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**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 5**

**THE JUDICIARY  
AND LEGAL SYSTEMS**

**PUBLIC HEARING**

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***PRESENTATIONS BY:***

***PROF DANIEL NINA: UCT INSTITUTE OF CRIMINOLOGY  
F KOBESE: SANCO, EASTERN CAPE  
M MONYELA: COMMUNITY MEDIATOR, ALEXANDRA***



CONSTITUTIONAL ASSEMBLY

DATE:

9-2-1995

CHAIRPERSON: Ladies and gentlemen, it is seven minutes past and I think we should start. Mr Danie Schutte, as yesterday and many days before has been on time. Danie, julle moet miskien agter die...kom uit daarso, doen julle dinge in die openbaar jong. Ons weet die Broederbond is nou agter die goeters, maar.....

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Today we only have one set of witnesses, the three gentlemen there. Fikile Kobese is Acting President of the South African National Civic Organisation, which one are you? That one, Eastern Cape Region and Chairperson of the Anti-Crime, Human Rights and Popular Justice Department of SANCO. Then Mr Martin Monyela is Community Mediator of the Joe Modise Quatro Camp in Alexandra township in Gauteng region, or isn't that quite correct? Joe Modise Camp in Alexandra township, and Daniel Nina is National Manager (Research) of NICRO and Research Associate of the Research Institute of Criminology. Welcome gentlemen, you have 10-15 minutes to put your case, and thereafter the hon colleagues will put questions to you. Go, you press there.

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PROF D NINA: Good afternoon to all distinguished members of this committee, on behalf of my two colleagues and comrades, Fikile Kobese and Martin Monyela, we would like to thank you for having invited us here. I think it is a special occasion for us because we have been working together for many years in South Africa on the question of empowering communities to continue doing what they do best, which is solve problems. Solve problems I might say outside the realm of the State, outside the Judicial System of the

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State, which many of you represent, and certain (indistinct) parties in parliament you also represent. But I must say that Judicial System, the old one and the new one is still quite illegitimate for many of the communities in the urban domain of South Africa, and by communities I mean townships, African communities where the rule of law, justice, judicial processes are quite a foreign matter. In that regard we come here today to share some ideas with you of the work we have been doing in the past few years as part of the realm that is academically called "Popular Justice", and also to share with you what we understand should be the future of this community expression that has prevailed in South Africa consistently, at least for the last 10 years. Which if you don't take appropriate measures, today in the drafting of this new Constitution it might continue in the future. Because we are talking about a new legitimate government, we're talking about the need of each citizen to abide to the rule of law, we need to take serious measures in order to regulate what the people are already doing and what they will probably continue doing if we don't do something.

We have a very simple presentation here which I will talk part of the more academic form of slides(?) and my two comrades, colleagues will brief you on what is happening at the grassroots level. We will try to do it very briefly, but please bear with us if we extend one or two minutes.

The history of so-called popular justice or community justice I might emphasise, is an urban phenomenon, we are talking about African people who were displaced from the rural environment and coming to the urban settlement or settings, they have to organise some type of mechanism to regulate their communal existence to protect themselves, to



solve conflict among dwellers of the community where they were existing or co-existing. All this happened, as some of you might know, basically because the government, the old one, was illegitimate and in particular because access to justice - to State justice - was either inefficient or unfair. In that regard, the history of popular justice was a story that began in the urban setting of the township, is something that many of people have managed to track to the 1930's, 1940's when the first vigilante association was organised. I don't know if any of you have heard about them, but they exist fundamentally in the Eastern Cape where in the African location people create their own mechanism for protection, order and conflict resolution. 10

The history has evolved through many instances, many developments, sometimes trying to be co-opted by the State, you remember the Mahotla and the Lehotla which the State tried to bring to the urban setting in the 1970's the idea of traditional method of conflict resolution. However, there is a turning point in the history which is the 1980's 20 of which some of you were part of, in which when we were organising people's power the call for establishing people's court was part of this process. Organising people's power meaning to create a parallel legality to the State. The history of people's court is various right? We know mostly of necklacing, we know mostly about modelling which is people walking through the middle of a community naked, we know about whipping, we know about human right violations. We know about that, even myself I know of that. However, we know with less precise information is 30 the successful safari of the history of people's court and how it evolved later on into more organised practices, more 1. regulated /...



regulated practices by the Community Representative Organisation, in particular the Civic Organisation. This turning point which happened in the 1980's late 1980's I might say after gross State repression, of the leadership involved in popular justice/people's court, took a new format into what has been called street committees, (indistinct) committees, fundamentally residential associations in the urban environment, the urban township which the people organised mechanisms in a systematic way, 10 in a very simple language, shared by one or two local elected representatives, to solve the daily problems of the people. I might say that this has happened consistently since late 1980's, and it's still happening today and no matter that we have a democratic government, no matter that we are trying to make great changes in the Constitutional Accord in the Supreme Court, people would rather go to the local street committee and solve their problem there and find some type of justice instead of going to the formal court. I will stop for a second to allow my comrade here 20 to make any input.

CHAIRPERSON: Just a moment, Mr Douglas are you leaving? Can you just switch off you...I thought you were leaving. May I take this opportunity colleagues to especially welcome the Secretary of Parliament, Mr Robin Douglas, thank you very much for visiting us this is the Theme Committee No 5 dealing with the Judiciary. Thank you for attending this, you can go on.

MR M MONYELA: Thank you. My name is Martin Monyela, I'm coming from Joe Modise Camp in Alexandra township, in the 30 Gauteng Province. The Joe Modise Camp Committee is one of the fourteen camps operating under the banner of Alexandra 1. Civic /...



Civic Organisation. The camp has established a District Resolution Committee, the function of the Committee is to deal with cases that have the potential of creating tensions and conflict among the community, for example neighbourhood disputes, family matters, social problems and petty crime.

The proceedings of this structure ensures maximum participation of the community, and its ultimate aim is the rehabilitation and re-education of the wrong-doer. The Camp never had a history of physical punishment, necklacing or whipping, but relied on restitution and community work as a means of re-education. The mediators do not have any formal training and rely mostly on their own common sense and a commitment to improve the living conditions of the community.

In each dispute hearing, a chairperson is either elected by all the participants, or nominated by the camp. Hearings are conducted without any party forcing its view or interest on others, this is very important for the structure to enjoy the confidence of the community. It is important for the community to see itself as part of the process, that is participating and contributing towards the resolution of the dispute. Our success rate in resolving most of the disputes is attributed to the confidence the community has on the structure. The mediators are not present to find any of the parties in the dispute guilty, they are there to help the parties to reconcile and address their grievances.

Mediators are themselves living with the community and understand the underlying socio-economic problems facing the community. Because of the support enjoyed by the structures, we have been able to solve most of the crimes that the South African Police Services and the SADF have



failed to, like housebreakings, muggings, car hijackings, marriage and family problems. We know one another in the community, we are in a position to identify criminal elements than the police, and because the community has lost confidence in the police because of its brutality and protection of apartheid law. Without co-operation of the community, any form of justice whether in a democratically elected government is bound to fail. We have experienced cases where police have been referring people with family problems and minor disputes back to street communities, as they have no capacity to deal with it. We have managed, through these structures, to convert some of the known criminals into useful community activists. Their involvement in these structures has changed their conduct, and the way they perceive the community. We also have considerable success in retrieving stolen goods which we handed back to the rightful owners. We regard rehabilitation as the most fundamental in any future justice system in the country. The jurisdiction of our communities however, are limited to minor matters, we always refer serious crimes like murder and rape to the police. So in brief that is what the Dispute Resolution Committee in Alex is doing. Thank you. 10 20

MR F KOBESE: Thank you Mr Chairman, I'm Feikile Kobese from Uitenhage, I work in the Eastern Cape Region, at present I am the Acting President of SANCO. In addition to what has been presented from general to specifics according to the first and second speaker, I would mention that accept the the historical background of the African culture, where there are methods of discipline, where there is an environment where justice is held in high regard, created by 30



both young and old, Dispute Resolution from individual to cleanse families, group strifes, we note of course the historical background of conflict that has led to the mistrust, suspicions and lack of understanding between State structures and the communities. This has been revived, if we look at the era around...if we look at contemporary history, the era around 1976 and the flair up here in the 1980's again. Due to the massive uprisings, the State had conducted its forces, security forces, SAP, and others to actually deal with that situation. That has led to a situation where people felt that the police have literally ignored reported cases, even death cases really of a criminal nature and not a political nature. 10

There was domination of the criminal element, frustrated people then sought ways and means of establishing and understanding peace and stability among themselves. But it should be noted that at that point in time is the prevalence of spontaneity in the absence of training, absence of leadership direction, absence of experience and absence of resources, even the absence of a reliable State structure to refer to in issues that had to do with crime and conflict. That led to excesses I think, Dr Nina has mentioned those excesses, necklacing, whipping people etc. The breathing space since 1990 has been assessed by us and we felt that there is still continuous mistrust, it's a process to actually mend that situation. It's the lack of confidence in the State system of justice, State police service, lack of knowledge from our communities, suspicion that sometimes lead people to say there are other forces at play, other than they felt that there are two parties, that is say the police or justice system in the communities. 20 30



We felt that people should be brought closer to the government, they should be brought closer to the law, they should be brought closer to the understanding of what the government seeks to deliver, and take part in creating conducive conditions for implementation of development programmes.

