

https://dspace.org/

Informal Justice: The Alexandra Justice Centre and the Future of Interpersonal Dispute Resolution

van der Merwe, Hugo; Mbebe, Mpumi

1994-02
Centre for Applied Legal Studies
https://hdl.handle.net/10539/11820

Downloaded from a DSpace repository. https://dspace.org/

WITS
SCHOOL OF LAW

Working Paper Number 20

INFORMAL JUSTICE:
THE ALEXANDRA JUSTICE CENTRE
AND THE FUTURE OF INTERPERSONAL DISPUTE RESOLUTION

by

Hugo van der Merwe with Mpumi Mbebe

**The Paper was originally published by the
Centre for Applied Legal Studies as Working Paper No. 21
(February 1994)**

CALS
Centre for Applied Legal Studies

UNIVERSITY OF THE WITWATERSRAND
JOHANNESBURG

INFORMAL JUSTICE: THE ALEXANDRA JUSTICE CENTRE AND THE FUTURE OF INTERPERSONAL DISPUTE RESOLUTION

by

HUGO VAN DER MERWE

with

Mpumie Mbebe

Working Paper 21

February 1994

Preface

The Community Dispute Resolution Trust (CDRT) is a project aimed at assisting communities develop local community dispute resolution capabilities. Established in January 1991, initially to develop local dispute resolution centres, the Trust has become involved in the provision of a broad range of dispute resolution services to communities faced with rising levels of conflict. The Trust initiative is designed to develop the ability of communities to manage disputes between individuals, be they family or neighbourhood conflicts in an appropriate manner.

Through the introduction of mediation and forms of adjudication into communities, the Trust aims to play a part in the reshaping of the South African legal system to meet the needs of communities which have historically been denied access to effective means of dispute resolution.

Acknowledgements

The design and implementation of the Alexandra community survey was mainly the responsibility of George McCall and David Storey. Background research on Alexandra was conducted by Gengezi Mgidlana. The gathering of data regarding the operation of AJC was done through the assistance of the AJC registrar, Ben Dlomo, and the AJC mediators. Interviews with parties who had been through mediation were conducted by Victor Rambao and Sello Motsamai, and the survey of Alexandra residents was conducted by Social Surveys. We are grateful for the support of USAID, Rowntree Trust, Kagiso Trust (EEC), Otis Elevator, South African Breweries, W & A Investment Corporation, OSALL/OSAR, Premier Milling, British Council, Carlton Paper Corporation and the Canadian Dialogue Fund in providing the funding for the establishment of the centre and the research reported here.

Introduction

The legitimacy crisis of the legal system in South Africa is one that will continue into the 'new South Africa'. It is a crisis that goes beyond that of apartheid laws and the racial composition of judges, magistrates and lawyers. The legal system is itself alien, inaccessible and inappropriate for dealing with the conflicts which most South Africans experience in their daily lives. The courts have proved to be appropriate for only a small fraction of disputes even for those who do have the resources and inclination to use them. Black communities have on the whole been denied this access and have actively rejected this system which is seen as intricately linked to their oppression. They have pursued other options of resolving the conflicts within their communities, but these alternative structures have been undermined by state repression, internal community divisions, the lack of skills, resources and clear accountability procedures. The Alexandra Justice Centre (AJC) presents one possibility for addressing this conundrum.

The AJC provides interpersonal mediation services to the community of Alexandra, a township situated among the northers suburbs of Johannesburg, with a long history of resistance to the apartheid system, and more recently torn apart by internal ANC-IFP conflicts. In time the project intends providing a range of dispute resolution procedures that would include adjudicative processes.

The aim of this study was to evaluate the operation of the Alexandra Justice Centre (AJC) within the context of the community within which it operates. The first section of the report sets out to evaluate the AJC as a programme serving a specific community. This section attempts to provide an understanding of the values, beliefs and practices of Alexandra residents regarding interpersonal disputes. It also deals with the actual operation of the centre - its output, coverage, the outcomes

of mediations, the reaction of clients to their experience, and the actual case management process.

The second section of this report looks at the field of alternative dispute resolution more broadly. It evaluates the AJC experience in relation to the debate about the future of the legal system and the potential role of community based dispute resolution mechanisms. Proposals regarding programme policy and legal reform are considered.

The Importance of Interpersonal Dispute Resolution

Before going into the body of the report, it is important first to look at the sphere of interpersonal disputing and its significance in our society. The need to address interpersonal conflict is often (and particularly during the present stage of political transition) an issue that does not receive sufficient attention. Large scale public violence and disruptive collective action catches the spotlight and marginalises other spheres of human suffering and potential sources of social transformation.

Interpersonal versus intergroup conflict

Interpersonal conflict needs to be distinguished from other levels of conflict such as intergroup or political conflict. It refers to any conflict between two individuals; it covers everything from a fight between two lovers or neighbours to a person complaining about a deficient product or service. It is thus something that happens at the grass-roots rather than at the political level where it would be dealt with through structures such as the Local Dispute Resolution Committees. Interpersonal disputes, in most cases, are resolvable through informal negotiation between the two parties concerned and does not require the involvement of political

organisations or Peace Accord Structures.[1]

Escalation of Conflict

Some disputes arise simply from lack of communication or misunderstandings while others are very clearly embedded in the structural conditions of the society. Such is the state of our society however, that many disputes (irrespective of their origins) escalate to draw in more people and take on destructive and often violent forms. It is not unheard of for a simple misunderstanding over a relatively minor matter to end up as a major controversy involving a number of parties. This is not meant to imply that escalation of conflict is necessarily a bad thing. Certain conflicts need to be intensified and broadened in order to draw sufficient attention and involve more parties. This does not necessarily denote violence or destructive strategies.

While many of the factors causing such escalation are deep structural issues and products of a long history of strife, the absence of locally acceptable forums and procedures for resolving them is one reason for their escalation. Escalation of conflict is often a strategy employed because of the lack of an effective alternative. Conflicts that could be resolved effectively at an early stage between the primary parties if an acceptable person or process was available are, in stead, pursued through more coercive, disruptive methods. It is only at the stage of open confrontation between groups of people that the conflict draws the attention of external agencies who then attempt to resolve the conflict.

---

[1] There are, however interpersonal disputes that may require intervention by either the Peace Accord Structures or a political party (eg politically motivated threats and attacks).

Avoiding conflict

The other face of many interpersonal conflicts is silent endurance or avoidance. People learn to live with their problems or opt to avoid them. They may complain to others, but they do not pursue their grievances. These grievances may be related to specific incidents, but are probably more often part of ongoing relationships. Endurance can be a costly process if the conflict continuously burdens the aggrieved party. Avoidance can also be very costly if it involves relocating one's home (eg if the dispute is with a neighbour or landlord) or if it means changing employment. The costs associated with either putting up with problems or attempting to avoid them can be high for the individual disputants, but it may, moreover, contain hidden costs for the wider community. If individuals were willing to put up with bad services, unacceptable behaviour, etc, those responsible (or the structures responsible) would not be challenged and would, most likely cause further grievances or conflicts.

Positive spirals

Just as conflict has a dynamic spiralling affect that affects a broader range of parties, it could also be argued that conflict resolution has consequences beyond the direct impact of the particular settlement and the individual disputants. Conflict resolution has the potential of not only preventing something that is destructive, but of promoting certain positive values. Mediation is, ideally, not simply about getting people to stop fighting, but also to get them to understand each other better and to learn to respect the other's values and needs. If this is accomplished, the relationship between the parties would in fact be improved relative to before the conflict, and the parties would in fact acquire better communication skills that are applicable to their other interpersonal relations.

The potential outcome of mediation is thus much more

than two satisfied disputants. The more significant result is a better relationship and improved interpersonal communication skills, and increased understanding of another (group's) value-frame. It may also provide the parties with the opportunity of reaching a consensus on how to deal with future conflicts that may arise. Such bonds, understandings and skills would clearly also have implications for intergroup relations within the neighbourhood or community to which the individuals belong.

In a society which lacks value consensus and which is fraught with political divisions, interpersonal disputes often escalate into wider conflict involving large groups of people. For those disputes that can be addressed at the interpersonal level, we must provide appropriate forums and disputing skills that meet the needs of disputants, promote the strength of community bonds, and prevents the negative costs of coercive actions and spiralling conflict.

Evaluation of the Alexandra Justice Centre

The Establishment of the Alexandra Justice Centre

The Alexandra Justice Centre was established as a community-based service for the resolution of interpersonal disputes involving residents of the Alexandra township. It seeks to provide those residents who have not had access to adequate (formal or informal) mechanisms of dispute resolution, an avenue for effective, accessible and legitimate resolution of interpersonal disputes. The aim of the project is to provide a service to individuals in the community while also enabling the community to deal constructively with such disputes.

The Alexandra Justice Centre was established by the Alexandra Civic Organisation (ACO) with the assistance of the Community Dispute Resolution Trust. ACO is a popularly elected and democratically accountable community structure. It has ultimate say over the operation of the Justice Centre. Through being answerable to ACO, the Justice Centre thus is accountable to the Alexandra community as a whole. CDRT's role is mainly that of funder and to provide the resources of dispute resolution.

The structure and operation of the centre were developed through discussions between the two organisations. ACO selected ten members from the various geographic zones of the township for training in mediation, and CDRT provided them with training, totalling 50 hours for the mediators and additional training in categorisation and referrals for the registrar. CDRT is also involved on an ongoing basis in providing advice and assistance in administration, research and refresher training.

