieve the maximum democratization of the rule of law. Thereby law can potentially serve as one means for weakening capitalist relations and realizing socialist goals.

Moreover, Brickey and Comack (1987, pp. 109-114) propose a dialectical process to remove the artificial barrier between legal and political concerns. It is necessary to focus on the relationship between oppressed groups, the state and the economic system. Oppressed groups must seek legal recourse to problems collectively, and the political nature of problems must be recognized. However, the individualization of inequality issues in capitalist legality is identified as a confining factor. Brickey and Comack consequently stress the need for law to acknowledge **structural** inequality and **collective** rights and freedoms, and to include collectivities as legal participants. Furthermore, they suggest that struggles should not be restricted to the legal arena; lobbying, strikes and boycotts are identified as examples of additional strategies for pressurizing the state and achieving substantive change.

In South Africa, early critical sociological writing was greatly influenced by instrumentalist conceptions of law. In 1973, for example, Suttner had written that:

> . . . law is always a tool of power in the sense that it is used only if it is suited to the purpose deemed necessary to fulfil at any time. If unsuitable, as our constitution proved to the Nationalist Party, it is changed. . . . Rules of law may prove inadequate for the rulers in which

> case they change them. If inadequate for the ruled, they first change the government and then the rules (Suttner, 1973, p. 173 cited in Davis, 1988, p. 65).

Similarly, Davis (1988, p. 66) had initially conceptualized a doctrine of human rights solely as an instrument of conflict management, and with reference to the South African scenario had proclaimed that:

> . . . law has no intrinsic value of its own. Irrespective of whether its content is denial of human rights, on the one hand, or embraces all the human rights . . . adumbrated, law remains a mechanism utilized by the power bloc in society for its own needs. . . . It is essentially because the law is a tool of power, that the cry for human rights to be written into a legal system is so futile.

Subsequently, Davis (1988, pp. 67-68) has identified the pitfalls of these analyses. As he indicates, instrumentalism exaggerates the significance of economic factors and fails to recognize the historical significance of political struggle. Applied to South Africa, instrumentalism relates legal reform solely to economic changes, and overlooks the influential role of political struggles. Davis (1988, p. 75) now considers it vital that a Marxist theory of law ". . . be based on the notion that people struggling within inherited structures and ideological constraints do create their own history." These struggles take place within the realm of specific changes in the relations of production (Davis, 1988, p. 89).

In this thesis I will consider law neither as simply a tool of the ruling class, nor as an 'unqualified good.' I will try to sustain a tension between the skepticism of Althusser and the optimism of Thompson. I support the

Marxist notion of the economic base as supreme and the law as superstructural. Moreover, and analogous with the perspectives of Davis (1988), Collins (1982), Fine (1979), Sumner (1981), and Brickey and Comack (1987), I give pre-eminence to the dialectical relationship between the law and the economy. I agree with Cohen's (1988, p. 208) contention that efforts to achieve formalism, informalism or any other legal change take on political meaning in accordance with how and by whom they are initiated and utilized. On the basis of the above, I regard the law as a product, site and vehicle of both South Africa's apartheid regime and the liberation struggle. Hence I believe that law's potential as a vehicle for change in South Africa can only be realized through affirmative action and broader structural and substantive change. An equitable redistribution of power and resources is an essential ingredient to the attainment of legal equality and justice in the post-apartheid society.

1.2 Conceptualizing Informal Justice

Informal justice has been a feature of diverse socio-political systems and contexts:

> . . . examples of informal justice can be found in every social formation, flying the banner of every political ideology: in precapitalist societies and contemporary Third World nations; under liberal capitalism, social democracy, and fascism (in both their historical and contemporary manifestations); and in socialist revolutions and established socialist regimes (Abel, 1982, Vol. 2, p. 2).

This substantiates the need to interpret instances of informalism within their specific historical and material contexts, and to heed Cohen's (1988, p. 208) call to identify the proponents of informal justice and their rationale and methods of practice.

The available literature often presents informal, community-based justice as the antithesis of formal, state-based justice. Abel (1982, Vol. 1, p. 2), for example, proposes the following 'fluid' interpretation of informalism:

> We are concerned here with **legal** phenomena, i.e., with institutions that declare, modify, and apply norms in the process of controlling conduct and handling conflict. Such institutions are informal to the extent that they are nonbureaucratic in structure and relatively undifferentiated from the larger society, minimize the use of professionals, and eschew official law in favor of substantive and procedural norms that are vague, unwritten, commonsensical, flexible, ad hoc, and particularistic. Every instance of informal justice will exhibit some of these characteristics to some degree, though in none will all of them be fully developed.

In contrast to this tradition, Cain (1988) avoids juxtaposing formal and informal justice, and evaluating informalism in relation to select characteristics of formal structures. Cain (1988) considers informal structures on their own merit. Drawing on 'success stories' from prefigurative justice agencies in advanced capitalist societies, she identifies qualities of the ideal of collective justice as a starting point. In this thesis, periodic reference is made to 'prefiguration.' In the South African context, the term denotes the process of instilling the ideals, values and ethos of a post-apartheid society into

contemporary organisations and structures. Prefigurative popular justice apparatuses provide the opportunity for experiential learning.

I will compare and contrast the positive and negative attributes of formal and informal justice within specific contexts. Following Cain's example, I do not regard community and state-based justice as mirror opposites: community-based justice is much more than a cheaper, quicker, less technical and more accessible alternative to state justice. My conception of popular justice resembles Cain's collective justice, in that it is presented as the ideal version of informal justice. My ideal incorporates the following essential ingredients stipulated by Suttner (1986a, p. 6): "Popular justice means a system created by the community, in which the community participates, and whose operation is mandated and accountable to them. The people see their control of a system of justice as part of the struggle to control their own country." The concept of popular justice per se will be elaborated later in this chapter.

Virtually all mechanisms of formal justice embrace elements of informality, and informal justice apparatuses usually have formal components. Allison (1987) proposes a transcendence of the dichotomy of legal justice and substantive popular justice. In his philosophical thesis, Allison (1987, p. 25) alludes to substantive and legal justice as ". . . the defective, dichotomous products of the co-existing and contradictory demands for generality and specificity." He identifies the implementation of general rules as both the fundamental strength and weakness of the formal justice

system. On the positive side, general rules, principles and rights may protect the weak or powerless, provided that they are recognized as legal subjects. These rules may, however, be refuted on the basis of their historical and contextual specificity and rigidity. The regulation of select circumstances and simultaneous dismissal of others may also have detrimental effects. Most significantly, the emphasis on formal equality disguises the reality of substantive inequality.

Allison (1987, pp. 21-25) attributes the shortcomings of substantive popular justice, namely popular prejudice and failure to protect the weak, to the absence of general rules. He stresses that a society with diverse norms and values is susceptible to prejudicial practices. Based on his conception of popular justice as reliant upon the demands of the specific situation, Allison does not regard substantive popular justice as a viable alternative to legal justice. He refers to the writings of Hirst (1980) and Hunt (1985) to substantiate the need for rules and rights.

Allison's condemnation of informalism on the basis of an absence of rules raises questions that have long been at the very core of debates in the sociology of law. Does informalism essentially imply an absence of rules? Are rules and principles intrinsically imposed from above, or can they be compiled and implemented by people at a grassroots level? Moreover, does the existence of general rules automatically inhibit power and guarantee the protection of the powerless? As illustrated in Chapter 2, it cannot be claimed that South Africa's state-based justice system has served to protect the weak.

On the contrary, the system has predominantly perpetuated the situation of the disempowered and provided justifications for oppression. While Allison criticizes Cain for imposing her own ideal of informal justice, it seems that he fails to differentiate between popular and populist forms of justice. As I suggest below, this differentiation is pivotal.

1.3 The Experience of Informal Justice in Advanced Capitalist Societies

Over the years, three general perspectives on informal justice in advanced capitalist societies have surfaced: (a) support for the ideal, (b) criticism of the practice, and (c) appraisal of the ideal and practice (Abel, 1982; Cohen, 1988; Matthews, 1988). During the 1970s in the United States and Britain, practitioners and academics optimistically regarded informalism as a means of enhancing access to justice, participation, flexibility, accountability and community interests. Less than a decade later, critics questioned whether community-based alternatives were, contrary to expectations, facilitating the expansion and relegitimation of the formal legal system. Subsequently there have been attempts to advance beyond outright support or condemnation, and pursue a practical, theoretical and contextual appraisal of informalism that is sensitive to contradiction. These three perspectives are described below in greater detail.

1.3.1 Support for the ideal

During the 1970s, studies by legal anthropologists (see Abel, 1982a, 1982b) highlighted the historical and social specificity of modes of legality, and the plurality of law. In each society, law was seen to operate on various levels and to incorporate diverse, sometimes conflicting procedures. Studies observed that formal justice structures were not the only means of realizing justice, and that 'bourgeois legality' might actually hamper the attainment of justice (Matthews, 1988, pp. 2-3). It became evident that informal dispute processes had been utilised transculturally and transhistorically as a means of tempering, humanising, appending or opposing formal law and legality.

Aspects of these anthropological and comparative studies attracted the attention and support of both conservatives and radicals. Emphasis on the supremacy and effectiveness of traditional values appealed to the conservatives. In contrast, evidence of post revolutionary comrades' courts and people's courts encouraged radicals to envisage increasingly collective, democratic and egalitarian modes of dispute resolution, and the potential for building 'prefigurative reforms' within and under the structures of advanced capitalism (Matthews, 1988, p. 3).

Additional support for informal justice stemmed from both the so-termed crisis of legality, and from skepticism surrounding the legitimacy of formal legal procedures. The crises of legitimation and effectiveness were accelerated by the overapplication of law and overloading of the courts, which

critical theorists regarded as an attempt to deal with broader socio-economic crises. Left critics increasingly conceptualized formal structures as immanently class-based, as systematically promoting the interests of the wealthy while oppressing the poor. Shortcomings of the formal legal process included inequality before the law, limited access to legal structures and representation, the prevalence of an adversarial system of adjudication producing 'winners' or 'losers,' the alienation of participants, and the ineffectiveness of sentencing (Matthews, 1988, p. 4).

Proponents of informal justice, in response, stressed the significance of increased participation, access to law, and the minimization of stigmatization and coercion. In sum, they contended that participants should be able to play an active role in the resolution of their own disputes (Christie, 1982). Moreover, the courts should devote attention to public concerns and be accountable to the community. Cohen (1988, p. 203) itemizes the 'destructuring impulse' permeating the terminology of the abolitionists in Western liberal democracies as manifested in: ". . . deinstitutionalization, decarceration, deprofessionalization, delegalization, demedicalization, antipsychiatry, decentralization, deformalization, decriminalization, and so on."

A central legal reform movement in the 1960s and 1970s (see Cohen, 1988) focused on extending access to justice, by striving for financial affordability as well as social justice. Informal justice apparatuses seemed viable vehicles for realizing these goals. Moreover, they appeared to have the

potential for reducing bureaucratic barriers and promoting participatory justice less dependent upon professionals and legal discourse. In addition, the informal and inclusionary methods of community-based structures were perceived by proponents as a means of diminishing stigmatization and preventing minor offenders from getting caught up in the web of the criminal justice system. Informalism's potential for negotiation, mediation, conciliation, resolution of conflicts, restoration of social relations, and encouragement of compliance and cohesion was contrasted with the seemingly coercive and punitive aspects of the formal legal system, its restricted image of the purpose for adjudication, and its preoccupation with the determination of guilt (Matthews, 1988, pp. 4-6).

1.3.2 Criticism of the practice

The end of the 1970s was, however, characterized by increased disillusionment with informal justice. The advocates of informalism were accused of being over-idealistic and unwittingly unleashing a barrage of unintended consequences, particularly by playing into the hands of conservatism. The causal relationship between the crises of legality and the emergence of informalism was called into question. Critics suggested that the crises were in fact accentuated by conservatives to substantiate informalism. The applicability of anthropological studies to urban industrial capitalism was also contested (Matthews, 1988, pp. 8-9). The recreation of precapitalist informal legal systems within heterogeneous Western capitalist contexts was increasingly deemed as impossible (Cohen, 1988, p. 208). The wholesale

transplantation of 'third world' informalism was also frowned upon. Santos (1982), for example, denied that informalism implied a revival of traditional values. He argued that social processes which have been integrated and rationalized by the state cannot re-appear in their traditional form.

While it was contended that informal justice would reduce the magnitude of the formal legal apparatus, the formal system continued to expand during the 1970s. Specific movements towards 'community' and 'diversion' actually resulted in increased intervention in certain areas, as well as an increase in the number of people drawn into the criminal justice system (Cohen, 1979, p. 347). Abel (1986) identifies this extension of the state's network of social control as the key function of informalism. He shows that the number of legal practitioners in the United States more than doubled from 1950 to 1980. In addition, a new category of paraprofessionals emerged, and the network of legal control increased in size and formality. The introduction of seemingly uncoercive procedures thus enabled the state to acquire control over new areas.

The ideological role of the 'community' concept was also opened to scrutiny. 'Community justice' was evidently introduced during the period when many working-class communities were becoming further fragmented. Rather than being 'consensual' and 'harmonious,' communities were frequently torn by conflict. 'Community courts' thus stood a chance of either heightening or diminishing the conflict (Matthews, 1988, p. 10). While acknowledging that popular politics may emanate and flourish at a

community level, Menzies (in press) criticizes the realists' pre-occupation with 'community' policing and 'community' justice. He argues instead for 'the community' to be considered within its overall historical and dialectical context. As he explains, "The state, the political economy, the law, ideological and cultural formations, cannot be so conveniently bracketed off" (Menzies, in press). Moreover, focus on the community as an isolated entity increases the potential for both internal excesses and co-option and destruction by the state. The strategic application of the concept of 'community,' and the annihilation of a sense of community in the South African context, are addressed in Appendix C.

As with formal courts, informal structures can be neutral in appearance, yet perpetuate inequalities and further the interests of the powerful. The creation of an impression that bureaucrats cared about citizens' rights and problems contributed to the relegitimation of the judicial and state apparatus. Simultaneously, the development of alternate structures often led to the abandonment of law as a site of struggle and deflected attention from the shortcomings of the formal apparatus. Informalism provided justification for the claim that these pitfalls were the result of 'junk' case overload. Moreover, instead of challenging the formal system, informal structures tended to emulate the depoliticized and individualized principles of the formal legal structure (Matthews, 1988, pp. 12-14).

Abel (1981, p. 262) consequently maintains that both formal and informal legal institutions predominantly render conflict conservative rather

than liberating. In order to be liberating, a justice system would need to organise people, make them aware of the universality of their personal problems and the power attainable from collective action (Abel, 1981, p. 251). While informalism creates the impression of increasing self-determination and competence, the assumption of personal liability for problems--stimulated by broader processes of domination and exploitation--alleviates the responsibility of the state (Matthews, 1988, pp.13-14). Abel (1981, pp. 247-248) raises additional questions: If formal structures are unable to achieve formal justice, why should informal apparatuses be capable of attaining formal justice within an unjust society? Also, how is it feasible for legal institutions to be equally accessible to all within an unequal society?

While the 'community' was allegedly their primary source of support, the Neighbourhood Justice Centres[3] mostly received referrals and authority from the formal justice system (Matthews, 1988, p. 15). In addition, people who previously sought solutions to their problems informally constituted a new category of legal clients. Ironically, informal justice thus served to formalize the informal. The majority of cases reputedly encompassed intra-class domestic and neighbourhood conflicts. Participants were usually workers, the poor, ethnic minorities and women (Abel, 1986). As Matthews (1988, p. 14) observes, state support was based on the assumption that the

[3] Technically, these are three experimental projects established by the American Law Enforcement Assistance Administration in 1978. Generally, they denote a wide range of non-judicial, state-funded or organised neighbourhood dispute forums and processes, including mediation and arbitration, that strive to resolve interpersonal civil or criminal disputes (Hofrichter, 1987, xxxii, n.3).

informal structures would pacify the impoverished and powerless, and diminish the potential for mass resistance.

The existence of informal structures enabled the formal apparatus to focus on cases which were more severe, and usually more lucrative. Abel (1981, pp. 246-247) ponders the beneficiaries of the alleged reduced cost of informal alternatives to state courts. He raises the following questions: Does the existence of informal courts diminish state expenditure? The existence of informal courts implies that the caseload of formal courts will be reduced, resulting in less delay. Therefore, are the users of the formal courts the ones who may derive benefit? Informal courts do not have as much coercive power, due process assurances and safeguards as do the formal courts. Are these alternatives cheaper because they are less beneficial to participants? Moreover, the effectiveness of the informal institutions was called into question. Many cases were unresolved. This was ascribed to a low level of co-operation on the part of respondents, which in turn was attributed largely to the limited coercive power and constraints exercised by the informal institutions. Some people were reluctant to participate in these structures, while others took part on the assumption that participation might minimize their sentence (Matthews, 1988, pp. 11-12).

1.3.3 Appraisal

Reflecting on the criticisms outlined above, the third perspective re-evaluates the ideal and practice of informalism. Matthews (1988, pp. 15-17)

identifies several limitations of the 'conspiratorial' perspective. Since critics have tended to emphasize the integrative and controlling aspects of law, Matthews maintains that their interpretation is functionalist; they neglect to acknowledge the double-edged nature of law. He consequently proposes a more elaborate political analysis of factors motivating informalism, which include in particular the desires of the populace. Furthermore, Matthews criticizes the rigid reliance on dichotomies--for example, formal/informal; conservative/liberating; legalization/delegalization--for obscuring the complex and paradoxical nature of law. Santos (1987, p. 122) also stresses the ever-changing relations between various legal systems. He consequently prefers the terms 'interlaw' and 'interlegality' as opposed to 'law' and 'legality.'

Cohen (1988, p. 204) agrees that 'the destructuring promise' was not realized and in fact contributed to ". . . insidious changes in the opposite direction." However, Cohen (1988, pp. 206-207) criticizes several of the papers in Abel (1982) for oversimplifying present reforms as "sheer manipulation and state conspiracy." In Cohen's (1988, p. 255) words,

> The simple advocates of community and decentralization have been wrong to imagine that their projects can be kept apart from the wider power structure, while the demystifiers and critics are wrong to think that these projects will be totally contaminated by the outside world and can never offer glimpses of a different social order.

Cohen (1988, p. 204) advocates a review of the 'destructuring ideologies,' instead of an endorsement of the punitive, monopolistic justice system. He

suggests that Thompson's injection of optimism should be extended to informalism and alludes to the following possibilities:

> The reform movements toward informalism and community justice evoke powerful symbols of participation, self-government, and real community. There are 'utopian transcendental,' even 'potentially liberating' elements here, even if they are imprisoned and distorted in the overall state structure of social control (Cohen, 1988, pp. 206-207).

Cohen (1988, p. 207) notes that only in the context of the 'socialist-type transformations' described in Portugal, Chile and Mozambique was the liberatory potential of informalism and community justice realized.

According to Matthews (1988, pp. 22-23), critics overlook the advantages of informal justice. While certain studies highlight the ineffectiveness of informal apparatuses, others show that the majority of participants express satisfaction with proceedings, and often benefit from direct involvement. Moreover, Matthews rejects comparisons drawn between formal and informal courts with respect to cost, effectiveness and speed. He maintains that most of the cases pursued by the Neighbourhood Justice Centres would not have been eligible for formal court hearings. Consequently he suggests that such comparisons be drawn between informal structures and people's attempts to resolve conflicts themselves.

Matthews (1988, pp. 18-21) thus calls for a thorough analysis of power and social control to enhance our understanding of the ramifications of informal justice. He uses Foucault's conception of power, as opposed to the

Gramscian concept of hegemony used by several critics, to examine the consent-based relationship between rulers and subordinates. Essentially, Foucault stresses the productive as opposed to the repressive nature of power in modern society. He views power as multidimensional rather than monolithic, and claims that power cannot be reduced to the interests of a specific group or class. Based on Foucault's analysis, Matthews (1988, p. 19) maintains that informalism signifies the development of an increasingly normative, inclusive and decentralized method of control, congruent with changes in the distribution and organisation of power. The new form of power does not rest entirely in the hands of either the 'state' or the 'civil society'; it is part of the 'social' realm and provides a locus for the expression and protection of the participant's individuality. Furthermore, the new power base serves as a site of struggle over ability, knowledge and privilege.

This section draws attention to a multitude of contentions and dilemmas surrounding informal justice per se. However, the First World setting of much sociological writing on the subject of informalism limits applicability to the South African context. The following section concentrates on justice emanating from the revolutionary setting, and thus has more direct bearing on people's justice in a changing South Africa.

1.4 Justice Born in Struggle

Allison (1987, pp. 34-38) studies adjudicative structures initiated during the course of political struggle. He notes that a liberation movement may

assume judicial functions if the official justice system lacks legitimacy. Furthermore, and drawing from Gramsci's notion of hegemony, a revolutionary movement may strategically create institutions with counterhegemonic and prefigurative potential. Judicial initiatives may also boost revolutionary confidence and impede counterrevolutionary activity. Abel (1982, Vol. 2, p. 12) highlights 'a sense of collective empowerment' as an important contribution that informal justice can make to revolutionary struggle.

1.4.1 Conceptions of popular justice, socialist legality, collective justice, revolutionary justice, and distributive justice

I cited Suttner's (1986a, p. 6) definition of popular justice in Subsection 2.1.2 since it encapsulates key tenets of the ideal of people's justice proposed in this thesis. I will now turn to related conceptions suggested by other writers.

Based on the definition by Mozambican revolutionaries, Sachs (1984, p. 99) conceptualizes popular justice as justice that is popular in form, functioning, and substance. A popular justice system would thus incorporate accessible language, active community participation, and judges emanating from the ranks of the people. Isaacman and Isaacman (1982, p. 282) regard popular justice in Mozambique as a central ingredient to the class struggle based on its promotion of community participation to further the interests of workers and peasants and secure their involvement in the socialist

revolution. Instead of adopting coercive methods, Mozambican popular justice initiatives have focused on rehabilitation via political education and collective labour (Isaacman and Isaacman, 1982, p. 292). Sachs (1985, p. 139) cautions against reliance upon the spontaneous expression of the people, which he brands as populism. He emphasizes the significance of building a relationship with the people as a means of encouraging the development of a new consciousness.

In a 1972 debate between Foucault and two Maoists (Foucault, 1980, pp. 1-36), the term 'popular justice' is used to refer specifically to acts performed by the masses to bring class enemies to justice. The interpretation of the early phase of popular justice coincides with my concept of populist justice pursued by the people. Taking the proletarian Chinese Revolution as their point of reference, the Maoists regard popular justice as a means of initiating the broader struggles against injustice and the judicial system (Foucault, 1980, p. 24). 'Excesses' are considered advantageous to the initial stage of the ideological revolution since they serve to unify and prepare people emotionally for the revolution.

The Maoists maintain that once the masses have been ideologically revolutionized, 'regulations' should be introduced. They propose people's courts monitored by a revolutionary state apparatus, namely the Red Army, as a suitable forum (Foucault, 1980, p. 32). The Red Army serves as a disciplining, unifying force, resolving the contradictions among the masses and acting as a neutral force between the masses and their oppressors. With

general interests at heart, the Red Army could determine objective sentencing criteria. This would deter the perpetuation of 'egotistical revenge' against egotistical oppressive apparatuses, and maintain the revolution (Foucault, 1980, pp. 2-3,10,13)

Hipkin (1985, p. 129) vehemently distinguishes between popular justice and socialist legality. Hipkin questions whether popular justice is progressive or repressive. He draws attention to the reactionary nature of popular justice, and maintains that the history of popular justice is "stained with the blood of repression." Furthermore, he describes popular justice as sometimes "nasty, brutish and short on 'progressive principles' " (Hipkin, 1985, p. 118).

Popular justice is conceptualized by Hipkin (1985, p. 130) in the following four ways:

> *as a foundation for class-based mass participation in the formal legal process
> *as part of a reactionary attempt to impede a system of socialist legality
> *as community action, for example citizen's committees, anti-rape and anti-arson patrols
> *as terrorism and vigilantism, confronting both capitalist and socialist societies

In his condemnation of popular justice, Hipkin (1985) neglects to devote the equivalent amount of attention to socio-historical and contextual factors as he does in his analysis of socialist legality.

Hipkin (1985, pp. 118-123) demonstrates that socialist legality is not a universal category, but is historically and contextually specific. He describes socialist legality as the outcome of the relationship between a specific legal system and revolutionary strategy. Socialist legality may be perceived as the product of a class struggle, anti-colonial struggle or national liberation struggle. In accordance with Sachs' formulation, socialist legality may also constitute the law practiced in 'liberated areas' during the course of the struggle, as exemplified in Cuba, China and Zimbabwe. Santos (1979) and Henry (1983) have both demonstrated that the granting or proactive securing of legal power contributes to people's political consciousness (Hipkin, 1985, p. 122). Furthermore, Thompson and others regard socialist legality as part of the struggle to achieve democratic legal forms in a capitalist system. In essence, socialist legality must be an integral part of the struggle and the maintenance of socialism. Hipkin contends that racism and sexism pose a most significant challenge to left legality. He regards the status of people of colour and women under socialism as "the acid-test for socialist legality" (Hipkin, 1985, p. 123).

In contrast to Hipkin, Sachs (1985) argues that in Mozambique the term 'popular justice' elicits positive connotations whereas it is 'socialist legality' that has negative associations. Socialist legality refers to laws and restrictions introduced by the post revolutionary government in response to emergent problems. The new popular tribunals are regarded as archetypes of popular justice, and Sachs (1985, p. 146) ranks them amongst the most outstanding gains of the revolution.

Interestingly, Foucault (1980, pp. 28-29) is emphatically opposed to the use of people's courts as a vehicle for popular justice. He agrees with the Maoists that retribution cannot be limited to thoughtless, immediate, spontaneous acts which are separate from the broader struggle. Using the French Revolution as his key point of reference, Foucault maintains, however, that the notion of court is a vestige of the bourgeois system antithetical to popular justice. As an essential mechanism of the bourgeois judicial state apparatus, the court serves to initiate and increase contradictions among the masses, predominantly between the proletariat and the 'non-proletarianised' (Foucault, 1980, pp. 35-36). Historically, the court has restricted and controlled popular justice by encapsulating it within apparatuses which resemble state institutions. Foucault (1980, pp. 1-2) regards the strict delineations between true and false, guilty and innocent, and just and unjust as oppositional to people's justice:

> There are two forms which must not under any circumstances be adopted by this [the new] revolutionary apparatus. Just as there must be no bureaucracy in it, so there must be no court in it. The court is the bureaucracy of the law. If you bureaucratise popular justice then you give it the form of a court. . . . this idea that there can be people who are neutral in relation to the two parties, that they can make judgements about them on the basis of ideas of justice which have absolute validity, and that their decisions must be acted upon, I believe that all this is very far removed from and quite foreign to the very idea of popular justice (Foucault, 1980, pp. 27, 8).

Foucault (1980, pp. 8-9) contends that when the masses identify, punish or re-educate an enemy, they should draw upon their personal experience of

oppression rather than an abstract universal conception of justice reinforced by a state institution. Instead of determining sentencing criteria, a revolutionary state apparatus should be involved in educating and training people politically, so that they themselves can decide sentences (Foucault, 1980, p. 13).

Santos (1979) regards popular justice as a significant part of the struggle for socialist legality, and his analysis is thus integrative. Santos (1979, pp. 156-160) locates popular justice in the concept of 'dual power' developed by Lenin and Trotsky. He interprets 'dual power' as the presence of a ". . . plurality of centres of political power arising from contradictions between competing classes" (Santos, 1979, p. 156). Santos addresses the revolutionary conflict which may ensue, and describes confrontation with state power as the ultimate aim of 'dual power' initiatives. Hipkin (1985, p. 129) credits Santos's study of the Portuguese revolution for demonstrating the significance of incorporating all forms of state apparatus in a revolutionary context in order to validate revolutionary justice. Hipkin also finds merit in Santos's finding that popular justice is inclined to transcend the content but not the form of bourgeois law.

In her study of informalism in advanced capitalist societies, Cain (1988) adopts a working-class perspective. Cain (1988, pp. 59-60) describes the goals of her ideal of informal justice, namely collective justice, as the maintenance of internal discipline and the furtherance and defence of the class struggle. She identifies collective justice as a significant source of a prefigurative model.

There are two additional types of justice relevant to this thesis, namely revolutionary justice and distributive justice. Principles of the South African Freedom Charter of 1955 (see Appendix E) call for revolutionary and distributive justice. Hipkin (1985, p. 126) defines revolutionary justice as "a non-codified system geared to the practical, political and ideological requirements of a revolutionary situation." In the South African context the term could imply the attainment of liberation from the oppressive and repressive apartheid regime. Any strategies and tactics implemented to advance the struggle could thus be regarded as vehicles of revolutionary justice. South African society is marked by disparity, with power and the wealth of the land resting in the hands of the white minority. The realization of distributive justice thus necessitates redistribution; an equitable sharing of power, land, and other resources; and equal access to justice, education and opportunities. It follows that these goals are far beyond the realm of law in itself.

1.4.2 Potential hazards

As outlined above, Sachs (1985) condemns dependence upon the spontaneous expression of people, which he rightfully distinguishes as populism. Hipkin (1985) on the other hand incorporates populist tendencies in his conception of popular justice, which he highlights as intrinsic and reactionary. Although Allison (1987, p. 38) acknowledges that dispute-resolution is functional to power, he too has reservations about judicial

initiatives born during the course of struggle. As discussed below, he is particularly wary of the situation where intra-class conflicts are prevalent, and where there is tension between expediency and prefiguration.

People's courts may be used as a vehicle for furthering class interests. To illustrate the complexities of competitive factions, Allison (1987, pp. 38-43) refers to the situation in several South African townships where there are tribal divisions, a division between the youth and older residents, divisions between the employed and the unemployed, between new and old residents, and between those possessing and not possessing residence rights. Today it is pertinent to add to Allison's list the divisions between people with different political affiliations (see Appendix B): notably, those between conservatives and progressives, between ANC and PAC supporters, between the ANC and Inkatha members, and most significantly between revolutionary and counterrevolutionary forces. Intra-class conflict and other divisions are either initiated or manipulated by state policies, and may jeopardize the potential development of 'dual power' (Allison, 1987, pp. 40-41). In a similar vein, Cohen (1988, p. 211) is wary about the significance of informal justice in the revolutionary struggle since ". . . the state can co-opt, ignore, or undermine this challenge to its authority."

In addition, Allison (1987, pp. 43-52) expresses concern regarding the tension between the needs and realities of revolution (expediency) and the demand for prefiguration. While he does not essentially condemn revolutionary expediency, Allison (1987, p. 45) maintains that it

misrepresents prefigurative practice. He reiterates Munck's conclusion (1984) that war conditions are generally conducive to summary justice. Particularly in circumstances of intense conflict, it is in the interests of the struggle to deal swiftly with suspected informers, sell-outs, counterrevolutionaries, collaborators and others impeding the change process. The potential need for secrecy may diminish accountability and increase the possibility of individuals or factions pursuing personal interests in the name of the struggle. Although violent means of struggle may be condoned as necessary, it is likely that a post-liberation society would condemn violence as a vehicle for conflict resolution. Still it must be recognised that response patterns do not automatically follow contextual changes. The liberation movement's intolerance of internal criticism and external opposition may set an unwanted precedent, and stifle potential for constructive criticism and debate in the future. This exemplifies the conflict between acceptable means and ends. The attempt to inculcate liberationist ideals, values and behaviours may be negatively affected by the need to respond to violators of revolutionary goals. In response to Allison's thesis, it may be argued that expediency and prefiguration are not essentially dichotomous and may in fact be integrated.

The susceptibility of the concept of popular justice to manipulation (for any purpose) is demonstrated in a study by Ietswaart (1982, pp. 147-179). Ietswaart (1982, pp. 147-179) compares and contrasts the discourse of summary justice with that of both formal and popular justice. Her study was based on Buenos Aires newspaper reports of official communiques regarding conflicts between state armed forces and Marxist 'subversives' in Argentina in 1977.

Ietswaart suggests that the texts integrate components of formal justice with an 'aura' of natural justice. Moreover, several features were reminiscent of popular justice discourse. For example, perpetual reference was made to the presence of 'the public' or 'the people.' Furthermore, there was a propensity for defining 'problems' instead of offences, and for incorporating environmental factors. According to Ietswaart, the texts represent acts of summary justice and 'caricature' the discourse of both legal and popular justice. Popular justice terminology was employed to describe the annihilation of political opposition. Ietswaart (1982, p. 160-161) defines summary justice as a totalitarian strategy designed to deal with 'political enemy number one.' Summary justice defines and treats the individual on the basis of a single characteristic: in the Argentinian instance, 'subversiveness.' In terms of the concepts that I have adopted in this thesis, the Argentinian officials employed populist tactics disguised by popular justice terminology to counteract revolutionary justice which they described as populist acts of subversion.

Ietswaart (1982, p. 167) views these texts as an integral part of a broader political discourse whose key objective is legitimation. She contends that the post-1976 authoritarian Argentinian regime stressed popular involvement in its political discourse, including reports of the ongoing struggle against subversives, as a means of acquiring legitimation and popular support. In addition, the discourse is considered congruent with official Argentinian political rhetoric, which has populist inclinations (Ietswaart, 1982, p. 170). As a result of Ietswaart's study, Abel (1982, Vol. 2, p. 2) cautions that ". . . the

boundary separating both liberal and socialist notions of popular justice from the fascist reality of summary justice is uncomfortably permeable." The need to delineate analytically between the discourse of justice and justice per se is also emphasized.

Abel (1982, Vol. 2, p. 10) describes the development of popular justice and attempts to eradicate colonialism and capitalism in post-independent Mozambique as ". . . triumphant but threatened by the same forces, especially its racist southern neighbor." Mozambican efforts to introduce and sustain progressive changes have obviously been jeopardized by adversaries. Despite the signing of the Kommati Accord of mutual non-aggression by South Africa's former president P.W. Botha and Mozambique's late president Samora Machel, South African forces and their Renamo allies waged countless destabilisation manoeuvres against the Frelimo government. Nicaragua and Cuba are additional examples of targets of imperialist attack. A powerful potential hazard, namely counterinsurgency, is a continual threat. Revolutionary changes are always met by counterrevolutionary efforts. The maintenance of popular justice initiatives is thus a great challenge.

1.4.3 Evaluation, and tension-reducing mechanisms

In reviewing potential problems and negative conceptions of popular justice, striking questions come to mind: Is popular justice predominantly an ideal? Are populist tendencies intrinsic to justice born in struggle? Fortunately positive experiences of popular justice like the Mozambican

example described by Sachs (1984, 1985), and Cain's (1988) perspective, inject a sense of optimism. Cain (1988, p. 51) attributes negative attitudes towards informalism to the inadequate theoretical distinction between variations of informal justice. Furthermore, informal apparatuses are not always evaluated within the framework of a broader structural theory (Cain, 1988, p. 54). Cain (1988, p. 55) consequently admires the studies of Mathiesen and Santos for their conceptualization of informal structures in relation to theories of the social structure at large, and for their distinction between positive and negative types of informalism. She elects to follow the example of Mathiesen and Santos by regarding a theoretical framework and distinctions between forms of justice as pivotal to analysis. In accordance with her working-class stance, Cain formulates the ideal of collective justice and compares and contrasts embodied features with professionalized (state) justice, and with the characteristics of other less appealing manifestations of informal justice.

In response to his concerns described in 1.4.2, Allison (1987, pp. 52-60) suggests possible ways of diminishing the tension between expediency and prefiguration. Initially, he proposes an 'enlightened attitude' towards expediency. The liberation movement should implicitly encourage the particular attributes and actions which are deemed desirable for the future. Allison argues that prefiguration per se enhances popular support, and thus constitutes a demand for expediency. This contention coincides with Gramsci's motivation for the development of prefigurative institutions as a vehicle for pursuing counterhegemony. Allison proposes Ungar's ideal of 'inspired participation' as an additional tension-reducing mechanism. He

stresses the ethical significance and validity of assuming responsibility for consequences and becoming actively involved in the struggle. In conclusion, Allison identifies the transformation of society as the phenomenon most likely to reduce the tension between expediency and prefiguration.

1.5 Post-Liberation Legal Changes

Should the entire legal system of an oppressive regime be abandoned once liberation is achieved? As noted earlier, Pashukanis (1978) predicted that the state and law would 'wither away' with the advent of socialism. Hirst (1980) on the other hand has been concerned with the form and organisation of law under socialism. He advocates that a pluralist model of democratic checks and balances be incorporated into a socialist system.

In his discussion of Mozambique, Sachs (1979, pp. 31-36) explores why much of the law was not changed once the country gained independence. Sachs (1979, p. 35) concludes that the old legal doctrine provided a framework and some consistency at a time of accelerated social change in Mozambique, when subjectivity and arbitrariness could have been rife. He maintains that new codes of criminal, family, property, and commercial law could not be compiled prior to social transformation, nor could they be dictated by the experience of other revolutionary countries. According to Isaacman and Isaacman (1982, pp. 281-323), the legal system introduced in post-independence Mozambique has been shaped by the experiences of the popular justice initiatives in the zones liberated by Frelimo during the anti-colonialist

struggle. Marxist-Leninist principles as reflected in the Mozambican reality are integrally influential. The process and tensions involved in implementing and formalizing popular justice in both the liberated zones and post-independence era are described as ". . . a dialectic between experimentation and formalization, practice and theory, that ensures both popular input and adherence to revolutionary principles" (Isaacman and Isaacman, 1982, p. 282).

The form, content and enforcement of law should thus be culture and history specific and congruent with revolutionary change (Sachs, 1979, p. 35). With reference to the Mozambican situation, Sachs (1984, pp. 103-104) is adamant that the essential questions are not 'African' versus 'Western,' or 'customary' versus 'modern.' Rather the challenge is how to develop new laws that are congruent with the needs, interests and personality of the people; how to involve people in the legislative process; and how to secure people's participation in the implementation and control of the new law. Certain traditional laws would not, for example, be discarded for being African or customary, but rather for their feudal disposition. Customary practices obstructing the liberation of women would be rejected, whereas traditions consistent with the values of popular democracy would be retained (Isaacman and Isaacman, 1982, p. 297). Similarly, colonial legal codes would not be abandoned on the sole basis of their external imposition, but because of the incompatibility of their language, content and assumptions with the needs of the Mozambican people (Sachs, 1984, pp. 103-104).

It is antithetical to the principles of people's justice to extrapolate the experience of other countries to South Africa. In essence, revolutionary change emanates from the people and cannot be prescribed. However, the central themes and debates portrayed in this chapter offer insights and guidelines. Chapter 2 focusses specifically on systems of justice in contemporary South Africa.

Chapter 2

Systems of Justice in Revolutionary South Africa

A review of South Africa's state and community-based justice systems is a necessary pre-requisite to the analysis of the fieldwork data. Participants presented their images of people's justice in relation to these systems. Table 2.1 (pp. 55-57) prefaces this chapter, providing a frame of reference for the thesis. The table incorporates characteristics of the following four categories of justice intrinsic to South Africa: state justice, customary law, popular justice, and populist justice. Two manifestations of the latter are distinguished, namely, populist justice pursued by the state, and that administered by the populace.

The dialectical relationship between state justice and popular justice is recognized. The apartheid system and its justice institutions have inspired, influenced and reacted to the development of people's justice. Since a detailed historical exposition of state-based justice is beyond the scope of the study, select features of the system are outlined in Section 2.2. Consideration is given to populist practices perpetrated by state agents. Factors motivating the development of community-based justice structures are identified throughout.

Indigenous African law predates colonialism and in varying degrees continues to pervade the lives of black South Africans. Considering its form, content, and jurisdiction, indigenous law may be conceptualized as people's justice. Furthermore, the underlying philosophy, objectives, and *modus operandi* of the township courts, including the people's courts, resemble African legal traditions. The key principles of African customary law are outlined in Section 2.3. The 'dual system' imposed on blacks from 1927 to 1986 (see Bapela, 1987) is described. The government's attempts to manipulate tribal identity and African customary law to the benefit of apartheid are highlighted. A review of perspectives on the current status of customary law concludes the section.

Informal policing and dispute settlement have occurred within black South African townships and squatter areas since their inception (Scharf, 1989b; Burman and Scharf, 1990). In Section 2.4, the experience of the community-based justice structures that existed in the townships in the mid-1980s is traced and located within an historical and political framework. Attention is devoted to these structures since most previous related South African studies equate people's justice with people's courts. Information is drawn from the studies of Hund and Kotu-Rammopo (1983), Bapela (1987), Van Niekerk (1988), Seekings (1989), Scharf (1989b), Scharf and Ngcokoto (1990), Burman and Scharf (1990), and Moses (1990). Examples are consequently cited from the townships in the Pretoria-Witwatersrand-Vaal (PWV) region, notably Mamelodi, Alexandra and Soweto; and Cape Town and Oudtshoorn in the Cape Province. The historical antecedents of the

people's courts, the *makgotla*, are described at the outset of the section, and the state's reaction to the courts is portrayed at the close. Acts of populism committed by the people are noted, and distinguished from popular justice.

2.1 A Typology of Justice

The compilation of Table 2.1 was inspired by Cain's (1988) typology of justice. In particular, I was impressed by Cain's consideration of informal justice on its own merit, and her distinction between positively and negatively perceived types of informal justice. Whereas Cain's data pertain to advanced capitalist society and were procured from several studies, this categorization relates specifically to revolutionary South Africa.

I have included state justice (which parallels Cain's notion of professionalized justice), but have tried to avoid conceptualizing other forms of justice solely in comparison thereto. Listing the special features of each type of justice was one way of describing each justice on its own terms. Images of people's justice portrayed by the South African state and state-controlled media have tended to blur the distinctions between popular justice and populist justice. In contrast, and analogous with Cain, I have differentiated between these latter two manifestations. Popular justice resembles Cain's collective justice, in that it is presented as the ideal version of informal justice. Considering its strong political component and emphasis on class struggle, collective justice could potentially be located on the continuum between my interpretations of popular and revolutionary justice. Street-based

populism on the other hand pertains to reactionary left-wing efforts to repress upholders of apartheid. Parallel attempts by right-wing community members to crush anti-apartheid activism (for example, the random shooting of black people) are acknowledged. These are not, however, included in Table 2.1. Moreover, populism is not restricted to the domain of 'the people.' Acts of populism have clandestinely been perpetrated by state security apparatuses to suppress anti-apartheid activity.

I begin with an overview of Table 2.1, and reference will be made to the typology throughout the remainder of the chapter. The salient features of each form of justice are listed in Table 2.1 alongside 11 headings. The table is regarded as an heuristic framework for the thesis. It is, however, important to note the limits of rigid delineations and simplified characterizations. Furthermore, the South African struggle defines and continually redefines these distinctions, and there is a dynamic relationship between the five co-existing types of justice.

At the outset, the table describes the source, internal structure, and nature of the law applied in each form of justice. Whereas state justice emanates from national legislation, customary law originates in the traditional tribal system. State-linked populist justice is strategically contrived by the security network, and popular justice is planned by community organisations or representatives. Acts of populism pursued by community members are either instinctive or reactive. The state justice system, state apparatuses engaging in populist activities, and the traditional African legal

system are all hierarchically structured. Forums of informal justice operate democratically, whereas street-level populism has no particular format. Only the law practised by state justice is statutory. Indigenous law is displayed in custom, and the law implemented via popular justice is shaped by the community. The law exercised by both types of populist justice is situationally determined by those assuming adjudicative positions. While street-level populist law tends to be impulsive, that initiated by the state is meticulously calculated.