We feel that the role played by community courts then will lead to lack of...to the cure in the area of lack of understanding. An educational role for the whole country could be correcting that situation. There is a lot of clamouring about bail given to people in the whole country, arrests made in one way or the other, the valuation of witnesses present in cases etc., this is lack of understanding of how the justice system works, and that lack of understanding is among our communities. We feel, a practice at their level, would expose the need for co-operation and would expose them to the dynamics which are sometimes technical and academic for them to understand that take place in the justice system of the country. Access to set areas for instance, access to informal settlements, follow-up on communal problems, are themselves a challenge for State structures. The demand is glaring for community participation and community co-operation for those to be achieved. Also community policing which is discussed all over the country in various areas, we'll never gain the necessary recognition we desired to get if there is lack of co-operation among the community without the type of initiative of community courts for instance. That would demonstrate in practice that such co-operation is necessary and recognition of the law should actually take place and people should understand these changes as a process rather than /...



than an event that can just flicker off if as they are switched on and off. There is recognition displayed by various sectors for what we have been engaged in so far. That recognition will be found among the State in terms of S A Police Service, that recognition has been expressed in public by organisations, it has been expressed by media in terms of publicly reported and independently reported cases, communities, youth organisations and business. Thank you.

PROF D NINA: Thanks a lot. What I would like to do now is 10  
to show you, the way we've been doing the last few years here with the community is documented what they do, (break in tape)..to emphasise on that one with researches recently in Gugulutu right? Okay, let me go with the figures. We were trying to find out who constitutes, who creates justice, who creates the rule of law. This was done last August in Gugulutu, three months after the election. With a sample of 120 people, different age categories, and it just seemed they were created jointly by the State, by people like yourselves, and by the community, people say 20  
that 67% should be a joint participation. (Tape break)...it comes to it should only be created by the State people have doubt, and they say 17% only created by the community, people again have doubts on that. So there is a strong emphasis of people participation in the aspect justice, in the aspect of rule of law and creation of law. If we go to a simple question, back into Natal in 1993, who have the legal authority to enforce the law and protect the people, you have the police 84%, lawyers 83%, magistrate courts 81%, but there again 70% for Civic Associations and 30  
peoples' court here got a bit more, I think 38%. Tribal authorities in the environment of Natal, in particular one  
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of the communities was semi rural traditional authorities in charge got 54%. Just outside the question of justice, more in the area of policing for example, but also in (indistinct) area of committee participation, who should protect the community, peace keeping in the future - joint mechanism between the community and the police 78%, only street committee 12% and just for the State only the police people in Guguletu are saying 8%, and this is something that happened last August. In relation who has the best capacity to assess crime, crime being a popular way of defining offenses, we talk about shooting, the State have predominantly in prevention and this is in Natal in 1993, and the State has over 60% in many of the areas that we have defined here, like shooting, murder, rape, burglary, but for those who don't know it's interesting that the community claims to have a right to intervene and assess their certain matters such as witchcraft, domestic violence and physical assault. How am I doing on time sir, am I overdoing it?

CHAIRPERSON: I think you go on, you're doing well. 20

PROF D NINA: Okay. About reporting crime, most people should take their own matters, in Natal again of those same type of crime, crime in a more popular way of speaking, we talk about the KwaZulu and South African Police, ANC Civics. Now we can see a breakdown in which the police are establishing itself a familiar role in the most serious type of crime, but when it comes to other matters, if there is a breakdown in which, like physical assault, witchcraft and domestic violence again, in which non-State bodies i.e. the Civic use, family neighbours passive role of intervention. This is now just a breakdown to specific crimes in Guguletu



right, what should the people do, how to handle issues of murder, there's a clear apartheid between the different communities across the country, that justice in serious type of crime is a matter for the State, we've got no doubt about that. Here again they say that 76% of murder issues should be dealt with by the State, and only 0.8% claim the community and 22% for a joint community/police effort. However, following the same line in the case of rape, again the State and the police have total control of 70%, most (indistinct) police have a lower percent, 26% and only the community 3%. 10

In the area of shooting and stabbing which is something that concerns quite a lot of people, again the State has a formal control or it has a perception that the State will deliver the goods, 80% in the case of shooting, and for the community less than 2%. In the case of the stabbing there is a division, and here it is quite interesting and my colleagues should ask why the people would like to have some control on that, in which the State will have only 45% and the community 20%. Finally, it is in domestic violence in the same case as Durban where Guguletu shows that the police...the street committees should have a greater intervention, 75% - the police should only have a lesser intervention of 5%. What I wanted to share with you is that the justice system that we have built up in this country (tape break), is one where there is a divided sense of responsibility between one hand what the one community has empowered itself to do through many years, and on the other hand what the State was meant to be doing in the past, but should be definitely doing now. It's a process of empowerment in which the community took control. The idea 30

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that we wanted to share with you here is, this recognition you have to take cognisance of this, this is a fact and this is what we see from so many communities. The point that many communities place in view what they have said in this survey in terms of extending their own jurisdiction. The need for recognition will allow to have a more fair judicial system, and from the (indistinct) a judicial system that is legitimate from both sides, from the side of the State because the State will recognise that the people will feel 10 that it is their judicial system, and also from the side of the people because they will be able to use it. To recur to it when it is necessary.

We talk then about necessary transition from own regulated practice of popular justice, to self-regulated practice of popular justice, as has happened in at least four communities in this country, Eastern Cape is probably the most organised one in that regard, and we need them to move into a new state in which first State takes notion of what is happening, and secondly where disregulation comes 20 clearly in the new document in the new Constitution. Where we will have a type of more popular judicial system that will cater for the vast of the population. With this course, different type of controlling or of the nature of the court we're talking about a popular type of court of elected people, or people appointed by the Government it depends on how much control the State wants to have, but definitely the State has a lease to have control with a presiding officer whom they should train and empower to conduct the proceedings. A very limited jurisdiction on 30 matters of family controversy or matters of inter-personal disputes between neighbours and small contractual claims,



helping or counselling an offender through re-education and rehabilitation at the community level, and limited jurisdiction on criminal offenses. We quote here something from Albie Sachs, now Judge of our Constitutional Court, who described clearly what should be the future of this type of community court. Fundamentally we're talking about access to justice at the grass roots level, access to judicial intervention to solve problems of the people at the grassroots level in which people could find that in order to solve their problems the State and the image of the State as providing justice can be given to them. 10

We finally discussed three possible models, one based on the Eastern Cape experience which you have a copy of in the submission postulated to you by Filile Kobese and also by myself. Also we mentioned finally the Eastern Cape is more on the self-regulation side with lesser State intervention. The Mozambiquean (indistinct) is an experience that we can follow in South Africa, the most Mozambiquean popular tribunals which later become community courts, were in the Regional Constitutional Court and this is a debate that we can have either Constitutional or courts by Parliament Act, but in Mozambique there definitely were Constitutional Courts for at least 12 years. Finally we can have a model based on partial State intervention in which the State could control only the infrastructure and the Presiding Officer and in which all the judges of the panel of the community court, probably a maximum of five Presiding Officers, five judges, lay judges could be elected on a voluntary basis from the community participants to be part of this process for a year term. By that way the State might then control by a presiding officer which is a civil 20



servant. This is in brief what we wanted to share, if there is any point that Martin would like to add please, otherwise we are open to questions. Thanks.

CHAIRPERSON: Thank you Dr Nina for a very well presented presentation, I just wonder why have you not submitted those very interesting research figures, I don't seem to find it in the document I have, if not is it possible for you to submit it?

PROF NINA: Yes. 10

CHAIRPERSON: You now have the opportunity to put questions. Bulalani?

MR B NGCUKA: In the statistics of Guguletu on domestic violence, what was the proportion of the females to the males of the people who were interviewed?

PROF D NINA: Female was 74% in favour of using the street committees, male was 77%.

MR B NGCUKA: Age group?