The way the cases are initiated is that they are either referred to the Centre through other organisations (such as the

Civic Advice Centre, Street Committees, etc), or the Centre is approached directly by the disputants themselves. The registrar handles the intake process by enquiring about the nature of the dispute and advising the complainant about the appropriate mechanisms to deal with the dispute. If not, it is referred to other legal or community-related bodies. If appropriate for mediation, the registrar will attempt to contact the respondent and set a date for mediation. A mediator is then chosen depending on their availability, knowledge about the issues in conflict, age, and relevant language skills. The mediation service is offered free of charge. Mediators are paid a nominal sum for their services. The registrar is the only full-time employee of the project.

The AJC was proposed as a pilot project by CDRT and accepted by the Alexandra community. Other centres have subsequently been established and CDRT is in the process of providing training and consulting with a number of communities with the view towards the creation of additional centres. Because it was CDRT's first project and as such, also the first project of its kind in South Africa, it was felt that it would be very valuable to undertake a thorough evaluation of the project and its role in the community it serves.

Alexandra: Setting the Scene

Socio-political Background

Alexandra is an African residential neighbourhood situated in the heart of Johannesburg's northern suburbs. With its population of approximately 360 000 living within an area of roughly three square kilometres, Alexandra has the highest population density of the PWV region (South African Township Annual, 1992). The population is housed in council housing and associated backyard shacks (63%), a clearly defined informal settlement (20%), a new housing development (13%), and a number of hostels (Markinor,

1990). Public services are largely lacking, with much of the community living without water-borne sewage, access to public amenities, or access to electricity.

Alexandra has over the years been the site of popular resistance to apartheid. The poor living conditions and lack of public services became a focus of protest during the early 1980s. The rising crime rate coupled with an antagonism towards the police and the perception of police apathy toward crime in the area inspired the Alexandra Youth Congress (a UDF affiliate) to launch an Anti-Crime Campaign in August 1985.[2] The threat that this and other forms of community resistance held for the state, led to increased confrontation which culminated in 1986 in what was termed the 'Six Day War' which resulted in the police being driven out of the township.

Popular resistance during this phase of heightened repression, occurred mainly through the emerging civic structures who, after 1986, increasingly focused on the building of organs of 'people's power'. The Alexandra Action Committee, a key organisation in the resistance movement, operated through a decentralised structure composed of area, block, street and yard committees.

The Establishment of People's Courts

The formal legal system is generally perceived by black South Africans as illegitimate (because of its association with the Apartheid government), as repressive (through its implementation by the police force), or irrelevant (because of the high costs and cultural foreignness). The failure by the State to provide

---

[2] A study by Vivi Stavrou (1992) revealed a very high level of suspicion and antagonism towards the police. Ninety four percent of interviewees believed that police were involved in political and criminal violence.

legitimate and appropriate dispute resolution mechanisms has led to a culture of people being inclined to take the law into their own hands when faced with conflict. Its main role in the lives of Alexandra residents is the prosecution of criminal offenses. When this element of police and court control lost its ability to maintain a minimum level of order in the community, informal mechanisms were created to fulfil this function. While such initiatives of the 1980s were not new to Alexandra or African townships elsewhere in South Africa, they now took a new, more organised form: People's Courts.

People's Courts were essentially motivated by the high level of crime, but also contained a political interest in returning control of the community to the residents rather than external state structures. The people's courts were operated by the various local civic structures within the Alexandra community, such as the block and street committees. They dealt with a variety of cases, both civil and criminal. The procedures used by the courts were informal, with evidence being defined broadly and the norms and values defining guilt or innocence being those of the community. Sentences imposed by the courts was generally rehabilitative rather than punitive, and those running the courts were drawn from the local community.

The establishment of alternative forms of justice presented a radical challenge to the state's moral as well as coercive authority in the township and was met with severe repression. The state sought to portray the courts as structures set up by the liberation movement to impose its revolutionary goals through brutal suppression of opponents. Those responsible for operating people's courts were detained and prosecuted (eg State v Mayekiso and others, 1988).

The detention of experienced activists left the community organisations without a coherent leadership which had managed to ensure the discipline and accountability of the people's courts. State repression also made it impossible to maintain open and effective community politics such as public meetings and elections.

Certain courts thus became cut off from the communities they claimed to serve and were increasingly open to abuses. Many of the courts also resorted to more punitive measures in the face of increased political polarization and internal community divisions. These excesses led to the courts being undermined in the eyes of the community.[3]

While never being completely eliminated the functions of these courts were gradually taken over by the local civic structures (especially after the increased political freedom of the 1990s). The resolution of interpersonal conflict came to be seen as part of their normal role in the community. The number of cases with which it was forced to deal, however, undermined the civics' ability to give sufficient attention to other matters of broader community concern.

The Need for Additional Options

Informal community mechanisms, while offering an alternative to the inaccessible and illegitimate mechanisms of the state, were not able to cope adequately with the demand for dispute resolution services. In order to fill this gap, the Alexandra Civic Organisation engaged the CDRT in a joint effort to set up an experimental project which would use mediation (a non-coercive, voluntary, community based) process to resolve interpersonal disputes. This programme was established to complement the efforts of the local civic structures. It would reduce the caseload pressure on the civic structures by taking on cases that did not require overtly political intervention, provide more specialised skills and services for those

---

[3] See Schärf (1989 and 1990b) and Glaeser (1991) for a more detailed discussion of the factors which undermined the operation of People's Courts.

cases that were not resolvable by the civic structure, and provide a more private forum for cases of a more personal nature which disputants did not want to bring to a public arena.

Evaluation Process

There were three main components of the evaluation of the Alexandra Justice Centre.

Household Survey

The aim of this survey was to develop an understanding of the values, beliefs and practices of Alexandra residents regarding interpersonal disputing. It was conducted in 1992 using a stratified random sample of 292 residents to gain insight into various sections of the Alexandra community[4].

Case Forms

The second component of the study looks at the actual operation of the centre - its output, coverage, the outcomes of mediations, and the actual case management process. This information was

[4] This sampling strategy was selected in order to ensure adequate representation of a number of important demographic components of the community. These were: gender, age, dwelling type and geographic location. Interviewers were assigned specific geographic areas where they were to locate particular dwelling types and identify a respondent by gender and age.

mainly gathered through analysing the content of case records.[5]

Follow-up Survey

A follow-up survey was conducted in order to gain an understanding of the respondents' experience of mediation, to assess their satisfaction with the process, and evaluate the long-term impact on the actual dispute. Sixty three disputants who had been through mediation (almost equal numbers of initiators and respondents) were interviewed in this regard.[6]

Dispute Processing in Alexandra[7]

Frequency and Types of Conflict

Various types of conflict in the Alexandra community were identified as occurring fairly frequently. When asked about the different types of fights that they had experienced over the previous six months, those disputes that featured most prominently were: disputes with neighbours (22%), followed by those with

---

[5] The data is based on the 115 cases that were brought to the centre during its operation between September 1991 and December 1992. For 54 of these cases, information was also collected regarding the respondent in the case.

[6] After an evaluation of the case forms and follow-up process, new forms were designed in collaboration with the registrars of the various Justice Centres. Examples of some of these are included as appendices.

[7] Information for this section was gathered using the household survey.

friends (13%) and those with another family member (10%). Most people reported at least one fight in this period. Interpersonal disputing is clearly a very common occurrence in Alexandra.

Dispute Resolution Mechanisms

Utilization of elements of the formal legal system was expectedly low, with only 14% reportedly ever having consulted a lawyer, 9% reported ever having taken a fight to a court, and 16% ever having been to the police with a problem. Women were particularly excluded from this avenue for resolving disputes. Only 11% had been to the police and 9% had been to a lawyer. A relatively high 12%, however, reported that they had taken a dispute to the court.

Courts

For a variety of reasons the South African legal system is largely perceived as illegitimate and inaccessible. When those who had taken their fights to mechanisms other than the courts were asked why they did not take their fights to the courts, a range of responses was given. Seventy two per cent said that the fight was not serious enough or that they managed to solve the problem themselves. Courts are thus seen as a forum for more serious disputes or as a forum of last resort. Eight per cent responded that the courts take too long or are too expensive. Others responded that they disliked the courts, were afraid or lacked information, or that they court involvement would not be appropriate in their dispute.

The court's legitimacy is also undermined by its close affinity with the police in the public's eye. Eighty eight per cent of respondents felt that 'the courts always believe the police,' and 80% disagreed with a statement reading 'the police always tell the truth in court'. (One hundred per cent of those living in flats

disagreed with this statement.) Furthermore, 92% thought that 'it is impossible to get help from the courts without going through the police'. Optimism about improvements in the 'new South Africa' was also dramatically low.

A brief recent history of dispute resolution in Alexandra is shown on ***Table A***.

Table A Where did people take disputes?

MECHANISM	before 1985	1985 - 1989	1990 - 1992
Court (including maintenance court, commissioner's court, etc)	2%	2%	**8%**
Lawyer	1%	1%	2%
Police	1%	2%	**5%**
Advice Centre	1%	3%	3%
Council	1%	3%	**6%**
Social worker or welfare agency (including Home affairs, NICRO, etc)	1%	3%	**5%**
Witchdoctor	1%	1%	0%
Yard, area or street committees	2%	4%	**17%**
People's court	**7%**	4%	3%
None of the above	**82%**	**77%**	**54%**

The most obvious developments observed from the above table, are:

(a) the prominence of people's courts in the pre-1985 phase and their subsequent decline,

(b) the rapid increase in popularity of the yard, area and street committees,

(c) and the gradual increase in utilisation of various other forums such as the courts, police, council and social workers.[8]

(d) While there was an increased number of people using dispute resolution forums over the reported period, 54% of the sample reported not using any of these forums since 1990. Given the large number of disputes reported, this indicates a lack in viable alternative for people involved in disputes.