Distinctive qualities of each type of justice summarized in Table 2.1 are elaborated in subsequent sections of this chapter, and inform the substantive chapters to follow. The table indicates the beneficiaries and bodies to whom the different systems are accountable. Professional participants in the state justice system answer to their colleagues, and ultimately to the regime whose interests they serve. Perpetrators of state-connected populist justice are accountable to the state security apparatus, also in support of the status quo. The customary legal system is accountable to the tribal hierarchy and functions in the interests of the tribe. Practitioners of popular justice are answerable to their community, often via community organisations. They strive to benefit the community and promote the struggle. There is no evidence to substantiate the claims of accountability to 'the people' made by the executors of street-level populism. They may act in favour of their political affiliates, fellow gang members or personal interests.

The means of access to each form of justice, including both facilitating and impeding factors, are stipulated in Table 2.1 and detailed below. Popular justice is far more accessible to the public at large than is state justice. Customary law is an accepted way of life for blacks in rural areas, and present but much less focal in the cities. Both levels of populist justice are imposed rather than chosen.

The identifying characteristics of those possessing the power to judge are delineated in Table 2.1 under the subheadings of origin, status, class, race, and gender. The officials of the state justice system are employed in the civil service. Agents of state-linked populist justice are employees of the state security network. In contrast, the adjudicators of popular justice are volunteers in community organisations or individuals elected by the community. The perpetrators of street-level populist justice are self-appointed and have identified political enemies. Alternatively, they are affiliated to gangs. The majority of adjudicators allied with the two forms of state justice are ruling class whites, whereas those involved in the three community-based types of justice are subordinate class blacks. In addition, a number of blacks have been co-opted into the state security network, and there is some white support for popular justice endeavours. The adjudicators in all these justice systems are predominantly male. Although popular justice embraces the principles of non-racism and non-sexism, administrators are black and practically all male. The fact that forums of popular justice have been located in the black townships explains the racial exclusivity. The gender bias is reflective of the patriarchal nature of the society.

TABLE 2.1: A TYPOLOGY OF JUSTICE IN REVOLUTIONARY SOUTH AFRICA

Characteristics	STATE JUSTICE	POPULIST JUSTICE: STATE	CUSTOMARY LAW	POPULAR JUSTICE	POPULIST JUSTICE: STREET
ORIGIN	prescribed by national legislation	contrived by state security establishment	rooted in traditional tribal system	strategically created by community organisations or representatives	develops instinctively or reactively, usually in the locality
STRUCTURE	hierarchical - ranging from Magistrates' Courts to Supreme Courts to the Appeal Court	hierarchical; embodied in state security network	hierarchical - ranging from Family Courts to Ward Courts to Chief's Courts to the Paramount Chief's Court	non-hierarchical; internally democratic	fluid
NATURE OF LAW	statutory; circumscribed; primarily coercive and repressive; protective elements	populist; situationally determined by adjudicators; discretionary; calculated; coercive	non-statutory; displayed in custom; previous judgements sometimes serve as precedents	popular; dependent upon community norms, values, input and decision-making	populist; situationally determined by adjudicators; discretionary; impulsive; coercive
DISTINGUISH-ING FEATURES	professional; bureaucratic; pretense of judicial independence; heedless of substantive inequality	rigid distinction between in-laws and out-laws; secrecy; repression	traditional; patriarchal	decentralized; participatory; democratic; community bases predominantly correlate with working class status	summary; immediate; emotive
INTERESTS SERVED	regime	regime	tribe	community; liberation struggle	political affiliates; gang; personal
ACCOUNT-ABILITY	co-professionals; regime	state security apparatus	tribal hierarchy; tribe	community organisations; community at large	in principle accountable to 'the people'; in reality minimal or no internal or external accountability

TABLE 2.1: A TYPOLOGY OF JUSTICE IN REVOLUTIONARY SOUTH AFRICA (continued)

Characteristics	STATE JUSTICE	POPULIST JUSTICE: STATE	CUSTOMARY LAW	POPULAR JUSTICE	POPULIST JUSTICE: STREET
ACCESSS-IBILITY	restricted by high cost of legal representation; inadequate legal aid; technical evidentiary and procedural rules; technical discourse; urban concentration; cultural values of white minority	inflicted	the norm in rural areas; operant in attenuated form in urban areas	enhanced by affordability; commonsensi-cal evidentiary rules and procedure; simplicity of language; geographic proximity; congruence with community values	inflicted
ADJUDIC-ATORS					
*ORIGIN	civil service	state security network	tribal hierarchy	community organisations; community	stance contrary to politics of 'clients'; gangs
*STATUS	employees	employees	inherited	volunteers; elected officials	self-appointed
*CLASS	ruling class	ruling class; subordinate class co-optees	subordinate class	subordinate class	subordinate class
*RACE	white	predominantly white; black co-optees	black	black	black
*GENDER	predominantly male	predominantly male	male	male and female	predominantly male
PREVALENT CASES	economic crimes, e.g. housebreak and theft; political violations; land disputes	anti-apartheid activists and organisations; alleged terrorists, subversives and communists	family conflicts, pertaining particularly to customary marriage; land disputes; succession issues; criminal cases, e.g. theft	civil disputes, e.g. family conflicts, inter-neighbour disagreements; criminal cases, e.g. theft, vandalism; violations of mass political campaigns; intra-organisational disciplinary problems	political opponents (including informers, collaborators, state police); identified or suspected enemies; owners of sought-after goods

TABLE 2.1: A TYPOLOGY OF JUSTICE IN REVOLUTIONARY SOUTH AFRICA (continued)

Characteristics	STATE JUSTICE	POPULIST JUSTICE: STATE	CUSTOMARY LAW	POPULAR JUSTICE	POPULIST JUSTICE: STREET
ADJUDICATIVE AND SENTENCING PHILOSOPHY	to determine guilt pertaining to an action; to alienate the offender from society; to punish; to rehabilitate; to protect the 'public'	to retaliate; to frighten, silence, punish, or exterminate opposition; to deter other potential adversaries	to reconcile parties; to restore equilibrium and harmony in the community	to advance the ideals of the struggle; to resolve conflicts; to reconcile; to educate; to rehabilitate; to prevent recurrence; to integrate into the community; to restore social relations; to strengthen social cohesion	to retaliate; to frighten, silence, punish, or exterminate opposition; to deter other potential adversaries; to achieve personal gain
PREVALENT SENTENCES	primarily imprisonment; corporal punishment; fines; community service orders; death	harassment; surveillance; vandalism; detention; kidnapping; psychological and physical torture; shooting; bombing and burning of homes, offices, and motor vehicles (no institutionalized parameters)	reprimand; banishment from or to a designated area; work restrictions; fines - usually in the form of livestock; corporal punishment; death	community service; retribution; corporal punishment; encouragement to join progressive community organisations and the struggle	corporal punishment, ranging from a series of whippings to 'necklacing'[4]; vandalism; bombing and burning of homes, offices, and motor vehicles (no institutionalized parameters)

[4] A motor car tire is placed around the neck of a suspected informer or collaborator. The tire is then filled with petrol and set alight, causing the person to burn to death.

Table 2.1 incorporates the offences, disputes, or categories of people which fall within the jurisdiction of each justice. Cases appearing in the state courts most often pertain to allegations of offences or violations of the laws of the land. Although both the traditional African legal system and vehicles of popular justice address criminal cases, they primarily focus on family and neighbourhood conflicts. Additionally, customary law devotes attention to disputes concerning land and succession. Popular justice, on the other hand, addresses violations of mass political campaigns and conflicts within progressive community organisations. In contrast, populist justice on both state and street levels does not operate in the realm of processing offences or disputes. Related apparatuses or groups focus on people and organisations whom they have categorized as political adversaries, either to the left or to the right. The gang component of street-based populism targets sources of desired goods.

Sentences most frequently imposed are consistent with the adjudicative and sentencing philosophy and objectives of each type of justice. The state-based justice system predominantly segregates and punishes the offender. The conciliatory goals and sentences of popular justice are analogous with those of African customary law. In addition, the sentencing philosophy and practice of popular justice are congruous with liberationist ideals. Both populist justice implemented by the state and that exercised by the populace are directed at intimidation or destruction of political opposition. Acts of populism on the street level are sometimes also carried out for personal gain.

2.2 The State-Based Justice System

This section is a synopsis of the origins and key characteristics of South Africa's state-based justice system. A discussion of apartheid laws and contemporary legal changes is included, followed by a portrayal of the para-military practice of the South African Police and security establishment. Next comes an account of populist activities pursued by agents of the state security apparatus. Thereafter, the hierarchical court system and its inherent inadequacies are outlined. Sentencing tendencies and prison conditions are sketched. Factors contributing towards the formulation of popular justice alternatives are identified in the text and summarised at the close.

2.2.1 Historical roots and distinctive features

South African common law embodies a combination of Roman-Dutch and English law. Roman-Dutch law was introduced in the Cape in 1652 by the Dutch East India Company, and integrates Germanic custom with Roman law. The British occupied the Cape in 1795, and the common law was consequently influenced by English legal doctrine. The court system and criminal procedure are based on the English model (Bindman, 1988, p. 7). The formally non-racial and non-class tenets of Roman-Dutch civil law and South African criminal law mask substantive inequality behind judicial equality, and frequently discriminate against blacks, women, and workers. The law ignores substantive differences in negotiating power, class, race, and economic status (Suttner, 1983, pp. 3-4).

It is problematic for law in South Africa to be proclaimed as a representation of general social interests (Suttner, 1988, p. 85). In relation to white South Africa, the state performs several of the conventional 'universalizing' functions of the bourgeois state: "It [the state] seeks to ensure that the distinct class interests of various segments of the white bloc are submerged in the interests of maintaining the social order as a whole - but under the hegemony of the capitalist class" (Suttner, 1988, p. 86). In accordance with South Africa's racial capitalism, it is, on the other hand, essential for black and white interests and ideals to be portrayed through the state separately, rather than 'in common.' The term 'racial capitalism' reflects the inextricable link between race and class in apartheid South Africa. It is, however, important to note that the term fails to account for the white working class and black middle class. Some progressives consequently prefer to describe apartheid as a 'special type' of colonialism, whereby the white minority dominates and exploits the black majority.

A country's constitution serves as the foundation of its legal system. In terms of South Africa's constitution, residents are not equal. The inequities of the legal system stem from this central flaw (Yacoob, 1988, p. 66). As Omar (1990, p. 22) writes, ". . . in South Africa the law has never been independent, for the constitution has made it a servant of the state . . . whose victims have been black people in general, and the proletarianized and landless black masses in particular."

Boulle (1986, pp. 13-29) applies Nonet and Selznick's (1978) modalities of repressive, autonomous, and responsive law to aspects of the South African legal system. While characteristics of all three modalities are identifiable, Boulle (1986, p. 21) concludes ". . . that ultimately the South African legal system has its centre of gravity in the modality of repressive law." The following phenomena reflect this repressive disposition: the legal system's relationship with apartheid policies and the state's conception of order; the low level of consensus upon which the system is established and operated; limited access and representation; and the system's structural inability to respond to significant crises throughout the country (Boulle, 1986, p. 25).

Law in South Africa does not, however, operate exclusively through coercion. Suttner's (1988, pp. 81-102) analysis of the ideological role of the judiciary in South Africa illustrates that the state benefits from the portrayal of the judiciary as neutral, impartial, and apolitical. In Suttner's (1988, p. 83) perspective, the judiciary is not simply a tool of the ruling class, but ". . . exists in a contradictory unity with other state apparatuses which function to maintain the cohesion of the social formation as a whole." The ideological effects of the judiciary thus contribute towards the legitimization and reproduction of existing social relations. The content of the law, and legal rule articulated as principles, shape and legitimize social relations in South Africa. Inclusively, court proceedings abstract illegal acts and related legal questions from their socio-economic context. The court tries to create the impression of

acting in the interests of 'the public,' 'the community,' or 'society' (Suttner, 1988, pp. 81-102).

2.2.2 Apartheid laws

South African laws have reflected government policies and efforts to impose and maintain white domination. A myriad of laws has simultaneously contributed towards the political and economic subjugation of the black majority. Colonialism and racism have become entrenched in South African law: economic participation has been detached from political participation; differential economic opportunities and rewards have been institutionalized; diverse classes of citizenship rights have been created; and offences and controls have been designed pertaining exclusively to the disadvantaged classes (Turk, 1981, p. 133). The black majority has often been defined as **legal subjects** with respect to their responsibilities to the state, but as **legal aliens** with respect to civil and political rights (Turk, 1981, p. 133). It follows that the laws have not had the support of the largest sector of the population, who are still denied the vote (Chaskalson, 1987, p. 4). The disempowered predicament of the majority is a primary reason for the need and growth of popular justice alternatives.

The changes demanded by the African National Congress as a pre-requisite to negotiations with the National Party government were primarily located in the legal arena. Demands included the unbanning of political organisations, the release of political prisoners, the indemnification of

political exiles, the repeal of apartheid legislation, and subsequently, an end to the violence. The government responded strategically to these calls, as well as to international pressure. In February 1990 President F.W. de Klerk unbanned the African National Congress, the Pan Africanist Congress and the South African Communist Party (see Appendix B). The unconditional release of Nelson Mandela was followed by that of select other political detainees. Still, the process has scarcely been universal in its scope. For one thing, the definition of political prisoners depends on legal categorizations. Public violence, for example, is classified as a common-law crime. Consequently, known political prisoners have been charged and convicted of civil offences and hence remain in custody. Initially, only certain political exiles were granted indemnity. Those reputed to have links with the armed struggle encountered obstacles in securing permission to return home. Exiles who were not members of political organisations were not classified as exiles by the government. A general amnesty was however declared during the latter half of 1991. Any South African living abroad may now apply to the United Nations High Comission for Refugees (UNHCR) for assistance to return home.

The Reservation of Separate Amenities Act of 1953 was abolished on September 15, 1990. This Act had provided the blueprint for racially segregated public services and facilities. During the course of 1990 the government also declared white schools open to all races as of January 1, 1991. However, as observed by Ms. Mhumzile Mgcuka, general secretary of the National Education Co-ordinating Committee, the schools were opened, but

still not 'accessible' (Bakker, 1991, p. 6). Admission policy stipulated that a minimum of 80% of parents of each school population had to vote, and 72% needed to approve the enrollment of students of other racial groups. Half the school population had to remain white, and schools adopting this new model needed official approval. Open schools were able to introduce additional admission criteria, for example, age limitations and the successful completion of language and perception tests.

On February 1, 1991 President F.W. de Klerk announced the imminent repeal of cornerstone apartheid legislation, namely, the Population Registration Act of 1950, the Group Areas Act of 1950, and the Land Act of 1936. On June 17, 1991 the Population Registration Act was finally revoked. For the past 40 years, this Act has provided the foundation for South Africa's 'pigmentocracy.' On the basis of colour registration at birth, South African legislation dictated where to live, which school to attend, where to work, and whom to marry. The rescission of the Act primarily affects those born subsequent to February 1, 1991 who will not be colour-coded. As with the opening of the schools, the repeal of the Group Areas Act has been accompanied by a proviso. Predominantly conservative white town councils have been granted the power to decide whether people of colour should be permitted to reside in the designated area. While the Land Act has been abolished, the black majority lacks the resources to buy land. Ironically, the white minority may now be able to purchase land in the 13% of the country previously reserved for blacks.

It is important to note that legal changes have not been accompanied by affirmative action, nor have they altered power relations. As recently confirmed by Suttner, currently the head of the ANC's department of political education,

> Dismantling apartheid is not just a matter of laws but a matter of changing power relations, which may not be enshrined in law alone. Our objectives cannot be met just by the scrapping of some laws. They are met by scrapping power relations of national oppression and economic exploitation (ANC National Conference, 1991, p. 7).

2.2.3 Police and security forces

The South African Police (SAP) is the national police force responsible for the maintenance of internal security and law and order, and for the investigation of offences and prevention of crime (Bindman, 1988, p. 8). South Africa has been described by most critics as a police state. The local population tend to look upon the police as the enforcers and entrenchers of apartheid. Scharf (1989a, p. 231) contends that policing in South Africa should be perceived within the context of its colonial heritage of conquest and para-military praxis. The policing of blacks is essentially a process of forcefully imposing the ideology of apartheid, with little attention devoted to protecting blacks from attacks by criminal elements (Scharf, 1989a, p. 206). Over and above the realm of ideological control, the police are at the forefront of repressive action. Parliamentary laws have given the police extensive powers and have withdrawn judicial safeguards against police action. In addition, the police are often contemptuous of the law (Bindman, 1988, p. 119).

The police became increasingly militarized in the 1980s (Scharf, 1989a, p. 207). It is estimated that 35 000 troops frequented the townships during 1985. The South African Police were assisted by the South African Defence Force during that period. In 1986, 16 000 'hastily trained' black *kitskonstabels* (special constables) and municipal police augmented the force (Cock, 1989, pp. 5-6). The States of Emergency gave the police almost unbridled powers to use coercive means to crush opposition and preserve hegemony (Scharf, 1989a, p. 207). Many South Africans have observed or been subjected to unrestrained police action in the form of harassment, intimidation, arrests, detentions, and physical and psychological torture. The resulting hostility to and lack of confidence in the police are significant factors contributing towards the development of the community-based justice structures of the mid-1980s (Suttner, 1986a, p. 6).

The Security Branch of the South African Police deals with state security and has extensive *de jure* and *de facto* powers. Additional intelligence services include Military Intelligence, the Intelligence Evaluation Section of the Department of Foreign Affairs, and the National Intelligence Service. Furthermore, the State Security Council, a subcommittee of the Cabinet, operates an elaborate security structure (Bindman, 1988, p. 8).

An increase in local and international support for the mass liberation movement against apartheid has resulted in an intensification of 'state

lawlessness' to save the status quo. State conduct may be lawless even if it is legal:

> Laws which place such unrestrained powers in the hands of State Officials make the exercise of state power effectively lawless, that is, there is no independent judicial control over the exercise of power. One of the critical elements of the rule of law is that the law should be reasonably certain and predictable. The subject should know what conduct is commanded and what conduct is prohibited, and what criterion will be followed in applying the power of the state. Arbitrary power may be legal but it is fundamentally lawless (Budlender, 1988, p. 2).

The Act of Union (1910) introduced by the British Parliament is cited as an act of extreme lawlessness (Omar, 1990, p. 18). The Act sanctioned imperialist conquest and exploitation, and paved the way for white domination and state lawlessness. Sections 29 and 31 of the Internal Security Act 74 of 1982 are identified as contemporary examples of state lawlessness, representing a disdain for procedural justice (Omar, 1990, pp. 23-25). Section 29 made provision for indefinite detention for the purpose of interrogation; detainees are compelled to answer to the Security Police. It is thereafter presumed that statements to magistrates are made freely and voluntarily, and the accused detainees are responsible for proving otherwise. Section 31 facilitates the detention of witnesses who are compelled to give evidence. Raymond Suttner, whose writings are referred to in this chapter, was one of many imprisoned without charge. He was detained in June 1986 for just over two years. The Minister of Law and Order cited Suttner's 1986 paper promoting people's courts as one of the reasons for his detention (Burman

and Scharf, 1990, p. 16). Suttner was a senior lecturer in law at the University of the Witwatersrand at that time.

Figures released by the Detainees Parent Support Committee in 1987 estimated that 1 130 people were detained in 1984. In the first seven month State of Emergency in 1985/86 there were more than 8 000 detentions, followed by another 30 000 in the subsequent year (Cock, 1989, p. 9). This could reflect an escalation of reactionary 'detentionable' activity, and/or the increasing use of detention as a counter-insurgency strategy during that period. Of the estimated 2 517 'civil unrest fatalities' in South Africa between September 1984 and May 1987, 40% or 1 002 are reported to have been caused by the security forces (Cock, 1989, p. 9).

To date the Internal Security Act and Public Safety Act remain predominantly intact. Amendments were introduced in June 1991 reducing the period of detention without charge to ten days, and granting detainees access to contact family visits, and a lawyer and doctor of their choice. However, these Acts still make provision for bannings, detentions, and the declaration of States of Emergency.

2.2.4 Populist justice

As portrayed in Table 2.1, state justice has two key manifestations. State populism is naturally the more covert of the two. South Africa's security establishment is riddled with ". . . elements like murderous hit squads, 'dirty

tricks' operators, specialists in destabilisation, state-backed vigilante groups, and shadowy former agents of the disbanded Civil Co-operation Bureau (CCB)" (Esterhuyse, 1990, p. 17).

Vigilante forces first became active in 1985 (Haysom, 1989). Their violent and fear-provoking attacks aim to disorganise and destabilise progressive community organisations and their leadership. The South African Police has either openly supported or neglected to curtail vigilante activities. Activists have been harassed, assassinated or abducted by 'hit squads' or 'death squads' both within South Africa and beyond the country's borders. 'Death squads' have been described as ". . . a means of obscuring the responsibility of the terrorist state for the violent acts it commits" (Cock, 1989, p. 8). Anti-apartheid activists and organisations have been subjected to arson and bomb attacks (Cock, 1989, pp. 8-10). Albie Sachs, whose work is cited in the previous chapter, was one such victim. Sachs, an ANC member, suffered the loss of an arm as a result of a bomb planted in his motor car during his period of exile in Mozambique.

The following statement by Major-General C.J. Lloyd indicates the state-felt need to resort to extreme measures: ". . . sometimes you have to take out the revolutionaries if they are controlling the people" (Cock, 1989, p. 9). It is apparent that the above-described atrocities are counterrevolutionary strategies employed by upholders of white minority rule. An increasing amount of evidence linking state agents with the inciting or sanctioning of vigilantes and 'hit squads' is being uncovered.

The Civil Co-operation Bureau (CCB) exemplifies several features of state populist justice delineated in Table 2.1. Based on the hearings of the Harms Commission and the testimony of witnesses, the Human Rights Commission (HRC) published an in-depth analysis of the notorious organisation. The CCB was initiated during the 1970s, coinciding with President P.W. Botha's 'total strategy.' According to the HRC report, the military developed into a 'multi-functional security organisation' during that era, ". . . and one of its functions was the elimination of government opponents, both inside and outside the Republic of South Africa." The CCB controlled extensive arms caches. Unveiled atrocities of the CCB include treason, murder, sabotage, attempted murder, malicious damage to property and conspiracy to murder opponents of the government (Esterhuyse, 1990, p. 17). South West African People's Organisation (SWAPO) activist Anton Lubowski, whose study is referred to in Subsection 2.2.5, is one of many allegedly murdered by the CCB.

Following public disclosure and protest, the Chief of the Defence Force, General Jannie Geldenhuys, proclaimed on August 1, 1990 that the CCB had been dismantled and its employees transferred to the South African Defence Force. To date, the organisation's files have not been revealed. The Human Rights Commission and the mass democratic movement repeatedly called for the dismissal of the Minister of Defence, Magnus Malan[5], and other officials

[5] In response to mass protest, President F.W. de Klerk discharged Magnus Malan as Minister of Defence, and Adriaan Vlok as Minister of Law and Order, in July 1991. Both were delegated alternate cabinet portfolios.

who permitted the CCB to pursue criminal activities. They have also urged that files and ammunition be traced, and that former CCB agents be prosecuted for their alleged involvements. As affirmed by the HRC Report, ". . . the Botha era left us with the legacy of an SADF which had become a law unto itself - a state within a state, owing accountability to nobody and wasting millions of rands" (Esterhuyse, 1990, p. 17).

The above components of Botha's 'total strategy' were designed to combat the 'total onslaught' of the resistance movement, including the people's courts and other organs of people's power. Community-based justice structures could not possibly combat the oppressive and repressive actions of the state police and security forces. However, they presented township residents with the opportunity of assuming some control over their lives and security.

2.2.5 Courts

It is important to bear in mind that the vast majority of the disenfranchised renounce the South African justice system in its entirety. This rejection serves as a key stimulus for the initiation of an alternative system. Accordingly, the internal shortcomings of the administration of justice described in this subsection and noted in Table 2.1 have influenced the rise of popular alternatives.

Section 30 of the Republic of South Africa Constitution Act of 1983 stipulates that a Court of Law does not have the power to challenge the validity of an Act of Parliament. An unidentified South African socio-legal academic interviewed by the International Commission of Jurists (Bindman, 1988, p. 7) remarked that ". . . civil liberty and the rule of law were sacrificed on the altar of parliamentary supremacy to the idol of apartheid."

In accordance with the hierarchical court structure, the Magistrates' Courts comply with the decisions of the provincial Supreme Courts, which are in turn bound by the decisions of the Appeal Court. South Africa's adversarial justice system is modelled on the Anglo-American system (Bindman, 1988, p. 8). The respective legal representatives are responsible for gathering facts and cross-examining witnesses. The Attorney General is responsible for the prosecution of criminal offences, while the judge or magistrate is primarily detached and passive during the confrontational procedure (Kahn, 1989, pp. 613-614).

Small Claims Courts were initiated in certain localities in 1985 to enable people to pursue civil claims amounting to R1 500 or less (McQuoid-Mason, 1987a, p. 24). These courts are a cheaper, less formal alternative to the Magistrates' Courts. The adjudicators are Commissioners, usually practising advocates and attorneys, appointed by the Minister of Justice. Plaintiffs and defendants may call witnesses, but may not be legally represented in hearings. Claims against the state may not be brought before a Small Claims Court. Cases usually involve consumer complaints, unfair dismissals, and damage

to property. While companies, corporations and associations may not bring cases before these courts, they may be sued in them. Judgements may not be appealed in a higher court, but may be reviewed (McQuoid-Mason, 1987a, p. 24).

An estimated 99% of South African court work occurs at the Magistrates' Court level (Corder, 1986, p. 77). South African magistrates are appointed from the ranks of civil service. Several magistrates were former public prosecutors in the Department of Justice, accustomed to viewing cases from the state's perspective (Lubowski, 1989, p. 16). Left critics accuse magistrates of being pro-government. An academic interviewed by the International Commission of Jurists described magistrates as "products of their upbringing and captives of the bureaucracy" (Bindman, 1988, p. 114).

Supreme Court judges are appointed by the State President in Council from the ranks of senior advocates (Bindman, 1988, p. 7). An article published in 1987 reported that all 130 Supreme Court judges were white, and most were Afrikaans-speaking males. In stark contrast, an estimated 90% of all criminal cases involve black defendants (Lubowski, 1989, pp. 15-16). In addition to race and gender, the biases of social class, and the isolation of the magistrate or judge's position are identified as potential impediments to accountability and responsiveness. The isolation of judges has been attributed to their familiarity with only Western legal ideology, their membership of an 'elite profession,' their limited contact with the client group, and their efforts to remain 'impartial' (Lubowski, 1989, p. 16). The conservative, pro-status quo

propensity of the state adjudicators prompts the development of popular justice alternatives. The majority of South Africans yearn for a justice system which will have their interests at heart.

The adversary system presupposes that each party will have equal access to legal representation. However, as reflected in Table 2.1, there are obstacles to accessibility. The expense of litigation and inadequacy of legal aid prohibit most South Africans from securing professional assistance (Kahn, 1989, p. 617). The *Pro-Deo*[6] system designed to provide legal representation was described by the Hoexter Commission of 1983 as 'exhausted' (RP 78/1983, p. 154). In addition to the fact that legal aid is predominantly unattainable, presiding judicial officers are not legally compelled to inform an accused of the right to legal representation. The inadequacy of the *Pro-Deo* system is indicative of the disparity between the rhetoric and the reality of formal justice (Moses, 1990, p. 37). The restricted availability of legal aid is confirmed by the following statement of the Minister of Justice in 1978 cited in Suttner (1983, p. 17):

> Legal aid does not exist to be given to every person who wants it. The idea behind legal aid is that when a person cannot afford the costs of legal proceedings and he has a good case - and I want to stress that - a case which he ought to bring before the court, the richer sector of society helps the poorer sector of society to allow the administration of justice to take place. I do not want a legal aid that is available to all and sundry. We are surely not a socialist society.

---

[6] Latin for 'on account of God.' The Pro-Deo system provides for legal representation of indigent accused in capital cases.

It is estimated that almost 90% of criminal cases in the lower courts are undefended (Lubowski, 1989, p. 16). In 1983, the Commission of Inquiry into the Structure and Functioning of the Courts, chaired by Mr. Justice G.G. Hoexter, primarily blamed the adversarial system of litigation for case overload, delays, and high cost (RP 78/1983, p. 168). The Hoexter Commission ascertained that ". . . the high cost of litigation in South Africa is certainly the most important reason why access to justice for most people exists in theory only" (RP 78/1983, p. 135). South Africans residing in rural areas are further restricted by a shortage of legal resources. The inaccessibility of state justice is a key stimulus for the initiation of community-based alternatives within the geographic and economic reach of the populace.

2.2.6 Sanctions and prisons

Imprisonment is frequently prescribed by South Africa's criminal courts. Recent official statistics indicate that South Africa ranks second in the world behind the United States, with 357 out of every 100 000 South Africans incarcerated. In 1990, there were 110 000 people in jail (Swart, 1992, p. 1). As noted in Table 2.1 fines, corporal punishment in the form of lashings, community service orders, and the death penalty are also imposed. A system of 'Correctional Supervision,' expanding community service, is currently being introduced to reduce the prison overload and cost to South African tax payers. Notwithstanding, it has been officially estimated that the country's prison population will rise to 135 000 by the year 2000 (Swart, 1992, p. 1). South Africa has been renowned as 'a world leader in hanging' (Cock, 1989, p. 8).

According to a 1988 report compiled by the Lawyers for Human Rights, about 700 people had been hanged during the preceding five years. In South Africa, the death penalty may be ordered for murder, treason, terrorism, kidnapping, child-stealing, rape, and robbery (McQuoid-Mason, 1987b, p. 77). Racial discrimination persists through sentencing practices. As remarked by Harry Morris KC: "A White man is rarely hanged. The privilege is reserved for the Native. Lashes for the White man have almost been entirely forgotten, and caning is only half-remembered . . ." (Suttner, 1983, p. 4). On February 2, 1990, President F.W. de Klerk announced the suspension of executions, but judges may still order the death sentence (Hamalengwa, 1991, p. 102).

Conditions in South Africa's prisons have been described as deplorable (Bindman, 1988, pp. 124-126). The racially segregated institutions are overcrowded. Children are sometimes held in the same cells as adults. Furthermore, the prisons lack adequate medical services, and washing, toilet, and exercise facilities. Food and amenities allocated to white inmates are superior to those allotted to black prisoners. The status of the sentenced prisoner or detainee, coupled with personal conduct, influence treatment and privileges, particularly frequency of visits and letters.

In addition to the brutality of the warders, gang violence prevails in South Africa's prisons. Gangs are networked throughout the prison system (Haysom, 1981). Organised in a quasi-military fashion, these gangs have disciplinary codes and impose sanctions. Gang murders are common, and

prison officials have expressed their inability to guarantee the safety of prisoners (Bindman, 1988, p. 124).

Opposed to these alienating and punitive sentencing and prison practices, advocates of popular justice alternatives have strived to achieve integration and conciliation. Table 2.1 and more elaborately subsection 2.4.2.4 highlight the distinction.

2.2.7 Towards people's justice

The inadequacies of the state legal and justice system which contribute towards the formulation of popular justice alternatives can be summarized as follows: by virtue of their voteless position, the black majority do not support the justice system to which they are subjected. Apartheid laws dominated life in South Africa once the Nationalist Party came into power in 1948. Whereas the cornerstone discriminatory legislation has been revoked in the past eighteen months, the majority of the population remain disenfranchised and in a materially disadvantaged position. The South African Police and security forces are generally viewed by the populace as repressive perpetuators of apartheid. Although some of their often brutal pursuits are legal, they are essentially lawless. The clandestine attempts by agents of state security apparatuses to eradicate political opposition are characteristically populist. The hierarchical court system is inaccessible to the largest sector of the population. The adjudicators are usually white, conservative ruling class males. Litigation is expensive and legal aid totally inadequate. State courts are

concentrated in the urban centres, and reflect the values and interests of the white minority. Racial discrimination persists through sentencing practices, and imprisonment is frequently ordered.

2.3 African Customary Law

This section sketches the fundamentals of African customary law, the 'dual system' imposed on blacks from 1927 to 1986, and contemporary views on the status of traditional justice.

2.3.1 Central tenets

The key principles of African customary law are reflected in its adjudicative and sentencing philosophy as recorded in Table 2.1. Social solidarity is a primary feature of African society. Group interests are paramount, and discussion and consensus are intrinsic to government. Indigenous African law is non-statutory and displayed in custom. Legal proceedings are traditionally community concerns, directed at reconciling the parties involved and restoring harmonious community relations (Bapela, 1987, pp. 1-2).

Traditional courts were structured hierarchically, ranging from the Family Court to the Ward Court to the Chief's Court to the Paramount Chief's Court. The head of the household and the headman presided over the Family Court and Ward Court respectively. Furthermore, there were

Regimental Courts comprising men who had met the requirements of the initiation school, and Special Women's Courts regulated by the wife of the headman or chief. Aside from the Special Women's Courts, only adult males who had been initiated were allowed to attend court sessions (Bapela, 1987, pp. 2-3).

In the traditional courts, judgement was based on available evidence and the opinions of participants. While law was not applied prototypically, past judgements were sometimes used as precedents. Hearsay and circumstantial evidence were considered, but had to be substantiated. The accused was not required to plead and witnesses left the court once they had given evidence. Imprisonment has never been a feature of traditional African society, and punishment was directed at re-establishing equilibrium and harmony in the community. As displayed in Table 2.1, means of punishment included reprimand, banishment from or to a designated area, work restrictions, fines (usually in the form of animals), corporal punishment or death (Bapela, 1987, pp. 3-5). While Bapela (1987, p. 4) states that punishment is not geared at retaliation, certain of the above-mentioned sanctions seem to have a retaliatory edge.

2.3.2 'Dual system'

With the advent of colonialism, African customary law became subordinate to Western law. The application of customary law was confined to issues pertaining to marriage, land tenure in the tribal region, and

succession. Consequently, the power and prestige of the traditional leadership was significantly diminished (Bapela, 1987, pp. 5-6).

From 1927 to 1986, black South Africans were subjected to a 'dual system,' comprising both South African law and select aspects of African customary law. The 'dual system' is not recorded independently in Table 2.1, but certain of its characteristics are incorporated in the descriptions of state justice and customary law. Under the terms of the Native Administration Act 38 of 1927, a special hierarchical court structure was established for blacks within the jurisdiction of the Department of Co-operation and Development The structure incorporated the courts of chiefs and headmen, Commissioner's Courts, a Court of Appeal, and Divorce Courts (Bapela, 1987, pp. 5-6). This separate 'tier of justice' confirmed judicial segregation and deviation from the key tenets of formal justice, particularly the principle of equality (Moses, 1990, pp. 42-45).

Suttner (1983) illustrates how the Bantu law/court system, which managed civil cases between blacks, enhanced national oppression. The system corresponded with the policy of retribalisation which in turn coincided with the needs of the economy. The colonialists abhorred African customs during the nineteenth century when tribal chiefdoms were prominent. However once they had seized control of the land and most tribal chiefdoms, they began to tolerate customary law. The South African state thereafter attempted to revive the conquered chiefdoms. Retribalisation enabled patriarchal family production to subsidize the capitalist system. On an

ideological level, the courts' construction of individuals as particular tribal subjects represented an attempt to impede the development of a national consciousness and movement (Suttner, 1983, p. 16).

Contentions that the Commissioner's Courts would provide blacks with an appropriate, accessible, and affordable law and court system were not realized. As observed by Suttner (1983, p. 7), these courts were not analogous with the former Chief's Courts. Since they were not an integral part of the community, the Commissioner's Courts could not attain the flexibility of the tribal courts. These courts implemented several apartheid laws (Scharf and Ngcokoto, 1990, p. 344). Furthermore, court procedure was not significantly simplified, and legal representation remained unaffordable. While Commissioners had a wider jurisdiction than magistrates, they were less qualified. Also, they were largely dependent upon translators. The Commissioners were at liberty to classify law, to decide whether to apply 'Black law,' and to implement their own version of customary law (Suttner, 1983, pp. 6-10).

Instead of equating 'custom' with 'immemorial usage', Suttner (1983) emphasizes the dynamic nature of the term. In practice, the Commissioner's Courts frequently ignored changing African social patterns and customs, and focused on the custom of the most reactionary sectors of the community (Suttner, 1983, pp. 11-15). That tendency, coupled with the application of individualistic categories, significantly reinforced patriarchal domination over women. By solidifying the 'family-centred, male-dominated tribal

redistributive system,' Black law thwarted women's liberation. Black women were predominantly treated as minors and could not become 'free legal subjects' (Suttner, 1983, p. 5).

Scharf and Ngcokoto (1990, p. 344) note that these courts were generally viewed by blacks as tools of the status quo. Furthermore, the courts were reputedly tainted by irregularities and corruption (Bapela,1987:6). The Commissioners' Courts were abolished almost sixty years after their inception, in accordance with the Special Courts for Blacks/Bantu Abolition Act 34 of 1986 (Bapela, 1987, pp. 5-6). Their jurisdiction was delegated to the Magistrates' Courts (Bekker, 1990, p. 29).

2.3.3 Contemporary status

Charterists are opposed to the wholesale acceptance or rejection of customary law. They support the integration of practices which are consistent with progressive democratic values, and negate those which are considered conservative and patriarchal. Dlamini (1990, pp. 1-2) criticizes public perceptions which regard African customary law as obsolete, a mere tool of the government's policy of separate development, or 'primitive.' Writing from an Africanist perspective, he considers these impressions to be ethnocentric.

Suttner (1983, pp. 10-16) observes that in their championship of 'equality before the law,' liberal academics tend to degrade customary law and

promote the universal application of Roman-Dutch law. They regard the rural areas as the only viable locality for the implementation of customary law. In Suttner's opinion, this perspective negates the dynamic relationship between rural and urban areas. Urban changes impact upon rural dwellers, and many of those who reside in the cities continue to abide by tradition.

Dlamini (1990, pp. 3-4) emphasizes that customary law comprises processes, and adjusts to socio-economic changes. The state courts have, however, failed to take into account the 'living law' of the people. On the basis of political objectives serving white minority interests, and the prevailing philosophy of legal positivism, law has been imposed from above and customary law has extensively been restated or codified.

The Law of Evidence Amendment Act, 45 of 1988 makes provision for all courts to take 'judicial notice' of African customary law (Olivier, 1990, pp. 50-51). Visser (1990, p. 69), however, describes section 1 of that Act as an 'irrelevancy to judicial officers.' Since customary law is not a compulsory component of formal legal education in South Africa, it is not part of the repertoire of magistrates and judges (Visser, 1990, pp. 67-69). Bekker (1990, p. 30) considers the granting of discretionary powers to be advantageous, but maintains that the application of customary law should be mandatory. Visser (1990, p. 70) similarly proposes the imposition of rules and procedures to ensure the application of customary law. His long-term solution is the establishment of a 'unified responsive legal system.' Sanders (1990, p. 70) too is an advocate of legal unification backed by public approval. He suggests that

as a transitional measure, efforts could be directed at ". . . harmonisation of laws, via a process of regulating the (internal) conflict of laws . . ."

2.4 People's Courts: a Product, Vehicle, and Victim of the South African Struggle

At the outset of this section, the predecessors of the people's courts, namely, the *makgotla* are outlined. Thereafter, the socio-political context and host of factors motivating the development of the people's courts are identified. The aims and ideals of the courts are sketched. A description of the law and structure of the people's courts is followed by a portrayal of activities and procedure. Sanctions and changes in sentencing practices are depicted. In the process, populist justice is distinguished from popular justice and illustrated. The subsection is concluded with an appraisal of the accomplishments and negative attributes of the people's courts.

2.4.1 Historical antecedents: the *makgotla*

Considering the coercive and repressive nature of state law and justice, there has been a preference in black urban areas for solving problems at a community level rather than through the state legal apparatuses. This predilection, coupled with the maladministration of the state-controlled Commissioner's Courts described in Subsection 2.3.2, motivated the development of township courts or *makgotla* (Bapela, 1987, p. 6). The *makgotla* are not specified in Table 2.1. As described below, their goals and

modus operandi conform to aspects of customary law, popular justice as well as state justice.

The *makgotla* were predominantly operated by Community Councillors and their associates, with the aim of achieving social harmony in the townships. The *makgotla* attempted to bring about order and reduce violence. Since these aims were consonant with the interests of the state, and the *makgotla* reduced the workload of the state police and courts, they were officially tolerated (Hund and Kotu-Rammopo, 1983, p. 199). Popular support for certain *makgotla* is partially ascribed to the fact that presiding local conservatives sometimes promoted popular causes, had access to organisational resources, and were rarely subjected to state repression.

The *makgotla* developed in Soweto between 1969 and 1974, apparently in response to a surge of break-ins, assaults and rapes. Initially, certain of these *makgotla* were endorsed by local residents. They focused on family disputes and juvenile delinquency (Seekings, 1989, p. 121). Their rules of procedure and evidence resembled indigenous law. The legal process was uncomplicated and devoid of strict impersonal and technical rules characteristic of Western legal procedure. Hearings were attended by all parties concerned, and the *audi alteram partem*[7] principle was adhered to. Conciliation was emphasized in the proceedings. While corporal punishment was generally perceived to be unbeneficial, certain courts regarded flogging as

---

[7] Latin for 'hear the other side.' It is a principle of natural justice that no one should be condemned without being given a chance to be heard.

an effective sanction. The content of the law applied by the *makgotla* apparently had characteristics of both indigenous and Western law (Van Niekerk, 1988, pp. 293-294).

The *makgotla* in Soweto lost popular support from the mid-1970s, when policing apparently became increasingly violent and court sentencing increasingly severe. The *makgotla* were condemned for arbitrary and barbaric practice. Several of the *makgotla* were evidently self-appointed and self-serving, and their liaison with township residents was insignificant. They tended to rely on their coercive abilities as opposed to popular support or legitimacy (Seekings, 1989, p. 122).

Courts in other Pretoria-Witwatersrand-Vaal (PWV) townships also focused on civil and family disputes, particularly disrespectful or delinquent youth. They were controlled by older conservative residents, predominantly Community Councillors or members of the Ward Committees. The courts aimed to maintain 'community' and a social order they believed contributed to 'community' cohesion. In certain courts, trials were open, sentences were limited, and the purpose was conciliatory as opposed to punitive (Seekings, 1989, pp. 122-123).

In their study of Mamelodi, Hund and Kotu-Rammopo (1983, p. 180) applied the term *makgotla* to a range of courts with diverse styles of operation and degrees of popular support. They focused on the Ward 4 court in Mamelodi, which was founded in 1977 by volunteer residents in response to

the escalating rate of crime in the area (Hund and Kotu-Rammopo, 1983, p. 185). The court evidently functioned on the basis of adult participation and popular legitimacy. Since there was a tendency for sentences to be lenient, judges to be local and respected, and the aims of the court to be conciliatory, the jurisdiction and judgements of the court were usually accepted (Seekings, 1989, p. 122). However, the court was immobilised and ceased operation in 1979 after an individual who had been *sjambokked* (whipped) took his case to a Magistrates' Court. That Court found the volunteers guilty of assault and fined them R1 500 (Hund and Kotu-Rammopo, 1983, p. 185).

In contrast to the Ward 4 court, the *makgotla* linked with the Vukani Vulimehlo People's Party (VVPP), an authoritarian cultural movement in Mamelodi, primarily relied on coercion and fear tactics. The VVPP *makgotla* overpowered the Ward 4 court (Seekings, 1989, p. 122). Their procedure was semi-private, resembling *in camera* hearings. Corporal punishment was frequently imposed. In addition to the *makgotla*, informal patrols, migrant labour hostel police and gangs, frequently operating under the pretence of *makgotla*, were present in Mamelodi (Van Niekerk, 1988, p. 294). These structures were unable to secure peace, law and order in the township, and hooliganism was rife (Bapela, 1987, p. 6).