PROF D NINA: Age group 16-25 was 78%, 26-40 was 73% and 41-60 was 68%. If you want me to clarify on this regard, not based on this research that we did in Guguletu, but based on another research I did in Natal. I wonder if your line of questions come about the role of the extended family which in Guguletu in terms of the structure of the street committee, the first tier of solving intra-family conflict is the extended family, and that is all around the country. You find it very clear in Natal, but we didn't pitch the question at that direction here. 20

CHAIRPERSON: The next is Mr Douglas Gibson.

MR D GIBSON: Thank you Chairperson, I found this most interesting, there are a couple of questions I've got. The first is it isn't quite clear to me what the difference 30

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between the Civic Associations and the peoples' courts, what are we actually proposing here? Are we proposing that existing peoples' courts be given constitutional form and become formally part of our justice system. If we're doing that are we not confusing them with the Civic Associations, so that's the first question. Perhaps to...was that Mr Kobese who dealt with that aspect? Yes. Then secondly I'd like to deal with...ask Mr Nina to deal with the question of the background in which all of this developed. 10

I mean it's a very recent phenomenon in the sense that you say it's an urban phenomenon, really only started around the 30's and so on, but at that stage, a very small proportion of the South African population was urbanised, I mean it's only over the last 20 years that most...that a very large proportion have become urban dwellers. So I'm saying it's a recent phenomenon number one, and number two, have the circumstances not changed in South Africa? We're now a democracy, we've got a legitimate government at National and Provincial level, we're about to have legitimate governments 20

at local level as well. Flowing from that is the fact that you've got elected representatives, where people didn't have anybody they felt they could turn to before, they've now got members of parliament, they've got members of the Provincial Legislatures, they're going to have town and city councillors, all of whom will be available to them for mediation, for assistance, for representations and so on.

The third aspect is that the courts surely, as an arm of a legitimate State are going to be seen to be legitimate, I mean certainly in the immediate future, I think we will have 30

failed if we don't succeed in correcting that impression with people. Allied with that is the fact that you're going

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to have proper access to the courts, because one of the aspects that one's considering and insisting on is that people do have improved access to courts. We're talking about lay participation in the courts, all of which is aimed at increasing the community's confidence. Then the fourth one is the changing image of the South African Police Services, and the emphasis on community policing, community liaison. The fifth one I might add is your own statistics which in fact show a remarkable vote of confidence in the police, far more than I would ever have expected in respect of all of the serious crimes. I mean it's a much higher figure than one would have expected, so the community seems to have confidence in the police force. If you take all of those together, and consider why this informal organisation started in South Africa, has its basic reason for existence not disappeared or is it not about to disappear? 10

MR F KOBESE: Thank you Mr Chairperson. According to the first question as to SANCO or a civic role in the courts that we're speaking about, SANCO in fact needs division of roles by the leadership has 15 various departments that have now been condensed to the overload of those departments, they have been condensed to 11. One of these departments is dealing with the campaign for human rights and popular justice and anti-crime, which is a certain fraction of SANCO role. Therefore it is not necessarily the Civic as a whole itself, and SANCO would relate to such a structure if we were to follow for instance if we were to agree on the implementation of the proposal. SANCO is an organisation which would refer to as a campaign as any other campaign that it would refer to that is actually in favour of the communities. I don't know whether 20 30



that gives the explanation? So SANCO as an organisation is not holistically involved as a whole organisation, only in this particular area. In the areas of education, culture, local government, issues of development, economic development, housing etc. One of those campaigns is the campaign of popular justice, anti-crime and human rights, and proposes this as a department that could actually come to present its perspective in this particular meeting.

CHAIRPERSON: Do you want to add to that? Dr Nina, Mr Monyela? 10

MR M MONYELA: What happened in the case of Alexandra is that I think late in the 80's we had peoples' court and where I mean the people have been lashed cases, some cases few cases of necklacing, and whatever. After the 1980's, after the leadership of the Action Committee has been arrested, the Civic Organisation revived the structures in Alex to form street and yard committees, and in turn the yard and street committees developed this Dispute Resolution Committees that will actually deal with the conflict within 20 the communities, and the whole process is not entirely a civic matter but through the civic structures, communities actually form their own structures to address the grievances and problems that they were facing. As a civic organisation belongs to all residents in Alex, whatever political ideology and things, so I think we have to make distinction between the peoples' court and the new initiatives that have been taken by the community themselves, Dispute Resolution Committees. So there is a vast difference, ...the Dispute Resolution Committee are not 30 operating as peoples' court, but as the initiative within communities with people elected by their



area committees to serve in those committees and to deal with such cases.

CHAIRPERSON: Are you happy Mr Gibson?

MR D GIBSON: I'm very interested in your reply, thank you Mr Chairperson.

PROF D NINA: Probably in the film that we brought if you want to see it after we finish the discussion it will have more clarification on that question. In terms of your question addressed to myself, I wish that the question of legitimacy was automatic after 27 April then we have a legitimate governing, everyone goes to the police or to the courts right? What we have to face in this country that there is a culture, and cultures take time to build up in which the people manage to create a common understanding in which they say if we have a problem, we can go to the police, we don't go to the local court. We call people like Martin, we call people like Ficks to help us. When you start to think about that that there was a policy of the civic movement and there was a political policy as well from the UDF, ANC in particular conjunction in the 1980's to encourage people to organise themselves outside the State, therefore after 27 April, you have to reconstruct, destroy that culture that has been in operation. People not necessarily will walk easy back to the court or to the police. In the case of the police particular in different regions of the country you know that their major complaints about the police, corruption, police efficiency etc. We talk about the Eastern Cape, in the Eastern Cape the people have something called the anti-crime committee, because no matter how much Popcru toyi-toyi there with people in the community, the people haven't felt that crime has been



solved for them in the townships, therefore they organised. In all the communities, Alexandra, here in Guguletu also certain places in Natal people carry on doing this because at the end of the day it's also cheaper to stay in the community to solve your problem. If you find, if there is an adequate system which is legitimate to the community dweller, based that there is no physical punishment, further there is no humiliating punishment of any kind, that is just a matter of re-establishing the status quo before there was a problem, paying compensation, paying...restituting to the victim or to the complainer whatever he or she's asking, then people feel satisfied. Also it is happening amongst the community members, you're sitting with your peers of your community. It takes place speaking your own language, and also happening in a place that there is no one foreigner, everyone is part of that collective, right? I wish it was like you say that having a legitimate government means that everything starts to move smooth, it's not like that and we will have to build up that culture, and it will take a while, and that's my problem. I'm building that culture and that's the point I was emphasising we will have to create mechanism by which the State incorporate what the people are doing in a very regulated way so that there is an identity creating which people say, hey this is what we used to do, it's now part of the State, let's participate which is basically the experience in Southern Africa, Tanzania, Mozambique, Zimbabwe or with Africa as well, particularly in Central Africa the question of Uganda, that the State took over the initiative of the people in period of transition or in a more permanent way.

Second question, this I addressed in general in your  
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first question. The courts to be legitimate, access to court, lay participation. My problem is that many of the reforms that are taking place, also started to take place since 84 and onward. Short process court is 1984, then a lot of initiative on mediation, recognise family mediation 1987, the whole process of lay participation 1991 or 1990, and there were already initiative the short process court, the small claims court in 1984 and the short process court mediation for certain civil matters in 1991. The State took a lot of initiative to address this imbalance in which the people felt that the judicial system wasn't fair with them, but there are still people carrying on organising outside the State and that something that makes me feel worried or wary about what will happen now. If we don't take clear measures to address the situation, people will carry on organising themselves outside. Hence, I will suggest that you walk an extra mile and try to take every type of measure that could allow things happening outside the State to be regulated by the State and that the people will feel more confident to address the State directly.

The question of the police is you know, is not an easy question, there are so many problems with the police and I found that it is still quite illegitimate for most of the population in all type of communities. I've been working here with anti-crime forum of the Western Cape, and the complaints of police corruption, police discrimination etc., are valid ones. Therefore the initiative on community policing, the initiative of reforming the police, once that happens the community will need to build a bridge or the police will need to build a bridge with the community and once that happens, things might start to change. It's too soon /...



soon for that one.

CHAIRPERSON: The questioners are building up beautifully. Mr Hofmeyr, Dalling De Lange, Schutte, Ms Jana, Mr Le Roux. I appeal to the questioners to be concise and to the responders to be even more concise. We want to adjourn before 12 o'clock tonight.

