NON-STATE ORDERING IN THE POST-APARTHEID SOUTH AFRICA - A Study of Some Structures of Non-State Ordering in the Western Cape Province.

By

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Chapter 1

Introduction and Methodology

Introduction

Social ordering is an integral part of human life – it is the heart of society and, extending the metaphor, health of society depends on its consistent and regular activity. Throughout history nations and communities invented (and reinvented) ways of ordering their lives. There is no record of any form of community or society that existed without agreed ground rules as to how individuals and groups ought to behave and ways to enforce adherence to such ground rules. According to Thomas Hobbes[1] such ground rules constitute a social contract. He observed that people come together to give away some of their rights, especially the use of force, for the good of all. Without social contract, the great man reasoned, life would be "solitary, poor, nasty, brutish, and short" (Nina 2001:101) owing to the selfish nature of human beings. Michel Foucault, the famous French Philosopher, sees these ground rules of living together as 'conduct of conduct'.[2]

There are two main ways of ordering, viz. formal (state) ordering and informal (non-state) ordering, and within these two labels are different modalities. Formal ordering is normally vested in the government (be it a monarch, a king, a chief or a modern day state leader), while non-state ordering[3] is done by society, outside the formal government. South Africa, under the system of apartheid, had a style of formal ordering that was meant to protect whites and control their black counterparts (Brogden and Shearing 1993:178) and this manifested in the types of laws legislated; the way in which they were enforced and "... the training, deployment and equipment ..." (ibid.) of the South African Police (SAP). As this formal system excluded blacks, they (blacks) adapted their pre-modern system to urban conditions as a way of ordering their lives and seemed to shun the state-created structures that were meant to be the counterparts of the black rural structures of ordering. While many of these black non-

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[1] *See* http://www.zero.eti.br/textos/hobbes-ing.html. *(Last accessed on 24 August 2001). Also see Nina (2001:101) and Boskati (1997:16).*

[2] *See* http://mdcm.arts.unsw.edu.au/homepage/Courses/MDCM3101/. *Last accessed on 03 August 2001.*

[3] *Although the phenomenon of non-state ordering acclaims worldwide pervasiveness there is no consistency on terminology used in this field. Many terms have been used interchangeably. Among the very many terms used are: 'community courts' (Sachs & Welch 1990, Cutshall 1991, Stevens 2000); 'informal justice systems' (Abel 1982, Stevens 2000); 'popular justice forums' (Moses 1990, Merry 1992, Santos 1992, Seekings 1994, Nina & Schwikkard 1996); 'community justice' (Nina & Schwikkard 1996, Schärf 1997); 'people's law' (Van Niekerk 1995); 'folk law' (Allott & Woodman 1985); 'the living law (ibid.). My inclination throughout this dissertation is to use 'non-state ordering' (Schärf & Nina 2001) in referring to all non-state structures that are involved in the administration of justice or ordering. I will further borrow Nina and Schwikkard's terminology by using:*

- *'private justice' for structures of conflict resolution by NGO's,*
- *'Popular justice' for all other non-state ordering structures except NGO structures, unless otherwise directed by context. (1996).*

Note should be taken right at the outset that 'private justice' should not be confused with 'private security' which refers to commercial security and/or armed response companies (See Shaw 2001). While the latter is also a form of non-state ordering, it does not fall within the parameters of this dissertation as dictated by the available empirical data.

state ordering structures were apolitical and concentrated on merely regulating the lives of the urban residents in the beginning, politics infiltrated many of them, especially in the 70s/80s.

When the post-apartheid state was inaugurated in 1994, one of its responsibilities was to reconstruct (or transform) ordering, ranging from the police force (as it then was) to the judiciary. To that end the state went about changing the relationship that its predecessor had with citizens, especially blacks. This we see in the sphere of policing where the concept of community policing has been put in place and the South African Law Commission[4] is working on a legislation dealing with non-state ordering further to the impressive (albeit incomplete) transformation that has been made to the state law.

It stands as a very serious indictment on the post apartheid South African government that seven years after dismantling the apartheid system, no accessible legal system is yet in place to accommodate the majority of South Africans. This is specifically true in respect of blacks, who were excluded from the structures of the previous government. The South African formal legal system is still alarmingly inaccessible and there is no viable alternative to it, despite the fact that majority of South Africans use non-state dispute resolution mechanisms more than they use the state justice system. Not that there are no alternative dispute resolution structures, but that many of the available ones lack the necessary support of the state and that many of them remain uncoordinated and unaccountable (to the State and the communities they operate in). Resources and energy have been invested in the transformation of the state law but that lop-sided approach (of focusing solely on the state law) is self-defeating and tends to reinforce the judicial marginalisation of majority of South Africans. Or putting it more dramatically (and truthfully) by borrowing the apt phraseology of Pashukanis, the South African government is trying to apply "an equal measure to manifest unequals" (Brogden & Shearing 1993:180) and thereby simply "increases inequality" (ibid.). The law that is inaccessible and alien to majority of the citizens is the one receiving all the government support. It is argued herein that such transformation that has been effected to the state law has been a good progress even though it has ignored the indigenous African dispute resolution mechanisms, popular justice and private justice. To remedy this defect, it is recommended, the state should take the lead and harness the energies of non-state ordering structures to effect cross-fertilisation that will result in a dynamic pluralistic South African legal system.

It is a known fact that Africans have always been using their indigenous dispute resolution mechanisms and popular justice structures in urban areas, which were, to a considerable extent (especially in the beginning), based on such indigenous model, with adaptations. Conspicuously from the 70s many of these popular justice structures posed themselves as an alternative form of ordering to the state justice system. This stance invited the wrath of the then South African state with the mid 80s being the climax. During the mid 80s the state attack was intensified to an extent that many of the popular justice structures were paralysed as many of their leaders/members were in prison or in hiding owing to the states of emergency. Even leaders/members who were not in prison or in hiding could not function effectively owing to stringent state laws at the time.

[4] *See chapter 5 hereof for further discussion.*

The period of transition (i.e. the late 80s to the early 90s) brought about two important developments within the non-state ordering field, viz. community justice structures started re-emerging under the leadership of adult members of the community and the NGO movement started entering the urban townships with teaching and training in mediation/dispute resolution. The township residents were receptive of these NGO-initiated dispute resolution mechanisms and many of the community based justice structures co-operated with the private justice movement. An outstanding example in this regard is the Alexandra Justice Centre[5]. There are also other examples such as the Quaker Peace Centre training members of the street committees in Nyanga and Khayelitsha, Western Cape Province.[6]

Thus when the post apartheid government took office in 1994, the climate was conducive for initiation and implementation of an accessible judicial system and human rights–friendly alternative dispute resolution mechanisms. On the one hand the NGO's had paved the way by initiating workable processes and the communities were willing to embrace new ideas. The relevant role players were therefore ad idem that a new system had to be brought into existence. This, I think, was the watershed in non-state ordering. The course of non-state ordering took on a new face altogether. This is vividly evident in that many of the structures that participate in non-state ordering today are different from the ones that co-existed with the apartheid state. They emerged as a result of, among other factors, the absence and/or inefficiency (or perceived inefficiency) of the state ordering mechanisms and in many respects their agenda is dictated and sustained by such non-deliverance on the part of the present state.

The efforts of NGO's and the receptive attitude on the part of many communities presented a golden opportunity for the government to take the lead in supporting these initiatives. Unfortunately this is an opportunity that South Africa lost. While there were undoubtedly good reasons on the part of the government for not focusing on this field (e.g. it had inherited a malfunctioning, underresourced machinery, etc), it is inexcusable that nothing concrete has been done now almost a decade after its ascension to power.

The de facto absence of the state in ordering within the townships resulted in the township residents taking initiatives to order their lives. I argue that the transfer of political power and the way in which it was done (i.e. via negotiated settlement) had the effect of incapacitating the popular justice structures for a variety of reasons. Inter alia there was no need for an alternative justice system, the new state ideologically arrested and detained many members of these structures and many leaders of these structures physically joined the state. The net result of this chain of events, I will further argue, was that many of the non-state ordering structures became weaker and could not provide services of the quality they provided in the past. For example, street committees of SANCO became less active, more conspicuously in handling of criminal cases, though my research shows that the same applies to civil cases - albeit to a lesser degree. If this be the case, as I am convinced it is, the townships were faced

[5] *See Storey (1991) for a detailed discussion of the Alexandra Justice Centre.*
[6] *This is based on my interview with a mediator at the Quaker Peace Centre on 23 January 2001.*

with a situation where the state justice was absent owing to, among others, the weakness of the transitional state on the one hand and a weak non-state ordering system on the other. It is within that context that the emergence of the post 1994 non-state ordering structures and increasing plurality in this field (after 1994) should be seen. Crudely put, the state justice was non-existent, inefficient and/or inaccessible and the non-state ordering system had become weak with the result that people had no avenues for dispute resolution. As Hobbes would argue, the result of the state's (sovereign's) absence is a state of war. Yet, as Nina (2001:106-7), observed, instead of the result of the sovereign's absence being a state of war, South African communities (especially blacks) resorted to their own alternative ordering mechanisms during the apartheid period. That appears to be the trend that followed the post 1994 de facto absence of the sovereign. In a way the communities picked up from where they had left, but the change of environment dictated different modus operandi, as chapter three hereof aims to demonstrate.

Having lost an opportunity to co-ordinate, influence and harness the structures of non-state ordering that existed before and immediately after 1994, the state produced a Discussion Paper in 1999 aimed at regulating non-state ordering (in the wording of the Discussion Paper: 'Community Dispute Resolution Structures'). The take of this dissertation is that the Discussion Paper as it stands now, will do little to improve the status of non-State ordering. My worst fear is that it may further cripple the already ailing non-state ordering system should it be proceeded with in its present form. While the basis for this assertion will be developed towards the latter part hereof (Chapter 5), it is in order to state that the Discussion Paper appears to be way out of touch with developments and trends on the ground. It seeks to create uniform structures of 'Dispute Resolution'; while the day to day experiences within the targeted communities militate against the success of such a model. My submission is that a one-size-fits-all approach ignores the local diversity of the different communities and their sense of justice and expectations from a justice structure. The Discussion Paper further ignores the fact that the proposed model is as foreign to the needs, culture and expectations of the black communities as the Western judicial system is. Much as the Western system enjoys some peripheral status in the black urban communities, so will such structures proposed by the Discussion Paper be. This model which is proposed in the Discussion Paper seems to be a product of the private justice movement (rubberstamped by the South African Law Commission) with little or nothing to do with the communities it intends to serve. According to the coordinator of an NGO (which, by own admission influenced the Discussion Paper and was closely consulted in the production thereof), they wish to create a 'culture' in the communities. Needless to say that it would be a waste of resources over and above it being an insult to the communities to talk about creating a 'culture' as if all township dwellers are a people without culture, while evidence shows that there is a culture of dispute resolution which lacks support from the donor community, the NGO's and the government. As I argue in chapter two, the strength or otherwise of an ordering system is dictated by its access to resources.

The take of this dissertation is supported by a recent research conducted in some townships of the Western Cape Province. The research was guided by the following themes:

- the functioning of some non-state forms of ordering;
- their relationship with state organs;
- their relationship with one another;
- the participants' visions regarding these structures; and
- their role in social ordering at large.

I draw on the worldwide tendencies of the phenomenon and premise my discussion on the fact that non-state ordering will and must always exist, regardless of the political set-up. My submission is that dynamic legal pluralism is the solution in our quest to make justice accessible to all South Africans or majority of South Africans at least. In order to do that, it becomes imperative to explore the different forms of non-state ordering that exist within the communities as well as their modus operandi. This is crucial because these structures keep on changing form. There is an obvious need to know the present modalities within the non-state ordering sphere if legal reform is to be proceeded with in a more informed way.

The outline of the dissertation is as follows:
This introduction and research methodology constitute chapter one, followed by chapter two which provides an overview of the concept of non-state ordering and grapples with the theoretical concepts such as 'access to justice' and 'legal pluralism', linking them to the South African situation. It paves the way for chapter three, which deals with the field research. I table and analyse the research findings in respect of each of the (researched) structures that participate in non-state ordering in the Western Cape townships. In chapter four I engage with the factors that broadly influenced the state of social ordering in the country. These are factors such as the transfer of political power which while clearly impinging on ordering is less linked to the day to day activities of these structures. Thus while chapter three deals with views, experiences, activities of these structures as they happen on the ground (as well as my analysis thereof), chapter four goes a step further and looks at the bigger picture, as it were.

Chapter five deals with the Discussion Paper of the South Law Commission regarding non-state ordering structures. Though the provisions of the Discussion Paper do not form part of the law yet and may be subjected to changes throughout the legislative process, I included them as they provide the only attempt to deal with non-state ordering and the document represents views of activists, academics and the state. My research findings show that while the state has been busy probing the concept of ordering, non-state ordering has been changing form independent of the state initiative, though surely influenced by the state at times, and that the two orders seem to be developing parallel to each other. This parallel development, however, does not preclude partnership between the two but necessitates innovative ways of finding common ground and pulling together of resources, hence my suggestion of a dynamic legal pluralism. It is in pursuit of such innovative ways that recommendations are presented at the close of that chapter.

Chapter 6, which concludes this dissertation, attempts to put all the pieces of the puzzle together and emphasises the main theme of this dissertation, viz. 'Non-state ordering is a reality as demonstrated by experiences of some townships of the Western Cape Province. While non-state ordering proves to be indispensable, it threatens the Constitutional ethos of the country in the absence of (state) regulation. The South African Law Commission has tried to attend to regulation of this field, but their Discussion Paper, as it stands (seen against the current experiences in the field), is unlikely to remedy the situation. On that basis the recommendations made may inform policy in this field'.

Research Methodology

"Within the economic system there exist 'central structural mechanisms' and the task of the researcher is 'to organise one's concepts so as to grasp its essential features successfully'" (Tim May 1997:11).

This research involved two aspects, namely literature review and field research with the latter taking the form of focused interviews and participant observation with different members of the community. The literature review was initially aimed at acquiring, from the available literature, a hypothesis and academic direction.[7] It was, however, only helpful to the extent that it informed me about the existing structures and the thrusts of other authors and researchers in this field as I did not adopt a hypothesis[8] and therefore went into the research field expecting the facts to speak for themselves. Though I held no explicit theory much in line with 'empiricism'[9], my approach differs from empiricism in that while I expected the facts to speak for themselves, I went into the field with the conviction that there were structures that exist[10] in the researched townships and I centred my research questions around them. I did not go into the field clothed in absolute researcher objectivity[11] expecting a 'world out there' existent independent of our interpretations of it. Being a black South African I share cultural values with the researched people and such background influences my interpretation and passionate involvement in these issues that are just as a matter of life and death to them as to me and my immediate relatives. My personal experiences as a member of the community obviously informed my take on the researched issues.

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[7] *See for example Bruce and Komane (1996:6) and Taylor in her work in Khayelitsha 199?.*

[8] *Adoption of a hypothesis entails that the researcher goes into the field with a theory and his/her aim is to collect data as evidence that supports or refutes such a theory (Jupp 1989:8; May 1997:11). The importance of theory is of significant concern as the link between theory and method impacts on the outcome of research and analysis thereof. Questionnaires are formulated under the influence of theoretical assumptions concerning what information needs to be collected and how same should be acquired. See generally Jupp (1989), May (1997) and Storey (1991:67-8).*

[9] *Empiricism is premised on that the facts speak for themselves and is not connected to any theory that the research seeks to test – the research findings are an end in themselves (May 1997:10-11).*

[10] *This approach lines with the premise of 'realism' that there exist central structural mechanisms in the community and the researcher's task is to investigate how they work (May 1997:11). This, as my analysis will show, is the method I found more appropriate for my research owing to its nature as discussed herein.*

[11] *Researcher objectivity entails that a researcher assumes a detachment similar to that of a natural scientist studying molecules in a laboratory premised on that there is a world out there that can be researched without personal involvement (May 1997:10).*

While fully accepting the assertions of both empiricism and positivism that there are facts about the social world that we can gather independent of people's interpretations of it, I decided against adopting their research methods right from the beginning. Their methods would entail a questionnaire requiring pre-coded answers. As I think this type of a questionnaire would restrict my engagement in the interviews while the nature of this researched phenomenon enquires into experiences, opinions, views and interpretations from the interviewees. I wanted to be able to discuss the issues, phrase and rephrase questions and follow-up questions. This aim, I submit, can only be achieved through what Moser calls a "guided or focused interview" (1958: 205, 206), for which I opted, during the interviews.

Although my theoretical approach may seem to somewhat necessitate triangulative[12] data collection methods it is more in line with 'realism'[13] in that I assumed the existence of central structural control mechanisms[14] and set out to investigate their essential features; their genesis and their role in society with special emphasis on legal ordering as a social control mechanism, though not in isolation from other social mechanisms. I knew that structures such as street committees, South African National Civics Organisations (SANCO), South African Police Service (SAPS) , community policing fora, etc., exist in the researched townships but I was not informed about these structures' interpretations of themselves and their interpretation by the outsiders (to these structures) such as community members and fellow structures.

The limitation of this approach I chose lies in that "... the people's knowledge may be partial or incomplete" (May 1997:12). Certainly each of the organisations, through its interviewed members, saw itself as 'the' structure in terms of relevance to the needs of the people, with minor exceptions such as where members of the SAPS discredit it (SAPS) as inefficient. So bias cannot be overruled, yet that does no harm to the outcome of the research as the 'outsiders' views balance this apparent bias. A further limitation of my approach is that organisational rhetoric tends to create artificiality in the interviews of organisations as in people not expressing individual interpretations but that of the organisation, hence the value of interviewing the individual members of the community who do not subscribe to any organisational ideology.

As to the bias (partiality) of the researched structures the balance is provided by my having sat through some of the organisations' meetings and having observed their day to day running of their organisations as well as views of other organisations about them. While I have been able to sit through 'hearings' of some structures as at the time of writing I have not yet sat through one of the Peninsula Anti-Crime Agency (PEACA) which I would have liked to do given to controversy that surrounds this organisation.[15]

Access bargaining was easy for me as there is willingness on the part of organisations to be interviewed and this, in my case, was attributable (at least partly) to my association with the Institute of

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[12] *Triangulation refers to the use of two or more data collection methods at the same time (Storey 1991:68).*
[13] *See footnote 10.*
[14] *I did not go out to determine whether or not there were such structures. Their existence, in the words of Dixon, were my ' background assumption' (1999:7).*

Criminology, UCT in that they have a good working relationship with many of these organisations. My production of a letter from the Institute invariably opened doors for interviews. Some organisations such as KCPF (Khayelitsha Community Policing Forum) and the SAPS (some members in Khayelitsha) told me they would do it for Professor Schärf (my supervisor whose signature the introduction letter bore) who has been of great help to them.
Access to the organisation, however, does not necessarily translate into acquisition of the observations needed. For instance, in respect of PEACA who were equally receptive of me, I was not allowed to go with them on their investigations and despite having visited their offices eight times I have not been able to find a case in progress and they would not undertake to inform me when one was in session for me to attend.[16]

The open reception, however, had its difficulties in that some structures wanted to 'own' me such as one organisation wanting me to be part of their strategic planning and participate in meetings to, among others, outwit their adversaries (fellow structures that I also had to research). It was also not easy to move from one structure to the next as far as one organisation that unambiguously detests the other, initially wanted me to rely on their judgment about that organisation and were not happy with me going to that organisation. For these reasons I had to remind them of my status as a researcher and the ethical principles in terms of which I conduct research. One other problem was that many of the interviewees attached to organisations saw the interview as an opportunity for exposure and would sing only praises for the organisations while hiding weaknesses of their organisations. This I found in respect of PEACA, for example, where the coordinator admits use of force and split within the organisations while their deputy director denies it. The result of this attitude is that the researcher is denied some relevant information and may walk away with half the picture.

Interview Procedure, Strategy and Questionnaire

My chosen approach of focused interviews that allowed informality gave me freedom to formulate my questions, alter their sequence during interviews, explain their meaning, add more questions and change their wording, an advantage as observed by Moser (1958:205). Notwithstanding this freedom, I tried to adhere to the main themes of my research, viz. the functioning of non-state forms of ordering in the community, their relationship with state organs as well as participants' visions of these structures and their role in social ordering at large.

My interviews with organisations were all tape-recorded while those with individual members of the community were written down by hand in the form of note taking during the interviews[17] after which

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[15] *See the discussion of Peaca in Chapter 3.*
[16] *This vindicates Dixon's assertion that "access to the field for the participant observer is not a once and for all right of passage but a continuous process of negotiation" (1999:9).*
[17] *I decided not to use a tape recorder with individuals simply because a few raised objections thereto, others allowed its use but expressed reservations. One of my first interviewees agreed to the use of a tape recorder yet the change of demeanour and apparent discomfort showed me that she was not happy with it. I was able to judge*

transcribing took place. I interviewed 29 individuals of whom 16 were women, 13 men, 10 aged between 18 and 25, 19 aged over 25 years between July 2000 and April 2001[18]. The breakdown of my interviews is as follows:

- 29 ordinary citizens of whom 12 where victims of crime;
- a chief magistrate;
- the secretary of KCPF (who also allowed me to sit in as members of the community came to report complaints);
- 8 members of the subforums of the KCPF (four of whom are members of the Executive Committee of KCPF);
- secretary of the Gugulethu Community Policing Forum (GCPF);
- members of SANCO and street committees in Gugulethu (5) and Khayelitsha (3);
- 2 members of PEACA;
- 4 members (mediators and trainers) of Quaker Peace Centre[19];
- 3 members of U Managing Conflict (UMAC);
- the Project Co-ordinator of Community Peace Programme (CPP);[20]
- members of the Peace Committees (3) including the organiser for Khayelitsha;
- an inspector of SAPS in the Crime Prevention Department;
- a senior superintendent of SAPS in Khayelitsha;
- the chairman of Congress of Traditional Leaders of South Africa (Contralesa).
- I further sat through 'hearings' in Mfuleni, attended a two day workshop ran by SAPS for KCPF members and sat through three disputes handled by the Peace Committees of Khayelitsha.

Sampling

I adopted the 'purposeful sampling' method[21] in that I targeted particular limited number of organisations and few individuals. This sample is limited in terms of size and therefore precludes generalisation in drawing of conclusion. Comfort may be derived from the fact that the interviewees were chosen carefully on the basis of representativity (i.e. to cover all the important role players in this field) and relevance of their activities to the broader picture of ordering. Organisations that participate

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as this was my second encounter with her. And indeed when I switched it off, the difference was visible and we could discuss as in a normal conversation.

[18] *The interview time ranged from 15 minutes to one and half hours in one sitting. The 15 minutes was normally the first encounter when I introduced myself as my full interviews normally took place on a second visit, especially with individuals not attached to any organisations as the latter were first contacted telephonically. I preferred to interview individuals on a second encounter as I found people more at ease on the second encounter after having had time to digest my request.*

[19] *Quaker Peace Centre and UMAC are NGO's involved in dispute resolution and training of mediators in the researched townships, among other places.*

[20] *Community Peace Programme initiated a project in terms of which they established Peace Committees n a number of townships, including Khayelitsha. See pages 41 – 47 hereof..*

[21] *See generally Patton (1987) and Hauck (1997) for further discussion of this method of sampling, notably the advantage that a great deal may be learned "...by focusing in ... understanding the needs, interests, and incentives*

in non-state ordering were known to exist through the available literature. Starting with the well-known structures such as SANCO it emerged that there were other organisations also involved in non-state ordering and such other organisations were then approached so that previous findings could be enriched and such information previously acquired could be used to inform direction in identifying and pursuing new issues. New issues emerge in this phenomenon as plurality of the field increases. Throughout the process other organisations and individuals were identified, partly through snowballing, and approached in my pursuit to get views of "... those who are best informed..." (Chambers 1983:85). Each interviewee was asked to comment on the activities of each of the structures of ordering that were identified as operative in his/her particular area, with the result that despite the limitedness of the sample in terms of quantity, it is of a fairly good quality and reasonably balanced.