---

[8] Hund and Kotu-Rammopo (1983:183) quote a similar estimate of two percent for court utilization for estate problems in a Pretoria court in the early 1980s.

Table B provides a summary of certain features of various dispute forums that were commonly used in the sample.

Table B

MECHANISM	% Use 1990-92	Relationship Betw. Parties	Issues	% Settld	% Satsf'd	% V.Fair
Court	8%	neighbour merchant partner	money gossip	66%	63%	57%
Yard, Area or Street Committee	17%	neighbour family member service provider	money gossip property	54%	43%	40%
Police	5%	neighbour partner friend	gossip money another man/woman	73%	33%	33%
Social Worker or Welfare Agency	5%	neighbour friend partner	money 3rd party (eg. child) respect	79%	71%	64%

Of note here were:
(a) the relatively few disputes among partners (husband-wife, girlfriend-boyfriend, ex's) that were taken to civic structures
(b) a high number of other family disputes were however taken to this same forum
(c) also of note is the relatively high rates of settlement,

satisfaction and fairness assigned to courts by those who had used them. For those with the skills and resources to use them, they therefore do provide some relief

(d) civic structures, while being the most commonly used, received relatively low scores on all three these measures

(e) police, as may be expected, while being effective in handling many cases showed low satisfaction and fairness ratings.

The overall picture is that of disputes involving ongoing relationships (neighbours, partners and friends) being taken to agencies that are external to the community (and therefor not very accessible or legitimate) or to internal structures (that are not perceived as very effective, satisfactory or fair).

When asked whether they thought it likely that services will improve dramatically in a post-apartheid South Africa, 76% responded that 'the police will never change' and 69% said that 'the courts will not improve dramatically'.

Views/Values Regarding Dispute Resolution

Table C summarises the responses to questions designed to find out about people's views and values about appropriate ways of resolving disputes.

Table C

Statement read to respondent		% Agreement
	Appropriate Forums	
1.	The best settlements are those made by the parties themselves.	77%
2.	Family problems should be kept within the family.	87%
3.	When I fight with people I am close to, I cannot go anywhere for help because I don't want the whole neighbourhood to hear my problems.	74%
	Appropriate Process	
4.	People who are fighting will continue to do so until someone else makes them settle.	71%
5.	I would rather have some wise person settle the matter than have to negotiate with the person I'm fighting with.	76%
	Appropriate Outcomes	
6.	In family fights, resolving the bad feelings is more important than deciding who was at fault.	79%
7.	Settling a dispute almost always requires deciding who was wrong.	76%
8.	Anyone who has wronged another must be punished	71%

What came out most clearly here were:
(a) the view that disputes can and should be resolved by those most directly involved, and that personal disputes require an

unintrusive, confidential forum (as shown in the first three questions),
(b) the need for a third party in resolving many disputes (as shown in questions 4 and 5), and
(c) a strong inclination towards judgment and punishment except in family disputes (see questions 6, 7 and 8).

Attitudes Towards Mediation and AJC

A mediator was described to the respondents as a person to whom you could take a fight, who would not take sides, would not blame either side, but would only help both parties to work out their own solution that they could both agree to. When asked whether they would be interested in trying this type of help, 83% responded that they were 'very interested' and 8% that they were somewhat interested. Only 9% said that they were uncertain or not interested.

When asked whether a centre offering mediation services is a good thing for Alexandra to have, 75% of residents responded 'definitely yes,' and a further 17% said 'probably yes'. These favourable responses are not surprising given the number of disputes, the unavailability of legitimate, accessible and effective dispute resolution forums, and the views and values which reflect a positive inclination towards the usefulness of a third party which is able to ensure confidentiality.

AJC Operation[9]

Case Load

Case files show that the centre was approached for assistance by 115 individuals during its operation in 1991 and 1992. Five of these cases were referred to the Alexandra Advice Office. Of the 110 cases that were deemed appropriate for mediation, the centre managed to convince 54 respondents (49%) to come to the centre to discuss the possibility of mediation.[10]

Fifty (93%) of these respondents agreed to submit the dispute to mediation. Seven (14%) of those cases where both parties agreed to mediation, mediation never took place due to one or other party not showing up for mediation on the agreed date. Forty three cases (37% of all reported cases) finally reached mediation.

Case Types

The demographic composition of the cases brought to AJC reflected a relative spread or balance of age, gender, education level, and language group.

The most common issues that people brought to the centre were money, property, physical abuse, and living arrangement in common area.

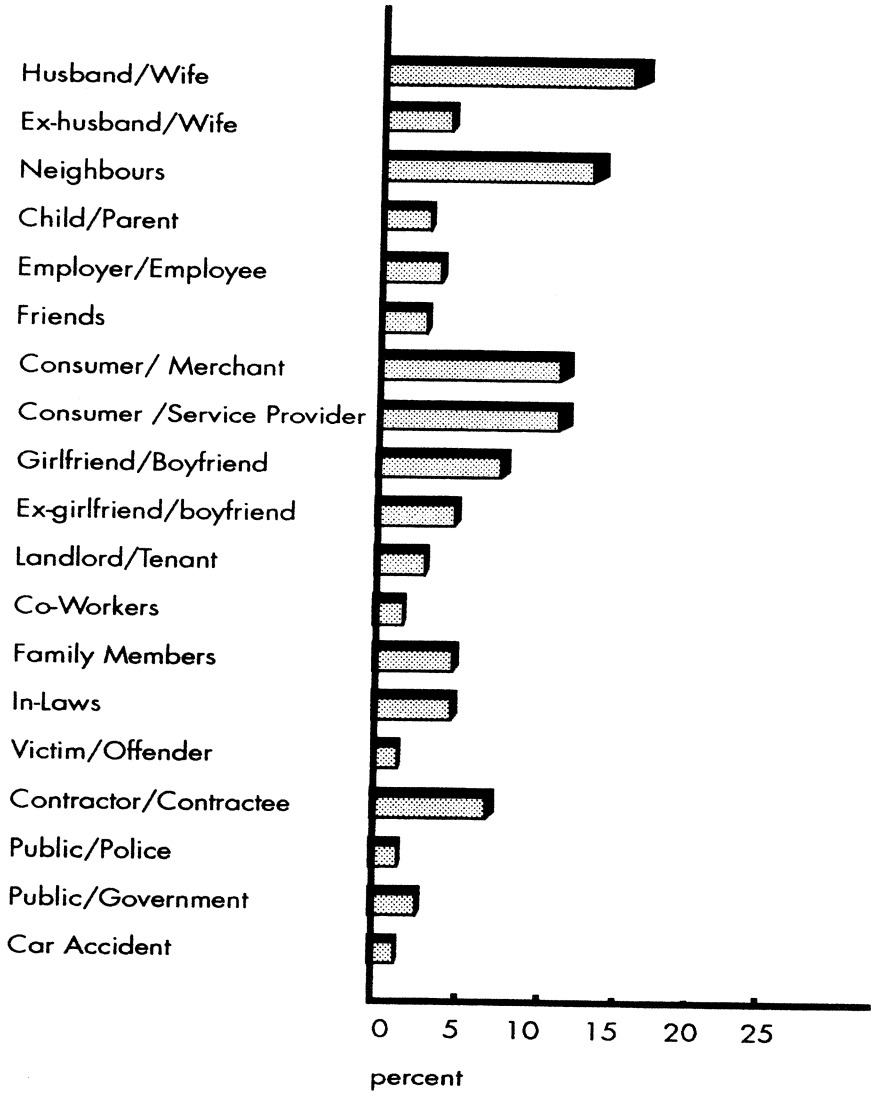
---

[9] Information for this section was collected by content analysing the case management forms, with the exception of measures regarding satisfaction which were extracted from follow-up interviews.

[10] The case load was seriously affected by the political violence in the township which forced the closure and relocation of the centre in late-1992.

A wide range of relationships is presented by the cases being brought to the centre. The cases range from various personal disputes to business or contractual relations. The most common cases to be brought to the centre are (as shown on ***Diagram D***): husband-wife (17%), neighbours (13%), consumer-informal merchant (13%), consumer-service provider (12%) disputes. The majority of cases can be categorised as personal.

Diagram D

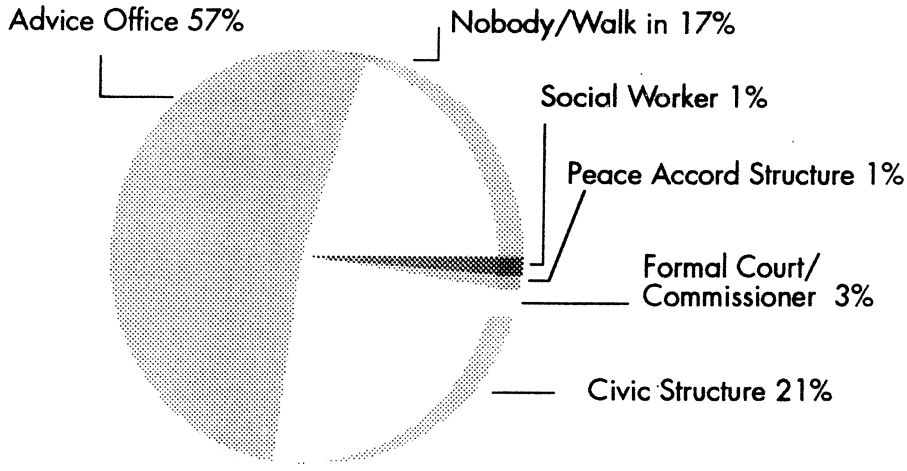

Husband/Wife
Ex-husband/Wife
Neighbours
Child/Parent
Employer/Employee
Friends
Consumer/ Merchant
Consumer /Service Provider
Girlfriend/Boyfriend
Ex-girlfriend/boyfriend
Landlord/Tenant
Co-Workers
Family Members
In-Laws
Victim/Offender
Contractor/Contractee
Public/Police
Public/Government
Car Accident
0
5
10
15
20
25
percent

Functioning of the centre

Diagram E shows that the centre mainly relied on referrals from the civic and its associated bodies. The majority of referrals came from the Alexandra Advice Office. The second largest source from the various Alexandra Civic Structures, and only 17% were walk-ins - without specific referrals.