MR HOFMEYR: Mr Chairperson, I hope I follow your injunction here. I want to just say two things. I think for me the question that Mr Gibson referred to, but I don't think it's only a question of the legitimacy of the existing justice system in a sense. I think the reality in most of our townships is that people do not have access to the justice system. If you suffer petty theft or an assault, the chances that that case is ever going to end up in court, that you are ever going to see justice in the formal justice system is almost non-existent and the same goes for even very serious crimes. I think what interests me and why I think that we need to look seriously at the idea of community courts, is that it can give people access to justice, that in some way that their problems that they suffer are actually resolved. I think...so I just in partial response to what Mr Gibson has said but I would like it if you could comment on that as well. What I would like you to comment on maybe a little bit in more detail, and I think some of those things are covered in your written submission, is the fact that I think that it is important that your community courts, or call it what you will, your Dispute Resolution Committees, that they need to be tied into the formal justice system in some way, that there are mechanisms for taking out cases that do not belong in those courts and taking them into the formal justice system. I

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would like you perhaps to spend a bit time just talking about the ways in which one can establish those ties or links between your community courts and what we have as a formal justice system at the moment.

PROF D NINA: Access to justice. I totally agree with you. If you want, one day we go in loco and visit many communities that have this mechanism and what we are basically.....



could go on revision to the magistrate's court or people could refer matters to the magistrate's court, or vice versa the magistrate's court could send the matter back to the community because that might be the best place to solve the problem. What we need to have is a very clear jurisdiction limitation for the community court, a very clear administrative procedure of referral, and that doesn't take too much you just need a register for which the Presiding Officer could do that, and we need that the parties are informed if they are not satisfied with the decision of the community court, they could ask for a revision or if you want an appeal to the magistrate's court. But definitely a revision to the magistrate's court. It has happened in other countries, i.e. in Zimbabwe for example they have...we have another problem here, we're talking about urban experience, but we don't...haven't spoken about what will happen in the rural areas where traditional authorities have had a role to do this, consider a solution. In Zimbabwe what they did was to establish the village court for the rural settlement or environment, and the community court for the urban areas, and both of them with powers to go on revision or refer matters to the magistrate authority. 10 20

CHAIRPERSON: The next is in the words of Mr Terblanche, Mnr "Dahling".

MR D DALLING: Well, we'll deal differently with the delegation. Mr Chairman, I must congratulate these three members, I think they've brought some very refreshing ideas to us, which I'm sure can find a place in the work that we do. I see it as a natural extension of the small claims court system quite frankly which already has had some success in the more formal sector. I see the major 30



advantages of these ideas as being a major saving in costs at all times, a swift resolution of matters where otherwise they'd be waiting on rolls at courts for a long time, access which my colleague has spoken about. Community participation, which in itself gives legitimacy to a system, and I think that also these ideas could help to relieve the burden on the State in regard to many minor matters, of both a criminal and a civil nature. Now, that then is my attitude towards your representation, so it's very positive. 10

To put one or two little problems, and I hope you can give us some ideas. You've given a very good answer to what Mr Hofmeyr has already put. One of the important things is, what law is to be applied, in other words, when we're talking about lay people in courts, lay Presiding Officers, now what is...I favour your...the mixed model that you've proposed that's the third item on your short memorandum, I favour that rather than the rigid first two models. But, what law would be applied, would there be a basis of law that would apply, that's the first thing? Secondly, how do we...how would we go about trying to create a system which ensures certainty of law? Because I think that when you have any law that is applied, the important thing is that there is relative certainty, that precedence are created and that there is certainty. Is there a means whereby this could be done? Lastly, there will be people who will not wish to submit to the jurisdiction of lay Presiding Officers, do you feel that these courts should have exclusive jurisdiction over the smaller matters or community matters, or do you think that a person involved could have the option to go to a more formal court if he or she wanted it? I wondered if you could just respond to that, but bear 20

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in mind that my attitude towards your representations is very positive and I'd like to find these answers to help us find a way to do this.

PROF D NINA: In terms of the law to apply has to be the law of the State definitely. You are operating a very limited jurisdiction in very simple matters, right? Before under approach I have personally taken differing area of my written work and my participation with various communities, is to train them in before 27 April last year on basic understanding of human rights, and basic understanding of the culture of equality and of fairness. After 27 April, I could say people should be empowered to understand at least the basic principle of the Bill of Rights of the Constitution and because they are operating a very...within a very limited jurisdiction where common sense is good enough to solve problems if they are respecting a culture of rights as guaranteed by the Bill of Rights, should be enough. 10

What happens in many communities today that common sense prevails, it's not the law of the lawyers, it's not the law of the State, it's common sense and in many occasions, provided they understand a culture of fairness and equality is enough. In many of the community where we worked, for example you will see in other documents we have managed to share that value. It might not be enough, but based on the experience of other countries it proved that it was enough, particularly in Mozambique and I could talk about that later on. Certainty of the law, we think about that if we go to the formal court, we think of going to a panel of mediation, arbitration, we start to think about that kind of certainty, we negotiate on terms. If we 20 30



are trying to convey a type of communal mediation, communal way of solving problems, therefore the certainty of the law is a different type of priority. In terms of jurisdiction, exclusive or inclusive, it's a good question, I don't have a clear answer for that one. However, I will believe that in terms of fairness, each party who is common to community court, and who feel that they are receiving second type of justice, they should be entitled to say no I'll rather see this matter in the magistrate's court, and be represented. 10  
It could be a clause within a law enabling an Act for this type of court guaranteeing that.

In terms of the law to apply I just want to show you, this is what they did in Zimbabwe, this is the training of community court Presiding Officers and clerks, you just create a manner, you train them and they apply principles the State law constitution or laws within their jurisdiction that they have clarity.

MR D DALLING: Could I have a follow-up question Mr Chairman? 20

CHAIRPERSON: Yes certainly Mr Dalling.

MR D DALLING: Just one, thank you. The question of the court not being a court of record. In the small claims court, you have to submit to the jurisdiction specifically the parties, and...or the party who is suing, submits to the jurisdiction and if whatever the decision, there's no appeal against that decision because it is not a court of record, in other words there are not reasons given for decisions and things like that. Would you see this court in the same sort of light or would you allow of a review or an appeal to a higher court? 30

PROF D NINA: It depends what power you....(tape break)



what power you provide at court for appeal or for review. The experience in other countries that the record is being kept, the experience in Alexandra and Martin can testify on that, is that they keep a record right, and they can use it if they have to review a same party coming over later on. It is a practical decision, it has proved not to be a difficult one, particularly in Zimbabwe I remember I was following the proceedings, it's a standard record, quite simple, the only clause in Zimbabwe was that the record needs to be written in English, because it was the common language for all the clerks, or people working for the judicial department. Otherwise, the proceedings were running in the local language. 10

CHAIRPERSON: Mr Johnny De Lange?

MR J DE LANGE: Mr Chairperson, it's always an honour to follow after Mr Dalling. Chairperson, thank you. I also want to unconditionally give my word of praise as well to the representation of all three of the members and just generally the kind of hard work and the kind of research and so on. I really do think, as Dougie has said, it brings a breath of fresh air into some old and staid thinking maybe, and hopefully this will find reflection in the future. I for one unconditionally support this kind of popular justice, as you've explained it and as it's developed in the last few years. Mr Hofmeyr and Dalling have attached the one aspect I wanted to deal with, so that's mainly been dealt with, and this is the kind of formalisation between the kind of structures of popular justice and your more staid kind of structures. Just to get clarity in my mind, let me just try and look at this. Now if you look at your three options, the first option clearly will not be 20 30



regulated in any way, there won't be a statute to regulate it, it's done on the basis of self-regulation and there maybe some status systems of some sort, but the state wouldn't in any way intervene there. Clearly the second one, that will be completely a Statute of Parliament and it will be dealt with through law or in any other way that one would deal with it. The third model, let me just understand, that will also be a statute, but clearly when it comes to issues like mediation and arbitration and the kind of methods of conflict resolution you can use, that clearly there will be some flexibility built into it that one can use those mechanisms. So in that sense it's not strictly necessarily applying the law of the land, but as you've said, more common sense than the kind of notions of justice and so on. But there will be a regulating mechanism in which that takes place, and even as you've said, review proceedings, appeal proceedings if necessary under certain circumstances. So I just want to see if that's the kind of model that you have in mind there and obviously one doesn't want to pinpoint this because that's not the task, but I just want to see your thinking. My more...my issue that worries me more now because it affects us is in your paragraph 3 you say that you aim to share these ideas with us, how to organise and you regard it as the lowest tier of courts in the judiciary in the final Constitution of the country. Now, it's clear that you envisage something to be in the Constitution. It seems to me, on your own version that you've given us that most of these matters, if they are dealt with, are best dealt with in Legislation. At most what you're looking for is to make sure that the Constitution provides for principles that would allow the

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kind of popular justice and lay participation you're thinking of, but not necessarily going into the kind of details and so on. To put it negatively, that the Constitution doesn't prohibit notions of popular justice on the lines that you've explained it. Is that what you have in mind that we need to deal with, as a principle but not the kind of details or do you expect us to look at a bit more than that?