Ethics

Right from the outset, the objectives of the interviews and how the data will be utilised were outlined both in the letter of introduction from my supervisor (as referred to above) and reiterated by myself when bargaining for access. I am glad to report that there were not many ethical issues raised during this research. I started each interview (on first encounter) by explaining to the interviewees the options available to them. I asked if they were willing to have their names used and whether they had no objections to the use of a tape recorder. While all interviewees who represented organisations had no objections to their names being recorded and a tape recorder being used, many of the ordinary citizens generally had reservations. Even those who agreed to the use of a tape recorder seemed to change demeanour the moment I switched the recorder on and would suddenly start choosing words and showing extreme care in what they say. It would appear that people associate a tape recorder with some sort of formality. Even members of organisations who had no objections to a tape recorder often asked me to switch the recorder off when they said something that they regarded as sensitive (e.g. power struggle among some NGO's in Khayelitsha). As a result of this apparent discomfort with a tape recorder, I decided, early in the study, not to use a tape recorder in respect of ordinary citizens. This was after I had observed change in demeanour in a few of them the moment I switched the recorder on and the ease that returned to the conversation the moment I switched it off. All these decisions were made in consultation with the interviewees and where I had been asked to switch the tape off so as not to capture some part of the interview, I made and honoured the promise not to include such 'off-record' information in the data. I must say, however, that such 'off-record' information has been of great help in clarifying issues and politics that influence the field of non-state ordering.

What I considered a serious ethical issue to deal with presented itself when one organisation invited me to participate in their strategic planning meetings where they were to plot against the other organisation which was also part of my research. This organisation had also tried to discourage me from

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of a small number of carefully selected people... than gathering a little information from a large, statistically significant sample" (Patton 1987:52, Hauck 1997:40).

interviewing the rival organisation at an earlier stage of my interviews. After explaining my ethical position as a researcher the problem was satisfactorily solved.

Another ethical dilemma that I faced came when two prominent members of two different community structures, in two different places, asked me for money to buy food as they could not afford to do so. These were requests made to me on personal basis because of the relationship and trust that had developed between us. It would not have been a serious ethical issue were it not supporting one of my findings in this research, to wit: people serving in these structures are the poor, majority of whom do not have a source of income. They are not rewarded yet they provide a significant service to the community. My ethical dilemma was whether to include this information in the data or not, and I eventually settled for referring to them only as 'prominent members of community structures', with the hope that no one else will be able to recognise them.

Data Analysis

As Hauck (1997:47), relying on Miles & Huberman, advises "analysis is the process of bringing order to the data 'sorting and sifting through these materials to identify similar phrases, relationships between variables, patterns, themes, distinct differences between subgroups, and common sequence". After collecting the data the first step was to have it typed. At this stage I dealt with the cassettes and notes in the order of interviews without concerning myself with their context and themes they may fall under. In the process of transcribing, however, I evaluated the data to see if I am addressing the themes of this research as set out above. As this research was one part of a four-sector research, I used the joint meetings with the other team members and the supervisory staff to weigh the data at hand and seek guidance regarding the next step such as what might be lacking from the data, what may be over-emphasised as well as identifying the interviews to follow up. The data analysis has therefore been done throughout the life-span of this study. The final analysis, however, took place at the end of the field research. It took the form of going through all the data and then studying the preliminary reports as well as the literature review and making sense, as it were, of all the available information.

I started the analysis by dividing the data into different organisations that the interviewees belonged to (e.g. all interviews of KCPF would be put together) with interviews of individuals also put together on their own. The next step was to go through the individual interviewees and find out what they had to say about each organisation/structure and where they referred to a particular organisation/structure such information was then put with the data relating to such an/a organisation/structure. The same was done with the views the structures/organisations hold about one another. These views are presented in the form of discussion (as paraphrased by me), direct quotation and anecdotes. As these quotations and/or anecdotes cannot be said to represent the whole data,[22] they are what, in my view, represent the typical

[22] *Bryman, as quoted by Hauck (1997:51) warns that "there is a tendency towards anecdotal approach to the use of data ... brief conversations, snippets from unstructured interviews, or examples of a particular activity are used to provide evidence for a particular contention. There are grounds of disquiet in that the representativeness or*

response of interviewees to a particular question or they relate to an issue that my reading of the available literature, the interviewees and/or participant observation identified as crucial relating to the phenomenon of non-state ordering.

generality of these fragments is rarely addressed". This is the shortfall I set out to avoid by presenting all views regarding an organisation (both for and against) under the heading where it is discussed.

Chapter 2

Access to Justice for Black South Africans in Urban Areas[23]

This chapter seeks to show that majority of black South Africans do not have access to justice and discusses the reasons for this observation. It then proceeds to suggest that legal pluralism is not only an option we have, but a necessity. The concept of legal pluralism, as it was during the colonial and apartheid periods, is discussed not only so as to contextualise the type of legal pluralism I propose, but also to de-demonise the concept of legal pluralism by rescuing it from, (borrowing Brogden & Shearing's phraseology), "colonial past and ... contemporary abuses" ((1993:185). I also trace the recent history of the concept (i.e. legal pluralism) in South Africa starting from the last days of apartheid to date, albeit a very short summary.

It would appear that diversity of social, and concomitantly that of legal, needs[24] necessitates diversification of the legal system in order to make justice accessible to all. Equality before the law must not of necessity, I submit, entail blanket application of one legal system for all, unless followed by concrete measures to ensure that that legal system accommodates virtues, aspirations and sense of justice of all and is practically accessible to all. Appropriate at this stage is to consider Pavlich's advise to "... acknowledge the importance of post-modern conceptions of law that recognise the importance of 'diversity' and contextual difference with respect to people and the legal institutions that ought to exist" (1992:41). Lessons from the colonial period should teach us that in a plural society the law can, and perhaps must treat the citizens equally by treating them differently if the law is to be the servant of the people. The line is very fine and the ice is very thin for skiing owing to racial sensitivities, birthed by the brutality of the apartheid style of governance. The danger of depriving some of the citizens of justice in the name of equality before the law manifested in South Africa during the colonial period. Brookes had something enlightening to say:

"Under the impression that Natives were so barbarous that their laws must be worthless, the Orange Free State has failed with one or two minor exceptions, to recognise Native law at all. Under the equally mistaken impression that any differentiation between Europeans and Natives in the law courts meant oppression for the Natives and an infringement of the principle of equal justice for all the Cape Province has similarly withheld all recognition of Native Law" (Van Niekerk 1995:67). The challenge of the new legal order, I think, is to avoid the two unholy extremes in reconstructing legality in the country. There has to be a clear understanding that political strides in uniting the people do not translate into social unity and it is in the latter that law is called upon to play a significant role as it is a

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[23] *Though many of the factors that contribute to inaccessibility of justice to black South Africans in urban areas apply equally to the rural areas, I focus on urban areas mainly because my research was conducted in the latter and urban areas and their ordering structures differ significantly from the rural areas.*

[24] *This diversity manifests in the form of different cultures, traditions, legal paradigms, notions of law and procedures as well as different notions of fairness and appropriate outcomes. It is a moot point as to who defines justice and when is justice really justice.*

vital instrument in the society.[25] Brogden and Shearing (1993:180) advise that "... the application of an equal measure to manifest unequals simply increases inequality. As the jurist, Pashukanis, once argued succinctly, conferring legal equality upon social unequals serves to reaffirm their inequality".

Equality before the law is entrenched in our Constitution, but should it be interpreted to mean same set of laws for all citizens irrespective of their socio-legal (or even economic) needs, status and background? Would that constitute access to justice for all South Africans? An answer in the affirmative, as may well enthusiastically come forth from some quarters would be an ideological blockade to access to justice. The most significant gain of South Africa was ridding herself of discrimination (be it on the basis of race, gender, class, age etc.). This, however, good as it is, has to be balanced by a humble realisation that such equality acquired at political level, has to be looked at through a different set of lenses when coming to legal reconstruction as a unitary (or universal) law is restricted by realities of the social field in which its application is to take place. The theoretical rhetoric of political and legal unity may not translate into practice with the result that the dominated class is basically denied justice simply because the rights equally available to all citizens have to be enforced "... (in an individualized fashion) within the context of unequal social relations" (Storey 1991:9). While discriminatory laws and uneven distribution of justice institutions contributed enormously to inaccessibility of justice to blacks in the past (and today), it would be simplistic to think that rectification thereof would translate into access to justice for them. Access to justice goes further than availability of official (state) institutions[26] and scrapping of discriminatory laws in that availability of structures, and perhaps well qualified staff to attend to legal disputes, is not enough to guarantee access.

The most important ingredient of access to justice seems to be congruency of law and its institutions with the values of the people it intends to serve as dictated by their socio-economic stage of development. Lack of this ingredient results in a (coerced) unity that neglects diversity, promoting some hypocritic belief that: being equally human and guaranteed equality before the law our needs and expectations are the same thereby insinuating deviance on the part of those whose needs or expectations from legality differ from our 'unity'. South Africa, at present, shows signs of this hypocrisy as far as we have legal institutions and set of laws that are in theory accessible to all while in practice a cluster of barriers conspire to deny majority of the citizens access to justice[27]. Those barriers are economic, psychological and geographical[28] in nature expressing themselves in varying degrees in

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[25] *See Sieder (1996:1) who details the importance of law in state reconstruction and as a vital tool in social transformation and an institution that regulates relationships among citizens and between them and the state.*

[26] *As Moult (2000:1), quoting the Deputy Minister of Justice, puts it: "it is one thing to have access to the courts, but what happens inside?"*

[27] *The case in point here is the plight of the majority of township dwellers who are practically denied access to state law as chapter 3 hereof hopes to show.*

[28] *E. Johnson, Jr. (Cappelletti and Garth 1979:8) identified geographical barrier as one of the factors that deny people access to justice. It is rightly placed together with economic and psychological barriers. I submit that a geographical barrier is the less serious, at least in South Africa, and therefore the less important of the three barriers identified by Johnson. The question of geographical barriers would be of considerable significance in the rural areas but not much so in the urban townships. Economic and psychological seem to be the main barriers to justice in the urban townships. The direct costs and indirect costs involved in litigation (ibid:1979:306) contribute significantly in denying potential litigants access to justice. Psychological barriers manifest themselves in people not understanding the law that they are supposed to invoke in case of need nor procedures involved. The Western*

their contexts of manifestation. The essence of this sad reality, in my view, lies in that the South African legal system has ignored the diversity rooted in the population and on that basis sought to uniformalise them, even through legality, by imposing institutions that are irrelevant and alienating to the majority of the population. The legal institutions may not be inherently irrelevant, but the timing of their establishment may render them so. One does not have to look hard to grasp this 'cause and effect' situation of legality in the country. Even a cursory look would reveal that popular justice exists exclusively in the black areas, or at least involves blacks. The absence of popular justice in white and coloured areas (or among white and coloured people) is explainable in that their values are congruent with the South African legal system and it is therefore relevant to them in terms of their needs and expectations. The contrary explains the situation in respect of blacks[29].

The non-state ordering structures satisfy the very needs that make the state justice inaccessible as the informal justice systems are quick, carried out within walking distances and in a language and procedures understood by the parties (Stevens 2000:11).

Sachs and Welch (1990:2) advise that to improve access the laws need to be popularised and simplified for easy understanding by the people and the procedures involved should fall within understanding of the people. Clearly the law cannot be said to be accessible to people if they cannot understand it. And how can people understand the law if it is so complicated that even the lawyers themselves do not understand it fully? It would appear that it would be an exercise in futility were we to attempt to popularise the state law in its present substantive and procedural form. On the contrary popular justice is, ideally, supposed to be popular already and needs no popularising.[30] The problem with popular justice is that it tends to be class orientated: it is the poor who dominate this arena. And further that the nature of non-state ordering makes uniformity and regulation difficult.[31] It should be clear that

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system applied by our courts is foreign to majority of black South Africans and so is the language/s used (English and/or Afrikaans). The long time that it takes to settle disputes in these courts worsens the situation and it adds to the already existing psychological barriers. A typical situation is as follows: A person feels s/he has been wronged, but does not know what the law says about the situation. S/he has no money to consult a lawyer for advice, let alone the cost of litigation - that is if s/he knows that a lawyer might be of assistance. Here we have a lethal combination of economic and psychological barriers augmented by ignorance on the part of the potential litigant. As if that were not enough, for an employed person litigation means endless days of absenteeism from work. So there is just too much against the ordinary citizen, especially the poor, in terms of access to justice, which is what informs the preference by many of them to rather use community justice structures.

[29] *Mangokwana has stated that in respect of blacks in South Africa the courts were geographically inaccessible, procedures complicated for the people, the language used foreign to the people and further that people who instituted legal proceedings in the formal courts risked their jobs (2001) as sitting times of the formal courts clash with the people's working times. The situation has not changed yet; the courts are still as inaccessible as ever, for those same reasons. It is that very fact that accounts for the flourishing of the non-state ordering, not only in South Africa and Africa as whole, but also in many other parts of the world. See Chapter 3 hereof for discussion of the present situation in the black townships of the Western Cape Province.*

[30] *The popularity of popular justice is not unproblematic at all as in its present status, as my research shows (in the second part hereof), popular justice movement has been subjected to a tremendous influence from the state and private justice.*

[31] *It would be extremely difficult to define community justice, its substance, its procedure and regulation. What constitute community justice in the Western Cape, for example, may differ significantly from what constitutes same in the Northern Province. See Schärf who exposes such non-uniformity even in one province the Western Cape (1989:178-9). Common sense, which forms an important part of popular justice, cannot be trusted as a fundamental part of a legal system of any people in the absence of the traditional socio-economic conditions that*

application of popular justice might not sit comfortably with the South African Constitution (yet it can be made to do so through working on both)[32], which, among others, guarantees same set of laws for all the citizens. A closer look at a simplistic promotion of community justice structures would really mean promotion of a set of laws for the poor and another set for the rich, and that is, not doubt, a perfect recipe for disaster.

It is hardly overstating one's case to say that in South Africa, as in many other countries, there is clear discrimination when it comes to access to justice in respect of state law. It is the middle class, mainly white in South Africa, who can afford the costs of litigation and as a result of their wealth can shop for the best legal advice in town.[33]

The question of access to justice, if my analysis holds, can therefore proceed from the premise that the state justice in its present form cannot be popularised and made accessible in practical terms and that non-state forms of ordering in their present form cannot be accepted as a complete legal order to be applied by the people. Constraining myself from arriving at the apathetic conclusion that nothing works, I think, the question should be: what do we do to both non-state law and state law to create a system that is more accessible to all South Africans without promoting class discrimination in the sphere of justice, yet not neglecting the diversity of the population? This debate would therefore lead us into entertaining the question of legal pluralism, which seems to provide some answers. The belatedness of South Africa's liberation (or independence in the context of colonisation of special type as discussed by Storey (1991)) provides an advantage in that we can learn from other African countries and the message seems to be that pluralism is bound to increase after independence and therefore in addressing access to justice we should not aim at a unitary judicial system, just for the sake of unity (as that equals hypocrisy), but at drawing from all the systems that are part of our ordering, yet conscious that it is only interaction, not static pluralism with its colonial distortions, that is desirable. As chapter three will show, the township residents' access to justice is restricted by psychological, economic and

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sustain it and in the face of the transition undergone by the population, as results of my field research, augmented by the inroads made by private justice and the state into the popular justice structures, imply. It is this non-uniformity and uncertainty of the non-state justice that, I think, accounts for its constant shifting of boundaries (Abel 1982:2), augmented by inconsistency on the part of both academics and activists (Nina & Schwikkard 1996:69). How more problematic will it be for the ordinary people and the state? It would be more problematic for the latter as provider of security and peace or at least as one of the important institutions shouldering that responsibility. Sachs' (Sachs & Welch 1990:102) advice is most appropriate to dismiss any romanticism or any prejudice that may be attached to non-state ordering: "community justice is not in itself more fair or less fair than any other forms of justice. Its ambit needs to be clearly defined and its competence limited".

[32] After all even the state law cannot be said to be sitting comfortably with the Constitution, hence we had many laws being declared unconstitutional and had that been the case there would have been no need to have a Constitutional Court in the first place.

[33] Recently, I heard of a driver who was caught speeding and fined R8000.00 that he paid and was duly released. That shows how money buys justice for the rich. A poor person would not have been able to raise that amount and would as a result have been taken to jail. This was on radio news during the festive season 2000. This situation is similar to what happens daily in the state courts. A disturbing picture of this fact can be seen in the bail law where majority of prisoners awaiting trial sit in prison because though a bail amount has been fixed, they simply cannot afford it. See Paschke 1997. One can therefore argue that poverty, not the law, keeps them in prison. By extension even at sentencing level, the likelihood remains that such people may have to serve prison sentences simply owing to their inability to pay fines that may be imposed.

geographical barriers and there is plurality of ordering in the townships. When I propose legal pluralism (which I do later herein) I am not inventing a new form of ordering. I am proposing a realistic approach that takes into account the fact that the state law is inaccessible to majority of blacks; that there are mechanisms in place that afforded them ordering, etc. I propose that in order to make justice accessible to these people the state law should be transformed further (and this is very important) by ridding it of the barriers identified above and the non-state ordering structures should be encouraged to continue functioning, but they must be regulated. That suggests that there can and should be coexistence of state and non-state structures.

Legal Pluralism

Legal pluralism refers to the existence of more that one ordering system at a given time in a community and such coexistence could be one in which the systems co-exist with their relationship being that of relative harmony and that in which the relationship takes a form of conflict.

The former would, for example, be where the state law co-exists with other forms of non-state law and they cooperate one with the other or even just tolerate each other. Such a relationship would be manifest especially in respect of private justice, as where the non-state forums are headed by NGO's as such forums tend to accept, support and submit to the state law as experienced in South Africa at present[34]. The other situation would refer to where the non-state forums operate in resistance to the state law. Santos' definition of popular justice tends to put it as falling within this category clearly based on the particular manifestations of this phenomenon as witnessed in Portugal and Brazil[35]. It is, however, not wholly reflective of popular justice movement, especially in a set-up like the present day South Africa which has clearly moved away from that form and assumed a new dimension. One can no longer comfortably class the popular justice movement, as in resistance to state law[36].

Developments that took place in South Africa during the past two decades show that the popular justice movement manifested in diverse ways at different times starting from the civic movements of the late 70's to the early 80's and then being invaded by politicisation of the movement in the mid 80's. The effect of the transfer of political power was that the popular movement was purged of its spark of resistance to the extent that we now talk of co-operation between them and the state. It is this co-

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[34] *As chapter 5 will show there appears to be a close relationship (which I ventured to call 'intimacy') between the present state and NGO's that participate in non-state ordering. Peace Committees of the CPP are a perfect example in this regard as the Discussion Paper, discussed in chapter 5, has been produced in close consultation with them (i.e. the CPP). In the CPP's own words: "The 'Zwelithemba model' has been explicitly endorsed by the South African Law Commission, whose Discussion Paper (Paper 87, Project 94) on 'Community Dispute Resolution Structures' was* ***developed in close consultation with the CPP****. The Law Commission is at present preparing legislation to give some form of recognition to Peace Committees" (CPP 2001:5 – emphasis added).*

[35] *See Santos' work on Portugal (1982) and Brazil (1992)*

[36] *This is not to suggest that popular justice, or even community justice at large, is in harmony with state law because it retains its character as an antithesis to state law. What has changed, at least in the researched townships, is that community justice sees itself as, and seeks to operate in, a complementary way to the state. The*

operation that demands a relook at the nature of this relationship of co-operation within the context of legal pluralism. This becomes even more significant when we consider the inroads made by private justice and state justice into communities traditionally left to popular justice. We have moved at least two levels, away from the nature of legal pluralism noted by Nina & Schwikkard as follows:

> "... an 'old' legal pluralism, that is, the relation between state law and indigenous law in Africa - the latter conceived as a variety of so-called traditional and customary law" (1996:70).

Their definition is clearly reflective of a situation where the Western system applied on parallel basis with African system as it was in South Africa before the changes ushered in since the transition period when the two systems operated as two entities mutually influencing each other. Even then, though, theoretical lenses produced by the old legal pluralism (or legal dualism) restricted the discussion to the officialdom of the system, which resulted in theoretical inability to completely engage with legal pluralism in a way that looked at it in its entirety, such as when, as Van Niekerk observed, the indigenous structures (such as courts of chiefs and headmen) wore two caps by operating as part of and within the parameters of the state law while they further acted *ultra vires* when they handled matters legally placed beyond their jurisdiction.[37]

The foregoing notwithstanding, however, there was a clear line as to the sphere of the two systems or entities: the one applied to blacks only and the other to whites with universal application mainly based on discretion of the courts. With that line now a bit obscured, as a result of the official end of racial discrimination, the social field has broadened and the interaction, in that same field, becomes more complex. It follows that the initial definition of legal pluralism would not be wholly true this day, hence the new legal pluralism which Merry (1988:872) defines as moving "away from questions about the effect of law on society or even the effect of society on law towards conceptualising a more complex and interactive relationship between official and unofficial forms of ordering. Instead of mutual influences between two separate entities, this perspective sees plural forms of ordering as participating in the same social field".

It is in that line that I now proceed to briefly consider legal pluralism by looking at the interaction among the elements that constitute it and I divide the discussion into historical and contemporary (and possible future) interaction.

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only exception is PEACA in this regard, though PEACA also sees itself as complementary to the state, their activities cast doubt on the sincerity of their role, as it will appear in chapter three.

[37] *For instance courts of chiefs and headmen instituted and recognised by the state would deal with matters wholly reserved for the formal Western courts (See Van Niekerk 1995).*

The Historical Interaction

Legal pluralism in South Africa traditionally concerned the coexistence of the Western legal system and the indigenous African legal system with the latter manifesting in both official and unofficial structures participating in legal ordering, yet the unofficial element thereof being somehow excluded from the interaction.[38] While unofficial tribunals continued to settle disputes throughout the colonial period, parallel to the state law, this realisation only struck the South African authorities in the 1960s, when as Bennett noted, it was discovered that most of disputes among blacks were handled via the unofficial tribunals (Bennett 1991:90). It was in the 1970s that the flourishing of unofficial tribunals became evident. As this can in no way be seen as showing that the unofficial structures started emerging during this period, the probable account for their coming into the light, as it were, could perhaps indicate that it had eventually registered to the authorities that these structures were there to stay and could not be ignored. This becomes clearer when seen against the backdrop of all legal developments that preceded the 1960s.[39] Perhaps it was only from the 1960s that the undesirability, unjustifiability and inefficiency of the formal structures and the indispensability of the non-state ordering structures commanded attention too loudly to be ignored.

Seekings' (1994:2) observation shows that blacks have always had their own dispute resolution mechanisms existing parallel to the state structures established to serve such a purpose. Court-like structures emerged in different parts of the country and what strikes me is that they emerged without any networking or any form of co-operation, yet they were similar in nature, unlike today where there is a considerable amount of communication networks among the structures and a clear agenda of influence from both private and state law, as seen in the progress made thus far.

Schärf and Ngcokoto (1990:344) seem to hold a view similar to Seekings, which, it is submitted, is well founded:

> "With no credible formal adjudicative structures to use, Africans perforce resorted to their own informal structures, taking on various forms, and using a range of enforcement options,

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[38] *The main facets that characterize the South African system may be outlined as follows (as drawn from the sources in brackets):*

- *The precolonial indigenous law (See Van Niekerk 1995:37-47)*
- *The Western legal system (Bush 1979:229)*
- *The official indigenous law (See Van Niekerk 1995 – especially pages 53 to 75 where the developments of each province are discussed)*
- *The Unofficial indigenous law (Moses 1990:48-97 ; Van Niekerk 1995: 99-128)*
- *The contemporary non-state legal system (As discussed herein)*

Features of each of the above facets manifest in the South African legal system today.