Diagram E

Follow-up Survey



Awareness of the centre is spread mainly through word of mouth. Of the respondents who were contacted, 35% said that they had previously heard of the centre - 80% from family, friends and neighbours, and 20% from meetings they had attended. Respondents were usually contacted by letters delivered by AJC staff or the initiator. 80% of respondents who were interviewed, were contacted within a week of the initiation of the case. Many respondents were reluctant to come to the centre. The impersonality of a letter that only briefly outlines the services offered by the centre, seems insufficient to convince people that mediation would be in their best interests. This approach thus clearly needs to be reviewed.

Where mediation did take place, 56% were conducted within a week of the initiation of the case, and a further 11% were conducted within the first two weeks.[11] Mediations were almost all conducted in the home languages of the disputants (very seldom in English).

Outcome

Of the 43 mediations that took place, 40 (93%) reached settlements. Thirty four (85%) of these settlements were recorded in writing. The substance of these agreements consists mainly of: monetary payments (35%), change in behaviour (35%), provision of goods or services (22%), or a change in relationship (11%).

Client Satisfaction

When asked whether they would use AJC again, 94% of initiators and 93% of respondents responded that they would.

---

[11] This compares very favourably with court cases where disputants have to wait months (if not years) for their day in court.

In relation to satisfaction with the process, the overwhelming majority of clients said that they got ample opportunity to tell their story, that the mediator tried hard to understand both sides, and that the mediator was impartial. High satisfaction with agreements was also reflected in the interviews. About 90% of both initiators and respondents were satisfied with the outcome, and similar figures were found for perceptions of the fairness of the outcome.

While satisfaction may be high, the compliance rates of these settlements leave plenty of room for improvement. There is a large discrepancy in the evaluations provided by initiators and respondents. While 86% of respondents say that initiators are keeping entirely to the agreement, only 43% of initiators evaluate respondents' compliance as entirely satisfactory. Thirty nine per cent of initiators in fact claim that respondents do not stick to agreements. This discrepancy in rates of compliance is probably largely due to the unequal burdens placed on the two parties by the agreement -respondents are usually the ones who agree to do something or change their behaviour.

In cases where there has been a lack of compliance, disputants are, however, generally keen to have further mediation of the case. They thus still believe that mediation can overcome the obstacle presented by non-compliance. Compliance is however clearly a problem that needs to be addressed more intently.

Assessment

In making a broad assessment, the Centre clearly fills an important gap in providing a community-based, voluntary, confidential forum. Moreover, it would seem that disputants' evaluation of the centre indicates high rates of satisfaction and fairness, but as with the yard, area and street committees, it needs to work on ways of improving their effectiveness in providing lasting settlements. This necessitates looking into

possible legal mechanisms that would provide support for the process.

Other problems that need to be addressed are the small case load and the lack of success in contacting respondents.[12] In this regard, there are however lessons that can be learnt from our other newly established centre in the West Rand. Through effective publicity and more vigorous organizational networking, they have acquired a monthly caseload four times that of the Alexandra Justice Centre.[13]

The potential clearly exists for the AJC to expand its role significantly within the community it serves. Through increased publicity and efficiency, and improved networking with community and state bodies (such as the courts, the police and department of manpower), the scope and significance of its role could expand profoundly. The potential of developing cooperative links with state bodies are particularly vital and promising in the light of national political developments. The lessons and successes of the AJC are also capable of being applied (with some adaptations) to other communities. This potential, however, can not be realised without the availability of the necessary resources related to the provision of training and operation of the centres.

Research would also have to remain a vital component of the operation and expansion of Justice Centres. The field of interpersonal dispute resolution in South Africa is still in its infancy. Processes and mechanisms that have been established

---

[12] Neighbourhood Justice Centres which depend on community referrals in the United States experience similar problems with contacting respondents and convincing them to come to mediation (McGillis, 1986: 59).

[13] A report on the West Rand Justice Centre will be published in early 1994.

are not well documented, understood or publicised. Programme assessments are essential for drawing out the lessons from existing initiatives. We need to isolate problems that can be addressed and highlight achievements that can be replicated.

Implications for the Future of Alternative Dispute Resolution (ADR)

Before looking at the broader question of the possible restructuring of the formal legal system and the role of community dispute resolution under a democratic dispensation, we will first explore some of the more immediate policy questions facing the field of alternative dispute resolution raised by this study. These questions are vital to the future direction of the field and will remain relevant even under a restructured legal system. The main areas that need clarification are: the goals of community dispute resolution, its links with community structures, its links with the formal legal system, its functions and procedures, and a clarification of its policies relating to power disparities within the communities.

Goals of Community Dispute Resolution

What are the primary goals motivating the development and institutionalisation of dispute resolution mechanisms? Harrington and Merry (1988) outline three 'ideological projects' in the ADR field in the United States (which also reflect subtle tensions within the South African debates on ADR). They are differentiated by their goals:

1) Increasing access to forums that are capable of resolving disputes
2) Contributing to personal growth of disputants (therapeutic model)
3) Transforming the communities in which the programmes operate

These are not clearly distinct goals or necessarily contradictory in practice (they in fact use very much the same

mediation techniques), but different emphases have implications for the operation of the programmes and the type of impact it is likely to have.[14] These goals are played out in the links between the ADR mechanisms and the formal legal system and other arms of government, dependency on referrals from government structures, links with community structures, accountability structures, sources of funding, professionalisation of service, selection of mediators, dispute resolution procedures, etc. The ADR movement in South Africa has been motivated by a mixture of all three of the above goals. Their relative weights are however still the subject of dispute. Different initiatives are likely to carry different emphases. The debate produced, we believe, is a healthy one that should not undermine efforts to expand the field. The pursuit of any one goal to the exclusion of the others does, however contain dangers that need to be guarded against. This debate will be illuminated by a consideration of the various policy issues facing the establishment and operation of dispute resolution centres.

Links to Community Structures

The relationship between the dispute resolution mechanism and the community in which it operates is vital in determining its

---

[14] McGillis (1986) makes a somewhat similar distinction between community-based and justice system-based programmes which focus disproportionately on different goals. Community-based programmes, he argues, focus more on the goals of decentralising control of dispute resolution, developing indigenous community leadership and reducing community tension, while justice system-based programmes focus on increasing access to formal justice, improving the dispute resolution process and reducing court congestion.

success in resolving disputes and its impact on the community it serves. This relationship can take numerous forms, each having its own advantages and drawbacks. Decisions about the type of relationship is also significant because it impacts on the shape of the communities that we are helping to build.

An ideological motivation guiding most dispute resolution initiatives is to empower the individual disputants through giving them greater control of their disputes. Empowering the communities within which these individuals live is however also just as important. The ability of communities to have some influence over the values guiding individual behaviour is something that should be encouraged. Individual self-interest can not be the only guiding principle. While it is a central consideration in dispute resolution, it should also be balanced with the needs of the community more broadly. The way in which this relationship between the dispute resolution mechanism and the community is shaped will however determine the mechanism's ability to balance the needs of the individual with those of the community. Valuing either too much presents serious dangers. The relationship consists of various aspects that need to be examined.

Accountability and Control

Different models of community accountability are possible. The AJC approach of accountability structured through the civic is but one option. This model allows for clear structures of authority and community participation in decision making. It is however also limited by the capacities, efficiency and political exclusivity and popularity of the civic. Reliance on this base could exclude the possibility of intervening in conflicts where one party does not support (or is wary of) the civic. If the structure of the organisation is not operating properly (eg lacks community participation or democratic accountability) the functioning and reputation of the centre can be severely

harmed. If the civic is directly involved in a conflict with a certain section of the community, the centre could very easily be drawn in and used as a weapon in such a dispute. Similarly, if there is a conflict between the civic and external state or political structures and the centre's operation is dependent on having a working relationship with them, the operation of the centre could suffer. The effectiveness of using this model is thus dependent on the local conditions affecting the community and the operation of the civic, as well as the development of the national civic and political initiatives. The continuously changing local dispensation impacts on the role played by civics and thus affect the relevance and efficacy of this relationship.

Other models of accountability are also possible. There are a range of political, social and economic organisations with whom project initiators could develop a relationship. Each organisation carries a different package of advantages and disadvantages. The wider one makes the scope of involvement, the greater the breadth of cases would be. The question would then, however be whether the centre would be restricted by the conflicting demands of the various participants. Would it be limited by the lowest common denominator (eg through decisions requiring consensus)? Or can the centre pool all the abilities and resources of the various organisations. The West Rand Justice Centre has taken this approach with evident success (while also having to negotiate around some of the difficulties it presented).

