MCH91-31-2-16 5th September, 1986

To: Department of Legal and Constitutional Affairs
From: PMC Secretariat

Dear Comrades,

As you are most certainly aware, the state of ungovernability is deepening with each passing day in most areas of the country. In a number of localities, the people have formed organs of people's power, one important instrument of which are the people's courts.

The movement is faced with the urgent task of giving guidence to these organs and help develop them to play the revolutionary role expected of them. In this regard we have prepared the document enclosed herewith entitled, "Ungovernability and People's Power". It is still under discussion. Section 5.8 in this document discusses the question of People's Courts, but leaves a number of questions unanswered.

We hereby solicit the assistance of your department to draft basic guidelines for the People's Courts. These would cover such issues as their political content, structure, investigation, defence and appeal, forms of punishment, and how to prevent abuses. The guidelines - which would be attached to the document referred to above - should be brief and simple, and merge popular experience with professional guidence.

At a later stage, and in consultation with legal functionaries inside the country, we shall have to work out detailed documents on this question. At the same time, the DLCA should find ways of involving democratic legal functionaries inside the country in such popular historical initiatives.

Find also enclosed herewith the ff. documents for reference:

+ Alternative Structures
+ Weekly Mail cutting (15/5/'86)
+ Paper by AvH on "people's power" (We do not agree with many of the views expressed in this document but it is worth reading.)

Other relevant information can be found in journals such as Work In Progress, and the ANC Newsbriefing and newspapers.

Thanking you in anticipation.

In the Year of MK!

for PMC Secretariat.

ON THE PEOPLES COURTS AND PEOPLES JUSTICE: SOME DISCUSSION NOTES 30.7.86

The growing movement for the creation of peoples courts in our country has produced a need for systematic and careful appraisal. The experience is so new and at the same time so rich and varied, that it would be inappropraite to attempt to lay down any hard and fast rules. What is required is a synthesis and evaluation of experience already gained in the light of the principles of our struggle. These notes are offered as a starting point for such a process. They should be read and critically analysed. Appropriate comments should be made in relation to each section. Further observation should be made about matters omitted or not adequately dealt with. Wherever possible, concrete situations that have occurred should be referred to. In this way a fuller and more authoritative document can be prepared in the future.

1. The Functions of the Peoples Courts

a. to solve concrete problems affecting the life of the people

b. to reduce dependence on the regime's institutions

c. to give the people confidence in their own structures and their capacity to exercise power and govern themselves

d. to gain experience for the future transformation and renovation of the country's legal system

2. The traditions lying behind the peoples courts

A. The ancient popular tradition (so called customary law)

Community justice in traditional society had many strong and positive features which form a continuing aspect of contemporary popular culture and which need to be drawn on now and in the future. In traditional society, justice was characterised by the following:

(i) there was extensive community participation in the resolution of disputes

(ii) the law was basically known to the whole community

(iii) issues were looked at in their global context andnot in terms of of narrow legal definitions

(iv) procedures were generally informal and flexible, aimed at securing the truth and arriving at a verdict considered just by the community

(v) the issue was always seen as not merely affecting the parties to

the dispute but the peace and tranquility of the whole community, hence considerable emphasis on the importance of restoring social harmony and good neighbourliness.

At the same time, there were features which do not correspond to the culture and needs of the current period:

a) Domination exercised by certain privileged families over others; domination of men over women; domination of the old over the young. These are cultural questions that need to be handled with sensitivity, taking into account local opinion, but in general the new courts must, without unnecessary discourtesy, respect the principle of equality of all persons, and encourage the formation of the future free and equal citizens of a democratic society.

b) A tendency to identify legal rights and duties with the clan and the ethnic group, which, if followed today, would keep the people divided and hinder the acquisition of a national and democratic consciousness. Thus the courts both in their composition and in the norms they apply, should rise above the limited vision of ethnicity. Many customs and practices can and should continue as aspects of daily life, for example, those associated with marriages and funerals. They form part of the culture and personality of the people but do not constitute the basis of legal rights which are essentially the same for all, independently of ethnic origin or language groups. At the same time, the principle of uniformity should not be forced, but applies with sensitivity to local feeling and custom. For example, the whole question of lobolo and associated matters needs to be carefully studied and not dealt with simply at the level of slogans ("it is ours, so we must preserve it" or "it is feudal so we must reject it")

c) Whereas in general, procedures were highly rational and based on the effectiveness of cross examination and logical inference, in certain cases highly irrational and non scientific procedures were used, involving ordeals and imputation of sorcery. While traditional healers and spirit mediums are part of the nation and have their contribution to make like any other patriots, there is no place in the peoples courts for such activities as the alleged smoking out and punishment of witches and sorcerers.

