REPRESSIVE AND RESTITUTORY SANCTIONS IN THE TOWNSHIPS: THE SOCIAL ORIGINS OF THE DIFFERENT FORMS OF PUNISHMENT IN THE PEOPLE'S COURTS

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Introduction

One of the aims of 'community policing' is to bring the justice system and its institutions closer to the people, especially Africans, who, for most of South Africa's history, have been estranged from it. Through being distant, detached, foreign and, worse, being perceived as an instrument for subjugation, the apartheid justice system alienated Africans and led to the development of strategies which confronted, encumbered, and impeded its normal operation.

One such strategy was the establishment in the 1980s of radical 'people's courts' in African areas. 'People's courts' sought to fill a gap left by state institutions which were either retreating or being shunned by township residents, as a consequence of, and a strategy in, the escalating confrontation between the state and the 'democratic movement'. However, much against the role they played in filling the gap, the successes of 'people's courts' were quickly drowned in the calls for their suppression, when accusations were levelled against their processes and methods.

However, the prevalent conception of 'people's courts' as 'kangaroo courts' is not in line with the view that one gets when one analyses their origins, institution and transformation. Many who have performed such analyses have raised important objections against the 'kangaroo court' conception of 'people's courts' (Suttner, 1986; Seekings, 1989; and Scharf, 1988a). These analyses suggest that the conditions under which 'people's courts' assumed their role affected the method and process of their operation. Such conditions include bad relations with police and non-cooperation with township officials.

Nevertheless, while such objections capture some of the important features of 'people's courts', they do not provide a satisfactory analysis of the reasons behind the differences in punishment; ie, why some courts use *repressive sanctions* and why others use *restitutory sanctions*. Those who have attempted to provide an answer to these questions have either pointed at the political affiliations of the

participants (Scharf, 1988a) or the age of the participants (Seekings, 1989; Scharf, 1988a).

This study aims to show the social origins of the different forms of punishment. It does so by investigating conditions conducive to repressive punishment and conditions favourable to restitutory sanctions. What emerges through this analysis is that neither political affiliation nor age fully explains one form of punishment or another. This observation is important since, too often, brutal forms of punishment are identified with young associates of 'radical' political movements. Also, the analysis and evidence provided here detracts from Durkheim and Foucault's contention that repressive and restitutory sanctions occur in different historical periods.

The analysis proposed here is most important at a time when South Africa enters a democratic era, governed by the rule of law, in which all people are equal before the law. But, if the new legal system does not create mechanisms which encourage people to appeal to it for the resolution of disputes, and if people do not and cannot get justice from it, the new legal system is bound to look very much like the old. For instance, the inability of the police and the court system to intervene in the recent spate of retaliatory violence, which has paralysed different communities, has resulted in the side-lining of these 'normal' legal procedures and a preference for Commissions of Inquiry - such as the Goldstone Commission (see Slachmuiler, 1992:14-16) - which are perceived to be more 'objective' than either the police or the courts. We can hardly expect justice in the new era to be organised around Commissions of Inquiry.

Also, it is imperative that, in the new era, we should be able to look at dispute-resolution institutions in African townships in a different light. In a country with so much distrust for the police, where the police have mostly been an invading force from outside, fortified dispute-resolution institutions, facilitated by respected members of their communities and with assistance and cooperation from revamped police procedures should be seen as potential viable vehicles for 'community policing'.

This report is organised into seven sections. The seven sections follow immediately after the discussion of some definitions. The first section is on methods. The second section presents two case studies of two different forms of punishment. After the case studies, the essential characteristics of each form of punishment as well as the environment conducive to such punishment are presented. The third section attends to the reasons behind two forms of punishment within one area during both the 'old' and 'new' 'people's courts'. The fourth section provides a brief history of the evolution of 'people's courts' between the 1960s and the 1980s. In order to dispel the misconceptions of the

1980s 'people's courts' as the only or the most brutal forms, the fifth section - by comparing the 'old' and 'new' 'people's courts' - discusses why and how such impressions were created. The sixth section attempts to provide an adumbration of the persons as well as the environment conducive to brutal forms of punishment in the late-1980s and early-1990s. The seventh section makes proposals regarding issues which need to be addressed if 'community policing' is to succeed.

Research Methods

Two research methods are used: (i) participant observation in two of the 'people's courts' which have been established in Kwamashu, and (ii) in-depth interviews with some of the members of 'people's courts' and some of the residents of areas where 'people's courts' have been established.

The two 'people's courts' in which participant observation takes place are chosen because of their differing methods of punishment. One uses mostly *repressive* forms of punishment and the other uses *restitutory* forms. The study compares the two 'people's courts' with a view to finding out whether the method and process of punishment reveal more about the process and members as well as whether and under what conditions 'people's courts' could assume the function of 'community policing'.

For participant observation purposes, I attended meetings and 'disciplinary hearings' of the two people's courts between January and September 1994. I had prior exposure to the two people's courts in the late-1980s when they were established but did not undertake to study them then. My duty at the meetings and hearings was to observe the processes and listen to discussions and arguments.

For interview purposes, I selected a purposive sample of members of 'people's courts' and members of communities where 'people's courts' have been established. The sample was purposive because there is no reason to believe that the kind of knowledge for which the study looks is normally distributed in the population. My interviews centred around reasons for the establishment of 'people's courts', methods of punishment and conditions and discussion of extreme cases of punishment.

The two incidents, to which this study refers, are chosen because each represents the extremes in which the respective 'people's courts' can go, regarding their methods of punishment. The events surrounding the first incident emerged in my discussions with members of the relevant 'people's court'. I have witnessed some cases in which this 'people's court' administered punitive sanctions, but none has come close to the 1989 case, narrated below. Regarding

the second 'people's court', I have witnessed a number of the cases that they have tried and was present during the one mentioned in this report.