PROF D NINA: In fact we discussed the same question 10  
because we were expecting that question, not necessarily from you but from our distinguished members here. Listen, there is not a straight rule of how to do this, in particular, Mozambique found that in the initial Constitution, post independence of a Constitutional mandate for popular tribunal, which eventually became community courts and were taken out of the Constitution, were an Act of Parliament, for political reasons that we can explain later. In other countries, like Zimbabwe they are an Act of Parliament. My recollection of independence, is that 20  
the first popular tribunal of cure were also constitutionally created. It is a reflection that there was a popular movement that took power and that certain things need to be legitimate now in the notional image of the State, hence the Constitution certifies that. We discussed the question and my initial reaction as someone trained as a lawyer, as this could be just an Act of Parliament, because as you stated in the actual constitution, the interim one that any other court will be an Act of Parliament. However, we have problems here with 30  
image of the State, we have problems with the question that you asked me at the beginning of the legitimacy, or  
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what people think about what they've been doing, and what they think about what you're doing on behalf of them.

In that regard I think that in order to take effective cognisance of what has happened here and take it seriously, an Act of Parliament won't look too positive outside the realm of this hall, because people will start to think about it. We have been fighting for this and the recognition that we're looking for has not been given to us, that's the first way for me of approaching it. Having it within the Constitution will be an important fact, an important recognition. That there should be Constitutional Courts, Supreme Courts and other courts included, 1, 2, 3...community courts, one of them. It's not a small matter to think about, it's probably the most important court that you will have in this country because it's the court of the bread and butter of the ordinary citizen of this country. The period of transition and the research on Mozambique has proven that this can be more effective than the Supreme Court on transforming the notion of justice, on transforming the understanding of respect in the rural flow. Fundamentally in the case of Mozambique of empowering women with equality, it's a very effective mechanism of bringing the law to the grassroots level. In that sense I will suggest we shall give life to this popular process that happened here, we should regulate it and take notice of it in the Constitution and the final Constitution and later in Parliament, we should regulate it. That will be my position, but what I want to share with you is that there's not a clear-cut decision on that and listed in the comparative literature. India for example, in the case of the minorities there, they recognise with the cultural right

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that they will have right to organise their judicial mechanism, of which the people then, by act of their local instructor will organise it. South Africa will have to take its own route. We discussed it and we found, at least myself in this position, that this might be the right answer at this stage. I don't know if Martin wants to add or (indistinct) on that?

CHAIRPERSON: If not, then Mr Schutte, are you finished Johnny?

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MR DE LANGE: I was just wondering on the three, the analysis of the three models, the first question if you can just give me a brief response to that broadly how you see it.

PROF D NINA: The Eastern Cape model is based on self-regulation is a particular stage when we were there in 1993, and it required very little State intervention, i.e. a (indistinct) linked to the formal judicial system, a loose way probably finance this process where we organise ourselves and if you look into the proposal in the yellow package of the summation, the people talk about how to elect persons of accountability etc. The Mozambiquean experience is the straight case of total State control, and one of the reasons they took it away from the Constitution as I explained, is that the Presiding Officer, the late judge of the community...Popular Tribunal of Mozambique were party officials, the Frelimo party members and their association with Renamo, Renamo say no we cannot have this tribunal at the local level, where the judges are representative of your party, hence they demoted from the Constitution to just as an Act of Parliament and creating civil servants (inaudible). The third model is the idea that Martin can

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add because we discussed it and he was thinking about it, where we just basically have a Presiding Officer control and paid by the State, persons will report back to the local instructor of the government, magistrate's court or the panel of the judiciary division, and in which all the members are elected by the community. What you guarantee on the one side there is accountability to the State, either to the magistrate's court creating a process of reporting back and also there is funding from the government to pay for the infrastructure. But also you maintain community involvement by creating a mechanism in which the local community elect the three additional members of the community court the fourth additional member to run for a term of one year, and they have an allowance paid by the State. It could be a nice combination, what you have to regulate is that the Presiding Officer responds - not to the community - but to the Government and takes control that things are operating there as you were saying in your question, according to the law of the land, at least to the principle of the law of the land.

CHAIRPERSON: Mnr Schutte?

MR D SCHUTTE: Thank you Mr Chairman. I'd like to latch on the same sort of question that Mr Dalling asked, and that relates to personal jurisdiction. Basically, he argued the possibility of allowing de novo hearing of the case if a man is not satisfied with the justice. But the way that I've heard Mr Monyela, is that this is...the basis of this is voluntary submission, and I'd just like to know whether that is the case. Whether it is based on voluntary submission, whether a person can avoid being heard by this court or not? That's the one aspect, the next aspect is the question of structure /...



structure, whether you've looked at the structure of the small claims court and whether that would not be a very good model to use to structure your own structure on, being that the jurisdiction be laid down in a court of law and thereafter that there be a committee which could be constituted in a way that you suggest, constituted in terms of the Act.

MR M MONYELA: Yes, what you said is that in our case, I mean people are not forced to come to the Dispute Resolution Committee, but what we have realised is that most people in the community will refer their family matters to be heard by elder people in the community, that will be sympathetic, people that know they are bringing backgrounds, family backgrounds and things. They don't prefer to go to ordinary courts for such issues, so in a way it's voluntary because people come during the day and we register all cases that people come on, and we set dates for the hearing of those cases. People are able to call in witnesses because those community courts are based in the locality where the actual problem happened. An inspection in loco is taking place, I mean there are witnesses and the people are free and willing to participate. In most cases, I mean we have been successful because whatever position that came out is the position of the community you know, because it's not only one people outside are making decisions on behalf of the people, they are part you know, they are relating their experience to other community members. Some of the residents experienced similar cases before, they'll be able to relate their experience and say this is how we resolved this matter and in most cases I mean what the position is accepted by both parties. What happens is that it doesn't

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only end there to say this is the decision that is taken, in most cases what happens is that the accused in most cases can be actively involved in the structures, going out solving similar cases you know and as I've reported earlier on, we have been able to turn potential criminals into useful community activists. That is how we have been operating, it's a voluntary process, if people feel they are not satisfied they either have the opportunity to go and report the matter to the police. There are cases where there's been minor injuries, what has been happening that people will say okay, you'll take care of the medical treatment of the person until the person is properly healed. If the person is not satisfied he feels that is not the right decision, he'll go to the police and lay a charge of assault, so it's a voluntary process altogether. 10

MR D SCHUTTE: Mr Chairman, it's not voluntary if you grab the man and say look, you must be here, but afterwards you can say whether you're satisfied or not, and that's the question. Is it voluntary post, I mean ante the hearing, can the man who is accused or is involved say no, I don't want to hear from you, I want to take this matter...this matter can be taken to the magistrate's court that's the question. 20

MR M MONYELA: There has been some instances where people refuse to come to us, to our Dispute Resolution Committee, in that case we don't force people, we don't take people by force to come there. What I'm saying is that the community has confidence in those structures because it's their own structures, they've established those structures and they feel confidence in those structures. There are some instances where people will say I'll prefer to go to the 30

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police for this matter, in that case I mean we don't even use force to get the person to come to the court.