d) The mode of life of the people has changed extensively, so that, for example, principles and rules that corresponded to an agrarian society based on scattered household production are frequently inappropriate for an industrial society with extensive division of labour, vast residential suburbs and small nuclear families. At the ideological level, there have also been substantial trans formations brought about by the traditions of political struggle, the impact of the Church, of schools and of the media. More specifically, long contact with the official courts and recourse to lawyers has produced new ideas about the rights of the people, especially in relation to questions of procedure and the right to defence.

d) Finally, the traditional law has been greatly abused by authoritarian administrators and corrupt chiefs, so that in many areas it has lost its character as being the law of the people and instead been converted into an instrument of domination and personal power.

To sum up:

Traditional systems of justice constitute a rich store of experience to be drawn on, especially in relation to their emphasis on community involvement, patient quest for the truth, non technical and non professional approach, viewing questions in the round and attempting to find creative and positive solutions which contribute towards social harmony and general respect for justice in the community. At the same time, and making some allowance for different local conditions, the new courts should be democratic and non ethnic in their composition and should include representatives of all social strata and age groups, and of women as well as men. The norms they apply should be the norms of the new society that is emerging, rather than the norms of traditional society, although where possible, violent ruptures with the past should be avoided. In this way, the best of the historic traditions of the people is re invigorated and incorporated into the present, while those aspects that hold back the struggle and the advancement of the new society are left by the wayside.

B. Universal traditions of justice (so called modern law)

So called modern law is the product of centuries of struggle by diverse peoples in all parts of the world. it is not the property of any continent or any people, let alone any race.In its best form, it consitutes part

of the univeral culture, the patrimony of all humanity, available to all. Our people have a right to free and equal access to the internationally accepted general principles of law and justice just as they have to the universal principles of medical care and education. The problem in South Africa is that despite its protestations to the contrary, the offical and so called modern legal system has always been an instrument of domination and repression. Its potentially democratic and protective aspects have always been subordinated or else by passed in pursuit of the systematic maintaiance of racial domination and super exploitation. The function of the new courts is precisely to rescue the modern legal system from the oppressors who have proved their inability to operate it in a fair manner. Certain principles which the regimes courts have never respected need to be guaranteed to our people for the first time.

Thus the peoples of the world have struggled long and hard to eliminate torture and physical abuse from trial proceedings; to be tried by their equals; to guarantee to accused persons a right to know the nature of the charge against them and the right to make a defence; to ensure that decisions are based on objectively verified evidence and not on prejudices or arbitrary opinions; and, in appropriate cases, to ensure some external check in the form of appeal or review, so as to reduce the ~~ch~~ danger of abuse or error.

The reality of the regime's system of justice constitutes a denial of all these principles. Our people are constantly abused by soldiers, police and prison officers; the majority, who have no money, have no chance of hiring the legal skills necessary to make a proper defence; the laws and procedures are usually so technical and complicated as to be beyond the comprehension of non lawyers (and even of many lawyers); decisions are based on prejudices and racial stereotypes even where the laws themselves are not overtly racist; and appeals are costly and in any event subject to the same expense and incomprehensibility as the original trials. As Nelson Mandela declared in his 1962 speech from the dock: I feel I am a black man in a white man's court, and that no common standards of justice exist between me and those who sit in judgment over me.

The problem therefore goes much deeper than simply repealing the overtly racist laws and having a few black faces on the bench. What has to be changed is the whole character and style of justice in our country, transforming it from being an instrument of violence, humiliation and exploitation

into one that defends the rights of the people, is accessible to them and responds to their needs. Proceedings in the new courts should be in a language the people understand. While the courts should function with a certain solemnity and dignity consistent with their important social role, they should at all times maintain an 'open' and intimate character, in which people feel they are really being judged by their equals and not by some strange and elitist caste. Access to the courts should not be regulated by wealth or status but depend on need. The courts in their composition should reflect the diversity of the community at large. Their procedures should not be unduly technical. And, of course, the law itself should favour the interests of the people at large and not those of certain select racial or class minorities (nor that of one sex over the other).