☐ Definitions

Before we continue, it is important to spell out our understanding of the concept 'people's courts'. This concept has been (and continues to be) so misused and abused for political capital that each time it is used it conjures up images of wild youth running rampant in an environment without social controls, issuing violent punishment without any consideration of 'facts'.

This study uses 'people's courts' to refer to those forms of 'authorities' established in African areas because the official legal system is unable, reluctant or is prevented from functioning. In this manner, this conceptualisation departs from fashionable understanding of 'people's courts' as associated with the 1980s 'comrades'. For too long, lack of appreciation of the varying dynamics of African areas has tied the concept 'people's courts' to the politically radical, mostly youthful, organisations of the 1980s. The defining of the pre-1980s courts out of the concept of 'people's courts' on the bases that they were linked to the state and, therefore, not part of a political process, can only be maintained by conceptions which are oblivious of the fact that Bantustan political interests *politically* mobilised pre-1980s structures or their participants. In the area in which research for this paper was conducted, Inkatha Yenkululeko Yesizwe politically mobilised the conservative 'people's courts' and, through them, began instilling its own brand of 'respect' (*ubuntu/botho*). Moreover, structures which fit Seeking's definition of 'people's courts' (1989;120,126) - save for the fact that they were in 'conservative' areas - were formed (in the 1980s) in numerous informal settlements whose people favoured or sympathised with 'conservative' political parties.

Therefore, the conceptualisation adopted by this study insists that 'people's courts' existed and continue to exist in areas associated with 'conservative' politics as well as in areas associated with 'radical' politics.

Repressive and Restitutory Sanctions

This section presents two cases of punishment witnessed in Kwamashu. The first is an example of repressive punishment and the second is an example of restitutory punishment.

> Mandla was a notorious tsotsi who always carried a knife and had used it against a few people, in some cases, with fatal consequences. He had been arrested a few times but, as far as most people were concerned, not long enough. If they had a way, they

would 'lock-him-up' for good. As a consequence of his past, most people were afraid of him.

It so happened that one day he was accused of having raped a young girl. His case was brought before a street committee which was given responsibility to try him and issue an appropriate form of punishment.

After he had been told of the charges against him, he was asked to defend himself. He simply stated that he did not rape the girl. Moans of disbelief and exasperation with trying to prove the obvious could be heard from those in attendance. He was told that he had been found guilty. As is normally the case, two choices of punishment were taken; 200 and 700 lashes on his back. Those in attendance had to vote on the number of lashes. They overwhelmingly voted for 700.

He was made to take off his pants, was tied to a tree and then the lashing began. Where the sjambok made contact with the bare skin, the skin swelled up. When the same spot was hit two or three times, the skin burst into open sores, and there was blood everywhere. Blood ran down his legs, the blood had to be wiped - three times - off the sjambok. When his buttocks were so bloody that there was no spot without a sore, the lashing was moved to the back of his thighs. As he screamed for mercy, he was reminded of all the people he had stabbed and of those who died, those who did not receive any pity from him.

When all those who had been enthusiastic about lashing him had satisfied themselves, one of Mandla's friends was asked to lash him. He first declined, murmuring something about the patch of blood which was forming around Mandla's feet. When he realised that he was not being asked but was being told to beat his friend, he reluctantly took the sjambok and delivered a few weak blows. He was made to stop and someone was chosen to show him how to lash; this was done not on Mandla but on his friends behind. After that, he got the point. The next set of blows he landed on Mandla were more spirited.

Mandla did not survive the lashing. He collapsed somewhere near 500. There were protests over the fact that he died without getting all his punishment. Those who felt robbed in this way, chose to douse his body with petrol and set it alight rather than call the police to take his body to the morgue. As the fire was consuming

his body, some were singing songs condemning all 'enemies of the people' to death.

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Bheki, a notorious thief who had a record of having stolen from many people, was accused of having stolen washing - which had been left overnight to dry - from the washing-line. He was brought in front of the street committee and was told of the charges against him. He was asked if he had an answer which could absolve him. He confessed to having stolen the washing and promised to collect it from the people to whom he had already sold it.
His 'character witness' testified that what could have lead Bheki to theft was that he (Bheki) was in some financial trouble which needed resolving urgently. The witness was told that desperation need not be a cause for theft; Mandla could have borrowed the money from someone in the community.
The street committee chairman, then, told Bheki that he had been found guilty of theft. There was a vote on what should happen to him. The vote was that he should be lashed 200 times. The chairman intervened and asked if there was a chance that the fact that he confessed to his crime could be used as an extenuating circumstance. Those present were willing to forgive.
Instead of 200 lashes, he was sentenced to mow the lawn - for the whole month - of the house from where he had stolen. If he failed to do this at anytime, the 200 lashes sentence would be reinstated. He was given 30 days within which to serve his sentence.

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The two incidents are separated by only five years; but they may as well be separated by centuries! They occurred within the same area in two different street committees or people's courts. The first occurred towards the end of 1989 and the second occurred in June 1994. The two forms of punishments are 'ideal types' of the forms of punishment administered by the respective people's courts. The fact that such different processes and methods of punishment take place within one area and within what could be considered as the same time frame, contradicts what major theorists - such as Durkheim and Foucault - would lead us to expect.

In *The Division of Labour in Society*, Emile Durkheim explicates the virtues of modern society to the 'conservatives' who are lamenting the disappearance of traditional society and are condemning the 'disintegration' produced by modern society. He does so by arguing that modern society in which there is

specialisation of functions and which is characterised by *restitutory* sanctions is preferable to traditional society in which there are homogeneous functions and which is characterised by *repressive* sanctions. In doing so, Durkheim analytically conceptualises the two societies and their corresponding forms of sanctions as existing in different periods.