The political context and players in township politics changed after 1984. Involvement with the state became incongruent with popular support. Conservatives were consequently replaced by members of progressive civic and youth organisations. Intertwined with political organisation, the people's

courts thence developed in the townships (Seekings, 1989, pp. 131-132). In contrast to the *makgotla*, these structures adopted specific political objectives consonant with the aims of the liberation struggle (Van Niekerk, 1988, p. 295). The people's courts were an integral part of the mass movement striving to change the state (Seekings, 1989, p. 132).

2.4.2 People's courts

Seekings (1989, p. 120) describes people's courts as extra-state township courts with four definitive characteristics. The courts

*met periodically
*had an identifiable structure
*responded to civil and/or criminal allegations in the township
*were to some extent aligned with the left-wing opposition.

Similarly, Moses (1990, p. 2) regards people's courts as ". . . informal dispute settlement tribunals which were popular and which operated independently of any state structures in African townships during the period 1985/86." The people's courts are thus represented in Table 2.1 under the heading of popular justice.

2.4.2.1 Rationale

An estimated 400 people's courts developed in the townships of South Africa in the mid-1980s. While there were close parallels in goals, structure and functioning between the various courts, there were significant regional

differences. Scharf and Ngcokoto's (1990, pp. 345-348) study indicates that these regional differences could be attributed to the extent of democratic heterogeneity, the level of political organisation, and the degree of affiliation with political movements in each locale.

It is pertinent to locate the emergence of community-based justice structures in the mid-1980s within the recurrent cycles of structural oppression, mass resistance, and state repression. This particular phase of the struggle was preceded by a state-declared State of Emergency which in turn was triggered by mass resistance rendering the organs of civil government in the townships ungovernable (Swilling, 1988, pp. 103-104). The mid-1980s was different from other periods of struggle. Violence and counter-violence were more prevalent. Activists openly declared their allegiance to the ANC and even the SACP, and there was a notable growth in grassroots organisation in the townships (Moses, 1990:56). Scharf (1989b, p. 175) sees the latter part of 1985 as an exceptionally tumultuous stage of the struggle. Cock (1989, p. 5) cites the introduction of the tricameral parliament system[8] in September 1984 as a central factor contributing towards the surge of township violence in the mid-1980s. The people's courts developed in an atmosphere of street confrontation between a combined state police and defence force, and township youth (Scharf and Ngcokoto, 1990, p. 341). The people's courts were not immune from the 'pervasive violence' and 'militant rhetoric' of the day (Scharf, 1989b, p. 175).

---

[8] The three-tier system facilitated coloured and Indian representation in parliament, and simultaneously perpetuated the exclusion of blacks.

Several factors have been identified as conducive to the development of community-based justice structures in the townships in the mid-1980s. As outlined in Section 2.2, the majority of South Africans rejected the state legal system based on their perception of the system and its courts as instruments of apartheid. Distrust of the system was apparently deepened by police activity or lack of response when intervention was requested (Van Niekerk, 1988, p. 293). The police were pre-occupied with the suppression of political opposition, and resultingly neglected conventional policing (Scharf, 1989b, p. 170). In addition, Van Niekerk (1988, p. 293) contends that Western dispute-settlement procedures were deemed inappropriate for solving the legal and social adjustment problems experienced by urban blacks. It was estimated that in 1983, less than two percent of urban blacks took their grievances to state courts. The Councillor-based courts received minimal support from local residents. The Magistrate's Courts (formerly Commissioner's Courts) ceased to function in certain townships during that period of unrest. By the mid-1980s, the authorities were seemingly losing control in the townships (Van Niekerk, 1988, p. 295). Alternate institutions and structures were needed.

Concurrently, the mass democratic movement refocused attention on the Freedom Charter of 1955 (see Appendix E), and attempted to realize some of the central tenets of that document. The primary clause of the Charter, namely, 'The People Shall Govern,' is considered to be an integral part of the struggle (Suttner and Cronin, 1986). As stipulated in an Eastern Cape United Democratic Front pamphlet circulated in the mid-1980s,

> No longer are we prepared to wait for Botha to make changes in our country - we are taking our destiny in our own hands. Democracy will not come at the day of our liberation - it should be built already in the process of destroying the old order . . . (Suttner, 1986a, p. 2)

The movement thus undertook to render the country ungovernable, and to thereafter pursue the goal of people's power by attempting to assume control of specific state organisations and institutions, and by creating alternative community-based structures. The mass democratic movement established civic authorities in the township to mobilize the community and provide a forum for the discussion of concerns. These civic authorities included street committees, section committees, area committees, and at the head of the hierarchy, the civic associations which originated in the mid-1970s. People's courts began to develop as organs of people's power in close association with these civic authorities (Van Niekerk, 1988, p. 295).

Specific conditions in each area influenced the emergence and focus of people's courts. Activists in certain township civic organisations initiated people's courts in response to the lack of discipline within their organisations or pertaining to their protest campaigns. For example, coercive measures frequently applied during consumer boycotts resulted in a decline of popular support for the organisations. Activists consequently launched anti-crime campaigns to deal with the problem, which was frequently attributed to *comtsotsis* (gangsters pretending to be comrades) (Seekings, 1989, p. 124).

Bapela (1987, pp. 7-8) describes how people's courts in Mamelodi developed from the disciplinary committees initiated by progressive youth organisations. The activities of the *comtsotsis* were a motivating factor in the initiation of the people's courts. Several *comtsotsis* had been eliciting donations from store and *shebeen*[9] owners in the name of the civic organisations, using the pretext that the money would contribute towards the cost of the funerals of the victims of police action.

In certain instances organisations regarded people's courts as a useful means of securing a focal place in township politics. The increase in the number of courts in Alexandra, for example, was attributable to a loss of confidence in the state police and courts, and furthermore to the diversity of groups competing for political leadership (Seekings, 1989, p. 124).

Scharf (1989b, p. 171) identifies three factors that motivated the formation of the Nyanga East Youth Brigade People's Court in Cape Town in July 1985. First, people's courts were mushrooming in black townships throughout the country, particularly in the Eastern Cape. There was the desire to emulate the political agenda of these structures in Cape Town. Second, civic youth organisations regarded people's courts as a potential vehicle for recruiting membership and politicizing township youth. Third, certain youth were troubled by the fact that so-called marginalized youth had been taking advantage of the chaos and conflict in the townships. These marginalized youth were attacking and stealing from residents for personal gain.

---

[9] Illicit neighbourhood-based liquor outlet.

2.4.2.2 Ideals

The adjudicative and sentencing philosophy of popular justice summarised in Table 2.1 corresponds with the ideals of the people's courts. Moses (1990, p. 87) identifies the realisation of people's justice and people's power as the key objective of these courts. With reference to Suttner's (1986, p. 6) definition of people's justice, Van Niekerk (1988, p. 296) contends that the people's courts aimed ". . . to unite the people in their struggle and to educate them about their political objectives." This goal is reiterated by a respondent in Moses's (1990, p. 83) study, ". . . [to educate] our people about justice for a new South Africa which we dream about." Developing and participating in people's courts were also a means of enhancing the self-esteem and independence of township residents (Scharf, 1989b, p. 170).

The people's courts served as a vehicle for involving residents in political structures. Moreover, people's courts provided a forum for transmitting the moral values of a post-apartheid society to township residents. Scharf and Ngcokoto (1990, p. 341) describe these counter-hegemonic objectives and qualities as the application of ". . . a new morality, a people's morality that conformed to the political ideals of their liberatory projects." Key aspects of this new morality included discipline, accountability to civic organisations, acknowledgement of the fact that the apartheid state and its perpetrators were the real enemy, and that offences committed against oppressed persons were antithetical to community solidarity and the struggle (Scharf and Ngcokoto, 1990, p. 349).

The founding principles of the Nyanga East Youth Brigade, for example, were regarded by Scharf (1989b, p. 172) as promotive of ". . . the concepts of collective justice and a caring community." With reference to the Cape Town and Oudtshoorn examples, Scharf (1989b, p. 180) observes that the people's courts acted in furtherance of their own interpretation of due process of law, emphasizing democratic ideals. In principle, they stressed collective participation and the inclusion of representatives from all progressive civic structures, for example student and women's organisations. To quote Scharf (1989b, p. 170), ". . . the people's courts were an attempt to experiment with prefiguring the lowest rungs of a post-apartheid adjudicative infrastructure." And in the words of a resident of the Oudtshoorn township of Bongulethu,

> It [the people's court] was to try to give our people a foretaste of what they could expect in a New South Africa, how their problems would be dealt with, how free they would be even to participate in the law of their day to day running (Moses, 1990, p. 71).

Bapela (1987, pp. 21-23) identified the central aims of the Mamelodi people's courts as the restoration of peace and order, the development of trust and unity, the rehabilitation of offenders to enable township residents to live together in harmony, and the reconciliation of the parties involved. Furthermore the courts encouraged residents to resolve difficulties and disputes amongst themselves in compliance with traditional African perceptions of justice.

The above-described ideals of people's courts fit the characteristics of popular justice outlined in Table 2.1. In his delineation of people's power, Sisulu (1986, p. 19) emphatically distinguishes the ideals of popular justice from negatively perceived populist forms of justice:

> Struggles over the past few months demonstrate that it is of absolute importance that we don't confuse coercion, the use of force **against** the community, with people's power, the collective strength of the community. For example, when bands of youth set up so-called 'kangaroo-courts' and hand out punishments, under the control of no-one and with no democratic mandate from the community, this is **not** people's power . . . When disciplined, organised youth, together with older people, participate in the exercise of people's justice and the setting up of people's courts, when these structures are acting on a mandate from the community and are under the democratic control of the community; this is an example of people's power (Sisulu, 1986, p. 19).

2.4.2.3 Structure, focus, and process

As confirmed in related literature, the people's courts rejected apartheid law. According to Sanders (Van Niekerk, 1988, p. 297), there is a strong indigenous component to the law practiced by the people's courts. Bapela (1987, p. 13) maintains that people's justice is rooted in African customary law. A notable distinction is that only males participated in the traditional courts, whereas the people's courts were open to the entire community. Van Niekerk (1988, p. 297) contends that it is difficult to decipher the precise content of the substantive law. The people's court in Mamelodi, for example, dealt with crimes similar to those addressed by indigenous law: assault, theft, robbery, witchcraft and rape.

The law practiced by the people's courts may be conceptualized as people's justice or popular justice. This justice was popular in that its language was accessible, its procedure was dependent on community participation, and its judges were community members serving community interests (Bapela, 1987, pp. 12-13). These phenomena are reflected in the 'nature of law' and 'accessibility' categories pertaining to popular justice in Table 2.1.

Several people's courts were subsidiaries of local civic organisations which were in turn affiliated with the UDF, the umbrella body for progressive community-based formations (Moses, 1990, p. 83). Congruent with traditional patterns, community members were expected to report offences to the civic structures (Van Niekerk, 1988, p. 295). Certain townships were policed by patrolling squads comprising local residents. As exemplified by Bapela (1987, pp. 17-18), the adult men and youth who constituted the Mamelodi patrolling squads volunteered to try to keep peace and order in the township. Equipped with *sjamboks* (whips), they sought out dangerous weapons and potential troublemakers.

As outlined above, several people's courts initially became engaged in organisational and campaign discipline, particularly pertaining to consumer boycotts. It was, however, not always possible to draw the distinction between boycott-related disorderliness and general disorderliness. Most courts consequently became involved with the resolution of a range of civil disputes

and social problems, analogous with the focus of the *mukgotla* (Seekings, 1989, p. 26). The cases most frequently handled by the people's courts are summarised in Table 2.1.

Kagiso and Munsieville residents, for example, encouraged the court to deal with cases other than those associated with the crime prevention campaign. The court thus became engaged in civil and family disputes. Typical people's court cases included family disagreements viz. parent-child conflicts, wife abuse, and disputes concerning maintenance payments; inter--neighbour disagreements; theft and vandalism (Seekings, 1989, pp. 126-129).

In Mamelodi, specific courts were established to deal with youth, adults, general issues, and civil matters concerning the community, for example rents and taxes. The hierarchical court structure was constituted as follows: street committees, section courts, the disciplinary committee, and the highest court of appeal, the people's committee. The disciplinary committee involved members of the different sections, and the people's committee comprised youth in conjunction with the executive committee of the civic association (Van Niekerk, 1988, p. 297).

People's courts in Mamelodi were divided into four categories. Court A consisted primarily of adults who handled adult concerns. Bapela (1987, p. 19) reports that allegations of adultery were often brought to the Mamelodi people's courts, and the courts strived to reconcile married couples. Court B handled juvenile cases, Court C general concerns and Court D offences related

to the rent boycott. Judges and prosecutors were predominantly but not exclusively male (Bapela, 1987, p. 12).

As Van Niekerk (1988, p. 296) observes, people's court procedure resembled both indigenous law and *makgotla* procedures. Hearings were characteristically informal, inquisitorial and exempt of technicalities. Interpreters were used where required. The adjudicating officer participated in the extraction of evidence. There were no rigid rules pertaining to the admissibility and relevance of evidence, nor to the burden and measure of proof (Bapela, 1987, p. 13). Hearsay and circumstantial evidence were considered, but had to be substantiated. Character references were also considered. Analogous with indigenous law and *makgotla* procedures, the *audi alteram partem*[10] principle was applied. Unlike indigenous legal proceedings, hearings were not confined to adult male audiences (Van Niekerk, 1988, pp. 296-297).

Civil and criminal cases were addressed in the same set of proceedings. In contrast to criminal cases, however, civil matters were sometimes settled out of court at the street committee level. Van Niekerk (1988, p. 296) reports that the accused was constantly informed of his/her rights and subjected to examination. Trials were not conducted under oath. In a criminal trial, the accused was cautioned to speak the truth and requested to plead. Bapela (1987, pp. 14-15) draws a distinction between cross-examination in the state courts and cross-examination in the people's courts. In the former, cross-

---

[10] See Footnote 7, Chapter 2.

examination is seemingly directed at detecting loopholes in the evidence of the accused. In the people's courts, cross-examination had an educative motive to convey to the accused that his/her behaviour was unacceptable to the community, and to indicate how wrongdoings could be rectified. A lengthy discussion was succeeded by a democratic vote to decide upon guilt and punishment.

The Nyanga East Youth Brigade, for example, is reported to have elected the following four office-bearers to its people's court: a chairperson to conduct hearings, a clerk to keep records, an organiser of the complaints book, and an orderly. The concerns of the complainant were outlined in the complaints book. He/she was subsequently requested to bring the defendant to court on a particular day. The Youth Brigade sometimes provided the complainant with a letter summonsing the defendant to court. If deemed necessary, the Youth Brigade's patrol or 'pick-up team' was sent to collect the defendant. Upon stating his/her concerns at the hearing, the complainant was subjected to questioning by the defendant and any Youth Brigade member. The defendant was thereafter requested to relate his/her version, and could be questioned by court members and the defendant. Guilt and punishment were democratically decided by participating Youth Brigade members (Burman and Scharf, 1990, p. 724).

2.4.2.4 Sanctions

According to Bapela (1987, p. 15), the people's courts adopted the slogan 'educate first and punish later if necessary.' As noted in Table 2.1 emphasis was placed on rehabilitation, and conciliatory sanctions in the form of compensation, restitution and education were usually applied. Several sentences involved community service, for example labouring in parks, sweeping streets (Van Niekerk, 1988, p. 296), cleaning somebody's yard, helping the elderly, and pamphleteering for civic organisations. Other sentences included returning stolen goods, doing a good deed for the victim (Scharf, 1989b, p. 173), the prohibition of hard liquor, having personal savings monitored, or even acting as an adjudicating officer in a similar trial. An attempt was made to keep sanctions congruent with political objectives, and to involve offenders in community organisations and the liberation struggle (Van Niekerk, 1988, p. 296).

In his study, Scharf (1989b, pp. 172-173) notes that during the initial phase, the punishment process of the Nyanga East Youth Brigade People's Court aimed at educating wrongdoers about the effects of their deeds, particularly the harm incurred to community solidarity and the liberation struggle. A lecture on the expected behaviour of ". . . the ideal comrade of a future, apartheid-free South Africa. . ." was often an integral part of the process. An attempt was made to include community service and avoid impersonal and alienating punishments, and to show that the offender would be received by a nurturing community upon the completion of

his/her sentence. Finally, an offender was encouraged to join the Nyanga East Youth Brigade and thereby learn responsibility.

Violence, including corporal punishment, was associated with police brutality, and therefore usually avoided by the people's courts. Instilling fear was regarded as antithetical to the unification of people in the struggle. Corporal pun' hment was, however, sometimes imposed (Van Niekerk, 1988, p. 298). Scharf (1989b, p. 173) notes that when the Nyanga East Youth Brigade ordered corporal punishment, a number of Brigade members participated in dispensing the lashes, to portray the penalty as 'collective punishment.'

The people's courts in Mamelodi apparently allowed those who had committed less serious offences to choose between lashes and community work. Some people opted for lashes. The harshest punishment imposed by the courts was 100 lashes in three known cases. An individual would not receive more than ten lashes at any given time; he/she had to return to the court for punishment in series. Ill people were not subjected to corporal punishment; they were ordered to do community work (Bapela, 1987, p. 15).

The literature shows that the latter phase of several people's courts was characterized by increasingly harsh sentences. These demonstrate a deviation from the adjudicative and sentencing philosophy of popular justice reflected in Table 2.1. Violent tendencies in sentencing have been attributed to the detention of leaders and subsequent command of overzealous youth (Van

Niekerk, 1988, p. 298). Scharf and Ngcokoto (1990, p. 341) strongly suggest that the increasingly punitive sentences imposed by the people's courts be considered alongside ". . . the punitive practices of the state's armed forces in the context of a near civil war. . ."

The 'punitive momentum' of the Nyanga East Youth Brigade's People's Court was fuelled by the experience of frequently violent state repression of popular resistance. As described by Burman and Scharf (1990, p. 728), "The situation on the streets was that of a low-intensity war. Violence was part of daily experience." Meetings and protest marches led by township activists were counteracted by the teargas, birdshot, buckshot, *sjamboks* (whips), and batons of the state police and armed forces. In response, teenage township activists aided by marginalized youth constructed burning barricades. State brutality was met by stones, petrol bombs, and periodic attacks on sell-outs or those suspected of collaborating. Court members were consequently disposed towards absolutism (Scharf and Ngcokoto, 1990, p. 353). Although their system of justice was punitive, several Youth Brigade members considered it to be 'fairer' and 'more humane' than the repressive, biased state system (Burman and Scharf, 1990, p. 728). The 'punitive clique' undermined the democratic process by dominating the voting procedure, and convicted the majority of defendants. Observing this growing propensity towards conviction, certain township residents used the court to retaliate against their personal enemies. Sentences became increasingly harsh, and were criticized by several residents for being disproportionate with the offences.

There were disputes over punishment philosophies owing to the fact that members were youth with diverse ideological inclinations. According to Charterists interviewed in Burman and Scharf's (1990, pp. 727-728) study, both Charterists and Black Consciousness supporters used the Nyanga East Youth Brigade's People's Court as a forum for recruiting membership, but their punishment policies differed. The Charterists claimed that they gave pre-eminence to education and community service, whereas the policy advanced by the proponents of Black Consciousness was more punitive. Apparently, the punitive approach pursued by a dominant, charismatic Black Consciousness activist was endorsed by the escalating number of politically undisciplined, previously marginalized members.

People's courts have been accused of engaging in 'necklacing'[11] and 'hacking.' These allegations have, however, been widely renounced and brutal acts have instead been attributed to mass anger (Van Niekerk, 1988, p. 298). Based on his study conducted in 1986, Bapela (1987, p. 21) confirms that *sjambokking* (whipping) was the most extreme punishment ordered by the people's courts in Mamelodi. 'Necklacing' and 'hacking' were not features of these courts; they were consequences of spontaneous popular reaction. Both Scharf and Ngcokoto (1990, p. 361) and Moses's (1990, p. 3) expositions of people's courts reiterate the inability to substantiate allegations of people's courts ordering 'the necklace.'

---

[11] See Footnote 4, Chapter 2.

2.4.2.5 Street populism

Before presenting an appraisal of people's courts, I elaborate on the concept and practice of populist justice. Table 2.1 clarifies the distinction between popular and populist justice. As illustrated in the typology, 'necklacing' and 'hacking' fall within the realm of populist justice: street, that is, populist justice administered by the people. According to Brigadier Stadler, nearly 400 people were 'necklaced' between 1984 and 1987, and an additional 200 were burnt to death (South African Institute of Race Relations, 1988, p. 23). Community councillors, policemen, suspected *impimpis* (informers), collaborators, and women thought to be involved with witchcraft were among those 'necklaced.' Since parties involved have been black, the government has conveniently reduced the explanation of 'necklacing' to black-on-black violence. As confirmed by Cock (1989, p. 11) the 'necklace' has facilitated ". . . a focus of attention in which the increasing pattern of state violence has become obscured."

Other acts of street-level populism have been targeted at the security forces, particularly the police. Black police officers have been shot and state witnesses in political trials have been assassinated. In addition, violent and punitive action was sometimes pursued in the townships as a means of ensuring political compliance. During the 1985 consumer boycott, for example, one woman was forced to eat raw meat while another was compelled to drink a bottle of cooking oil purchased from a white-owned store (Cock, 1989, pp. 7-9). Cock (1989, p. 9) notes an important distinction:

those suspected of perpetrating street populism are predominantly charged and brought before the state court, whereas the suspected assassins and abductors of apartheid's opponents are not. This was the case up until January 1991 when the government initiated a special police detective unit to investigate cases of political violence, including those emanating from their own ranks.

2.4.2.6 Appraisal

Several apartheid opponents regarded the people's courts as a novel and positive accomplishment in the course of popular struggle. People's courts were perceived to be a significant method of insurrectionary struggle, and a forerunner of post-apartheid democratic organisation (Seekings, 1989, p. 119). Adopting a Gramscian perspective, Moses (1990, p. 6) maintains that the form and content of people's courts posed ". . . the biggest ideological challenge and threat to the South African state and legal system than ever before in our history." Furthermore, the courts represented a significant organisational development. The involvement of civic and youth organisations in the process of township dispute settlement was regarded as particularly innovative, and a means of strengthening the organisations (Seekings, 1989, p. 132).

The anti-crime campaign pursued by several people's courts was reportedly successful (Seekings, 1989, p. 129; Burman and Scharf, 1990, p. 725). According to Bapela (1987, pp. 21-23), the people's courts in Mamelodi secured

the safety of township residents more adequately than the police were able to. The incidence of crime and other behaviour condemned by the community decreased significantly: particularly with respect to cases of assault, theft, robbery and children's disrespect towards their parents. The presence of the courts was a deterrent to potential offenders. A degree of peace and order was achieved, respect for parents was ingrained and people felt more comfortable moving about in the township in the evenings. The people's courts thus initially received the support of Mamelodi residents. At the outset members of the civic organisations and people's courts demonstrated to the people of Mamelodi their commitment to positive, constructive change and the development of a peaceful community atmosphere.

In most cases, repressive state intervention was the ultimate cause of the cessation of people's courts (see below). However, as reflected in past studies, popular support for several of the people's courts diminished prior to their termination. Scharf (1989b, pp. 181-182) identifies the political conflict of the day, and the detention or harassment of leading activists, as two factors contributing towards the development of negative tendencies, which in turn contributed towards a decline in popular support.

A number of the people's courts seemed to become self-serving. The youth in Alexandra were accused of arrogance and lawlessness. They were criticized for imposing increasingly harsh sentences and administering corporal punishment. While the alliance with township justice was previously identified as a means of strengthening civic associations, the

converse also applied. In Alexandra, for example, a civic association linked with an unpopular court risked losing credibility (Seekings, 1989, p. 133). Based on a decision taken at a meeting of block committee representatives, Alexandra Action Committee leaders were sent to break up the Alexandra people's courts in May 1986 (Seekings, 1989, pp. 129-130).

As illustrated in Scharf's study (1989b), popular support for the Nyanga East Youth Brigade People's Court diminished during the latter part of 1985. The Court became a site of factional power struggles and unjustifiable excesses, therein emulating features of the dominant state legal structures. The Court regained some local support when consumer boycott related cases were addressed, and those exploiting the status of *amaqabane* (comrades) were severely punished. Concurrently though, the condonement of rigorous punishment reinforced the 'punitive momentum' (Burman and Scharf, 1990, pp. 727-728). Scharf (1989b, p. 178) identifies one of the major weaknesses of the Nyanga East Youth Brigade People's Court as the lack of accountability to any community organisation or local political structure that could have provided legitimacy and assistance when there was incongruency between ideals and practice. While a number of people's courts were UDF derivatives, the Nyanga East Youth Brigade People's Court was not affiliated with any political movement. The Court perceived itself as generally accountable to '. . . some vaguely defined local community' (Burman and Scharf, 1990, p. 731). Membership increased from about 50 to 300 in an eight month period. The leadership was unable to provide adequate political education,

supervision or discipline. The integration of offenders into the Court was not accompanied by the required 're-education' (Burman and Scharf, 1990, p. 727).

In addition, gangsters and 'pseudo comrades' operated in the name of people's courts to further their own interests (Van Niekerk, 1988, p. 298). During the consumer boycott, for example, they opportunistically constructed roadblocks and confiscated people's purchases from white-owned stores. Instead of handing the acquired goods over to political organisations, they kept them for their own consumption (Burman and Scharf, 1990, p. 727).

In accordance with the dominant value system, the older generation condemned the fact that the youth took it upon themselves to adjudicate over adult-related cases (Scharf, 1989b, p. 174). Militant youth, known as the 'young lions,' gained prominence in the struggle. Their acquired status and power contradicted traditional authority patterns: "In a context in which rites of passage from boyhood to manhood were still overwhelmingly observed, the arrogation of authority and leadership roles by the youth was unacceptable to the older generation" (Burman and Scharf, 1990, p. 730). Furthermore, the Nyanga East Youth Brigade People's Court failed to pursue the ideal of non-sexism (Scharf and Ngcokoto, 1990, p. 349). The court was operated exclusively by males, and sentencing was biased in favour of male-centred values.[12]

---

[12] The following case outlined by Burman and Scharf (1990, p. 725) illustrates this prejudicial tendency. After an evening of drinking, a young man made advances to a young woman. When she swore at him, he hit her. She fought back and he eventually stabbed her. She took the case to court. The court concluded that her swearing had provoked the attack. The only punishment

Negative features of the people's courts in Mamelodi were identified as dishonesty, partiality towards certain participants, and unfair punishment. As was the case with several *makgotla*, judgement and sentencing became unacceptable to the majority of supporters. Moreover, these criticisms resulted in animosity amongst township residents (Bapela, 1987, p. 23).

The negative attributes described above illustrate how people's courts deviated from their initial ideals. While there is no evidence to support allegations of 'necklacing' and 'hacking' within the context of people's courts, it seems that several courts resorted to other populist practices in the climate of political upheaval.

2.4.2.7. State reaction to people's courts

The state and most of the media described people's courts as ". . . a barbaric instrument of intimidation and repression, used by township agitators to enforce the compliance of moderate township residents in unpopular consumer boycotts and other campaigns" (Seekings, 1989, p. 119). On June 12, 1986, a State of Emergency was imposed, followed by an attempt to destroy the alternative township structures. Several people's court participants were detained or went into hiding. In terms of Proclamation R224 of December 11, 1986 the publication of certain information on people's

---

imposed upon the man was the payment of the taxi fare to transport her to hospital.

courts was prohibited. Proclamation R96 of June 11, 1987 essentially outlawed these structures by making it an offence to belong to a people's court, to propose that others accept the authority of a court, or to do so oneself (Burman and Scharf, 1990, p. 705). State controlled media attempted to undermine the legitimacy of people's courts by perpetuating the image of people's courts as barbaric structures intent on 'necklacing' adversaries (Moses, 1990, pp. 88-89). Scharf and Ngcokoto (1990, p. 361) infer that the state managed to convince a significant percentage of the population that 'necklacing' and people's courts were synonymous.

Moses (1990) emphasizes the counterhegemonic threat posed by the people's courts. Incorporated in the concept of people's justice, people's courts attempted to construct a new legality and thereby challenged the white ruling bloc. The liaison between township judicial institutions and other left-wing extra-state structures was threatening to the state (Seekings, 1989, pp. 132-133). The link between left-wing politics and day-to-day township problems posed a similar threat. In a confidential letter written to the Director General of the Department of Justice on April 14, 1986 the Attorney-General of the Witwatersrand expressed his concern about people's courts. He correlated the form and function of the courts with calls made by the ANC and SACP, and drew the following conclusion: "People's Courts is a faset van a veel groter strategie wat gemik is op die vernietiging van die staat"[13] (Moses, 1990, pp. 90-91).

---

[13] Afrikaans for "People's courts are a facet of a much greater strategy intent on the destruction of the state."

Between 1986 and 1988, there was an official attempt to convict the alleged organizers of the people's courts of treason. In the Mayekiso and Zwane trials, Brigadier Herman Stadler contended that the approximate 400 people's courts in the South African townships were created as an integral part of the ANC's conspiracy to undermine state authority. The accused in the Mayekiso trial were, however, acquitted of all charges. The accused in the Zwane and Ntshilele trials were ultimately convicted of sedition, rather than treason. The convictions of sedition were based on the judges' findings that the accused had ". . . arrogated to themselves certain functions of the police and the judicial authority of the state . . ." by pursuing an anti-crime campaign and/or operating a court. There was no evidence to substantiate allegations of an ANC conspiracy or intent to subvert state authority (Seekings, 1989, p. 123).

For Moses (1990, p. 88), the South African state's response to the people's courts reflected the impact of these structures:

> . . . the fact that its [the state's] hegemony was crumbling, that one of its main legitimating structures, the legal structure which includes the judiciary, was rendered ineffective and that it was unable to secure the consent of the black people of South Africa, without resorting to brute coercion.

In August 1988, the head of the security police announced that practically all people's courts had been eliminated. In Seekings' (1989, p. 130) opinion, most

courts were terminated by the end of 1986 as a result of state repression during the State of Emergency.

The South African state thus employed the formal law as well as populist discourse and techniques to undermine and exterminate the oppositional people's courts of the mid-1980s. The literature highlights the dialectical relationship between five types of justice in their struggle for and against apartheid in South Africa. While the state's legal order is clearly oppressive and repressive, popular justice and aspects of customary law have protective and liberating potential. In this study, interviews were conducted with South Africans in an attempt to explore the themes and systems portrayed in Chapters 1 and 2.

Chapter 3

Research Method

The fieldwork data of the thesis were assembled during July and August 1990 in Cape Town, South Africa. Considering that the study focused on people's interpretations and perspectives of people's justice, qualitative research methods were employed. Forty interviews were conducted with 42 participants. This chapter describes the compilation of the sample and the interview procedure. Techniques and key questions are outlined. Inclusively, the limitations of the interview material are stipulated. The way is paved for the analysis of the data and the development of theoretical constructs.

3.1 Sample

A strategic sample of 44 potential participants was initially compiled. The sample was purposively chosen to correspond with the study's central aim of portraying diverse conceptions and perceptions of people's justice in a changing South Africa. The criteria of political affiliation, occupation, race, gender, and class were considered, and an attempt was made to achieve heterogeneity in the sample.

A cross section of 24 lawyers, parliamentarians, paralegals, activists, community social workers, and socio-legal academics participated in the

study. Considering that people's justice is the central theme, it was essential to include members of the general public. An additional 18 participants, most of whom resided in three diverse geographically and racially defined neighbourhoods, were therefore incorporated in the sample.

I have lived most of my life in South Africa, and studied and worked in community social work in Cape Town from 1980 to 1987. I was consequently able to select certain potential participants based on my relative familiarity with the Cape Town legal, political, and academic arenas. In compiling the sample, I enlisted the assistance of a former teacher, two former community work colleagues, the offices of political parties, and the National Association of Democratic Lawyers (NADEL). During the course of interviewing, a number of participants referred me to others who could potentially provide useful insights and diverse perspectives.

A description of the composition of the 'professional' segment of the sample will be followed by a description of the 'public' component. Tables 3.1 and 3.2 show the distribution of race, gender, and political affiliation in the respective segments. With regard to the criterion of political allegiance, individuals reputed to be aligned with significant political parties and ideologies (see Appendix B) were purposively chosen. Participants included supporters of the Conservative Party (KP), the ruling Nationalist Party (NP), the Democratic Party (DP), the African National Congress (ANC), the Pan Africanist Congress (PAC), and the Azanian People's Organisation (AZAPO).

Table 3.1 illustrates that 18 of the 24 professional participants held liberationist ideals. These respondents are not, however, representative of professionals in the South African legal arena. As portrayed in Section 2.2 of the preceding chapter, the formal legal profession is generally pro status quo. I intentionally placed emphasis on the views and visions of those who advocate substantive change because this study examines people's justice within the context of a **changing** South Africa. Moreover, liberationist ideals are congruous with the aspirations of the majority of the population. Table 3.1 shows that 12 of the 18 progressive participants were members or supporters of the ANC. This ANC prevalence is based on the premise that the organisation is the most prominent force in the liberation struggle. The ANC is not, however, the only player in the field. Since the thesis focuses on **images** of people's justice, other political suasions were incorporated. As noted in both Tables 3.1 and 3.2, there were respondents who supported either reformist or liberationist ideals, but whose party affiliation remained unspecified. Participants were not directly asked to state their party allegiances. These were either stipulated by referral sources, or voluntarily communicated during the course of interviews.

Since the presentation of legal, paralegal, and academic perspectives were objects of the research, occupation was a sampling criterion. Political affiliation and occupation were not mutually exclusive categories. Participating lawyers, paralegals, social workers, and academics identified with specific political philosophies and many of them were active in the political arena. Of the ten practicing lawyers selected, three were advocates,

and two were employed at the Legal Resources Centre (LRC). The LRC is primarily funded by overseas organisations, and staffed by professional lawyers who endeavour to take on 'impact' cases pertaining to broader community issues. The remaining five lawyers were employed in private practices, two in public interest departments. In addition, a Cape Town-based Democratic Party (DP) leader and a Transvaal Conservative Party (KP) parliamentarian, both with legal backgrounds, participated in the study.

Of the nine paralegal participants, two were employed at the Legal Education Action Project (LEAP). The Project is affiliated with the Institute of Criminology at the University of Cape Town, and primarily operates in the rural areas. One paralegal respondent was working at the Khayelitsha Advice Office, and two were employees of an Advice Office in a coloured township. One paralegal participant was employed by a law firm. The seventh was implementing a street law project under the auspices of the University of the Western Cape. Interestingly, three paralegal respondents were trained lawyers who elected not to work within the state-based justice system. Two community social workers at the National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) were included in the sample. Three academics were selected from the schools of law or criminology at the three universities in the Cape Town area, namely, the progressive English-speaking University of Cape Town, the progressive predominantly 'coloured' University of the Western Cape, and the more conservative Afrikaans-speaking University of Stellenbosch.

TABLE 3.1: CHARACTERISTICS AND POLITICAL INCLINATIONS OF **PROFESSIONAL** SEGMENT OF SAMPLE

	CONSER-VATIVE	REFORMIST			LIBERATIONIST			
	KP	NP	DP	PARTY AFFILIA-TION ?[14]	ANC	PAC	AZAPO	PARTY AFFILIA-TION ?
BLACK MALE				1	2	2	1	
COLOUR-ED MALE					4			
WHITE MALE	1	1	1	2	3			2
BLACK FEMALE					1			
COLOUR-ED FEMALE					1			
WHITE FEMALE					1			1

TABLE 3.2: CHARACTERISTICS AND POLITICAL INCLINATIONS OF **PUBLIC** SEGMENT OF SAMPLE

	CONSER-VATIVE	REFORMIST			LIBERATIONIST			
	KP	NP	DP	PARTY AFFILIA-TION ?	ANC	PAC	AZAPO	PARTY AFFILIA-TION ?
BLACK MALE					1			2
COLOUR-ED MALE				1	2			
WHITE MALE	1	1			1			
BLACK FEMALE					1	1		1
COLOUR-ED FEMALE					2			1
WHITE FEMALE		1	1	1				

[14] Political party affiliation unknown.

Considering the colour-coded nature of South African society, I ensured that the three most prominent racial groups[15] were included in the professional segment of the sample. Table 3.1 displays that there were seven black, five coloured, and 12 white professional respondents. These figures reflect the prevalence of whites in the legal and academic domains. In reality the number of white professionals is proportionately higher than the sample indicates. My emphasis on progressive perspectives resulted in the inclusion of several people of colour. It is, however, important to note that race does not essentially correlate with political persuasion. Within the legal profession there are, for example, white radical opponents of the system and black moderate upholders of the system. As indicated in Table 3.1, one of the black respondents purported reformist ideals, and seven white participants supported substantive change. Therefore, while race was taken into consideration, more emphasis was placed on political affiliation.

I wanted to incorporate a woman's perspective in the study. The legal profession, university schools of law, and even the progressive community organisations in South Africa are male-dominated. While the professional segment of the sample reflects this, I included four female paralegals and activists. As shown in Table 3.1, all four women supported liberationist ideologies. This could signify that women are more integrated in the paralegal sphere and liberation movement than in the state-based justice

[15] There are four classified racial groups in South Africa: blacks (26 million), whites (5 million), coloureds (3 million), and Asians or Indians (1 million).

system. Alternatively, this phenomenon could be the outcome of the sampling technique, or merely co-incidental.

Fourteen of the 18 people who comprised the public segment of the sample were selected from three geographically and racially defined neighbourhoods, namely, Khayelitsha, Bonteheuwel, and Gardens. Khayelitsha is a black township comprising a combination of core housing and site-and-service squatting schemes. Developed in the mid-1980s, Khayelitsha is located 30 kilometers from central Cape Town. It is significant to note that an estimated seven million out of a population of 35 million South Africans are squatters. Bonteheuwel is a working-class coloured township on the outskirts of Cape Town. Many Bonteheuwel residents were relocated from other neighbourhoods in accordance with the racial Group Areas legislation. The third selected neigbourhood, Gardens, is an established white middle-class suburb in close proximity to the city centre.

As stated in 3.1, respondents were not randomly chosen. Community workers familiar with the three selected neighbourhoods assisted me to identify and approach a range of participants. The five participants from Khayelitsha were a gardener, an unemployed man with no formal education or work experience, a creche facilitator, an unemployed domestic worker, and a young pregnant woman. The five Bonteheuwel respondents were a factory worker, a caterer, an unemployed activist, a fruit-and-vegetable hawker, and a retired nursing aide. The four Gardens participants were a housewife, a musician, a business executive, and a school teacher. An additional three

members of the public were referred to the researcher as potentially resourceful participants. The first was a black University of the Western Cape student who was actively involved in both student and township politics. The second was a coloured feminist active in the women's movement. The third was a white member of the clergy who lived and served as a minister in a coloured township. His wife was present during the interview and agreed to participate.

Table 3.2 illustrates that the public participants were also adherents of a range of political ideologies. Of the 18, one was conservative and five aligned themselves with reformist or liberal politics. Analogous with the professional segment of the sample, the majority of public respondents supported liberationist ideals, particularly those of the ANC: there were 12 liberationists, seven of whom were ANC followers. As indicated above, an almost even number of respondents was chosen from each of the three racially defined areas. With the additional four participants, there were six blacks, six coloureds, and six whites in the public segment. Each of the three localities was predominantly homogeneous in class terms. As shown in Table 3.2, a gender balance was secured in this segment of the sample: there were nine female and nine male respondents.

3.2 Interview Procedure

Ethical approval to conduct interviews was obtained from the Simon Fraser University Ethics Review Committee. Potential participants were

contacted and informed of the nature and purpose of the study. A written statement introducing the researcher and the study was submitted to potential participants or participatory organisations on their request. The fact that the study was being conducted under the auspices of Simon Fraser University was confirmed. Participation was voluntary. Full or partial withdrawal could have been undertaken at any time, without explanation, during the interview. Furthermore, full personal confidentiality was guaranteed.

Forty-two of the 44 people approached agreed to participate in the study. Several respondents indicated that the research was being conducted at an opportune time. The unbanning of the key liberation movements, the release of Mandela and select other political prisoners, the withdrawal of media censorship, and the lifting of the State of Emergency facilitated an atmosphere of increased openness and freedom of speech. Prior to February 1990, respondents, particular those opposed to the apartheid regime, might have feared reprisals, and consequently been reluctant to disclose their views and allegiances. Furthermore, there was less need to expend energy on resisting repression. People were able to devote more attention to 'what we want,' over and above 'what we don't want.' Only two of the selected participants declined to be interviewed. A legal academic stated that he had no knowledge of the subject, and referred me to his colleague. A lawyer recommended by the Nationalist Party postponed three appointments and finally declined, stating he was too busy.

An interview in each sample segment was a joint interview: one with two paralegals/activists, and another with a husband and wife. Twenty-one of the 23 interviews with the professional segment of the sample were conducted in participants' offices. Due to physical distance, one interview was conducted telephonically. The Conservative Party office was unable to identify a Conservative lawyer in Cape Town and referred me to a Conservative Transvaal parliamentarian with a legal background for telephonic contact. Another interview was held in a restaurant. Fifteen of the 17 interviews with the public segment of the population took place in respondents' homes. The remaining two interviews were conducted at the University of the Western Cape. These diverse interview localities exposed some of the contradictions and disparities inherent in South African society: from the plush chambers of an advocate to the scanty shack of a squatter. In accordance with participants' preference, 38 interviews were conducted in English and two in Afrikaans. The duration of each interview ranged from 30 minutes to one-and-a half hours. The average length of an interview was one hour.

Before arranging interviews, I consulted with South Africans who were well versed with the dynamics of the socio-political climate of the day. They briefed me, and confirmed the relevance of my topic. Nevertheless, in the initial interviews I felt hesitant about the pertinence of my questions. I gained confidence and clarity as the interviews proceeded.

As a supporter of the ANC, I felt most comfortable with respondents who aligned themselves with the ideal of a non-racial, non-sexist democratic South Africa. I sometimes felt inclined to contest the responses of those participants who held alternate views. However, I resisted the temptation; I realised I was there to record rather than challenge their perspectives. My urge to engage in debate was stronger during the three interviews with Nationalist Party followers, and most intense during the two interviews with the Conservatives. They either attempted to defend and disguise their racist and elitist ideology, or were blatantly discriminatory. Those who indulged in justifications angered me the most. A Nationalist Party supporter and one of the Conservatives were particularly condescending towards me as a woman. One of them persisted in addressing me as 'my girl.' Since confrontation might have jeopardized the interview, I restrained myself.

In the four interviews with PAC and AZAPO supporters, I felt conscious of my whiteness. As these participants were expressing Africanist and Black Consciousness aspirations, I wondered what they were thinking of this white South African researching people's justice. However, since these people had consented to meet with me, and since the identity of the researcher was not the subject of discussion, I chose to avoid the issue. In one of these interviews, I sensed that the respondent felt inhibited by my being a white South African. He seemed to be exercising discretion and phrasing his responses in neutral terminology. In retrospect, I think I should have interjected and stated my tolerance of, and need for, diverse perspectives.

A few professional participants requested transcripts of their interviews, and many asked for copies of the completed thesis. In terminating an interview with a Khayelitsha squatter, she pleaded with me to convey to the government the people's need for food and shelter. I explained to her that I had no connection with the government, but that I would record these needs in my thesis. I hoped that I had not created any other unrealistic expectations.