C. The tradition of the struggle for freedom and justice.

A third tradition on which we proudly draw is the tradition of resolute respect for human dignity and morality which has always characterised our struggle. We do not take our morality from the enemy, from the Swaneopoel's and the Rambos, nor our sense of justice. We build our own principles of humanity and revolutionary morality in the course of the struggle. It is a morality of liberation, of transformation, of belief in the capacities of all human beings. While resolutely and implacably defending the gains of the people, our courts constantly nurture sentiments of justice and fairness amongst the people. Let the enemy and not the people, be afraid of the courts; the people must feel that the courts are there to protect their interests and their freedoms. The ordinary person in the street should feel that the courts are his or hers, and not feel intimidated by them, nor that he or she has to show blind obedience. Our struggle has thrown up many great lawyers who have shown the way, persons of unswerving revolutionary commitment, who have been marked by an intense respect for their fellow human beings: Oliver Tambo, Nelson Mandela, the late Bram Fischer ..... Their approach has always been to consider questions carefully, take into account all opinions, avoid personalising issues, ever try to find the solution that is most rewarding, that consolidates unity and leaves everyone concerned with a sense that the right decision has been arrived at. Their objective has always been that of re education, not vengeance. Even in the heat of battle, they have never lost their dignity, their sense of pride in what they stand for. Let others go in for swagger and crowd pleasing, for demagogic and simplistic solutions. Our leaders, lawyers and non lawyers alike, have always preferred to seek principled positions, clear demarcation from the enemy, and unity, unity and more unity among the people.

Conclusion:

These three traditions, namely, the traditions of customary community justice, of universally recognised principles of law and procedure, and of revolutionary humanism within the ranks of the struggle, are not three separate ingredients that have to be artificially welded together. They come together naturally in the day to day activities of the courts, as concrete problems are solved in a concrete way. Different persons connected with the courts will have had different contact with the various traditions. What is important is that each contributes in a natural way the experience that he or she has had, blending the different experiences into a new whole, the new people's justice in South Africa.

3. The Constitution of the Courts

Local conditions vary so much at this time of upheaval and repression that it would be dangerous to lay down firm rules about how the courts should be constituted. But on the basis of certain experience already gained, it is possible to indicate a few broad guiding principles.

The courts should be collective bodies having at least three members at any sitting. This helps ensure representativity and also reduces the danger of favouritism or individual prejudices that may arise when only one person sits as judge. It also requires a non corrupt life style so that the judge enjoys the respect of the community.

Normally, the greater the personal integrity, the greater the respect by the community. But there are other qualities that enter, questions of temperament, aptitude, and experience of life, though these are relatively secondary (and the ability to make learned quotations from legal written or political philosophers should not even rate as a tertiary quality. Trained lawyers or law students have their role to play, but they have to learn to speak in a language that is accessible to the people). Authority should not be based on fear but on respect. Where possible, mechanisms should be created for involving the community in the process of selecting judges. This can be done by elections or by consultation. If elections are held, they should be done in a dignified way, without canvassing or 'running for office'. The people can be given a chance to select from a list of persons with proven qualities, or else be given the chance to reject from a proposed court anyone they regard as corrupt or incompetent. The people should be advised that they are the final selectors of the judges, and that they should choose people because of their qualitites of integrity, good sense and commitment to the welfare of the people. Aprropriate forms of celebrating the constitution of a new court and signifying its meaning for the community and the struggle, should be found. (In certain circumstances enemy repression will be such that the courts

cannot function openly. Naturally, in such cases the identity of the judges might have to be protected. But wherever possible, justice should be open and not secret, and the judges should be known and not be ananymous).

The third criterion refers to the balance of the court rather than to the qualities and prestige of each member. Attempts should be made to ensure the maximum representativity possible of the various strata and groups in the community, achieving a balance between young and old, male and female, as well as of the different social and linguistic groupings. At the same time, the persons chosen do not represent any particular group in the sense of being there to defend sectional interests. All the judges, whatever their age, occupation, sex or language group, defend the interests of the people as a whole. What has to be guarded is sensitivity to the special concerns of specific groups, without losing sight of the larger general interest. The question is not one of balancing out in a simple arithmetical way all the different groups in the community, but of ensuring that the full range of talent and experience of all sections is tapped. The courts can in fact become major instruments for developing sentiments of unity in the community.