And, even though Foucault, in *Discipline and Punish*, is not exactly making the same point as Durkheim, there is great overlap in what they say, namely, the conceptualisation of the 'traditional' and 'modern' forms of sanctions as existing in two different societies or moments. Unlike Durkheim, Foucault is interested in the reasons behind the disappearance of 'public punishment' as the dominant form and the emergence of 'private punishment.' He concludes that the development of the 'sciences' created an understanding of the human animal which made it possible and more effective to 'discipline' the 'soul' rather than 'punish' the 'body' of a person.

For the purposes of this study, most important is the convergence of the theorists' conceptions of forms of sanctions and types of societies. Despite such conceptions, in the townships of South Africa - as the two opening paragraphs show - we witness the coexistence of the two forms of punishments within the same society. The obvious questions are: How is it possible for the two forms to exist in one society? What does this co-existence imply? What does each form of sanction tell us about the society? If needs be, how can we change the forms of sanctions so that they may be more humane? Or, alternatively, how do we change the society so that it produces more humane forms of sanctions?

To arrive at answers to these questions, this study applies some of the knowledge found in Durkheim and Foucault. Durkheim explains the kind of society which produces either form of punishment and Foucault details the process and meaning of the different kinds of punishments; the role of power and knowledge or, as Foucault insists on their inseparability, power/knowledge.

❑ Repressive Sanctions

Durkheim argues that a society which produces repressive sanctions is a society with *mechanical solidarity* or solidarity of similarities. In traditional society, he argues, the division of labour is not advanced; ie, the range of possible functions is not wide. Therefore, people perform relatively similar functions. Such employment creates an affinity of similarities which is intolerant of deviations from the norm. As such, the society has little tolerance for difference; deviations from the norm are normally vehemently repressed.

One of the most vivid examples of the kind of repressive sanctions that Durkheim refers to, is given by Foucault in his account of the 1757 public

gruesome brutalisation of Damiens who was accused of killing the King in France:

> Then the executioner, his sleeves rolled up, took the steel pincers ... and pulled first at the calf of the right leg, then at the thigh, and from there at the two fleshy parts of the right arm; then at the breasts. Though a strong, sturdy fellow, this executioner found it so difficult to tear away the pieces of flesh that he set about the same spot two or three times, twisting the pincers as he did so, and what he took away formed at each part a wound about the size of a six-pound crown piece ...
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> (T)he same executioner dipped an iron spoon in the pot containing the boiling potion which he poured liberally over each wound. Then the ropes that were to be harnessed to the horses were attached with cords to the patient's body; the horses were then harnessed and placed alongside the arms and legs, one at each limb ...
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> (A)fter several attempts, the direction of the horses had to be changed, thus: those at the arms were made to pull towards the head, those at the thighs towards the arms, which broke the arms at the joints. This was repeated several times without success.
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> Finally ... the executioner Samson and he who had used the pincers each drew out a knife from his pocket and cut the body at the thighs instead of severing the legs at the joints; the four horses gave a tug and carried off the two thighs after them ... then the same was done to the arms, the shoulders, the arm-pits and the four limbs; the flesh had to be cut almost to the bone ...
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> The four limbs were untied from the ropes and thrown on the stakes set up in the enclosure in line with the scaffold, then the trunk and the rest were covered with logs and faggots, and fire was put to the straw mixed with this wood. (Foucault, 1979:3-5).

In important respects, the process of the public execution of Damiens resembles some public punishments given to some people in the townships in the hey-days of people's courts. In some important aspects, the execution of Damiens resembles, but also differs from, the punishment given to Mandla. However, the sequence in the process of a punishment by a people's court is similar to the sequence in the execution of Damiens.

Firstly, the guilty person is paraded through the community; in the case of theft, with the items he has stolen. As he walks around the community, he is made to condemn his actions and himself. Sometimes the guilty person is not paraded but

is just made to condemn his actions and himself at the court where he is being tried. According to Foucault:

> (T)he only way that this procedure might use all its unequivocal authority, and become a real victory over the accused, the only way in which the truth might exert all its power, (is) for the criminal to accept responsibility for his own crime ... (1979:38)

The 'confessions', which the accused is expected to make, vindicate not only those who punish him but also those who refrained from committing his crime. In cases, where the accused does not 'confess', he vindicates neither those who are to punish him nor the innocent. The refusal to confess adds to the arsenal of evidence of the recalcitrance of the accused and the likelihood of guilt on his part. 'Holding out' gets used as evidence of the accused's incorrigibility.

Foucault continues:

> (I)n the ceremonies of the public execution, the main character (is) the people, whose real and immediate presence (is) required for the performance ... The aim (is) to make an example, not only by making people aware that the slightest offence (is) likely to be punished, but by arousing feelings of terror by the spectacle of power letting its anger fall upon the guilty person ... (1979:57-58).

The manner in which offenses are punished, especially those which had not been recognised as offenses previously - such as rape, wife-beating and the carrying of dangerous weapons - impresses upon those present and - in the case of those absent - hearing about the punishment that a new authority is in charge and that different forms of behaviour are anticipated. More and more people refrain from acting in the prohibited manner, while the reign of the people's court lasts.[1]

Having been identified by the parade around the community, the guilty person is again identified - permanently - by the punishment given to him. Foucault argues that:

> (T)orture forms part of a ritual ... It must mark the victim ... public torture and execution *must* be spectacular, it *must* be seen by all as its triumph. The very excess of the violence employed is one of its glory: the fact that the guilty man should moan and cry out under the blows is not a shameful side-effect, it is the very ceremonial of justice being expressed in all its force. Hence no doubt these tortures which take place even after death: corpses burnt, ashes thrown to the winds, bodies dragged on hurdles and exhibited at the roadside. Justice pursues the body beyond all possible pain (1979:34).