A third possible model is that of direct popular accountability. This is most clearly evident in the operation of certain traditional forums where the whole community (in theory) participates in decision making, or through formal democratic election of representatives to a dispute resolution committee or of mediators themselves. The traditional model may, to some extent, still be a model that can be utilised by dispute resolution mechanisms in smaller rural communities, but is not viable in larger, more transient and divided urban

neighbourhoods. Full participation of certain sectors of the community may also be limited by such an approach because of traditional roles and values, particularly related to women.

Funding

The question of funding for the mediation centre is central to the concern for local accountability. In the case of the AJC, no funds are raised directly from the community, either through contributions or fees for services offered. The centre is completely dependent on international funding which is channelled through the CDRT. The CDRT takes responsibility for writing funding proposals, meeting funders and accounting for expenditures. This raises the question of the true independence of the centre as well as local capacity building in relation to funding and management skills. To overcome this, the CDRT has, over the last few months organised bookkeeping, fund raising and other management/administration workshops for the Alexandra and other Justice Centres. (The question of government funding will be discussed in a later section.)

Community Participation

A third question of community linkages is the type and levels of community participation in the operation of the centre. Although this would in practice be largely determined by the accountability structure, it can be analyzed separately. In the AJC case, the mediators were drawn from the various geographic areas of Alexandra. They were however also all active members of the civic structures. They are also a static group, with most mediations being concentrated in a small core group who are accumulating a disproportionate amount of experience. This presents the danger of the formation of an elite group and the exclusion of broader participation. It also

results in a feeling of marginalisation among certain mediators who are then lost as potential participants in the project. On the other hand this concentration of skills in the hands of a few members of the community allows for the development of greater mediator experience and expertise and, therefore a more effective service. This increased professionalisation of the field is thus likely to lead to a greater efficiency of service (as long as it is able to avoid increased bureaucratization as well). If the staff of the centre can commit themselves to certain professional ethics that are seen as existing above their narrow political affiliations, it is also likely to help keep the service above the fray of community politics. This distance from community dynamics could however also result in the perception of detachment from community interests. A service that is not perceived to have organic links is likely to lose credibility and be seen as serving elite interests.

Professionalisation is also linked to the choice of mediators, and the type of training they receive. If volunteers are only accepted on the basis of factors such as their level of formal education or their ability to communicate in English (an important problem if the training is only offered in English), the perception of elitism is likely to undermine the relationship between the centre and the community. If the training is very technical or based on alien cultural values, the operation of the centre is also likely to create a feeling of alienation among those who use it. If the process used by the centre is not familiar in terms of local common-sensical understandings of conflict, the centre may acquire the respect of sections of the community (as the courts have done), but it will create a clear barrier between an empowered elite and the disempowered disputants.

Another important way in which professionalisation can be avoided is continuously to train new members of the community in mediation skills and to maintain a revolving roster of mediators. This will also serve to enhance conflict handling skill among the community at large. This is in fact what the

CDRT has undertaken by training an additional ten mediators in Alexandra in 1993.

Referral and Enforcement

The processes of case referral and enforcement of agreements are further points of interaction with the community and community organisations. The AJC has depended on the civic structures and the civic advice office for the large majority of its referrals. This dependency is itself a form of accountability but also serves to narrow the base from which cases are drawn. The referral of cases by the AJC is also very narrowly channelled to the civic advice office. Enforcement of agreements, an issue that the research has shown as problematic, has up till now not received much attention in the Alexandra situation. Community involvement in enforcement may be another option that could be pursued. If the terms of agreement were made public, there would be more moral pressure on the disputants to comply. This would of course also introduce other problems such as denial of privacy and the danger of vigilante action.

The case management process and the use of mediators in the AJC case both serve to reinforce its links with the civic structure, which was, to some extent inevitable, due to the way it was originally established. This dependency, while building on the strength of the civic, however also reinforces the limitations that may be inherited from the weaknesses of the civic.

Linking individual and group concerns

Interpersonal disputes have to be understood in the context of the divisions and conflicts that characterise the broader community. An organisation that provides assistance to individual clients should also be able to examine patterns of complaints which point to structural problems and which

require intervention at a political or collective community level. A mediation mechanism should thus have an interest in identifying such collective grievances and be linked to community organisations that can pursue collective goals through channels that can promote structural change. This linkage would allow the Justice Centre to serve both a research and a community building function. The research will be in the form of collecting information about widespread community grievances (information that could be used by community organisations) and the community building function would be in the form of educating disputants of the structural sources of their problems and channelling their grievances into organisations which can pursue collective action (eg civics, trade unions, political parties and women's organisations).

Power Inequalities within the Community

Any initiative related to dispute resolution should recognise the existing inequalities related to power and status in the communities they serve and actively pursue policies that address such inequalities. There has been an increased awareness on the part of NGOs of the problem of internal divisions within communities. The term 'community' has itself been challenged as a concept because it implies a sense of collective identity or commonality of interest and obscures the apposing interest of different sections of the population (see eg Friedman, 1993 Hutchinson & Green 1984). These divisions take on many forms such as class, ethnicity, housing sectors (eg landowners v tenants, formal v informal settlements), employment status (unemployed v formal v informal employment).

Power is disproportionately distributed in all communities. These power relations will be affected by the introduction of new resources and skills. External involvement (such as funding and the introduction of skills) should be

sensitive to these dynamics and be cautious of simply reinforce existing relations. Affiliation of the dispute resolution mechanism to any one organisation is likely to contribute to the power or prestige of that organisation. In a divided community (or within a divided or fragile organisation), such decisions are clearly very sensitive. The introduction of scarce resources (such as money or jobs) into a community or organisation can easily create tensions even where these had not existed before.

One important dimension that needs to be considered, and which illustrates the problems associated with such intervention is gender. Gender inequalities is a problem that affect both formal and informal dispute resolution mechanisms. A gender conscious policy for the establishment of dispute resolution mechanisms should ensure a gender awareness in the design, skills training, operation, and policy making process.

Dispute resolution initiatives should recognise the lack of consensus within communities regarding the processing of disputes, ie perceptions of appropriate forums and processes. Research by Nina and Stavrou (1993: 15), for example, show significant differences between men and women regarding their views on how to deal with certain domestic disputes. (Women are more inclined to call in external parties such as social workers and police, while men favour the involvement of family and friends.) Dispute resolution mechanism and procedures should be designed with an awareness of these differences built into the planning process.

Mediation also needs to be understood in terms of the role played by norms and values in determining negotiation behaviour and outcomes. Norms about appropriate or acceptable behaviour by men and women are continuously being debated in all South African communities. Mediators need to be aware of differences in values among disputants and the

values that they themselves promote in the mediation process.[15] Certain values should perhaps be made explicit and uncompromisable (eg issues relating to human rights). Values relating to gender roles in the black communities can prove particularly controversial because of their links with debates about traditional versus 'imposed Western' values. What should the role of community dispute resolution be in bringing about social change in a community's values and practices? The CDRT has spent months on consultation in all the communities where Justice Centres have been established attempting to ensure broad inclusivity. It has however also at times taken a stand on the inclusion of a certain proportion of women as trainee mediators. Such a policy could however be more actively pursued in relation to the participation of women as well as other marginalised groups in the community.

To see gender divisions simply in terms of value differences is however misleading. Power imbalances are clearly also a problem that need to be addressed. While this ultimately needs to be addressed at a wider social and political level, mediators have to aware of power dynamics and be willing to intervene to prevent domination by one party in the mediation process. The mediator may have to take a hard line in ensuring that the process itself is not be open to abuse by the more

---

[15] On the problems posed by different approaches to interpersonal communication between women and men see Tennen (1990), on how family and public values affects gender and justice, see chapter six of Orkin (1989). For a good discussion of different cultural styles and values relating to dispute behaviour in the United States, see Kochman (1981).

powerful party.[16]

Functions and Procedures

The present operation of the Alexandra Justice Centre is confined to voluntary, private mediation of non-criminal interpersonal disputes. Every parameter of this role needs to be subjected to examination in determining future options for development. Should all cases brought to the centre be voluntarily referred, as opposed to mandatory attendance? Should all the cases be treated as confidential disputes involving simply the two individual disputants? Should the forum allow for other processes such as arbitration, adjudication, med-arb (a combination of mediation and arbitration), etc? Should the jurisdiction be expanded to criminal cases and disputes involving groups rather than individuals?

Voluntary participation and agreements

Should any party ever be pressured to attend mediation? More specifically, should disputants ever be ordered to attend mediation by the courts, police, civics, or any other body that is capable of coercive sanctions? No party is, however, ever completely free from external pressure. So, what form of pressure is acceptable? The basic philosophy of mediation is founded in the belief in voluntary consensual decision making. Would pressure to participate in mediation undermine this principle, even if decisions about outcome are still left up to the disputants? In the case of mediation, it may be argued that

---

[16] Albie Davis (1984) addresses the question of compensating for power imbalances in mediation.

pressure to attend is offset by the voluntary nature of proceedings and consensual decision-making process. If, however, decisions are binding (as is usually the case in arbitration), participation should be voluntary. This would allow anybody with doubts about the neutrality of the mechanism or the justice of the procedure to opt out.[17]

Other forms of dispute resolution

The procedures used by dispute resolution centres is not neatly circumscribed - mediation is but one possible option. While the Alexandra Justice Centre is, at present, purely a mediation centre, the original plans envisioned a possible extension into forms of adjudication, particularly the addition of an arbitration component. The role of such a component is still being considered. It would allow the centre to take on a wider scope of cases, and it would also offer greater finality to those mediation cases which do not end in settlement.