With the consent of participants, 35 interviews were tape recorded. These respondents appeared to be unperturbed by the recorder. I was able to focus, and participate in these interviews without being preoccupied with note taking. Furthermore, tape recordings have provided me with verbatim accounts of the dialogues. On the recommendation of the referral resource person in Khayelitsha, I used notes during the interviews with three squatter residents. It was thought that these participants might be intimidated by the official demeanour of a tape recorder. They expressed their comfort with note taking. In addition, two participants preferred that I use notes, and notes were taken during the telephonic interview.

The data were studied after each interview. Tapes were replayed and notations elaborated upon. To maximize the retention of content, I immediately tape recorded an outline of the interviews in which notes had been used. A coding system was employed to avoid or inhibit potential identification. The tapes were transcribed and thereafter destroyed. Confidentiality was maintained during the data-analysis and write-up phases

of the study. To facilitate analysis, response patterns were categorized and files compiled accordingly.

3.3 Research Techniques and Questions

Forty semi-structured, open-ended interviews were conducted with the forty-two respondents. The interview method was chosen to provide the opportunity for clarification and elaboration of both questions and answers. No questionnaire instrument was used. While flexibility was a central feature, there was a common pattern and sequence to questions and answers. Questions differed from one interview to the next, contingent on the area of expertise. New topics, questions, and insights were developed during the course of interviewing, and incorporated into subsequent interviews.

Questions corresponded with the three central themes of the study, namely:

*Conceptions of people's justice;
*Perceptions of the community-based justice structures of the mid-1980s;
*Visions of people's justice in a post-apartheid South Africa.

Each of these is elaborated below.

First, participants were asked to attach meaning to the concept of people's justice. What is the rationale behind people's justice? Does people's justice essentially imply informal justice? What is the relationship between

state and community-based justice? What are participants' impressions of the agencies and agents of state-based justice? Is law 'from above' a site of struggle? Is African customary law a vehicle for people's justice? How do perceptions of people's courts relate to conceptions of people's justice? Respondents were encouraged to elaborate on examples of people's justice.

Second, interpretations of the form and content of community-based justice structures were examined. Particular attention was devoted to the people's courts which emerged in the townships in the mid-1980s. What was the rationale behind the formation of these structures? Are they perceived as alternatives to an unjust justice system, or as structures designed to resolve disputes and problems outside of the realm of the state-based system, or as a means of furthering specific political ends, or as prefigurations for a post-apartheid society? Who initiated and operated these structures? Were the structures affiliated to community-based political organisations? To whom were the facilitators accountable? How did the structures in the Western Cape compare with those in other parts of the country? Why were there regional differences? Did the structures resemble traditional African channels and methods of dispute resolution? What did participants perceive as the strengths and weaknesses of these structures? What were their impressions of the allegations of abuse of power and harsh punishment meted out by the people's courts? Did the community-based justice structures of the mid-1980s serve educative and empowering functions? Were they able to achieve democratic and participatory justice, and community control?

Third, participants' visions of people's justice in a post-apartheid South Africa were explored. How can justice be realised? How can law be made increasingly accessible to people? Is it desirable to involve the public in the process of legal change? If so, how is it feasible? How do progressive lawyers and paralegals define their future role? Does the South African Freedom Charter of 1955 (see Appendix E) still have validity? What is a rights culture, and how can it be developed? Is there support for the current proposal to compile a Bill of Rights? If so, what should the document embrace? How can the state system of white man's justice be transformed? Should African customary law be formally incorporated into the post-apartheid legal system?

The desirability and feasibility of popular community courts were addressed. Is it feasible to establish people's courts within the context of divided communities? Can there be competing courts? How do proponents of people's courts envisage the structure and parameters of these forums? Is a hierarchical system comprising community, regional, and national courts a viable option? By whom should people's courts be operated, to whom should they be accountable, and what should be their jurisdiction? Should they have the power to punish? If so, should they be confined to administering certain types or degrees of punishment? If the emphasis is on community justice, is it appropriate or necessary to impose rules and standards? Should there be consistency in procedure amongst communities, or would this be antithetical to the concept of community control?

3.4 Limitations

It is important to note that the study does not claim to be representative of 'the people' or even of lawyers, paralegals, activists, socio-legal academics, and community members of the Greater Cape Town area. In accordance with its exploratory objectives, the study aims to portray and discuss **images** of people's justice at a particular juncture in South African history.

Most participants' impressions of the people's courts of the mid-1980s were not based on direct involvement with these structures. People's courts were a feature of only the black townships and, for reasons discussed in the text, were more prominent in the Transvaal and the Eastern Cape than the Western Cape. Consequently, only four black participants had had first-hand experience of people's court operations and trials. The remaining black township residents had learned of people's courts by word of mouth. Most coloured and white respondents had acquired their knowledge from the state-controlled media. Two participating lawyers had been involved in the defence of people accused of operating people's courts. Four had had dealings with individuals who complained of unfair treatment by the people's courts. Many legal professionals had reviewed related state court records.

Limitations of the study include the time constraint within which participants had to be selected, contacted, and interviewed, and the researcher's distance from the context of the study during the data analysis

and write-up phases. Furthermore, it is significant to note that the views of respondents cannot be interpreted as the official positions of the movements they support. Participants were not mandated to respond on behalf of specific political parties or organisations.

A detected sampling bias is that a higher number of participants were supporters of the African National Congress than of other political groups. Eighteen of the 42 respondents aligned themselves with the organisation. This bias was based on the assumption that the African National Congress is the key movement in the liberation struggle. Over the past decade, polls[16] have consistently indicated that 70-80% of South Africans support the African National Congress. The prominent position held by the movement in the Convention for a Democratic South Africa (CODESA) is another barometer of its strength. Notwithstanding, the revolutionary potential of the African National Congress has yet to be ascertained.

3.5 Description and Analysis of Data

The data are described and analysed in the following three chapters. The format corresponds with the three central themes of the study stipulated in Section 3.3:

*Chapter 4: Conceptions of People's Justice
*Chapter 5: Perceptions of People's Courts

---

16 Polls suggest that 10-30% of the population support De Klerk's Nationalist Party, 4-5% favour Inkatha, which is more popular than the PAC, and less than 1% support AZAPO.

*Chapter 6: Visions of People's Justice in a Post-Apartheid South Africa

In the substantive chapters, reference is made to the race, gender, political allegiance, profession, and place of residence only when it is necessary to distinguish individual participants, and when these criteria have bearing on responses and indicate universality or particularity. A Respondents' Key has been incorporated and participants are intermittently referred to in terms of these numerical codes (see Appendix D). Select descriptive criteria have purposively been omitted from the key to conceal respondents' identities. Certain responses are quantified to reflect their prevalence or uniqueness. It is, however, important to remember that these numbers are not always conclusive because interviews were semi-structured and not all questions were posed to all participants.

The following political classifications are employed in Chapters 4, 5, and 6: conservative, pro-government, liberal, and progressive. In relation to the descriptions in this chapter and in Appendix B, conservative interviewees voiced support of the Conservative Party (KP), and pro-government participants showed allegiance to the ruling National Party (NP). Considering their recent ideological and policy shifts, the Nationalists are categorised as reformist in Tables 3.1 and 3.2, alongside Democratic Party members and other liberals. However, in the description and analysis of the data, the Nationalists are distinguished from the liberals because the latter are considered to be one step to the left. The term progressive is applied in the following chapters as a substitute for 'liberationist.' The responses of ANC,

PAC and AZAPO participants are frequently differentiated to reflect their divergent conceptions, perceptions, and visions.

Chapter 4

Conceptions of People's Justice

> People's justice? I'm not sure what it is. It sounds right (R5)[17] . . . . To me personally, it's something foreign. I just can't think what it means really. I don't know what it is (R30).
>
> Setting up kangaroo courts to 'necklace' and murder political opponents (R35). . . . The violent confrontations taking place in Natal and the Transvaal now, are those instances of people's justice? (R38) . . . . The killing of an unknown person on the basis of the 'uniform' that that person adorns. It's terrible (R40).
>
> A conciliatory, community-based justice system based on the central tenets of African customary law (R19). . . . Community forums developed by the people as alternatives to white man's justice (R9). . . . The fair, democratic justice system we envisage in a post-apartheid South Africa (R1).

These images of people's justice reflect three different response patterns unveiled in the study: (a) unfamiliarity with the concept; (b) negative, populist associations; and (c) conceptions of an ideal. As this study demonstrates, there is no singular definition of people's justice. In the words of an advocate supportive of the Nationalist Party, ". . . it is for the speaker to attach his own conscious meaning to the concept, and then do with it what he likes" (R8). Similarly, a University of Cape Town academic stated that ". . . it depends for what purposes one is using the concept of people's justice as to

---

[17] A numerical code has been assigned to each of the 42 respondents. The Respondents' Key is located in Appendix D.

where you use a cutoff point" (R24). "**Which people's** justice?" was the question posed by a Khayelitsha[18] resident. "The justice of the majority, or of a select group?" (R27). He too recognised that the concept is subject to personal interpretation. Moreover, he stressed that understandings of the concept are influenced by people's experience of what they have defined as people's justice. The meaning of people's justice thus fluctuates in accordance with the concept's employer, the employer's intentions, class, gender, ethnicity, political affiliation, and perceptions of the practice of people's justice.

When asked to comment on these constructs, 29 participants referred to people's justice and informal justice interchangeably. The remainder were, however, reluctant to draw a rigid distinction between formal and informal justice. As noted by a University of the Western Cape law professor, so-called informal apparatuses like the people's courts may have formal, established rules and procedures. Conversely, elements of informality pervade the state-based justice system. An advice office worker objected to employing the formal/informal dichotomy for a different reason: today's informal structures may potentially become tomorrow's formal institutions. The distinction between state and community-based justice was consequently proposed as a more useful framework. According to a Bonteheuwel[19] activist, justice, including people's justice, is a ". . . relative, fluid and flexible concept and not a rigid and statutory one" (R32). Consonantly, people's justice fluctuates in

---

[18] See Subsection 3.1, Chapter 3.
[19] See Subsection 3.1, Chapter 3.

accordance with political and economic trends and changing norms. Furthermore, people's justice is essentially linked to people's power. The activist thus proposed that people's justice be allowed to develop rather than be imposed. Similarly, a social worker at the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) opposed bipolar conceptualizations, and advocated a 'graded' understanding of people's justice (R21).

This chapter explores the concept of people's justice in contemporary South Africa through the eyes of the interviewees. The aim is twofold: to portray the diversity in conceptualizations, and to decipher common trends. The concept is viewed against the background of a society largely devoid of basic human rights. Considering the dialectical relationship between people's justice and the apartheid state's justice system, participants' experience of the latter is portrayed. Public respondents' amenability to utilising existing problem-solving resources is examined. Consonant with a central theme of the study, attention is devoted to the role of the law as a potential site of struggle. As noted in Chapter 2, people's justice is often equated with people's courts. For the purposes of this research, however, and without dilating into the catch-all realm, the concept is being expanded to include other aspects and arenas of people's justice.

4.1 The Context

4.1.1 A 'rightless' society

Progressive participants stressed the importance of reviewing people's justice in South Africa against the background of a general absence of rights and rights culture. A liberal Gardens[20] resident stressed that the existence of apartheid largely precludes the possibility of human rights. In the following two passages, PAC and ANC-aligned legal professionals respectively outlined the predicament, emphasizing the background of deprivation experienced by the black majority:

> For many years people in this country have never been aware of rights. Minister after Minister in the 1950s and 1960s told them [the black majority] that they were non-citizens only welcome here for their labour, and that the education they were given was a privilege that was only there to train them for the white man's needs (R2).

> The majority of the people in this country have largely been excluded from having specific rights. They have really fallen in the realm of administrative law where people have actually given them privileges. And even where there are rights, they've always been dealt with in terms of privileges. I think it's important to look at that, because in our culture, in our psyche, in our society, we do not have that type of rights culture (R10).

A public interest lawyer referred specifically to the current absence of women's rights in South African law. The women's cases in the Legal Resources Centre's portfolio predominantly pertain to issues of subservience

---

[20] See Subsection 3.1, Chapter 3.

as opposed to rights. Women's legal battles are frequently centred around custody, maintenance and the occupation of the family home.

The fact that certain rights are presented and accepted as privileges was confirmed by a Bonteheuwel resident (R30). He described how people feel indebted to the government for their pensions, for example. Forgetting about the years when they laboured and paid taxes, they fail to realise that they are merely receiving what is rightfully theirs, and imagine that the government is supporting them. In addition, Respondent 30 criticized the overextension of the right to disability grants. He surmised that a high percentage of people in his neighbourhood receive disability grants because they are easy to secure. Consequently, these people have become dependent on the government, and complacent. He condemned the government for thereby ". . . weakening us as a people."

The intricacies of people's justice cannot be contemplated without taking into consideration the basic needs reality confronting many South Africans. As elaborated by a resident of Khayelitsha, "People here don't know about rights. We are all struggling. We have no houses, no food . . ." (R25). Her statement substantiates the Marxian notion that formal rights cannot be considered apart from substantive inequality. As previously noted, an estimated seven million South Africans are have no 'formal housing.' Two other Khayelitsha interviewees conveyed that local residents are ignorant of the few rights they do have. People have no idea what action to take when

they are evicted from their shacks. They do not know how to begin to try and secure legal assistance when the need arises.

The white priest working and living in a coloured township confirmed that, as a result of the exploitative apartheid system and their limited knowledge of the law, coloured township dwellers are also unaware of the few rights they do have. The successive States of Emergency increasingly stripped people of their rights. In the priest's view, ". . . oppression and abuse have become an accepted way of life" (R39). The following statement by a Bonteheuwel resident mirrors this predicament: "As a rule we just let ourselves be trampled over because we are not clear on what our rights are" (R31). She estimated that one out of every 20 local residents may have a 'vague idea' of human and legal rights, which usually stems from their exposure to television courtroom dramas.

4.1.2 The apartheid state's justice system

> In the South African context, if you talk of people's justice you are talking in terms of people being able to resolve the problems that exist in the community in which they live on an amicable basis, without resorting to the state courts which, you will pardon the expression, are manned exclusively by whites and mete out white justice (R3).

In various ways during interviews, 38 interviewees articulated their understanding of people's justice against the backdrop of the apartheid state's justice system. Thus, even some supporters of the system realised the rationale behind people's justice. Respondents' race, exposure to oppression

and repression, and level of political awareness correlated with their perceptions of the institutions of state justice. While recognising that state legal institutions are inaccessible to most South Africans, conservative, pro-government, and liberally-inclined white interviewees maintained that the system is basically 'in order.' In contrast, progressive participants stressed that the justice system in its entirety is the product of an illegitimate regime. All blacks and coloureds, and white activists expressed their lack of confidence in and disdain for the law, the police and the courts, which they viewed as allies of the apartheid system. Consequently, the oppressed and political left interpreted people's justice as a reaction towards institutionalized racism which permeates all levels of the judiciary.

The majority of the population have not had access to the making of the laws that govern them. A black paralegal and activist in the women's movement outlined how the regime's laws have discriminated against women (see Ramphele and Boonzaier, 1988). She highlighted the double oppression suffered by black women. Up until the mid-1980s, black women were regarded as extensions of minors in relation to their husbands. In order to purchase certain articles or enter into contracts, a black woman had to have the formal authorization of her husband. According to a LEAP paralegal, a high percentage of employed women work in the domestic and agricultural sectors, where they are not protected by labour legislation and have no rights. Black working class women are subjected to triple oppression. With regard to violence against women (see Vogelman and Eagle, 1991), a NICRO social worker described the laws on interdicts and arrests as 'archaic.' Much abuse of

women is not legally regarded as crime, and a police officer may arrest a batterer only if he/she witnesses the battering incident. A female resident of the site-and-service section of Khayelitsha reflected on the pains of the legally-backed migrant labour system. She and her siblings were previously 'detained' in the Transkei homeland, while her husband was forced by economic necessity to labour under contract in the city. Consequently, an advocate of women's rights proclaimed that, "We don't only talk apartheid war, we talk gender war" (R42).

South African Police abuse and brutality was outlined in Chapter 2 and confirmed by Bonteheuwel and Khayelitsha residents, and legal and other activists interviewed in the study. As elaborated by two Khayelitsha interviewees, the police tend to perpetuate the abuse to which residents may be subjected, and rarely play a protective role. According to a Bonteheuwel resident, the police do not intervene in gang fights: "You can phone them. They will come, see it's a gang fight, and walk off. Afterwards they will come and collect the bodies" (R33). A third Khayelitsha respondent stated that the police frequently fail to pursue charges laid by black complainants who consequently have 'two angers': (a) towards the alleged offender(s), and (b) towards the justice system for failing to intervene.

Participants across the spectrum acknowledged that the state's system is plagued by inaccessibility: excessive legal costs, inadequate legal aid, urban concentration, complex discourse and procedure. Eleven respondents elaborated on the inadequacies of the legal aid system, and confirmed that

legal aid in South Africa is a privilege rather than a right. Two LEAP paralegals (R13, R14) reported that people must submit to a means test to determine their eligibility, and that only the indigent accused in Supreme Court capital cases are eligible for *Pro-Deo* [21] defence lawyers. These respondents acknowledged that it is, however, easier to secure legal representation for political trials as a result of overseas funding. Respondent 13 estimated that South Africa's legal aid fund runs dry three-quarters of the way through the year. Thereafter, it is virtually impossible to procure legal aid, particularly for battered women and divorce cases. The attainment of legal aid in the rural areas is apparently a rarity. Access to justice in these areas is often further complicated by the dual roles assumed by state police and court officials: it is not uncommon in small rural towns for the second-in-command of police to act concurrently as the state prosecutor. It follows that it is structurally impossible to pursue cases of police brutality effectively considering that charges have to be laid with the police, who are then supposed to investigate and prosecute 'their own people.'

'Flaws' in the justice system were attributed by a Gardens conservative to an ". . . imbalance in the numbers of the population" (R35). He explained that the black majority is rapidly multiplying whereas the white minority is stagnant or decreasing in size and that that impedes the government's ability to provide ". . . a more equal system of justice." While acknowledging the previously stated problem of inaccessibility, a conservative politician (R11) and a pro-government advocate (R8) used the rhetoric of judicial objectivity

---

[21] See Footnote 6, Chapter 2.

and independence to substantiate their endorsement of the state justice system. Respondent 8 added that the courts have managed to remain impartial when politically controversial issues have come to the fore. On second thought, he distinguished between the Supreme Court and the Magistrates' Courts, and stated that the latter sometimes succumb to bias because their officials are inadequately educated and trained on judicial affairs. He added that the decisions of the Magistrates' Courts are fortunately subject to scrutiny by the Supreme Court.

According to a liberal politician, "In spite of the fact that the courts are legitimated by the government, they have enjoyed an infinitely greater degree of respect than the regime" (R12). He elaborated that the amount of respect correlated with the level of the court: the Supreme Court was more revered than the Magistrates' Courts. A liberal lawyer distinguished between civil and criminal trials. He maintained that in a conventional civil trial both parties usually get a fair hearing, whereas in a common law criminal trial the opportunities for a just outcome are diminished. Although justice may prevail in civil cases, he too recognized that the disadvantaged have little chance of accessing the courts and legal representation. Notwithstanding, he declared that the existence of defined rules fuels his faith in formal law while the absence of rules substantiates his skepticism of people's justice. However, contrary to the lawyer's assumptions, people's justice does not necessarily preclude formal checks and balances (see Chapters 1 and 6).

Conservative, pro-government, and liberal legal professionals were severely criticized by their progressive counterparts in the study for refusing to acknowledge the prejudicial tendencies amongst the judiciary. The following passages extracted from interviews with two progressive advocates portray their condemnation of their liberal colleagues:

> People like Kentridge[22] and so on, who say there's not much wrong with the legal profession, it's bloody nonsense. I mean they're just benefitting. They may not agree with the system, but their mere silence is acquiescence in many ways. In an imperfect system where forces are loaded against the one, by being neutral you are definitely favouring the ones who are not the underdogs (R10).

> There is a room here where they tell you the day before which judges are hearing which appeals the next morning. I went up there one Sunday, and a senior liberal advocate stops me in the passage and asks me, "What are you doing on this floor?" I said I want to see who my judge is for tomorrow. So he asks me what sort of appeal, "Was it a public violence appeal?" Then he asks me, "Does it make a difference?" I could not believe that a senior man practicing law in this division did not know what was happening; the sort of thing that happened in Nazi Germany at Nurenburg. And we have come nowhere near Nurenburg . . . but people are already saying they don't see these things (R9).

From the perspective of progressive participants, South Africa's state courts are an integral part of the oppressive system, and racial and gender bias are endemic. Since the inception of organised courts, law has by act of design been the law of the white man. The judiciary is thus perceived as a monopoly of whites and males who uphold and protect apartheid's laws. People of colour and women usually face 'double discrimination' in South Africa's courts: (a) the laws are biased, and (b) the judicial officers are prejudiced.

---

[22] Sydney Kentridge is a prominent South African advocate.

Based on his political views and fifteen years of legal experience, a progressive advocate asserted that "[j]ustice is not what is represented in the South African courts. . . . I have no illusion that those who have implemented or executed justice in this country, have done the concept of justice incalculable harm" (R9).

The criminal courts were described as 'a real sausage machine' by a Gardens liberal. On the basis of personal experiences, three public participants of colour described the attitudes of presiding officers as disdainful, bordering on contemptuous. Respondent 34 maintained that court officials, the state prosecutor in particular, were disrespectful not only towards the accused but also towards witnesses, family members, and spectators. Two participants who had previously appeared in court without legal representation described how they had been intimidated, confused, and frustrated during their trials. The prosecutors had little time for their questions and concerns. A Bonteheuwel activist (R32) related that he had witnessed court interpreters influencing cases by purposively misinterpreting discourse as a result of their personal biases or hostilities. Moreover, both Respondents 32 and 28 observed that the outcomes of court battles often have more to do with the skills of the lawyer and legal technicalities than with justice. According to the former, such practices are typical of 'bourgeois democracy.'

The humiliating legal procedures to which rape survivors are subjected were outlined by three feminists. Respondent 13 estimated that one out of ten cases of rape and wife battering are reported to the police. About six

out of ten reported rape cases reach the courts. One in four of the accused are thereafter convicted. Consequently, only an estimated one percent of those alleged to have raped are subjected to legal sanction. The fact that sentences often reflect racial prejudice was recorded in the literature and endorsed by respondents. Even a Nationalist Party supporter (R36), who maintained that the justice system has a generally good reputation, recognised that blacks and coloureds often get ". . . a bit of a raw deal." She acknowledged that a black convicted of raping a white person receives a much harsher sentence than a white found guilty of raping a black person.

NICRO social workers reported a recent increase in the incidence of community service, but confirmed that imprisonment is still frequently ordered by the criminal courts. Whereas Respondent 36 attributed South Africa's high rate of recidivism to premature release on parole, a Khayelitsha resident described how the prison experience contributes towards criminal careers and an escalation of crime. Gang activity is rife within the confines of the reformatories and jails. The following case was cited by Respondent 32 to illustrate how prisoners often get entwined in a web of criminal activity:

> I met a man who at the age of 16 was sentenced to prison for four months for stealing from a shop. He landed up spending 17 years inside. Because when he got in there, he was beaten up and found protection in a prison gang. But in order to join the gang, he had to stab somebody. And for that he got two years. Then he became a 'girl,' which means he could be sodomised. In order to take his 'dress' off, in other words to become a man again, he had to go and kill someone. And that added years.

Progressive participants declared that the most alarming judicial scenarios have been witnessed during periods of heightened unrest. A black student activist noted that acts in pursuit of freedom are often criminalised. Consequently, ". . . the courts are used as a tool to oppress people, to stifle organisation, to suppress aspirations" (R41). A Bonteheuwel resident (R34) described the sentences imposed on children during the unrest as 'indefensible, cruel, inhuman.' She reported that teenagers who were first offenders were regularly sentenced to prison for 18 to 24 months. Six participants conveyed that they had previously been detained without trial for anti-apartheid activity. They described the harsh, often torturous prison conditions to which they had been subjected, and how they were sustained by their commitment to the struggle. A progressive black lawyer elaborated as follows:

> One thing that kept us going in prison was the fact that yes, we had done everything we were accused of. When mass resistance escalated in 1984, we were still in prison. We were able to happily say, there you are, we did plant the seeds and we were correct. So we never regretted a moment we were in prison, although we didn't like it. We believed it was worthwhile (R3).

The recurring cycles of state oppression, mass resistance and heightened state oppression were thus revealed in the context of these interviews. The people's courts evolved in the mid-1980s during one such period of intensified conflict. This form of people's justice can consequently be located at the juncture between majority rejection of the minority's imposed discriminatory system and subsequent iron fist reprisals: the recognition of what we do not want replaced by efforts at implementing what

we might want, met by coercive measures to crush these aspirations and alternative pursuits. A progressive advocate captured the process as follows:

> At all levels of the judicial system, ranging from the Magistrates' Courts to the Appeal Court, we have had frightened men dispensing justice. They are members of a minority group and their views are consequently the views of that minority. When that minority is threatened, they react to protect minority rights, minority privileges . . . . They identify so totally with a system which is immoral, which perpetuates a crime against humanity (R9).

The publicized civil rights issues were described by five interviewees as insignificant in comparison to the travesties of justice permeating all levels of the judicial system. One advocate named judges, for example, Tom Lategan, who were predisposed to the death penalty during the 1980s (see Subsection 2.2.6, Chapter 2). Their reasoning was not that execution was the only appropriate legal penalty, but rather that it was an effective response to threats against the minority's domination and security. This advocate expressed relief in reporting that there were exceptions. He cited instances where members of the judiciary, despite their colour and background, had made humane and just decisions. These men restored his faith in humanity.

4.2 Public Amenability to Agents of Justice

I tried to ascertain whom the public respondents elected to approach for assistance in resolving disputes and personal or community dilemmas: did they prefer to go to the local police station, the headmen in black townships, the advice office, the church, or an alternate resource? In particular, I wanted

to find out whether structures of people's justice were within participants' realm of possibilities. I address contemporary adherence to African customary law and traditional forums of justice separately in Section 4.4.

Participants' preferences correlated with their colour, political suasion, exposure and accessibility to alternatives. Conservative and pro-government interviewees expressed faith in the state's justice apparatuses. Although liberally-oriented participants had reservations about these structures, they typically opted to use them. Black participants across the political spectrum were the most disposed to using alternative community-based structures. This may be indicative of the fact that blacks are most familiar with locally-based alternatives, because, as observed by Bapela (1987), these are consistent with traditional structures. Furthermore, community forums of justice have predominantly been developed in black townships and squatter camps, and are consequently most accessible to blacks. Based on the fact that they are the most severely oppressed by the regime's institutions, blacks have also had the most pressing need to resort to alternatives. In contrast, apoliticized coloured respondents did not consider community-based mechanisms to be viable options, and apoliticized white participants either rejected such alternatives, or presumed them to be ineffective. Politicized whites and coloureds, for their part, conveyed their willingness to use alternate resources, provided they are accessible. The following passages extracted from interviews illustrate some of these trends.

A black female resident of the site-and-service section of Khayelitsha explained why she now approaches the local civic organisation for assistance, rather than the headmen or the police:

> Before we used to go to the headmen, men chosen by people in each area to take care of things. There was a civic organisation, but I didn't know how it worked. But now nobody needs headmen, because they cause fights. If the headmen want to take your house, you must just leave. With the civic there is no fighting. The ANC wants people to stay and work together. . . . I had a lot of problems with the headmen. They said, "We are going to burn down your creche." They wanted to kill me because I had ANC people around the house. The ANC people had come to ask me if they could have a meeting here and I had said yes. . . . Without transport and a telephone nearby, it is difficult to get to the police. In any case, when the headmen threatened me, I went to the police. But they don't care. They didn't even write anything down. They said they didn't have books. I've got a witness. They shouted at me when I walked out. The headmen work with the police. I went to the ANC people. They helped me a lot. They stayed around the house. If the headmen see me they can shoot me (R25).

A working class coloured resident of Bonteheuwel characterized the police as intimidating, scornful towards coloured people, and ineffective. However, he reported that, given the lack of options, people still resort to the police:

> . . . it's quite a long time ago since I've been to a police station. I went two years ago with a neighbour who was picked up being drunk on the streets. At the police station the people were so rude to you that you were afraid to ask them what will happen and things like that. You are afraid to go to them, because of the attitude they adopt to you as a people. Even if people know that where can they go to? As far as the police stations are concerned, they are not helpful. But people still go there (R30).

Respondent 30 expressed confidence in the civic structures and advice offices, but maintained that they do not have the power to address crime. These sentiments were endorsed by a white priest living and working in a coloured township. In addition, he recognized the limitations of the church in solving problems, and emphasized the need for a viable alternative:

> In a place like Bonteheuwel, people are actually not knowing what to do with domestic and community affairs. They are not wanting to call in the police because of the reaction of the police to people living in a community like this. They feel abused by the police, and so they prefer not to call them. . . . I feel loathe to advise people to go to the authorities with many of their disputes because of the way they are being treated. . . . Our civic and advice office infrastructures I don't think have been built up sufficiently for people to trust that as a viable option. And I think people have been using the church. But even now there are people saying, what can the church do because legally the church has no power at all. So people are feeling the pressure of this whole system at the moment, not really knowing where do we go to settle disputes. I don't think there is anywhere at the moment. So I think some alternative does need to be found (R39).

Conversely, a white, middle class Gardens resident articulated the need for coercive measures to curtail 'certain disturbances.' She consequently placed her confidence in the police as opposed to 'the man in the street with his little gathering':

> The people responsible for causing certain disturbances, the *skollies* (junkies), regardless of what colour or race they are, the only thing they would adhere to is police instruction. As far as I know they would not take much notice of the man in the street with his little gathering because of the mentality, and the structure, and the whole make-up, and what we've been used to in this system. I imagine we could get together as you suggested but, try as we would to the extreme of our ability, we could never resolve such problems. You have to have the police or somebody with the authority to resolve it. And that I can only

> say as a South African having been born and brought up with all races. I'm saying that thinking back on things that have happened over the years (R36).

According to a feminist involved with Rape Crisis, there is scope for utilising local alternatives in instances of violence against women and children. Considering the way in which survivors of sexual abuse are mistreated by the justice system, and the low conviction rate, women have little faith in the state justice system. This is reflected in the low reporting rates of rape and wife battering. The interviewee described the following incident in the black township of Guguletu[23], where community members themselves attempted to deter an individual who had sexually abused children:

> A man was sexually harassing children, and instead of going to the police, a group of adults in the area formed a committee. They went to the man and said, "We know what you are doing. We're watching you. And if you do it once more, you've had it." And that certainly had much more direct effect in stopping the problem than anything the state would have done in that situation (R42).

4.3 Law 'From Above' in Pursuit of Justice

4.3.1 State justice as a site of struggle

Based on the above perceptions and the literature review, it is clear that South Africa's laws and state justice institutions have served as mechanisms for oppression and repression. Simultaneously though, it must be asked

---

[23] A black township established in 1954 on the outskirts of Cape Town.

whether the judicial system has also provided a vehicle for resistance and potential social change. This question was posed to the professional sector of the sample. Progressive lawyers were asked to share their perceptions of their professional role within a system they intrinsically reject.

A legal academic (R23) did not regard law as an effective site of struggle. He emphasized that law in the South African context has primarily served as a vehicle for maintaining the status quo and repressing resistance. Instead of accomplishing social transformation, the professor suggested that law tends to follow change. He acknowledged that law may, however, signify changes that need to be implemented and play a role in their enforcement. An ANC activist (R32) agreed that the judicial system has been predominantly oppressive. However, he observed that bourgeois democracy's portrayal of the legal system as 'independent' has occasionally enabled progressives to use the law to achieve small gains. Overall, he did not perceive legal pursuits as solutions, but as vehicles for creating space. An advice office paralegal (R15) identified commendable examples where progressive lawyers and the few liberal judges have been able to mobilise the law to tackle, further or enforce people's rights. He stressed, however, that these are isolated incidents. According to seven progressive respondents, women have not used the law to fight discrimination and win equal rights due to a lack of legal tools. There is apparently no channel for pursuing precedent-setting cases. Considering that the legal system is by design repressive and inaccessible to the politically and economically disempowered, the potential for progressive manoeuvres is severely restricted.

A LEAP paralegal (R13) declared that she and her colleagues have little faith in the law. However, she acknowledged that law has sometimes been a useful site of struggle. For one, court action has proved to be an effective means of publicizing community concerns. During the States of Emergency, affidavits and court evidence were practically the only means of publicly exposing state repression. As she explained, the significance of law as a site of struggle is undermined by the fact that the Supreme Court is not empowered to overrule laws which are perceived to be unjust. While many judges in the Appellate Division have deemed the laws governing detention, for example, to be unjust in principle, there is no formal judicial apparatus for overriding legislative supremacy.

Respondent 5 stressed that he attributes much value to law and to the rule of law as such. He enlisted his work experience to illustrate the empowering function that lawyers can fulfill in enabling communities to build up strength to fight their battles. Liberal participants seemed ambivalent regarding the transformative potential of law. Respondent 12 confirmed that the law and the system of justice have certainly been contentious issues, and on that basis law could be labelled a site of struggle. On further reflection, he too recognized that the judicial system has served as a battleground between the apartheid regime and the liberation struggle. He stated that in many instances the Supreme Courts have taken a stand against the government and the police, and the law and judicial system have consequently gained some respect.

A NICRO social worker (R20) alluded to the existence of the National Association of Democratic lawyers (NADEL), Lawyers for Human Rights, the Black Lawyers Association, the Legal Resources Centres and independent progressive lawyers as evidence of the perceived role of law as a site of struggle. To some extent, these organisations and individuals have enhanced the accessibility of law, and their periodic victories have had an empowering effect on people. Respondents cited examples of successful legal battles, most of which were won on the basis of legal technicalities as opposed to acknowledged principles of justice. An ANC activist reported that a number of people had been released from detention because their detention orders were signed by a warrant officer instead of a lieutenant as was required. Respondents 13 and 20 conveyed that many battles, for example, against forced removals, have been won on the basis of the unlawful promulgation of laws and bylaws by local authorities. The monetary compensation awarded to KTC[24] squatters whose shacks were burnt was cited as another such legal victory (R20).

A conservative politician condemned 'political opportunists' for attempting to 'hijack, demoralize, and exploit' the justice system (R11). In contrast, progressive lawyers across the political spectrum argued that the law courts have been important arenas for battles between the supporters and opponents of apartheid. Several of these participants were affiliated with

---

[24] A black squatter camp adjoining New Crossroads on the outskirts of Cape Town.

NADEL, and aligned themselves with the struggle. Political organisations have used the legal system as one vehicle for their attack on the state apparatus. In order to exploit the gaps and challenge the system, progressive lawyers stated that they have had to be more skilled, technical, persuasive and creative than their opponents. They acknowledged that their role to date has predominantly been reactive, rather than transformative, in responding to arrests, detentions, assaults, shootings, and burnings.

A PAC-oriented lawyer remarked that since he regards the justice system as the unjust product of an illegal government, his participation in law may perhaps be interpreted as hypocritical. He justified his lawyering by observing that these structures and their victimization of blacks are part of our current reality, and his role is that of a catalyst. A lawyer supportive of AZAPO stated that he worked to defend the rights of the poor and the disadvantaged, and consequently elected to practise within the context of a public interest law centre. An ANC-aligned advocate similarly described his professional goals in terms of the struggle: "My task as I see it is to fight trials and defend the rights of my people, the oppressed people of this country" (R9). These sentiments were echoed by another progressive advocate, who stressed that he operates on the basis of a political mandate for the sole purpose of furthering political objectives:

> We've pushed them and pushed them and pushed them. We've fought with them. Our function is to create space, to give our people some freedom, some breathing space in which to operate, in which to mobilize our people. I make no excuses for that. I have used the law as far as possible. As far as legal ethics and my own ethics allow me to do that, I do it. I've got no compunction. I don't owe anything to the

> government. I don't believe at all in their laws, I don't believe in their system. I don't believe in all those things. But I've used their own system, not just me, I'm saying other people as well, we've used it to turn it against them (R10).

A lawyer employed by the Legal Resources Centre (R6) noted that law is but one of many sites of struggle in the South African context. He suggested that there may have been times when lawyers have overestimated the significance of law as a medium for struggle. During the successive States of Emergency, for example, progressive lawyers sought out loopholes in legislation and fervently believed they could make major breakthroughs. However, their hopes were crushed when the state responded with amendments to these laws. At times lawyers were the only people who were allowed personal contact visits with detainees, but they were legally incapacitated and could perform only quasi social work functions. Detainees resorted to national hunger strikes once they realized the impotence of their lawyers. Respondent 6 stressed the effectiveness of these hunger strikes in rendering Emergency regulations powerless. He believed their impact contributed significantly towards the subsequent lifting of the Emergency and the unbanning of the liberation movements. Considering the limitations of the law, LEAP encourages people to pursue legal action in conjunction with other avenues of struggle. Respondent 13 noted that exclusive reliance on lawyers has in fact had a detrimental effect on organisations. She described instances where people placed all their faith in lawyers, ceased campaigning and became complacent, only to lose their court cases and their rights. These participants' insistence on combining legal battles with mass organisation and

other vehicles of struggle is consistent with Fine's (1979) contention that law is not the only potential inhibitor of power.

4.3.2 State justice as a medium for people's justice

The question was posed as to whether people's justice can be located only in the realm of community-based structures. Conversely, is it feasible to achieve a people's justice within the domain of the state-based justice system? Twenty-one participants contested whether making justice accessible to the people necessitates steering clear of state legal structures. As noted by a legal academic, the related notion of people's education is not necessarily extra-state. There is, for example, a current drive to develop the University of the Western Cape into a people's university in furtherance of education for the 'new' South Africa.

Four public interest lawyers suggested that aspects of their work are conducive to people's justice. By implication, using the law to further the struggle is a medium for people's justice. According to Respondent 6, the Legal Resources Centre strives to undertake 'impact' cases which relate to community concerns and may be conducive to broader social change. The government's abolition of influx control[25] was, for example, the result of a legal battle complemented by years of mass resistance. Two other lawyers described recent instances where they equipped community members with

[25] Statutory laws designed to control the influx of black South Africans who sought residence and employment in 'white' cities and towns. The Abolition of Influx Control Act was passed in 1986.

the requisite skills to state their case in battles with local government authorities. They proposed that their empowering role in, for example, land law disputes and claims and negotiations surrounding community reconstruction and facility planning could be perceived as a contribution towards people's justice.

In the contemporary context of the apartheid regime, people's justice can, however, obviously not be realised within the parameters of the state justice apparatus. Dissatisfaction with the latter is a major stimulus to people's justice. However, if people are able to translate their ideas and sentiments into state institutions, there would be a much closer equation between people's perception of justice and the products of the justice machinery. Many liberal and progressive participants surmised that a reconstituted and democratized state justice system could become a symbol of people's justice. A liberal lawyer stipulated the need to incorporate into the system increased accountability, accessibility, and an awareness of what life is like for the majority of South Africans. According to a progressive academic, the formal legal system could potentially qualify for the title of people's justice in the event of majority rule. I think 'democratic' should preface the prerequisite of majority rule. The vision of people's justice via state institutions is expanded in Chapter 6.

4.4 African Customary Law as a Vehicle for People's Justice

As portrayed in the literature (Bapela, 1987; Burman and Scharf, 1990; Dlamini, 1990; Sanders, 1990; Scharf, 1989b) and confirmed by participants, the idea of people's justice is not new in the South African context. The African tradition is rich in dispute-resolving and mediation mechanisms (see Chapter 2). African customary law and traditional courts have been in existence for centuries. Chiefs and elders have always played a pivotal role in community life. Traditionally, they have adjudicated various disputes and problems in the community. Thirty-one respondents--particularly those who purported conservative, Africanist and Black Consciousness views-- identified these indigenous forums, or aspects thereof, as consonant with people's justice.

A PAC-oriented lawyer (R2) cited examples of how black people in both rural and urban areas still to varying degrees subscribe to customary law and address problems collectively. Both he and an AZAPO-aligned lawyer acknowledged that they continue to abide by certain customs and turn to their fathers or other revered persons in the community for assistance in the resolution of private problems. While recognising that the traditional system is not flawless, 19 participants across the political spectrum lauded the customary courts' capacity for attaining justice and promoting reconciliation. Eight black respondents voiced their respect for the wisdom and authority of the mature, experienced elders of the community. Moreover, they believed that judgement by a group of participating adults diminishes the chances of judicial prejudice. They regarded the punitive measures administered by

these courts to be far more effective than the prison sentences so frequently imposed by state courts. Affordability and 'quick relief' were listed as additional advantages of traditional courts.

Notwithstanding, Respondents 2 and 28 remarked that the traditional concept of law is gradually fading away in the urban areas, ". . . with the level of enlightenment of people, through people being exposed to western norms of living." In contrast, Respondent 19 did not think that customary law is disintegrating, but transforming: while elements of the traditional system persist, there is a tendency to emulate state court procedure. In the opinion of Respondent 17, transformations have not been motivated by popular desire; they have been orchestrated by the white minority government. In accordance with the regime's oppressive policies, restrictions have been imposed upon the mandate and jurisdiction of customary courts. Stripped of much of their power, according to Respondent 17, the domain, effectiveness and protective capacities of these structures have been substantially diminished.

Historically, the state's tendency to either promote or demote African customary law has been strategically linked with wider political and economic trends. The state's need to exert control resulted in the abolition of certain traditional powers and the imposition of the regime's legal and judicial system. Conversely, the indigenous system has periodically served to legitimate and perpetuate separate development, tribalism, self-determination, and the concomitant denial of the vote to the black majority.

A conservative politician (R11) correspondingly commended the government's former recognition of the jurisdiction of the traditional courts with respect to civil matters under the Native Affairs Act of 1927. He deprecated the government's subsequent 'abandonment' of these indigenous structures, and criticized 'liberalized' people who negate these forums for being paternalistic. On the other hand, a progressive black attorney (R3) described how the regime has exploited the tribal system to further the interests of apartheid and to create divisions within the black community. Headmen were created, and chiefs were co-opted and granted legal powers. The positive qualities of the traditional system were thus undermined and distorted by the role played by the majority of the chiefs in the struggle. Consonantly, an ANC-aligned advocate proclaimed that the African traditions and concept of people's justice have been ". . . completely manipulated and perverted by the colonialists' conquests" (R10).

ANC supporters dismissed certain traditions and procedures as patriarchal, and stated that only select aspects of customary law qualify as people's justice. A black female activist refused to equate people's justice with African customary law. She acknowledged some similarity in the underlying principles of these two forms of justice, particularly their attempt to solve problems at a community level. However, she stressed that certain aspects of traditional law contribute towards the oppression of women, and therefore cannot be labelled as people's justice. Women are, for example, alienated from the dispute-resolution process. Furthermore, she described how a customary law like *lobola* (bridewealth) entrenches male domination:

> My mother and the majority of African women accept lobola as a given; not me. To me *lobola*, be it in the traditional form of cattle or whatever, symbolizes being passed from the control of my father to the control of my husband. No way (R18).

4.5 People's Justice as Revolutionary Justice

Consonant with the plea for 'power to the people,' people's justice was placed squarely on the agenda of the resistance movement during the mid-1980s (see Chapter 2). An attempt was made to replace the government institutions and structures in the townships with popular alternatives. The 'dual power' conception of people's justice was addressed by ANC-aligned Respondents 18 and 10. The latter explained how people's justice was thus one means of giving expression to the fundamental tenet of the Freedom Charter (see Appendix E), namely, 'The People Shall Govern.' It was not necessary, nor was it enough, for people to wait until liberation; people needed to assume immediate control over all aspects of their lives.