4. 'Independence' of the judges

The successful operation of the courts depends in large measure on a clear definition of their functions and of how they relate to other community and political structures. The apartheid courts claim to be independent, but never really have been. The judges are drawn from the dominant community and such internal divisions as exist among them reflect the different trends within that community, rather than the demands for justice of the people at large. The fact that certain individual judges have broken away from defending the immediate interests of their race and class, does not mean that the judiciary as a whole has ever challenged the apartheid system that brought it into being. In the same way the community courts will defend the interests of the community which has brought them into being and will be far from neutral in cases involving conflict between the interests of the people and the interests of the apartheid state. Similarly, the ancient peoples' tradition of judges being actively involved in the life of the community, is a positive tradition to be actively encouraged. We do not want judges who stand aloof from the problems of the people.

We do not want a caste of superior beings standing over and above the community (whether because of wealth, education, feudal position, or command of firepower). In this sense, the judges should never be 'independent' of the people, or outside of the peoples longing for freedom and justice. Moreover, in their day to day functioning, the courts should liase naturally and easily with all community organisations, social, political and religious. These are all important resources which can contribute to the arriving at of just results and the correct implementation of decisions of the court.

At the same time, the courts should be independent in one sphere, and that is in relation to their decision making. The judges are chosen on the basis of their ability to arrive at just results. They must truly exercise their minds and achieve a genuine collective wisdom, taking into account all the relevant factors. The people do not want show trials with pre determined results. They do not want judges who take orders from any one, not even from the most highly respected leaders. There are many situations in which such leaders will take and act on decisions directly, especially where direct confrontation with the repressive apparatus of the enemy is involved. These are political or political military decisions. The courts are not involved, nor would it be correct for them to be involved. But in cases properly within the judicial sphere, it is the courts and not the political structures that take decisions. In appropriate cases, and generally in favour of greater leniency rather than more rigour, the political structures can suspend or modify the execution of sentences, taking into account wider factors than were present to the court. (This would be analogous to executive clemency, which most state systems recognise). In general, however, the political structures and the judicial structures should seek to act in harmony with each other, and with the objective of achieving the same goals, rather than in an atmosphere of mutual suspicion and conflict. Their power is derived from the same source, namely from the community. What is seperate is their functions. The political leaders have the fundamental task of giving broad leadership to the struggle. They should not become bogged down in the multiple and endless details of concrete disputes. The hearing of evidence alone can take hours, days weeks. And the cases never end. The more successful the courts are, the more cases they accumulate. It is necessary to have a specialised agency, rooted in the community, to deal with these cases.

The political leadership should encourage the selection of good judges, ensure that the procedures are fair, just and efficient, and then leave the task of judging to the courts. If the judges are corrupt or incompetent, if they lose the respect of the people, the people should have the right to replace them. But the decisions of the courts should stand, unless overruled in terms of established procedures. Also, there is nothing wrong in analysing in a political way, the general trend of decisions, if the results are too severe, or too lenient, or the measures adopted inappropriate. What should be defended is the integrity and relative autonomy of the courts in deciding concrete cases. Furthermore, decisions should be arrived at relatively rapidly, without interminable delays and appeals to other bodies.

5. The Functioning of the Courts

basically, the courts function in two phases: the phase of preparation, and the phase of hearing.

The phase of preparation relates to the period when matters are referred to the courts, sorted out, when the issues to be determined are defined and the list of witnesses prepared. Proper preparation is fundamental to a proper trial. It is especially important that the releveant witnesses be contacted and arrangements be made for them to be present. It is useful for the court to have an adminstrative clerk to attend to these matters, under the control of at least one of the judges (usually the President of the Court).

The trial phase refers to the period when the evidence is led and the court makes its decision on the case. It is here that certain basic procedures have to be followed to ensure that the essential facts and arguments are properly put before the court. At the present stage, with an immense variety of circumstances in different parts of the country, it would be inappropriate to lay down rigid rules about procedure. In all cases, however, it must be remembered that the courts are embryonic, that they do not have the full staff and apparatus of a formal state court. It would be incorrect at this stage (and to some extent, even in the future) to attempt to copy all the formalism of a state court, with voluminous documents, full records of the proceedings, complicated rules of evidence and an atmosphere of great formalism and technicality. Our measure of the effectiveness of the courts is not how close they are in formal terms to copying an apartheid court, but how well they succeed in discovering the truth in a dignified way and finding appropriate solutions to the

questions in issue.