[39] *In order to deal with blacks the Black Administration Act (38 of 1927) had been brought into being. With it and on its basis, Commissioner's courts, Courts of Chiefs and Headmen, the Black Divorce Court and other structures had been brought into existence to settle disputes among blacks.*

starting from 'private' police forces in the form of makgotla, peace-keepers or vigilantes to neighbourhood moral pressure"[40]

As the black South Africans continued ordering their lives in the ways best known to them and serving their needs, the state also realised that something had to be done. The Hoexter Commission was introduced to look into the functioning of the courts. It had been realised that these "courts had subjected Africans to a far lower standard of justice than practised elsewhere". (Bennett 1991:81). On a recommendation of the Hoexter Commission, the Commissioner's courts were abolished and the Small Claims Courts came into existence. It was this step that boosted internal legal pluralism within the state law and unlike in the past it was not based on racial classification.[41] This was all done as a measure to address the problem of access to justice (Bennett 1991:87) as, for instance, it was hoped that justice would be more accessible in the Small Claims' Courts primarily because its procedure would be simple, inquisitorial and, most importantly, the costs would be low. Van Niekerk (1995:80-81) rightly points out that the Small Claims Courts did not seriously address the problem of access to justice in respect of blacks. The barriers to justice remained pervasive; e.g. the language barrier was not addressed at all.

It has to be remembered that the Hoexter Commission was brought into being in the 80s during the time of intense political struggle for liberation of the black masses and administration of justice was part of the battlefield (Schärf & Nina 2001:43; Nina & Stavrou 1993:4). And it was during this period that "popular justice developed a more systematic way of functioning" (Schärf &Nina 2001:43). It is this period that clearly shows the parallel development of the popular justice and the state law.

One could ascribe to the 80s, the fierce struggle between the state and the black people, which was manifesting in their respective senses of legality and therefore values they espoused. The state embarked on measures to legitimise the legal system in the eyes of the black people on the basis of the Hoexter Commission's recommendations. While still busy with this process it became evident that more than a soft approach of reforming the judiciary was necessary. This was dictated by the reality of escalation in resistance and defiance of the legal order and its (resistance's) threatening position as an alternative ordering clearly undermining the state legality. Moses relates a statement that reveals the attitude of the state towards the uprisings contained in the following quotation:

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[40] *This observation clearly refers to the urban black areas as the rural areas had established institutions of ordering. I submit that it be seen in the context of blacks being plunged into urban life without any supportive structures of ordering and therefore developing their own system. Borrowing from Hobbes' theory, this development may be seen as the origin of an alternative sovereign as the main (state) sovereign excluded them. This discourse suggests that the absence of a sovereign results in chaos (See Nina (2001) for a discussion of this theory in the South African context).*

[41] *See Corder 1985 for discussion of the Hoexter Commission's recommendations regarding the Small Claims Courts especially page 83.*

"People's courts is 'n faset van in veel groter strategie wat gemik is op die vernietiging van die staat." [42](Moses 1990:91).

This statement bears testimony to the fact that the battle had assumed political connotations, more clearly if it had not been so clear right from the beginning, with the state reacting in a repressive and brutal way to this development (Van Niekerk 1995:101; Moses 1990:88).
The response of the state becomes well positioned if it is borne in mind that local township courts were used intensively and actively during 1984-6 when community solidarity and discipline were paramount and that people's courts were formulated under the auspices of the United Democratic Front (UDF). According to Burman and Schärf (1990) these structures were positioned to be in opposition to the state and to prefigure a post-apartheid legal ethos. Seekings states: "...many younger political activists understood and portrayed the people's courts as prefiguring post-apartheid ordering structures" (Seekings 1994:18).

In sum: from the time of colonisation to the mid 80s we see efforts on the part of the White government to subdue and control Blacks. During this period, also glaring is reluctance on the part of Blacks to toe the line. From the mid 80s to the early 90's, active defiance of the government's social control structures manifests itself. It is at this stage that the South African legal system undergoes a major paradigm shift with the state clearly showing willingness to be transformed certainly under the influence of political changes that took place at the time. The current legal order, discussion of which follows directly hereunder, began right at this stage.[43]

The Contemporary and Possible Future Interaction

The basis of legal pluralism in South Africa, as in other African countries, is that the Western legal system and the indigenous African traditional structures operated parallel with each other with the former having imposed itself upon the latter (Van Niekerk 1995:56-69; Chanock 1991:52-70), though such an imposition was not completely successful in that blacks continued to apply their own traditional dispute resolution mechanisms outside the official terrain (Schärf and Ngcokoto 1990:344), with or without the state's blessing. It is this persistence in adherence to their own indigenous structures on the part of Blacks that accounts for the existence of non-state ordering as seen in the townships today though to a considerable extent they owe their existence to Westernization as far as they have embodied some of the latter's features.[44]

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[42] *The English equivalent of this statement is "People's Courts are a facet of a broader strategy aimed at undermining the state". Moses (ibid.:89) quotes this statement which was contained in a letter dated 14 April 1986 written by the Attorney-General of the Witwatersrand to the Director General of the Department of Justice.*
[43] *The liberation movements and the Apartheid government embarked on negotiations towards the late eighties, which culminated in the non-racial government currently in office. See Storey (1991:58).*
[44] *It is submitted that the forms of non-state ordering are not traditional indigenous structures, but rather structures of own breed owing their birth to the interaction between the Western and African traditional dispute resolution mechanisms. The hybridous process has been gradual and more evidence of its impact is still to be seen in the urban areas as transition of the people progresses and the interaction involving the state and community*

It is the existence and application of the state (official) law on the one hand and that of the African indigenous law on the other that traditionally constituted legal pluralism in Africa, but with independence a shift has been experienced as seen in other parts of the continent and that sums up a trend also emerging in South Africa. Bush noted:

"In practical terms the resulting pattern of continued pluralism includes: (a) the retention of customary procedures for dispute settlement, whether as official customary courts per se or as unofficial but recognised extrajudicial mechanism; (b) the continuation of a relatively formalised judicial procedure, on the Western model in the higher courts; (c) the introduction of an intermediate type of forum as an official lower court, with regularised but simple procedures and a paraprofessional staff; as well as in some cases; (d) the introduction of still other intermediate or alternative forums, ..." (1979:300)

It is worth noting that though Bush's description allows for existence of unofficial 'extrajudicial mechanisms'; it is restricted to the domain of officialdom in that it accommodates the unofficial structures/mechanisms as recognised by the state. It remains a debatable question whether ordering should be wholly state regulated or some part thereof should remain outside state regulation and if regulated , the extent of such regulation[45].

This becomes important when we consider Bush's further observation that juridical pluralism has not only continued, but African countries became more pluralistic after colonisation (ibid.). We now see South Africa, for example, becoming more pluralistic than it was during colonisation and the apartheid era. This trend contributes to legal pluralism in that with the people becoming more pluralistic so do the structures they employ for their legal needs. Concomitantly, a variety of modes of ordering, interacting in the same field, increase. This discourse sits comfortably with Ralf Dahrendorf's view[46], who contributing to the Marxist theory, observed the working class of today "as a stratum differentiated by numerous subtle and no-subtle distinctions" (Siegel 1998:231). This becomes even clearer when coupled with Bush's apt observation that: "a new sector has been recognised in the populace consisting

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structures intensifies. Even at present, it is clear, that community justice structures stand somewhere between the two systems and cannot be put wholly in either.

[45] My submission, which will be developed later herein, is that the state should be primarily vested with the responsibility of all forms of legal ordering. Though there is a lot of ordering taking place outside the state, especially among black South Africans, and that it will proceed for a long time, I opine that if the state law is made more accessible and accommodates expectation of the diverse population, it has the potential to serve the whole population in line with the democratic principles of the country.

[46] Though Dahrendorf was probably dealing with a people different from South Africa under circumstances equally different, I am struck by how reflective of the South African population, urban black (in townships) in particular, his notion of " imperatively coordinated associations" is. He said this in deviating from Marx's original dichotomy in his concepts of class, state and conflict. The underlying observation, which makes it relevant to our situation, is the extent of transition that occurred between Marx's time and his (a century apart). The constituency within the working class has become more pluralistic. By analogy, the constituency of the urban blacks has changed and our research into their legal ordering has to take that factor into account, "especially given that a significant sector of the black population occupies the informal sector and, strictly speaking, does n't qualify for the label working class. Marx would have called them 'lumpen proletariat'. But that would n't work in South Africa. Informal sector is yet one more fragmentation of the poor" (Personal communication with Wilfried Schärf).

of individuals – and even whole communities – in various stages of 'transition' between the customary and modern (i.e. European style) worlds" (1979:229-230). That "sector" could only have increased now two decades after the writing of this observation. This observation is vindicated by Schärf's assertion that affluent blacks (in South Africa) do not use the traditional ordering structures (Schärf 2001:45), at least, as far as it confirms the non-homogeneity of the population and the existence of the stratum in the community as suggested by Dahrendorf, and by extension, I submit, to socio-legal institutional preferences as shaped by the obvious non-homogeneity of values. Friedman, focusing on the South African situation has also recognised the existence of such stratum in both the white and black communities in asserting that in considering socio-economic policies, it would not be appropriate to neatly dichotomise in terms of " ... 'whites' and 'blacks' and 'haves' and 'have nots' because within these labels are groups which are affected differently..." (1991:2).

Legal pluralism has taken on a new dimension and Van Niekerk (1995:4) refers to this form of pluralism (i.e. new legal pluralism) as legal pluralism in a wide sense while per her definition, it contrasts with the legal pluralism in a narrow sense as in South Africa which would better be referred to as legal dualism owing to the fact that it implied existence of two main legal systems officially recognised. It would appear that we have now broken the boundaries of officialdom and therefore can no longer focus on the formally recognised law, but on forms of ordering (state and non-state) and their interaction and influence in our quest to do justice to the legal pluralism concept thereby enhancing its contribution towards crushing the cluster of barriers to justice. That approach would be more in line with what Bush (1979:229-230) calls "dynamic pluralism" (as opposed to static pluralism) which concerns itself with the interaction between the different elements of the pluralistic system.

One has to realise that we have many forms of ordering in South Africa today and that each one has its separate identity and is not capable of reducibility to the other/s. Just as private justice is a legal phenomenon of its own nature and differs from the other modes of ordering and therefore cannot be reduced into any of the other modes without losing identity and its advantageous features, so is popular justice and obviously, state law. This observation fits squarely into Griffiths' definition of legal pluralism:

> "...the (variably frequent) presence within a social group of multiple legal orders, where the existence of a separate legal order entails the existence of a distinct rule of recognition: that is 'separate' legal orders are not reducible the one to the other" (1985:68).

This relationship between the dominant and the dominated legal orders has its history in South Africa and seems to be allowed to proceed, though not with the same intellectual arrogance and coercion. It would appear that the reducibility of one system or mode to the other/s is not capable of implementation if any success is to be achieved, what remains within realm of reasonable possibility, and apparent likelihood in South Africa, is forging of some sort of a working relationship among the modes within the country's pluralistic legal system. The question becomes: what can we do to each of these modes of ordering to make each more accessible and better suited for a harmonious relationship

with other modes? How do we produce a dynamic pluralistic legal system that is constituted by all the modes in which all of them benefit from cross-fertilisation in the interest of better access to justice for all? The concern with this project would be that the field of play is not level in that the Western system has already apportioned to itself the status of the dominant system. From that position, it is the Western system that would define the parameters of the relationship and further determine jurisdiction of the other modes of ordering.

The concern is not much the nature of the Western legal system (as a phenomenon) dominating the rest on ideological basis, but rather that, I argue, the status of the legal system as representative of the social and economic status of the people using it. I cannot imagine a system of any dominated group being equal to or even dominant over that of the dominant group. That, I submit, would be a sociological contradiction in terms. The strength or otherwise of a legal system seems to be, to a great extent, dependent on the resources available to it.

Reality therefore dictates that the Western law (which dominates the South African State law) will remain dominant within the legal pluralism in the country even under evaluation through the discourse of the new legal pluralism. The change brought by this discourse is that it equips us to evaluate all the different modes of ordering in the community (Nina & Schwikkard 1996:69). It would therefore allow us to recognise the rampant limitations of the state law at local level (Nina 1993:18) and soberly accept its dominance without confusing dominance with effectiveness (or success) and guided by that misconception, ignoring the input of other forms of ordering which though dominated complement the dominant system and have the potential to do better given the necessary support. The dominance of the state law therefore cannot be ignored and the relationship with other forms of ordering ought to be seen from that perspective. Sieder's warning that "... any notion of dual or plural legal systems, which implies equality of systems, is inherently flawed" (1996:11) should be kept in mind in our consideration of legal pluralism in South Africa. Once we appreciate the strengths and weaknesses of all the elements constituting our pluralistic legal system, the better equipped we become to use all of them in a complementary way and the plasticity that allows mobility and cross-fertilisation among its (dynamic legal pluralism's) elements, will have room to make it evolve into a legal system mirroring the diversity of values within the country.

Among the weaknesses that we will have to accept is the disturbing feature of non-state ordering in its practical status as an inferior form of justice in that, among others, it does not enjoy the coercive muscle the state law boasts and, even more unsettling, that it reflects the inferior status of those who apply it. In the words of Abel: "... Help is always extended downwards – the very relationship of helping is inherently unequal. Because the personnel of informal institutions are of relatively low status, those whom they help must be even lower" (1982:6). This certainly holds true in South Africa where while majority of blacks use non-state forms of ordering, the affluent blacks do not use these forms of ordering, as observed by Schärf (2001:45). This observation accords with world-wide trend, save the restriction to blacks in respect of South Africa.

Some comfort, however, may be derived from the fact that equality of systems is not a prerequisite for the existence of legal pluralism. On the contrary, inequality seems to characterise legal pluralism, and in my view that is its strength as far as it accords with and genuinely reflects the undeniable inequality that characterises society. Dominance, therefore does not make dynamic legal pluralism impossible. It would be ideal to have equality of all legal systems, but that is not an ideal to be seriously entertained at all owing to the unequal progress already made in the development of the legal system, all informed by, in sum: the imposition of the Western legal system upon Africans by the colonial overlords; the undue capture of the indigenous African laws into static law, the political influence of the 80's on the people's courts; the current legal reforms spearheaded by the present government and the impact that all those factors had on non-state ordering; against the backdrop of the current inaccessibility of justice to majority of black South Africans.

The beauty of dynamic legal pluralism is that it does not demand of us to pay attention to the past and the fairness thereof with the aim of redress, but it allows us to look at the present status of the systems, with pragmatic lenses, and diagnose their interaction on basis of their present form. Hence despite the undue enrichment afforded the Western legal system at the expense of other systems, dynamic legal pluralism makes it possible for us to accept it as a player within the pluralistic interaction, and benefit from its strength while it is complemented by other forms of ordering.

The next chapter demonstrates that there are currently diverse modalities of ordering within the communities. It describes each structure, its modus operandi and analyses them. While the present chapter has briefly outlined the history and philosophical underpinnings of this field in a general sense, the next one looks at specific manifestations of this phenomenon in one Province (the Western Cape). It hopes to use experiences of this province (more accurately some townships in that province) as a cases study to show that in deed there is plurality in ordering and that this field has reached a point of no return. This empirical evidence is aimed at supporting my suggestion for a legal system based on dynamic pluralism. It seeks to take the theoretical discourses discussed in the present chapter and test them against real day to day experiences of the grassroots level of the South African black townships and vice versa. The link between theory and 'real life', as it were, should be forged if a holistic approach to legal reform is to be realised, lest the delinking between policy and practice and concomitantly poor (or lack of) implementation will continue to haunt us. This is especially true in respect of non-state ordering where such a delinking between policy and prevalent tendencies would just entail mushrooming of more structures, often unaccountable and threatening to other people's rights. That is over and above the waste of resources invested in such legal reform were it not to bring about tangible changes on the ground.

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Chapter 3

Research Findings

This chapter looks at some of the structures involved in non-state ordering in the black urban townships of the Western Cape Province. While these structures cannot be said to be representative of non-state ordering in the whole of the Western Cape nor of all the structures in the locality where they operate, they undoubtedly represent the most active and/or best known of the structures. These are community policing fora as structures that straddle state and non-state ordering, Contralesa as a structure most representative of chieftainship-based methods of dispute resolution, street committees as urban popular justice structures with a history of skirmishes with the apartheid government, Peninsula Anti Crime Agency (PEACA) as a structure that emerged in the post 1994 South Africa as well the Peace Committees that are a product of the private justice movement. I first detail the descriptive features of each one of these structures and then provide a short analysis so as to contextualise and link it to the current theoretical debates of the field.

Community Policing Fora[47]

The community policing fora are structures that vividly bear testimony of police change in South Africa. In the words of Pelser (1999:10), they are "... the most visible, if not the only, expression of South Africa's community policing policy". The Community policing concept was introduced into the South African policing policy by section 221 of the Interim Constitution (Act 200 of 1993) and then legislated through the South African Police Service Act 68 of 1995 (Pelser 1999:10, Tait 2000:12).

The Khayelitsha Community Policing Forum (KCPF)[48] was formed in accordance with the new vision of the South African Police Services (SAPS) and its inception took place in 1995/96, as was a trend in other provinces.[49] KCPF has an executive committee that was elected by the community at a general meeting. Community structures (such as SANCO) and the SAPS are represented on the KCPF. On 19 April 2001, I visited the police station and found that the relationship between the SAPS and the KCPF has gone a step further in that an inspector attached to the Crime Prevention Department of the SAPS now sits in the KCPF office with the secretary of the KCPF. KCPF is unusual in that it claims legitimacy over any other community structures as far as representativity of the whole community is

[47] *The report on Community Policing Fora is based on interviews with members of the CPF's in Khayelitsha, Gugulethu, Mfuleni as well as UMAC. Though the foregoing form the primary source of the information contained herein, interviews of other community structures and individuals have also been used.*

[48] *While CPFs of other areas have been included in the interviews, the KCPF is one that received more focus in terms of the number of interviews as well as participant observation.*

[49] . *See Kushlick et al 1995, for example, in relation to Gauteng and Tait 2000 in respect of Gugulethu in the Western Cape Province. Also see Tladi (1996) for a discussion of the CPF's, their genesis and functioning.*

concerned. Based on that legitimacy it is seen by some of its members as superior to all other structures. According to an interviewee (a member of the executive committee) KCPF is 'the only legitimate structure and everything and every project in the community ought to be done through this structure'. This view is however not shared by other structures such as SANCO, PEACA, Peace Committees nor is it the official policy relating to CPF's.

Members of the KCPF are involved in other structures such as SANCO, Khayelitsha Business Forum and the Reconstruction and Development Programme(RDP). My impression of KCPF, based on interviews of different leaders and participants as well as my observation in their office, was that it is 'a one stop forum' where all problems are attended to and all issues affecting the community are addressed. Some of the cases are brought directly by individuals while others are referred to the KCPF by other structures such as street committees.

Further to settlement of disputes in the community, the KCPF also runs neighbourhood watches as a crime prevention strategy. They have a good working relationship with the SAPS (Khayelitsha).[50] The only organisation, to my knowledge, that openly disputes the legitimacy and efficiency of the KCPF is PEACA. The charge is that "community police forum just occupies offices at the police station and receives money while they do nothing for the community." (Co-ordinator of PEACA).

A blurring of functions appears in areas like Mandela Park, Khayelitsha, where one finds both SANCO and subforums of the KCPF operating without a clear demarcation of jurisdiction. They both attend to cases affecting the family and minor neighbourhood disputes. Both refer serious cases to either the police or the KCPF. There are no directives concerning whom referrals are to be made to. Talking about referral of cases a member of the executive committee of SANCO local, in Khayelitsha, said:

> "If a case is serious or cannot be solved despite our efforts or one of the parties is not satisfied, we approach *the police forum or the police"* (Italics added for emphasis).

It seems that to a considerable extent, referrals are left to the leader's discretion. What appears to be a new trend is that referral of some cases by street committees does not go to higher structures within SANCO hierarchy, but to KCPF. In the past referrals from SANCO area branch would go to SANCO local. Some see KCPF as having now assumed this role. For example, the current secretary of KCPF said that there are times she went to attend street committee meetings where a decision had been arrived at and one of the parties had approached KCPF on grounds of dissatisfaction. In such an instance she would go and attend the meeting and "... solve the problem".

My interviews with members of KCPF and SAPS reflect that KCPF invariably refers criminal cases to the police and thereafter monitors progress of the resultant investigation. They also handle cases

[50] *This is based on my interviews with SAPS and KCPF members as well as my observations on my research visits to Site B and Harare Police Stations in Khayelitsha.*

involving 'imigalelo'[51] and family members. Sometimes family matters are referred back to street committees. Even here discretion plays a very important role. For example, when a young lady who had run away from home approached the KCPF, as she was afraid of her father who would punish her for having run away from home to a boyfriend, the secretary of KCPF took her home. I accompanied them to the house, where the secretary successfully pleaded with the father not to give her a hiding. When the secretary herself was robbed of her belongings, she took it upon herself to mobilise other people and looked around for the culprits until they found two of them in the possession of some of the stolen property. When these suspects were granted bail she took it upon herself again, with the assistance of the KCPF chairman, to confront both the police and the senior prosecutor. The result was that the investigating officer was changed and a warrant of arrest was issued for the suspects to be rearrested. Throughout she kept the investigating officer under tremendous pressure to ensure arrest. The character of individual members and their use of discretion, therefore, have a tremendous influence on the functioning of KCPF, especially in light of the lack of clear guidelines regarding the structure's modus operandi.

Yet one day while I was interviewing another member of KCPF in their office and generally observing how she dealt with the cases/complaints reported, a different picture emerged. A man walked in and reported that he had a quarrel with his girlfriend and needed help to solve the problem as she was threatening to harm and destroy his property. The KCPF member listened to him and then told him to report the case to his street committee and if it does not help, he was to obtain an interdict against her.

The secretary, who was absent at the time, thought an appropriate thing would have been for her to approach the girlfriend and convince her not to carry her threats out, failing which she would help the complainant obtain an interdict immediately.

Further to the discretion allowed, the character of the particular KCPF member seems to be very significant. It would appear that the ability of the secretary to confront respondents, SANCO street committees and the police account for the perceived success and efficiency of the secretary as a person, not so much the institution itself. A less confrontational/courageous person may find it difficult to perform the task.

While KCPF undertakes community dispute resolution, this is not a tendency of other community policing fora in the Province. In Gugulethu, the community policing forum restricts itself to being a liaison between the SAPS and the community. They have neighbourhood watches that fall directly under the Gugulethu Community Policing Forum (GCPF). GCPF does not involve itself in settlement of or resolution of disputes among community members at all. This is a role left completely to Sanco street committees. According to the current secretary of the GCPF, if a person comes to report a dispute to GCPF, they refer him/her to his/her street committee immediately. The same procedure

[51] *This refers to a saving scheme in terms of which a group of people save money together to be distributed at the end of a specified time period (normally during the festive season).*

applies in Nyanga and Mfuleni. It therefore appears that KCPF is more of an exception in this role as a dispute resolution structure.

Congress of Traditional Leaders of South Africa (Contralesa)[52]

Contralesa, an organisation comprising of traditional leaders, was formed in 1987. It has been actively involved in the South African political life since its inception when it positioned itself against the apartheid government. It consistently advocates rights of the traditional leaders either through itself or through individual members within the South African House of Traditional Leaders. Recently traditional leaders and the government have been at loggerheads around the functioning and powers of traditional leaders within the new democratic framework. That dispute is not resolved yet. For the present purposes it suffices to restrict our discussion of Contralesa to its role as a dispute resolution structure, save to state that Contralesa is apolitical as an organisation while its members are free to join any political organisation of their choice. This organisation, however, entered into an alliance with the ANC in the past and it is of the opinion that it played a critical role in the ANC's election victory. They say the only provinces not won by the ANC in the 1994 elections are the ones in which Contralesa is not active, namely the Western Cape Province and Kwazulu-Natal.[53]
Contralesa is an organisation that traditionally belongs to the rural areas where chiefs and headmen still lead their tribes and clans. By the nature of urban townships, it would be difficult to have chiefs reigning in the urban areas. One of the reasons obviously being that the members of different tribal or ethnic groups share residential areas. It would then be difficult to identify a chief to rule over a particular residential area.