In a slightly different way in the townships, the pursuing of the body normally depends on what the crime is and who the accused is.[2] 'Crimes against the people' and in the interests of the 'system' get punished viciously. For instance, Mandla had committed what were considered as 'crimes against the community' under the apartheid era and had not been 'sufficiently punished'. This marked him as an 'instrument of the state' in its 'war' against the people. In such *expiatory* (Durkheim) punishment, the purpose of the torture is to make the guilty person suffer in as much as it is possible to suffer without dying. To be torture, Foucault continues:

> (P)unishment must obey three principal criteria; first, it must produce a certain degree of pain ... death is a torture in so far as it is not simply a withdrawal of the right to live, but is the occasion and the culmination of a calculated gradation of pain ... death-torture is the art of maintaining life in pain ... by achieving before life ceases 'the most exquisite agonies' (1979:33-34).

Torture is a form of vengeance that the aggrieved community metes out on the person who violates its rules and conscience. The rules infringed have to be those considered essential for the survival of the community. Communities without many options - those without power, or with fragile powers, to protect themselves from attacks -are likely to exhibit extreme forms of punitiveness against those who betray their interests.[3] Any one guilty of such a crime is made to suffer 'the most exquisite agonies'. Public flogging and torture confirm the superiority of the community over the forces represented by the accused himself/herself as well as his/her actions.

In the ceremony of inflicting extreme pain, leniency against the guilty person is, at best, taken as encouraging the acts committed by the guilty party and, at worst, as a direct assault against the offended community:

> If the executioner triumphed, if he managed to cut off the head with a single blow, he 'showed it to the people, put it down on the ground and then waved to the public who greatly applauded his skill by clapping'. Conversely, if he failed, if he did not succeed in killing the 'patient' as required, he was liable to punishment (1979:51-52).

In the townships, most people present at a hearing are expected to participate in the flogging (non-participation is considered as tacit consent with or approval of the accused's actions).[4] The township is replete with examples of what happened to Mandla's friend, the one who, at first, would not brutalise Mandla.

Sometimes, the accused person dies, while being punished, before the crowd has satisfied itself that he has been adequately punished. In such cases,

punishment follows the body beyond death. The setting of Mandla's body on fire and the scattering of his remains became a method of extinguishing him from the face of the earth. Sometimes the anger against a person is so great that attacks follow him even to the grave and beyond. Foucault discovered the same practice among the 18th century French:

> The four limbs were untied from the ropes and thrown on the stakes set up in the enclosure in line with the scaffold, then the trunk and the rest were covered with logs and faggots, and fire was put to the straw mixed with this wood.

To sum up, in societies which practice *repressive* sanctions, we notice the close association and identification of people to either the leader or the community itself. The leader or the community seems based on grounds which are relatively easy to destabilise; the leadership or community is easily thrown into crisis. Hence, the community sees itself as being in a constant state of siege. The function of *repressive* sanctions is to dissuade people who dare to catapult society towards some form of crisis. Any action seen to propel society towards cataclysm, or action or inaction seen to condone such plans, is punished violently.

In such a society or community, as Durkheim also discovered, the rights of persons are respected in as much as they conform to the established order; the community or society is much larger than the sum of its parts. No right can be protected if it threatens the very existence of the society or community!

❑ Restitutory Sanctions

As hard to believe as it may be, the people's court which inflicted such 'exquisite agonies' on Mandla and 'pursued him' beyond death does not always deal with those who break the rules in such an oppressive manner. It, sometimes, emphasises *restitution* over torture.

Bheki, for instance, was brought to trial without much fanfare. The trial was, also, not 'spectacular' (Foucault). He was simply, and almost formally, charged and was allowed not only to defend himself but also to bring character witnesses. When he was found guilty, the statement the chairman read to him, almost apologetically, was 'the community finds you guilty of theft'. When he was sentenced, he was given 30 days within which he was to serve his sentence. After all had been done, when objections to the sentence had been heard, responses made and Bheki had been allowed to apologise for his actions, the chairman said to him 'we hope, comrade, that this is the last time you are brought in front of this community on a charge of theft'.[5]

When Bheki was tried, the objective of the court was not *expiation* but the *restoration of the status quo ante* (Durkheim). Normally, in cases where a

person's property had been destroyed, the guilty party is sentenced to reimburse the owner in full. It is only when the guilty party either refuses to pay or is incapable of paying and, in addition, does not want to accept an alternative sentence, that corporal punishment is considered. Even then, there is great concern about the proportionality of punishment to the crime committed, almost verging on leniency.

The processes of restitutory sanctions seem aimed at reconciling the individual to both the party he or she offended and the community as a whole. Cleaning the yard of the people he stole from would have required Bheki to be in constant contact with that family. Under such conditions, the potential for the development of friendly relations between the 'convicted' person and the 'complainants' is increased. In fact, people who carry out their punishments eventually become close to the families whose yards they are 'sentenced' to clean. However, this should be tampered by the fact that a large number 'run away' without either commencing or completing their sentences.

In summary, societies with restitutory sanctions are more interested in reintegrating the person to the community than in punishing them. Persons are considered important and their rights are respected. Even when they err, such actions are not seen as wilful assaults on the society. The society is considered not greater than the sum of its parts.

This is mostly a consequence of stability within the society and the fact that the society or leaders do not feel besieged. This creates room for the tolerance of difference within the society. Deviations from the norm are not violently punished but the manner with which they are addressed serves to reinforce the importance of persons and their voluntary membership in the community.

Why Two Forms of Punishment in One Area?

The question we asked at the beginning is how come the two, ostensibly contradictory, forms of punishment exist in one place. A detailed answer to this question does not only require an elaboration of how it is that the old 'traditional' norms among Africans do not die and the 'modern' cannot be born, it, also, requires an explanation of how the prevailing relations between the state and Africans has created conditions in which the only acceptable forms of punishment, in some case, are those of the repressive kind.