Basic justice requires a fair hearing and a balanced response to the established facts. A fair hearing means that the persons involved in the case (in a criminal matter, "the accused", in a civil matter, "the parties") know what the issues are that are being tried and are permitted to make an effective defence of their interests; that the case is decided in an atmosphere of dignity, without undue pressure or emotion; and that the decision is based on clearly proved facts (which can include matters generally known to all the community).

A balanced response means one that is arrived at collectively, that takes into account all relevant factors, that is proportional to the situation (not exaggerated one way or the other) that corresponds to notions of justice in the community and that achieves the overall purpose of defending the rights of the people and re inforcing unity.

6. The role of the judges and of the People

Two najor kinds of criminal trial procedure can be found in the majority of countries in the world: the so called inquisitorial system and the so called accusatorial system. The inquisitorial system (sometimes referred to as the Continental or civil law system) gives the judges the principal role in the calling of winesses, the testing of evidence and the discovery of truth.

The lawyers for the prosecution or the defence have a secondary or subsidiary role. The accusatorial stystem, on the other hand (sometimes called the Anglo Saxon or common law or gladiatorial system), gives the principal role in t conduct of the proceedings to the prosecution and defence lawyers. The judge sits back as a sort of umpire controlling the proceedings, seeing to it that the rules of the game are followed and intervining to clear up doubtful points rather than to direct the presentation of evidence. In the accusatorial system, the judges also have nothing to do with the preparation of the case, something left entirely to the prosecution acting with the police, while in the inquisitorial system it is a judge (usually not the trial judge) who supervises the investigation.

The apartheid courts have under the influence of British colonial rule, generally been modelled on the accusatorial system, though in recent years, and with a view to strengthening the position of the prosectuion, elements of the inquisitorial system have been introduced.

Whatever, the system that might be adopted in a future liberated South Africa, the choice at present in the community courts should not be based

on what theoretically could be considered "the better model" but on the concrete needs and possibilities of the present stage. The basic facts are that instead of having trials dominated by the state apparatus and the legal profession, we have trials dominated by the community, drawing on popular traditions of extensive community involvement and re inforced by the democratic ethos of the struggle. The guarantee of justice, therefore, resides neither in the investigative powers of a judge directed police team on the one hand, nor in the forensic (court room) skills of lawyers on the other, but in the close relationship of the judges to the people and the active involvement of the community in the proceedings.

The role of the judges is an active one. They receive the complaint, initiate enquiries into potential witnesses, guarantee an atmosphere of dignity and seriousness at the hearing, ensure that all the interested parties have a proper say, both in presenting their side of the facts, and in contraverting that of the other. They give the community a chance to contribute their knowledge and ideas, as well as to see that justice is being done. In addition to determining the particular case in issue, the judges act in an examplary way, educating the public in the ways of justice and the principles of the new society in formation.

Finally, taking into account all the material placed before them, all the evidence and all the arguments, and applying common sense, their knowledge of the community, generally accepted notions of lawful and unlawful behaviour (see later), and guided by the principles of justice and humanism that have always characterised the struggle, the judges make their decision. Note: it is the judges who make the decision. They listen to the people, give weight to the information and arguments advnaced by the people,but do not decide the issue on a public vote or by acclamation of the crowd. There might be special circumstances of intense conflict, in which it would be impossible to convene the court and apply proper proceedings. The imminence of a police or army raid, for example, might necessitate a hurried decision in battle conditions. But this should never be considered the normal way of dealing with cases, not even those of the gravest nature. The peoples justified indignation should be neither combatted nor let loose on the rampage, but recognised and converted into a finely balanced and precise instrument that furthers the cause of liberation. The people grow as a people and their self confidence and creativity advances to the extent that they are organised, and it is in this sense that the community courts become major instruments in consolidating community power and building the bases of a future liberated society.

7. Classification of Cases and Types of Offence

Certain broad classifications are helpful in determining the kinds of procedures that are most appropriate in concrete cases. Thus the proceedings in a case of divorce or failure to pay maintenance for a child, might be quite different from those to be adopted in relation to a charge of being a police spy or murderer. The former type of case can be handled informally with every attempt being made to get the agreement of the parties while the latter needs the most careful assessment of evidence and great respect for proper procedures.