Contralesa has, however, started establishing itself in the urban areas, including the Western Cape where it has branches in Strand, Khayelitsha, Langa, Crossroads, Nyanga (KTC), Gugulethu and Phillipi. They aim to afford Africans a home from home, which means they wish to implement rural ordering mechanisms in the urban areas. Their membership fee is R10.00 per year and anyone over 18 years may join the organisation. They find urban ordering structures alienating for Africans with a rural background. As the interviewee put it: " the urban structures such as SANCO are too urban for the people". The first branch of Contralesa in the Western Cape was introduced in 1996. According to the interviewee they have, however, been trying to give the chiefs a voice in the Western Cape from as early as the 60's through the 70's and when youth structures started abusing power in the mid 80's (e.g. necklacing of people), it became clear that the chiefs were the only solution. But the chiefs could not unite and act, as the political conditions were not favourable. On the one hand the government repressed the chiefs and would only use the chiefs and headmen for their own ends. On the other hand

[52] *The report on Contralesa is based on my interview with the chairman of Contralesa in the Western Cape on 19 April 2001. His name is withheld in line with a promise I made to him especially in light of the personal information that he volunteered (e.g. inability to pay his child' fees as discussed later herein).*

the popular structures such as the ANC, ANCYL, PAC, etc. saw them as anti democracy and a hindrance to liberation.

Even at present Contralesa still has problems with other community structures such as Sanco who have objected to the existence of Contralesa in the townships of the Western Cape because according to Sanco, the interviewee said, "there is no place for chiefs in the townships"[54]. Contralesa aims to engage the government in creation of jobs for the people as well as building of necessary facilities such as schools and clinics. In the words of the interviewee of Contralesa, those are the things they "will demand and fight for". To that end they would like to have new residential areas built to alleviate accommodation crisis as there is a lot of unused land and it does not make sense why people should live on top of each other in the present townships. Such places would then be under the authority of chiefs who would run them exactly as they do in the rural areas.

More relevant for the purposes of this dissertation is the fact that Contralesa would like chiefs and headmen to settle disputes among residents. They would further organise people to patrol the streets at night so as to prevent crime. This, according to the interviewee, was done in the Crossroads where crime subsided dramatically when headmen, of whom he was one of the leaders, patrolled the streets at night and dealt with 'skollies'[55]. One of the regulations imposed by the headmen was that people had to be indoors after 9:00pm and anyone found outside that time of the night had to have a good reason, such as coming from work. They were known as 'witdoeke'. The reason why they do not deal with crime at present, he said, is because they are afraid of the 'skollies' who now have lots of guns while the patrollers do not have access to guns. Moreover, they are not recognised by many of the urban residents and structures and in order to succeed; Contralesa would first have to organise the chiefs, headmen and other residents to support their efforts to curb crime.

The interviewee explained the modus operandi in settling disputes among the people as based on negotiation. The procedure followed is that once a complainant reports a dispute a messenger is sent to the house of the person against whom the complaint has been laid requesting the person to come to the chief or headman's house on a particular day on which the complainant would also be present. Both parties would then describe their version of the dispute after which the chief or headman will rule on the matter. An example the interviewee gave was that of a young man who had impregnated a girl and refused to pay 'lobolo' or damages. The first inquiry would be whether or not he is the one responsible for the pregnancy. If that is determined the chief will order him to pay. In a case where the young man concerned denies paternity, a blood test is ordered and its outcome settles the matter. The

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[53] *This is according to Nkosi Nonkonyana (now the national coordinator of Contralesa) as quoted by E. Naki in the Dispatch of 02 October 1997.Online:* www.dispatch.co.za/1997/10/02/page%252012.htm. *Last accessed on 13/09/2001.*

[54] *According to the secretary of SANCO local in Khayelitsha, however, SANCO has not objected to the formation and functioning of Contralesa. She said although SANCO never discussed and made an official decision on the matter the interaction between the two structures "will have to be carefully discussed as their approaches to issues may differ. For example the status of women and youth within traditional meetings". Traditional structures such as Contralesa, she said, "tend to treat women and youth as less important and unlikely to make a meaningful contribution during discussions".*

result being that either 'lobolo' or damages must be paid by him. Should the young man remain uncooperative, his parents are held responsible and have a duty to make him pay, failing which further steps are to follow. Asked what such a further step would be, the interviewee said that would be to take the case to the formal courts.[56]

Contralesa' s establishment in the urban areas of the Western Cape has to be seen against the backdrop of the openness of (or contest in?) the field of non-state ordering in this province. It obviously derives relevance from the fact that chieftainship plays a very important role in the lives of many of township dwellers. Though there are no structures for chieftainship in the townships, individuals have very strong rural roots. Having grown up in the rural areas and still having dual residence (as having houses both in the rural areas of the Eastern Cape as well as the townships), many township dwellers still hold that the indigenous African dispute resolution mechanism, epitomised by the institution of chieftainship, is the answer to the rampant social problems in the black community. The logic is that in the rural areas crime is low and social problems are not as bad as in the urban townships and that is due to the existence of chieftainship in the former and absence of same in the latter. There is obviously a considerable measure of simplicity in this approach as social problems develop and flourish independent of chieftainship. Experiences throughout the world show similar urban social problems even in places where its existence cannot be attributed to existence or otherwise of chieftainship. In America, for example, the existence of these social problems has sparked off the so-called 'an antiurban bias' (Henslin 1996:434). " '... Jefferson (1977) added that cities contribute to the good government of a nation about as much as sores contribute to the strength of the body'. While attitudes have not always been this extreme, rural life often has been pictured as the source of virtue and the city as the corrupter of youth and the source of evil" (ibid.). And as people are faced with this urban crisis

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[55] *The word 'skollie' means a criminal or just someone who is deviant in a way bordering on criminality.*

[56] *This view of formal courts as 'a further step' is shared by many people including members of the different community justice structures such as SANCO. This is premised on the fact that the state law, applied by the formal courts, seems to be perceived as the "law" – ultimate authority. An interviewee involved in dispute resolution as a member of UMAC observed that the mention of the formal courts still gets people to listen as many people would rather not deal with the formal courts. A leader of SANCO in Gugulethu also shares this view and cites an example of a person who was reported to SANCO for breaking another person's window. She says they sent three letters to the person the first two of which she ignored. She however responded (by coming to SANCO) after receipt of the third letter, which included the warning that it was the last and should she ignore it, the matter would be taken to the formal court. To me this remains an interesting perception by members of the community, especially when some members of the community have no respect for the state law and its authorities. Many people have no confidence in the formal justice system, yet a mention of it still induces fear. It would appear, however, that people are conscious of the might of the law and would rather not be caught on the wrong side of it. They would not trust it to deal with their grievances but they fear it to act against them. What further appears is that the inefficiency/ineffectiveness of the law (state law) is attributed to unwillingness and corruption of some members of the system (such as the police) not as much the system itself. The might of the state law has been demonstrated with clear brutality in the past and it is not surprising that its mention still induces fear. The apparent mixed response to the state law by the community members can well be captured in the words of Mr. Justice Bhagwati, Ex-Chief Justice of India, who said*

> *" ... I saw poor, exploited, deprived people who had seen the majesty of the law but never felt its justice. They looked upon the Law as an enemy that took from them but never gave anything. It was not a friend..." (Mangokwana 2001:148).*

Applied to South Africa this may partly explain why a person who has been subjected to community justice or even vigilante action would still fear delivery to the formal court. The Law of the state is perceived by some as an enemy of the people and people are reluctant to be delivered to it. This fact struck me afresh when, while I was working on this part of the dissertation, my colleague, Kelley Moult, completely unaware of this finding, expressed her observation about the implementation or abuse of the Domestic Violence Act by saying: "...once a document comes from the court, many people tend to abide by it whether it has been properly done or not..."

they long for the good yester years. And for an urban South African that is likely to point to the reign of chiefs in the rural areas where they think they could find the virtues that urban life lacks, to wit "... life of greater simplicity and happiness" (ibid.). For many black South Africans that points to the chieftainship. Moreover the mobility of individuals between the rural and urban areas, in a way makes them contrast the two areas on regular basis. This longing for the yester years is shared by many a structure of ordering in the townships. Individual members of structures such as SANCO, PEACA, etc. disclose how they wish to settle disputes in the indigenous African way. The reality is that such a feeling will remain a wish as the conditions of life in the townships are different from those in the rural areas. The sense of community that characterises rural areas is absent from the townships in many respects. The ties that held individuals one to the other have diminished, with considerable remnants, of course.

The plurality of ordering in the townships is boosted by a lack of certainty. In the rural areas it is commonly accepted that chieftainship is an institution for dispute resolution and a person would have little other alternative but to make use of it, whether s/he personally likes it or not – it is sort of a fact of life[57]. Should a person undermine such an institution, the whole community would regard him/her as a deviant. But in the townships there is freedom as to what structure to approach without fear (at least as it would be in the rural areas) of being seen as different from others. People can go to PEACA or to SANCO street committees or even the formal courts - whatever structure the particular individual deems capable of serving his/her interests in a given time and dispute.

Structures like Contralesa, I submit, are a physical manifestation of the nostalgia on the part of the township dwellers. Looking at the things that Contralesa aims to do, one notices that they are the very functions performed by chiefs and headmen through, inter alia, structures such as makgotla in the rural areas.[58] It is therefore not surprising that other community structures, such as SANCO, object to their existence. For one chieftainship, per se, implies superiority of the institution and, contrary to the present day democratic practices, is based on inheritance of positions. That clashes with the democratic principles espoused by many of the community structures. It must be said, however, that Contralesa seems ready to adapt to the order of the day. For instance, youth and women may hold leadership positions.[59] But the extent of that adaptation remains unclear. It would appear that individuals of royal descent feel left out in that they are not recognised for who they are and therefore fight for a place of their own. This should be seen within the broader picture of South African politics where traditional leaders are fighting for recognition by national government.

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[57] *See Mangokwana (ibid.) for a detailed discussion of a rural life where each member of the community is subjected to the authority of chieftainship.*

[58] *See Mangokwana (ibid.). Makgotla in this sense used in its general application as "... a generic term for all sorts of non-state, traditionally-derived dispute-resolution and/or governance structures ..." (ibid.).*

[59] *Mangokwana (ibid.) sees the absence of women and youth in makgotla as what impacted negatively on their efficiency and perceived efficiency. The inclusion of women and youth in these urban structures of Contralesa is therefore a politically correct and relevant step.*

One look at the objectives of Contralesa such as development of the community and dispute resolution reveals that they are the same as what structures such as Sanco busy themselves with. It is therefore a matter of 'who' does it as opposed to 'what' is done. This point struck me afresh when I interviewed a Contralesa leader who has a long history of personal power who now found a home in Contralesa. One wonders if he is not only looking for a form to (re)constitute personal kingdom. How else can one justify the need to form a new structure instead of joining the existent ones such as Sanco, seeing that their concern and aims are the same, such as development of the community and service delivery? This is not to insinuate that structures such as Sanco ought to have monopoly of ordering, but to indicate the redundancy the one structure may occasion for the other and that demise of one structure may be an opportunity for another.

Street Committees

Street committees exist as structures at "...the lowest level of the civic organisation" (Mangokwana 2001:156 - footnote 30). The researched street committees are affiliated to SANCO and are known as SANCO street committees. They are part of a four-tiered structure. A number of street committees (about 4-6) come together and form a SANCO branch. Above branch are 'local' (embracing the whole township); then 'regional' (being the provincial wing of SANCO) and 'national' (for the whole country). They restrict their jurisdiction to 'bread and butter issues'[60] which refers to disputes among neighbours and family matters. What remains unclear is the procedure that they follow, despite probing in my interviews. What I could detect were that: to many people procedure seemed insignificant, that the leader/s use/s discretion as to procedure, the resolution of a dispute depends on the willingness of the disputant, not only to attend, but also to accept the outcome and that there are no clear channels to be followed in the event of non resolution of a dispute. This feature also characterises all other researched community justice structures, but Peace Committees. Further there seemed to be a clear understanding that criminal matters are a terrain of the SAPS and CPFs. It is evident that SANCO street committees retained their structural characteristic in line with previous research findings (Boskati 1997:22-31). The obvious difference is that they have relinquished criminal matters to the state. This is clearly attributable to the transfer of political power and the approach of the present government, which is accepted, at least by SANCO, as legitimate augmented by its (the present government's) willingness to cooperate with the community. The main manifestation of this cooperation, as it will appear further herein, is in the community policing fora. There is an impressive cooperation between SANCO, and its street committees and the SAPS as all interviewees indicated existence of such a cooperation.[61]

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[60] *This phrase was used by a SANCO interviewee in Khayelitsha and it is resonant with other interviewees and my observations in the researched townships.*

[61] *In Khayelitsha there is referral of cases between SANCO street committees; the SAPS and the KCPF, though the basis and consistency of such referrals remains somehow discretionary. But what is clear is that: unlike in the past there is cooperation, which becomes relative. The same can be said about Gugulethu where there is a dual membership of both SANCO and CPF. Gugulethu should be seen against the background of the problems that CPF, many members of which were associated to SANCO and the ANC, had problems with the local SAPS. (See Tait 2000 in this regard). It is therefore an impressive progress to now be able to talk about a cooperation. In*

My further observation is that street committees, in Khayelitsha, seem to be less active compared to Gugulethu. This is evident in many organisations assuming the role of non-state ordering with encouragement or tolerance by SANCO. SANCO seems to accept, albeit implicitly, its inability to handle cases, at least in Khayelitsha where some members of SANCO refer cases to PEACA, others to KCPF, as well as to the newly established Peace Committees. This can be attributed to the fact that the GCPF does not set itself out as an organ for community dispute resolution, while KCPF clearly assumes this role, even seeing itself as the 'only legitimate structure'[62] and as having assumed the role of SANCO 'local'[63]. In Gugulethu, CPF seems to appreciate the separate identity of SANCO and subjects itself to SANCO's influence as it was evident when the current secretary of GCPF came to consult with SANCO executive committee regarding a problem GCPF had which consultation coincided with my visit there. The Khayelitsha set-up appears to be more of an exception than the general trend of CPFs, even in the Western Cape townships.[64] What is clear, however, among all street committees is that the working relationship with the SAPS and other government structures, has minimised the scale of operation of the street committees and the latter confine themselves to being first aid structures with very limited jurisdiction. What differs is their extent of the minimisation of such scale. This I have attributed to 1980s politicisation of ordering structures and the exodus of these structures' members into government.[65] Moreover SANCO suffered a serious blow when many of its members defected to the African National Congress during the local elections in 1996/7, when SANCO and ANC had differences on candidates to be voted for, as observed by Boskati (1997:24-5).

There is no doubt that street committees of SANCO have established themselves as the most pervasive and well-known structures in the field of non-state ordering, at least in the Western Cape Province. This is attributable to a number of factors, among which the role they played during liberation struggle (albeit under other names and in cooperation with other structures) in mobilising the masses and serving as a home to members of the liberation movement. Street committees can be traced back to the civics that characterised the black townships throughout the 70s and the 80s. They reacted in different ways to the political influence, ranging from being temporarily ousted by the youth at some stages of the struggle (e.g. the mid 80s). What the civics were able to do was to retain their identity and emerge out of the political turmoil relatively stable, dependable and trustable by many of the members of the community. When Sanco came into existence, they were given a nationally consolidated voice.

The civics, however, never had one identity and SANCO has not been able to bring all the civics within its grasp and control. What SANCO did was afford the different civics a national identity and a sense of

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Mfuleni the leader of the local community structure, Masicedane, is the chairman of the CPF and their relationship and referral system has been smooth.

[62] *This is according to the secretary of the KCPF.*

[63] *This is the view of both the secretary and the deputy secretary of the KCPF and confirmed by an executive committee member of SANCO.*

[64] *This was brought to my attention by a mediator and trainer at UMAC who has been involved in dealings with the KCPF. According to a member of the executive committee of the CPF in Nyanga, their approach is similar to the one in Gugulethu. Through observation and an interview with the chairman of the CPF in Mfuleni, it appears that their trend is similar to Nyanga and Gugulethu.*

recognition. The result was that the different civic organisations gladly accepted the identity, being recognised and known as SANCO 'branches', 'local' and 'regional' but in reality they remained their own masters to address the social problems of their respective communities at the grassroots level.

The political changes that swept throughout the country did not leave SANCO unaffected both positively and negatively. During the mid 80's the street committees (then mainly operating under the auspices of the United Democratic Front (UDF))[66] were used as a terrain for resistance against the state ordering. During this time the civics were used to express alternative ordering mechanisms and such manifested in their handling of cases, both civil and criminal. Now that there is no more need to challenge state ordering owing to SANCO's acceptance of the present government's legitimacy, among other factors, SANCO structures relinquish their role of handling cases to the state. That is very clear in respect of criminal cases and SANCO's support of the community policing fora in the various communities.

What remains puzzling is SANCO's focus on civil cases, while they have in the main relinquished their 'jurisdiction' (for want of a better word) over criminal cases. It is clear that SANCO street committees set themselves to solve civil cases and deal with disputes among individual members of the community. Is it perhaps because SANCO is unwilling to relinquish that part of their responsibility? I think SANCO would be willing to relinquish power to deal with civil cases just as they did with criminal cases.[67] This is not to suggest that SANCO easily released handling of criminal cases – the process has been problematic and gradual with some SANCO branches still holding on to dealing with criminal cases. Khayelitsha shows evidence of this 'hold' even in 2000.[68] But in general SANCO accepts that criminal cases are for the SAPS and the CPF's. I think the release of criminal cases to the SAPS is owed to the introduction of the CPF's, in the main. The CPF's provide a vehicle through which SANCO could monitor the police and their activities thereby providing a space for SANCO to still

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[65] *See Chapter 4 for further discussion of this point.*

[66] *As the UDF invested a lot of "... effort and resources into building organisation and co-ordination in the civic sector." (Seekings 2000:278), there can be no doubt that the civics took a political stance against the apartheid government. Classifying the civics as operating under the auspices of UDF in no way suggests that the relationship they had with the UDF was a smooth one as there were people within these civics who wished to operate independent of the UDF (ibid.:279).*

[67] *The willingness of SANCO to relinquish power in dispute resolution has been demonstrated in at least two instances in the Western Cape, namely:*

- *When the now defunct Community court of Gugulethu was established SANCO gave it the responsibility of handling cases. It was only when the community court stopped functioning that Sanco resumed dispute resolution again. Even here it is evident that SANCO recognised the community court and was part of the structure as well as the consultation process that led to its establishment. In that regard the community court had the same role, more or less, that is held by the CPF's in it being a community structure that involved the people and was accountable to them while at the same time cooperating with the state. What could have made the cooperation between the street committees and the Community Court is the fact that, as Professor Wilfried Schärf advises (in personal communication), almost all members of the Community Court were members of SANCO street committees or other functionaries. His observation lines up with my interviews and observations.*
- *When the Peace Committees where established in Khayelitsha in 2000, SANCO gave them a go ahead to deal with cases among the people, thereby assuming the role that had been played by the SANCO street committees up to that stage. The members of the street committees cooperate with the Peace Committees such as in attending the Peace Committee Gatherings and participating in the dispute resolution.*[67]

[68] *See Mdama and Mesi's April (2000) newspaper reports for the particular hold of street committees of SANCO on to criminal cases.*

have some control over the handling of criminal cases. There was a way in which the police could be held accountable and SANCO was part of the structure holding that mandate, to wit: the CPF's. The CPF's were therefore a bridge between the community structures, such as SANCO, and the State. I submit that the fact that there is no structure equivalent to the CPF's in respect of civil cases, further contributes to community structures' hold onto civil cases.

What one sees is that SANCO performs dispute resolution out of necessity. Were there accessible structures that handle cases among the township dwellers, SANCO would not engage in this service. Were it the aim of SANCO to do dispute resolution, I submit, they would not easily let go of that responsibility as they seem ready to do as shown in the above examples.

The Peninsula Anti Crime Agency (PEACA)[69]

Peaca was formed in 1998 by ex-members (soldiers) of 'Umkhonto we Sizwe (MK), Azanian People's Liberation Army (APLA)[70], Self Defence Units (SDU's) and the South African National Defence Force (SANDF). Their offices are two shipping containers situated at Site C taxi rank in Khayelitsha. PEACA boasts a membership of 1500 people throughout the Peninsula. The members of PEACA are appointed into office by the founders[71] of this organisation. Among the most important positions in the executive committee of PEACA are Commander, Co-ordinator, Director and Deputy Director.

PEACA was formed in response to the high rate of crime and the Criminal Justice System's inability to deal with crime. Though their initial focus was on criminal cases, they now handle all cases brought to them. The Co-ordinator of PEACA whom I asked as to what cases they deal with put it as follows:

> "Armed robbery, murder, car theft. But petty cases are supposed to be handled by SANCO and its street committees, but street committees fail. The people come to us and say 'sisi/butie' those people failed, so we handle those cases as well".

This feature of PEACA (their handling of criminal cases) distinguishes them from other community structures, which restrict themselves to non-criminal cases, thereby leaving criminal cases to the Criminal Justice System. PEACA further distinguishes itself from other community structures in that they charge disputants for services rendered. There are two methods in which money is collected. The Co-ordinator put it as follows:

> "The complainant pays R70.00 for transport and we go and fetch the respondent. The respondent then has to pay the money back to the complainant because we wrote a letter and s/he did not come to us... There are these structures called 'imigalelo'. If PEACA is to collect R200.00 from a respondent, we collect R220.00. R20.00 goes to PEACA and R200.00 to the

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[69] *This report is based on interviews with different members of PEACA, including the Deputy Director and the Coordinator.*

[70] *MK and APLA were the military wings of the African National Congress and the Pan Africanist Congress, receptively.*

[71] *The founders of PEACA are the members who were responsible for its formation and called the rest to join. They appointed other office bearers and there is no provision for duration in office, which implies permanent position in office as confirmed by the Coordinator.*

complainant. That is how we buy food and we pay for our phone. But if there is no case we have no money".

Like many community structures, to my knowledge only Peace Committees being an exception, the members of PEACA are vested with significant discretion regarding the procedures to be followed in handling of cases. The extent of discretion is demonstrated better in the words of the Co-ordinator of PEACA, who said:

> "When a person comes to report a case to us we take a statement and then write a letter to the respondent calling him/her to our office. When the respondent arrives we listen to both the complainant and the respondent. Because of my intelligence, acquired in military training, I can tell who is telling the truth and who is lying. Then I make a decision concerning who is wrong and who is right".

This should be a disturbing attribute of PEACA especially when taking into account the fact that PEACA is a forum of first and last instance (i.e. they handle the case from the beginning to the end with no allowance for review or appeal). It is independent of all other structures and accountable to none. Concerning referral of cases to other structures, the co-ordinator said:

> "... If a case is not very serious we do not go to the police station, we take chances. Before we go to the police, we try our best *to force the person to admit guilt.* We do not refer cases to other structures". (Italics added)

The Deputy Director of PEACA, however, denies that PEACA ever uses force. But the admission of the Co-ordinator to the use of force seems to line up with an allegation made by a lady who was involved with Peaca as a respondent, who said:

> "When they (PEACA) arrived at my house, they told me to pay the money I owed to the other person and they did not even listen to me. Then they took me to the container. There I was left with other men who told me to go home and come again with the money."[72]

Relying on my interviews and observations, the following features are easily attributable to PEACA:

- It appears to be the most controversial among all the researched ordering structures.

The KCPF through its Chairman, Secretary and Deputy Secretary regard Peaca as a vigilante group run by criminals with no mandate from the community of Khayelitsha and it should be closed down. The South African Police Services' interviewed members hold different views about PEACA in that an inspector dismisses PEACA as using unconstitutional means to handle suspected criminals while a senior superintendent at the same office sees Peaca as useful, though having reservations about their modus operandi. To contrast the inefficiency of the criminal justice system with the apparent efficiency of PEACA, he used the following example:

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[72] *My research visit to KCPF coincided with her reporting of this incident to the KCPF and she was advised by the secretary to lay a charge of intimidation against PEACA.*

"If a person's hi-fi has been stolen and that person reports the case to the SAPS, it is firstly difficult to get the criminal due to lack of information as people do not cooperate in tracing perpetrators. Even if the police apprehend the suspect and get the hi-fi back, it is stored at the police store until the case has been finalised. This is a serious inconvenience to the victim who normally, in Khayelitsha, does not have insurance on his/her belongings. If the case is reported to PEACA they trace the culprit and after getting the hi-fi, they give it to the victim immediately. That is why people tend to prefer PEACA to the police".