The need for a forum for dealing with traitors and agents of apartheid was identified by Respondents 9 and 16 as an additional motivating factor. Anti-apartheid activists resorted to people's justice because it was not feasible to go to a state court to have an informer evicted from the community. Respondent 9 noted that the war of liberation was not legal in terms of South African law. However, considering that apartheid constitutes a crime against humanity, the people's cause, war, and actions are morally and legally just.

Three other progressive participants defined people's justice as essentially a projected notion of a post-apartheid system, counterpoised to the current realities of the state justice apparatus. While recognizing that the concept is rooted in South Africa's rich customary history, Respondent 1 described people's justice in the contemporary context as symbolic of ". . . what we would want in the future." According to this perspective, people's justice is synonymous with a transformed justice system which may incorporate legitimated people's courts at a community level. Projected notions of people's justice are explored in Chapter 6.

4.6 People's Courts as People's Justice

Thirty participants distinguished between people's justice and people's courts, while 12 used the terms interchangeably. The conceptions of people's justice articulated by respondents who equated the two terms were obviously influenced by their perceptions of people's courts. In addition to the traditional courts addressed in Section 4.4, interviewees alluded to varying combinations of the following three manifestations of township-based people's courts: (a) courts initiated during the heightened conflict of the mid-1980s, (b) courts operated by Community Councillors and vigilante groups, and (c) courts currently functioning, predominantly in the Natal region. These structures were described by an academic as ". . . an odd mix of co-optation and resistance, that waxes and wanes depending on how the balance of forces operate" (R24). Certain courts represented a form of resistance against colonialism, while others reflected the state's attempt to exert

hegemony by sanctioning and simultaneously co-opting the institutions of the indigenous people.

While I elaborate on diverse perceptions of the courts of the mid-1980s in Chapter 5, in the present section I sketch the vigilante courts based on the reports of interviewees. The justice implemented by these tribunals is distinctly populist (see Table 2.1). According to the Cape Town experience, most vigilante groups emanate from a squatter context. The government has generally allowed squatters to rule and police themselves, as long as they do not pose a political threat. The government has officially granted local authority status to, for example, the vigilante forces in Crossroads[26] and Khayelitsha. Respondent 24 highlighted the 'awkward overlap' between self-determination and co-optation: ". . . indigenous structures are co-opted under the guise of letting indigenous people rule themselves their own way, yet containing them in such a way that they don't constitute a political threat."

These courts are operated by the vigilante leaders and presided over by headmen. As remarked by Respondent 24, the courts are a source of patronage and power. The coercive, excessive practices of the vigilantes and the elements of counterinsurgency which pervaded the Crossroads people's courts were detailed by a progressive public interest lawyer:

> Ngxobongwana, the vigilante leader in Crossroads, ran courts for ages. They used to lock up kids and beat them. We have evidence from a number of court cases that the police were fully aware of and at times

---

[26] A black squatter camp on the outskirts of Cape Town.

> co-operated with those groups. The Major in charge of Guguletu Police Station saw the courts' guards as a useful local homeguard, because he said they would often assist them in tracing stolen cars in a vast squatter area. They would sometimes hand over stone-throwing children to the police. There was quite a link between these parties. And I think one's got to be a bit cautious about seeing that as people's justice. They were playing particular roles, particularly within a State of Emergency, where Joint Management's policy with the state was to try and exacerbate whatever differences they could within communities. And the sort of counterinsurgency policy that they were following as a state enabled favoured groups often to take the law into their own hands (R6).

Wosa, Khayelitsha Community Councillor-cum-vigilante leader, operated a similar enterprise. The following 'typical case' described by a liberal lawyer illustrates the brutal and opportunistic inclinations of Wosa's court administrators:

> A pregnant woman approaches the headman complaining that the father of her unborn child is not looking after her. Moreover, she urges that he be fined because he got her pregnant and they are not married. Thereafter, the court's henchmen call the homeguard who go out and grab the guy. If he doesn't come, they drag him and beat him until he does. They fine him. They take a substantial portion of the fine for themselves, and give the rest to the woman (R5).

The five Khayelitsha respondents cited similar incidents, and reported that 'kangaroo courts' are still being convened by Community Councillors in Khayelitsha. Interviewees recognised that these forums operate undemocratically and are antithetical to the interests of the people. According to a Khayelitsha advice office worker (R17), residents who use these forums are usually unaware of their atrocities and unfamiliar with alternate resources, for example, the community organisations. However, as people

gain insight into court practices, they are rejecting these apparatuses, and the Community Councillors are becoming increasingly isolated.

The concept of people assuming responsibility for their own problems coincided with conservative and pro-government interviewees' support for the 'separate development' of each racial group. Correspondingly, they condoned the concept of people's justice and the existence of traditional courts, but deplored the populist and revolutionary orientations of other apparatuses. Respondent 8 was one such participant who accepted the concept of people's justice, but found particular practices 'abhorrent':

> There can surely be nothing wrong with people getting together with others in their immediate environment to create the necessary structures, informal as they may be, to maintain order and dispense justice. And in many cases that must surely have been the motivating idea. But certainly in practice it has not worked out like that. Personal ambition overrides everything else, and the operation is abhorrent (R8).

Liberal participants who equated people's justice with people's courts and regarded these forums as abusive either portrayed people's justice in negative terms or altered their definition of the concept. A liberal politician (R12) associated people's justice exclusively with people's courts in all their manifestations. Referring to the two terms synonymously, he described people's justice as a 'revolutionary concept' which 'rings rather uncomfortable bells.' In the following passage he accounts for his disapproval:

> It's [people's justice has] been dispensed as justice that's not really justice; that is tyrannical in nature and tyrannical by majority decision, with elements of intimidation and arm-twisting and blackmail and all that kind of stuff involved in it. . . . To the extent that one is given the impression that emotion and strong political and other prejudices often play a role in the manifestations of people's justice in South Africa, that is something I don't like (R12).

He acknowledged that his impression was based on selective information, but believed his perceptions were consistent with those of most white South Africans.

Other liberal respondents, who did not necessarily equate people's justice with people's courts, conveyed that their perception of the concept was nevertheless clouded by the reality of the practice. Respondent 4 disclosed that he previously endorsed the notion of people's justice because he supported the rationale and objectives of the people's courts of the mid-1980s. He acknowledged, however, that his optimism associated with that image of people's justice was subsequently deflated by the practice which he described as largely 'depressing.' Consequently, he preferred to conceptualize people's justice as the enhancement of people's accessibility to the justice system, without necessarily bypassing state institutions.

In contrast, progressive participants endorsed the notions of people's justice and people's courts, but identified and disqualified the populist practices of certain people's courts. In other words, they refused to recognise the latter as manifestations of people's justice. A lawyer supportive of the ANC emphasized community identification with the judicial apparatus as an

essential ingredient of people's justice which was not a feature of the populist courts. Both a PAC-oriented lawyer (R2) and an ANC-aligned paralegal (R17) condoned the rationale and objectives of the people's courts of the mid-1980s, but were reluctant to classify these forums as expressions of people's justice. Respondent 2 attributed the shortcomings of these courts to their *ad hoc* foundation and political orientation. Respondent 17, on the other hand, emphasized the repressive contextual conditions under which the courts operated. He stressed that private interests sometimes took precedence over public interests because the political organisations were suppressed and their leadership detained. Perceptions of the initiation, implementation, and outcomes of the people's courts of the mid-1980s are elaborated in Chapter 5.

4.7 Demarcating Popular and Populist Justice

Progressive and some liberal participants were adamant that populism should not be regarded as a component of people's justice. As reflected above, they were reluctant to dismiss people's justice on the basis of perversions committed in the name of the concept. Instead, they distinguished between the ideal of popular justice and populist distortions (see Table 2.1). A progressive advocate specified the demarcation as follows:

> I really do understand mob justice. But I think we stand for something different in this country. We stand for a country where we want to be humane and care for people, even people who do make mistakes. I don't think it's the best way to put them against the wall and kill them all; to put them in front of a mob and say, we say you have done this, so don't contradict us in any way. That is not people's justice (R10).

A Gardens liberal (R37) distinguished between people's courts and so-called kangaroo courts. She maintained that the activities of the kangaroo courts foster violence. Even the liberal politician who was averse to people's justice delineated between the concept and ". . . certain manifestations of a revolutionary approach" (R12). Compelling an individual to drink cooking oil during the consumer boycott was not, in his opinion, an instance of people's justice. Rather, it was an act of a quasi-war situation, where effective struggle was assumed to be dependent upon a maximum degree of discipline with little tolerance for dissent or individualistic behaviour. He added that people's justice may, however, be imbued with similar 'inadequacies' because the concept has also been a product of war.

In contrast, conservative, pro-government, and some liberal respondents did not distinguish between the ideal of people's justice and manifestations of populism. They were either unable or unwilling to transcend the state and media's populist portrayal of people's justice. As articulated by a conservative interviewee, "Me and my compatriots interpret people's justice as something negative, something to be suppressed" (R35).

4.8 Other Community Forums of People's Justice

In an attempt to expand the concept of people's justice beyond the realm of people's courts, liberal and progressive participants invoked a range of community-based possibilities. In addition to locating people's justice within a diversity of social institutions, they suggested that the work of

paralegals, and street law activities, be incorporated into the domain of people's justice.

Two academics (R23, R24) stated their inclination to associate people's justice exclusively with non-state, civilian-initiated structures of mediation and adjudication. However, they recognised that people's justice may encapsulate all structures which engage in social ordering. As specified by Respondent 24, ". . . the very process of ordering involves a prioritization of right and wrong, of do this and don't do that." He observed that these structures create and incorporate values, and that coercion features in varying degrees: a gang may, for example, rule militaristically while other structures operate democratically on the basis of consensus and moral suasion.

Three interviewees listed a plurality of community-based manifestations of people's justice, some of which are more ideologically linked than others. Conflict-resolution methods applied within the political arena were identified by Respondent 20 as suited to people's justice. Although the procedure is not standard, senior activists have periodically been elected as neutral chairpersons to facilitate the resolution of intra-organisational disputes. Since 1986, black township residents have engaged in policing and other initiatives to curtail the surge of street gang membership. According to Respondent 24, such efforts to reduce local crime could be classified as forms of people's justice. In addition, the operation of South Africa's prison gangs could be viewed as a manifestation of people's justice. The gang system is rigid and militant, and titles like judge, prosecutor and magistrate are actually

designated. Student Representative Councils functioning in township schools could be perceived as yet another sphere of people's justice in that they attempt to inculcate a particular ethos and code of behaviour amongst the students. Religious groups also administer a degree of justice. Cape Town's Muslim community is very powerful in that respect. The cohesiveness of their culture, the extended family and the informal sector tend to counteract youth gangsterism and similar phenomena. Furthermore, Respondent 24 suggested that the manner in which street kids order their social milieu could be labelled as a form of street justice or people's justice. According to Respondent 23, even the family responds to problems according to a certain order of justice. He named the disciplinary committees within churches and sporting bodies as other sites of informal justice.

On another front, seventeen liberal and progressive participants proposed the integration of the activities of paralegals into the sphere of people's justice. By definition, paralegals in South Africa are usually volunteers and occasionally paid workers who belong to community or political organisations. Their role includes advice-giving, training and education on legal rights. In other words, paralegals strive to take the law to the people and enhance access to knowledge and resources. The Legal Education and Action Project (LEAP) affiliated with the Institute of Criminology at the University of Cape Town is one facility operated by paralegals. Since 1987, LEAP has initiated projects and organised workshops to empower people by teaching them their rights and encouraging them to use those rights to defend themselves against an intrusive and abusive state. State

repression was rife during the period subsequent to LEAP's inception. Several workshops were consequently held to instruct people to take statements, and pamphlets were compiled in non-technical language to inform people of rights and procedures pertaining to detentions and other security legislation. Furthermore, LEAP has been instrumental in establishing advice offices in the rural communities. The advice offices, which have become a feature of most townships, offer counsel, attempt to assist people with the resolution of their problems, and occasionally mediate disputes. Both the advice offices and LEAP try to identify common problems and assist local residents to address these collectively. The advice offices refer complex cases to lawyers, social workers or other specialized resources.

Street law was proposed by six respondents as one possible medium for people's justice. However, these participants differed in their opinions about the substance of street law and about the timing and conditions under which related projects should be pursued. To date, street law projects have predominantly been implemented in certain high schools under the auspices of the University of the Western Cape and the University of Cape Town. As outlined by a street law programmer (R19), workshops aim to teach people about the laws they encounter on a daily basis and equip them with the skills to solve certain problems themselves and seek legal counsel when necessary. Inclusively, the role and function of law and definitions of 'fairness' are explored. The program encourages people to analyse and appraise current laws and legal principles critically and to suggest alternatives to those which they find objectionable. While acknowledging that street law could be an

effective vehicle for teaching people about their legal rights and fostering a rights culture, three interviewees believed that projects have been prematurely implemented. Respondent 13 argued that there is no point in educating people on apartheid's laws, except for the purpose of incitement. She and Respondent 18 consequently suggested that it would be more appropriate to pursue street law in the post-liberation era. In contrast, Respondents 20 and 21 endorsed the teaching of current laws because they remain the reality and are not going to be transformed overnight. Furthermore, they and Respondent 19 stressed that providing knowledge is not synonymous with encouraging acceptance of the laws of the apartheid regime and, in any event, street law is about more than just describing current law.

4.9 Ideal Qualities of People's Justice

Sixteen respondents conceptualized people's justice in relation to varying combinations of the following key ingredients: popular participation, fairness, democratic practice, volunteerism, and accessibility. These participants were not intent upon stipulating whether these essential qualities be located within state or community-based structures. Instead, they believed that the form and content of the legal system should be guided by the will of the people. They consequently insisted that the political structure should accommodate input from the public at large regarding the design and administration of the justice system. Respondent 24 elaborated that people should be actively involved in the processes of policing, mediation, and

adjudication. Furthermore, participants insisted that legal institutions must function democratically. As epitomized by Respondent 31, people's justice is ". . . justice by the people for the people." By eliciting popular participation in decision-making, planning, and adjudication, people's justice, according to Respondent 10, would serve as a means for creating a democratic culture in South Africa.

Respondents also emphasized the 'justice' component of people's justice. Three progressives found it ironic but necessary to qualify justice as fair justice, congruent with the values of the population. In the opinion of Respondent 24, people's justice has a 'voluntary flavour,' and he consequently proposed volunteerism as an additional criterion. Moreover, interviewees stressed the significance of informational, financial, and geographic accessibility: if all people do not have access to legal knowledge and the dispensers of justice, a system cannot be equated with people's justice.

One dominant theme underlying this chapter has been the identification by participants of the apartheid state's justice system as a key stimulus for the development of people's justice. People's justice was not, however, defined as simply the converse of the state-based system. In conformity with Cain's (1988) assertion, respondents maintained that the relationship between formal and popular is far more contradictory and complex. Furthermore, most liberal and all progressive participants looked

beyond people's courts alone and suggested a range of media and forums for the attainment of people's justice.

These alternative sites and strategies were numerous. Paralegals, for example, were viewed as instrumental in the implementation of people's justice. Popular participation, fairness, democratic practice, and accessibility were identified as key ingredients. Some liberal and progressive respondents regarded a restructured, democratized post-apartheid state justice system as a potential vehicle. Based on their respective apartheid, Africanist, and Black Consciousness ideologies, Conservative Party, PAC and AZAPO supporters equated people's justice with traditional African law and courts. ANC participants, on the other hand, defined only the progressive aspects of the indigenous system as congruent with people's justice. Whatever the legal orientation and political allegiance, the people's courts of the mid-1980s played a prominent role in shaping images of people's justice among the respondents. Chapter 5 focusses on these people's courts and reveals how perceptions of these structures influenced legal and public conceptions of people's justice.

Chapter 5

Perceptions of People's Courts

This chapter focuses exclusively on the people's courts which existed in several black townships in the mid-1980s. Based on a review of past studies, a description and appraisal of these structures were presented in Chapter 2. As a complement, this chapter portrays participants' perceptions of the rationale, ideals, practices and outcomes of the people's courts. The aim is to reflect both the diversity and the trends in interviewees' responses to these apparatuses, which often constituted a point of reference in their exposition of people's justice.

It is important to bear in mind that access to information on people's courts was severely restricted during the States of Emergency (see Subsection 2.4.2.7). Since the people's courts were based in the black townships, black respondents, and politically active whites and coloureds in the study, were most familiar with court operations. Only four participants had first-hand experience of the people's courts. The remainder based their perceptions on hearsay or 'readsay.' As reported in Chapter 2 and confirmed by liberal and progressive respondents, the people's courts were negatively portrayed and powerfully undermined by the state through the media. Even the liberal media attacked people's courts on the basis of isolated deviations and abuses. One participant described the liberal media's assault as ideologically

motivated by their own belief in the superiority of the legal system of western democracy (R16). The majority of legal participants derived their insights from judicial inquests, state court records, and clients who complained of excessive punishment and unfair treatment by people's court officials. Without denying the negative aspects and consequences of the people's courts, it is significant to note that interviewees were disproportionately exposed to the negatives and to distortions.

In addition to negativity, vagueness pervaded the responses of those interviewees who did not reside in the locale of the people's courts and those who were not politicized. Even a participant who had been peripherally active in a civic organisation in the coloured township of Bonteheuwel (R31) had heard of the people's courts, but admitted to having no first or second-hand knowledge of their operations. She imagined that these forums resembled small claims courts, but differed from the latter due to the absence of trained decision-makers. Another Bonteheuwel resident (R30) regarded people's courts as congruous with African tribalism and rule by chiefs. Consequently, he considered people's courts to be 'something very strange' to the coloured population. However, the limited knowledge and unfamiliarity of most underexposed participants did not deter them from generally disparaging the people's courts. A pro-government Gardens interviewee, for example, who also acknowledged merely hearing of the people's courts, did not hesitate to defame court facilitators for their 'barbaric' practices.

5.1 Rationale, Ideals, and Merits

5.1.1 Products and vehicles of the struggle

Consonant with past studies (Burman and Scharf, 1990; Scharf, 1989b; Scharf and Ngcokoto, 1990; Seekings, 1989), participants observed that the people's courts emerged in the context of resistance politics. The courts were products and vehicles of the struggle. A progressive advocate (R10) described how people began grappling for 'dual power' alternatives in an 'imperfect environment.' During the campaign of ungovernability launched by the mass democratic movement in the mid-1980s, there was an attempt to make the local authorities defunct by encouraging community structures to assume their functions. The people's courts were thus initiated as a substitute form of justice in the face of majority disregard for the present unjust legal system. Contradictorily, a pro-government respondent (R8) labelled the people's courts as 'a capricious system,' and a conservative interviewee (R35) derogated the people's courts as merely ". . . based on the ANC's opinion of what people's courts should be."

As recognised by six participants, a number of courts were initiated by individual community residents, predominantly youth, who felt it necessary to control those who persisted in contravening the consumer boycott of white-owned stores. A liberal politician (R12) described such people's courts as a 'war-like' response to a perceived need in a revolutionary situation. According to this scenario, people elected to launch their own justice system,

which in his opinion tended to be more of a 'rough system of discipline' than a source of justice. He suspected that the system was based on the justification that compliance is paramount in a war situation, and dissent and individualistic behaviour are unaffordable luxuries.

In contrast to the assumptions of previous research (Burman and Scharf, 1990; Scharf, 1989b; Scharf and Ngcokoto, 1990), most participants in this study did not view the people's courts of the mid-1980s as an intended prefiguration of post-apartheid adjudicative structures. As recorded above, the majority of respondents viewed the people's courts as a strategy to provide an alternative avenue of justice in the struggle against apartheid rather than as a preliminary model for the future. Hence, they did not perceive the tension between prefigurative practice and revolutionary expediency addressed by Allison (1987). Instead, they focussed on the integration of, and conflict between, substitute justice and revolutionary expediency.

Progressive participants reiterated the finding of past research (Moses, 1990; Scharf, 1989b) that developments were not even: each people's court was influenced by the surrounding regional level of political and organisational development. As explained by an ANC activist, people's courts were initiated in the Transvaal township of Alexandra and townships in the Eastern Cape within structures and communities with a strong political tradition. The idea was emulated nationally, including areas which lacked political tradition, cohesion, discipline and direction.

5.1.2 Gains

Progressive and most liberal participants asserted that people's courts were initiated on the basis of positive and constructive ideas and objectives. Many of them identified certain people's courts in Alexandra and the Eastern Cape as model structures which operated with credibility: residents opted to use these courts instead of the police stations. Concurrently, people gained a sense of empowerment because they did not have to depend on white courts, lawyers, and interpreters. Based on a review of people's court cases, a legal academic (R22) credited them for dealing primarily with people's pragmatic problems as opposed to abstract legal issues. In other words, the courts engaged primarily in solving 'non-justiciable' disputes where state court intervention would have been either inappropriate or unavailable. Respondent 22 cited the following examples of cases brought before the Alexandra People's courts to illustrate this tendency: children running away from home, children showing disrespect towards their parents, girlfriends running away from boyfriends, and neighbourhood troubles.

In contrast to Alexandra, other people's courts did not receive such an unequivocal endorsement, although some specific positive attributes and consequences were identified. A Khayelitsha resident who had witnessed the proceedings of the Nyanga East Youth Brigade People's Court in Cape Town praised the facilitators for their 'strictness,' fairness, and ability to discipline people and deter negative behaviour. Furthermore, she appreciated the financial accessibility of the court, and reported a decline in the incidence of

township crime, for example, rape, during the court's period of operation. She admired court officials for confiscating the weapons of gangsters, and addressing the problems of the elderly and people with no formal education who usually experienced slights and abuse from agents of state justice.

An additional seven interviewees reported that the rate of gangsterism and other crime declined in townships where area committees, street committees and people's courts were established. An advice office paralegal (R15) acknowledged the effectiveness of those people's courts which recognised their limitations and confined themselves to the terrain of minor disputes. Under these conditions, the courts often succeeded in preventing problems from escalating into major conflicts. He also lauded certain people's courts for promoting community service as opposed to corporal punishment, thereby enabling offenders to give something back to the community. A PAC-aligned lawyer commended the people's courts for providing parties with quick redress.

Participants regretfully recognised, however, that the majority of the people's courts had come to deviate from these original goals and plans. In addition, the four interviewees who represented Africanist and Black Consciousness ideologies remarked that the people's courts had diverted from the ideals of traditional African structures. Respondents offered diverse explanations for these digressions. There was a significant difference between the descriptions offered by conservative, pro-government and liberal respondents, and the portrayals of progressive interviewees: the former

viewed the shortcomings of the people's courts in isolation, while the latter located them in the broader context of the oppressive apartheid state.

The people's courts were not immune from their contaminated environment. Progressive participants identified the detention of the leadership of organisations as a prime factor contributing towards control-related problems. As emphasized by one paralegal, the people's courts were the product of an abnormal society, and in an abnormal society, ". . . things tend to function in an abnormal manner" (R18).

5.2 Contentious Issues

5.2.1 Disqualified as a legal system

Discussions focused predominantly on the negatively perceived aspects and consequences of the people's courts. A conservative interviewee denounced people's courts because the structures failed to meet the basic requirements of a legal system, namely, independence, control, and opportunity for review or appeal.

The inclination among many respondents to condone the idea of people's courts while condemning the practice was depicted in Chapter 4. The following response of a lawyer supportive of the Nationalist Party further illustrates the trend:

> The original motive may have been a noble one, a praiseworthy one, a laudable one. . . . It is not the underlying idea, but the way it so often works in practice that I find abhorrent. Drawing from the court records that I've read, not only is the punishment extreme, but the procedures that are applied I find abhorrent. . . . The verdict and the sentence are rolled into one and sort of passed by a general and emotional acclamation. Someone shouts, "That man is an informer or a spy." If the crowd called for the blood of a particular person, that's the sentence he'll get. If they don't, maybe he's lucky. There seems to be no system, there seems to be no discipline. The people who got the worst end of the stick came out pretty poorly, some of them just with their lives. Others didn't; they were summarily executed by the terrible necklace method (R8).

Based on past studies, it was noted in Chapter 2 that there was no evidence to support allegations of 'necklacing' in the context of the people's courts. The respondent cited above was amongst the conservative and pro-government interviewees who neglected to distinguish between popular and populist forms of justice (see Table 2.1).

While acknowledging that all South Africans are exposed to a continuous barrage of propaganda, the liberal politician (R12) stated that his perceptions of people's courts are entirely negative. Analogous with Respondent 8, he described the justice exercised by the people's courts as 'rarely satisfactory' and elaborated his concerns as follows:

> I'm very uneasy about the impression one sometimes gets that the sort of rabble get involved, and it's a kind of majority decision where all sorts of people sit, and there's a lot of emotion involved, with a lot of anger involved and that kind of thing. . . . rather than some kind of objective decision that is taken by highly trained and dispassionate people (R12).

In conclusion Respondent 12 emphasized the potential dangers of implementing alternatives to the state justice system in the context of a divided society:

> If you don't accept the institutionalized justice, and you set up your own, then your own systems are probably going to suffer ultimately from many of the same inadequacies as the institutionalized system, and more of them (R12).

A liberal public interest lawyer (R5) also acknowledged that the people's courts had been established in the townships with good intentions of providing alternate forums to deal with complaints and resolve disputes in a sophisticated way: they tried to reach agreement and dispense forms of justice more civilized than the justice of Magistrates' Courts. However, he considered that the uncontrolled and unregulated people's courts in practice attracted power seekers and provided opportunities for abuses of power. He consequently argued that a 'legal mind' and formal rules are prerequisites to the adjudication process. He recognised that there is 'room for error' in the state courts too, but that there is at least a channel for appeal.

A PAC supporter, who criticized the people's courts for deviating from the traditional structures and *modus operandi*, believed that the courts disregarded the basic principles of a fair and impartial judiciary and trial system. Based on first-hand observations of people's courts in the Transvaal, he reported that the person who was the first to reach the court and lay a charge was usually believed to be in the right. People were frequently convicted on hearsay, and inappropriate sentences were passed. He described

instances where youth dragged elderly people from their homes on the basis of allegations, and subjected them to corporal punishment. Considering these phenomena, he echoed the assertions of Respondent 12 in proclaiming that "Such systems can sometimes be more oppressive than the oppressive state legal system."

5.2.2 Affiliation and accountability

Concerns regarding the accountability of the people's courts were raised during 34 interviews. Organisational affiliation was not seen to be a guarantee of accountability, but was considered a safeguard. An unknown percentage of people's courts emanated from street committees and other civic structures, but not all courts were allied to the progressive movement. Respondents reported that certain courts were initiated by individuals who were aligned with political organisations, but who got involved of their own accord without an organisational mandate. In addition, a number of 'maverick' courts were allegedly established by individuals on 'ego trips' (R9).

Research on the Nyanga East Youth Brigade People's Court (Burman and Scharf, 1990; Scharf and Ngcokoto) cited in Chapter 2 referred to an internal battle of supremacy waged between Cape Youth Congress (CAYCO) and Azanian National Youth Unity (AZANYU) members, Charterist and Black Consciousness supporters respectively. Two interviewees clarified that these participants were acting as individuals and not on the basis of their organisations' mandates. As outlined by an academic, AZAPO's aim is to

destroy the settler regime first, before commencing a process of reconstruction for the post-apartheid society. Prefiguring post-apartheid structures via the people's courts of the mid-1980s would have been antithetical to AZAPO policy. An ANC activist, who was an executive member of CAYCO during the mid-1980s, confirmed that CAYCO never took a conscious decision to initiate and implement people's courts. He contended that individual CAYCO members operationalised their own conception of people's justice. They did not discuss their pursuits within the confines of CAYCO because they knew the CAYCO leadership would disapprove.

A liberally-oriented lawyer (R4) remarked that it was not only vigilante groups, but also the progressive community organisations, who abused people's courts. He believed the community organisations were not equipped to deal with legal situations. While others have proposed that the 'negative' people's courts were independent from the civics, the lawyer maintained that the initiators of the courts were either actively involved or associated with broader community structures and political organisations. He contended that the respective organisations neglected to discipline the people's courts. While not disputing these claims, it is important to remember that most of the leadership of the community organisations was detained during the life of the people's courts. Furthermore, the repression forced the people's courts and other civic structures to operate in secrecy underground. As observed by progressive participants, control-related problems were caused largely by the consequent lack of guidance and direction and by the restricted ability to network.

An ANC activist (R18) suggested that she and other disciplined comrades who were not detained at the time should assume some of the blame, because they did not try to curtail the chaos prevailing in certain people's courts. Considering that these problems were occurring nationally, the paralegal wondered, however, whether activists' intervention would have been effective under any circumstance. Moreover, she admitted that she herself feared going near the people's courts during the latter phases of their existence once criminal elements had assumed control. A progressive attorney (R3) added that fear of prison and other repressive measures deterred adults who were not in prison or in hiding from getting involved.

A legal academic (R22) endorsed the significance of organisational affiliation, but claimed that that in itself was not sufficient to control the exercise of discretion. In instances where people's courts were allied with civics, it is necessary to ascertain whether the civics reflected and were supported by the majority of the community. The professor presumed that they were. Furthermore, it is questionable whether the civics were always able to exert control over the associated people's courts, particularly in instances where offences emanated from not belonging to the majority group. The professor surmised that the rules were not applied universally to adherents of diverse political stances.

Participants agreed that there was no standardized, universal system of accountability. A Nationalist Party supporter (R8) remarked that the absence

of accountability enabled the facilitators to use the courts to 'pay off old scores,' and to 'get at their enemies.' Most courts were perceived to be accountable to a particular sector or political movement rather than to the community as a whole. These structures were thus ideologically-oriented and lacked overall credibility.

5.2.3 Political and ideological orientation

Across the spectrum, respondents alluded to the inherent dangers of linking people's courts to a specific political party or ideological agenda. It can, however, be argued that all courts are saturated with ideological content and process. The courts of the apartheid regime are among the most vivid examples. Interviewees reported that people's court disputes were often imbued with political innuendoes, and emphasis was placed on the individual's political allegiances. A public interest lawyer (R6) remarked that ideologically-laden terminology, for example 'spy' and 'enemy,' is not useful in any judicial system. The liberal politician described the ideological propensities of the people's courts as follows:

> These structures are heavily-laden with ideology, heavily-laden with prejudice, heavily-laden with a very particular view of what society should look like, and with a very prejudicial emphasis, or an emphasis of prejudices, where democracy, as it is more conventionally understood, human rights, and the essence of dissent are not respected to a great extent (R12).

Nine respondents observed that some people used the courts to attack their political rivals. As specified by a PAC-aligned lawyer, the people's courts

were guided by natural forces of justice, and at times political inclination superseded a sense of justice:

> If perhaps one of the parties belonged to the same political inclination as the person presiding, of necessity the presiding officer will decide in favour of the litigant or in favour of the party who belongs to his political inclination (R2).

Participants referred to the infiltration of ideology and politics as one factor which contributed towards injustices and abuses. Respondent 39 identified the ideological and political biases permeating people's courts as conducive to excessive punishment. People felt threatened and angered by the actions of people who held opposing political beliefs. Their instinctive reaction to, for example, a police informer was to kill the person. Similarly, Respondent 22 linked the instances of brutal punishment to cases where ideology was enforced, for example, to sanction non-compliance with a boycott, collaboration with agents of apartheid, or intimate relationships with an informer or police officer. Where a particular group attempted to exert its hegemony, retribution and methods of deterrence were applied. Another PAC supporter also identified political involvement and alignment with specific political organisations as shortcomings of the people's courts. However, he recognised that it is difficult to distinguish between the political and the apolitical, and remarked that "[t]o a black man, almost everything is political" (R19).

5.2.4 Youth domination

The 'youngness' of the administrators was identified by thirty-one respondents as a shortcoming of several people's courts. During the time when the leadership of organisations was detained or in hiding, the youth were holding the reins without guidance or direction. According to participants, the youth may have lacked the maturity to judge cases impartially. Moreover, they may have been impulsive and inclined to act solely in pursuit of personal ambitions and political aspirations. While a pro-government interviewee maintained that the youth had little or no life experience, it is obvious that they at least had experience of township life, enmeshed with state oppression and repression.

There was a conflict of interests between the older, tradition-bound, conservative members of the community and the progressive youth. Respondents 20 and 24 elaborated on the generational conflict and competition for supremacy which emerged in the mid-1980s. The youth were assuming an increasingly active and important role in the struggle for liberation, and simultaneously resisted the adults' ability to set moral behavioural patterns. The established African cultural networks were consequently weakened. Concurrently, the adults' ability to discipline and control the youth was being undermined. It follows that the older generation generally opposed the youth's condemnation of the former non-political street committees and their control over people's courts.

Adult objection to the dominant role played by youth in the administration of the people's courts was confirmed and contested by a Khayelitsha resident (R28). The belief that ". . . no child should be challenging an adult" coincides with African tradition. However, Respondent 28 believed that the youth do not deserve criticism because, unlike the 'sedentary' adults, they were politically active and took initiative.

In principle, a progressive lawyer (R1) too did not object to youth operating people's courts and presiding over older people. In his opinion age was not the factor; responsibility, discipline and the sanction of the broader community were the important pre-requisites. His aversion to the instrumental role played by youth in certain people's courts was based on the lack of fairness, consistency and discipline in their procedures. He alluded to the potential for simulating the inadequacies of the state justice system:

> They tended to become powers unto themselves, and to mete out their version of justice willy-nilly, without regard for the rights of others, without listening, without giving a fair trial; and do no more than ape the white courts, and sometimes go even worse and conduct what are called kangaroo courts. (R1)

Implicitly, this respondent echoed the distinction between popular and populist justice drawn in Table 2.1. In the most negative instances, people's courts no longer qualified as manifestations of popular justice; by definition they degenerated into populist kangaroo courts.

5.2.5 Opportunism

People's courts were criticized for overstepping the mark, indulging in opportunism, and succumbing to gang influence. Eight respondents reprehended people's court facilitators for delving in issues far beyond their jurisdiction and abilities. The people's courts were condemned for intervening in private disputes between spouses. Court facilitators were accused of being inadequately trained to deal with serious crimes like rape or murder. In other words, the people's court administrators assumed power without being equipped with the necessary skills to use that power appropriately. An advice office paralegal cited the following case as an indication that street committees and people's courts sometimes failed to recognise their limitations:

> A woman approached a street committee to complain that a builder had taken her money for a home, and subsequently disappeared with the money. The street committee went after the builder and got him into the people's court, where they tried to *neek* [grab] the money out of him (R16).

In her opinion, such a matter should have been referred to an attorney to pursue litigation in a civil court.

In addition, 11 respondents discredited the facilitators for failing to give priority to the interests of the community and exploiting the courts for personal gain. While acknowledging the detention of the political leadership as a mitigating factor, an ANC activist (R32) conveyed that he and others who

are involved in the struggle for 'serious transformation' and 'order in transformation' are upset by the opportunism and abuse which prevailed in certain people's courts. A progressive paralegal (R15) described as 'terrible abuses' incidents where violators of the consumer boycott were compelled to consume the washing powder or fish oil they had purchased from white-owned shops. An ANC lawyer (R10) confirmed that the facilitators of the people's courts took it upon themselves to enforce the consumer boycott and to deal with those who had contravened. He described their method as 'very undemocratic,' and the whole situation as a real *gemors* (mess).

The infiltration of *skollies* (criminal elements), who lacked a sense of fairness and impartiality, was identified by 16 participants as another shortcoming of people's courts. Respondent 32 observed that the criminal element and gangs often become intrusive in the absence of political leadership. Respondent 18 described how gangsters, 'hiding in the name of the people's struggle,' had hijacked several courts and used them as channels for furthering their personal interests. She urged that the abuses perpetrated by the youth and the *comtsotsis* (gangsters pretending to be comrades) be viewed within the context of apartheid socialization:

> The regime has created monsters out of our kids. Those kids involved in the people's courts weren't able to enjoy their childhood. They were being shot at, and had to defend themselves with stones against the police and the soldiers. . . . they became adults overnight because they had to fight a police force and an army. . . . As a result, the youth had no respect for their elders. Kids no longer respected human life. And those are the effects of apartheid (R18).

5.2.6 Excessive punishment

The harsh penalties meted out by people's courts were recalled by 24 respondents across the political spectrum. Conservative and pro-government interviewees alluded to these excesses to substantiate their condemnation of people's courts. Without condoning severe punishment, progressive participants, on the other hand, were generally reluctant to evaluate the people's courts solely on the basis of these extremes. Moreover, a number of progressives insisted on viewing the punitive measures within the broader context of the apartheid society.

Based on the nature and intensity of certain punishments, the conservative politician defined the people's courts as 'a step backwards':

> The development and presence of people's courts seems to revert back to the penal systems of two, three, four, and even five centuries ago; even back to the Dark Ages, where we have a system with no control (R11).

A PAC-affiliated lawyer (R2) also deprecated the excessive penalties imposed by the people's courts. He was particularly shocked by instances of corporal punishment imposed, for example, on female defendants, and cases where punishment was administered in public. A black student activist (R41), who had first-hand experience of a people's court in a small Transvaal township, criticized the harsh punishments imposed by that forum: hundreds of lashes were sometimes inflicted, even upon elderly people. Respondent 41 reported that he was working at the local advice office at the time and accompanied a

few accused persons to their people's court trials. On one occasion he secured a doctor's certificate on behalf of an accused in an attempt to exempt the person from excessive corporal punishment. The court officials responded with intimidation, accusing him of 'acting like a lawyer.'

Considering that the state and the media recurrently spotlighted the extreme punishments administered by people's courts, a legal academic (R23) commented that it is easy to associate these structures with the abuse of power. He related that abuses are not restricted to the domain of people's courts and routinely occur, for example, within the context of state courts and the family. While emphasizing that he found extremely punitive measures to be alarming and unjustifiable, the professor refused to think of people's courts merely in terms of these extremes. An AZAPO activist believed that the people's courts got 'hijacked in the heat of the moment,' and the courts' facilitators acted impulsively. He too insisted that the people's courts should not, however, be condemned on the basis of ". . . the excesses that were resorted to via that process" (R7).

The people's courts' proclivity towards inflicting corporal punishment was also criticized by an ANC-aligned lawyer (R1). Based on the notion that violence begets violence, he viewed whipping in the context of either a state or people's court to be destructive. He was disappointed that the people's courts had not pursued a more humane and constructive policy of sentencing. He regarded the excessive sentences imposed by people's courts as

indicative of the fact that ". . . apartheid has dehumanized a lot of our people."

An ANC-aligned advocate (R9) disclosed that he had encountered people's court sentences where the number of lashings seemed disproportionate with the offence. While these appeared to reflect unacceptable abuses of power, he thought it essential to concentrate on 'the real abuses of power': "I refuse to deflect attentions from those abuses with the possible abuses by informal structures set up by the people." He referred specifically to the 'quasi judicial puppet structures,' namely, the institutions and courts operated by Community Councillors and vigilante groups in the townships. He described horrendous abuses of power committed by these 'functionaries' of the apartheid order aimed at creating disunity amongst the oppressed and eliminating 'troublemakers.'

Respondent 42 also insisted that allegations of excessive punishment be considered within the context of apartheid's violence. She referred to a case in the Eastern Cape:

> . . . charges were laid for what was termed extremely violent punishment. When I visited the township in which the related incident occurred, the real violence became apparent. The living conditions were appalling. The system of apartheid is the real manifestation of violence, and allegations of excessive punishment must be considered within that context. Violence breeds violence. The violence of the regime is far more excessive. It is obvious that oppressive living conditions cause frustration and potentially violent reactions (R42).

5.3 Community and State Reactions

5.3.1 Divisions in the community

As outlined in Subsection 5.2.4, the generational conflict was exacerbated by the directive role of the youth in the people's courts. Moreover, five respondents reported that the male domination of people's courts was a source of criticism. The negative pursuits of certain people's courts also had repercussions. According to 13 interviewees, several community members rejected the people's courts on the basis of the courts' opportunistic, coercive, and punitive inclinations. Local residents consequently questioned the court facilitators and their respective civic organisations. As observed by one liberal and two progressive participants, the community organisations lost support as a result of the people's court excesses committed in the name of the organisations and the struggle. The age, gender, and ideological divisions in the community and the crisis of legitimacy were thus identified as unfortunate outcomes of the people's courts.

5.3.2 State response

The state's discrepant attitudes towards the people's courts operated by chiefs, headmen, and vigilante groups, and towards the people's courts aligned with the mass democratic movement, was observed by seven

progressive participants. An ANC-affiliated lawyer explained the reason for this double standard:

> There was no hullabaloo about the courts operated by the chiefs and headmen. It was o.k. The natives were disciplining each other and having control over each other. But when the civics emerged in the urban areas and tried to resolve problems, and began to use the power they had as civics, the state was worried and saw this as sedition. . . . Whilst the state pounced upon all those who were spearheading the campaign for these people's courts, the state ignored the collaborators, the Community Councillors collaborating with the state who were running people's courts as well as prisons in Crossroads and Khayelitsha (R3).

Hence the state was not necessarily opposed to people's courts, but to structures with counterhegemonic potential. It is apparent that the state perceived people's courts as a threat, but I think Moses (1990) overestimates the extent to which the people's courts immobilised the legal system. As substantiated by the detention statistics cited in Chapter 2, the wheels of the criminal justice machinery were turning most efficiently during that period. The coercive means used to suppress people's courts and other organs of people's power signify the impact of these structures as well as the state's power and ease of access to repressive mechanisms. Therefore, I do not think the people's courts were able to realise the ultimate goal of Santos's (1979) 'dual power.' Although they obviously disturbed the state apparatus, the people's courts lacked the power and resources to actually confront the status quo. By removing and reproaching the political leadership and people's court facilitators and by perpetuating the 'necklace' image, the state succeeded in negating people's courts, and consequently in maintaining the hegemonic

upper hand. The state's ability to undermine community alternatives is one of the reasons why Cohen (1988, p. 211) advises against the over-emphasis on the significance of people's justice in revolutionary struggle. The experience of the people's courts signifies that socio-economic change is an essential part of the realisation of people's justice.

This chapter confirms that the initial aims and early practices of most people's courts were consistent with Cain's (1988) ideal of collective justice. However, as articulated by respondents, the courts ultimately failed to achieve community control and participatory justice. To varying degrees, the people's courts contributed towards the struggle, but their operations simultaneously created divisions in the community. Focussing exclusively on excessive practices, conservative, pro-government and some liberal interviewees condemned the people's courts. The Africanists were primarily perturbed by the fact that these structures deviated from the indigenous law and courts. ANC supporters did not romanticize the people's courts, but situated their shortcomings within the context of the apartheid society. They identified state repression as the prime factor contributing towards the downfall and cessation of the people's courts. The problems revealed in this chapter, particularly the lack of accountability to the community at large, the instances of opportunism, the domination by the youth and by males, the imposition of excessive punishment, and, coincidingly, the emulation of the apartheid system, were secondary causes of the courts' demise. Most people's courts had lost the majority support of the community before they were

ultimately terminated by the state. Caught up in a cycle of repression and resistance, the people's courts seem to have sown some seeds of their own destruction. However, it is important to note that these secondary causes were inextricably bound with state oppression and repression.

The desirability and feasibility of people's courts in the post-apartheid society are explored in Chapter 6. Their potential structure and jurisdiction are deliberated by liberal and progressive proponents. Although most participants did not interpret the people's courts of the mid-1980s as prefigurative, the 'new' South Africa will inevitably be influenced by the 'old.' Respondents drew extensively on the experience of the mid-1980s in formulating their visions.