It is not rare that one hears of an association of African tradition with *repressive* punishment, even among 'Africanists'. It may well be true that traditional Africa violently punished certain forms of acts but, as should be clear from Foucault's account, this was not (and is still not)[6] the preserve of African cultures. In fact, the kind of punishment imposed - by African culture - on one depended on the

kind of offense one had committed; African culture also had *restitutory* sanctions.

The focus on *repressive* sanctions as a product of African culture is normally intended to blunt (or to detract from) the focus on the relations between the state and the reproduction of violence in the townships. Africans in the townships, arrived with both forms of sanctions, *repressive* and *restitutory*.

What seems to have given the upper hand to *repressive* sanctions is the fact that townships were 'occupied territories' in which residents were not much more than prisoners or people suspected to be prone to criminality. They were occupied by the police, the army, and their corresponding informants and surrogates. In turn, the residents considered actions which propagated the will of these institutions, or action which, in any way, were injurious to the community, as 'treasonous'. This environment, together with the fact that Africans had no 'human rights' and very little, if any, positive access to the legal system, created conditions within which the rights of Africans could be abused without any possibility of appealing for intervention from the legal system.

The political climate of the mid- and post-1980s created conditions in which numerous issues which *prima facie* were not political assumed political significance. Among these are rape, wife-beating, witchcraft, theft and unpunished - by the established legal system - acts of violence against the community. Anyone guilty of any of these crimes was perceived to be an 'enemy of the people' and deserving of *repressive* sanctions.

However, some crimes continued to be treated as civil crimes. Among these were domestic and neighbourly disputes and conflicts and some forms of violence in which weapons were not used. Those kinds of disputes and forms of violence which were not life threatening or those which were not a threat to the whole community tended not to be punished repressively.

It is important to make it clear here that the two forms of punishment did not begin with the radical people's courts; as the next section shows, these forms of punishment existed even during the time when the council system-dominated people's courts (the *Makgotla*, around Johannesburg or *oQonda*, around Durban) were in existence.

Evolution of People's courts 1960-1980

This section aims to show similarities and differences between the pre-1980s people's courts and the post-1980s people's courts. It is fashionable these days to refer to the people's courts of the 1980s and beyond as 'kangaroo courts' where 'the law of the jungle' reigns. This claim is almost always made, although without explicit recognition, as though the forms of punishment meted out to people in the 1980s were new. These forms of punishment have existed in the townships

from their establishment. It seems that what accounts for the spotlight on the 1980s courts is that, prior to the 1980s, the people's courts were run by those who did not have a confrontational attitude towards the state.[7] Therefore, the state was quite content to live with their excesses.

It is in this regard that we should repeat that people's courts have been in existence in Kwamashu almost from the time of its establishment. They have, however, assumed different postures depending on their relations to the residents and their relations to the legal system, the police and the courts in particular.

There are varied reasons behind the establishment of different forms of people's courts. They range from the need to complement the functions of the police, the need to substitute the functions of the legal system and the need to cover such issues neglected by the legal system because they are considered either unimportant or because the system is incapable of dealing with them. But most importantly, people's courts were established to curb the incidence of violence and counter- violence in many urban communities.

The pre-1980s people's courts were relatively conservative; they sought to resolve domestic and neighbourhood disputes in line with the established legal system. They were a response to the wide-spread conflicts and disputes which were generated by living in close quarters in an urban environment without established rules and forms of authority. Whilst, in the rural areas, most people had systems of dispute-resolution and established forms of relating to others, the urban environment presented these people with unfamiliar forms of relating to others. In some cases, these unfamiliar forms generated conflicts and disputes.

Because the police could not be at all places at once (many of the residents were officially illegal in urban areas and, therefore, could not solicit assistance from the established legal system and that the legal procedures made available to Africans had lost their credibility and legitimacy through their association with the influx control infrastructure) people's courts were set-up so that they would attend to conflicts and disputes. These people's courts operated with tacit, although not formal, approval from the legal system. Their methods of operation was that a complaint would be brought to them by the injured party; they would then call a community meeting at which the case was tried. Normally, the guilty party was asked to pay restitution to those they had injured. In some cases, the guilty party would be sentenced to corporal punishment.[8] Since many of the participants in these people's courts were themselves either police or police reservists, it is difficult to accept that the police did not know about the brutality of the punishments.

Save for their lapses into brutality and the fact that they were unpopular, this generation of people's courts operated relatively successfully. This was largely

due to the fact that it could call upon the legal system to buttress them whenever they felt that it was necessary. However, this generation of people's courts was normally presided over by the unpopular councilors who were seen as complicit in the subjugation of Africans in urban areas. Those who disliked these people's courts operations frequently invoked their association with the influx control establishment and the rent collection and expulsion-from-houses infrastructure.[9]

Their role was even more tarnished when, in 1975, they were given the role of verifying residency which enabled work-seekers to receive permits from the influx control machinery. It is also during this time that they were given powers to collect rent and to impose rates for services. Opposition to the 'system' began to mean doing away with unrepresentative councilors. This, in turn, meant doing away with or severely affecting the operation of the 'conservative' people's courts.

The Successes and Failures of People's Courts

In the process of removing the 'old', structures of the 'new' people's courts were established. The 1980s people's courts emerged during the era of popular rejection of the state and many of its legal institutions. In the beginning, many people's courts boasted the 'popular election' of members to the courts as well as elimination of crime and violence. As time went on, however, the dynamics of their environments - to which we have referred above - militated against many of their virtues. But before we discuss the failures of people's courts, we should discuss their successes.

❑ Successes

In many places where they were established, people's courts succeeded in attenuating the 'state of nature' which existed prior to their establishment; ie they removed the right of revenge from the injured party and bestowed it on the community. Consequently, the deadly weekend knife-fights were drastically reduced as knife carrying was 'outlawed' and vehement punishment meted out to those who violated the ban on carrying and using knives against others.