The transformation of the centre into a multi-door community court where some cases can be heard by representative of the community and adjudicated according to community norms and values has also been suggested. The questions of procedure in arbitration and adjudication can become very controversial. On what basis are decisions made: formal law, community norms, perceptions of equity, 'common' sense? The use of such procedures would also introduce complicated policy questions. For example, would parties

---

[17] The issue of voluntarism in private mediation is contentious amongst scholars and practitioners. Some scholars argue that mediation can undermine the rule of law in that weaker parties can be pressurised to conclude unfair agreements (see for example McEwan and Milburn, 1993 and Faris, 1992).

participate voluntarily, or could they be forced to participate? If so, would the decision be binding or simply advisory? How would decisions be enforced? Would these decisions be recognised by the formal legal system? Would the community or community structures be given the authority/capacity to enforce decisions?

If mechanisms which place binding decision-making powers in the hands of a third party (eg arbitration or adjudication) are used, the policy questions become much more problematic. Such mechanisms raise the question of introducing and legitimating coercive mechanisms and measures. The introduction of such mechanisms will have major implications for their relationship to both judicial and local legislative structures (more about this later).

Confidentiality

The private/confidential nature of the AJC's operation has also been subject to debate. On the one hand it reduces public involvement in the resolution of disputes and possibly excludes relevant players or witnesses from getting to make an input. On the other hand it however allows a safer environment for people to air their grievances that they would otherwise have kept to themselves. People are often reluctant to involve the public in disputes that involve a personal relationship. These disputes may, in stead, be suppressed or avoided if a confidential forum was not provided. The private nature of the AJC mediation process also allows a more honest exploration of the issues in the dispute. Parties are not influenced by the judgements and perceptions that the presence of an audience would impose. As long as the composition of the mediators/arbitrators reflect that of the community as a whole, this would, in part, compensate for the lack of public involvement (Grant and Schwikkard, 1991: 314).

Jurisdiction

Another question facing the centres is the scope of their jurisdiction. Should they take on criminal cases? (At present, civil actions arising out of criminal cases are taken on.) Taking on criminal cases essentially means taking on the responsibility of determining guilt and innocence, a adjudicatory function which would imply extensive coercive control and would require much more extensive training. If they moved into this role, much greater regulation would be needed, and there should be clear boundaries about the type of cases they dealt with (no cases involving serious injury, rape, or murder) and limitations on the types of sentences which they are capable of imposing.[18]

In non-criminal cases should they take on disputes involving groups of disputants rather than simply interpersonal disputes? There would not seem to be any obvious reason not to, except if the mechanism is seen to be biased towards one group in the conflict. This would however also require additional training in dealing with more complex multi-party disputes.

Should there be a cap on the size of the amount that could be claimed through these procedures? Just as there should be limitations on the form of punishment that such mechanisms could impose and given the limited training received by their mediators, civil actions should also be kept within certain bounds.

---

[18] See for example Schärf's (1990a) proposed guidelines for procedures, jurisdiction and sentencing. Welch and Sachs (1990:23) also commented that certain types of cases (such as family disputes, neighbours' quarrels, etc) were effectively dealt with by the popular tribunals in Mozambique, while other more serious cases require professionally trained judges and established principles.

Linkage to other services

Another consideration is the linkage between the dispute resolution process and the provision of other community services related to interpersonal disputing, eg counselling, legal advice, etc. Combining these facilities in one venue would facilitate cooperation and ensure optimal coordination. Referring clients from one centre to another could result in frustration and eventual 'lumping' of many of the disputes.

While mediation services have been developed around a belief in impartial or neutral intervention in interpersonal disputes, it has also been motivated by a pursuit of access to justice. In South Africa, lack of access to justice is fundamentally associated with the relative power balance between disputants and impartial interventions such as mediation is clearly not (on its own) a viable channel for pursuing justice. Other assistance that can contribute to the empowerment of disputants such as legal advice, access to the public media, or direct advocacy also need to be explored. The AJC has mainly relied on its close links with the civic for the screening of non-mediatable cases and the channelling of these cases into other forms of assistance. The West Rand Justice Centre has, on the other hand, attempted to provide para-legal assistance, and in some cases assisted in providing direct advocacy for disadvantaged disputants.

Whether this empowerment route is likely to undermine the operation or reputation of a centre offering impartial dispute resolution services is debatable. If it does undermine the operation of such a centre, what are the relative costs and benefits of its inclusion? Are sufficient advocacy services available elsewhere in the community? The answer to the latter question is generally 'no', and the challenge is thus either how to provide such services without undermining the dispute resolution function, and/or how to maximise utilisation of whatever services are available and to ensure that an

impartial approach is not manipulated to the disadvantage of less powerful parties.

Links with Formal Legal System

This policy question relates to the tension which presently exists (and which will continue for some time to come) between the reluctance to deal with commonly perceived illegitimate institutions and the need to maximise the effectiveness of the centre in achieving its various goals.

Referral of cases

During the planning phase of the Alexandra Justice Centre, contact was made between the CDRT, ACO and the Department of Justice in order to discuss possibilities of cooperation. Only three referrals have however, to date, been received by the AJC through the formal legal system.[19] In the United States, the question of referrals through the legal system has been particularly contentious. The question has generally centred on whether the mediation process can still be considered voluntary if there is a (threat of a) civil or criminal case against one of the parties. It is an acute problem for those centres who rely mainly on the legal system for their case load. One option that has been applied (eg in the San Francisco Community Boards) has been to take such cases only if all court actions or threats thereof have been dropped.

The question of a two-track legal system is also a contentious issue. If the centre offers the court the option of

---

[19] The West Rand Justice Centre has received more referrals through the formal legal system and other state departments.

directing certain cases into other forums, is this not creating an opportunity for them to avoid processing cases that they feel are of less significance? Some such cases may be in dire need of legal intervention, and through relegation to mediation, disputants are denied access to formal justice. If we consider it necessary for certain cases to go to court, the question of which cases the courts refer to mediation should be carefully considered and monitored. The centres should not simply be dependent on the courts' perceptions of which cases suit which forums. One obvious response to this problem is that diversion to mediation should occur only with the consent of the disputants, but in the case of disputants with little knowledge of the legal system and their legal rights, this would be an insufficient safeguard.

This question can also be asked in reverse: how does a mediation centre decide which cases to take on and which to refer to the courts? One answer would again be to firstly inform the parties of their options and to allow them the choice. As previously discussed, certain cases should however be referred to court as a matter of policy because of the jurisdiction of the mediation structure. Other cases may also be referred on the basis of requiring stricter evidentiary hearings, or the community may also benefit from a clear legal precedent in certain cases.

Enforcement of agreements

Most of the cases that were mediated resulted in (signed) written agreements which are legally enforceable through civil action (clearly not an ideal option for most disputants). With regards civil action, there would be a problem in that some of the agreements made at the AJC only spell out broad intentions of cooperative behaviour, or do not specify dates for when certain actions would be taken or specific values for goods that will be replaced. Legal enforcement of such agreements may

therefore prove to be impossible. In cases where a clear legal case exists, it has to be decided whether or not police and court involvement in such enforcement is desirable. This has to be weighed up against the options of involving the community in enforcing compliance (as discussed above).

Formal Law v Local Values

Another consideration in the South African context is whether the centre should operate within the ambit of the formal law, or whether it should supplement, circumvent or appose it. The formal legal system does allow space for some local spheres of alternative control or self regulation. Historically under colonial and apartheid rule, this occurred through the jurisdiction granted to traditional courts and makgotla (Hund and Kotu-Rammopo, 1986). ANC aligned organisations have however also managed to carve out their own areas of autonomy which the government has been forced to concede. Most of our day-to-day interactions within organisations (social and work) are however of this type of locally regulated behaviour.[20] The question would thus be whether this space is sufficient for entire communities to develop sufficient levels of internal control for justice centres to operate effectively.

On the one hand, the operation of the centre should be able to maintain its integrity within the community within which it operates from the formal law (i.e. it should not have its decisions or agreements overruled by the external legal system), while on the other hand there needs to be some form of power vested in the legal system to review the operations and decisions

---

[20] See Henry (1985) for a further examination of this ambiguous relationship of support and opposition between the two systems.

of Justice Centres in order to ensure the protection of human rights (a position strongly advocated by Mowatt (1988; 1992a).

While most legal academics argue that ADR occurs in the shadow of the law with settlements being constructed on the foundation of law (see eg Mowatt 1992a and Faris 1992)[21], for people in many communities in South Africa the formal law is however not an ever-present entity , casting a shadow over their interactions with their neighbours, family, friends, or even those with whom they engage in business transactions. Most people are either relatively ignorant of the law, fearful of the legal system, reject its legitimacy or simply do not have access to it.