Chapter 6

Visions of People's Justice in a Post-Apartheid South Africa

The form and content of post-apartheid legal and judicial systems are currently being discussed and debated within reformist and progressive circles in South Africa. As described by a NADEL-aligned lawyer, people's justice is largely a projected notion of ". . . what we would want in the future" (R1). Although the majority of respondents recognised that change will be shaped by the aspirations of the people, by the new government, and by the extent to which democracy is practised, they explored a range of possibilities during the course of these interviews. While most professional and public respondents hypothesized about the intricacies and ramifications of a post-apartheid justice system, the following statement by a female resident of the site-and-service sector of Khayelitsha elucidates the fundamental needs and aspirations of a high percentage of South Africans: "I don't know about justice. We need food and houses. Tell the government to give us houses" (R25). These pleas penetrate the realm of distributive justice which, as noted in Chapter 1, supersedes the scope of legal justice.

Respondents based their images of the future on their understanding of South African dynamics, with occasional reference to the experiences of other revolutionary societies. Visions emanated from personal experiences and political aspirations. Considering that conservative and pro-government

participants were not favourably disposed towards the idea of people's justice, this chapter reflects a pre-occupation with liberal and progressive visions. After addressing the changing intervention strategies of activists, paralegals and lawyers, the desirability and feasibility of popular participation in the process of legal change are examined. Participants' definition and propagation of a rights culture is explored. Concurrently, impressions concerning the contemporary relevance of the South African Freedom Charter of 1955 (see Appendix E) and reactions to the proposal for a Bill of Rights are outlined. Next, and consonant with respondents' conceptions of people's justice, attention is devoted to the transformation of the state justice system and the potential incorporation of African customary law or select aspects thereof. Finally, the chapter focusses on interviewees' rationale for either supporting or opposing the initiation of community-based justice apparatuses in a post-apartheid South Africa. Proponents of people's courts share their visions of court structure and functioning.

6.1 Changing Strategies

The De Klerk government's unbanning of the liberation movements, release of Mandela and other political prisoners, and response to Mandela's call to enter into negotiations with the ANC distinguish 1990 as a milestone in the change process. Did activists, paralegals, and lawyers detect any corresponding changes in the nature or degree of the day-to-day problems confronting people? Were they adopting alternate intervention strategies?

Furthermore, how did they conceive their future role in the post-apartheid era?

An ANC activist and advice office paralegal (R15) reported that, despite the ongoing structural and legal changes, he had not noticed any variation in the nature of client problems. He suspected that even if there had been an announcement that night that a new government was in power, many of the same social problems would persist. He anticipated that there will be low wages, high bus fares, and a shortage of houses, schools and medical facilities for a long time. However, both he and Respondent 16 noted that people involved in mass organisations are realising the need for a changing approach to old problems. In addition to complaining, shouting slogans, demonstrating and marching, it is necessary to equip people with the skills to respond to negative situations in a constructive manner and to propose viable alternatives: ". . . we need to shift from merely challenging and confronting to saying what we want, and actually being there to implement what we want" (R15). Respondent 15 referred to the Hire Purchase Act[27] to illustrate the need for proactive responses:

> You'll have the Hire Purchase Act and repossessions for a long time to come. We used to go, "Bad, bad business to do that to the poor people." And then we used to expose them in the papers. We still do that. But what we now have to do is equip our advice workers to draft proper legal documents to take on those big businesses, and to teach people not to sign. We've tried to do that often in the past, but that aspect of actually equipping people has always or mostly been overrun by our efforts to agitate people around bad practices, and we've

---

[27] In the early 1980s, the Hire Purchase Act was replaced by the Credit Agreements Act which similarly regulates 'instalment sales' and repossessions.

> neglected the skills section of things. We can complain about Montana[28] and other furniture places, but we must now get to say what is unfair about the Hire Purchase Act. We must equip people to deal with the present Act, and also to come up with alternatives.

The surge of right wing violence, and the relationship between the police and the right wing, are phenomena currently capturing the attention of the Legal Education Action Project (LEAP). Whereas LEAP was preoccupied with detention-related issues for the three years subsequent to the agency's inception in 1987, two paralegal employees (R13, R14) reported a current shift towards a developmental approach in training people to be advice-givers and to render paralegal services within their own communities. It is hoped that these paralegals will ultimately be incorporated into a new and accessible justice system (see Legal Education Action Project (LEAP)/Black Sash, 1990). Advocating the deprofessionalization of law, Respondent 14 shared his long-term vision of paralegals and advice office workers constituting the frontline of the new system. He was convinced that lawyers need training by political activists and paralegals. Respondent 13 observed a general 'mood' in the country to focus on more than repression alone. While LEAP is adapting services to meet changing needs and 'moods,' she remarked that the agency remains involved with repression-related cases: people were occasionally still being detained and shot, and frequently being evicted and dismissed in small Cape Province towns like Ashton, Robertson, Hermanus and De Aar. Considering the cessation of the State of Emergency and of the international

---

[28] A retail furniture outlet.

campaign against repression, Respondent 13 intimated that activists need time to evaluate current circumstances and adjust intervention accordingly.

A social worker (R21) at the National Institute of Crime Prevention and the Rehabilitation of Offenders (NICRO) also observed that community organisations previously pre-occupied with fighting apartheid are currently deliberating and clarifying what to fight for. The field is immense, and organisations are consequently devoting attention to concrete issues, and pursuing what she termed 'social interactive' changes. She identified the prevalence of gangs as one entrenched problem which is receiving an increasing amount of attention. In the past, political organisations would have relegated such tasks to the realm of social work, because activists were pre-occupied with the 'real' problems. Respondent 21's comments indicated that a dose of realism has been injected into the idealism of the progressive organisations.

The magnitude of the gang problem was elucidated by Respondents 21 and 32. According to the former, certain gangsters have been operating in Khayelitsha, Guguletu, and Crossroads in the name of the struggle. They claim to be ANC or PAC activists, but their looting, raping, fighting, and killing signify that they are members of the Young Americans, Cape Town Scorpions, Naughty Boys, or other local gangs. Respondent 21 reported that community organisations are offering to facilitate peace treaties between gangs and encouraging gangsters to assume responsibility for a 'new' South Africa. Respondent 32 added that community organisations can promise

gangs an end to apartheid, justice, and acceptance in a 'normal' society. Therefore, the gangs should work with the organisations to achieve a 'normal' society. The challenge of convincing gangs to become supporters rather than abusers of the community is, however, enormous. Gang activity is lucrative and, considering an estimated 40-60% unemployment rate, community organisations are unable to offer alternate sources of income. Furthermore, the progressive organisations are democratic in nature and cannot provide gangsters with the personal power they derive from gang membership. Their non-sexist policies are also a far cry from the 'macho' existence to which the gangsters are accustomed.

An escalation of violent crime was reported by another NICRO community worker (R20). He related that an entire 'culture of violence' has emerged over the past few years, with little value attached to life. Espousing that violence breeds violence, he attributed these trends largely to the brutality of apartheid and its agents. Furthermore, he observed that people have resorted to violent solutions as a result of frustration and despondency. He surmised that the level of violence may subside in response to the sense of optimism emanating from recent political and legal changes, and the possibility of negotiations. In addition, he anticipated that violence may diminish because political organisations are now addressing crime, gangsterism, and other 'bread and butter issues.' Respondent 20 was perhaps naive in that he omitted to recognise that the day-to-day life of the majority of South Africans has not changed, despite hints of structural change and shifting strategies of intervention. Further, he failed to account for the

inevitable violent counterrevolutionary attacks, which began escalating in August 1991. Respondent 20 observed that in Cape Town, economic crimes remain the most prevalent. However, with the advancement of technology, strategies have become increasingly sophisticated. Moreover, in accordance with inflation, crimes involve an increased quantity of money and goods. Considering the agency's mandate, Respondent 20 insisted that NICRO has a role to play in the transformation of the criminal justice system. In particular, NICRO could suggest new definitions of crime and appropriate sentences, promote diversionary strategies (particularly for young offenders and those convicted of victimless crimes) and alternative sentencing, propose improvements to prison conditions, and contribute towards the compilation of prisoners' rights. While acknowledging that NICRO has certain specialized skills, Respondent 20 stressed that the agency should not become elitist.

According to ANC, PAC, and AZAPO-aligned lawyers and advocates, legal professionals too will need to transcend their preoccupation with legal defence and play an increasingly proactive, creative, and developmental role in the post-apartheid era. Respondent 3 expressed the hope that lawyers will be able to participate in restructuring the justice system to give expression to a new spirit of democracy. The importance of ensuring that the new structures will promote and safeguard justice was emphasized by Respondent 7. Respondent 3 remarked that lawyers have an important educative role to play both during the current phase of the struggle and in the future. Lawyers should simplify and explain the prevailing laws and procedures and proposed changes to enable the public in making informed decisions. He anticipated

that lawyers will get involved at a grass roots level, and thereby improve their reputation in the community. He was pleased to report that NADEL is in the process of explaining the ANC Constitution to the community, and will thereafter possibly do the same with the ANC Constitutional Guidelines. He expressed the hope that lawyers will practice for the purpose of achieving justice for all and not for 'quick financial profit.'

The need for political education to prepare people for the post-apartheid society was emphasized by a PAC-aligned lawyer (R2). He felt particularly disturbed by the infighting and power struggles amongst the various political organisations, and by the tendency for people to react spontaneously on the basis of political slogans without knowing or questioning what these slogans mean. He attributed these shortcomings to ". . . virtual political bankruptcy on the part of the masses." Moreover, since political sentiments have been legally suppressed for several years, he remarked that people have yet to adjust to freedom of expression. Consequently, he urged that all political organisations assume responsibility for the political education of their members and supporters, and that the rights of political affiliation and dissent be emphasized: ". . . there is no monopoly over political inclination, it is no crime to adhere to a different political ideology." In his opinion, the need for political education is accentuated because there is no guarantee of a multi-party system in a post-apartheid South Africa. I think Respondent 2's accusations of political bankruptcy are presumptuous. While South Africans may lack a theoretical understanding of systems and structures, their lives are completely entwined

with politics. I endorse the need for freedom of political allegiance, but cannot help wondering whether Respondent 2 was not primarily concerned with securing a safe spot for the Africanists in the face of the increasingly evident popularity of the ANC.

As reported by Respondent 4, trials emanating from the States of Emergency era are still in progress. He surmised that in the post-apartheid era, a conservative legal or local authority may use its power to forcibly remove a group of squatters who are fighting for their rights to land and housing. However, he believed that the need for representing community organisations in 'pitched battles' against local authorities will diminish. Local authorities are beginning to negotiate with community organisations on issues of land, housing, and education. Lawyers need to become increasingly involved in interpreting legislation, and in empowering and equipping community organisations for the negotiation process. In his opinion, paralegals and others with particular skills may fulfill this advisory role more effectively than lawyers. Indicating that law is not the terrain of legal professionals exclusively, he emphasized the need for lawyers to collaborate with the Development Action Group (DAG)[29] and similar resources. The lawyer expressed the hope that several law practices which have concentrated on human rights work will become increasingly redundant. He proposed that these lawyers either get involved in a new period of reconstruction or some other field of legal practice.

---

[29] Established in 1986, the Development Action Group (DAG) serves as a professional advisory body to communities. On request, DAG assists in the planning and implementation of community projects.

In contrast, Respondent 10 surmised that affirmative action, potentially emanating from a Bill of Rights, will necessitate legal battles for the rights of the oppressed, particularly women and blacks. An increasing need for legal services in the rural areas was observed by two public interest lawyers. Respondent 6 felt positive about the current demand for legal assistance emanating from the rural areas, because he believed it is indicative of a developing rights consciousness. Whereas people had previously felt wronged and impotent, they were beginning to recognise their power to effect change. Respondent 9 anticipated that human rights abuses will persist in the post-apartheid era and courts may continue to serve as arenas of struggle. Consequently, he stated that he will continue to fight trials and defend the rights of oppressed people in the new order. Most human rights legal work in South Africa has been dependent on overseas funding. Respondents 4 and 10 anticipated that this sponsorship will cease after liberation. They consequently expressed concern regarding the future availability of funds for progressive legal pursuits.

6.2 Grassroots Participation in the Change Process

The desirability and feasibility of involving the public in the process of legal and judicial change were explored. Whereas conservative and pro-government participants tended to dismiss the idea as either disadvantageous, impracticable, or both, progressive respondents proclaimed that lay participation in legal and judicial decision-making is an essential

ingredient of people's justice. The latter respondents suggested practical ways in which the ideal of popular participation could be realised. The diverse perspectives and strategies proposed by participants are elaborated below.

According to a liberal politician (R12), it is essential for the details of a legal system to be decided by political leaders and legal experts. Consequently, he stated that it was 'practically impossible' to design a legal system on the basis of grassroots decision-making and 'a people's consensus':

> . . . I think if you try and mobilize ordinary people to make random suggestions about what is wrong with the law and what the legal system should rather look like, first of all you'd get a very poor response, but to the extent that you do get a response, it will be a very helter skelter affair. It will hardly give you guidance as to what should be done. I think there would be a couple of obvious things. I think there will be complaints that people can't afford justice. But there's no respectable lawyer in South Africa who's not aware of that.

Respondent 12's assertions signify his belief in the autonomy of the legal apparatus and the superiority of professionals. In contrast, a street law programmer (R19) contended that lay people are capable of suggesting innovative methods of legislating, and new laws. In fact, they are sometimes more adept than lawyers because they are not confined by their knowledge of legal principles and are able to be spontaneous.

Emphasizing that his response was not based on 'legal highhandedness,' a legal academic (R23) agreed with the liberal politician that the expectation of popular participation in the law-making process is

unrealistic. While he saw 'no harm' in opening up the legislative process to facilitate public commentary, he too anticipated that people would not rush forward with input and appraisals. Therefore, he did not think public involvement should be a prerequisite to passing a law. I think in any context, there are people who are likely to be responsive and some who may be apathetic. However, I believe the existence of uninvolved individuals is a defective reason for resisting popular participation in the change process. Respondent 23 reported that elicitation of public feedback is not a novel idea: in the old Zuid Afrikaanse Republiek in the Transvaal, laws had to be published before they could be enforced. Similarly, in contemporary South Africa, all new provincial legislation must be published to allow for public comment prior to endorsement. Notably, the academic's examples involve passive methods of evoking public response. In contrast, I think popular participation should be actively procured.

An advocate supportive of the Nationalist Party (R8) maintained that the idea is desirable, but that it is not feasible for the 'ordinary' person to propose ways in which the justice system can adapt to accommodate personal needs. In his opinion, feasibility is jeopardized by (a) the prevalence of people 'jockeying for positions' and 'eyeing one another as potential opponents and enemies,' and (b) the generally low level of education and resulting lack of basic understanding of what the justice system is or should be. As a result of the current 'turbulence,' Respondent 7 agreed that community involvement is desirable but not practicable in the current turbulent times. However, in contrast to Respondent 8, he insisted that public involvement should be

secured at the earliest opportunity. Learning to live together as a community was identified by a Bonteheuwel resident (R30) as a prerequisite to engaging people in suggesting changes to the law (see Appendix C). Consequently, he wished that political activists would nurture a sense of community by educating and encouraging people to understand one another and live together amicably and co-operatively.

Acknowledging that he had never before contemplated the possibility, a liberal lawyer (R5) stated that it would be ideal to involve communities in the compilation of local legislation. He acknowledged that law encompasses both parliamentary and delegated legislation. Respondent 39 agreed that it would be ideal for the public to be able to give feedback and suggestions to the legal authorities in the post-apartheid society. According to Respondent 37, 'good' suggestions put forth by people should at least be put to the test. The progressives, on the other hand, emphasized that it is not only ideal but necessary to secure popular participation in order to enhance the status and legitimacy of the justice system. As stipulated by Respondent 14, people's justice means people should be involved at all levels of the justice system.

Progressive participants in the public sector of the sample insisted that the enfranchised population in the post-apartheid society be involved in suggesting changes to the laws and the judicial system. They articulated their need to have a say in the laws by which they will be expected to abide. Respondent 27 added that forms of justice which do not meet the community's approval should be discarded. The significance of eliciting the

input of the entire community and not merely a select sector was stressed by Respondent 31.

The need for women to take up their leadership positions, place their demands on the central political agenda, and seize equality was emphasized by three feminists in the study. Respondent 18 specified that women should be directly and actively involved in the design of new laws and a justice system:

> We need to be there when the laws are being made in this country. We need to assert ourselves and stipulate what laws we think will be protective of women. No male chauvinist is going to decide this is good for a woman or not. Decisions are not to be made by some people in some dark corner, or by our male comrades for that matter. . . . We want to set up the kinds of laws that govern women by ourselves. We want to have a say in a judicial system which affects us as women.

Moreover, the need to feminize the change process was stressed. Respondent 42 anticipated that it will take years to eradicate the 'militarised' conception of problem solving so prevalent in South Africa. Given the chance, she believed that women could facilitate and nurture a process of negotiation and co-operation. Respondent 18 was pleased to report that representatives of the women's movement are involved in the needs assessment and law-drafting projects of the Centre for Development Studies (CDS)[30]. Working alongside lawyers and researchers, these representatives are ensuring the inclusion of a woman's perspective.

---

[30] The Centre for Development Studies (CDS) was established in 1990 to conduct research projects on a range of subjects and sectors of the population with the purpose of informing a future government.

As articulated by Respondent 14, the question is not whether popular participation is feasible, but how it is feasible. Three progressive lawyers maintained that the degree of community involvement in advancing legal and judicial change will be influenced by peoples' fight for their rights. Furthermore, popular participation will depend largely on the extent to which the political process in the transforming society accommodates democratic practice and accountability.

Two ways of facilitating popular participation were proposed by Respondent 1. First, people should elect a legislature and give that body the power to draft laws. Second, people should be legally permitted to express their feelings about legislation. Respondents 6 and 20 outlined that it is the role of a politically acceptable and accountable person or party to continually interact with constituents and report on current activities and objectives. Constituents' recommendations and desires pertaining to legal changes and innovations should simultaneously be collated. Respondents 6 and 39 specified that people should be able to protest laws which they believe are not serving their interests, and these laws should be reviewed by the government.

According to Respondent 32, no country can be run on a 100 % democratic basis. He outlined that the 'spirit of socialism' talks about democratic centralism, whereby the country is run on the basis of the 'mood' rather than the say of the people. The feelings of the people may not,

however, always be interpreted accurately. Respondent 10 believed that the success of the post-apartheid legal system and the eradication of social ills are largely dependent upon public participation in the decision-making and priority-setting process. According to the advocate, the distinction between political and civil society is being discussed in progressive circles. He condemned the situation in Eastern Europe where mass organisations were integrated into the Party, and a small bureaucracy emerged as the controlling body. Alternately, he supported the retention of a multitude of independent progressive structures as a means for entrenching democracy in the divided South African society. He believed that the civic and trade union movements should be 'the watchdogs of society': they should exert pressure on the political structures and review and comment on proposed legislation. Thereby, the reins will not be exclusively in the hands of parliamentary representatives.

Similarly, Respondent 9 stressed that democratic participation is an essential ingredient of the new progressive democratic legal order he envisages, and stipulated that "Democracy means people should do it not lawyers." Consequently, he criticized Namibia for putting the cart before the horse. That country's constitution was drafted by lawyers and then presented to the people for endorsement. He argued that 'fundamental rethinking' is necessary and the compilation of an alternate legal system in South Africa cannot be the task of only lawyers who are all trained in the Roman Dutch tradition. Both he and Respondent 19 predicted that it will take decades before the laws of contract and shipping are changed, and recognised that lay people

may lack the technical skills to contribute towards complex legislation of these kinds. However, they insisted that public participation be mandatory in the formulation of laws which affect people's lives, for example, the principles of new criminal codes and marriage laws. They maintained that legal professionals could play a role by devising structures and mechanisms to operationalize these principles, and by stipulating the people's desires in suitable legal terminology.

Seven other liberal and progressive lawyers agreed that lawyers, intellectuals, and technicians should not 'grab control' in the compilation of the post-apartheid legal system. They too recognised that lawyers, however, have the skills to assist in translating community demands into legislation and, conversely, in translating legalese into accessible terms. According to Respondent 6, it is up to the politically elected to request or instruct professionals to write up the people's proposals. Respondent 16 also opposed professional domination, but was not averse to professional involvement. She explained that being professional does not necessarily preclude working in the interests of the people. Besides assisting with semantics, she believed legal professionals and academics could contribute towards the development of new ideas and the evaluation of laws and the judicial system to ensure that these remain consonant with the interests of all South Africans.

Respondents 4 and 17 indicated that popular input could be facilitated by networks of paralegals, advice office employees, and community workers. Respondent 15 confirmed the significance of consulting with the community,

but added that it is easier said than done: "Lots of people speak about consultations with the community, but everybody who has worked in communities knows it is difficult to actually exactly do that." He reported that there are about 10 activists in Bonteheuwel who claim to be representative of the community. He debated the feasibility of these activists going door-to-door and asking Bonteheuwel's estimated 80 000 residents, "Aunty, do you want a people's court?" While he believed that people should be involved at all levels of decision-making, he maintained that it would be ideal but unrealistic to request community members to draft a proposal of legal and judicial changes. He illustrated his reasoning and proposed a more realistic approach:

> I think one can be romantic about the whole thing. To go to my father and ask him to come up with a proposal for a revamped legal system, I think is a bit absurd. If you go and ask my father what kind of legal system he wants, he will say something that's fair and something that he can afford. And so people who are in regular contact with the ordinary folk, and who have both technical ability and an understanding of the communities must try to work out something that is fair and economical and easy to understand, and take it back to the people to enlist their feedback and suggestions. That is how the people can participate (R15).

Equipping people with a basic knowledge of law and legal proceedings was identified by Respondent 16 as a useful prelude to procuring their participation in the decision-making process. According to Respondent 19, street law projects are one medium for teaching people about the law and encouraging the development of their critical, analytical skills to enable them to contribute towards the shaping of a post-apartheid legal system.

Additionally, Respondent 3 asserted that people will be requested to review proposals designed by study commissions, and will thereby be involved in the decision-making process. He reported that a number of study commissions have been established to investigate various fields, and that he is a member of a commission examining the appointment or election of judges and the role of the judiciary. He explained that these commissions propose various options, outlining the advantages and disadvantages of each to enable people to make informed decisions. The proposals are presented to all civic structures for review and discussion. Thus, at a grassroots level, proposals may either be endorsed or substituted with alternative recommendations. People may, for example, vote against people's courts and for a non-racial state court system.

6.3 Rights Arena

6.3.1 Validity of the Freedom Charter

In discussing rights and aspirations, a number of participants expressed their views on the current significance of the South African Freedom Charter of 1955 (see Appendix E). While identifying certain pitfalls, these respondents recognised the document's value and widespread embracement. Inclusively, they suggested that the Charter provides guidelines for the formulation of a proposed Bill of Rights. It is important to note that, congruent with their movement's policies, the Black Consciousness and Africanist interviewees

rejected the Freedom Charter. As recorded in Appendix B, the PAC was in fact established by former ANC members who objected to the central tenet of the Charter, stipulating that South Africa belongs to all its residents, both black and white.

The historical significance and usefulness of the Freedom Charter were recognised by Respondent 6. Both he and Respondent 12 credited the document for demarcating the needs, rights, and aspirations of South Africans. The Charter was commended by Respondent 39 for offering solid guidelines on freedom, equality, and the non-differential treatment of all citizens. In addition, Respondent 15 lauded the document's portrayal of people's visions and basic demands for improving their quality of life, for example, by having a home, an education, and freedom of cultural expression. Based on the Charter's widespread legitimacy, Respondents 20 and 23 insisted that the rights articulated therein be considered in the development of a rights culture and Bill of Rights. Respondent 16 recommended that a Bill of Rights should emulate the Charter's representation of all and not merely one select group of South Africans. Furthermore, she recommended that the Charter's validation of 'peace and friendship' should be entrenched to prevent the government from engaging in war without the consent of the people. To this list of credits, I add the fact that the Freedom Charter was formulated by democratic procedure and therefore truly qualifies as a people's manifesto (see Sechaba, 1985; Suttner, 1986b; Suttner and Cronin, 1986). The Charter thus provides a procedural model for the compilation of a Bill of Rights.

As observed by Respondents 6 and 12, certain aspects of the Charter do, however, need updating. The former identified silence on women's rights as a major shortcoming of the document. Furthermore, the Freedom Charter was criticized by Respondents 12 and 39 for being idealistic. Respondent 39 contended that the Charter's fundamental principle, namely, The People Shall Govern, has been misconstrued to mean that ". . . everybody will be sitting in parliament and making decisions." Further, while the Charter proclaims that there will be houses and security and comfort for all, he maintained that there will still be a shortage of houses, injustices, and insecurities in the post-apartheid era. The document's lack of specificity and failure to stipulate how expressed needs should be addressed were noted by Respondents 12 and 15. The former consequently remarked that the Freedom Charter is by no means a substitute for a Bill of Rights or a constitution.

6.3.2 Developing a rights culture

As recorded in Chapter 4, South African society has suffered from a virtual absence of a rights culture. In accordance with the economic needs of the status quo, the disenfranchised majority has periodically been granted privileges rather than rights. The 'cheapness of life' evident in contemporary South Africa is a repercussion of the apartheid regime's degrading and exploitative policies. In these circumstances, it is not possible to accede to the instrumentalists' dismissal of rights and rights struggles (see Davis, 1988; Sumner, 1981). The interviews demonstrated vividly that 'rights culture'

under such conditions evokes a range of connotations. Meaning is assigned to the term by the user, context, and purpose of application.

An academic (R24) outlined the differential interpretations of the term employed respectively by constitutional lawyers and agents of change. Constitutional lawyers perceive a rights culture to be enmeshed with either customary law, common law, or a Bill of Rights which protects the individual against the aggression of the state or other persons. They maintain that the South African state has not provided the infrastructure, machinery and procedure to facilitate the development of a rights culture. Consequently, constitutional lawyers advocate that people be made aware of their rights and how to exercise them. In contrast, the academic stated that progressive forces do not associate a rights culture with only the contents of a Bill of Rights. Their interpretation gives pre-eminence to the use of people's intuitive wisdom and notions of fairness or justice:

> Those members of the ANC or UDF who would advocate politicized street committees to form the lowest tier of an adjudicative infrastructure, would regard that ethos as part of a rights culture . . . in other words, a high level of accountability to collective decision-making, subjection to collective will, a set of appeals to higher structures within political organisations, and hopefully an adherence to a Bill of Rights ethos as well (R24).

Without referring to a Bill of Rights, Respondent 15's interpretation of a rights culture paralleled that of constitutional lawyers posited above. Both he and Respondent 17 emphasized the need to inculcate a rights

consciousness and to mobilize people to engage in rights struggles. The former elaborated why he regards the development of a rights culture as ". . . one of the essences of struggle," and described related strategies: People have been inclined to accept the status quo or have lacked the confidence to challenge their predicament because they have been oppressed, exploited, and dehumanised by apartheid and denied knowledge and skills. Consequently, activists have strived to develop a rights culture by initiating organisations to make people aware of their rights and their power to enforce those rights, and to take action if their rights are infringed. Inclusively, they have encouraged people to unite and collectively challenge authorities to bring about change. Thus, congruous with Sumner's (1981) contention, rights and rights struggles have served to politicize and mobilize the oppressed. According to Respondent 15, increasing assertiveness on the part of the people is indicative of the success of these efforts. People are beginning to realise their worth, and the fact that they do not have to live in a *pandokkie* (hovel) in a swamp in Hout Bay[31]. They are becoming increasingly aware and vocal regarding their rights to liberty, housing, education, and medical assistance.

Consonantly, Respondent 6 observed that the process of developing a rights consciousness is gaining momentum and people are gradually realising their right to fulfill their needs as human beings and citizens. However, he remarked that there is still a long road ahead and emphasized that people have even to be alerted to rights pertaining to simple day-to-day matters, for

---

[31] A 'detached dormitory suburb' on the outskirts of Cape Town, administered by the Western Cape Regional Council Services.

example, their right to be sold fresh rather than stale bread. Respondent 30 felt optimistic about the potential for nurturing a rights culture amongst the younger generation who are relatively politicized. However, he surmised that it would be extremely difficult to inculcate a sense of human rights amongst the older generation who tend to accept life at face value and are unaccustomed to questioning or challenging their predicament. He added that a high percentage of people are dependent upon disability grants or state pensions and are consequently reluctant to criticize the government. Although he recognised that it is impossible to divorce politics and rights, the Bonteheuwel resident suggested that activists should approach and educate the older generation ". . . without acting radical" (R30).

Women's rights have yet to be won and instituted in South African law. Notwithstanding, the study revealed progress in the development of a women's rights consciousness. According to Respondent 18, the level of political awareness with respect to women's rights is higher in South Africa than in any other African state, including Zimbabwe and Mozambique. The younger generation in particular appears to be politicized and she thus felt optimistic about the fight for women's rights in the post-liberation society. She remarked that white comrades have criticized the women's movement for neglecting feminist issues. However, considering the above-mentioned achievements, she did not think their criticism is justified. Furthermore, she noted that countries which have long since been liberated from colonialism are still fighting for women's rights. She acknowledged that most women became involved in the movement to fight for national liberation, but have

simultaneously received some education on women's rights. She believed that the struggle for the liberation of women should run alongside the fight for national liberation. Consequently, she urged that comrades who are clear on both political and women's issues provide input on ways of integrating the two struggles.

The fact that the ANC and the Congress of South African Trade Unions (COSATU) have created women's wings was criticized by Respondent 42 because she believed that women's issues should be dealt with in the centre of organisations. She felt angered by the justification that addressing women's needs and rights will have divisive effects. Furthermore, she reported that, despite the progressive political organisations' policy commitment to non-sexism, women are not equitably credited for their contributions and the organisations continue to be dominated by males.

Freedom of political conviction and practice was identified as a right to be incorporated into a rights culture. A liberal politician stressed the need for South Africans to be made aware of their own rights and the rights of others. He stated that people's individuality and individual choice have suffered in the revolutionary situation, and that South Africans are overcome with fear:

> We have a frightened populace. People are just terrified out of their wits. And there's nothing as bad for democracy as a frightened populace. Things like free political choices in the black townships of South Africa are very, very tenuous at this stage. And that is no good (R12).

Consequently, he regarded the development of a rights culture as crucial. He believed that people need to learn to function as individuals and gain a sense of self worth and confidence in order to respect other people's worth and rights.

While he was not averse to the idea of developing a rights culture, a pro-government advocate felt skeptical due to a lack of consensus regarding the definition of human rights. He alluded to the conflict in Hout Bay between land owners and squatters at the time to illustrate diversity in perception and conceptions of human rights:

> The regular residents of Hout Bay will tell you that their human rights have been violated: They cannot do what they want on their own private properties, their personal safety is being threatened by the day, their property is being stolen or damaged, and they have no redress. At the same time, the Hout Bay squatters will tell you that their human rights are being violated because they have nowhere else to go, or they want to be there, or they don't want to be elsewhere. And in any event these other people must put up with it. And it's not true that the other people's lives or personal safety are being threatened. So if you don't allow a squatter to squat on the nearest available private land, he will say, "My human rights are being violated" (R8).

The advocate concluded that human rights cannot be viewed as a universal, workable concept until people have been educated to understand what human rights are about and that human rights require a high and 'civilized' degree of tolerance on the part of every individual. His condescension is ironic. To date, the black majority have been deprived of education and denied rights by the so-called civilized white minority. Who needs to acquire a 'civilized' degree of tolerance?

Respondent 34 recognised the need to develop a rights culture and secure human and legal rights, but felt overwhelmed by the enormity of the task: "Everybody is screaming and shouting democracy, and a Bill of Rights and people's rights. Yet where do we start?" Her response reflects the mass democratic movement's pre-occupation with the destruction of apartheid and the currently recognised need to devote energies to constructing alternatives. Respondent 6 recalled that members of the ANC's constitutional team have been advocating the dissemination of a nationwide rights consciousness. He proposed that lawyers make a contribution by running educative workshops for the advice offices, and pursuing litigation when necessary. The priest interviewed in the study maintained that the church should play a role in the development of a rights culture, because the church signifies humanity and the building and restoration of dignity. A Khayelitsha resident (R26) identified the following community resources as capable of enhancing a knowledge and culture of rights: advice offices, community activists, and law students. Although the street law manuals in current use do not deal with human rights specifically, Respondent 19 surmised that street law could play a significant role in educating people about their basic rights. Respondent 13 agreed, and recommended that street law be incorporated into the school syllabus and taught through the media.

The need to nurture the development of a rights culture within the context of legal studies was identified by Respondent 23. He remarked that the rights of legal subjects constitute the point of departure in the teaching of

private law, and that the latter consequently incorporates a rights culture. However, in the field of public law, there has been a tendency, particularly within the Afrikaans universities, to emphasize the normative, rule aspect of law and the powers of the state. In the professor's opinion, it is pertinent for public law to focus on the subjective aspect of law, namely, the rights and claims of people in order to advance a rights culture.

6.3.3 Bill of Rights

The question of a Bill of Rights has become critical in South Africa since liberal lawyers initiated Lawyers for Human Rights in 1978. As outlined by Respondent 3, both pro-government and progressive forces opposed that organisation's propagation of a Bill of Rights at the time. Nationalist Party supporters dismissed the need for a Bill of Rights and referred to the absence of such a document in Britain and other democratic countries to substantiate their argument. At the opposite end of the continuum, progressive critics maintained that the struggle was a fight for national liberation and a new constitution, and could thus not be reduced to a struggle for human rights alone.

This study demonstrates that perspectives have since changed. Both the state-aligned Law Commission and the Legal and Constitutional Committee of the ANC published working drafts of a Bill of Rights in 1990. With the exception of one PAC-aligned lawyer, respondents across the political spectrum endorsed the need for a Bill of Rights. The majority of

liberal and progressive participants recognised that such a document may act as a smokescreen for substantive inequalities, but did not believe that a Bill of Rights should be rejected on that basis. They maintained that it has potential intrinsic value. As indicated below, the focus of the debate has shifted to the preconditions, timing, and content of such a document. Notably, progressive participants specified that a Bill of Rights should not precede the inauguration of a democratic post-apartheid government. Furthermore, they argued for the inclusion of collective social and economic rights and corrective measures to alter property relations and facilitate a redistribution of wealth.

The notion of a Bill of Rights was welcomed by the conservative and pro-government respondents. In contrast to the progressives, they were primarily concerned with protecting minority group rights. In particular, they were eager to secure the current status and privileges of the white minority. Although he questioned the feasibility of developing a rights culture, Respondent 8 favoured the implementation of a Bill of Rights. He stressed the need for human rights to be incorporated and clearly formulated in the document. Moreover, he believed it is pertinent for all citizens to be bound by the same human rights. He maintained that if there is no unanimity, a Bill of Rights will be 'a pipe dream,' and the concept of human rights will be used to conceal true intentions and promote personal agendas.

Liberal and progressive respondents recognised that a Bill of Rights may potentially disguise and perpetuate substantive inequality. Respondent 6

alluded to constitutions worldwide which are 'littered' with formal rights and are meaningless because no person or court has been willing or able to enforce them. Both Respondents 1 and 15 referred to the Bills of Rights in the South African 'homelands' of the Transkei, Ciskei, and Bophutatswana, and observed that these documents are disregarded by the authorities and disrespected by the people. As described by Respondent 15, these documents are ". . . not worth the paper they are written on." Participants thus stressed the need for a Bill of Rights to be honoured by both the government and the nation in order to be a 'working instrument.'

Liberal respondents regarded clearly defined formal rights as a constructive starting point. They maintained that the possibility for abuse of a Bill of Rights, and of other legal institutions, does not negate its potential utility. Consequently, they rejected the instrumentalist argument that a Bill of Rights should be dismissed for obscuring and perpetuating substantive inequalities. The following extracts reflect the liberal perspective. Cynicism about those who do not believe in incremental change is apparent:

> . . . only if one's major purpose in life is to illustrate how hopelessly unfair the society is that you live in, is that argument valid. In other words, if you prefer to have no improvement, to have no equality or no justice, because if you have some equality it hides, it draws attention away from the other inequalities, then that argument is valid. If you want everything either absolutely perfect or otherwise absolutely wrong, then that argument is valid. Otherwise it's nonsense. That argument is very problematical in our society, where people are unable to snap out of a revolutionary or protest mode, unable to snap out of the role of being the underdog, and snap into a mode where they are actually the potential owners of power and the potential people who are going to reconstruct the society. They somehow want to retain a

> hands-off position, very critical, very negative, and expect the thing to come right of its own accord. And only when it's perfect, then move in and be part of it. It simply doesn't work like that. And it never has, never will (R12).

> The notion that all shall be equal before the law in a Bill of Rights, I don't think, would con anybody on the street to believe that because that's included in a Bill of Rights it describes the *de facto* situation. You can extend the leftist critique to everything. You can say by extending the vote to everybody, you're giving the impression that all are equal within the country, when in fact there's so much inequality. That isn't an argument for not extending the vote (R4).

Both liberal and progressive participants recognised that one cannot write substantive justice. However, they regarded a Bill of Rights as a vehicle for claiming, enforcing, and protecting substantive rights: "Providing people with formal rights is not the end of the road, but it's a mechanism behind which people can mobilize to secure more substantive advantages" (R22). A public interest lawyer (R4) conveyed that he would have been better able to fight unjustified detentions had there been in place a prescriptive Bill of Rights, and that such a document would have aided the task of lawyers during the States of Emergency. Respondent 6 stressed that lawyers need formal rights in order to fight for substantive rights on behalf of community organisations, trade unions, and other clients. He added that rights struggles need to be accompanied by a political process of representation and accountability. The liberals perceived the situation to be more complicated once a Bill of Rights transcends 'liberal freedoms' and enters into the realm of economic and social rights, for example, the rights to development, food, employment, and fair wages. They maintained that it is not easy for a court to legislate or make decisions in those arenas. According to a progressive public

interest lawyer, the dilemma of enforcing socio-economic rights is experienced internationally.

Interviewees remarked that any government has the potential to abuse power and operate repressively. Without negating the notion that a Bill of Rights serves to protect bourgeois rights, a legal academic (R22) pointed to the disastrous consequences suffered by the people in Eastern Europe in the absence of rights. The liberals and some progressives maintained that a Bill of Rights presents an independent check which supersedes legislation and government and provides a yardstick for gauging laws and abuses of power. Other progressives debated the extent to which a Bill of Rights can actually inhibit the emergence of totalitarian regimes and dictatorships, but agreed that a Bill of Rights may at least enhance a rights consciousness. Respondent 12 stressed that people should acquire the confidence to take legal action, and not feel impotent, in the event of their rights being violated. According to Respondent 23, a Bill of Rights is an instrument like any other, which should be changed if it fails to facilitate the attainment and enforcement of people's rights.

In contrast, and in the Althusserian (1977) mode, a PAC-aligned lawyer was emphatically opposed to a Bill of Rights, because he saw it solely as a means of confirming existing inequalities:

> The problem is that the people who are propagating a Bill of Rights, are people who feel threatened that their rights will be violated in the post-apartheid South Africa. The reason for them to feel threatened is of course a sense of imbalance of the distribution of rights in our country.

> For example, if you own the whole of Anglo-American, that's your right, the right of ownership. If you own about 90% of this land, it's your right. So I see the proposed Bill of Rights as nothing other than a means of entrenching the imbalance of acquired rights as is presently the case (R2).

Other progressives in the study also recognised the pursuit of self-preservation by the privileged and powerful via a Bill of Rights. They stressed that their concept of a Bill of Rights encapsulates collective rights and precludes the subdivisions of white minority and other group rights and class interests. An AZAPO-aligned supporter (R7) stipulated that as a lawyer he supported the motion for a Bill of Rights, which he regards as an instrument for developing a rights culture and consciousness. Respondent 1 expressed the wish that a Bill of Rights will protect the rights and gains that people have won through struggle. Moreover, ANC-aligned participants insisted that a Bill of Rights addresses all three generations of rights (see Sachs, 1990). In other words, the document should include (a) civil and political rights; (b) social, cultural, and economic rights, including rights to alleviate poverty, hunger, and want; and (c) the rights to development, peace, social identity, and a clean environment. As expressed by Respondent 15, a Bill of Rights must embrace 'real change':

> A Bill of Rights must be grounded in the solid demands of the people. You can talk about political power and you can talk about Bills of Rights but if you don't address the economic inequalities and poverty, those things won't mean a thing.

While stressing that they do not perceive such a document to be 'a cure all,' the progressives, ANC supporters in particular, hoped that a Bill of Rights

will serve as one vehicle for transforming the society. They insisted that provision be made for affirmative action. Respondent 3 alluded to the controversy surrounding the potential right of the state to expropriate private property, and the associated debate as to whether expropriation should be accompanied by fair compensation. Respondent 1 recommended that the Bill of Rights should prescribe a just process of redistribution and thereby prevent arbitrary dispossession. The above responses thus indicate the progressive desire for the document to both reflect and further the struggle.

According to progressive participants, a Bill of Rights should only be introduced once all vestiges of apartheid have been eradicated. They believed that political change should precede legal entitlement because a Bill of Rights implemented or enforced by the present judicial structure will be anti-democratic and will inevitably be enlisted to perpetuate white power and privilege. Consequently, they anticipated that a Bill of Rights will be one of the outcomes of a negotiated settlement. Viewing the compilation of a Bill of Rights as a political rather than a legal decision, they advocated maximum popular participation in the process. While working committees of legal practitioners and academics can make a contribution, they believed the contents of the document should emanate from debates in the democratic organisations and on the streets.

The need for a Bill of Rights to be accompanied by public education was emphasized by Respondents 12 and 16. They argued that the existence of the document will not in itself mean that people are aware of their rights.

Furthermore, people need to understand the structures and processes through which they will be protected, and that even the power of the government will be subject to a constitution and a Bill of Rights. Respondent 16 recommended that the Bill of Rights be integrated into both the school curriculum and instructional programs for adults as one means of counteracting potential mystification.

6.4 Transforming the State Justice System

Consistent with the notion of people's justice, respondents suggested ways in which the system of white man's justice could be transformed into a democratic, just system representative of and accessible to the people (see Davis, 1991; Steytler, 1991).

6.4.1 The form and content of law

The responses of liberal participants signified that they were more amenable to changing the state justice system than they were to initiating community-based judicial apparatuses. One of the questions raised was whether South Africa's legal system should be discarded in its entirety. Pro-government respondents recommended ways in which the prevailing justice system should be modified or reformed. One conservative went so far as to suggest that the justice system would be ". . . more equal if the numbers between the population groups could be more equal" (R35). Whereas both liberals and progressives advocated a fundamental restructuring of the legal

order, progressive participants emphasized that fundamental economic and political change is an essential accompaniment.

Acknowledging that there are some positive and protective aspects in South Africa's current common law, a public interest lawyer (R6) suggested that it may not be advisable to 'dump' the legal system in its entirety. He alluded to Albie Sachs's (1979) study of Mozambique to highlight the potential dangers of prematurely abolishing the entire justice apparatus. Furthermore, he noted that Namibia has not totally eradicated the pre-independence judicial system, but that the success of that country's strategy has yet to be evaluated. A lawyer supportive of the PAC (R2) maintained that while all discriminatory aspects of the legal system will be abolished, the concept of legality will prevail in the post-apartheid society. He elaborated that although requirement aspects of certain contracts of law may change, it will always be wrong to steal, people will still enter into contracts and agreements, and estates will still have to be wound up. Two ANC-aligned respondents (R1, R32) maintained that it is premature to make prescriptions and confirmed that the form and content of law in the new society will be influenced by the transformation, the legislators and the degree of democracy exercised by the new government. These responses indicate that progressive interviewees did not endorse Pashukanis' (1987) 'withering away' thesis, even though they recognised the involution of law and racial capitalism. Despite their differing propositions, they identified the need for legal regulation in the post-apartheid era.