(i) _ Matters for the court and matters not for the court

It is not every kind of dispute that should go to the court

a) political questions: In general, political disputes should be dealt with in a political and not a penal way. This applies to internal debate within the movement, and debate between the the movement and forces outside.

b) Minor disciplinary matters: there is a whole range of misconduct by members of the movement that should be dealt with by the structures to which the members belong and not by the courts. The remedies of reprimand, demotion, suspension from certain activities, suspension from the movement, and expulsion, can be applies after comradely discussion and evaluation, without involving the courts. Even serious disciplinary matters which relate to the internal life of the movement and do not touch the life of the community at large, should be dealt with with in a political way by the political structures.

c) Self defence against vigilante attacks. While the courts might have a role in determining appropriate measures to deal with vivilantes who have been disarmed (or have disarmed themselves) it is not the function of the courts as such to create self defence units or to lead the combat against vigilantes.

d) Direct action against the state forces of repression. Political military questions are determined by other structures.

e) Disprespect for the personal authority of individuals. This fuedal and anti democratic notion has been severely abused by Bantustan leaders to impose their will on the poeple and stifle free speech within the ranks of the people. The community courts should not allow themselves to be used in an analogous way.

f) Trifling questions. People should not run to the courts with every minor complaint

every minor complaint of name calling or quarrels with a neighbour.

(ii) Classification of cases that come before the court:

The informal, non professionalised and community based nature of the courts makes it unwise to attempt rigid classifications. Thus it is unnecessary to decide whether a neighbour's quarrel involving violence is a civil or a criminal matter. In formal legal systems, the difference is of great importance, since different courts are involved, with different procedures and different remedies. Sometimes the same case is brought twice, once for punishment, the other time for compnesation (e.g. assault, dangerous driving).

These formal distinctions are not appropriate in the peoples' courts at the present stage. The more experienced courts could consider creating special sections to hear special matters e.g. family matters, commercial disputes. But in general, the courts function with an all round competence to hear all matters. What is more important is to distinguish between cases where the remedy is slight and those where the remedy is grave. In the former case, proceedings can be rapid and informal; in the latter, great attention must be paid to procedures which guarantee that no mistake is made and that the public feel that a proper trial has been held. As a rule of thumb, it is proposed that the following broad classifications might be helpful:

Minor domestic and community problems

Highly informal proceedings, consultation with family, neighbours, respected members of the community who knoew the parties etc.- emphasis on reconciliation where possible, but giving definitive decisions where necessary.

Serious domestic problems

For example, family breakdown leading to divorce, persistent refusal to pay maintenance for childre, problems of paternity- more formal proceedings, with extensive consultation with persons who know the parties, investigiation on the spot where necessary- emphasis on reconciliation, or at least agreement as to the solution, but with a firm decision by the court if necessary (division of property, payment of maintenance, amounts and how to be effected, whether to be paid to the court or directly to the guardian of the children etc).

Anti social and disorderly behaviour,

molesting people, persistent public drunkenness and similar conduct informal proceedings, attempt at persuasion through public

pressure. If misconduct repeated, order of performing useful public service.

General criminal misconduct:

such as theft, assault, intentional damage to property, sexual interference, proceedings with a fair degree of formality, clear and concrete proofs necessary, public involved in the proceedings, remedy of reprimand, reasonable fine, public criticism, performing useful work for the community under supervision, compensation to the injured party.

Serious general crims:

Rape, armed robbery, murder, arson where life is endangered, proceedings conducted with great care, public involvement, solemn pronouncement of the court's decision. Remedies, public criticism, fine, compensation, useful community service, confiscation of goods, banishment from the community or a combination of these. The question of physical punishments is a complicated one that needs serious and objective study. Corporal punishment and the death sentence are so closely associated with the regime's courts that everything possible should be done to avoid their imposition. Prison has also been used to degrade rather than re educate and in any event, the possibilities of the peoples courts using prison do not exist at the moment. The advantage of physical punishment is that it is immediate, relatively easy to administer, and directly related in the public mind to the crime committed. Its dis - advantage is that it further brutalises society, those who suffer it, those who inflict it and those who witness it. It becomes a short cut remedy that gives a superficial solution to problems that require serious investigation. It estranges the courts from the people, associating them with an element of violence and fear that weakens the fundamental task of the judges of re-establishing social harmony and a sense of shared values.