MR KOBESE: (?) (Indistinct) to that Mr Chairman will be the situation is voluntary and the reality is the instances instead where police would refer some cases back to the community courts, having assessed you know the expense in terms of money, time, engagement etc., that it would cause to the community which maybe undue when compared to the case at issue. If one opts not to use the community courts, say the accused, there is no problem as long as if one refuses to actually attend or to be engaged with the community courts, we would wish that to go further so that justice is done, say to the police. Instead of refusing from us and saying it's gone because the case is off, we would actually encourage the complainant to launch that case with the police. We would inform the police that there is such a case and this person would like it to be handled by the magistrate's court, that's what we would encourage. 10

PROF D NINA: Perhaps I should just add to that line of question, there are cases of forced participation, there's no doubt on that we've been reading the newspaper recently in Thokoza and Tembisa recently in the PWV/Gauteng area. What we are talking about is that many of the communities has gone through a process of purification if you want to use that word, where they have learned to create their own mechanism of legitimacy and authority without having to compel to physical violence. I personally...I'm not in a position to bring you here about cases, that's not my role, I'm an advocate of positive popular experience. I could mention to you at lease five, six different experiences throughout the country where the community is doing 20 30



something that never comes to the press, which is a positive experience of community participation, very legitimate and with a strong authority based on moral standards or moral position. Following on what my two comrade colleagues were saying, here for example I will tell you what happened in Guguletu. A long time ago I listened, in the last two years there is no type of physical punishment in operation there, we train them, we empower them, we gave them certificates all that type of thing, as the experts tend to do. But what we have managed to do is that they have learned to engage and to liaise with the State authorities in order to support their authority. For example, in cases of which they find that they have jurisdiction, that the matter has been referred to them either by the police - and that is happening in this country - the police say go to the street committee they can handle it for you, or matters having been referred by the magistrate because this is a small thing between two neighbours and you can handle it at the local level. They have asked the police for example to support them, they say please bring this person over, or ask this person to come to us, that is happening. Where we think of regulating this practice is the possibility of either in the option of all exclusion jurisdiction to magistrate's court that you can seek for assistance either from the magistrate or from the police authority to bring a party to your case. It's not different from what the formal courts do when the party doesn't want to come before them, but communities have developed their own mechanism to do it basically on a voluntary basis and at the moment, in the last two years, seeking assistance from the State to find their



jurisdiction. Your second question in terms of a small claims court, I might say a small claims court is a good start, it's a good beginning this line, but we have to go further than it. Particularly we're thinking about popular participation in the process of justice of judicial intervention and the practice that is happening today in the country in both more than one person, as the small claim court does, and in both different type of jurisdiction. I think it's a good beginning, but we have to go more than 10 this, we have to give flavour of it with popular practices that have happened in this country.

CHAIRPERSON: Thank you. Mnr Le Roux, is u vraag al ondervang, anders is jy baie welkom om te vra.

MR J LE ROUX: Mr Chairman yes, thank you very much. I was worried about accountability, but Dr Nina has already answered that question, thank you sir.

CHAIRPERSON: Thank you, that's an excellent question. Mrs Ghandi, has your question been done, or do you still want to put it - if so you're very welcome to do so. 20 Priscilla, unfortunately I scratched out your name that was done in error, I apologise and you have the floor.

MRS ?: I accept your apologies, thank you Mr Chairperson. Dr Nina, you have conducted extensive research on existing community court systems in various communities. Can you please give us a brief overview of the general perception of the people in these areas in respect of community courts and more specifically perhaps, can you give us some sort of statistics on what the level of success of community courts are in each of these areas. Secondly, perhaps this 30 question has already been answered partially, what is the level of relationship between the community courts and the 2. police /...



police in the areas that you have researched? Thank you.

PROF D NINA: Thanks, the first question is I could answer it partially, the second question...or completely, the second question is more...partially the first question, the second question is okay. I have done research in basically four of the whole provinces, or three of the whole five provinces in the PWV area in Alexandra, in Natal KwaZulu, in the Eastern and the Western Cape. You find different levels of development if I can use that word in which for 10  
 example in Natal and KwaZulu the level of lack of skill to solve conflict at the community level was quite big. Not that things have remained like that but the level of capacity, human capacity or human resources to handle the problem was not so developed. However, the first initiative of regulating peoples' courts in this country comes from Pietermaritzburg, and it's an experience that happened in 1990 there is a proposal of regulating from peoples' court illegitimate to legitimate peoples' court and the document should be an historical document in a certain way, but it 20  
 exists and was coming from the community of Imbali. In the Eastern Cape you will find the most...the greater level of participation, enthusiasm and militancy, not necessarily the most developed civic structure and this is important to one of the first questions. After the transition from peoples' court into Civic Organisation dealing in conflict resolution, having a strong Civic Organisation, determining that you have an effective mechanism of conflict resolution, because there is a level of accountability, of fair representation through an elected member, and most of the 30  
 civic operates as an authority in the community. What you have in the Eastern Cape is beyond the enthusiasm, the Civic  
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Organisation is not fairly developed throughout the corners of the community and that brings certain problems. I also hear that it's here in the Western Cape, particularly in Guguletu where you find a combination of extremely developed Civic Organisations with extremely developed structures at the grassroots level, which are very efficient in the area of conflict resolution. Something that's also happening in Alexandra that not only do you have all the structure at the local level from the yard and street committee to the area committee to the central civic, very developed, but they also have the resources to have an advice officer in the community, they even brought an NGO to develop another kind of mediation in the community for interpersonal conflict. Therefore, I will suggest that it will depend throughout the country, at least the area of the country I have seen, a combination of a fairly developed Civic Organisation with effectively(?) at the grassroots level, and then that will determine the success in conflict resolution. 10

The success rate is difficult to measure, although all the (break in tape).....in term of rate of success in solving cases, all the communities have a record book, I haven't sit down to follow the book, but Guguletu, Alexandra I was working at a hostel in Natal which was extremely secretive or closed about their conflict resolution mechanism, but they also have a record book. If Fikile comes in the Eastern Cape then the anti-crime have probably the best, elaborate and sophisticated log book of crime coming to them and being solved, and they do have a rate of about 90% of solving crime problems in that community. 20

Your final question is how do they link with the police. It also varies depending on the province, the level of hostility /... 30

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hostility - historical hostility - with the police and the level of the speed in which the police have changed from repressive mode into community policing mode, and also it depends on the level of the attitude of the community to engage with the police. I don't know the experience of Alexandra, but I speak about the experience of Guguletu at the moment, and in a certain way in the Eastern Cape. I think in Alexandra we train on the area of community policing, conflict resolution and there has been a systematic pattern of change in the last 18 months, to a level that the community basically run the community police forum, not vice versa, and what the police use take advantage of the street committee for crime prevention, solving problems that they don't want to handle. 10

CHAIRPERSON: Mrs Gandhi, your question please?

MRS E GHANDI: I'm starting but .....I'm not saying that I don't want to ask, I know that we are in a hurry to finish off, but I've got a question....

CHAIRPERSON: Please take your time, take your time. 20

MRS E GHANDI: Thank you. The first question relates to women, I know that you said that in Mozambique you know the experience was that it helped women to be more empowered, but what I've heard for instance in India where they had a system called the Panchayat(?) system, and although India was liberated in 1947 and it was only last year, after a long struggle that women managed to get dispensation whereby they now have three women included in that Panchayat(?) system It is only now, after so many years of struggle, that they are getting some justice. I'm just concerned that whilst we want to recognise this kind of community court, how will it impact on women. Are women for instance represented on any 30



of those structures that you have studied and so on? That's the one question, and the second question is that we have a peculiar situation here, we are called the "rainbow nation", and we have many different traditions, cultures and so on. What generally in this kind of traditional or customary court, what generally happens is that you emphasise the differences amongst the different cultures, and it sort of has the effect of being continuing the sort of tribalism or whatever one would call it. It perpetuates that rather than bringing the nation together and building a unique South African nation. I would just like to know if there is a possibility of having these kinds of courts which are more generalised rather than based on tribal customs or racial or whatever one would call it. What I'm saying is bringing all of them together into one, like for instance if a person is living in an area where all communities are living together again, would there be a court that would apply to everybody, community court? Thank you.

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PROF D NINA: To answer the first question. I think what was important in Mozambique, is that the Presiding Officer and the members of the popular tribunal were specifically trained about equality and about particular empowering the poorest sector of society, in this case women. There is a whole series of literature on the Mozambiquean experience, case by case, that 10 years after the process was initiated there were positive effects about a new understanding that women were equal partners in society with equal responsibilities and equal benefit and that they should not be treated in a lesser way.

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I know in the case of India, and I know what you're

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talking or you're mentioning about. I think the formula here in relation to Mr Dalling, (if I pronounce it correctly), line of question some time ago is that we have to operate within a clear framework of rights, duties and obligations, based on a principle of equality and fairness and if that is being given as a standard way, following the Bill of Rights of the Constitution, and people have systematic training in that, there should be no problems, it's a matter of monitoring right? I don't know about the experience of Zimbabwe in this case, but I know in Cuba also there was positive effect on that. You can empower at the grassroots level certain areas of the privileged people, you also extend the understanding that the State is legitimate, but you can manage to accomplish that. It requires that you are aiming towards that direction. In relation to South Africa, it also varies from community to community. In KwaZulu/Natal there was no way to have a woman sitting in those panels, I'm afraid to say. In the Johannesburg area and in Alexandra when I worked there in the panel of my comrades here, there were not women in both, but in other areas of Alexander women were very involved, and in fact they even were trained furthermore in the area of conflict resolution, they had an active role. In the Eastern Cape, there again I had a workshop on this in the Eastern Cape for a long time you know, will continue a workshop here...if you bring women, they gave all types of explanation why women were not involved, the job of conflict resolution and order was a man's job, the area of stokvel, funeral club, whatever that was the women's job. In Guguletu, which is the community I have been working, African community in this region, women have a very active role, not as talking in a position /...



position of power within the civic and position of active participation in the proceedings, and in that sense for me Guguletu is the most healthy of these type of structures that I have seen.