Whereas pro-government respondents favoured amendments to enhance the accessibility of the existing system, liberal and progressive participants expressed the hope that people's justice will evolve in the form of a 'completely effused and democratized' state legal apparatus. As noted above and reflected in their conception of people's justice (see Chapter 4), the liberals were more amenable to the restructuring of the state justice system than to the initiation of community-based justice. They emphasized the pertinence of increased accessibility to justice. Furthermore, they stressed the need for a heightening of accountability and an awareness of the lived reality of the majority of South Africans. Expressing their opposition to the institution of people's courts within the context of divided communities, Respondents 4 and 5 stipulated their preference for a justice system with a strong sense of the rule of law and an independent judiciary. They surmised that the state judicial apparatuses may gain respect once the political system is democratized and people begin playing a role in government.

Liberals and progressives deliberated the order of change: should legal change prescribe, reflect and/or solidify socio-political and economic transformation? Inclusively, they discussed the relationship between law, politics, and ideology. Recognising that legal problems are frequently rooted in South Africa's system of racial capitalism or colonialism of a 'special type,' most progressives reiterated Brickey and Comack's (1987) plea to transcend the artificial barrier between law and politics. A few progressives proclaimed that law and politics should generally be separate, but stipulated that it is necessary to integrate the two temporarily during this time of transition to

facilitate the dismantling of apartheid. Based on what she termed a liberal, western understanding of ideology, Respondent 16 did not endorse the propagation of ideologically-based law considering that all citizens do not ascribe to the same ideology. Simultaneously though, she wondered whether law can in fact be objective. After some deliberation, she advocated a 'humanistic' approach that would formulate law on the basis of common human rights. While recognising that law cannot be divorced from the struggle, a legal academic (R23) opposed the use of law as an instrument of change because he feared that law would thereby serve as an instrument giving effect to a particular ideology. He alluded to apartheid's laws as a case in point, and maintained that if new laws are dictated by one set of preconceived ideas, the justice system will continue to be repressive and will not enable people to liberate themselves. Consequently, he believed that law should facilitate rather than prescribe change. In their deliberations, Respondents 16 and 23 did not, however, consider the possibility that the lawmakers in the post-apartheid society will hopefully be giving expression to the will and ideology of the majority.

Liberals and progressives stipulated that repressive aspects in South African law have to be removed to facilitate access to the courts and the enforcement of rights. Thirty-one respondents stipulated that racially discriminatory legislation must be abolished, and not altered or replaced with euphemisms. Realising that racism will not automatically dissipate, 23 of these participants advocated the introduction of a clause outlawing racial discrimination. Sixteen respondents added sexual discrimination to the

demolition list, and stipulated the need to outlaw practices which discriminate against women. These figures indicate that sexism is not a burning issue for as many South Africans as is racism. Furthermore, there may be a degree of reluctance, even amongst so-called progressives, to relinquish traditional sex roles and advance towards gender equality. Nevertheless, based on the ANC's policy of non-sexism and the potential opportunity of compiling a constitution 'from scratch,' feminists in the study felt optimistic about securing equal rights and women's rights (see Van der Horst, Christie, and Driver, 1987). Three feminists (R13, R21, R42) recognised that policy and legal change will not necessarily reflect transformed attitudes and practice amongst the populace. However, they regarded formal change as an essential base for substantive change. Emphasizing the sexist propensities of South African society, Respondent 13 anticipated that it may take 50 years to change people's everyday gender politics.

The need for the new legal system to accommodate affirmative action was articulated by most liberal and all progressive participants. They expressed the hope that the laws will reflect the transforming society with its inherent problems, injustices and deprivations. In the words of Respondent 1, the new laws must make provision for ". . . an extension of democracy at every level of people's lives." In addition to granting the vote to all citizens, a sense of democracy should be injected into the workplace and the community. While recognising that an equitable redistribution of power, wealth, land and other resources is beyond the scope of law and essentially

calls for nationalization, the progressives insisted that the laws establish affirmative action to rectify these disparities.

6.4.2 Policing

I did not ask specific questions pertaining to policing, and only two respondents addressed the transformation of the police force. A NICRO social worker anticipated that the police will earn respect and gain the co-operation of the people once they cease to function as an arm of the repressive state and become accountable to the community. Based on his belief that people should have input and control over the policing of their community, an academic advocated the democratization of the state police force. Furthermore, he debated whether formal powers and responsibilities of state policing should be transferred to civic organisations or whether community efforts at policing should be formalized. He referred to revolutionary Nicaragua to illustrate the potential hazards of uncontrolled policing: once the Sandinistas seized power, any citizen could act as a local police officer and many people engaged in policing activities through their involvement in community organisations. However, abuses ensued and people tried to spread ideology and encourage activities that were contrary to the revolutionary party. The professor reported that the results of group attempts at community policing in South Africa have been 'uneven.' He thought it would be particularly perilous to give people a 'free hand' at policing within the context of deeply divided communities. Moreover, he stated that it is difficult to control the policing activities of vigilante groups, who are usually influenced by the views of the

far right. Consequently, he highlighted the need for 'a controlling mechanism,' and suggested that community policing be controlled by a democratized state police force.

6.4.3 Courts

As reported in Chapter 2, an estimated 90% of South Africa's criminally accused currently appear in court unrepresented. Consequently, 15 interviewees proposed that legal aid be instituted as a right rather than a privilege. They, pro-government participants included, advocated the extension of the state legal aid system to ensure that indigent accused in criminal cases have access to defence lawyers. Respondent 1 elaborated that within a system of people's justice, arrested persons should be entitled to the legal representation of their choice, and that defendants in people's court cases should be afforded that same right. Six participants insisted that the right to representation be endorsed by a Bill of Rights. Four lawyers and paralegals proposed the introduction of a public defender system as a means of increasing the availability of legal representation. They reported that conscientious objectors have long since pressured the government to initiate a public defender system as an alternative to military service. In addition, Respondent 6 suggested that paralegals be trained to provide legal representation. He proposed that they gain initial experience by handling bail applications. Thereafter, paralegals could defend people charged with minor offences, and enlist the assistance of lawyers if and when necessary.

Many participants advocated the demystification of the courts and the simplification of procedural aspects. They anticipated that there will be a move from a due process model to one which is more equity-based. Progressive interviewees were adamant that the present judges should not preside over post-apartheid courts. Emphasizing that law is not the exclusive terrain of lawyers, eight progressives urged that community representation and popular participation be integrated into the transformed state court system. While recognising that lawyers may know, understand and be able to manipulate legal procedures, they did not think that lawyers are necessarily endowed with the relevant knowledge and ideas to administer justice. Even if there are learned magistrates and judges, the lawyer believed it would be desirable to have community members as assessors who would have a say in the trial procedure and verdict.

Considering that the small claims courts are affordable and allow disputants to present cases and conduct defences themselves, five participants advocated the extension of that system. Labelling the existing forums as 'elitist,' Respondent 20 recommended that small claims courts be established in each locality or attached to every Magistrates' court, and that the community be educated on court functions and procedures. A liberally-oriented lawyer (R4) proposed that an extended small claims court system would enable more people to pursue civil litigation without the expense of legal intervention and simultaneously reduce the 'pile-up' in legal practices. Furthermore, he recommended that certain violations, for example traffic offences, be transferred out of the realm of lawyers and state courts. He

suggested that paralegals be encouraged to extend their work beyond legal education and into legal practice itself. While Respondent 4 was committed to reducing legal costs for clients, he seemed equally devoted to furthering the interests of legal professionals. He appeared to be intent on diverting cases which lawyers may find financially unrewarding and tedious, thereby freeing-up more time for lucrative legal work.

6.4.4 Possibility of a jury system

The prospects of, and opportune time for, instituting a jury system in the post-apartheid era were contemplated by 13 liberal and progressive participants. They either had reservations about the infiltration of prejudice or anticipated that a jury system would contribute towards the legitimation of the post-apartheid adjudicative apparatus. Considering the potential influence of the jurors' emotions, Respondent 12 was one participant who dismissed the idea of a jury. He suggested that such a system may be acceptable if there are clearly defined and fair rules which are understood and meticulously observed. However, he stated his ultimate preference for judges to be ". . . completely dispassionate, almost hardened to emotional aspects."

While two progressives (R1, R10) regarded judgement by one's peers to be consonant with people's justice, they had reservations about the practicalities or timing of implementing a jury system. Interestingly, these participants promoted the notion of a 'jury' in the context of people's courts, where 'jurors' would be members of a defined community rather than the

broader society. Respondent 10 was reluctant to advance the establishment of a jury system because he felt perturbed by the potential for manipulation and the prevalence of diverse language and cultural backgrounds. Since prejudice is ingrained in South African society, Respondent 1 believed it would be premature to initiate a jury system in the centralized, state courts immediately after liberation:

> The people are going to come into the society with a whole host of prejudices, and no jury is going to be able to wish those prejudices away so soon after all this turmoil. Maybe in years to come. We need to first build a tradition of fairness and unbiasedness, where we do away with prejudice. That's going to take a long time in this country. We are going to remain with a heritage of racism in all sectors of our communities (R1).

In contrast, Respondents 39 and 40 proposed the implementation of a jury system as a means of bridging the gap between justice as it is perceived by township residents and justice practised by the state courts. Respondent 39 remarked that he did not reject the idea of a jury on the basis of possible prejudice, because bias could permeate any judicial system. He illustrated that it would not, however, be fair to have a white farmer serving as a juror in the trial of a black township dweller. Until such time when there is a diminution of the deep-seated prejudice and hatred which dominates South African society, he recommended the inclusion of a specific selection criterion: the jury should comprise members of the same or a similar community to the one in which the disputants reside.

At the other end of the spectrum, a lawyer supportive of the PAC (R2) wholeheartedly endorsed the institution of a jury system in the post-apartheid era. In his opinion, a jury comprising people of various pre-apartheid backgrounds will benefit the adjudicative process. Moreover, the public will have confidence in a jury which is representative of the society. He suggested that such a system will also provide a forum for expressing the conceptions of a post-apartheid society.

6.4.5 Penal system

In presenting their visions of people's justice, four respondents addressed the transformation of the penal system. Respondents 5 and 37 urged that the values applied in sentencing be consistent with the lived reality of the majority of the population. Respondents 1 and 32 believed that imprisonment cannot be eradicated, but hoped that alternate constructive sentences will become more prevalent. Furthermore, Respondent 1 insisted that prisons in the post-apartheid society perform progressive functions and provide offenders with the opportunity for constructive rehabilitation, including skills development and the instillation of a sense of self worth. Prisoners should no longer be a source of cheap labour to farmers, nor should they be left lying idle in their cells for days on end. Respondent 32 emphasized the educative aspect of sentencing, which should prevent recidivism and deter behaviour considered harmful to the community.

6.5 Status of African Customary Law

Should African customary law, or select aspects thereof, be formally incorporated into the post-apartheid legal system? Responses varied in accordance with political allegiances and ideologies. Conservative, pro-government and liberal participants favoured the inclusion of the indigenous system. While the traditional law and courts were central to their concept of people's justice, the Africanist and Black Consciousness-oriented participants agreed with the ANC supporters that culture is not static and that conservative practices should be abandoned. Advocates of African customary law discussed possible structural arrangements and either proposed a dual system with the traditional apparatuses running alongside the state institutions, or an integrated system. These perspectives and suggestions are outlined below.

The conservatives advocated state recognition and reinstatement of indigenous law. Consonant with their belief in 'separate development,' they insisted that it is the black people's prerogative to stipulate the structure and function of their traditional institutions:

> We should not be paternalistic and say, "We present you with such-and-such a system." We shouldn't devise something new and impose it. Rather, we should encourage the black people to come up with what they see as traditional courts and how these courts should be operated. We should then acknowledge their vision (R11).

Pro-government interviewees maintained that black people should be entitled to 'certain traditional rights.' They insisted that indigenous apparatuses be adequately 'staffed.' Their responses reflected their pre-occupation with group rights, control, and financial expense. Liberals endorsed the incorporation of African customary law on the basis of South Africa's cultural diversity, the fact that many blacks still abide by their traditions, and the notion that the definition of certain crimes is culture-specific. They stressed that their support was based on the widespread, long-term legitimacy that traditional dispute-resolution forums have enjoyed, and that their future stance will also be dictated by community aspirations.

As recorded in Chapter 4, a PAC-aligned lawyer surmised that the traditional concept of law will lose prominence as people become enlightened and increasingly sophisticated through exposure to western norms of living. Emphasizing that customary law and traditional courts are an integral part of the rich African culture, two other PAC supporters and an AZAPO-aligned lawyer, however, urged that the African heritage should not be discarded. While stressing the validity of the traditional system, they observed that, like any culture, African culture is imbued with both positive and negative aspects. They agreed with most ANC participants who thought that the positive characteristics should be retained and perpetuated, whereas the negative principles and procedures should be abandoned. They recognised the need to eradicate traditional gender discrimination, and stipulated that a communal approach to conflict resolution should not be confined to men.

The responses of most ANC interviewees echoed Sachs's (1984) contention that the issue is not 'African' or 'western,' but the needs and interests of the populace. Four ANC supporters were, however, averse to African customary law in its entirety as a result of its patriarchal nature. A paralegal and activist in the women's movement (R18) identified the patriarchal tendencies of many African traditions and the fact that there will be resistance to change. For her the issue was not whether to integrate or exclude indigenous apparatuses, but how to eliminate discriminatory attitudes. In her opinion, forced changes will create 'divisions' and have disastrous effects. Consequently, she proposed that traditional sex roles be transformed through a process of education. She believed that women should not be confronted, but should rather be educated and exposed to alternative perspectives. Similarly, she suggested that it would be more beneficial to educate than to challenge male comrades. Another feminist (R42) anticipated that sexist customary laws will constitute major points of contention. She wondered whether the traditional practice of *lobola* (see Subsection 4.4, Chapter 4) for example, could be outlawed. She was among the progressives who believed that *lobola*, whereby the groom gives cattle or other material goods to the father of his bride, perpetuates patriarchal values. Consistent with Respondent 18, Respondent 42 emphasized the importance of public education as a means of changing attitudes. In addition, she believed that the entrenchment of non-discrimination and equal rights clauses in the new constitution would provide a basis for challenging those traditional values which are not constructive.

Advocates of African customary law discussed and debated structural specifics. Conservatives supported the notion of a dual system with respect to civil matters. Identifying the longstanding Transkei Penal Code as an exception, they believed it would be too complex to institute parallel procedures in the sphere of criminal law. In contrast, pro-government participants were entirely opposed to the idea of a dual justice system. They believed that the existence of more than one system with more than one set of rules, principles, legal concepts and procedures will promote uncertainty and possibly chaos. In the words of Respondent 8, "You and I will never know what our rights are and what they are not." He added that an alternate system is potentially feasible in only the remote areas of the country where people may be alienated from the mainstream legal system. Implicitly, community-based justice apparatuses are only acceptable by default.

Liberals on the other hand envisaged post-apartheid courts as structured in both a hierarchical and complementary fashion. Acknowledging the existence of conflicting legal belief systems, they suggested that people should have the option of taking certain cases to either a state court or a traditional court. They reported that there are African customary laws pertaining to unplanned pregnancies, for example, which are not included in current state law, and believed that people should be able to use traditional forums to resolve related concerns. They suggested that issues like maintenance for children should, however, be handled exclusively by the state courts to avoid the dilemma of contradictory judgements.

In contrast, progressives who favoured a select application of indigenous law called for an integrated rather than a dual system. They described the challenge as one of devising a new system of South African law which combines the positive elements of both Roman Dutch law and the traditional legal system. For reasons different from those of conservatives, they too stressed that the content of the new system be decided by the people, and not be imposed from above.

6.6 People's courts

6.6.1 Opponents and advocates

Amenability to people's courts in the post-apartheid era fluctuated in accordance with political allegiances. Given their negative impression of the people's courts of the mid-1980s, conservative and pro-government participants opposed the inclusion of similar structures in the 'new' South Africa. Whereas indigenous courts are consonant with the conservative belief in separate development, people's courts, in principle, encapsulate progressive values and empowerment, and are not racially exclusive. While they did not regard the people's courts which emerged at a heightened period of conflict as prototypes, the majority of liberal and progressive respondents supported community courts in the post-apartheid era. In other words, they refused to reject the notion and possibility of people's courts as a result of the unacceptable, populist practices of certain such structures. The tolerance expressed by the liberals was not, however, commensurate with the

enthusiasm of the progressives. Below, I outline these diverse perspectives, and devote particular attention to the rationale provided by the advocates of community courts. It is significant to note that most proponents of people's courts questioned the feasibility of initiating these structures in the context of divided communities. Their reservations are addressed in Subsection 6.6.2. Furthermore, the majority of proponents insisted on the inclusion of checks and balances. Subsection 6.6.3 records these provisos.

An academic at an Afrikaans-speaking university supported the concept of community-based justice, but identified himself as an 'exception to the rule.' He surmised that the majority of his colleagues regard community-based forums as haphazard, inferior, and, moreover, as antithetical to their vested interests as lawyers. The liberal parliamentarian expressed ambivalence as to whether community-based justice structures should serve as 'practice grounds' for teaching people the skills of conflict resolution. He acknowledged that involvement in such forums would fulfill an educative function and assist people to solve other problems in their lives. However, he wondered whether the process should be inverted:

> Is that where one starts? Does it make sense that people who actually participate in judging a dispute should judge a dispute in order to learn how to handle that kind of dispute in their own lives? There certainly are some good arguments why they should do so, and there are probably equally good arguments why there are dangers involved. Is the right approach rather that they must first learn how to sort that dispute out in their own lives before they have any capacity or ability to judge that dispute in somebody else's? ((R12)

Interestingly, a PAC-aligned lawyer (R2) maintained that community-based justice apparatuses will ". . . automatically fade from the face of the earth" in the post-apartheid era. He envisaged that people will participate and gain confidence in an integrated, non-racial state justice system. Consequently, he declared that there will no longer be a need for people's courts or other community-based justice apparatuses in the future. In retrospect, I wondered whether his 'withering away' theory was influenced more by a belief in the superiority of professionalism or an aversion to the ANC flavour of people's courts.

Even a liberal lawyer (R5) who believed in the supremacy of 'the legal mind' in the attainment of justice remarked that the 'vast failure' of the entire criminal justice system serves as an incentive for the development of people's courts alongside the state courts. Proponents identified the economic and geographic inaccessibility, complexity, prejudicial and adversarial nature, and alienating effects of the state judicial system as incentives for initiating people's courts. In contrast, people's courts would be affordable, geographically accessible, uncomplicated in their discourse and procedure, consistent with the values of the community, and participatory. Proponents emphasized that definitions of crime may be community specific and that it is ideal for people in a community to have a say in matters of justice and pass judgement in accordance with their own interests, norms, morals, and standards (R1, R27, R39). Based on popular will and comprising a cross-section of the community, people's courts should be able to discipline and protect all its members (R27). As opposed to the impersonal adversarial

system dominated by lawyers, proponents saw merit in face-to face conflict resolution: people's courts would provide a greater opportunity for reconciliation than the state courts, which tend to solidify 'battle lines' between people (R14, R19, R41). Furthermore, the participatory nature of community justice would serve to counteract the alienating effects of western capitalist society and its judiciary (R10, R16, R18, R32).

According to Respondents 1 and 15, the concept of people's courts is endorsed by the legal principle of being judged by one's peers. Based on his belief that every person has a particular image or sense of fairness based on a 'gut feeling,' Respondent 24 condoned community-based justice apparatuses. He maintained that even lawyers and judges make decisions in terms of that gut feeling, but are simply more versed in ". . . couching their judgements in terms of fancy rigmaroles and rules and due process jargon." Respondents 10, 16, and 17 emphasized that their affirmation of community-based justice corresponds with their belief that people should be able to govern themselves and resolve their own problems: "Some of us at least stand for people, including so-called uneducated people, taking control of their decisions and lives" (R10). In contrast to Respondent 12, a progressive paralegal (R18) viewed people's courts as a potential source of community education and development. Since active participation by complainants, defendants, and the community is intrinsic to people's court trials, people would learn from the experience. According to Respondents 10 and 17 lay participation in the adjudication process is a means of deepening democracy in pursuit of socialism.

People's courts could play a significant role in resolving disputes on which the law may be silent and which would not fall within the jurisdiction of the state courts (R22). Community-based forums could provide adequate and effective media for resolving the multitude of petty offences and disputes in communities (R3, R18). As observed by Respondent 7, an escalating proportion of disputes are pervading the turbulent transitional period, most of which do not lend themselves to state court trials. By facilitating the discussion of issues and disputes, community courts could provide a viable alternative to violent confrontation as a means of problem-solving (R5, R7, R16). The above range of responses endorses Cain's (1988) contention that community-based justice is far more than the antithesis of the state judicial system.

6.6.2 In pursuit of consensus and objectivity

Is it feasible to establish people's courts within the context of divided communities? It was apparent that the majority of community court proponents, including the progressives, had reservations. They acknowledged that it would be extremely difficult to operate community dispute resolution mechanisms during the current state of transition, marked by a lack of community consensus and a rigid demarcation between members of a particular camp and their enemies. Consequently, proponents suggested ways of combatting bias. Some participants believed that people's courts could in fact be instrumental in resolving these conflicts and in nurturing community

cohesion. Proponents held different views on the integration/segregation of people's courts, politics and ideology, but were unanimously opposed to partisan courts. I elaborate these perspectives below.

Although she supported the ideal, a Bonteheuwel resident (R31) doubted whether the oppressed people are ready to assume responsibility for a justice system. Her apprehension was based on the prevalence of prejudice in South Africa and her assumption that, as a result of deprivation, the majority of people have not 'developed' sufficiently to be able to be objective and make substantiated decisions about justice. Consequently, she recommended the implementation of a rigorous educational program to enhance the decision-making abilities of both the older and younger generations as a prerequisite to initiating people's courts.

Considering the lack of a sense of community (see Appendix C), Respondent 30 also believed it is premature to initiate community-based justice forums in certain areas. He alluded to the diversity and lack of intimacy amongst people in Bonteheuwel, which he attributed largely to relocations in terms of the Group Areas Act (1950). Consequently, he suggested that established small-scale cohesive communities, where people have lived intimately together for generations, might currently be suitable locations for people's courts. He recognised that blacks have also been subjected to forced removals, and, moreover, that many black families have been separated as a result of the migrant labour system. However, he believed that communal living is part of the 'African heritage,' or 'tribal instinct,' and

that community courts are thus more viable in black than coloured communities. He identified the attainment of community cohesion as a necessary precondition for community justice.

Similarly, a liberal lawyer (R5) regarded small, clearly-defined rural communities with widely-acclaimed leaders to be suitable localities. An academic (R22) agreed that it would be far easier to implement community-based dispute resolution mechanisms in areas where people share common interests, values, cultural and political beliefs. However, he believed that it is all the more pertinent to initiate such mechanisms in contexts characterized by a lack of universality. He referred specifically to the development of racially mixed, high density residential areas in the post-apartheid society, comprising people who have previously been alienated from one another. He maintained that neighbourhood-based dispute resolution centres could play a 'healing' role and ultimately facilitate the development of a new notion of community.

Another academic (R24) acknowledged that the notion of community justice draws on the 'gemeinschaft ethos' and is imbued with a 'lovely romantic ring.' Simultaneously though, he alluded to the potential dangers of instituting such a system in communities which are not homogeneous and where an imbalance of gender and/or ideological power prevails. Respondent 5 argued that the concept of community is a fallacy. He maintained that every locality is inhabited by an aggregate of groups and the majority group is in a position to enforce its values and views. Neighbourhood courts would thus

most likely be dominated by the most powerful faction in the locality. Both Respondents 22 and 24 alluded to the tension between the reflection of popular sentiments held by the majority, and the avoidance of discrimination against people who are not members of that majority:

> In the realm of informal justice there is the massive tradeoff between local accountability and sensitivity to local values on the one hand, and protection of the weak on the other hand. And those two are in perpetual orbit and polarity, at opposite poles in a sense. Some sort of accommodation has to be found (R24).

There was lack of consensus amongst proponents as to whether people's courts can or should be separated from politics and ideology. Their responses corresponded with their perspectives on the integration/ segregation of law and politics recorded in Subsection 6.4.1. Eleven respondents stated that the people's courts are progressive structures interrelated with progressive politics in both theory and practice. Seven participants felt ambivalent about integration, but surmised that it may be difficult and even detrimental to depoliticize community courts during the transition. Based on the belief that ideological affiliations have contributed towards the shortcomings of people's courts, six participants stipulated that people's justice should not be synonymous with political justice. While Respondent 23 believed that people's courts should not be entwined with ideology, he maintained that informal justice should preferably not be refined. He did not know how to resolve that dilemma. Other 'separatists' specified that a people's courts should represent a geographic area and not a political party and that court officials should not have vested political

interests in the outcomes of court decisions. Although he believed that adjudicative and political powers and functions should be separate, Respondent 24 observed that such segregation is antithetical to the African tribal context where the power to designate right and wrong is closely linked to patronage which in turn is allied to political power.

Respondent 24 suspected that the formalization of structures operated by people with strong, overt political agendas may detrimentally affect the objectivity of justice. Ambivalently, he stated that it may therefore be preferable to revert to 'a more professionalized model' in polarized settings:

> I find it very difficult. The moment one looks at divided or polarized townships, one is inclined to go back to a more professionalized model - assuming, perhaps erroneously, that the more professionalized model is more objective and has lesser overt agendas. Who knows (R24).

Interestingly, the counterargument was presented in Subsection 6.6.1 as one of the motivations for people's courts: these structures could provide divided communities with a non-violent means of resolving their conflicts.

Proponents were, however, unanimously averse to partisan courts initiated and dominated by one particular political organisation or party. Using the strife-torn province of Natal as an example, Respondents 4, 6 and 24 illustrated that partially representative people's courts are susceptible to bias and abuse. Respondent 24 related that the people's courts in a Natal township which was a UDF stronghold were hostile towards Inkatha members, who were forced to appear against their will. Respondent 4

questioned which faction would assume responsibility for a community court in Natal in the future, and to whom the court would be accountable. Correspondingly, proponents were opposed to competing courts. Respondent 15 elaborated that it is not feasible to have an ANC court and a PAC court, allowing people to choose the avenue best-suited to their interests. He acknowledged that people's courts established in areas where, for example, the ANC enjoyed majority support would obviously have an ANC 'flavour.' However, he believed that adherents of diverse political ideologies should feel comfortable using the courts.

Participants suggested ways of combatting bias within people's courts, presuming they are to be integrated into a future South African scenario. Respondent 12 insisted on the attainment of a maximum degree of consensus amongst political groupings regarding the operation of these structures. Since he regarded the term people's justice to be saturated with the ideology and motives of a particular political doctrine, Respondent 7 recommended that it be replaced with a more neutral term like 'communal justice.' The latter portrays an overall community enterprise and human method of confronting and resolving problems. Many interviewees suggested that court facilitators should be representative of the community at large, and consequently be elected (see Subsection 6.6.3). Furthermore, Respondent 22 advocated effective legal control and the adoption of the ideology of equality before the law. Respondent 6 urged that the people's courts of the future be devoted to the attainment of justice, and not be designed to serve as retaliatory arenas or mechanisms for political and ideological pursuits.

If people's courts are to be affiliated with community organisations (see Subsection 6.6.3), proponents urged that these organisations be democratic and endorsed and respected by the community at large. Respondents 15 and 41 vehemently opposed affiliations with existing community structures because they maintained that these structures are intrinsically party-political. Consequently, they stressed the importance of consulting with the community per se, rather than with partisan community organisations. Respondent 15 explained that people's courts influenced by the political objectives of partisan community organisations will be 'born in controversy' and lack general credibility. For that same reason he was averse to the idea of converting the current party-political street committees and other civic organisations into people's courts, despite the fact that these bodies have had some experience in the dispensing of justice. In addition, he believed that there is still a need for these civic formations to concentrate on struggle-related objectives: people have yet to be mobilized to confront the multitude of apartheid structures which remain intact.

6.6.3 Structural location, parameters, and safeguards

Proponents expressed the progressive vision that people's justice in a post-apartheid society will constitute a transformed state justice system and legitimate people's courts at a community level. Consonant with Respondent 7's plea to substitute the term people's justice with communal justice, Respondents 6 and 16 considered the negative connotations associated with

people's courts and proposed a name change. Eleven interviewees stressed that people's courts cannot exist in isolation and must be linked to other forms of people's power. They elaborated that operations may be abstract, futile, and potentially abusive if the people's court has no broader powers to take action or to access the necessary resources. Three participants wondered whether community-based alternatives, which may be able to function democratically and effectively on an informal basis, should be incorporated into the formal system. Six interviewees, however, insisted that community-based justice structures be centrally controlled by a state department. They maintained that, unless well co-ordinated, decentralised systems are more susceptible to abuse than those which are centralised. Many participants stipulated that the formal recognition and situation of community courts do not necessarily imply that these apparatuses should be formally constituted, and certainly do not mean that they should be devised 'from above.'

Some proponents recommended that people's courts should be situated at the base of the state's hierarchical court system, while others believed they should be complementary. The latter deliberated whether people should have the option of utilising either Magistrates' or people's courts, or whether these forums should have different jurisdictions. Based on suggestions emanating from leftist circles, Respondent 24 presented an outline of a hierarchical adjudicative structure for the post-apartheid era: a range of formally recognized local courts, possibly called neighbourhood courts or people's courts, will be officiated by lay people or paralegals. A decision will need to be made as to whether these administrators should

remain lay volunteers serving on a rotating basis or whether they should become civil servants employed on a full-time basis. A participant will be able to apply to a Magistrates' Court or other designated forum if he/she feels dissatisfied with the mediatory intervention and decision of a lower court.

Eight proponents were decidedly reluctant to envisage people's courts at the base of a hierarchy of state courts. Respondents 5 and 22 stipulated that they do not view people's courts at a 'hierarchically inferior level.' Furthermore, the eight participants believed that if the people's courts are adjunct to the criminal courts and are relegated the 'minor cases,' they will be inclined to enforce decisions of state courts, rather than be guided by popular sentiments. Therefore, they suggested that people's courts should meet a totally different need and respond to issues which fall beyond the parameters of the state courts.

While the will and participation of the local community were identified as paramount, seven respondents stressed the need for a degree of universality. They believed that community courts should incorporate community-specific legislation, but that they should not contradict what is defined to be right and wrong in terms of the centralised law of the land. Furthermore, they advocated a measure of uniformity amongst community courts nationwide. They urged, for example, that an individual should not be found guilty in Khayelitsha and not guilty in Bonteheuwel of the same offence. Consequently, they proposed that people should assemble to devise a system which is universally acceptable and applicable. Hence the tension

between the perceived need for consistency and the concept of community control is apparent.

The following sentiments, extracted from interviews with an advocate and a paralegal respectively, were shared by 30 proponents of people's courts:

> We do not want unstructured people's courts where people can have a jolly good time. . . . They shouldn't be a group banging on a door late at night pulling out the accused. That's got very little to do with justice (R10).

> We do not want loose people's courts springing up everywhere. We need disciplined and accountable people's courts monitored by disciplined comrades (R18).

Proponents' visions were embedded with cautions, and pleas for built-in safeguards. They urged that people's courts be established in a controlled fashion and stressed the importance of defining the mandate, jurisdiction, objectives, procedures, and powers of community-based justice structures. Reiterating Hirst's (1980) plea, they prescribed the inclusion of regulations, checks and balances to prevent the abuse of power. It was apparent that some of their suggestions were influenced by their experiences and perceptions of the people's courts of the mid-1980s and those still in operation.

One exception was Respondent 23 who believed that people's courts are essentially informal, and that the imposition of formal rules and guidelines would destroy their informality. He maintained that such structures have informally accepted rules and a framework of general,

untechnical guidelines which are agreed upon in an almost 'subconscious way.' The professor did not base his propositions on the negative practices of the former people's courts which he labelled as 'extremes.' He suggested that if the facilitators of people's courts abuse their powers and violate people's rights, affected parties should have recourse to the state courts.

Choosing the middle road between no structure and rigid structure, Respondent 32 proposed structure with flexibility. He cautioned that structure is conducive to bureaucratization, an excess of which could be counterproductive: the people's courts could become alienated from the community they are designed to serve. Consequently, he advocated broad guidelines which would allow for the traditions, values, and norms of the particular community to assume a steering role. He did not, however, believe that the courts should have unlimited powers and endorsed the incorporation of safeguards against abuse. Furthermore, he proposed universal aims and objectives, for example, community unity, popular participation, and rehabilitative and preventative education.

To substantiate the need for structure and control, the majority of proponents alluded to potential disasters to which community courts might be prone. Bearing in mind that South African society is 'brutalized' and lacks a culture of rights and democracy, Respondent 10 felt concerned that people's courts may be 'hijacked' and used as coercive mechanisms. Moreover, he noted the prevailing intolerance of alternate views and feared the practice of mob justice, which he regarded as antithetical to the aspirations of people's

justice. According to Respondent 4, the closer a tribunal is to the people, the more scope there is for bribery and corruption. Respondent 24 indicated that it will take some time to ". . . screen out the opportunists and the powermongers." Respondent 15 outlined the possible dangers of giving people power and resources without the required training. Following Foucault, Respondent 16 believed that abuse is probable when certain people are endowed with more knowledge than others and are thus able to control and exploit the less knowledgeable. She maintained that the potential for abuse can be decreased but not eliminated.

Should the facilitators of the people's courts be volunteers, appointees, or elected officers? Most participants recommended that the administrators be elected by the entire community to ensure their credibility across the board. Respondent 13 proposed a jury type system comprising elected jurors. Decision-making would thereby be the responsibility of a group rather than an individual. Reflecting on the traditional African system, Respondent 7 advocated the enlistment of community members who have intuitive wisdom and a presence of mind which enhance their ability to assess situations and resolve problems. Both Respondents 13 and 16 recommended that court officials should be elected for a specific term. Thereby they will not become entrenched in their positions and the court will not be monopolised by one small clique.

The importance of training and equipping people with the necessary skills to administer community-based apparatuses was stressed and substantiated by 22 proponents:

> It's very nice and romantic to say that the people shall dispense justice themselves. But an ordinary housewife, and a *rooker* (marijuana-smoker) who stands on the street corner but is old enough to participate in this forum . . . You have to be sure that people who come and dispense justice have enough skills, and knowledge, and understanding to actually maintain those things. It won't be good enough to just give people the power and the resources, and not equip them to use those. Because then we will have a repeat of the abuses that were happening in the 1980s (R15).

Respondent 18 proposed that people's courts in a post-liberation society be monitored by advice office workers and other paralegals on a national basis. She suggested that paralegals in turn be accountable to a designated structure which could provide the required skills, consultation, and professional advice. Similarly, Respondent 32 recommended that local community workers, advice offices, paralegals and lawyers constitute an advisory body to the people's court. Respondent 16 agreed, but believed that the executive body should include representatives from other sectors of the community, namely, the church, school principals, Student Representative Councils (SRCs), and the community at large.

Two Africanists, a Black Consciousness supporter, and two other progressives recommended that community courts incorporate the positive aspects of the traditional African system. Although he envisaged that court procedure would not be overly legalistic, Respondent 15 recommended an

adherence to the basic principles of law and natural justice, for example, *audi alteram partem*.[32] How to achieve co-operation without using coercive means was one of the questions raised by Respondent 22. He alluded to the scenario of comrades dragging the accused to people's court trials, and commented that enforced participation seemed antithetical to the notion of people's courts. Therefore, he proposed that facilitators strive to somehow set the tone for securing compliance without the use of force or threats. To empower people and prevent their exploitation, Respondent 16 insisted that the community be educated on the law and procedure of the people's courts.

Accountability to the community was emphasized by all 32 advocates of people's courts. They deliberated whether organisational affiliation is a prerequisite and suggested ways of securing accountability. Six respondents thought it essential for people's courts to be officially linked to other community structures, for example, civic organisations. The remainder intimated that a relationship with, and accountability to another community apparatus may be beneficial, but are not necessarily indicative of accountability to the broader community. Instead, they stressed that it is vital for a people's court to identify with the community and for the community to accept the legitimacy of the court. Respondent 16 maintained that discipline and accountability could be achieved by ensuring that people's courts are administered by elected representatives of the community. Both Respondents 6 and 16 proposed that the actions of people's court facilitators should be

---

[32] See Footnote 7, Chapter 2.

subject to review and that any person found guilty of abuse of power be discharged.

6.6.4 Jurisdiction

With one exception, proponents of people's courts stated that jurisdiction should be specified, and they categorised problems which they believed should and should not fall within the jurisdiction of community-based justice. There was a general consensus that these structures be confined to resolving uncomplicated conflict of rights disputes, for example, family or other interpersonal conflicts, neighbourhood disputes, community issues, social problems, and financial disputes. Misconduct by youth and conflicts between money lenders and borrowers are two examples of the cases respondents suggested could be resolved by these forums. Respondent 37 thought that public issues which fall within the municipal realm, for example rates and taxes, could be dealt with at a community level. Respondent 18 proposed that an offence like housebreak and theft be adjudicated by a community court in order to expose the thief and deter his thieving. Four progressives added that community courts should take on cases involving cultural values which may need to be judged in accordance with a set of principles divergent from state legality. The following is an example of such a case:

> A person institutes action for defamation in the formal court, the defamatory statement being to the effect that this person is an informer. And the magistrate refuses to uphold her claim, alleging, "What is it? Is it defamation to say the person is an informer?" But if

> you take it in the context of a person's background, to say a person is an informer in the black community is one of the most serious defamatory statements you can make about a person. And that community will be able to understand the seriousness, the gravity of the matter which the white magistrate fails to appreciate (R19).

Contrary to the presupposition of Respondent 19, the post-apartheid state justice system may, however, encapsulate such offences if they represent the interests of the society at large. Respondent 7 suggested that researchers produce a comparative analysis indicating which problems are more amenable to being solved by state institutions and which by community-based justice apparatuses.

Five participants stressed that people's courts should not dwell in the realm of right and should thus refrain from pursuing the aims of criminal justice. Instead of employing the criminal/civil distinction, 11 other respondents stipulated that complicated disputes and serious crimes should not be handled by people's courts. These should be referred to lawyers and adjudicated in the transformed state courts. Respondent 9 elaborated that serious cases may call for harsh sanctions and should be handled by people with legal training and expertise in cross examination and evaluating evidence. While he surmised that officials of a people's court may have the ability to objectively try those accused of serious offences, Respondent 19 maintained that the jurisdiction to try an offence like murder must be accompanied by the jurisdiction to impose an appropriate sentence. Since he did not believe that community courts should have the power to impose imprisonment or other harsh sentences, he agreed that severe offences

should not fall within the jurisdiction of these forums. Murder, rape, and fraud were identified by Respondents 18 and 39 as examples of serious crimes which should not be handled by people's courts. Respondent 37 mentioned burglaries and muggings as examples of crimes which community members would not be able to control. While Respondent 32 maintained that the definition of serious crime is relative, he too suggested that community courts should not address cases of murder, terrorism, or large-scale fraud. He explained that murder cases may divide the community and fraud may involve resources belonging to the nation or parties beyond the realm of the community.

Regarding informality as a key characteristic of people's courts, Respondent 23 felt ambivalent about demarcating boundaries of jurisdiction. He explained that the imposition of an official instrument circumscribing the jurisdiction of a community court would negate the informality aspect. However, he agreed that there should be limitations because community structures may be incapable of dealing with certain problems, particularly in the context of a complicated modern society. He concluded that jurisdiction could be determined by the disputants' acceptance or rejection of the forum. If, for example, two communities involved in a dispute did not both accept the legitimacy of a particular people's court, the jurisdiction of the structure would automatically be restricted.

6.6.5 Punishment powers

Should people's courts be granted the power to punish offenders? If so, should they be confined to administering certain types or degrees of punishment? There did not appear to be any correlation between participants' responses and their political ideologies. Instead, stances seemed to be motivated by either the perceived need for coercive power or the desire for controlled power and humane and constructive sentencing.

Two progressive paralegals (R16, R18) believed that people's courts should have the power to punish in order to be taken seriously, be effective, and deter offensive behaviour. Alternately, Respondent 16 maintained that the courts should confine themselves to dealing with cases which do not necessitate punishment. As a means of instituting checks and balances, he suggested that serious offences and severe sentences passed by people's courts be reviewed and ratified by a higher court or committee. Respondent 39 also acceded to punishment powers and added the proviso that community court adjudicators be representative of a political and ideological cross-spectrum of the community. In his opinion, this would diminish the chances of sentencing bias and harsh punishments. Respondent 40 interpreted harsh sentences as reactions motivated by anger, and consequently stressed the significance of incorporating education and regulations. Inclusively, she believed that sentencing criteria and guidelines should be stipulated, that capital punishment should be prohibited, and maximum sentences defined.

Respondents 15 and 20 endorsed the need for specifications regarding appropriate and inappropriate sentencing and punishment.

According to Respondent 32, sentencing is counterproductive if it is solely punitive. It should therefore include educative, rehabilitative, and preventative components. Simultaneously, he opposed an overly 'liberal' approach because he believed that it is human nature to seek punishment for a wrongdoing and, furthermore, he endorsed the view that a judicial system may be exploited in the absence of punitive measures for instances where punishment is required. Respondent 23 agreed that community courts cannot rely exclusively on moral persuasion to enforce their rulings, and thus also insisted on the inclusion of coercive powers. Consonant with his interpretation of people's justice as a social rather than legal justice, he indicated that sanctions should be guided by community norms and consensus. Respondent 32, however, felt ambivalent about giving the community free reign over punishment: while he respected the norms and will of the participating community, he was perturbed by the possibility of populist-style punishment. Subsequently, he recommended that imprisonment should not be within the community court's realm of possibilities and that eviction from the community should be the most severe sentence for residents who persist in disrupting the functioning of the community. Respondent 23 maintained that socially coercive sanctions can be equally or more effective than legal sanctions imposed by state courts, and cited rejection by the community as a severe social sanction.

The hope that people's courts would pass humane and constructive sentences and place emphasis on retribution and rehabilitation was expressed by Respondent 1. Both Respondents 22 and 4 proposed that people's courts should impose only restitutive, compensatory sentences, for example, community service and fines, which they believed would benefit the community. Respondent 4 added that corporal punishment should be legally abolished at all levels, and agreed that people's courts should not have the power to imprison offenders. Respondent 18 suggested that cases where community court sanctions proved ineffective be referred to a conventional court.

In contrast, two public interest lawyers (R5, R6) insisted that people's courts should not have the power to punish. Respondent 6, however, stressed the need for an 'enforcement system.' In other words, if a party refuses to abide by a community court's decision, there should be recourse to 'higher' constraints. He illustrated that if neighbour X ignores the court's order to remove his/her fence which is infringing on neighbour Y's territory, neighbour Y should be able to take the matter a step further to ensure the execution of the order. The lawyer suggested that recalcitrant parties be taken to a higher court to be punished for contempt of court.

6.6.6 Appeal mechanism

The importance of instituting a mechanism for appeal against unjustly-perceived court decisions was highlighted by 13 proponents of

people's courts. Respondents 5 and 6 based their opinion on the fact that adjudicators can make mistakes. Emphasizing the need for 'checks and balances,' Respondents 14 and 19 agreed that the right to appeal would facilitate the verification of sentences. Respondent 4, who correlated close proximity to the community with increased chances of bribery and corruption, advocated the integration of rights of appeal or review on that basis. Respondent 1 stipulated that appeals should be heard by a structure other than the one which passed judgement, for example, an independent appeal tribunal or a state court.