An executive committee member of the KCPF said about PEACA: "These people are trained as soldiers. They are very active people who have been active all their lives. They now find themselves in a situation of unemployment, so they create activities to keep themselves busy. Unfortunately the high rate of crime makes it possible for them to engage in such activities. Being trained soldiers who are unable to render their services within the country's military structures, they try to create a platform for themselves so that they can get some recognition and make a living as well. Everyone needs an income to survive".

An interviewee who has been involved with PEACA in a professional capacity as a member of an NGO dismisses PEACA as a group of people merely trying to make a name for themselves. While PEACA claims to charge minimal fees as indicated above, the interviewee who had to deal with PEACA as a respondent alleges that PEACA demanded R1600.00 as part of their fees and they informed her that the amount could be higher as the account was still going to be 'taxed'. And an inspector of the SAPS relates a case where PEACA had collected R2000.00 on behalf of a complainant, which he (complainant) never received. The complainant approached the police for protection because instead of giving him the collected R2000.00, Peaca was demanding R1000.00 from him as an outstanding amount of their fees. The respondent had been ordered to pay fees of R3000.00 to PEACA, but disappeared after only paying the R2000.00.

- Though PEACA claims to operate throughout the Peninsula, all interviewees in other areas, viz. UMAC, CPF's of Mfuleni, Gugulethu and Nyanga as well as SANCO bear no knowledge of their activities outside Khayelitsha.
- PEACA has been accused by many for use of force in dealing with suspected criminals and PEACA members contradict one another in responding to these allegations. The Co-ordinator of PEACA admitted use of force in handling of suspects. Another interviewee at the PEACA office admitted intimidation as the means they used to get people to tell them the truth. He denies ever assaulting anyone, as they never reach that stage. In one of the offices [73]there are pictures on the wall, which show people lying down. He says they show people these pictures and tell them that

[73] *This is the office in which I found two people tied up on my first research visit to PEACA. Though the Deputy Director of PEACA denied this event, the aversions of this member vindicate them, especially when he admitted to me that they tie people up and let them lie down. All he denied is that they assault them in the form of punching and slapping them.*

that is how they would be tied up and shocked with electricity. He says that they show them the electric plug and tell them that it controls a machine in the adjacent room, which will be used to shock them. The Human Rights Committee records a well-known incident in Khayelitsha where a police officer was kidnapped by PEACA (2001:25). An interviewee at KCPF informed me that the family of the kidnapped police officer had to pay R150.00 per day so that the police officer could be fed. He spent the whole weekend at the PEACA container. He was accused of having stolen a motor vehicle, which later was proved to be his own. I can further confirm the use of force by PEACA in that the first day I went to introduce myself to them I found some men, in the office, casually punching two people who were apparently tied to each other. The Deputy Director of PEACA vehemently denies use of force despite the evidence such as members of PEACA having been convicted and serving sentences resultant from their handling of criminals (which he sees as a campaign by those opposed to and jealous of PEACA) as well as my personal observation of use of force.[74]

Despite my nine visits to PEACA offices, I have not been able to find a case in progress at all and there is no register of cases to be handled. The explanation initially given to me was that the weekend was their busy time. My visits there, even on weekends, failed to find any case in progress. My last visit was on Saturday, 14 April 2001, banking on an assurance from a PEACA member that that day was bound to be very busy. All I found on that day were only two people in the office who are members of Peaca and no cases where expected. It is really difficult to tell if PEACA handles cases the way they say they do, but the account of the lady who was handled by PEACA as a respondent gives a hint: it appears that in many instances PEACA members go to look for the respondent/suspect immediately after a report has been made which does not necessarily have to be at the office, and when the respondent/suspect has been found summary trial takes place on the spot. That would explain why the Co-ordinator of PEACA was not aware of a well-publicised case in which PEACA had recovered about R40 000.00 for members of an 'umgalelo'. He probably did not know about it because it was handled by some members outside the offices and there are no records.

- PEACA has been trying hard to boost its image by attempting to forge a working relationship with many other institutions and organisations. Among others they tried to join the KCPF, they approached Dr. Omar, the former Minister of Justice, for a letter of recommendation to form a private security company; they approached the Centre for Conflict Resolution (CCR) and are now negotiating with the Community Peace Programme (CPP).

[74] *This interviewee suggests that my observation is not a true reflection of what was happening on the day in question. I went to the Peaca office to introduce myself and found two people tied up and lying on the floor of one of the offices with a number of men punching and kicking them. The interviewee said about this event: "... you did not have a clear view and you may be mistaken as we do not do such things here".*

Peace Committees

The Origin of Peace Committees

Peace Committees are a project initiated by the Community Peace Programme (CPP), an NGO involved in dispute resolution. The CPP is a successor to the Community Peace Foundation, which was central to the community policing policy in South Africa. This project started in 1997 in Zwelithemba (Worcester, Western Cape) and has since expanded to Strand/Nomzamo; Paarl/Fairyland; Mbekweni; Franch Hoek (Western Cape); Cala (Eastern Cape); Thabong (Free State) and Umlazi (KwaZulu-Natal).

The latest establishment of Peace Committees in the Western Cape took place in Khayelitsha towards the end of 2000 with the first committee starting operation on September 2000. As in May 2001 Khayelitsha has six Peace Committees. They operate from M267, Site B, the home of one of the members of the Peace Committees.

Modus Operandi of the Peace Committees

According to the CPP (CPP: 2001) Peace Committees seek to deal with problems at micro-level. They have been influenced by a number of factors in this regard, inter alia:

- Governance is no longer monopolised by the state;
- There is greater concern with restitution on the part of private governance;
- Reduced reliance on force and criminal law;

This is based on the theory that CPP calls 'a re-feudalization of the world' which is described as realisation "... that our present post-modern environment is one in which governance is no longer monopolised by the state and in which there are new 'fortified fragments' – such as gated residential communities and various other 'public' places – that are controlled and managed by what might be thought of as 'corporate or private governments' (that is, arrangement whereby certain governmental functions are carried out by auspices that are not states)" (ibid.).
This theory also informed the community policing aspect that has been espoused by the South African Police Services (SAPS) and manifests more clearly in the community policing fora.

The people who run the Peace Committees come from the community itself and membership is open to all interested in joining. They are firstly recruited and then trained in the method to be followed in the running of the Peace Committees. The conduct of the Peace Committee members is regulated by what CPP calls "Code of Good Practice and the Steps in Peace Making". The role played by members of Peace Committees in dispute resolution is summed up in the following statement:

"The role of Peace Committee members is purely to facilitate – it is not part of their job either to judge anybody or to make decisions about solutions". (CPP 2001).

Peace Committees in Khayelitsha

The Peace Committees in Khayelitsha meet at 18h00 during weekdays and 10h00 on weekends and holidays, whenever there are cases to be dealt with and there are members available to deal with them. According to the Project Co-ordinator of CPP, Peace Committees handle all cases that are brought to them as long as all parties involved consent to it. The practice in Khayelitsha, however, is that criminal cases are handled by KCPF and SAPS and disputes relating to houses (ownership, transfer of ownership, inheritance etc.) by SANCO Street Committees.

When a person comes to register a complaint the Peace Committee takes down his/her biographical details in full. The reason for the detailed recording is to enable the Peace Committee members to make follow-ups as well as for delivery of letters in future. According to an interviewee at CPP office a further reason is to avoid fictitious cases as the members are remunerated on the basis of the number of cases handled[75]

After recording details regarding the parties (disputants), invitations are sent to the respondent, interested parties (e.g. family members) as well as the street committee in the area. Such invitations are delivered by a member of the Peace Committee. On the scheduled day at least two members of the peace Committee sit on the case. One serves as a facilitator while the other serves as a secretary who minutes the proceedings. They record names of all present at the meeting. Though theoretically, as put by the CPP interviewee, at least two members are required to sit in, it appears that they need a minimum of three. At least in Khayelitsha the meeting is presided over by a facilitator, one member takes minutes and the other completes the prescribed form. This happens throughout the proceedings. It is possible however for the member who did the minuting to sit down later and complete the prescribed form relying on the minute book.

When the disputants arrive they are separated from each other and a statement is taken from each regarding the problem to be solved. The reason for separating the disputants during statement taking is to avoid confrontations, reservations and embarrassment. After the statements have been taken, they are read in the presence of the disputants and all present. At this stage the facilitator asks both parties what the cause of the problem is, and thereby opens the matter for discussion so that the parties may arrive at a solution.

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[75] *The amount paid for each case is R100.00, which is distributed as follows: "Each payment of R100 is divided into four funds. 10% goes towards the Committee's administrative expenses. 30% goes into a community-building fund for social crime prevention projects. 30% goes into a loan fund for supporting micro-enterprise development within communities. The final 30% goes to support the Committee members who were involved in facilitating the Gathering" (CPP 2001:4)*

Being a relatively new phenomenon in Khayelitsha, the impact of the Peace Committees is not yet clear and their relationship with other structures cannot be assessed, as one would have liked to. What can be said is that their relationship with KCPF got off to a rocky start. KCPF objected to their formation as they saw them as not formed through conventional community ways in that the KCPF was not adequately consulted, while the Peace Committee members say that KCPF was consulted but would not give its blessing. SANCO is caught somewhere between the two structures. A member of the executive committee of SANCO says that they support both structures and the two structures' differences do not concern Sanco. In practice, both Peace Committees and KCPF have members of Sanco within their ranks. Peace Committees are saturated with SANCO members, with the majority of the Peace Committee members being members of SANCO Street Committees and the street committees being part of Peace Committee gatherings. This, however, does not suggest that the relationship between Sanco street committees and the Peace Committees is harmonious in all respects. It differs from one place to the next or from one street to the next, as it were. On 16 April 2001, I observed this mixed reaction by street committees to Peace Committees in that while members of street committees accompanied disputants to each of the three cases that were heard, another street committee sent a letter saying they would not come as they do not know the Peace Committee and do not think they are obliged to attend meetings of a structure that they do not know.[76]

From my interviews with Peaca, Project Coordinator of the CPP and members of the Peace Committees, it is clear that the Peace Committees do not have a relationship with PEACA, but there is an opportunity for changes as PEACA has shown interest in operating as Peace Committees do. The Project Co-ordinator of the CPP confirmed PEACA's statement that they (PEACA) approached the CPP, though they have not yet come to a working arrangement. Of interest is that while both PEACA and the CPP have indicated willingness to work together, the members of Peace Committees in Khayelitsha want nothing to do with PEACA. PEACA is not allowed, by the Trevor Vilakazi branch of SANCO, to operate in that area. The SANCO branch there, according to the organiser of the Peace Committees, approached PEACA to inform them of their position that Peaca is not allowed to come to their area at all. The coordinator of PEACA, however, bears no knowledge of this state of affairs, but admits that it is possible that such a message might have been conveyed to other members of PEACA. He continued to say that Peaca would deal with cases anywhere "... as we do not have to get permission from street committees that fail in their duties. If they were not failing PEACA would not have been established. They are now jealous because we satisfy complainants our success".

Common between PEACA and the Peace Committees is the fact that they both have a problem of not being recognised by KCPF. Moreover, common between them is the fact that they cooperate with Sanco. While Peace Committees have a more intimate relationship with SANCO as indicated above,

[76] *The use of the word "know" should be understood in its local use: it does not only mean not being aware of the existence of the structure, but non recognition of the structure. When I asked people about structures such as PEACA, I was often told "We do not know Peaca" or "there is no PEACA in Khayelitsha" really meaning: "we do not recognise PEACA as one of our structures".*

Peaca also, according to their Co-ordinator, often handled cases referred to it by Sanco street committees. Both structures also embarked on dispute resolution based on, to paraphrase crudely, the inefficiency of Sanco street committees.[77]

What distinguishes Peace Committees from other community dispute resolution structures is that they have a clearly spelt out procedure, keeping of records and members are not allowed much discretion. They know what procedures to follow and have a 'code of good practice' which seems to make them accountable to CPP, the NGO that controls and pays them. Among the varied community structures, the Peace Committees are the ones remunerated by their NGO, namely CPP. While all other dispute resolution structures do not get remuneration, PEACA charges a fee and cost covering payment as from the disputants.[78]

Peace Committees should be seen in the context of plurality of ordering in Khayelitsha. There are KCPF, PEACA, SANCO, and other structures, all performing dispute resolution within the community. These structures' dispute resolution mechanisms are a new phenomenon in the townships and none can claim to have reached a position of uncontested claim to monopoly of ordering and their intended beneficiaries do not know for certain what is to be expected from them. That is: the values these structures cherish and their modus operandi remain an uncertainty at least in the mind of the ordinary citizen[79]. On the one hand the residents of Khayelitsha are caught in the web of their general mistrust of the formal justice system, the inaccessibility of the formal courts for those trustful, hopeless or 'ignorant' enough to approach them. On the other hand they face a set of African values not congruent to the socio-economic status quo. There are therefore no justice institutions accessible to them. It is not surprising, therefore, that any structure that gets established seems to get a ready following in some or other part of the community, at least at the initial stage. In their shopping for justice the residents are restricted to what would appear to be a second rate justice with many structures making substantive and procedural rules as they go which might even differ from one case to the other.

Peace Committees therefore come as an addition to the already existing structures. They are manufactured outside Khayelitsha yet implemented in that township, just as in other townships where they operate. Like many other structures of private justice Peace Committees are not based on traditional African dispute resolution mechanisms, though it can hardly be denied that they possess some features of such mechanisms. The most striking feature is the Peace Committees' contribution towards funding of community projects and offering of loans to community members embarking on entrepreneurial activities. This seems to be the modern counterpart of the original trend of community structures to serve as not only dispute resolution structures but also as saving schemes.[80]

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[77] *Some members of Peace Committees who are members of SANCO stated that street committees are not efficient anymore hence the Peace Committees are appropriate. PEACA, through its Co-ordinator, indicated that they deal with criminal cases because SANCO Street Committees fail. (Refer to the above discussion of PEACA).*

[78] *See the subheading on Peaca above.*

[79] *See discussion of the views of the ordinary citizen later in this chapter.*

[80] *The 30% allocated for loan fund, as seen above, serves this purpose.*

Peace Committees lack ability to censure as they do not mete out punishment and do not render any judgement because their role is restricted to facilitation and the parties are supposed to arrive at a solution themselves, through facilitation by the Peace Committee members. It could therefore be said that Peace Committees are not concerned with justice at all. As long as the problems had been 'solved' their goal has been accomplished. Peace Committee members take pride in their impartiality and non-involvement in the making of the solution, as the parties are to do it themselves. Their role therefore can be said to be that of creating a conducive environment for the parties (disputants) and interested parties to discuss their problem. The role of the facilitators may be theoretically described as purely facilitative, but, from my observation of their proceedings, it appears that in practice their influence in the outcome is clearly beyond facilitation. Just short of prescribing what the solution should be, the different members' inputs tend to suggest the members' ideal outcome. Only that the disputants are the ones to verbalise it as their solution. According to the CPP, Peace Committee members are allowed to "urge"[81] the parties to arrive at a solution and in that light, it would appear, that in cunningly pushing for a particular outcome, the Peace Committee members are within their mandate.

This approach (non-involvement) has its advantages particularly seen against the backdrop of abuses of power that are rampant in community structures and the lack (or inadequacy) of training on the part of the facilitators. There seems, however, to be too much emphasis on people arriving at solutions to their own problems and the basis for this assumption is not clear. The Peace Committees do not offer any protection for those on the lower side of the social scale. As Dahrendorf (Siegel 1998:231) observed the working class of today is a 'stratum differentiated by numerous subtle and non-subtle distinctions'. This can be easily applicable to the community of Khayelitsha, particularly if we appreciate the nature of evolution (from customary to European style) in the transition that characterises the population, as suggested by Bush (1979:229). What this implies, inter alia, is that even in Khayelitsha there will be non-homogeneity of values and social standards.[82] It therefore cannot be assumed that each person is well equipped to articulate his/her version or diagnosis of the problem in question, let alone bargaining for a solution.

Even when interested parties such as family members and community leaders, such as members of street committees attend, it is not a guarantee for an equitable outcome. The more articulate or even dominant a disputant the stronger the chances of a solution being pushed down the throat of the opponent, while the Peace Committee members may be watching helplessly locked in their cage of non-judgmentality, if the theory of non-involvement were to be strictly adhered to. Moreover, there is no duty on the part of the facilitator to explain the rights of the disputants upfront (be it on invitation to attend and/or before the gathering starts). This is particularly important to ensure free participation by the disputants, especially the respondents, in a country with a history of community structures that wielded too much power. It would not be strange for a person to mistake the 'invitation' from the

[81] *In the words of the Project Co-ordinator of the CPP: " ... if there is a real deadlock, the members of the Peace Committee may urge the people to consider different possibilities, but that is how far they should go".*
[82] *Also see Friedman (1991:2) for the non-homogeneity of the community, South Africa in particular.*

Peace Committee as a directive, especially where the street committees are also involved. It would be difficult to know what the consequences of non-compliance with such an invitation from the Peace Committee would be. The result would be a voluntary attendance, which is subtly coerced by fear of likely consequences, especially given the dynamics and experiences of non-state ordering in Khayelitsha.[83]

Structures such as SANCO street committees, which participate in Peace Committee gatherings, should not be underestimated because some street committees have power in their areas. Power to sanction. There may be stigma attached to an individual who refuses to attend a Peace Committee gathering after receiving an invitation. It has to be remembered that with other structures such as Peaca failure to attend after receiving a letter is a serious offence. A person who refuses/fails to attend a Peaca hearing after receiving a letter, becomes liable for the expenses incurred in going to fetch him/her for his/her residence.

The fear of the respondent of possible consequences is likely and justifiable if we take into account that it is in Khayelitsha where a resident's shack was burnt down simply for reporting a case to the police instead of reporting it to a SANCO street committee (Mdama 2000:9). And that is not an isolated incident as in February, in Khayelitsha, a lady was subjected to name-calling, intimidation and swearing by the community simply for not reporting a case to SANCO (Mesi 2000). The involvement of Sanco, therefore, does not solve much of the problem and does not make Peace Committees any better, if anything it lends its coercive muscle to them, in terms of being able to pressurise the uncooperative respondent without tainting the image of the Peace Committees.

Given such a background of Khayelitsha, it would be appropriate for the powers, jurisdiction and legal status of Peace Committees, as well as the rights of the disputants and the consequences/implications of non-compliance with the invitation, to be clearly stated in the invitation.

The efficiency and legitimacy of Peace Committees become more crucial as we are mindful of the fact that this is a model that has support of the South African Law Commission (as in August 2001) and it is a model to be rolled out throughout the country in the event of the envisaged legislation being passed. The link between the Peace Committees that exist now and the ones envisaged by the SALC is captured by the CPP as follows:

> "The 'Zwelithemba model' has been explicitly endorsed by the South African Law Commission, whose Discussion Paper (Paper 87, Project 94) on 'Community Dispute Resolution Structures' was developed in close consultation with the CPP. The Law Commission is at present preparing legislation to give some form of recognition to Peace Committees" (CPP 2001:5).

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[83] *As Boskati (1997:34) observed in Khayelitsha, people considered to have done something wrong in the community were "... forced to appear before the street committee". And if they persisted in their refusal to attend the meeting they were "... ordered to leave the community" and such person may even have his/her "...shack burnt".*

Further unique about the Peace Committees is their requirement that not less that 50% of the members should be female. This is an interesting provision in a community characterised by male dominance in community structures. The tendency of male dominance in community structures seems to be dwindling. Though other community structures do not have a categorical requirement for female representation as Peace Committees do, they also have an impressive number of females in their committees. The structures in mind are community policing fora of Khayelitsha, Gugulethu and Nyanga as well as Sanco.

Private Justice[84]

While non-state ordering takes the form of popular structures[85] such as SANCO, Contralesa, PEACA and like structures, they have been influenced considerably by the private justice movement. There are two main ways in which private justice contributed to non-state ordering in the townships[86], viz.

- They perform dispute resolution;
- They train members of the existing community structures as well as individual members of the community in dispute resolution.

Dispute Resolution by Private Justice

Among the many organisations that perform dispute resolution role in the Western Cape communities are UMAC, the Quaker Peace Centre, CPP, FAMSA and others. UMAC and the Quaker Peace Centre do not seem to focus mainly on resolution of disputes in the community at the individual level. They do so mostly in an indirect way by supplying the community with dispute resolution skills. They give training to community members who then serve in the community structures. Examples of training of members of the community is where the Quaker Peace Centre trains members of street committees in Khayelitsha and Nyanga who then serve their communities independent of the Quaker Peace Centre.

UMAC has been involved more in training and development than in settlement of disputes among individuals. While they work with street committees and have been instrumental in the establishment of the CPF's and training of the CPF members, their role has been mainly that of monitoring and

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[84] *Private Justice refers to structures of conflict resolution that are run by Non-Government Organisation (See Nina & Schwikkard 1996). The information on private justice organisations is based on interviews with 3 organisers/mediators of UMAC; 4 mediators/trainers at the Quaker Peace Centre; the Project Co-ordinator of CPP; members of Peace Committees in Khayelitsha and my observations in Khayelitsha for over a year.*

[85] *Popular structures refer to organisations that participate in community justice but are not led by the NGO's (ibid.). While these structures are also non-Government organisations, the use of NGO –led structures herein refers to the structures that are based on mediation (Western/Eurocentric based) and are formed mainly outside the townships and implemented into the townships. Pertinent examples would be UMAC, the Quaker Peace Centre, the CPP etc.*

[86] *There are many other ways in which these structures contribute to the communities but I restricted my observation to their functioning in dispute resolution and related matters for the present purposes.*

dealing with the bigger conflicts such as taxi violence/disputes. It has to be stated that individual members of UMAC share their skills in the communities in which they live and as one organiser states, people often approach him in Nyanga township so that he can mediate in their differences/conflicts. That, however, is not in his official capacity.

Training in Dispute Resolution

The organisations involved in the townships offer training to the communities in diverse fields. Though dispute resolution is just one of their projects,[87] usually put as 'maintenance of peace' or 'peace-building', it will receive more attention for the present purposes. All the organisation hereinfore mentioned qualify as part of the private justice movement in that they put themselves forward as available for dispute resolution services and training in the communities. Some are more involved than others. But in general it could be said that many of these organisations have been involved in training of members of the community to participate in dispute resolution. UMAC has trained members of the CPF's as part of their facilitative role in their formation, the Quaker Peace Centre has trained members of the street committees in Nyanga and Khayelitsha, the CPP has trained members of the Peace Committees in the townships where they operate.

While services of the private justice have contributed significantly to the functioning of the community structures, they have often been restricted by financial considerations. Many of the organisations can only afford training of the people but are not in a position to make follow-ups so as to monitor the trainees' progress in putting what they learned into practice.[88] Other structures are able to offer once off courses to community structures depending on the availability of resources. Of all the organisations considered herein, the CPP is the only one that has control over their trainees (even after completion of training) and hold them as accountable members of the structures through membership of the Peace Committees. The Quaker Peace Centre also followed a similar approach in the beginning and even provided some remuneration for the people involved in community dispute resolution. It is clear, therefore, that availability or otherwise of financial resources to these organisations that rely on private donors/fundraising will determine their scale of application in terms of the geographical areas covered and the quality of and follow-up to the courses that they offer.

By and large, training of individuals in the community in dispute resolution has not proven to be a very good option as compared to training of people who are already involved in some community justice

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[87] *Organisations such as the Quaker Peace Centre and FAMSA engage in many other projects such as community development, youth programmes, workcamp projects, etc. See their other projects on their respective websites: FAMSA http:* http://www.idesign.co.za/famsa/. *and the Quaker Peace Centre:* http://www.quaker.org/capetown/. *(Both last accessed on 03 May 2001).*

[88] *An example in this regard would be the Quaker Peace Centre which trained members of street committees in Nyanga and Khayelitsha and tried to keep them accountable to them by monitoring their activities and remunerating them. But the Quaker Peace Centre could not sustain this initiative for lack of financial resources.*

structures.[89] That could be because of lack of structural authority through which to function and derive support. It would be difficult, for instance, for a person who has individually received training from one of these structures to market him/herself as available for mediation within the communities. Even if s/he were able to do so s/he may still encounter obstacles as there is a tendency within the townships to restrict ordering to existing structures or to organisations that have a relationship with the 'legitimate' community structures. It is practically impossible for an organisation or individual to operate in ordering in the townships without some relationship with existing structures. When I attended Peace Committee hearings in Khayelitsha members of the ANC and the ANCYL came to interrupt the meeting simply because these organisations had a rally going on and the members of the Peace Committees were expected to attend. Among the statements uttered was that: "we allowed the Peace Committees to operate in this community and they are now getting out of control". The response of the Peace Committee facilitator of the day, who is the branch chairman of the ANCYL, was that: " we know that we belong to you and we should attend the rally and we will stop the hearings right now".