The 1980s people's courts, following on some of the practices of the 'old', also set in motion processes through which guilt and innocence could be determined. As a result an environment in which the mere cry 'thief' would lead to someone's death as all and sundry converged to assault the alleged 'thief', was transformed into an environment where even the thief had the right to be heard and be 're-educated.'

By and large, people's courts succeeded, within their limited powers, to stamp out petty crimes among neighbours and they managed to diffuse both petty and

serious domestic and neighbourhood squabbles pregnant with violence (see, for instance, Thembi's case in Section six below). In his study of people's courts in Cape Town, Scharf refers to people's courts as having 'enjoyed the support' of the community (1988a:9).

Failures

Some of the processes and methods which the people's courts applied lead to threats against their own existence. The participation of injured parties in not only providing testimony but also in determining guilt and innocence as well as in punishment compromised the impartiality of people's courts.

The massive number of cases to which most people's courts had to attend meant that mostly those who did not work or go to school could be the ones present in most hearings.[10] This group, as we explain below, was the one most impatient with wrong-doing and most prone to repressive punishment.

Together with the massive numbers of cases, their informal nature and threats of attacks by the police discouraged the responsible members from participating and, instead, opened a gateway for the emergence of the 'irresponsible' members into leadership positions. The assumption of decision-making positions by critical numbers of the 'irresponsible' groups lead to wanton abuse of corporal punishment as ever larger numbers of lashes were given out as sentences and carried out at single hearings.

The undoing of people's courts, therefore, is closely related to their informal nature, the fact that they were illegal, the fact that the election of people degenerated into the self-selection of volunteers, the participation of injured parties in the critical areas of the process of judging and punishing, and their inability to maintain impartiality in both judging and punishing; eg inability to control excesses in punishment.[11]

Conditions Conducive to Repressive Punishment

The dynamic environment within which people's courts functioned could not be effectively mastered by any informal structure facing the wrath of the state. This environment exerted extreme pressures against restitutory forms of sanctions and tended to render summary punishment the most expedient form.

Nonetheless, many who have researched the post-1980s people's courts converge on the fact that the youth is responsible for imposing brutal punishment. (Seekings, 1989:129- 131). However, the reasons given for why this is so are not satisfactory. While it is true that the youth in people's courts tend to favour repressive punishment over restitutory punishment, it is not totally true that only the youth impose such sentences, as was the case with the pre-1980s people's

courts and as is the case with people's courts in many informal settlements dominated by 'conservative' adults. Therefore, explanations which emphasise the youthfulness of participants in corporal punishment do so because they de-emphasise the social environments which nourish conditions for punitive sanctions.

And, contrary to Durkheim, the people's court which practices restitution exists in an environment without much division of labour, even though there is a greater division than exists in rural areas. And contrary to Foucault also, there is little evidence that the benign forms of punishment, albeit not formalised, are informed by knowledge from the 'social sciences'. Within the era of each people's court, what seems to determine whether a person is brutalised or not is their own history, the type of offense and, indeed, the type of participants in the people's court.

A person's own history influences the type of punishment in as far as the accused is considered a threat to the community. Anyone with a 'record' - normally this information is from people's memories - of being a dangerous trouble-maker, normally gets a tough sentence. If the person has injured or killed another person or people in the past, he is often given the most extreme of all possible punishments.[12] On the other hand, if a person is considered an otherwise good person and has committed a non-violent offense, great leniency is shown towards him or her.

❑ Age of Participants

The participants of the people's court which punished Bheki included both the older and younger men of the area. Their concern, in most of the cases over which they presided, was the reconciliation of the individual to the community. Some researchers have associated such disposition with the older participants. There is a lot of credence to the argument which holds that the older generation have known forgiveness in their lives (mostly from living in relatively harmonious rural areas) while the younger generation have not. However, many of the people who preside in people's courts themselves grew up away from rural areas; mainly in and around Cato Manor; under conditions similar, if not worse, than those in which the youth live.

As far as participants within post-1980s people's courts are concerned, what seems to distinguish the benign people's court from the one which brutalised Mandla was not so much the age of participants, but (i) poverty, (ii) whether or not they have fixed property, (iii) whether or not they have dependants, (iv) relationship with the criminal justice system, and (v) the general lack of knowledge about human rights (by all concerned, the accused, accusers and those who punish).

The Youth

It is true that life has not been kind to the younger generation. But more than their age, what seems to be common among the youth who prefer repressive sanctions is that they come from fatherless families or families where the dominant male, for one reason or another, has lost power. These youth are, by and large, children of daughters of the families who were abandoned by their fathers, whose fathers died, or whose fathers do not get along with their mothers.

The life of many township 'comrades' requires that a person be available for service almost 24 hours a day. For some youth parental influence makes it difficult for them to avail themselves for such service. But, for others, where parental influence is lacking, the youth tend to do as they wish. Being brought up and cuddled by grandparents, often grandmothers, strict discipline tends not to be meted out to them as often as may be necessary.

All these factors conspire to avail these youth to the streets and to the influence of their peers. In an environment without legitimate dominant disciplinary structures, they become a law unto themselves.

Poverty

But it is not just the absence of a father which leads the youth astray. It is that the absence and weakness of a father are associated with the poverty of the family. In such cases, it is the poverty of the family which makes it difficult for many families to function 'properly'. The poverty of the family, the fact that the mother has to be away at work for long hours, the fact that the grandmother may not be able to control the child, all connive to 'free' the child to the influence of peers and the violent streets. And such streets have their own laws; such as that of 'a tooth for a tooth', 'a life for a life' and 'shoot first before you are shot'.