Overall, this chapter reveals that visions were intricately connected with participants' political and ideological allegiances and their related conceptions of people's justice. Furthermore, participants' amenability to the initiation of community dispute resolution mechanisms was influenced by their perceptions of the people's courts of the mid-1980s. Aside from endorsing indigenous law and supporting a Bill of Rights protective of the minority race and class, the conservatives' projections of people's justice were conspicuous by their absence. While pro-government interviewees supported minor changes to enhance accessibility to the system, the liberals and progressives proposed a transformation of the state justice apparatus. Black Consciousness and Africanist respondents devoted particular attention to a recognition of the positive attributes of African customary law and courts. Emphasizing the need for popular participation, justice and democracy, ANC supporters advocated a transformed state legal order accommodating

affirmative action, and an integration of the constructive aspects of traditional law. Most progressives and some liberals favoured the establishment of people's courts, with provisos.

In sum, the liberal and progressive projected notion of people's justice was distinctly popular and free of retaliatory populism. The promotion of the will of the people did not preclude checks and balances. The progressive vision clearly regards both state and community-based law, alongside distributive justice, as potential vehicles for change and for the deepening of democracy in the post-apartheid society. Simultaneously, the conservative and pro-government participants' investment in the status quo reflects that there is and will continue to be resistance to these liberationist ideals.

Conclusion

Taken in their totality, the findings of the study illustrate the dialectical relationship between conceptions, perceptions and visions of people's justice. Moreover, they exhibit the intricate and contradictory correspondences of law, politics and ideology more generally. People's justice means many things to many people. Images depicted in the thesis were filtered through political lenses.

Conservative respondents in the research, consonant with their separatist mentality, endorsed people's justice insofar as the concept and practice encompass African customary law and courts. Using the alleged independence and objectivity of state justice institutions and the populist practices of the people's courts of the mid-1980s as their justifications, they rejected a concept and vision of people's justice which contradicts and threatens the status quo.

Responses of the pro-government or Nationalist Party supporters were only slightly more enlightened than those of the conservatives. They too applauded the merits of the state legal apparatus, but recognised a need for amendments to enhance accessibility to legal representation and justice. The prejudicial tendencies of the magistrates were attributed merely to inadequate legal education and training. Considering South Africa's multiculturalism, they also condoned the indigenous system. However, based on potential cost

and control factors, the Nationalists were not as insistent as the conservatives on the formal recognition thereof. Claiming to accept the concept of people's courts, they provided a host of reasons for dismissing the practice: notably, the low level of education of the populace, the rigid political divisions in the community, and the propensity towards populism as reflected in the experience of the mid-1980s. Both conservative and pro-government interviewees welcomed a notion of a Bill of Rights which formally protects individual and group rights, particularly white minority power and privilege.

Liberal respondents, based on their belief in the superiority of professionalism and the security of clearly defined rules, were predisposed to conceptualizing and envisaging people's justice within the parameters of state-based justice. One step to the left of the reformism represented by the Nationalists, they advocated that the state legal apparatus be effused, restructured and democratized. Their support of the traditional African system emanated from their belief in freedom of cultural expression and the widespread acceptance and respect that these structures and practices continue to enjoy. There was a lack of consensus amongst liberals regarding the desirability and feasibility of people's courts in the post-apartheid era. While expressing their appreciation of the concept, they feared the possibility of 'haphazard' and emotionally charged practice. The shortcomings of the people's courts of the mid-1980s and the difficulty of initiating people's courts in polarized communities contributed towards their ambivalence or outright rejection of the practice. In accordance with their conception of law and politics as separate entities, liberal proponents of community-based justice

voiced support for apoliticized community courts. Although they recognised that a Bill of Rights may potentially mystify and perpetuate substantive inequality, they viewed formal rights as a necessary foundation for securing substantive rights and as a means of protection against the abuse of state power.

AZAPO and PAC-oriented participants, consistent with their respective Black Consciousness and Africanist ideologies, equated people's justice with the indigenous system. ANC-aligned respondents were less pre-occupied with structural location. Both their concept and vision of people's justice centred around the essential ingredients of popular participation, democracy, accessibility, justice, and the need for accompanying social and economic transformation. All progressives stressed the need to popularize law: the public must participate in the compilation, implementation, and evaluation of the legal order. Rejecting overtly patriarchal and conservative principles and practices, the progressives proposed an integration of select, constructive aspects of African customary law. The ANC vision encompassed a transformed state justice apparatus and popular people's courts at a community level. Most AZAPO and PAC respondents were not averse to the initiation of community courts and suggested that the merits of the traditional African system be incorporated into these structures. Progressives recognised the political and economic roots of many problems and conflicts. The majority thus emphasized that law cannot be depoliticized if it is to serve as a vehicle for transformation. All proponents of community-based justice rejected the possibility of competing partisan courts. They acknowledged the

inherent difficulties of operating people's courts in polarized settings, and suggested ways of minimizing bias, and ensuring that these structures are representative of and accountable to the community.

In their advocacy of a Bill of Rights, progressives emphasized that their concept of such a document incorporates collective rights and makes provision for affirmative action to rectify social and economic disparities. Liberals and progressives emphasized the need to eradicate racist policies and practices. Aside from the feminists, the elimination of sexism and procurement of women's rights were less focal on the progressive agenda. Both liberals and progressives advocated an extension of the role and function of paralegals and community workers. Whereas the liberals limited that role to community liaison and the performance of menial tasks in legal practices, ANC supporters situated paralegals at the very frontline of the administration of post-apartheid justice. The study thus shows that law is not monopolised by professionally trained lawyers.

The demise of the people's courts of the mid-1980s impinges upon the questions and concerns raised by Abel (1981) and Cohen (1988) regarding the strategic significance of popular justice alternatives within the confines of an unjust society or during the process of revolution. The people's courts were unable to realise their 'dual power' objectives because they were not capable of withstanding the apartheid state's repressive machinery. This thesis thus endorses the notion that social transformation is a necessary accompaniment to the realisation of people's justice.

The goals and operations of the people's courts were tainted, obstructed and ultimately defeated by the repressive ideological, legal, and military mechanisms of the apartheid regime. Nevertheless, the courts were an integral part of the spirit of resistance of the 1980s, which contributed towards coercing the government to acknowledge the need for change in this decade. Although most participants did not regard the people's courts of the mid-1980s as models for the future, I think that the courts are in a sense fulfilling a prefigurative function. As reflected in the study, the courts provide an experiential base for discussing and debating the viability and ramifications of similarly construed apparatuses in the future.

Participants did not endorse Foucault's (1980) contention that the concept of people's court is antithetical to people's justice because 'court' is essentially a construction of the bourgeois state. While they identified the inaccessible, discriminatory state-imposed legal and judicial system as a primary motivation for popular justice, they substantiated Cain's (1988) thesis that people's justice and people's courts are much more than the mirror-opposite of state justice.

Although they expressed their understanding of summary, populist justice as a manifestation of war, progressive respondents did not advocate the integration of retaliatory, populist practices into their concept and vision of people's justice. Correspondingly, they did not support the Maoists' (1980) endorsement of 'excesses' as a means of unifying and raising the

revolutionary consciousness of the people. Instead they stressed the significance of weaving a culture of rights and democracy into the grain of the liberal movements and the concept and practice of people's justice.

Participants, including those with socialist visions, reiterated the arguments of Renner (Kinsey, 1983) and Hirst (1980), and recognised the need for legal regulation in the post-apartheid era. Since they did not anticipate that the need for law would dissipate with the destruction of racial capitalism, they did not endorse Pashukanis' (1987) withering away thesis nor did they support the anarchist (Bankowski, 1983) plea for no control. Progressives advocated a popularized system incorporating checks and balances. Insistence on safeguards by people's court proponents was influenced by their experience and perceptions of the populist practices of other community-based justice apparatuses, notably those prevalent in the mid-1980s. Furthermore, it was apparent that pleas for regulation were influenced by global events. The emergence of repressive, bureaucratic totalitarian regimes within the context of so-called communist countries encouraged progressives to steer away from instrumentalism and affirm the need for the development of a rights consciousness, rights struggles, and a Bill of Rights.

The thesis highlights certain tensions intrinsic to a people's justice: (a) the need for universality versus the concept of community control, (b) the protection of the weak versus the furtherance of the ideals and interests of the majority, and (c) the expression of the norms and values of the community versus the need for checks and balances. However, the liberal and progressive

vision of the practice of people's justice did not preclude the integration of standard practices, regulation, accountability and answerability to the community at large. Respondents found accommodation between these tensions by advocating that community members themselves devise the required checks and balances. They specified that the parameters, functions, and controls of the post-apartheid adjudicative apparatus must essentially emanate from the people and not be imposed from above.

In the post-apartheid South Africa, community based justice mechanisms must have the power, the systemic support and required resources to function effectively. However, these community initiatives may be subjected to intervention by counterrevolutionary forces. History reveals that every revolution is accompanied by a counterrevolution, yet only one progressive participant in the study alluded to the potential for counterinsurgency. The responses of conservative and pro-government interviewees signify their investment in the status quo and their resistance to change. It is inevitable that the South African right wing and other oppositional forces excluded from the post-apartheid political platform will attempt to impede, jeopardize and reverse the change process and related initiatives.

As stated at the outset, I have tried to maintain a balance throughout the study between the skepticism of Althusser and the optimism of E.P. Thompson. Law is an instrument like any other. It can be both used and abused. The study suggests that Abel (1982) and Cohen's (1988) contention--

that the concept of community justice takes on meaning in accordance with its employer and purpose of employment--can be extended to law in its entirety. Law in South Africa has been used by the apartheid state as a vehicle for oppression and repression. The progressive vision for a post-apartheid South Africa injects law with protective and liberating potential. The socio-economic and political environ is thus an additional factor influencing the conception and possibilities of a people's justice. Furthermore, the study demonstrates that personal experience of both the state justice apparatus and people's courts conditions people's perceptions and consequently their perspectives on the potential role of law.

As stipulated by Yacoob (1988, p. 66), legal equality can only be attained once the vote is extended to all South Africans and the government is legitimate. However, enfranchisement alone is not enough to secure legal equality. Accessibility to legal recourse may be further enhanced by popularized, democratized state and community-based justice apparatuses. While the elimination of the discrepancy between formal and substantive justice is beyond the scope of law alone, the realisation of people's justice is inextricably bound with distributive justice. People's justice in South Africa can only be actualised if accompanied by fundamental structural change. The destruction of racial capitalism and an equitable redistribution of power and wealth are prerequisites. If the progressive vision can be achieved and maintained, justice in South Africa will no longer be a contradiction in terms.

Appendix A

Glossary of Acronyms

ANC	African National Congress
AWB	*Afrikaner Weerstand Beweging*/Afrikaner Resistance Movement
AZANYU	Azanian National Youth Unity
AZAPO	Azanian People's Organisation
CAYCO	Cape Youth Congress
CCB	Civil Co-operation Bureau
CDS	Centre for Development Studies
CODESA	Convention for a Democratic South Africa
DAG	Development Action Group
DP	Democratic Party
IDASA	Institute for a Democratic Alternative for South Africa
KP	*Konserwatiewe Party*/Conservative Party
LEAP	Legal Education Action Project
LRC	Legal Resources Centre
NADEL	National Association of Democratic Lawyers
NICRO	National Institute for Crime Prevention and the Rehabilitation of Offenders
NP	Nationalist Party
PAC	Pan Africanist Congress
PWV	Pretoria-Witwatersrand-Vaal region
SACP	South African Communist Party
SADF	South African Defence Force
SAP	South African Police
SRC	Student Representative Council
SWAPO	South West African People's Organisation
UDF	United Democratic Front
UNHCR	United Nations High Commission for Refugees

Appendix B

Key Political Players in Transitional South Africa

Participants interviewed in this study were members or supporters of a range of political ideologies and institutions. In the analysis of the fieldwork data, reference is made to these diverse orientations. Furthermore, the rise and fall of people's courts in the mid-1980's is viewed within the context of cycles of structural oppression, mass resistance and state repression. Table B-1 consequently provides an overview of political parties, movements, and organisations prominent in contemporary South Africa. The features identified in the table and the proceeding discussion are based on extracts from the texts by Leatt, Kneifel, and Nurnberger (1986), Davies, O'Meara, and Dlamini (1988), and Williams and Hackland (1988). There is continual interplay and power play between these bodies.

The four parliamentary parties outlined in Table B-1 are the Conservative Party (KP), the Nationalist Party (NP), the Democratic Party (DP), and the Labour Party (LP). The Nationalist Party came into power in 1948 on the platform of apartheid. The Conservative Party was inaugurated by ultra-right wingers who broke away from the ruling Nationalist Party in 1982 in protest against the NP's alleged initiation of reformism. The Democratic Party represents 'liberal' monopoly capital. The DP is a product of the union between the former Progressive Federal Party, the Independent Party and the

TABLE B-1: KEY POLITICAL PLAYERS IN CONTEMPORARY SOUTH AFRICA

Features	CONSERVATIVE PARTY (KP)	NATIONALIST PARTY (NP)	DEMOCRATIC PARTY (DP)	LABOUR PARTY (LP)	AFRICAN NATIONAL CONGRESS (ANC)	SOUTH AFRICAN COMMUNIST PARTY (SACP)	PAN AFRICANIST CONGRESS (PAC)	AZANIAN PEOPLE'S ORGANISATION (AZAPO)	UNITED DEMOCRATIC FRONT (UDF)[33]	INKATHA FREEDOM PARTY	AFRIKANER RESISTANCE MOVEMENT (AWB)
INCEPTION	1982	1914	1989	1965	1912	1921	1959	1978	1983	1975	1979
IDEOLOGICAL ORIENTATION	racial segregation; Afrikaner nationalism and capitalism; anti-reformist	initially apartheid; Afrikaner nationalism and capitalism; subsequently reform of apartheid	liberalist	representation of coloured people; elimination of apartheid through use of apartheid institutions	Charterist (allegiance to the Freedom Charter); South African nationalism	Marxist-Leninist; Charterist (allegiance to the Freedom Charter)	Africanist; African nationalism	Black Consciousness black working class	anti-apartheid; Charterist (allegiance to the Freedom Charter)	tribalist: pro Zulu; collaborative opposition (collaboration with both state and capital)	neo-Nazi/fascist; white supremacist; Afrikaner resistance to reform
GOALS	evolved system of apartheid	power-sharing within a unified nation; protection of (white) minority group rights	unified, non-racial liberal democracy	universal suffrage within a single parliament	unified, non-racial, non-sexist democratic society	independent national democratic state potentially advancing towards socialist transition and ultimately communism	Africanist socialist democratic social order; government by the Africans for the Africans	democratic, anti-racist, anti-sexist worker republic	organisation of mass-based opposition to apartheid; democratic non-racial society	power-sharing in a federal state; autonomy for Kwa Zulu or Kwa Natal	creation of a *volkstaat* (people's state)

[33] The UDF was formally disbanded in 1991 subsequent to the unbanning of the liberation movements.

New Democratic Movement. The Labour Party is the majority coloured party in the House of Representatives of South Africa's tricameral parliament. The National People's Party, not included in Table B-1, is the dominant party in the chamber reserved for Indians, namely the House of Delegates. The three-chamber parliament was initiated after a referendum in 1983 as a means of incorporating coloureds and Indians into parliamentary politics. The exclusion of the black majority was thereby perpetuated.

The African National Congress (ANC), South African Communist Party (SACP), Pan Africanist Congress (PAC), and Azanian People's Organisation (AZAPO) listed in Table B-1 are pro-liberation movements, whose liberatory potential has yet to be realized. The ANC is widely recognized as the vanguard organisation in the national liberation struggle. The ANC is opposed to tribalism and strives for equal opportunities for all South Africans. The SACP acknowledges the leadership of the ANC in the struggle for national liberation. Consequently, the Party accepts the Freedom Charter and ANC policy decisions unconditionally. Both the ANC and the SACP promote leadership in the struggle. The SACP emphasizes stages in the revolutionary process. The underlying assumption is that the future will be shaped by the coalition of forces which assumes power in the post-apartheid society. The PAC was formed in 1959 by ANC dissidents who rejected the key tenet of the Freedom Charter which pronounces that "South Africa belongs to all who live in it." In contrast, the PAC proclaims that Azania--the PAC's substitute name for South Africa--belongs to the Africans (blacks) and not the colonialists. The struggle and the future South Africa should therefore be in

the hands of Africans. Between 1960 and 1990, both the ANC and the PAC were banned by the government and forced to operate in exile or underground. The SACP was banned for an extra decade, that is, from 1950 to 1990. AZAPO was established in 1978 to retain the banner of Black Consciousness, after all related organisations had been outlawed the previous year. The organisation subsequently incorporates a black working-class perspective, and strives to conscientize and mobilize black workers through the ideology of Black Consciousness.

Three diverse extra-parliamentary organisations, namely the United Democratic Front (UDF), the Inkatha Freedom Party, and the Afrikaner Resistance Movement or *Afrikaner Weerstand Beweging* (AWB) are delineated in Table B-1. In 1983, the UDF was established as as umbrella body for progressive civic organisations, trade unions, women's organisations, student bodies, religious and other democratic organisations. The UDF played a prominent role in organising mass-based anti-apartheid opposition during the era of successive States of Emergency and while the key liberation movements were declared illegal. The UDF was officially disbanded in 1991 subsequent to the unbanning of the liberation movements. In 1975, Chief Gatsha Buthelezi reinstated *Inkatha Ya Ka Zulu* (Zulu National Movement) of the 1920's. He subsequently renamed the movement *Inkatha Ya Sizwe*, declaring it to be a national liberation movement rather than a cultural body. After the liberation movements were unbanned in 1990, Inkatha assumed the name of Inkatha Freedom Party. Inkatha is now open to all races, but remains predominantly tribally and regionally based: most members and supporters

are Zulu and reside in the homeland of Kwazulu or the bordering province of Natal. The organisation is intertwined with the ruling apparatuses of the Kwazulu Bantustan. Finally, the ultra right wing, militant AWB was founded in 1979 as a bastion of white Afrikaner resistance to reform initiatives.

Appendix C

The Concept of 'Community' in South Africa

The term 'community' has diverse applications in the South African context (Thornton and Ramphele, 1988, pp. 29-39). The South African government has demarcated communities to substantiate and facilitate its policy of 'divide and rule.' 'Community' is frequently used by representatives of the state as a substitute for 'race,' 'ethnic group,' 'nation,' or 'people.' The term is also employed by political organisations to allude to supporters of a political stance or action. Furthermore, 'the community' is regarded as the entity in whose interests justice is sought via both the state system and the people's courts. Sentences decided by community-based structures are allegedly imposed on behalf of the community.

The utilization of the term 'community' does not, however, essentially signify the existence of a cohesive collectivity of people sharing common beliefs, characteristics or resources (Thornton and Ramphele, 1988, p. 30). As a result of South Africa's recently repealed Group Areas Act of 1950, several communities have been uprooted. For example, District Six, a predominantly coloured neighbourhood bordering Cape Town's city centre, was once a relatively cohesive community incorporating a social and economic network. District Six was demolished in 1965, ironically by the Department of Community Development, representing the white minority's ideology of

'community.' Thornton and Ramphele (1988, p. 33) cite from Pinnock's (1984) writings to describe the consequences of Group Areas removals:

> . . . like a man with a stick breaking spiderwebs in a forest. The spider may survive the fall, but he can't survive without his web. When he comes to build it again, he finds the anchors are gone, the people are spread all over and the fabric of generations is lost.

The difficulty of developing community alternatives to state-imposed justice in geographically defined communities devoid of a sense of community is discussed in the substantive chapters of this thesis.

Appendix D

Respondents' Key

R1 lawyer, private practice, ANC-oriented, coloured, male

R2 lawyer, private practice, PAC-oriented, black, male

R3 lawyer, private practice, ANC-oriented, black, male

R4 lawyer, public interest work, liberally-oriented, black, male

R5 lawyer, public interest work, liberal, white, male

R6 lawyer, Legal Resources Centre, ANC-oriented

R7 lawyer, Legal Resources Centre, AZAPO-oriented

R8 advocate, pro-government, white, male

R9 advocate, ANC-oriented, coloured, male

R10 advocate, ANC-oriented, white, male

R11 parliamentarian, Conservative Party, white, male

R12 parliamentarian, Democratic Party, white, male

R13 paralegal, Legal Education Action Project (LEAP), ANC-oriented, female

R14 paralegal, Legal Education Action Project (LEAP), progressive, male

R15 paralegal, Advice Office, ANC-oriented, coloured, male

R16 paralegal, Advice Office, ANC-oriented, coloured, female

R17 paralegal, Advice Office, ANC-oriented, black, male

R18 paralegal and women's activist, ANC-oriented, black, female

R19 paralegal, street law program, male

R20 community social worker, National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO), ANC- oriented, male

R21 community social worker, National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO), progressive, female

R22 law academic, University of the Western Cape (UWC)

R23 law academic, University of Stellenbosch

R24 criminology academic, University of Cape Town

R25 Khayelitsha resident, ANC-oriented, black, female

R26 Khayelitsha resident, progressive, black, male

R27 Khayelitsha resident, progressive, black, male

R28 Khayelitsha resident, progressive, black, female

R29 Khayelitsha resident, PAC-oriented, black, female

R30 Bonteheuwel resident, liberally-oriented, coloured, male

R31 Bonteheuwel resident, ANC-oriented, coloured, female

R32 Bonteheuwel resident, ANC-oriented, coloured, male

R33 Bonteheuwel resident, ANC-oriented, coloured, male

R34 Bonteheuwel resident, progressive, coloured, female

R35 Gardens resident, conservative, white, male

R36 Gardens resident, pro-government, white, female

R37 Gardens resident, liberal, white, female

R38 Gardens resident, pro-government, white, male

R39 priest, working and residing in coloured township, white, male

R40 spouse of priest working and residing in coloured township, white, female

R41 student, ANC-oriented, black, male

R42 feminist, ANC-oriented, coloured, female

Appendix E

The South African Freedom Charter of 1955

THE FREEDOM CHARTER

as adopted at the Congress of the People on 26 June 1955

Preamble

We, the people of South Africa, declare for all our country and the world to know:

That South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people;

That our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality;

That our country will never be prosperous or free until all our people live in brotherhood, enjoy equal rights and opportunities;

That only a democratic state, based on the will of the people, can secure to all their birthright without distinction of colour, race, sex or belief;

And therefore, we the people of South Africa, black and white, together equals, countrymen and brothers adopt this FREEDOM CHARTER. And we pledge ourselves to strive together, sparing nothing of our strength and courage, until the democratic changes here set out have been won.

The People Shall Govern!

Every man and woman shall have the right to vote for and stand as a candidate for all bodies which make laws;

All the people shall be entitled to take part in the administration of the country;

The rights of the people shall be the same regardless of race, colour or sex;

All bodies of minority rule, advisory boards, councils and authorities shall be replaced by democratic organs of self-government.

All National Groups Shall Have Equal Rights!

There shall be equal status in the bodies of state, in the courts and in the schools for all national groups and races;

All national groups shall be protected by law against insults to their race and national pride;

All people shall have equal rights to use their own language and to develop their own folk culture and customs;

The preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime;

All apartheid laws and practices shall be set aside.

The People Shall Share in the Country's Wealth!

The national wealth of our country, the heritage of all South Africans, shall be restored to the people;

The mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole;

All other industries and trades shall be controlled to assist the well-being of the people;

All people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions.

The Land Shall Be Shared Among Those Who Work It!

Restriction of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it, to banish famine and land hunger;

The state shall help the peasants with implements, seed, tractors and dams to save the soil and assist the tillers;

Freedom of movement shall be guaranteed to all who work on the land;

All shall have the right to occupy land wherever they choose;

People shall not be robbed of their cattle, and forced labour and farm prisons shall be abolished.

All Shall Be Equal Before The Law!

No one shall be imprisoned, deported or restricted without fair trial;

No one shall be condemned by the order of any Government official;

The courts shall be representative of all the people;

Imprisonment shall be only for serious crimes against the people, and shall aim at re-education, not vengeance;

The police force and army shall be open to all on an equal basis and shall be the helpers and protectors of the people;

All laws which discriminate on the grounds of race, colour or belief shall be repealed.

All Shall Enjoy Human Rights!

The law shall guarantee to all their right to speak, to organise, to meet together, to publish, to preach, to worship and to educate their children;

The privacy of the house from police raids shall be protected by law;

All shall be free to travel without restriction from countryside to town, from province to province, and from South Africa abroad;

Pass laws, permits and all other laws restricting these freedoms shall be abolished.

There Shall Be Work And Security!

All who work shall be free to form trade unions, to elect their officers and to make wage agreements with their employers;

The state shall recognise the right and duty of all to work, and to draw full unemployment benefits;

Men and women of all races shall receive equal pay for equal work;

There shall be a forty-hour working week, a national minimum wage, paid annual leave, and sick leave for all workers, and maternity leave on full pay for all working mothers;

Miners, domestic workers, farm workers and civil servants shall have the same rights as all others who work;

Child labour, compound labour, the tot system and contract labour shall be abolished.

The Doors Of Learning And Culture Shall Be Opened!

The government shall discover, develop and encourage national talent for the enhancement of our cultural life;

All the cultural treasures of mankind shall be open to all, by free exchange of books, ideas and contact with other lands;

The aim of education shall be to teach the youth to love their people and their culture, to honour human brotherhood, liberty and peace;

Education shall be free, compulsory, universal and equal for all children;

Higher education and technical training shall be opened to all by means of state allowances and scholarships awarded on the basis of merit;

Adult illiteracy shall be ended by a mass state education plan;

Teachers shall have all the rights of other citizens;

The colour bar in cultural life, in sport and in education shall be abolished.

There Shall Be Houses, Security and Comfort!

All people shall have the right to live where they choose, to be decently housed, and to bring up their families in comfort and security;

Unused housing space to be made available to the people;

Rent and prices shall be lowered, food plentiful and no one shall go hungry;

A preventive health scheme shall be run by the state;

Free medical care and hospitalisation shall be provided for all, with special care for mothers and young children;

Slums shall be demolished and new suburbs built where all shall have transport, roads, lighting, playing fields, creches and social centres;

The aged, the orphans, the disabled and the sick shall be cared for by the state;

Rest, leisure and recreation shall be the right of all;
Fenced locations and ghettos shall be abolished and laws which break up families shall be repealed.

There Shall Be Peace And Friendship!

South Africa shall be a fully independent state, which respects the rights and sovereignty of all nations;
South Africa shall strive to maintain world peace and the settlement of all international disputes by negotiation not war;
Peace and friendship amongst all our people shall be secured by upholding the equal rights, opportunities and status of all;
The people of the protectorates Basutoland, Bechuanaland and Swaziland shall be free to decide for themselves their own future;
The right of all the peoples of Africa to independence and self-government shall be recognised, and shall be the basis of close cooperation.
Let all who love their people and their country now say, as we say here:
"These freedoms we will fight for, side by side, throughout our lives, until we have won our liberty."

References

Abel, R. L. (1981). Conservative conflict and the reproduction of capitalism: The role of informal justice. International Journal of the Sociology of Law, 9, 245-267.

Abel, R. L. (Ed.). (1982a). The politics of informal justice: Vol. 1. The American experience. New York: Academic Press.

Abel, R. L. (Ed.). (1982b). The politics of informal justice: Vol. 2. Comparative studies. New York: Academic Press.

Abel, R. L. (1986). The transformation of the American legal profession. Law and Society Review, 20(1), 1-14.

Allison, J. (1987). Concepts of popular and revolutionary justice. Unpublished master's thesis, University of Cambridge, Cambridge.

Althusser, L. (1971). Ideology and ideological state apparatuses. In L. Althusser, Lenin and philosophy and other essays (pp. 127-186). New York: Monthly Review Press.

Althusser, L. (1977). For Marx. London: New Left Books.

ANC National Conference (1991, June 14 - June 20). New Nation, p. 7.

Bakker, H. P. (1991, January 21). Hundreds crossing race line: Some schools open to all - many to decide. The Argus, p. 6.

Bankowski, Z. (1983). Anarchism, Marxism and the critique of law. In D. Sugarman (Ed.), Legality, ideology and the state (pp. 267-292). London: Academic Press.

Bankowski, Z., & Mungham, G. (1975). Images of law. London: Routledge and Kegan Paul.

Bapela, M. S. W. (1987). The people's courts in a customary law perspective. Paper presented at Workshop 2 on New approaches in respect of the administration of justice, Institute of Foreign and Comparative Law, UNISA.

Beirne, P. (1979). Empiricism and the critique of Marxism on law and crime. Social Problems, 26, 373-385.

Bekker, J. C. (1990). The influence of recent legislation and constitutional changes on the application of African customary law. In A. J. G. M. Sanders (Ed.), The internal conflict of laws in South Africa (pp. 25-38). Durban: Butterworths.

Bindman, G. (Ed.). (1988). South Africa: Human rights and the rule of law. International Commission of Jurists. London: Pinter Publishers.

Boulle, L. (1986, April). Models of justice and the use of law. Paper presented at a conference on Law in a State of Emergency, University of Cape Town.

Brickey, S., & Comack, E. (1987). The role of law in social transformation: Is a jurisprudence of insurgency possible? Canadian Journal of Law and Society, 2, 97-119.

Budlender, G. (1988). Law and lawlessness in South Africa. Unpublished manuscript. Cape Town.

Burman, S., & Scharf, W. (1990). Creating people's justice: Street committees and people's courts in a South African city. Law and Society Review, 24(3), 693-744.

Caputo, T. C., Kennedy, M., Reasons, C.E., & Brannigan, A. (Eds.). (1989). Law and society: A critical perspective. Toronto: Harcourt Brace Jovanovich.

Cain, M. (1983). Gramsci, the state and the place of law. In D. Sugarman (Ed.), Legality, ideology and the state (pp. 95-117). London: Academic Press.

Cain, M. (1988). Beyond informal justice. In R. Matthews (Ed.), Informal justice (pp. 51-86). London: Sage.

Chaskalson, A. (1987, May). Democracy and law. Paper presented at the first national conference organised by IDASA, Port Elizabeth.

Christie, N. (1982). Limits to pain. Oxford: Martin Robertson.

Cleaver, E. (1968). Soul on ice. New York: Bell.

Cock, J. (1989, April). A map of political violence in contemporary South Africa. Paper presented at an IDASA conference on Women in the struggle for peace, Harare.

Cohen, S. (1979). The punitive city: Notes on the dispersal of social control. Contemporary Crises, 3, 339-363.

Cohen, S. (1988). Against criminology. New Brunswick: Transaction Books.

Collins, H. (1982). Marxism and law. New York: Oxford University Press.

Corder, H. (1986, April). Aspects of the judicial process. Summary of introductory remarks made at a workshop held during a conference on Law in a State of Emergency, University of Cape Town.

Cotterrell, R. (1983). Legality and political legitimacy in the sociology of Max Weber. In D. Sugarman (Ed.), Legality, ideology and the state (pp. 69-93). London: Academic Press.

Davies, R., O'Meara, D. & Dlamini, S. (1988). The struggle for South Africa: A reference guide to movements, organizations and institutions: Vol. 1 & 2. London: Zed Books.

Davis, D. M. (1988). Legality and struggle: Towards a non-instrumentalist view of law. In H. Corder (Ed.), Essays on law and social practice in South Africa (pp. 65-92). Cape Town: Juta.

Davis, D. M. (1991). Remaking the South African legal order. Social Justice, 18(1-2), 65-82.

Dlamini, C. R. M. (1990). The future of African customary law. In A. J. G. M. Sanders (Ed.), The internal conflict of laws in South Africa (pp. 1-12). Durban: Butterworths.

Durkheim, E. (1933). The division of labour in society. New York: Free Press.

Esterhuyse, F. (1990, September 29). Security shadow is FW's big challenge. Weekend Argus, p. 17.

Fine, B. (1979). Law and class. In B. Fine, R. Kinsey, J. Lea, S. Picciotto, & J. Young (Eds.), Capitalism and the rule of law: From deviancy theory to Marxism (pp. 29-45). London: Hutchinson.

Foucault, M. (1980). On popular justice: A discussion with Maoists. In C. Gordon (Ed.), Power/knowledge: Selected interviews and other writings 1972-1977 by Michel Foucault (pp. 1-36). New York: Pantheon Books.

Gramsci, A. (1971). Selections from the prison notebooks. London: Lawrence and Wishart.

Hamalengwa, M. (1991). The death penalty in the context of commission of crimes against humanity in South Africa: An historical perspective. Social Justice, 18(1-2), 95-104.

Haysom, N. (1981). Towards an understanding of prison gangs. Cape Town: University of Cape Town, Institute of Criminology.

Haysom, N. (1989). Vigilantes and militarisation. In J. Cock & L. Nathan (Eds.), War and society. The militarisation of South Africa. Cape Town: David Philip.

Henry, S. (1983). Private justice: Towards integrated theorizing in the sociology of law. London: Routledge and Kegan Paul.

Hipkin, B. (1985). Looking for justice: The search for socialist legality and popular justice. International Journal of the Sociology of Law, 13, 117-132.

Hirst, P. (1980). Law, socialism, and rights. In P. Carlen & M. Collison (Eds.), Radical issues in criminology (pp. 58-105). London: Martin Robertson.

Hoexter, G. G. (Chairperson). (1984). Commission of inquiry into the structure and functioning of the courts (Final Report RP 78/1983). Pretoria: Government Printer.

Hofrichter, R. (1987). Neighborhood justice in capitalist society: The expansion of the informal state. New York: Greenwood Press.

Hund, J. & Kuto-Rammopo, M. (1983). Justice in a South African township: the sociology of *Makgotla*. Comparative and International Law Journal of Southern Africa, xvi, 179-208.

Hunt, A. (1985). The future of rights and justice. Contemporary Crises, 9, 309-327.

Ietswaart, H ' (1982). The discourse of summary justice and the discourse of popular justice: An analysis of legal rhetoric in Argentina. In R. L. Abel (Ed.), The politics of informal justice: Vol. 2. Comparative studies (pp. 149-179). New York: Academic Press.

Isaacman, B., & Isaacman, A. (1982). A socialist legal system in the making: Mocambique before and after independence. In R. L. Abel (Ed.), The politics of informal justice: Vol. 2. Comparative studies (pp. 281- 323). New York: Academic Press.

Kahn, E. (1989). Is there cause for the popular discontent with the administration of justice? The South African Law Journal, 96, 602-632.

Kinsey, R. (1983). Karl Renner on socialist legality. In D. Sugarman (Ed.), Legality, ideology and the state (pp. 11-42). London: Academic Press.

Leatt, J., Kneifel, T., & Nurnberger, K. (1986). Contending ideologies in South Africa. Cape Town: David Philip.

Legal Education Action Project (LEAP)/Black Sash (1990). Working for justice: The role of para-legals in South Africa. Cape Town: LEAP/Black Sash.

Lubowski, A. (1989). Democracy and the judiciary. In H. Corder (Ed.), Democracy and the judiciary (pp. 13-25). Cape Town: IDASA.

Mandel, M. (1989). The rule of law and the legalization of politics in Canada. In T. C. Caputo, M. Kennedy, C. E. Reasons, & A. Brannigan (Eds.), Law and society: A critical perspective (pp. 305-315). Toronto: Harcourt Brace Jovanovich.

Matthews, R. (1988). Reassessing informal justice. In R. Matthews (Ed.), Informal justice (pp. 1-24). London: Sage.

McQuoid-Mason, D. (1987a). Street law: Book 1. Introduction to South African law and the legal system. Durban: University of Natal, Association of Law Societies of South Africa and Centre for Socio-Legal Studies.

McQuoid-Mason, D. (1987b). Street law: Book 2. Criminal law and juvenile justice. Durban: University of Natal, Association of Law Societies of South Africa and Centre for Socio-Legal Studies.

Menzies, R. J. (in press). The poverty of realism: Some contradictions in the 'progressive' fight against crime. In J. Lowman & B. D. MacLean (Eds.), Left realist criminology. Toronto: University of Toronto Press.

Miliband, R. (1969). The state in capitalist society: The analysis of the western system of power. London: Basic Books.

Moses, J. (1990). People's courts and people's justice: a critical review of the current state of knowledge of people's courts with a particular focus on South Africa. Unpublished master's thesis, University of Cape Town, Cape Town.

Munck, R. (1984). Repression, insurgency and popular justice: The Irish case. Crime and Social Justice, 21/22, 81-94.

Nonet, P., & Selznick, P. (1978). Law and society in transition: Towards responsive law. New York: Harper and Row.

Olivier, N. J. J. (1990). The judicial application of African customary law. In A. J. G. M. Sanders (Ed.), The internal conflict of laws in South Africa (pp. 39-55). Durban: Butterworths.

Omar, D. (1990). An overview of state lawlessness in South Africa. In D. Hansson & D. Van Zyl Smit (Eds.), Towards justice? Crime and state control in South Africa (pp. 17-27). Cape Town: Oxford University Press.

Panitch, L. (1977). The role and nature of the Canadian state. In L. Panitch (Ed.), The Canadian state (pp.3-27). Toronto: University of Toronto Press.

Pashukanis, E.B. (1978). Law and Marxism: A general theory. London: Ink Links.

Pearce, F. (1989). The radical Durkheim. London: Unwin Hyman.

Poulantzas, N. (1973). Political power and social classes. London: New Left Books.

Quinney, R. (1974). Critique of legal order: Crime control in capitalist society. Boston: Little, Brown.

Ramphele, M., & Boonzaier, E. (1988). The position of African women: Race and gender in South Africa. In E. Boonzaier & J. Sharp (Eds.), South African keywords: The uses and abuses of political concepts (pp. 153-166). Cape Town: David Philip.

Sachs, A. (1979). Mozambique: The survival of legal doctrine in a revolutionary society. International Journal of the Sociology of Law, 7, 31-36.

Sachs, A. (1984). Changing the terms of the debate: A visit to a popular tribunal in Mozambique. Journal of African Law, 28(1 & 2), 99-108.

Sachs, A. (1985). The two dimensions of socialist legality: Recent experience in Mozambique. International Journal of the Sociology of Law, 13, 133-146.

Sachs, A. (1990). Towards a Bill of Rights in a democratic South Africa. South African Journal of Human Rights, 6, 1-24.

Sanders, A. J. G. M. (1990). The role of comparative law in the internal conflict of laws. In A. J. G. M. Sanders (Ed.), The internal conflict of laws in South Africa (pp. 57-65). Durban: Butterworths.

Santos, B. de Sousa (1979). Popular justice, dual power and socialist strategy. In B. Fine, R. Kinsey, J. Lea, S. Picciotto, & J. Young (Eds.), Capitalism and the rule of law: From deviancy theory to Marxism (pp. 151-163). London: Hutchinson.

Santos, B. de Sousa (1982). Law and revolution in Portugal: The experiences of popular justice after the 25th of April 1974. In R. L. Abel (Ed.), The politics of informal justice: Vol. 2. Comparative studies (pp. 251-280). New York: Academic Press.

Santos, B. de Sousa (1987). Law, a map of misreading: Toward a postmodern conception of law. Journal of Law and Society, 14(3), 279-302.

Scharf, W. (1989a). Community Policing in South Africa. Acta Juridica, 206-233.

Scharf, W. (1989b). The role of people's courts in transitions. In H. Corder (Ed.), Democracy and the judiciary (pp. 167-184). Cape Town: IDASA.

Scharf, W., & Ngcokoto, B. (1990). Images of punishment in the people's courts of Cape Town 1985-7: from prefigurative justice to populist

violence. In A. du Toit & C. Manganyi (Eds.), Political violence and the struggle in South Africa (pp. 341-371). London: Macmillan.

Sechaba (1985). Selected Writings on the Freedom Charter 1955 - 1985. A Sechaba Commemorative Publication. London: African National Congress.

Seekings, J. (1989). People's courts and popular politics. In G. Moss & I. Obery (Eds.), South African Review, 5, (pp. 119-135). Johannesburg: Ravan Press.

Simon, R. (1982). Gramsci's political thought: An introduction. London: Lawrence and Wishart.

Sisulu, Z. (1986). Forward to people's power. Die Suid-Afrikaan, Herfs, 19.

South African Institute of Race Relations (SAIRR) (1988). Survey. Johannesburg: SAIRR.

Steytler, N. (1991). Democratizing the criminal justice system in South Africa. Social Justice, 18(1-2), 141-153.

Sugarman, D. (Ed.). (1983). Legality, ideology and the state. London: Academic Press.

Sumner, C. (1981). The rule of law and civil rights in contemporary Marxist theory. Kapitalistate, 9, 63-91.

Suttner, R. (1983, October). African customary law - Its social and ideological function in South Africa. Paper presented at an African Studies seminar, University of the Witwatersrand.

Suttner, R. (1986a, April). Popular justice in South Africa today. Paper presented at a conference on Law in a State of Emergency, University of Cape Town.

Suttner, R. (1986b). The Freedom Charter: The people's charter in the 1980s. Crime and Social Justice, 24, 72-95.

Suttner, R. (1988). The ideological role of the judiciary in South Africa. In J. Hund (Ed.), Law and justice in South Africa (pp. 81-102). Johannesburg: Institute for Public Interest Law and Research.

Suttner, R., & Cronin, J. (1986). 30 Years of the Freedom Charter. Johannesburg: Ravan Press.

Swart, K. (1992, February 9). Bold new plan for over-full prisons. The Cape Metro, p. 1.

Swilling, M. (1988). The United Democratic Front and township revolt. In W. Cobbett & R. Cohen (Eds.), Popular struggles in South Africa (pp. 90-113). Trenton: Africa World Press.

Thompson, E. P. (1975). Whigs and hunters: The origin of the Black Act. Harmondsworth: Peregrine.

Thompson, E. P. (1978). The poverty of theory. London: Marlin Press.

Thornton, R., & Ramphele, M. (1988). The quest for community. In E. Boonzaier & J. Sharp (Eds.), South African keywords: The uses and abuses of political concepts (pp. 29-39). Cape Town: David Philip.

Turk, A. T. (1981). The meaning of criminality in South Africa. International Journal of the Sociology of Law, 9, 123-155.

Van der Horst, E., Christie, S., & Driver, D. (1987, May). Towards a non-sexist constitution: Women's perspectives. Papers presented at the first national conference organised by IDASA, Port Elizabeth.

Van Niekerk, G. J. (1988) People's courts and people's justice in South Africa. De Jure, 21(2), 292-305.

Visser, D. P. (1990). The role of legal education in the internal conflict of laws. In A. J. G. M. Sanders (Ed.), The internal conflict of laws in South Africa (pp. 67-70). Durban: Butterworths.

Vogelman, L., & Eagle, G. (1991). Overcoming endemic violence against women in South Africa. Social Justice, 18(1-2), 209-229.

Walters, S. C. (1986). Education for democratic participation: An analysis of self education strategies within certain community organisations in Cape Town in the 1980's. Unpublished doctoral dissertation, University of Cape Town, Cape Town.

Weber, M. (1954). On law in economy and society (E. Shils & M. Rheinstein, Trans.). Cambridge: Harvard University Press.

Williams, G., & Hackland, B. (1988). The dictionary of contemporary politics of Southern Africa. London: Routledge.

Yacoob, Z. (1988). The Freedom Charter and equality before the law: Inequities and failures of the current legal system. In J. A. Polley (Ed.), The Freedom Charter and the future (pp. 66-70). An IDASA publication. Johannesburg: AD. Donker.