What one sees here is that the Peace Committees had to negotiate their establishment with the existing community organisations who then gave them a go ahead to function in the community. For that reason the ANC and the ANCYL see them as dependent on them for their existence. This was obviously a prudent step to take on the part of the CPP, especially because other structures such as KCPF object to its existence, but there may be a price to pay in the future. If the ANC sees the structures as under its control and the majority of the Peace Committee members belong to SANCO and the ANC, there could be a problem of political allegiances. At present there may be no problems as Site B is ANC dominated, especially M-block where the Peace Committees are concentrated. When other political parties increase their support in this area, there may be problems of party allegiances, as well as the one of party interests being put before those of the Peace Committees.[90]

Through the training of members of the existing community structures, the private justice movement has managed to infiltrate and considerably influence the state of ordering in the townships. And through training of individual members of the community they have also managed to cultivate a culture of mediation in the townships to a considerable extent. This statement has to be qualified because much as there are people who have embraced the culture of mediation in dispute resolution, there are others who still adhere to common-sensical ways of dealing with problems.[91] And there are individuals who would like to use the two approaches selectively. They choose either whenever it suits

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[89] *Individuals who underwent dispute/conflict resolution training on their own and not as part of community structures do not seem to be active in applying their skills. But those people who underwent training as part of community structures seem to utilise their skills. For instance Mr. Mange of Sanco local in Gugulethu put it as follows: "we have been trained in dispute resolution... we hold certificates here. We know how to mediate and resolve a dispute. Some of us have been trained by NICRO, others by FAMSA as we were dealing with many cases".*

[90] *Nina (1993:137), relying on his research findings in Kwazulu-Natal, observed that when politics enter the ordering structures, interests of political parties often interfere with those of the ordering structures.*

[91] *For example, one finds structures such as CONTRALESA that would like to apply the indigenous dispute resolution mechanisms, which are characterised by the forum handing down judgment and sanction after listening to the disputants. They are courts for all intents and purposes.*

their purposes. Even within organisations that profess to follow mediation one finds an arbitrary mixture of both. This is not some experience unique to the Western Cape townships at all as Storey (1991) also records a similar problem in respect of the Alexandra Justice Centre's mediators.

The private justice movement started intensifying its inroads into the townships during the time when it was evident that a new government was about to take office and it was clear that there had to be transfer of skills to the poverty[92] stricken townships. The deprivation that was imposed onto the township dwellers by the apartheid government had to be tackled. On the other hand there had to be change of culture from resistance to cooperation with the Government and that is what the private justice together with the state have managed to do. The perfect example is the fact that all the community justice structures that are affiliated to or network with or have been trained by private justice organisations do not handle criminal cases, but leave them to the SAPS. This achievement is as well attributable to the state introduced changes in the criminal justice system. Here we see structures such as the CPF's, the CSF's and projects such as the Pre-trial services of the Bureau for Justice Assistance.[93] The private justice organisations played a significant role in the introduction of these changes.[94]

What is clear, therefore, is that the private justice movement works in cooperation with the state and has been able to help the state penetrate the communities' values as seen in criminal cases. They, at the same time, complement the state in maintaining peace in the community and also helps in restoration thereof where such peace[95] has been disturbed.

Their assistance has been out of necessity in that while the legacy of apartheid was loaded with imbalances and injustices to be attended to, the post-apartheid state was weak and incapable of attending to all those needs.[96]

The private justice movement was particularly necessary in the field of civil law (as in settlement of disputes between individuals where crime is not involved) where they played a role of substituting the

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[92] *Poverty is used here in its most general meaning as "... 'poverties' as existing in relationship to any basic human need not being satisfied. For example, poverty of subsistence (due to insufficient income, food, shelter, etc.) of protection (due to authoritarianism, oppression, etc.) or participation(due to imposition of alien values upon local and regional culture, forced immigration, political exile, etc.)" (Mangokwana 2001:163 – footnote 60).*

[93] *See www.vera.org/sapage.html. Last accessed on 31/08/2001.*

[94] *UMAC has been instrumental in the establishment and functioning of the CPF's and CSF's and the Community Peace Foundation (the predecessor to the CPP) has been instrumental in the transformation of the SAPS in general, including advocacy of the concept of community policing.*

[95] *Peace seems to be the catchword of all the private justice structures. They all profess to work for peace in the communities. I think this was necessitated by the unrest (mainly political) that infected the communities from the mid 80's (the time of political uprisings) right through the transition period into the new era. CPP, for example, has 'peace building' as an important component of their project and their structures are called 'Peace' committees. Even the Quaker Peace Centre is a team of 'peace makers' (2001).*

[96] *I use weak state here as meaning a state that does not have monopoly of the means of violence: lacks administrative capacity to deliver services; lacks economic resources and also lacks penetration into society as borrowed from Dr. Graaff (2001) and argue that this was the type of state the post apartheid government inherited.*

state. With the civil courts not being accessible to the majority of township dwellers, the private justice movement jumped in to fill the gap, while in respect of the criminal law they worked hand in hand with the state. The relationship and interaction among the state, the private justice movement and the popular justice movement is not an easy one. It is one characterised by overlaps and clashing of roles. All these organs play a role in the community and I think the weakness of the state accounts for many of the problems in the legal ordering. This thought is based on my submission that many of the private justice movement's organisations serve as substitutes/surrogates for the unavailable state.[97] Based on my observations in the townships, it would appear that many people do not have objection to using the state law, but they tend to see it as unwilling to help such as in criminal cases where magistrate are alleged to let criminals out on bail, who then go out and harass potential witnesses, especially victims of their crime. Or police who either cooperate with criminals or are just unwilling to help. An ordinary citizen[98] (interviewee #4) of Site C, Khayelitsha, had the following to say:

> "We know exactly who commit crimes, but we cannot give that information to the police because the police will not arrest the criminals and on top of it they will reveal your identity to the criminals. There is no use".

She then proceeds to relate an instance when the police came to search her house. After conducting their search which found nothing of interest they then informed the family that they were searching for a gun as someone had reported that their father had an unlicensed firearm. They then disclosed the name of the person who gave them that information to them (the police). Then she says:

> "If we were skollies and indeed had that gun we would then go and use it on the person who reported us to the police".

It is therefore not mainly the institution that is challenged but the way in which its individual members act.[99] Accordingly, people who share Schönteich's view that it is just the bad application of the law that causes problems would proceed to say: had the law been properly applied there would not be the ugly results that destroy people's trust in the legal system and cause them to look for alternatives. This view accords with the sentiments of many interviewees. One can, therefore, say that the state is not capable of providing justice to the communities and as a result the communities look elsewhere. I think while it is true that the law is subjected to bad application in many instances, it cannot be said that such fact is the sole cause of the legal crisis. It accounts for the procedural aspect of the law, but I think there is more even in the substantive part of the law, that give rise to the persistent peripheral status[100]

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[97] *The state is available and non-available in different ways to different members of the community. The formal court could be available to one person and yet not available to his/her next door neighbour in terms of inaccessibility due to financial considerations. For such a person who wants a problem solved the alternative structure is the private justice movement.*

[98] *Ordinary citizen is used to refer to a member of the community who is not involved in ordering as part of the ordering structures, but is a potential receiver of their services. See Mattes & Bratton (2001) who use the word in a similar context.*

[99] *This view is shared by many people. See Schonteich 1997 who argues that there is nothing wrong with the law itself but its bad application which results in 'ugly results'.*

[100] *Burman & Schärf observed that the state law holds peripheral status in many of the black communities (1990:706).*

of the state law. The state law is in many respects alienating and incongruous to the values cherished by many members of the black population.[101]

I, however, think that the de facto absence of the state is one of, if not the, main obstacle. As Hobbes observed, the absence of the state results in formation of alternative structures[102] by the community and that is exactly what happens with many organisations dealing with legal disputes themselves. The private justice movement, through training of many township residents in dispute resolution, are able to influence the modus operandi of many community structures. It is partly as a result of this training that many community justice structures do not handle criminal cases anymore and do not use force in their handling of cases. For example, when PEACA contacted the Quaker Peace Centre for training, such training could not be done owing to PEACA's unwillingness to refrain from use of force.[103] Private justice movement's training in dispute resolution, therefore, does not only serve to impart conflict resolution skills, but also influences the procedures that structures ought to follow. By so doing the involvement of this movement in training gives non-state ordering a new dimension altogether.

The ordinary Citizen's view

Of all the role players in ordering, the most important player is the beneficiary – the ordinary citizen who is at the receiving end of the diverse legal ordering projects. Perhaps the pertinent question at this stage would be: 'who is the intended receiver of the services?' There can be no doubt that each of the organisations discussed herein target the black township resident who is poor and does not have access to the state law for a variety of reasons. There are mixed reactions from ordinary citizens regarding structures that operate in their areas. For instance, while one interviewee (interviewee #1)[104] said: "they (SANCO) call you and your neighbour and then you solve the problem. The truth will come out as people listen. They will know where the problem lies ... they do a good job...", another (interviewee #2), in the same vicinity, said "these SANCO people are not good. They promised us a lot of things during the elections. Nothing has been done. They now make themselves police. I think rather than going to them I would go to the taxis where I know I will get help. They will look for the

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[101] *PEACA, for example, argues that the state courts are unable to deal with lobolo cases as black people expect and therefore arrive at unacceptable judgements 'because the white people in the courts do not understand the black culture". Contralesa's take on civil cases is also incongruous to the state civil law. In cases of pregnancy, for instance, Contralesa is of the view that the man responsible has to either pay 'lobolo' (implying marrying or promising to marry the pregnant woman) to the parents of the woman or damages in case he is not intending to marry her. Once such a payment has been made , the matter is settled. But in terms of the state law mere impregnation does not result in an obligation to marry. It results in liability to maintain the child. Both PEACA and Contralesa believe that people under the age of 21 are a responsibility of their parents, with the result that even where criminal offences have been committed the parents are held responsible. The saying is: "When a child does something wrong s/he does it for the parent". Contralesa for instance , believes that a parent has an obligation to report to the community about a child who has gotten out of hand with failure to do so implying connivance on the part of the parent.*

[102] *See Nina 1994.*

[103] *This is according to Ms Mtwana who works as a mediator/trainer at the Quaker Peace Centre, Cape Town.*

[104] *For this section the interviewees who represent views of ordinary citizens spoke on agreement that while I have their names and addresses, such particulars should not be put on 'any reports'. As I promised them, I decided to put them as interviewee #1, #2, etc.*

criminal and give him a hiding. That is what matters and I will feel satisfied if the person who wronged me get punished. If they stole something from me, it will be returned to me".

I have tried to capture the view of the ordinary citizen regarding the status of ordering in the township and must report that the plurality of ordering has left many an ordinary citizen confused. People do not know what structures of ordering exist in the community. Those people who know about the structures are the ones who had to deal with them in one way or the other; for instance being one of the parties or a neighbour or friend having been one of the parties. Even in that case, it would appear that such individual's knowledge/awareness is restricted to that particular structure that s/he was involved with. The legal awareness is generally very low among the ordinary people. People are ignorant of even their basic rights. There is hardly any awareness about the difference between criminal and civil cases.

This lack of knowledge among the ordinary people often results in some of them blaming the criminal justice system for things that the criminal justice system is not responsible for. For example, when asked where they would go if someone indebted to them fails to pay, many of them say they would go to the police station. It is people with this view who get disillusioned when they get to the police station and they are told the police cannot open a docket and the alternative is to institute civil case through other channels. As an interviewee (interviewee #3) put it: "the police must stop undermining people. They must come and help SANCO to solve problems among neighbours – all problems, not only where blood has been spilled. Small problems between neighbours can result in big problems, or even death". Another interviewee said, "the police do not solve problems about washing lines and cleaning of (communal) toilets. They do not even listen to you. They refuse to even go and talk to the neighbour who is causing the problem". People still believe that debtors can be imprisoned simply for failing to pay their debts. Indeed this used to be the case when the notorious section 65 proceedings/inquiry used to take place in terms of which people who owed money would be ordered to pay by a magistrate and failure to do so within a stipulated period would result in imprisonment. Though the law has changed in that regard, it is not surprising that people are not aware of it. They are therefore surprised when people who owe them money do not get taken to prison. These statements which show that the interviewees expect police officers to settle civil disputes in the community, unfortunately, represent a prevalent view in the researched townships. When the police officers do not act as expected, the criminal justice system tend to be accused of inefficiency.

Drawing from my interviews and observations, the position of the ordinary citizens can be summarised as follows:

- A significant majority of ordinary citizens, at least in the researched townships, are ignorant of the law. That ignorance applies to both state and non-state legal ordering. This fact can be attributed to the fact that there has not been consistency of legal ordering structures that apply to the black South Africans. There has been constant shifting from one forum to the next on the part of the

authorities and organisations[105] and ordinary people have not been able to keep up with the pace. The fact that many township dwellers have rural roots and dual residence (e.g. one person having houses in both Khayelitsha and the rural areas of the Eastern Cape) exacerbates the situation in that such a person gets subjected to two legal ordering systems and it cannot be expected to be easy for him/her to familiarise him/herself with both.

- There is a de-linking between the ordering structures and the ordinary people. The state law is undoubtedly foreign to many of the township residents, as to many other black South Africans and that is not surprising given the legal dualism that exist/ed in the country. What is interesting is that there is a further delinking between the non-state ordering structures and the ordinary citizens. They are not as popular as reported to be elsewhere (Sachs &Welch 1990) and as they may have been in the townships, in the past. This can be attributed to the fact that many competing community justice structures have emerged among the people and it would be asking for too much to expect them to keep pace with them. Moreover, none of the ordering structures has visibly embarked on education programmes among the people. The result is that the community justice structures are in the hands of a few people and are known to a few residents.

In sum what we see in the townships is an interaction (and often competition) among different structures partaking in non-state ordering and their respective roles are not clear. It would appear that all structures are engaged in a big war of combating crime and restoring peace. Their distinction lies in their respective modi operandi. The result of this field characterised by lack of clear ground rules is that the structures become definers of their own goals and the routes to achieve them. The state's involvement is also not clearly defined as its support or tolerance sustains the different structures. This lack of clarity of roles, with the resultant blurring of functions, can be attributed to lack of regulation of ordering. This interaction (or even competition) among the ordering structures is not clear and the interviews were not of much assistance as even many of the role players are not clear on the nature of the interaction.

This problem is amplified when approached from the perspective of the intended beneficiaries of these structures' services, viz. township dwellers. Of all the interviews, in this category, not even one had confidence in the criminal justice system for reasons such as collusion between the police and criminals; police's fear of criminals; police's disclosure of witnesses' identity to suspects; courts' release of criminals back into the community to harass complainants and witnesses; the length of time that it takes to try cases with concomitant inconveniences such as waiting at the court the whole day just to be told in the afternoon that the case has been postponed; etc.

As for the non-state forms of ordering, SANCO is the most known structure, but it is generally regarded as ineffective primarily because its street committees do not attend to criminal cases as they

[105] *What come to mind are structures such as the Commissioner's Courts and their abolition and the introduction of the Small Claims' Courts (See Corder 1985 and Van Niekerk 1995) and the structures such as makgotla followed by people's courts, community courts, SANCO street committees, etc. (See Seekings 1989 and Mangokwana 2001 on the State and non-State spheres, respectively).*

used to, especially in Khayelitsha. The other structures are not well known, let alone the services they offer.

Relationship between Non-State Ordering Structures and the State Justice System

There are two levels at which the state justice and the non-state ordering structures relate to each other. There is a more systematic way of interacting in the form of participation in the community safety fora (CSFs). The CSFs comprise of a number of state departments and structures of the civil society. CPFs are represented on this structure and so are other community structures such as SANCO, political organisations and business. This level of interaction seems to be somehow policy and strategy orientated and takes a broader view on community issues. They discuss crime prevention strategies, law enforcement, etc.

The second level is the one at which community organisations deal with the state justice functionaries such as police officers, prosecutors, magistrates, etc. This level addresses issues in a more individual and specific manner. It happens when a particular non-State structure interacts with a state functionary regarding a specific case. While there has been such an interaction in the Western Cape such as in the now defunct Gugulethu community court dealing with the Mitchellsplein magistrate's court, this interaction has been conducted on an ad hoc and/or unofficial manner and tend to depend more on personalities than on the system itself. A chief magistrate put it as follows:

> "I find it easier to deal with community leaders of Gugulethu because they understand the law and do not make demands we are not allowed to grant, unlike people from other places".

A member of SANCO local in Gugulethu said:

> "We take matters to court if we think they are very serious.... They (courts) understand because we do not experience any problems. Especially with cases that have to be dealt with in the community.... If we ask them to withdraw a case they withdraw it if the request is reasonable. They also refer cases to us especially cases involving houses, dispute of ownership regarding a house after the death of the owner. Sometimes those cases end up in court but because the officials there know about us, they refer the cases back to us..."

This illustrates that there is no established system of referral between the state and non-state systems. The dependence of this interaction on personalities is further demonstrated in the words of a prominent activist in non-state ordering who was central to the 'referral system' in Gugulethu, who said:
"Our relationship with Wynberg (court) was very good. They referred cases to us and we referred cases to them. But now... has left and joined the Scorpions and the relationship is not that good anymore".[106]

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[106] *Interview with Mr Citabatwa on 17 July 2001.*

Chapter 4

Factors that Impinge (d) on Modalities of Ordering

Having looked at the current status of non-state ordering in the preceding chapter, this chapter discusses the different factors that in one way or the other impinge (or impinged) on the fashioning of the current structures. I argue that the negotiated transfer of political power; the pragmatic approach of the non-state ordering structures and politics inform the form of ordering that we now witness in the townships. The focus of this chapter is on the bigger (broader) picture and looks at the factors beyond the locality of the non-state ordering structures as an extension of the previous one that focused on 'specifics' as it were.[107]

The negotiated transfer of political power

The notion of non-state ordering (or legal informalism) in its present form seems to be considerably a product of the elite (across the colour line) and politicians with nothing or very little to do with the people it applies to or is intended for and their aspirations.[108] This state of affairs has been occasioned by a number of factors. Clearly the shifting of the liberation struggle from fierce confrontational basis to an around the table negotiation stands out as one of such factors. The status of non-state legal ordering was not one of the priorities during the lengthy negotiations that preceded the transfer of political power. Non-state ordering structures did not have an opportunity to articulate and defend their values and fight for their inclusion in the new legal order. Now, seven years in the country's non-racial democratic governance, it is clear (more than ever before) that the state law has severe limitations in its application to the whole country, especially in its application to the poor. If ever it was hoped that equality could be achieved without leveling the play-ground by addressing the imbalances that characterize the country's legal ordering, experiences in the urban townships militate against such a 'wishful thinking'.

While rights have been universalized, their enjoyment and enforcement are restricted by the socio-economic imbalances[109]that pervade the South African society. That leaves us with a universal right system without universal enforcement, which should qualify as some glorified hypocrisy. There is

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[107] *See Introduction – Chapter 1.*

[108] *Writing about private justice, Nina noted that: "community courts, or Mediation/Arbitration mechanisms, represent more than an external project entering black townships. It is true, and in fact it is impossible to deny, that as conceived today the whole project of community courts has been organised, defined and even implemented by outsiders to communities". (1991:3).*

[109] *Santos (1992:245) has captured the role of social imbalances in a legal system as follows*

> *"Legal conflicts are individual conflicts between legal subjects. Both Marxism and critical legal theories have claimed that this is a crucial feature in understanding how class relations and class inequities are reproduced by the legal system. The individuals (be they urban invaders or landowners) appear before the law as formally equal citizens, abstracted from the social differences between them, in view of which their formal equality is little more than a sham". Also see my discussion in chapter two.*

clearly a blanket declaration of human rights for all citizens, but practice shows that social inequalities militate against enforcement to guarantee enjoyment of those rights by the poor. The struggle therefore comes to a battle, somehow subtle, by the poor to have the universal rights translate into a reality in their lives. Considering a similar situation in Brazil, Paoli (1992:145) saw this type of struggle by the poor as "a demand of the right to have rights". It has to be remembered that the net product of the negotiated settlement was that the ruling class, with its legal system (the Western legal system), got its status of dominance entrenched, evidence of which lies in the line of thought that all other forms of ordering should justify their existence by complying with the law of the land (Prinsloo 1999:63). [110]

I argued, earlier, that dominance of a legal system amounts to dominance by the group to which it belongs and that the Western legal system is a universal law that suit the elite (the ruling class) whose ranks have now been opened to include members of all racial groups. We need a frank reminding that such 'law of the land' refers to the Western system as embodied in the Constitution[111] and other legislation. A cursory comparative look at other countries reveals that countries like Zimbabwe (Cutshell 1991) and Mozambique (Sachs & Welch 1990) addressed the issue of legality with more vigour than demonstrated in South Africa.[112] This fact may be occasioned by the manner in which independence was acquired in these countries, as their post revolutionary governments did not have to negotiate with their predecessors and make promises before taking office, at least not in the way South Africans did. The South African non-state forms of ordering seem to stand as some outsider dependent on the mercy of the state law, which must define it, its parameters and its jurisdiction and this may be linked to the political transition (negotiated settlement) without difficulty.

One other result of this negotiated settlement was that it paved way for attempts at enticing the non-state structures into some working relationship with the current government made possible by its mainly uncontested legitimacy. This is evident in the steps taken by the government, especially the Ministries of Justice and Safety and Security, thus far.[113] This seems to be a Judas-kiss aimed at nothing more or less than swallowing the non-state ordering mechanisms into the main stream of law as defined by the Western system. And this is not an attack on the dominance of this system nor challenge to the interactional relations within the pluralist legal ordering, but an attempt to set the record straight (within that pluralistic relationship) so that the different elements in this relationship

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[110] Though this line of thinking gives the state law an undue advantage, it appears to be the most practical approach in that he dominance of the state law has been developed and entrenched far more than any other form of ordering. There is no viable alternative to it. For one there is no clear co-ordinated non-state law. What we find are some structures that busy themselves with ordering and their approaches differ considerably. Brogden and Shearing (1993:Chapter 7) who, being advocates of community –centred ordering, accept the authority of the state and its pivotal role in ordering, policing in particular.

[111] I accept that the Constitution of South Africa is a product of negotiations and that it represents aspirations of all South Africans and protects "values ... for which the African people fought so hard" (Sachs 1999:14) but I am of the view that the Constitution reflects more of Western ideology than African values.

[112] After attaining independence Zimbabwe brought the unofficial traditional structures into the official hierarchy of courts, giving them a position as the lowest structures (Stevens 2000:55 – 57). Mozambique, after attaining independence in 1975, went about establishing a new legal system that incorporated popular courts into the formal hierarchy of courts. Further see (Schärf 1989:180)

[113] See generally Vision 2000 and the National Crime Prevention Strategy. These should be seen together with the very many changes effected to the laws of the country thus far.

may be identified, their strengths and weaknesses revealed, thereby making it possible for us to produce a legal system containing features of all of them.

The point that this set-up drives home is whether the legal system has really changed its attitude towards the non-state forms of ordering. The acid test is the impact the legal system has on the majority of South Africans. Has the hegemony of the Western legal system been accepted by the majority of South Africans? If not, then what explains the relative harmony between the state and non-state ordering modes[114] in the black areas as revealed by the research in the Western Cape Townships? Is it a matter of the township dwellers' acceptance of the state, borrowing Samora Machel's phrase (Sachs & Welch 1990:1) and paraphrasing it, an indication that while they minded being devoured by a foreign tiger in the form of the Apartheid State, they do not mind being eaten up by the local lion in the form of the current state?.