I have never advocated this idea for the township, my work on this has been very clear, this has to be a uniform model to apply throughout all areas of South African society. What I have been saying is that outside there there has been an experience that emerged out of the struggle, out of the African tradition of the history of the labour movement, you name it what is the recent...but that tradition has a value and we can take advantage of it now, and we can in the same way organise community courts for the townships in Botshabelo in the Orange Free State, but also for where I live in Rosebank or Rondebosch. They could have a very useful role in this period, particularly because definitely black people will carry on living in townships, but not necessarily in the traditional white areas, the demographics will remain the same. Therefore we can take advantage of practices that people know of a culture that they develop, and accommodate them. If they are firmly regulated, if they legitimate for everyone, people understand that it is a very limited jurisdiction and you can take advantage of it, people will learn to use it in the same way they learned to use the small claims court. What we're saying is the format of this structure should be different.

MR F KOBESE:(?) Just to add one point, the practical experience on the ground is that mostly our womenfolk participate in the lower broader structures, so they do let us be embarrassed (indistinct), but that is of course a process /...



process which will improve, it's in the direction of improving. Also what has come out is in the duration of handling those reported cases or situations, education on human rights has taken place quite extensively, because you capitalise on what is at hand, and you reach people you wouldn't reach otherwise. Gender issues have come up, the imbalance is enslavement or imprisonment into the old traditions etc. Youth issues and child abuse issues, issues you wouldn't be able to convey to those people in other situations or in meetings, mass rallies and so on, becoming issues that are intensively discussed and that advantage actually shows some development in understanding those issues. 10

CHAIRPERSON: Two more questions and then tea. Professor Paul Benjamin?

PROF P BENJAMIN: I'll be brief. When we're looking at the outcomes of cases in community and popular courts, to what extent are they mediated outcomes in that the Presiding Officer may induce the settlement between the parties and to what extent are they arbitrated in the sense that even though they maybe legitimate decisions, they're actually a third party decision? 20

PROF D NINA: I think it's a fairly more complex process than thinking in terms of a straight mediation or a straight arbitration. To start with, you don't have the idea of a third party, you have the idea of a third collective, there are a group of people discussing. My experience in different communities is that the truth, the outcome, no one cares about who did it, people just care about let's reconcile, it's a kind of group therapy in a certain way sometimes. The outcome, the elaboration and the creation 30



of a collective truth is a process of engaging among the different people participating those sitting at the panel of conflict resolution and the street committee member of the community in charge, and the people participating in the process. It takes a while, I will say in some communities yes, I saw this in Natal that they would force a decision, type of more judging or arbitration orientated in that regard, but in other communities, Alexandra and Guguletu it's more a process of evolving, everyone giving differing 10 opinions. The role of the Chairperson, and this is important, the role of the Chairperson is to facilitate the discussion to summarise, and in many cases it's to give a leading point, we have reached that (indistinct) for the parties, where should we go after that? But probably Martin could add on that one.

MR M MONYELA: Yes, what has been happening in one's structures is that in some cases, people in that locality will actually elect a Chairperson to facilitate the proceedings, to control the meeting. What is happening is 20 that even the accused party is given the opportunity to actually tell us as to how he sees the matter being resolved. In most cases, people have been saying I agree, I've done wrong to these people, and I'll do A, B, C and D, themselves suggesting to the meeting what...and in some cases people say that is not enough, can you take it further. That has been a process of discussing with all the parties amicably.

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MS ?: Perhaps this question has already been answered partially, what is the level of relations....

MR MONYELA: People who say that is not enough you know, can you take it further you know, that has been a process of discussing with all the parties amicable solution to the problem, where at the end of the day everyone will go set his (indistinct). So there were some cases where of course we'll say because this person suffered monetary loss because of the physical assault that you done on him, you will have to pay the medical expenses and then you'll have to go to this structure every month and give money for medical expenses. In this case there are minor cases where we have been saying this is the position, whether you like it or not you know, but in most cases our decisions have been reached through consensus of both parties. In some cases, the party will say give us a chance to go outside and see if the two of us cannot come to an agreement and we'll come back and inform the structure about what we've...so they'll go and say no we've agreed on this and this, does it satisfy you, and if both parties are satisfied that will be recorded as the decision of that proceedings. 10 20

CHAIRMAN: Second last question Mr Abraham Umzizi.

MR UMZIZI: Thank you Mr Chairman. Mr Chairman probably the question will go to both Mr Monyala and Mr Nina. Experience has always been the best teacher, I think these community courts must be coming up from the street committees. Now as I say, experience is the best teacher. In the past, the comrades used to fetch the so-called accused and the person would be threatened by necklacing, by many things before getting into court, actual court. The person or the accused or the suspect that may be, would be told /... 30 3.



told that if you don't tow the line, then the sentence is this. So the person was not given a chance to present his or her case. Invariably in most cases too, if a person would say I would like to have a legal representative, the person who will be barred(?) inside we don't want attorneys, we will deal with our cases so the person has to tow the line. Also we have found that some of the acts committed are not in the statutory law, such as probably witchcraft and the death penalty is not hesitated there, and when it's been given, you are not given a chance even to go an pray. 10

It's an instant killing there and then. How is your comment there?

CHAIRMAN: Dr Nina, may I just say Mr Umzizi has had very large experience in the Tokoza area, he's probably experienced, much more than I am in this.

PROF NINA: We can talk about bad experience a lot, until tomorrow morning right, so I just want to talk about positive experience that distinguishes themselves from those things we are speaking about, talking about. There has been serious engagement by various communities and that is my comrades here on which people have made a departure of that type of practice. In Alexandra in the 80's that happened as well what you are talking about, in the 1990's something else is happening and it's to that that we should aim, not to the bad experience. Witchcraft, we in Tokoza or in Tembisa I think at the moment there has been a whole case of witchcraft. Depending where you are, it's been (indistinct), I don't want to say that things are crystal clear here. In Natal when I was engaged there in 1992, everyone went to jail because they lashed 250 times this woman because she was claimed to be a witchcraft. I will 20 30



tell you a story that happened last year in Langa. Langa is very funny because in the old police building today, every Thursday evening or Tuesday evenings seats a People's Court or a street committee court right, community court and that's next to the police station and that happened very open, everyone knows this is happening. They were handling a case of witchcraft in which they brought in the two parties in conflict, the community was there but they also brought the police, because there was a formal complaint. 10

They started to address the matter and with the assistance of the police, they found out that it could be witchcraft, but it is also an interpersonal problem between two neighbours and then they referred the matter to an outside agency to solve it and it ended up there. But I want to address you that it depends also on where you are, what is happening with particular witchcraft, which is a serious matter in many communities, but it also depends on what type of external assistance is being provided. In the case of Langa, the assistance of the police was very useful to 20

diffuse something that was on the surface a witchcraft matter but underneath it was an interpersonal conflict.

MR MONYELA: I mean our experience in Alex is that you know there were serious mistakes that has been committed, we agree. Responsible leadership has been arrested by the previous government, radical leaders took over and controlled the whole proceedings. They were not accountable to any structure whatsoever, you know they were acting on their own. Here we are talking about the community, the structures that have been set up by the 30

community to actually address their grievances and problems.

Where we have elderly people, where we've got youth, women,



old and young, and where people are actually elected by all the people in a particular area, to actually deal with conflict in that area. At the end of the day, they are accountable to their area committee because whatever things that they've done, they have to refer back to the community. So I think we have to distinguish between what happened in the past and what is the new initiative that is taking place at the moment.

CHAIRMAN: Ladies and gentlemen, we are getting close 10  
to..we have been busy almost for two hours. Are you finished?

MR MONYELA: Mr Chairman, thanks for the privilege. A  
small addition would be that at this point in time, the  
experience of the past has led us to a situation where we  
have struggled by all means to have these structures working  
on a regulated approach. There is regulating document that  
has been worked out over a period of about six months for  
instance in the Eastern Cape. There is a code of conduct  
there which you must adhere to, and in many instances, one 20  
would hope you would opt not(?) to be part of the  
structures, because a lot is expected of you in terms of  
conduct, discipline and behaviour. There is a uniform  
structure that, there is a document that regulates and  
exposes the uniform structure that is pinned down to  
accountability. The point of departure is that the various  
representatives must be elected by people who know him or  
her, from birth if possible. What is the criminal record,  
what is the behaviour, what is the background, what is the  
education, what ability, what reputation etcetera, you are 30  
therefore elected only in your immediate area of residence,  
not in a mass meeting in a hall or a (indistinct) etc.