As a consequence of the poverty of their condition, many of the youth dropped out of school before they received their matriculation certificates - thus losing out on a passport to jobs and training opportunities.[13] Their life has largely been a hide-and-seek battle with the police.[14] Since the 1980s, they have been witnessing the gruesome deaths of people they know or of friends and relatives.[15] They live in a world where survival means that you strike first before you are struck. Such a world demands toughness which scorns pity and forgiveness. Many of these youth have not been shown kindness by anyone. Is it any wonder that they strike at the world whenever they get a chance?

Fixed Assets

What seems to differentiate the older people from the young is the fact that older people, by and large, have fixed property which could be got to by those

who wish to retaliate against their actions. The character of violence in the townships has changed to such an extent that conflict between two people is normally resolved by harming a person's relatives or dependants and damaging or destroying his or her property. Such fixed property is in the form of a house or, in a few cases, a shack-shop or store. A major derivative of point (i) above is that the youth who preside over the repressive people's court do not have fixed assets that could be attacked; some of them do not even have fixed or identifiable 'homes'.

Dependants

In the same manner as fixed assets, the older generation tends to have dependants who could be used in retaliation against them. The character of violence is such that one's enemies use one's relatives and dependants as legitimate targets in retaliation against one's actions. On the other hand, many among the youth do not have dependants and, those who do, are not responsible for their dependants' safety.

Relations with the Criminal Justice System

The processes of the criminal justice system both in their bias against Africans and their distance from African life have effectively alienated Africans from the justice system itself. As criminologist Riana Taylor claims:

> Instead of safeguarding the moral fibre of the nation, the criminal justice system has, in practice, served to disempower and alienate the majority of the South African population and has consequently alienated justice from the criminal justice system. (*Business Day*, 3 September, 1993).

Such absence of justice from the justice system, leads people to search for it elsewhere, such as in people's courts.

Since, from the 1980s onwards, the police have either been pushed out of the township or because they, sometimes, refuse to attend to disputes in the townships, people in disputes - even those who dislike the methods of people's courts - have no options but to appeal to people's courts for the resolution of disputes. By and large, people's courts functioned relatively successfully and 'normally' until those who preferred restitutory means of punishment were displaced by those who revelled in violent punishment. The use of violence brought to the fore those who were always willing to apply force whenever the opportunity arose. It was precisely this process which, in certain areas, created opportunities for hooligans to hijack people's courts for their own ends, all the while masquerading their ends as social responsibility or 'protection of the community'.[16] Violence became the double-edged sword which, on the one hand,

was a method of enforcing discipline and, on the other, was the process through which the socially conscious members of people's courts were overshadowed by criminal elements.[17]

In many cases addressed by people's courts, the form of dispute and the evidence required are outside the scope of the official justice system. For instance, there is a case of a young man (Sipho) who erected a shack in an informal area near Kwamashu, lived in the shack with his girlfriend, and has died in one of the hospitals in Durban. Consequently, there is a dispute between his girlfriend (Thembi) and Sipho's relatives over whether Thembi can inherit Sipho's shack. On the one hand, the family claims that the shack belongs to them because Sipho is their relative and, on the other, Thembi claims the shack because she lived in it with Sipho and, together with Sipho, paid for part of the extension on the shack. This is a dispute over property that is unregistered and, worse, erected illegally; a matter - despite its seriousness and potential for violence - outside the purview of the official justice system.

Human Rights

But, more than anything else, it is important to remember that Africans existed in an environment without civil, legal, or humans rights. The fact that they were almost always beaten by the police on arrest, arrested without summons, witnesses detained, brutalised in jails with such claims thrown away by the courts, their houses invaded by police at any time, added to the atmosphere within which African life is considered cheap and easily dispensable.

Such abuses, together with other forms of violence, occurring within African communities, lessen the impact that a people's courts brutalisation should have. A brutalisation which results in warts, marks or open wounds on a person's body (especially if the victim has been accused of a serious offense) is considered less of a tragic matter in an environment where people often lose their lives for either accidentally stepping on other people's shoes or bumping against them.

The fact that the state did not respect the human rights of Africans encouraged an environment within which African life was devalued. People who could take the state to court on the subjection of their rights were people whom the state would feel compelled to protect from the excesses of some of the people's courts. Such people would also be confident enough, if the case warranted, to lodge a charge against the unofficial people's courts at an official legal court.

Adults

The conditions which apply to adults who favour repressive punishment differ in some ways to those of the youth and, in others, they are similar. The men who

are in repressive people's courts, be they in the townships, informal settlements or hostels, are normally those men who are unmarried or live alone, or whose wives and children either have lost most forms of control over them or are too far away to be victims of revenge attacks.

Often such men are the poor who live in involuntary communities. They live by the auspices of some benefactor or are trapped in an environment where they are intimidated and cannot dissent from decisions taken by those around them.[18] Where they live is the only place they can live. If they lose the right to live there, it would be almost impossible for them to relocate elsewhere.

Post-apartheid and the Prospects for Justice

The proposal for the establishment of 'community policing' structures around the country is a welcome response to the calls for the replacement of the unpopular SAP, their methods and processes. However, the fact that policing is in the hands of the community is not a guarantee for efficiency and fairness, nor is it a guarantee against corruption and brutality as the cases of people's courts have shown. If anything, the people's courts have shown that the system of 'community policing' should be buttressed by a trusted system of distant and impartial police service operating within an environment governed by respect and protection of human rights.