ADR has the potential either to exist in a symbiotic relationship with law, serving as a 'democratisation of dispute settlement rather than an isolation or abandonment of law' (Mowatt 1992a: 58), and it could serve to promote forms of local autonomy over norms and values. Formal law is clearly needed in a country with so little consensus on values and norms. The shadow of the law thus needs to be strengthened and extended to protect human rights and make the formal law accessible to all citizens. This does however not necessarily contradict the need for building strong structures of informal dispute resolution. There are tensions between promoting both at the same time, but the choice between the two is a false dichotomy. Formal law has its very essential uses, but should not be seen as an avenue to resolving each and every conflict that emerges in society. It is there to provide a framework, a framework which is also needed by dispute resolution mechanisms to protect human rights and to contribute to the rectification of power imbalances. The formal legal system has to be dominant in those areas that seen as essential to

---

[21] Mowatt (1992a) notes that this shadow of the law may be more of a "mottled shade" due to its ambiguity and its fragmentary nature.

maintaining human rights, but allow community self regulation where this is possible. The dominant legal ideology among legal professionals (as well as their professional self-interest) would appose the concession of such authority. It is thus a struggle that communities and ADR proponents would have to engage in, in order to promote the field.

The Future of ADR and the Formal Legal System

Limitations of the legal system

Under a new democratic nonracial government it is anticipated that the formal legal system will gain legitimacy by being an instrument of more legitimate laws and by undergoing various reforms that would make its staff more representative of the country as a whole. While addressing some of the concerns for a more acceptable instrument of justice, there are a number of reasons why it will still not suffice as a mechanism for ensuring a just and stable society. Even given a fairly extensive refurbishing of the legal system (with the introduction of more black magistrates, judges, etc), the sources of law would most likely still be seen as remote - emanating from a distant (geographically and hierarchically) source of power; the laws themselves would still be formalistic and often contradictory of local norms and values; the implementation of law would still be in the hands of a group of professional elites whose authority is difficult to question; the court procedures would still be alien and confusing to most participants; the process of judicial decision making would still be formalistic and non-participatory; and the system is expensive and therefore not expandable to the

extent of offering all citizens equal and effective access.[22]

Even in the ideal scenario of an accessible, accountable and legitimate system being established, the question may still be asked whether the legal system is an effective tool for resolving conflict? It has been widely argued that the legal system through its inherently adversarial nature, is not suitable for resolving complex disputes (particularly where long term relationships are involved). The legal system is more suited for establishing state-sanctioned norms and to provide a potentially powerful tool in the pursuit of confrontational strategies. It is aimed at establishing winners and losers in a zero-sum battle. It thus provides a framework for structuring interpersonal relations which allow for greater predictability and regularity of interpersonal interaction and transactions. It is focused on providing principles to guide the abstract, general aspects that characterise these relationships. Law is an 'imperfect and sometimes incoherent attempt to impose relative order on a few aspects of an infinitely complex social reality' (Mowatt, 1992a: 58). It does not look for creative solutions that may produce mutually satisfactory solutions, it is more concerned with the past interactions and legal entitlements of the parties than their future relationships or with their multiple individual needs.

The need for alternatives

The alternative or informal mechanisms of justice have come about in response to both the illegitimacy, the inaccessibility and the inappropriateness of the formal legal system. Simply addressing one or two elements of its failure will not negate the need for alternative mechanisms. Given the fact that the formal

---

[22] This point is true notwithstanding the valuable efforts of those attempting to expand the services and skills of para-legals, legal advice centres and legal aid.

legal system will be a part of a future South Africa (and will probably be entrenched in the constitution), and given its inability to provide effective dispute resolution services (a failure evidenced all over the world), it would seem that informal mechanism will also be with us for the foreseeable future. It has existed in the shadow of the formal South African legal system over a considerable period of our history (Hund and Kotu-Rammopo, 1986 and Burman, 1989).

People seek mechanisms and procedures which are able to provide quick, effective and accessible relief to their problems and which affirm the values of how members of a community should relate to each other. If the formal systems are not capable of providing these procedures and outcomes, other alternatives are pursued. Formal justice services all over the world have regularly failed to live up to the expectations of individual disputants. The highly professionalised nature of these systems have created a barrier between them and their clients. In South Africa this barrier is so vast that the reforms being considered in the present period of transition will only scratch the surface of the problem. The legal system is itself conservative in nature and is unlikely to welcome fundamental transformation. Without such transformation the need for alternative informal mechanisms will persist.

The need for regulation of ADR

Proposing policies regarding the future of informal mechanisms may be considered a contradiction in terms, because an essential element of an informal mechanism, one might argue, is the absence of external regulation. If such informal mechanisms were to continue (and we would argue that it is both inevitable and desirable), there is however a need for it to be either regulated by or incorporated into the formal legal system. The need for such regulation arises out of the potential of such mechanisms being abused or manipulated by certain

groups or criminal elements, resulting in the abuse of individual human rights. Such abuses have at times occurred under People's Courts in the past and are likely to emerge in communities that are internally divided or which lack strong civil/civic structures which incorporate a broad cross-section of the community. Mowatt (1992a) motivates for such regulation because of the lack of procedural safeguards offered by ADR procedures. The inevitability of the regulation of dispute resolution mechanisms arises from the unavoidable inclination of any government to have some control over the way in which disputes are resolved (the values guiding both the outcome and process). It is also (as illustrated by the state reaction to the operation of the People's Courts) a powerful way of challenging the legitimacy of state authority.

Local community dispute resolution mechanisms have emerged in many areas and play a vital role in providing a forum for resolving conflict and affirming local community values. Elements of these mechanisms need to be preserved and promoted, while other less desirable aspects need to be curbed or eliminated. Such regulation also has the potential for increasing their legitimacy in the communities more broadly and instilling a sense of trust in their accountability and fairness. Excessive regulation does however hold the danger of formalising the informal and thus destroying the essential reason for their existence. If such external constraints or impositions were seen to be excessive or foreign to local needs by those using the service, its utilisation would decrease and people would turn to other unregulated procedures for resolving their disputes.

> Attempts to impose unacceptable models will merely result in their being by-passed, as has always happened. It is important that future planners bear this in mind when tempted to introduce institutions which conform with ideologies or images rather than what people

perceive as their needs. (Burman, 1988: 165)[23]

Incorporation versus independence

Two possible options face the future of alternative dispute resolution. The one is to explore official incorporation into the future structures of government, and the other is to continue as autonomous non-governmental entities operating within certain parameters specified by law.

The first option can be pursued by restructuring the legal system so as to incorporate new structures that operate below or parallel to the magistrates' courts (eg as proposed in a SANCO Eastern Cape discussion paper (1993), and the proposal for multi-door courthouses presented by Paul Pretorius (1990) and Macrae Glaeser (1991)). Possible criticisms of such incorporation are that subjugation to the legal system would lead to formalisation of procedures and professionalisation of services, and that it would encourage vertical rather than horizontal accountability. Would the placement of dispute resolution mechanisms under a legal system corrupt the basic nature and goals of the process; i.e. community accountability and local empowerment, voluntary participation and equity? It could be argued that the logic and inherent values of the formal legal system and informal mechanisms are so at odds that they could not operate under the same umbrella. If disputes that were settled through such a subordinated community court was then appealed to higher court, the case would be judged on completely different grounds. The hierarchical link between these structures could thus lead to the ultimate dissolution of the lower alternative mechanisms.

---

[23] See also Schärf (1989) for a discussion of the underlying tensions between formal and informal systems of dispute resolution.

Some ADR proponents (eg Faris, 1992) argue that ADR should be incorporated into judicial processes in order to ensure the protection of the public interest and guard against the injustices which could arise from power imbalances between the disputants.

Many proponents of ADR have however argued that state attempts to incorporate ADR mechanisms and procedures (such as the Short Process Courts and Mediation in Certain Civil Cases Act of 1991) undermine the foundations of ADR while compromising the pursuit of justice (Mowatt, 1992b; Cohen, 1993). The strength of formal law is its dependence on procedural safeguards and reliance on external sources of authority. ADR's strength is its informality and flexibility in response to the various needs of the disputants. Legal reforms aimed at incorporating ADR procedures should thus construct and promote options which build on the strengths of both alternatives, rather than develop a hybrid which compromises the strengths of each.

Institutionalisation of informal mechanisms may also occur as a component of local government, ensuring local accountability and the pursuit of local values. The danger here is the possible exploitation of the mechanisms by locally dominant political parties and the abuse of procedural justice in the pursuit of effective policy implementation. Another weakness of such a system is the inevitable competition and problems of coordination with the legal system with which it will compete for authority and jurisdiction. A model of such a system (existing within the state, but outside the authority of the formal legal system) is that of post-revolutionary Cuba in the 1960s and early 1970s, which was ultimately undermined by (among other factors) this intergovernmental competition and jurisdictional conflict (Salas, 1983).

The second option, that of allowing the operation of autonomous community dispute resolution mechanisms as parallel organs of justice has its own advantages and drawbacks.

It would allow greater flexibility to conform with local practices and conditions and allow greater experimentation with forms and procedures. It could avoid state intervention that pursues particular interests and circumvent power struggles that divide the departments and sections of government structures. It would also act as a check on formal legal mechanisms by providing alternatives and exploring new forms of community ordering. Multiplicity of dispute forums may also serve to allow disputants greater choice and satisfaction. The problems associated with such an informal approach are that it would be hampered by a lack of funding, that it could be less effective because of its lack of formal authority, that it would be inhibited by its competition with formal structures, and, if not sufficiently regulated, it would allow for numerous abuses. As has been suggested in earlier sections, such regulation is both desirable and possible.

This second option would also make a valuable contribution to the strengthening of civil society. Community ordering should not simply be left to the state. It should be a social function that different sectors of communities are drawn into and in which they can actively participate. ADR should be promoted as a source of direct community empowerment, rather than something that will empower lawyers, judges or government officials to better serve the community. CDRT has chosen to promote the development of ADR mechanisms outside the ambit of the state. This is not in reaction against those who hold (or will in future hold) power, but is out of a belief that communities should themselves be empowered to take some control of this sphere of their lives. The role of the state is however still seen as important in assisting and regulating ADR initiatives.