This is to actually ensure that the experience of the past makes us stronger for the future.

CHAIRMAN: Mr Umzizi, do you want to follow with a short one?

MR UMZIZI: Yes Mr Chairman. In the case where the accused requires the services of an attorney, is that right also being exercised, or is it still as it was in the past?

MR MONYELA(?): It's just like the Small Claims Court, parties are not required to legal representation and the whole operation has been successful. I mean this is not really serious cases where a person will require...minor community issues, petty issues, petty crimes, neighbourhood disputes, disputes over facilities, things that will not necessarily require the services of an attorney like murder, rape and things like that. 10

PROF NINA: If I may just clarify here what has been the training in the last four years, since that conference in Durban of the ANC 1990, is that the civic movement took a clear line of not handling serious matters. For example, the matter of rape and murder to be delegated to the police, this came as a policy of the ANC in a conference in Natal in 1990, and also held by (indistinct), two conferences that happened where they started to regulate this initiative. At least the community this has been working and has been respected all around. 20

CHAIRMAN: Thank you, last question and I hope I can be rude to you Mr Singh because you're of my party, make it short.

MR SINGH: Thank you Mr Chairman, I will make it as short as possible. Mr Chairman, I would like to endorse the sentiments expressed by my colleagues here with regards to 30



the approval of the ideas expressed by our team. The only thing is, I don't think I will go to say that it would be an undeserved approval. I have a few points that perturb me a little bit. Firstly, we have the question of jurisdiction now, I don't think we have arrived at any finality in this regard. Would you not agree that it would be imperative for a court of this nature to restrict itself, surely you know, to the very simplest of crimes because now what can happen now is, otherwise we'll start off with common theft and then you go to assault and then GBH and then you know they will be trying armed robbery and murder. Where do we draw the parameters, where does this stop. This is not entirely unimaginable because look, we have heard of these courts trying people for offences like witchcraft and where the maximum and ultimate penalty has been imposed, so now how do we determine the parameters and areas of jurisdiction of such a court. That is the first one, I'd like your comments in that regard. Secondly, considering that these courts will be working within the constraints of a very limited budget, how do you expect to enforce the decisions of the Presiding Officer and what powers are there to protect the complainant. What if the accused says that I refuse to comply with the verdict and/or sentence of the Presiding Officer, where do we go from there because you must remember it's not a very easy matter because you've got a whole crowd of people out there and they might decide to impose their own penalties. Then as far as the training of officers is concerned, from my knowledge I find that the training with regard to presiding officers, is a very long and complicated affair. How do we determine this and how do we implement this and how long would /...

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would it take such presiding officers to qualify in this regard?

CHAIRMAN: Mr Singh, you are taking very long.

MR SINGH: Yes sir, there are just one or two points here please. Then now, as far as penalties are concerned sir, you know how do we determine that the presiding officer will not impose a penalty that is over-commensurate with the nature of the crime that has been committed. This is an important factor because then it violates the basic principles of South African law in terms of which the accused is supposed to be innocent until proven guilty. So it would be legal sacrilege if you like. The other thing is a legal rights of the accused..I'm almost finished...what precaution is there to protect the legal rights of the accused because it's been mentioned that generally it is not acceptable for the accused in such forums to utilise the services of an attorney. Here again we'd be violating the legal rights of the accused. 10

CHAIRMAN: That's the end of it. 20

MR SINGH: Alright, that's the end of it.

PROF NINA: The parameters of the jurisdiction are easy to define. You can deal with family matters, not divorce or that kind but inter-family disputes, let's define it like that, some issues of domestic violence can be handled at that level as well. It would be very limited, probably where there is no physical harm, probably verbal(?) abuse or financial abuse, economic abuse. Also matters of inter-neighbour disputes and there are plenty of them, particularly in poor communities and also in middle class environment. Small criminal matters, such as - you will have to put a valid limitation - items no more than R300 30



could be seen in this type of court, very limited. In terms of the Small Claims Court also you can put a...contractual claims, you can also put a very limited value jurisdiction, R1 000, R800. This is basically they did in other countries, they limited the things in terms of value when there was crime or the matter involved, and in contractual matters, very limited jurisdiction. The same applies to family matters or domestic violence. In terms of enforcement of the Presiding Officer's decision, you can play with different possibilities. It should be important is that the enforcement of the decision should emanate out of the authority of the Community Court, because it should be respected as part of the environment where the people live. It does happen in many communities and I will mention Guguletu, where people believe in what is happening there, they will stick to the agreement. If it's not, you can use different type of mechanisms, like going to the Magistrate's Court for an order to force a party who has to do something to comply with the order of the Presiding Officer of the Community Court or refer it to the magistrate, or you can ask for assistance from the local police station if the physical right of the person is not involved. Penalties I will limit to the (indistinct). Community work is something that happens very ordinary in South Africa today, go and clean the local church, but what happens more often, and I have seen it on many occasions, is that for an injury you have to pay the cost of the injury and a small compensation. We are dealing with poor people, an amount of R50 is a big compensation, people accept that type of term. We were also talking about small fines to be imposed, community work, small fine, compensation to the victim /...



victim. That should be ample public apology, you don't know the effect that a public apology has in many cases, when you apologise to a party for something. Legal right of the accused, in the manner of rethinking the term "legal rights" of the accused in terms of legal representation and all the aspects of due process, we are dealing with a very limited jurisdiction, it might not be necessary at that level. The legal right or whether the type of right of the accused are going to be infringed we might have to allow 10 legal representation, but also it won't be part of the jurisdiction of this court, it should go to the Magistrate's Court where he or she is entitled to such rights.

CHAIRMAN: Thank you.

MR ?: In addition to that, the decisions of the Community Court can be subject to the review of the magistrate and also we foresee these courts being able to argue either in favour or against bail applications. We have the problem where criminal elements are given bail and they go back and commit crime. People who know one another in the 20 communities will be able to say no, this person is not entitled to bail because if he gets out this is the history of the person, this is the background of the person, we don't feel that person is entitled to go out because it's not safe for the citizens. Those kind of things we see as being the role of the Community Court, and also in case of serious crimes, where there has been murder and rape, the ultimate is that there is conflict between the families of the victims and the accused, there are revenge killings that are taking place. The role of that Community Court is to 30 make sure that those families are reconciled, even if the matter is taken to the Magistrate's Court, but there will



still be a wound that has not healed. It will be the role of the Community Court to make sure that those families reconcile.

CHAIRMAN: Colleagues, we have come to the end of this session, except I believe the gentleman has a video that they would like to show which could take up to half an hour. We have already been occupied for almost two hours, I'd like to have your thoughts on this. We still have to hold a core committee meeting, I can see Mr De Lange is extremely 10  
anxious to see the video, it is coloured white Mr De Lange. One possibility is if we - because I can see many of our colleagues are not here now, is to take the video and let the core committee deal with it to arrange for an appropriate time to show it, when all colleagues are here and all are awake. What is your feeling, can we do it that way? Yes, then I call on our colleague Mr Ibrahim to say a few words.

MR IBRAHIM: I thank you Mr Chairman. On behalf of the Theme Committee 5, we would like to take this opportunity to 20  
most sincerely the three colleagues that we have here, Mr Kovoso(?), Mr Monyela and Dr Nina for I think a very informative presentation of the issues that concern all of us. As you can see, the Committee is represented by quite a number of lawyers and it was not surprising to see in your chart that only 45% of the people felt that lawyers can solve problems. With regard to that, what we would like to state here is that all of you represent in one form or another, community interest, either academically or as activists. Throughout your statements, you have brought 30  
about the question of the issue of legitimacy in our country, particularly with regard to justice. I think the  
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theme that came out was that there is a need to bridge the difference between what people perceive and what is the reality. I think in that respect you have a very important role to play, and I think you have also guided us as to what we could do in that regard to bridge the gap. It's not always the case that when you don't report a matter to the police that it is a question of illegitimacy. For instance I parked my car at the airport, and I came back and I found all my four wheel caps gone, I didn't report it to the police, not because of the illegitimacy of the police force, but I don't think they are capable of bringing my wheel caps back. So there is also that element that one has to take into consideration when we look at the whole process. I think we have learned a lot, and I think all the speakers themselves, in their own time when they questioned you, said that they have been quite impressed with what you have said and we want to thank you and we hope that the research that you have done, the document that you have shown us the figures, that you would make that available to us. That would be very useful, I thank you.

CHAIRMAN: Thank you, we invite all for tea and coffee now. The core group within about five minutes here. Thank you colleagues, we adjourn.

COMMITTEE ADJOURNS