There can be no doubt that the social contract[115] that emanated from the negotiated settlement did little concrete to include majority of black South Africans[116]. By and large the real issues relating to their socio-economic situation remain a somehow unfinished work. Now, in the seventh year of non-racial democratic governance, there is yet no legislation that caters for their specific legal needs in concrete ways, beyond the increase of the legal pluralism within the state law.[117] While a Discussion Paper has been produced in respect of community justice in the urban areas (an unimpressive progress in any fair assessment), nothing has been done about these structures' counterparts in the rural areas.

The success of the negotiated settlement was therefore in promoting national reconciliation; legitimizing the universality of the Western legal system (in theory as it hardly translated into practice hence struggle for a right to have rights became inevitable), securing cooperation of non-state ordering mechanisms and adding a considerable number of blacks to the dominant ruling class. These successes of the negotiated settlement are epitomised by government structures such as the community policing

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[114] *There is a general acceptance of state law among the township dwellers. The problem does not seem to be non-acceptance of state law, but its inaccessibility to the majority of the people. A shining example of this acceptance is seen in courts such as the one in Nyanga that as an interviewee at UMAC advises, is utilised by the people of Nyanga and the surrounding communities. This is because of the court's geographical situation in the township and as a result its services have been exposed to the community. That improves accessibility of the state law. The existing community justice structures such as SANCO, Contralesa, CPF, etc, all accept the state law as parties are, for example, threatened with the formal courts in the event of non-resolution of a dispute or lack of cooperation on the part of one of them.*

[115] *In talking about social contract, I am drawing from the Hobbessian theory (or story) as applied by Nina to evaluate Anti-Crime Committees in Port Elizabeth (Nina 1994); the crux of which is that people come together and give away some of their rights in pursuit of common wealth thereby creating a sovereign in the absence of whom there is bound to be chaos. Nina's take is that in the de facto absence of the sovereign as seen in the South African townships during the Apartheid era, instead of chaos resulting, the township dwellers created an alternative sovereign and produced an alternative social contract (ibid.).*

[116] *See Dixon (2001) who, in applying the concept of 'bulimic' society coined by a Jock Young, a British criminologist, argues that South Africa has moved from one exclusive society to another (exclusive society).*

[117] *This refers to what Bush (1979:230) calls internal pluralism in his discussion of other countries such as Senegal and Tanzania. It refers to existence of different ordering mechanisms within the state law in contrast to the form of pluralism where the state law interacts with outside ordering mechanisms. In South Africa internal pluralism manifests in the form of structures such as Small Claims' Courts; Children's Courts, etc.*

fora[118] and the existence of the so-called justice centres in townships[119] which, it should be stated, are all products manufactured outside the townships, not by the residents of the townships, yet applicable solely to them. This presents a classic example of Nina's observation: "The 'wheel' of community dispute resolution is reinvented without considering what is already happening" (1993:134).

Translating this national political compromise, settlement or contract [120]into these townships what one finds is a manifestation of a people without rights, yet with an internationally acclaimed human rights espoused in the country's Constitution. This reality then forces one to look at macro-micro contradictions inherent in the state's interaction with the people, especially township dwellers. In effect what has happened is that the state has usurped the political muscle of defiance from the people through the negotiated settlement and yet has not satisfied the demands of the people. The macro-level liberation has not translated into micro-level reality. Earlier research in Khayelitsha [121] found that "...there is a delinking at the local level with the processes of restructuring national policy and structure" (Taylor 199?:20).

In sum, the impact of the negotiated settlement in the Western Cape townships has been three-fold and it is in that context that the previous chapter on research findings should be seen. Firstly, the national government's claim to legitimacy was secured and therefore the struggle took on a new form. A form of 'awaiting fulfillment of promises', being a struggle as far as it involved legitimate expectations on the part of the masses and thereby forcing the political powers that be to strategise and maneuvre, though now mainly at ideological level.
Secondly, these townships were faced with provincial government donning regalia of the previous one[122] that oppressed and brutalized them during struggle for liberation. And thirdly, something other provinces would share, their heroes of the struggle were now in power. This departure of champions into the ruling class' ranks created a vacuum in terms of resources, which militate against organised and strategic support of the dominated township dwellers.[123] The impact of this, in my view a crucial pillar in the struggle for socio-economic rights, can only be appreciated by looking at the role they (the champions/heroes who joined the ruling class) played in mobilising the masses during the political

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[118] Community policing fora as structures that straddle state and non-state ordering are creatures, I submit, that loudly testify to the present government's will to be popularized and/or transformed as Nina observed (Nina 1994). But further than that they have a more significant position in the development of legal pluralism as far as they signify the decentralization of state (demoting it from its long supposed theoretical authoritative position) and bringing it into the centre of interaction as player to be engaged with. Looking at this trend on the part of state at international level Santos (1992:133) noted: "... the state has become more problematic as a social actor, its 'absenteeism' has become more untenable. The analytical focus must therefore be on the states as contested terrain, a social field in which state and non-state, local and transnational social relations interact, merge and conflict in dynamic and even volatile combinations." I think the complexity of state's involvement in the interaction lies in its "double-barrelness" (for lack of a better word) in that it is both a field of play and a player. This discussion may be pursued at some other level as I submit that the allusions made suffice for my present purpose constrained by research focus.

[119] Justice Centres here refers to structures created by NGO's (e.g. Alexandra Justice Centre as discussed by Storey (1991), not Justice Centres as opened by the Legal Aid Board such as the ones opened in Athlone, Cape Town and Mitchellsplain in March 2001.

[120] The name does not matter for present purpose.

[121] One of my researched areas. See Chapter 3 hereof.

[122] See Taylor (ibid.) in this regard.

[123] See Heslen (1996) in respect of resource drainage that this departure is likely to occasion.

struggle. If there are still any doubts on this point a look at Santos' work in Brazil (Santos 1992:233 - 252), exposing the role of activists and intellectuals on the side of the dominated class in scoring victories against the ruling class, should allay them. Should that comparative research not obliterate any doubt then a random interview with the residents of Khayelitsha, especially informal settlement in Site C, should, as they all deliver one message, and I paraphrase: "we are a people with no houses, no recreational facilities, no security, no education and the situation is getting worse by the day". That, I suggest, is an indication of a neglected and dominated class in the urban areas with no consolidated, organised and articulated strategy for their struggle – a people without rights!

The Pragmatic Approach by Non-state Ordering

One of the remnants of the indigenous features of dispute resolution one witnesses in the townships is its pragmatic and concrete approach to problems as opposed to the abstractness of the Western legal system.[124] Aligning to no substantive or procedural niceties, people focus on solving a problem and restoring a relationship that may have been broken or remedying an injustice that may have been brought to pass. The pragmatic approach characterizes all structures that I came into contact with during this research. The debate as to the content of the modalities of dispute resolution mechanisms does not, in the least, seem to concern people involved in this calling in the townships. It is a baby of academics and politicians.[125]

This explains why structures such as the community policing fora, notably in Khayelitsha, engage in dispute resolution though that is theoretically not within their scope. In shopping for justice a party feeling aggrieved simply looks for an institution that will deliver the necessary remedy as dictated by the prevalent trend in the particular community congruent with such locality's cherished values. It is within this context that mushrooming of different structures following different approaches and their enjoyment of support should be seen. The state can operate along with many other structures such as PEACA, CPF's, Peace Committees, Street Committees, etc, without being of any concern to the receiver of their services. Nina's observation seems true: "... most communities are attempting to deal pragmatically with state justice (courts and police), as needed and defined by the community members themselves" (1992:20). This pragmatic approach accounts for the apparent lack of separation of powers in governance at local level. There is no judiciary, executive and legislature in practical terms at that level, at least in the eyes of a seeker of justice. For this reason, it is difficult to try to separate dispute resolution structures from safety and security structures in the interaction among organs such as CPF's, neighbourhood watches, street committees, etc., which interaction is characterized by (or results in) blurring of roles and functions. To some extent, I submit, it was this pragmatic approach that rendered state law "peripheral" (Burman & Schärf 1990:706) in the townships in the past, and

[124] *See Prinsloo (1999:65) for comparison of the two approaches. Also see Sachs & Welch (1990:55) regarding the essence of the pragmatic (concrete) approach to problems.*

continues to do so, in that the township dwellers expect a similar approach from the state and lack of same resulted in these structures being irrelevant and alienating as far as the township dwellers were concerned. And, it should be added, lack of pragmatic approach on the part of the present government might be guaranteed to yield similar results.

Schärf has noted that the courts of the formal legal system and their way of service delivery have little appeal for the majority of the township dwellers (Schärf 1989:168). Until transition of the judiciary has penetrated the value system of the township dwellers and addresses their legal needs and expectations from justice institutions, this gap between the approaches of the majority of township dwellers and formal legal system can be expected to haunt us for a long time. All the attributes of the professionalism of the formal courts (as identified by Schärf (ibid.)), but their staffing by members of one racial group, remain intact still "...expressing the discourse of the ruling class and ruling cultural values" (ibid.). Crudely put, the ruling class has merely opened its ranks to accommodate members of other racial groups at the same level, but the discourse remains the same. This process has everything that characterized the Mozambican procedure of production of "assimilados"[126] during the colonial era, except that system's overtness and arrogance.

It is in taking these reflections into consideration, that one sees the angle of the National Crime Prevention Strategy's pillar focused on community values and education (Shaw and Shearing 1998:6) useful, as there is surely no way in which this gap can be bridged without education and fair consideration of community values, if it is hoped to reach a concrete respectful relationship in the pluralistic legal interaction. One condition, however, needs to be added, to wit: such education must not be approached with a view that suggests that the community should be the learner of principles and ideology manufactured outside its borders, but a respectful process during which the state, the NGO's and the communities learn from one another as their experiences, values and expertise interact and cross-fertilize one another in a relationship that will then qualify as dynamic legal pluralism. What should be avoided at all costs is disregard of the warning by Nina that the 'experts' and their 'knowledge' should be rethought to avoid the "... presumption that 'we' could go to 'them' and give the correct instructions and solution to any problem...". (1993:136).

Impact of Politics on non-state ordering

The impact that deprivation of community justice, especially popular justice, of its leadership on continuity of its business is a sure result. Evidence of this may be seen in the demise of the Cape Town

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[125] *Nina (1993:139) sees it as "... tension ... noticed and lived more by academics and NGO service organisations than by community dwellers themselves". I could not agree more with his take, as the thrust hereof may demonstrate.*

[126] *As that country had a dual judicial system, there was a provision that some Africans could graduate from the African legal system into the Western one and those graduates were referred to as "assimilados". (Stevens 2000:47). There was a similar approach in other African countries during the colonial period, for example where litigants could be classed as "European (or assimilated) or as native" (Bush 1979:277) thereby determining the legal system to be applied.*

Youth Brigade Court which "...was occasioned by the detention in June 1986 of most of its members" (Schärf 1989:178) and closure of the Youth Brigade court (ibid.:175). The onslaught by the apartheid government on the people's courts in the mid 80s rendered people's courts dysfunctional in many respects, among others, due to "...detaining and arresting leaders" (Pavlich 1992:40). Flowing from these experiences one is inclined to conclude that taking leaders away from these structures affect their service delivery muscle.

My reference to this trend is informed by my observation that the present government has deprived the community justice structures of their leaders through ideological 'arrest and detention' in addition to having physically coopted many of them as through employment (in public service). We must remember the political history of popular justice at this point[127], and that there is a difference between street committees that were non-political and people's courts or street committees that were political with the latter serving as "...both courts and places at which the moral values of a future South Africa were passed on to the residents" (Schärf 1989:170). Implied in the author's observation of passing of moral values of a future South Africa to the residents, I submit, there is a clear feature that shows the nature of the relationship between the residents and the members of these structures. Education has always been part of the non-state forms of ordering and as such the novelty of this education process at that particular stage was the content of the teaching – the nature of the values that were being passed on to the residents. This distinction is crucial in order to understand the apparent vacuum created by the political transition.

To an extent these structures were used as an instrument to achieve a political goal – a means to an end. With the intensive and overt introduction of politics into the non-state ordering structures, the course of this field was changed. The United Democratic Front (UDF) and the African National Congress (ANC) penetrated some structures of non-state ordering to an extent that they "...ruled the community with a great deal of legitimacy and consent by the dwellers" (Nina 1993:137). With this 'rule', as Nina proceeds to note, however, the needs of the community were linked to the "...national agenda of the ANC, a situation that can preclude or interfere with the community's immediate needs. The process also interferes with the development of organic and autonomous structures of community self-governance" (ibid.). From this it should be clear that the politically aligned people's courts, by far the best known of the two types of popular justice structures in South Africa, had a political interest with ordering as some sort of a peripheral interest. In that context when the ANC reached a stage of ruling the township dwellers with legitimacy, their goal (even though somehow subtly) had been achieved as an alternative (resistant) form of legality was in operation parallel to the state legality.

The rub came when the political organisations, that penetrated the non-state ordering structures, did not need the protection of such (community ordering) structures anymore as the unbanning of political organisations entailed some free political activity which provided them with an opportunity to perform

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[127] *For analysis of the entrance of politics into the non-state ordering structures, see Pavlich 1992:33,36; Seekings 1989:126; Schärf 1989.*

their educative process within the political organisations. Hence people stopped attending workshops and meetings of the non-state ordering structures giving priority to political activities instead (ibid.:138).

The politically aligned non-state forms of ordering were serving as organs prefiguring the future socio-legal order of South Africa (Nina 1993:133: Pavlich 1992:33), and serving as an alternative to the existing state ordering. They were simply engaged in a war of maneuvre (Pavlich 1992:29) with the apartheid government and using non-state forms of ordering as a battle strategy taking advantage of the vacuum created by "...the demise of the councilors' courts" (ibid.:33).

When the dawning of a new order was imminent members of these structures changed strategies from resistance to negotiations with the state as spearheaded by the national organisations they were aligned to. Eventually they followed their 'national organisations' right into the corridors of power physically and/or ideologically.

A crude summary could be: the politically aligned forms of non-state ordering pell-melled the non-state ordering terrain, got what they wanted out of it and then left with little care of their legacy with which this field is still struggling to come to terms. It all happened within a short time period (as from the mid 80s to the late 80's / early 90's). Understandably a vacuum was created by their departure (physical and/or ideological) and that may explain why during that same period the private justice organs started making inroads into this field.[128]

On the basis of the foregoing analysis, it is understandable why attitudes changed on both the state and the community justice structures from the period immediately preceding the introduction of the non-racial government (the transition period) till today when we can talk about a "partnership" (Nina 1994) between the state and the non-state ordering organs. This partnership explains, to some extent, why many of the traditional non-state ordering structures such as SANCO street committees, etc., have somehow, as the findings of my research suggest, faded into the background – surely not as active as they used to be – and why structures that straddle state and non-state ordering such as the CPF's are receiving prominence and claiming more legitimacy over other structures.

The shortcoming of this transition, as I tried to outline above, is that it squeezed the non-political non-state ordering structures into oblivion. The 'war of maneuvre' assumed a political dimension and the whole township life became highly politicized with the effect of rendering any ideology of non-political nature somehow irrelevant, if not to the extreme of seeing it as reactionary to the masses' organisation of people's power.

The most important result of the political transition was the present state, the importance of which should not be underestimated as the non-state ordering structures are defined and shaped in the context

of the state[129] such as when they constitute an alternative sovereign in line with the Hobbessian theory[130] (ibid.). It is therefore important for us to see the relationship between the state and forms of non-state ordering as a partnership and not an alternative to the current state. It is in this context that the state's monopoly of the use of force is not challenged and its handling of criminal cases is not contested[131]. This also explains the mutual referral of cases between state and non-state ordering organs.[132] I submit that the community's willingness to release criminal cases is informed by the fact that the criminal justice system is more accessible and more punitive as compared to the civil procedure. In general terms the criminal justice system deals with less relationship centred problems compared to the civil court. The procedures of the criminal justice are relatively clear to the community in as far as a victim knows how to get the ball rolling (e.g. by contacting the police) and, importantly, a victim does not need finances to institute the proceedings. The civil court system lacks these attributes and that seems to account for the hold by the community justice structures onto civil cases.

Community justice, therefore, in this partnership of ordering with the state, fills the gap where the state is incapacitated. I do not think that the state is enjoying monopoly on criminal matters, as seen in many areas, because of its competence in that terrain, as evidence shows incompetence (at times gross) as pointed out by both the SAPS members and other interviewees.[133] This is why structures such as PEACA aim at dealing with criminals because the police are unable to. It is an implied term of the partnership agreement, it appears, that the state be granted monopoly of the use of force and as a result criminal justice, where harsh punitive measures may be necessary, be left to the state. The counter-hegemonic struggle has had its day and cooperation has moved in to replace it, which fact may be attributed to the perceived legitimacy of the present state on the part of the township dwellers, or at least the majority of them.

In sum, it would appear that non-state forms of ordering will continue to exist in the whole country both in the cities and townships and they ought to be encouraged to do so, but they should in no way seek to replace the state law, but rather complement it. The fact that we are now able to talk about a partnership between state and non-state ordering is a tremendous progress and should be developed further. On the other hand the state law should be responsive to the needs and expectations of the township dwellers and, indeed, the whole black population as it is already satisfactorily responsive to

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[128] *See Storey 1991:71-82 regarding the formation of the first Community Justice Centre in Alexandra township in Gauteng Province.*

[129] *Merry (1992:164) captured the influence of state to popular justice as follows:*
"Thus, popular justice is structured by the hegemonic order of state law which it opposes. Since it is defined as the antithesis of state law, popular justice partakes of much the same language, the same categories, the same ideology as state law. Despite an ideology of opposition, popular justice institutions often draw upon the symbols, ritual and language of state law".

[130] *See Nina (2001:98-116) in his discussion of the Anti-Crime Committees of the Eastern Cape.*

[131] *This represents the general trend though there are exception to it such as organisations like PEACA. Though the government seems to somehow stand morally questionable as far as it does not seem to have delivered on its pre-election promises, it still enjoys legitimacy among many of the township dwellers and their structures.*

[132] *Members of the SAPS, the CPF's and Community justice structures expressed a wish to an increase in referral of cases among the structures of ordering.*

[133] *See Schonteich (1999) for a detailed discussion of the ineffectiveness of the South African criminal justice system in its present form.*

those of the white population and even the black elite. This entails marketing[134] of the state law in the townships. It would be unfortunate to leave legal ordering among township dwellers completely to chance as in leaving them to be guinea pigs for initiatives of different NGO's and community justice structures such as PEACA, SANCO, CONTRALESA, CPF's, Mapogo-a-Mathamaga,[135] etc. Owing to the fact that there have been reports of abuse about many of these structures, it is necessary to find a way to make these structures accountable to the public so that people's constitutionally protected rights are not left vulnerable to abuse as they are at present. It is in pursuit of this line of thought that the next chapter looks at the initiatives taken by the South African Law Commission thus far.

[134] *Such marketing could be in the form of projects such as the street law project, other projects by law faculties of different tertiary institutions and law centres in the townships.*

[135] *Mapogo-a-Mathamaga is an organisation that operates in the Northern Province and Mpumalanga. It does not have a branch in the Western Cape and its inclusion is based on the fact that it shows evidence of self-styled community justice structures somehow maturing into vigilantism.*

Chapter 5

The South African Law Commission's Initiative

After grappling with the status of non-state ordering in the country in the preceding chapters, it becomes appropriate, to look at the project of the South African Law Commission (hereinafter "the Law Commission") aimed at addressing non-state ordering in the country as contained in their Discussion Paper.[136] I have, hereinfore, alluded to the present government's insufficient attention afforded this form of ordering as far below what it clearly deserves, while acknowledging that steps have been taken in that direction. The importance of the provisions of the Law Commission lies in that it provides, for the first time, a document, which seeks to regulate non-state ordering in the post-apartheid era. This becomes crucial for the future status of legal pluralism. Fresh questions to be engaged with are whether South Africa is going to follow in the footsteps of other African countries by drawing non-state ordering into the main stream of the country's legal system and thereby making it a lower tier in the legal system. Examples abound in this regard (Cutshall 1990, Ladley 1991 (Zimbabwe); Sachs & Welch 1990, Gundersen 1992 (Mozambique); Bush 1979 (Senegal, Tanzania, Zaire, Nigeria, Kenya)). Or whether a mode that keeps non-state ordering outside the formal legal system is to be procured. Something in line with "...the US Community Boards" (Merry 1992:168 – 170). Whichever of these options is adopted stands to inform the nature of legal pluralism in the country particularly concerning the role of the state in this interaction (pluralistic interaction of legal systems) because, the nature of the state tends to define the form of non-state ordering that coexist with it (Merry 1992:164-8).

Whichever mode is opted for the acid test remains the impact it will have on the 'real non-state ordering'.[137] What avails itself for scrutiny is the ability of the state to keep up with the process of socio-economic evolution in the communities and that is bound to reflect in the legal system that seeks to order them. What remains to be seen is whether the South African legal system will be able to make itself relevant to the people's needs thereby promoting its law (so far embodied in officialdom) from its status of periphery in the black communities into a system of law that celebrates, as it were, the cultural and socio-economic diversity of the South African population. Is there something concrete that can be done or does nothing really work?

The process of addressing the issue of non-state ordering in South Africa started in 1997 (SALC 1999:1) when the project committee on Alternative Dispute Resolution resolved to divide its project into three components, viz. 'ADR and the Civil Law, Family Mediation and Community Courts'

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[136] *This is not the final stance of the Law Commission on this matter, but merely a Discussion Paper. A lot can change between the time of writing hereof and the time the official stance of the government is declared.*

[137] *I use this phrase advisedly as I think whatever the product of the Law Commission may be, there will remain forms of ordering outside it when people take responsibility to solve their problems themselves without, or with little outside intervention, be it from the state or private justice sector.*

(ibid.:2). Before this decision was made, the said committee's mandate had been to investigate 'Arbitration' (ibid.:1) and from the parties that made representations to the Law Commission,[138] it is evident that the primary focus was not on traditional, popular and/or private justice (or dispute resolution mechanisms). While the project had started in August 1994, 'Community Courts' were only accorded real focus in October 1997 (ibid.:1-2). It would appear that the investigation of 'Community Courts' came as an after-thought in this process.

Unfortunately even the process of consultation that was followed in researching this phenomenon appears to have taken a superficial form. In the first place the process of consultation (or "polling of opinions" (ibid.:18)) with the "stakeholders" (ibid.) was very short. The consultative process took place between March 1998 (ibid.20) and July 1998 (ibid.:50). While this process of consultation may have afforded the project some legitimacy as was aimed by the Commission (ibid.:18) the end product (the proposals made) show that there is very little input from the consultative process that is reflected in the Discussion Paper. While one-day-per-Province consultative workshops could be very helpful, they have to be augmented by thorough research especially in a field as underdeveloped, diverse, fragmented and uncoordinated as the non-state ordering. Unlike in respect of state law and other fields, non-state ordering does not boast much consolidated (and up-to-date) pool of knowledge based on research.

Having said that, however, it needs be stated that this process, with its limitations, is an important milestone in the process of legal reform, especially in the field of non-state ordering. For that reason I found it apposite to choose and paraphrase some, in my view, important provisions of the Law Commission's Discussion Paper which I present and analyse hereunder:

The informal structures must be recognised and supported by law (paragraphs 3.3.4.3; 3.3.3.6; 4.2 and 4.6):

It would appear that this provision entails legislation that defines and regulates the structures as well as procedures thereof. It would also detail how the structures are to be staffed and whether and how the staff members are to be remunerated. This will therefore ensure uniformity of these structures throughout the country and in this way their accountability may be promoted. Even their jurisdiction can, in this way, be clearly defined so that, among others, it is known which cases are to be handled in these structures and which ones not. This will be congruent to what I ventured to call herein 'following in the footsteps of other African countries' as far as those countries have legislations regulating these structures. I wish to add that there is nothing wrong in so doing (i.e. providing legislation that regulates these structures of non-state ordering), but the challenge lies in circumventing the unholy unproductive circle of the propensity of legislation resulting in mere bureaucratization of some structures and in the

[138] *The Association of Arbitrators in South Africa and the Alternative Dispute Resolution Association of South Africa (ADRASA) are the parties that made representations to the South African Law Commission (SALC 1999:1).*

process causing appearances of more real non-state ordering structures. Would legislation of regulations result in people voting for other outside structures in the way they know best – with their feet?