Crimes against the freedom of the people

These are perhaps the most serious of all the matters that come before the courts, not simply because of their nature, but because they involve the most direct confrontation with the power of of the apartheid state. The proceedings have to be held with the greatest care. Freedom and the defence of freedom are not achieved by agitatedly pushing from one point to the other (again, we merely have to look to the behaviour of the tyrant puppets

of the regime, the organisers of the vigilantes and others of that kind, to see what we have to avoid, our differences with them are not only differences of victims, but differences of method, differences of relationship with the people, differences of ideology in the deepest sense of the word). Proceedings in these cases should be conducted with the full dignity that has characterised our struggle over the generations. The people should be involved as much as possible, saying whatever is relevant to the case, but not in the agitational atmosphere of a meeting. Nowhere is the authority of the courts more necessary than in the trial of alleged traitors and informers. Degrees of collaboration with the enemy have to be carefully determined, and all surrounding circumstances have to be investigated including the willingness of the person concerned to turn against his or her former bosses and collaborate with the people.

The punishment for these crimes will also range from public criticism for relatively minor transgressions to fines, useful work for the community, confiscation of goods, banishment, and, in exceptionally severe cases, the death penalty, there might be practical reasons which make it inappropriate for the court to be involved. The solution might be that in cases of manifest and severe gravity, where there is no doubt at all about culpability, the political/military structures take responsibility from the begining; in other cases, where the court feels that the matter before it is so serious as possibly to merit a death sentence, it should refer the case to the political/military structures for decision.

8. Legal Rules and Common Sense

Whether or not the term Roman Dutch Law will continue to describe the common law in a free South Africa, there is no need to adopt it now in relation to the body of rules being applies in the community courts. There are certain universally acknowledged principles of lawful and unlawful behaviour known to our people which do not have to be searched for in textbooks and law reports. The differences between voluntary and in - voluntary homicide, for example or whether force used in self defence is excessive or not, are distinctions known to all legal systems, and in the end, even the most erudite of judges use common sense criteria

in their determination. For community justice to maintain its character of being accessible to the people, it should avoid unnecessary technicality and reference to book learning. The people will respect the courts because they function honestly and intelligently and with sensitivity, because they operate in a manifestly fair manner and give judgments that are manifestly fair, and not because they are staffed by people who quote latin phrases or law reports. The judges will draw on common sense and common experience in deciding whether certain conduct is to be regarded as punishable or not punishable, or whether it should be lightly, or moderately or severely punished. Similarly, in civil cases, one does not have to be a legal expert to know when a contract is being broken, or what an adequate remedy would be. Similarly, common sense and common experience can be used in deciding when compensation should be paid for injury caused to another.

In family matters, the pinciple of defending the rights of children of trying to reconcile the parties, of equality between men and women, of equitable division of propety, of hearing all interested persons including the wider family and neighbours, of trying to minimise the damage when a marriage has completely broken down by granting a divorce on the fairest terms possible with the maximum possible agreement of the parties, such principles are well known and used frequently by family councils in informal arrangements, and should guide the courts in solving family disputes.

As more and more experience is gained, the best results can be classified and systematised and the positive and negative lessons can be spelt out in terms of a series of precise norms. At the present stage, however, flexibility and adaptability have to be the order of the day subject to the three traditions of justice mentioned in the introduction and to the close involvement of the community in the functioning of the courts.

At a future stage, a more formalised system of justice, with appropriate codes of procedure and substantive law, can be adopted. At present, great flexibility and adaptability are needed to ensure that the new courts grow and develop as the struggle develops, as they gain more experience and become more established.

9. The question of Defence

Whereas the non professionalised character of the courts should be seen as an asset, and whereas the vigilance of the judges and the presence of the public are the main guarantees against injustice, in certain cases

the court should give special attention to ensuring that everything reasonably possible that can be said and done on behalf of an accused person has in fact been said and done. This could be achieved by allowing the accused person (or in a major civil matter, the parties) to be supported in the court by a member of the community of his or her choice, or by the court itself appointing someone to fullfill this task. Two extremes should be avoided: the totally tame representative who makes only a formal defence if any at all, and the ultra aggressive, point taking person, who seeks to avoid discovery of the truth by means of raising secondary and largely irrelevant matters.

10. Renumeration

In general, access to the courts should be free. The judges and others act out of a sense of social responsibility and not for any material advantage. Any fines collected or goods confiscated are to be used for the benefit of the community. In certain cases, expenses incurred by the judges or wages lost, can be refunded. Strict control has to be maintained over funds of the court.