Conclusion

The Need for Further Research and Analysis

This study provides an initial insight into the use of interpersonal mediation in a specific context. The foregoing analysis of the Alexandra Justice Centre is mainly from an individualistic disputant perspective. Further research is obviously needed, particularly studies examining the implications for community ordering and broader social relations. Policy questions regarding the future of dispute resolution mechanisms need to be informed by research in the field and the development of a more comprehensive body of knowledge. As yet the field of dispute resolution is still a very under studied component of the South African civil society. Many questions are left unanswered.

Disputant satisfaction is one important goal, but we also need to develop research approaches and strategies which allow us to examine more clearly the potentials for contributing to community transformation and empowerment. To what extent do mediation programmes have the potential to contribute to a transformation of the communities in which they operate? Which programme models and intervention processes hold the most promise for such a contribution?

To analyze the impact of this programme on the community would require one to locate the individual disputes within their social structural context. Each dispute involves issues and actors that are located in a social context which shapes the options for resolution and the power dynamics involved in pursuing these options. Certain interpersonal disputes are clearly expressions of deeper social problems. Each is in some way unique, but many also reflect a common underlying conflict of interests between categories of social actors. How does mediation impact such disputes? Does it

simply impact on the particular case while leaving the broader basis unaffected? If it is not in itself sufficient, what relationship do ADR mechanisms need to develop with other community organisations and state structures to address such underlying problems?

Under which conditions does interpersonal mediation suppress conflict and when can it serve as a channel for intergroup reconciliation or effective intervention in intergroup disputes? What are the structural links between interpersonal disputes and intergroup disputes and what is the connection between interpersonal mediation and intergroup dispute processes?

Also needed is a more thorough analysis of what happens in mediation, that is, an examination of the role of norms, values, power, etc in producing the reported 'acceptable' outcomes. Can mediation impact the values of disputants and affect the power balance, or does it (due to its emphasis on neutrality) simply allow these to be expressed in the dynamics of interaction and the formulation of an agreement?

Different types of conflict, and classes of social actors are affected by different structural relations and power disparities. These contextual factors also vary from one community to another and are dependent on local and national political developments. It would seem that the suitability of addressing each conflict through particular processes or mechanisms is dependent on the both the nature of the specific conflict and the context of sociopolitical relations. An examination of the suitability of dispute resolution mechanisms should thus be specific to the context of the community within which it is proposed, the types of conflict that could be addressed, and the structure of the mediation mechanism itself. Such studies should however also be cognisant of the factors than are common to all mediation interventions such as those relating to the national political and cultural context (eg patriarchy, capitalism, racism, and the basic principles of

mediation).

The Future of Informal Justice

The work of CDRT presents an important contribution to the dispute resolution dilemma. It is an attempt to explore one option to address the problem. It has generally proved successful, with the evaluation pointing to various aspects which need (and are capable) of improvement. In order for the field to mature, other initiatives need to be explored, assessed and opened to public debate.

The state structures and the legal fraternity have already undertaken various initiatives in relation to ADR. The question of access to justice and the role of dispute resolution in our society should however not simply be left in the hands of legal professionals. The problem of interpersonal disputing is an issue that should be addresses by all who have an interest in the shape of a future society. Legal reform and the establishment of new dispute resolution mechanisms should be a joint venture of legal professionals and community activists representing the whole range of community interests.

This paper has touched on the various issues that need to be addressed in examining the future of informal or community-based forms of dispute resolution. A few suggestions have been made, but many options and policy questions need much more detailed discussion. The debate is wide open; it is in need of research, new suggestions, and experimentation.

Hugo van der Merwe
MSc (Conflict Resolution) (George Mason University)
Research Officer, Centre for Applied Legal Studies

Mpumie Mbebe
BSocSc (Hons) (Cape Town)
Research Officer, Centre for Applied Legal Studies

REFERENCES

Burman, S.B. and W. Schärf (1990) 'Creating People's Justice: Street Committees and People's Courts in a South African City,' Law and Society Review, vol 24(3).

Burman, S.B. (1989) 'The Role of Street Committees: Continuing South Africa's Practice of Alternative Justice,' in H. Corder (ed) Democracy and the Judiciary, Cape Town: IDASA.

Cohen, Charles (1993) 'Mediation: terminology is important,' De Rebus, March.

Davis, Albie (1984) 'In Search of Symmetry: Power Imbalance on Mediation? What if anything, should be done to compensate for the differing power of parties,' May.

Faris, J.A. (1992) 'Reconciling alternative dispute resolution (ADR) and judicial dispute resolution' Codicillus, October, 33:2.

Friedman, Steven (1993) The Elusive 'Community': The Dynamics of Negotiated Urban Development, Centre for Policy Studies, Social Contract Series, Research Report No 28.

Glaeser, Macrae (1991) 'People's Courts: Popular Participation and New Legal Forms for a New South Africa,' Student Law Review, University of the Witwatersrand, vol 3.

Grant, Brenda and Pamela-Jane Schwikkard (1991) 'People's Courts?' South African Journal on Human Rights, vol 7, part 3.

Harrington, Christine and S.E. Merry (1988) 'Ideological

Production: The Making of Community Mediation,' Law and Society Review, vol. 22(4) pp. 501-527.

Henry, Stuart (1985) 'Community Justice, Capitalist Society, and Human Agency: The Dialectics of Collective Law in the Cooperative,' Law and Society Review, vol 19(2).

Hund, J. and M. Kotu-Rammopo (1983) 'Justice in a South African Township: The Sociology of Makgotla', Comparative Journal of International Law in Southern Africa, XVI, July.

Kochman, T. (1981) Black and White Styles in Conflict, University of Chicago Press, Chicago.

Levy, M.H. and J.G. Mowatt (1991) 'Mediation in the legal environment,' De Jure, 24:1.

Markinor (Pty) Ltd. (1990) Document on the socio-demographics of Alexandra, Johannesburg.

McEwan, Craig A. and Thomas W. Milburn (1993) 'Explaining a Paradox of Mediation,' Negotiation Journal Vol 9(1), January.

McGillis, Daniel (1986) Community Dispute Resolution Programs and Public Policy, U.S. Department of Justice, National Institute of Justice.

Mowatt, J.G (1992a) 'Alternative dispute resolution: some points to ponder,' Comparative & International Law Journal, 25:1, March

Mowatt, J.G. (1992b) 'The High price of Cheap Adjudication,' South African Law Journal, 109: 1

Mowatt, J.G (1988) 'Some thoughts on Mediation,' South

African Law Journal, 105: 4

Nina, Daniel and Stavros Stavrou (1993) Research on Perceptions of Justice: Interaction Between State Justice and Popular Justice, Unpublished paper, Durban.

Nina, Daniel (1992) Popular Justice in a 'New South Africa': From People's Courts to Community Courts in Alexandra, Occasional Paper 15, Centre for Applied Legal Studies, University of the Witwatersrand, March.

Orkin, Susan M. (1989) Justice, Gender and the Family, Basic Books, New York.

Pretorius, Paul J. (1990) 'Community Courts: A Proposal,' Unpublished paper delivered at a NADEL workshop, 7 November.

Sachs, Albie and Gita Honwana Welch (1990) Liberating the Law: Creating Popular Justice in Mozambique, London: Zed Books.

SANCO Eastern Cape (1993) Proposal for a Uniform Model of Anti Crime Committees and Community Courts, Presented in May 1993, Port Elizabeth.

Salas, Luis (1983) 'The Emergence and Decline of the Cuban Popular Tribunals' Law and Society Review, 17(4) pp. 587-612.

Schärf, Wilfried (1989) 'The Role of People's Courts in Transition,' in H. Corder (ed) Democracy and the Judiciary, Cape Town, IDASA.

Schärf, Wilfried (1990a) Memorandum on People's Courts, submitted to NADEL (Western Cape) on 26 October, 1990.

Schärf, Wilfried (1990b) People' Courts: The Sociology of Township Justice, unpublished report, UCT Institute of Criminology.

Stavrou, Vivi (1992) The Alexandra Community Crime Survey, Project for the Study of Violence, Presentation on 15 October 1992.

Storey, David S. (1991) Law, Community Justice and the CDRRC: An Examination of the Potential for Progressive Informalism, Unpublished Thesis, Wits Law School.

Tennen, Deborah (1990) You Just Don't Understand: Women and Men in Conversation, Bellambie Books, New York.

OTHER TITLES IN THIS SERIES:

Appointments to the Public Service in the Post-Apartheid South Africa: The need for constitutional checks and balances. by Colin Kahanovitz

Welfare Law and Bureaucracy in a Changing South Africa: A case study of state
maintenance grants for the illegitimate. by Sandra Burman and Amanda Barratt

South Africa and Transition: From autocracy to what? by Dennis Davis

Achieving Equality for Women: The limits of a bill of rights. by Cathi Albertyn

The Reform of the Workmen's Compensation Act: The beginning of democratic social security? by Paul Benjamin

Popular Justice in a "New South Africa": From people's courts to community courts in Alexandra. by Daniel Nina

A Constitutional Court for South Africa. by NRL Haysom

Taxation in a Post-Apartheid South Africa: Its limitations as a fiscal tool - a preliminary overview. by DM Davis

The Future of Muslim Family Law in South Africa. by Firoz Cachalia

Who Owns South Africa? Can the repeal of the land acts deracialise land ownership in South Africa? by Aninka Claassens