One wonders if the envisaged legislation will not, in strict practical terms, be a somewhat duplicate of structures already existing within the formal legal system. How will non-state ordering structures, defined and implemented in terms of legislation, differ from the Small Claims Courts in terms of jurisdiction, inquisitorial nature of proceedings and informality? I think the only significant differences will be the presiding officer (in him/her being a professional in the Small Claims Court); the limitation of the Small Claims Courts' to civil cases (that is if the new non-state ordering structures will have a criminal jurisdiction) and, perhaps, the fact that there may be more than one presiding officer in the non-state ordering structure's sitting. If these be the only important differences, how then can the high amount of resources (as it surely will be) be used to create such duplicate structures? Why not add credibility and legitimacy to the Small Claims' Courts by simply harmonising the differences? For example, by making members of the community part of the Small Claims' Courts (could be as assessors or presiding officers); giving the Small Claims Courts a limited criminal jurisdiction if that is envisaged for the non-state ordering structures.[139]

Other African countries that followed this approach, the closest example of which being Mozambique, faced a different situation from ours and therefore could have been justified in following the route they followed. Mozambique had a complete dual system (one system for whites and another for blacks), while South Africa had a system of universal application especially towards the demise of the Apartheid state seen in the legal reforms that took place during that time, and that explains why, I think, South Africa could live with the legal system for seven years without producing legislation regarding non-state ordering.

I submit that the legislation envisaged will further stifle the organic nature of non-state ordering. There will certainly appear more non-state ordering structures outside the scope of the envisaged legislation.

Theoretically it would seem that the envisaged legislation will have an effect of decentralising the state and bringing it back[140] to the interaction with the other forms of ordering in the social field where it shapes and gets shaped by the fellow participants in the field, yet not coming as an equal player but asserting itself and, drawing on its unequalled authority, determining the ground rules. It would appear that the South African state now agrees to its transformation and forges partnerships with the community at different levels (e.g. CPFs and CSFs). Yet it appoints itself the senior and managing partner of the partnerships. Evidence of this trend manifests in the progress already made in other spheres of governance such as CPF's in the Criminal justice terrain. Here we see the state having

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[139] *I could go on and compare the envisaged non-state ordering structures with the Family Group Conference and the Family Court System, but refrain therefrom, as I would arrive at the same conclusion as this one (i.e. the one relating to Small Claims' Courts).*

legislated a structure into existence mandated to monitor its (the state's) delivery of services, yet holding it within its authority and accountability (at least theoretically).

While I submit that such legislation would not be appropriate if it brings into existence new structures into the non-state ordering sphere, I think the appropriate legislation would be the one that regulates the functioning of the existing structures[141] by laying down the basic conduct and practices they should adhere to so as to avoid abuse of human rights. There should be a specific legislation forbidding these structures from exercising compulsory jurisdiction among the communities in which they exist. But such legislation will not be of much use unless accompanied by publicity in the form of training and education.

A new name to be found for the informal justice structures (paragraphs 4.1 and 4.4.3.)

The names 'Community Dispute Resolution Structures' or 'Community Structures' are preferred to any other names used before. Further to the aim of freeing these structures from their historical baggage, it is argued that the term 'court' (as in 'People's courts', 'Community courts') would create confusion (Stevens 2000:103). This undoubtedly suggests that state law (the Western legal system) is the only system to have monopoly of 'courts'. [142]. I will not enter into a debate of whether this is justifiable or not at this stage, suffice it to say that such confusion was never reported in countries that used this term, viz. Mozambique and Zimbabwe and that a scholar and jurist who was involved in the Mozambican legal system using this name ('courts') seems to think that these structures are courts and I quote him:

> "We need new local courts. You may call them traditional courts, customary courts, or community courts, or whatever but they are courts. They are not just alternative dispute resolution mechanisms, or mediation or arbitration bodies, they are courts. They form part of the judicial system, they exercise judicial power, enjoy compulsory authority over those within their jurisdiction, and act on behalf of society as a whole to keep the peace and secure justice for individuals" (Sachs 1999:17).

In pondering this big issue about a name, I realise the onslaught of private justice on popular justice. It would seem that the envisaged informal justice structures are a brainchild of the private justice movement. Having nothing against private justice and acknowledging its significant role in the communities, I however think a misconception has been brought to pass in that they tend to be confused (conveniently?) with the organic popular justice structures such as makgotla and people's courts and they now seek to replace them. Needles to say that this is an exercise in futility. For one, the private justice movement is not premised on the values of Africans and they are not a product of the

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[140] *As Santos puts it," ... back to a place the state has never been". (1992:4).*

[141] *Not necessarily that there should be prohibition of formation of new structures, but that the communities be allowed to produce their own structures. In other words the State should not impose new structures onto the communities, but give a framework within which structures may exist.*

communities they intend serving. [143] They come from the West and it will take time for them to infiltrate the African value system. I further noticed the link between the private justice movement and the state and am struck by the intimacy of ideology as played out in the state's use and support of projects undertaken by this movement and vice versa.[144]

This is not insinuating fault on either party, but points to a further dynamic in legal pluralism as the state gets more involved in the field. Merry observed that "...political leaders at the national level often use popular justice[145] tribunals to reshape society (1992:163). And then proceeded to observe:

> "What is the relevance of popular justice for social transformation? ... popular justice served more clearly to *reinforce the power of existing elites and state law than empower local people.* I think the failure of popular justice to accomplish its social and political transformational goals results from the fact that ... it is supported and supervised by the state" (1992:168 – emphasis added).

It would appear, from the foregoing observations, that the formation of informal justice structures as proposed is an extension of state control in society and that private justice, as a movement, has strategically placed itself, through conscious planning and accurate foresight, as an instrument suited for this purpose. It is therefore more than 'just a name' but a fierce struggle among ordering mechanisms for a stake in the open field of ordering.

Attendance at the informal justice structures to be entirely voluntary (paragraph 4.3.2)

It seems to be common cause that attendance of the informal justice structures be voluntary. And no person can be forced to attend these structures. The available justice centres in the Gauteng Province use this approach – their attendance is voluntary (Storey 1991).

This confirms the state's monopoly of the use of force or threat of the use of force. The South African structures, therefore, will not have what Sachs attributed to similar structures elsewhere, viz. enjoyment of "... compulsory authority over those within their jurisdiction..." (1999:17). I have already engaged with the influence of private justice as well as the state's assertion of power hereinfore, and this provision should be seen in that light. No doubt the voluntariness of attendance of these structures will affect their functioning and ability to censure. Justice often gets associated with authority. Mr.

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[142] *This is not to suggest that I am against the Western legal system having a monopoly of courts. On the contrary I submitted above herein that community justice structures in their present form and functioning should not be elevated to status of courts, at least in the urban areas*

[143] *All the existing private justice structures are manufactured outside the townships.*

[144] *See the CPP's 2001 document entitled "COMMUNITY PEACE-MAKING: Building a model of democratic governance" which discloses their influence on the Discussion Paper, as an example.*

[145] *Merry's use of the term popular justice should be understood in the context of the interchangeability of terminology characterising this field. Differing from the use of this name in this dissertation, it does not refer to what I called "all other structures except NGO-led structures', but it refers to informal justice in general (Santos 1992:132; Fitzpatrick 1992:202), including private justice.*

Jansen[146] explains that people turn to CPF's for solution of their problems and they see CPF's as authoritative structures by virtue of their offices being next to the police and in South African townships police are rightly associated with ability to use force due to their past actions, especially during the Apartheid era when they were used to brutalize citizens. Mr. Makola[147] thinks that making the informal structures of ordering voluntary, in terms of attendance, is an attempt to destroy these structures. I submit that it is true that voluntariness of these structures will deprive them of coercion and without coercion their authority may be undermined. Yet I think it would be too dangerous to allow them coercive powers owing to the lack of accountability and the pervasive abuses of power. It is at this stage that the state should avail its coercive power so that when coercion is necessary it should be easy to turn to the state. That is the significant role that the state ought to play in the partnership with non-state ordering structures.

Community forums to remain informal and flexible in their procedures, inexpensive in their operations; accessible, non-alienating and responsive to the needs of the communities in which they operate (paragraph 4.3.3.)

This provision seems to be a summary of an ideal status of a legal system in any given society but one does not have to look hard to wonder if its romanticism can ever translate into reality. It seems to be a contradiction to talk about legislating and yet retaining the above features of a legal system, if legislation accords with my discussion thereof as contained hereinfore. If legislation, for instance, will result in uniformity and accountability, I think, there will be a serious problem in ensuring responsiveness of the system to the needs of communities that it serves. How will the system be able to, firstly, define those needs, bearing in mind the non-homogeneity of any given community even at the very local level, and secondly how will the progress of such community's needs be monitored to retain the responsive feature (supposing definition of the needs were possible)? At this stage I must submit that responsiveness to community's needs may be better realisable by the government, not the Government. It should be a very local matter and the thorough diversity of the South African population highlights the limits of the Government at the local level. The South African constitution of governance allows for local participation in other spheres such as local councils and those structures are the ones better placed to define and monitor the diverse needs of the community and the non-recognition of the Western fictitious separation of powers at the local level, especially townships and rural areas, makes the case for delegation of these ordering powers to government of the locality, the more stronger. It is impossible to divorce the judiciary from the other sectors of governance, probably rooted in the African traditional status of a chief who would be vested with the whole governance.

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[146] *Mark Jansen is a mediator and trainer at UMAC and an executive Committee member of CPF in Nyanga. I interviewed him on 14 March 2001.*

[147] *Mr. R.K Makola served as a magistrate during the apartheid period (for more than twenty years).*

The positive tone of this provision cannot, however, be denied as it shows the willingness of the state to be reshaped and transformed by the people to whose needs its laws would have to be responsive. I have already disclosed my take that this feature would serve better if drawn into the existing formal courts owing to the already undisputed status of authority of those courts and that would be easier compared to its introduction in the non-state ordering sphere in the form of new structures. The demands of non-state ordering for accessibility seem to be higher than those of formal ordering. The primary ingredient of people accessibility of justice, which characterises/d non-state legal ordering sphere is "...fusion of morality, law and legitimate leadership" (Schärf & Nina 2001:14) and, in my view, that is more than a mere ingredient, but a prerequisite if any success is to be achieved. And this prerequisite cannot be legislated into existence! What can be done is regulation of the existing ones and making them accountable to and resonant with the constitutional principles that South Africa has espoused.

Community forums to function within the law and the Constitution of the Republic of South Africa

While the present status of lack of regulation or control of the non-state forms of ordering is not ideal and it is obvious that there has to be some control from the Government (the extent of which remains a moot point), I find it difficult to see non-state forms of ordering functioning within the Constitution and the law (on the assumption that the latter refers to the Western legal system), especially the justice structures, without them losing their identity and their essential characteristics. Difficult but not impossible. A major mindshift would be necessary to reach this goal and Judge Sachs' insight is helpful in this regard:

> "..., I think it is important to avoid an unfortunate but prevalent tendency to put customary law and the Constitutional principle of equality on a collision course, that is, to say that for the one to live, the other must die, or to use a less dramatic metaphor, if custom triumphs, equality must fail (or vice versa). I think this is a profoundly mistaken view" (1999:19).

It is this 'profoundly mistaken view' that I think should be changed when I suggest a mindshift. More respect and cross-fertilization between the Constitution and the features of the non-state ordering should be forged. We have to move from seeing the law of the country in a mechanical way in its condition as "...formalised and frozen by magistrates, missionaries and patriarchal male elders in the colonial and apartheid era..." (ibid.:14) and open it to influence by the diverse cultures that characterize South Africa.

Theoretically, this provision confirms the state's role as a self-appointed managing partner in this partnership as discussed above. And it is only if accompanied by the suggested mindshift that it can enrich the dynamic legal pluralism in South Africa to the extent that each one of the elements of this dynamic interaction (including state law) is prepared to cross boundaries of the fellow elements and

ability to allow encroaching into its own boundaries. That will give a complete new meaning to the provisions that informal structures be subjected to the Constitution and the law of the land because, may be partly, the informal justice's values would then be reflected in the pluralistic legal system of the country. Then, at least at formal level, we will have one nation, one law.

Recommendations

In sum my submission is that it be accepted that the state of ordering in the country is unsatisfactory, to say the least, and that the reality in the urban black townships is that there are no viable mechanism of legal ordering. Civic organisations such as SANCO; other structures such as PEACA, Contralesa; NGO-led structures such as the Peace Committees, Quaker Peace Centre, UMAC etc., as well as structures that straddle the state and the community such as the CPF's; CSF's etc, may do a commendable job, but they fragment ordering to an extent that justice and ordering become a matter of chance. Moreover they are so uncoordinated that there will be no consistency in justice if they were to be relied on as sole uniformly accessible justice structures for the community. At the same time there is evidence that had the state law been more accessible and sensitive to the needs of black South Africans, people would make use of them. The state law needs to be developed into an accessible law reflecting the diversity of the expectations of all South Africans. While most of the present community justice structures are relevant and necessary, they must not be elevated to status of 'courts'[148] in the community, at least in the urban townships.

This take is based on my fear of the country creating a second rate justice for the poor. The poor should be able to choose between approaching these structures and the courts freely. It cannot be said that a person approaches a community structure freely if s/he does so because of ignorance of his/her legal rights, unavailability of courts to help or simply because s/he cannot afford the courts. Doors of the civil court should be opened to all and community structures should not be used out of desperate necessity but out of voluntary wish on the part of all the parties involved. The essence of the dynamic legal pluralism suggested herein is not that of us having state law kept for the privileged few and community justice for the poor. It is the existence of a dynamic pluralistic state law comprised of the Western system, the African indigenous system and mediation features. That would form the internal dynamic legal pluralism and it stands to succeed based on the Small Claims Courts' model that has been operating for more that a decade.

On the other hand, there will be community justice structures that are not part of the state law, but have to submit to its authority and regulation to curb abuse of human rights. These outside structures have a contribution to make and their relationship with the state law (which will be internally pluralistic) will form the second leg in the dynamic legal pluralism of the country.

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[148] *I refer to 'court' in its restricted functional meaning as meaning a 'court of law' per the Western system, with ability to compel attendance, afford due process, pronounce judgment and impose sanction.*

Drawing from the foregoing analysis I present the following recommendations in respect of legal ordering:

1. That the state law which has been transformed, and is still being transformed, be accepted as the only formal legal system of the country. Its application is universal and, with adaptations, has proved ability to serve the whole nation. An example of this would be the Small Claims' Courts, which while part of the state law allows for informality of proceedings and affordable costs.
2. That the non-state forms of ordering be allowed and encouraged to continue functioning in the community.[149] The necessity and relevance of these structures cannot be denied at all, but they have to be regulated and education should be intensified about the rights, jurisdiction and duties of these structures. That may include considering a subject on legal basics in schools so as to improve legal awareness. They should not be allowed to proceed unmonitored as that has proved to endanger other people's rights.
3. That the Small Claims' Court be marketed in the townships and should include members of the community as presiding officers and/or assessors.
4. That the Ministry of Justice introduce more justice centres and the Legal Aid Board relaxes its stance on civil cases so that many people can have access to the formal courts. It may as well be considered to place advice officers at the magistrates' courts so as to assist potential civil litigants.

The net result of the above recommendations would be that we have a legal system with a state law that is internally pluralistic thereby reflecting the diversity of the nation and the plurality in the non-state ordering sphere, yet regulated to avoid abuse.

While I support non-state ordering and the indigenous African dispute resolution structures, I think their future is not very promising and it is impossible to revive them, at least in the urban areas. As Brogden and Shearing put it: "... a return to past ordering traditions is impossible, given the development of a complex differentiated society..." (1993:162). They therefore cannot be set up as the only legal system for the people. The easy mobility of the people dictate that there are for ever increasingly to be cross-cultural, cross-ethnic and even cross racial legal disputes and the question of choice of law will prove an insurmountable task. To give a very simple example: suppose Community Dispute Resolution Structures are legislated into existence and there is one in Khayelitsha. A who lives in Khayelitsha and works in Claremont will be subjected to two different legal systems. Even worse, in practice, the Community Dispute Resolution Structures will be a form of a law for blacks as most of the

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[149] *Frank et al (1997:21-22) listed three options available to the State in respect of community structures as leaving them as they are ('status quo'); 'status quo plus one' (entailing status quo with surveillance by the state) and "incorporation into State Justice mind frame'. My recommendation clearly falls squarely into their status quo plus one. It, however, becomes problematic as to what the status quo is because of the existing (increased) plurality of ordering as chapter three shows. The status quo in 1997 is not the same as the one now in 2001. In the authors' words: "Popular participation can be motivated in terms of increasing the legitimacy of the formal system; providing a sense of community ownership over state justice structures; cultivating respect for law and order; creating a shared understanding of crime and its prevention and control; and, educating and sharing information with the public on the nature, operations, requirements and limits of the formal system" (1997:3).*

existing non-state legal ordering structures prove to be, in that they exist only in the black areas and are meant for blacks.[150] It is with this harsh reality in mind that the above recommendations seem to be the lesser evil. They are in no way ideal.

[150] *I am conscious, as Friedman advises, that it is problematic to dichotomise in terms of 'blacks' and 'whites' as there exist different groups within each of the racial labels. Indeed blacks living in the formerly white suburbs will not be subjected to the community justice structures. Even then the system remains problematic as it then discriminates in terms of wealth and not race and connection between the two in South Africa brings us back to 'black s and whites' in practical terms.*

Chapter 6

Conclusion

This dissertation sought to tease out the dynamics of non-state ordering in South Africa. It engaged with this complex field and given its plurality, fluidity, inconsistency and lack of any form of uniform regulatory framework, it may have raised more questions than answers. This is to be expected for a number of reasons, such as the lack of official political stance of the South African government on non-state ordering, the fact that non-state ordering is characterised by diversity, etc.

I have disclosed my reservations (to say the least) about the approach of the South African government regarding the country's legal system and ventured to call it 'hypocrisy' (for lack of a better and more respectful word). It is hypocrisy in that the way legal reform is gone about seems to imply that the state law in its present form is capable of serving all South Africans, but for lack of resources. I think this is where the root of the problem lies – a mistaken line of thinking. I argue that the state law, in its present form, is incongruent with the culture(s?), values and expectations (from a justice system) of many of South African citizens, especially, if not solely, blacks. The majority of black South Africans have been socialised in an ordering system based on the indigenous African ways of conduct which differ significantly from the philosophical underpinnings of the South African state law which is based on the Western style of ordering. I admitted herein that there has been development (or evolution) from African indigenous ways to European ways. But that 'evolution' has not reached a stage where the state law can be said to be applicable to all South Africans. Within the black population there are those people who have evolved to a position where they can live on the basis of the state law. At the same time there are those who adhere to indigenous African ordering systems (more conspicuously in the rural areas). Between these two groups there are people who straddle the two systems. Sadly, the South African government ignores the existence of these strata within the population and seeks to impose the state law, in its present form, on one and all.

Far from opposing the application of state law to all South Africans, I think it is the only practical solution given the implications of globalisation; inter-tribal, -ethnical, –racial and -national transactions as well as the undue enrichment that has been afforded the Western based state law, if only as a matter of choosing between the devil and a deep blue sea. What I contest (and see as hypocrisy) is the way the state law is imposed upon all South Africans while it is clear that such a stance equals a disservice in practical terms. The harsh reality is that the state law, which enjoys monopoly of access to state resources, fails to serve majority of the country's citizens and very little – close to nothing – is being done to improve that situation. The legal reform that has been taking place needs to be accompanied by concrete measures to popularise state law among black South Africans through eliminating the geographical, economic and psychological barriers to access to justice.

In Chapter three I presented the day to day experiences of a number of non-state ordering structures and hope to have shown that these structures operate outside the state with very little or no support from the

state. Black South Africans use these structures more than they use the state-created structures such as the formal courts. So these structures serve a purpose and cannot be wished away. Conversely, however, many of these structures, which I see as indispensable, have been associated with human rights abuses. There is, therefore, a clear need for a balanced approach that will preserve these structures while protecting the human rights of people who get to deal with these structures.

The Discussion Paper of the South African Law Commission acknowledges this need in the introductory reflections (SALC 1999:1–6) that preceded and informed the workshops they held throughout the country, even though the 'provisional proposals' (ibid.:58-70) do not seem to do justice to these legitimate concerns. The Discussion paper aptly diagnosed the present South African situation and alluded to potential problems between the Constitution of the country, especially in handling of criminal cases. The core of the problem, as the Discussion Paper puts its finger on, is the non-separation of civil and criminal cases (ibid.:vi) in the dealings of many of the non-state ordering structures. The dilemma here is that while it may seem more appropriate that criminal cases be the terrain of the state law, such separation may incapacitate many of these structures. Yet allowing these structures to handle criminal cases may result in violation of the Constitution of the country in respect of requirement for, inter alia, due process of the law. As my research findings point out, this concern may be a bit outdated. Many of the non-state structures, at least in the Western Cape townships, are willing to allow the state law monopoly of criminal cases. Even those structures that hold on to criminal cases do so mainly because of the inefficiency (or perceived inefficiency), not inappropriateness, of the criminal justice system. Moreover many of the interviewed ordinary citizens do not challenge the appropriateness of the criminal justice system, but accuse it of inefficiency as in taking too long to dispose of cases, lack of communication with victims and the community, undue discharge of criminals, etc. In that line of thinking, I would then argue, the state law, not non-state ordering (law?) ought to be subjected to overhauling and development. This submission ought to be seen in the context of my previous one (not as contradicting it) to the effect that legal reform has been gone about as though provision of resources to state law was the answer. I wish to harmonise these two submissions, lest they be seen as contradictory. It is not that lack of resources does not contribute to the problem, but it would be a mistake to present that one factor as the only obstacle. The philosophy underpinning the state law has to be worked on so as to resonate with the thinking of the urban township dwellers and their expectations from a justice system. One of the main charges levelled at sentencing, as held by many of my interviewees, is that it often punishes innocent people. The example given is that A, a married man, sole breadwinner, fathering eight children, gets sent to prison for five years as punishment for crime he committed. Nothing, the charge goes, is thought about the fate of that criminal's family. At the end they are the ones who go hungry while the culprit is fed daily.

It is here that CPFs, CSFs and other community structures ought to be consulted and utilised, inter alia, to effect meaningful communication among the various state departments and between the state and the society at large. It is only with rationalisation and proper channelling of resources as well as rethinking

of some of the state law philosophy that the recommendations presented in chapter five hereof way be of use.

It is in this context that I approach the Discussion Paper of the South African Law Commission. While the Discussion Paper ought to be hailed as a positive, if inexcusably long overdue, step; it is bound to fail should it proceed in its present form. It will just result in formation of more non-state ordering structures. State regulation, though undoubtedly necessary, as my recommendations hoped to demonstrate, ought to be in such a way that it simply sets parameters within which non-state ordering should take place without dictating their form, content, name and their modus operandi.

It has to be added that even if all these recommendations were implemented, they ought to be accompanied by legal education and other efforts to make the state law more accessible. Lack of legal knowledge is one of the main factors that contribute to the inaccessibility of justice. More than anything else, therefore, we need a political will and commitment to reconstruct this field. The parliamentarians, many of whom are products of popular justice structures, ought to remember their roots.

The last word ought to be on the role of NGO's in non-state ordering. I think these structures' role should be subjected to a major rethink. At present, my research findings force me to argue, many of them impose foreign dispute resolution ideas on black urban township dwellers. Their resources could be better utilised, I think, in supporting the existing structures and developing programmes that will serve to develop and consolidate developments through research and teaching. They can better use their organisational capacity and experience to conduct legal training in basic human rights and legal procedures, than in establishing many structures of dispute resolution.

Should that happen, I submit, South Africa will have a state law that is known by many of the citizens and a vibrant law abiding, human rights friendly non-state dispute resolution sphere. This can in no way be an easy process, but it would be a vision worth investing in, in that one of its benefits would be meeting many of the South Africans at their level of 'evolution' and in the process training citizens on the substantive and procedural basics of the state law. While it is critical that awareness of ordinary people about their rights be boosted, it is even more important that the future citizens of this country be given more attention. Hence my proposal for a school subject on basic human rights and legal procedures.

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