Nonetheless, some considerations need to be taken into account when the planning and implementation of 'community policing' is addressed. Firstly, 'community policing' is unlikely to succeed if the environment conducive to retributive violence and punitive punishment does not change for the better. As has been shown repeatedly in this report, this environment is produced by the fact that the legal justice system is either too distant from the residents of townships or functions in ways which do not seem to produce justice; ie as far as township residents are concerned. A future legal system should take into account the different conceptions of crime and punishment from different ethnic and religious groups and, from that, distil a truly South African conception of crime and punishment.[19]

For instance, in many African communities, the arrest of a person who has stolen a TV or VCR or, for that matter, any other form of property, is not necessarily justice. Justice is only arrived at when two things happen: (i) the person who lost his or her property gets the property back or is reimbursed for it; and (ii) the guilty party is punished. Therefore, if such differences in the understanding of crime and punishment are not addressed, there is a danger that doing away with people's courts and creating 'community policing structures' while, at the same time, not improving the manner in which the legal system

produces justice, may lead back to the time when individuals took the law into their own hands.[20]

Secondly, over and above their normal functions, 'community policing structures', should be empowered to address those cases which may not be easily addressed by (or are not within the official parameters of) the official legal system. Such practice should obtain, at least, until the official legal system is adapted to dealing with such cases.

Thirdly, 'community policing' cannot be expected to succeed in the long-term if it is dependent on the availability and self-selection of 'volunteers'. Sustained funding of the programme and remuneration or rewards for participants have to be seriously considered. Also, 'community policing' programmes are less likely to succeed if they are not buttressed by sufficient funds for the training and retraining of participants.

Finally, it is important to realise that 'community policing' is but a 'mopping up' of the consequences of the 'open faucet',[21] namely, unemployment, illiteracy and miseducation, broken or weakened primary institutions of socialisation and poverty. As long as the faucet is open, the best 'community policing programme', best planned by the best qualified, and best implemented by the well trained and most enthusiastic will have only marginal effect, in the long-term.

To be effective in the long-term, 'community policing' should be accompanied by programmes which create renewed and positive communities, such as job opportunities and training leading to well paying jobs, mass affordable education, sustained fortification of institutions of socialisation and rising incomes and standards of living. If we can do all of these, we will be deserving of peaceful communities.

NOTES

1 Men complain about the impact - to their families - of the punishment of wife or child 'abuse' since all forms are punished in the same way. For instance, a man who slapped his wife repeatedly with the palm of his right hand received the same punishment given to another man who had beaten his wife so badly that she spent weeks in hospital! Men claim that this makes it difficult for them to discipline members of their families, especially their children.

2 In a story published in the *Sunday Times* of 13 November 1994, a young man who was tortured and killed was 'a well known activist in the area ... who had terrorised women and committed various crimes under the pretext of maintaining law and order'.

3 It is not a coincidence that organisations from the AWB, exiled ANC, IRA and PLO as well as states like Britain (in Ireland), Israel and apartheid South Africa, to name a few, often mete out legal or extra-legal violent punishment to 'traitors'.

4 In a story reported in the *Sunday Times* of 13 November 1994, 'each man present' at a 'people's court' hearing was given a chance to stab the 'culprit' at least 'once' and it 'was decided that he be stoned by women'.

5 Indeed Bheki was not brought before the court again. He could not. He moved to a squatter area near Inanda without finishing his sentence. Instances in which people skip their sentences by moving to other areas have been used as reasons for the preference - by some members of people's courts - for those forms of punishment which are swift and immediate, such as corporal punishment.

6 Contemporary celebrations of brutal punishment range from, on the one hand, besieged communities (such as those in Israel and Ireland, for example) to the festive picnics held by some US citizens to celebrate executions of notorious criminals.

7 Brigadier Herman Stadler is alleged to have said that the post-1980s people's courts 'were established as part of an ANC conspiracy to undermine the authority of the state'.

8 See Jeremy Seekings's discussion of the 1970s *Makgotla* in the West Rand (1989) Although there might be differences between *oQonda* and the *Makgotlas*, there were great similarities in their processes and methods of punishment.

9 This became more pronounced when the councilors were given powers - by the 1977 Community Councils Act - to collect rent and rates.

10 The evening reviews to which Scharf refers may have required long hours of participation in the people's court (Scharf 1988:8). Scharf's discussion of this issue in relation to the rise in violence within a certain people's court concurs with our findings.

11 Although Scharf (1988:6-11) links violent punishment with political affiliation, he associates issues (similar to the ones we found) with the 'decline in democratic process'.

12 The Nhlungwane people who murdered the juveniles who had been released from detention, where they had been awaiting trials, claimed that those juveniles were guilty of numerous crimes in the area and had been frequently released without spending 'sufficient time' either in prison or in custody. CCV 19h00 News, 22 May 1995.

13 Hartshorne (1992) refers to these youth as 'alienated, hard-to-reach and unemployed'. See, also, Seekings' discussion of youth drop-out rates, failure rates, school leaving and unemployment (1993:13-15).

14 Mokwena's 'Living on the wrong side of the law', in Everatt and Sisulu (eds), 1992 refers to some of these youth as 'living on the wrong side of the law'.

15 'For we have turned our children into a generation of fighters, battle-hardened soldiers who will never know the carefree joy of childhood ... Our heritage to our children (is) the knowledge of how to die, and how to kill' (Percy Qoboza, quoted in Everatt and Sisulu (eds) 1992).

16 In the urban areas of Natal, youth who pretended to be 'comrades' but in fact were *tsotsis* were know as '*comisotsis*'.

17 In other contexts, this is the process through which responsible leadership gets displaced by or transformed into 'warlordism'.

18 For instance, hostel dwellers are coerced to join marches, attend rallies and to participate in attacks on members of opposition parties. (See Zulu, 1993:7-11).

19 The demonstrations in favour of long-term sentences without parole for child molesters and the suspension of bail for 'cop-killers' are the beginning of an attempt to manufacture a South

African brand of jurisprudence. The same pressure could be exerted on the justice system to address some of the issues occurring in African townships which it does not yet (and is not meant to) address.

20 As it is, doing away with people's courts or severely impairing their operations has brought back the knife-fights of the old and created an environment in which assassins are hired to even scores.

21 This metaphor is borrowed from James P Comer who used it in a different context (see Currie, 1985:226-7).

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