

LEGAL AND SOCIOECONOMIC DIFFICULTIES ASSOCIATED WITH THE INTRODUCTION OF COMMUNITY SERVICE ORDERS IN SOUTHERN AFRICA (With special reference to Transkei)

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INTRODUCTION

Transkei is like many other "Third World" regions. Most of its Xhosa-speaking inhabitants are desperately poor and suffer from all manner of socioeconomic problems; it is administered by a government which in the past has often been corrupt and ineffective¹. Transkei is where the "surplus population" of the 'old' South Africa were (in some instances) forcibly removed and is a difficult place to live².

Poverty in both underdeveloped and developed communities is increasingly seen to be at the root of the overwhelming majority of crimes³. Some say that crime often increases during times of decreased economic growth⁴, while others claim that crime is more prevalent during times of rapid economic growth⁵. With respect to both views, one can see a vicious cycle, in which a developing country's growth or decline in its economy is almost without exception a process of increased hegemony and a widening in the gap between the very rich and the very poor, with those in between struggling to make a living.

In such desperate situations, peoples' perceptions of what is morally 'right' and 'wrong' become blurred⁶. Some individuals see certain acts not as crimes, but merely as forms of "redistribution"⁷. Added to this is the devastating effect of South Africa's largely discredited

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¹ Both these and other unacknowledged facts are based on my personal observations and discussions with those living in the region.

² For an in-depth study of life in Transkei from a 'grass roots' perspective, see Julia Segar, 'Fruits of Apartheid: Experiencing 'Independence' in a Transkeian Village', Critical Studies in African Anthropology, No.2, Anthropos, 1989.

³ David Dewar, 'The role of city and local community planning in crime prevention', 3 SACC/SASK 1979, notes poverty as being 'the first causal element' in crime, particularly with what he refers to as the 'prevailing high degree of income inequality'.

⁴ Marx, although criticised for not having developed a 'coherent' explanation of crime, asserted that in times of recession, what he called the 'surplus population' sank into destitution, which then created what he termed 'the dangerous classes', who were likely to resort to crime. Discussed by Stuart Hall and Phil Scraton, 'Law, class and control', Crime and Society, Routledge, 1981.

⁵ Human Development Report 1990, publication by United Nations Programme for Development noted that 'rapid socioeconomic change . . . may lead to an increase in crime'.

⁶ Dlamini observes that 'sometimes ordinary and non-criminal conduct is criminalised for a variety of purposes'. A 'criminal sanction is applied to otherwise ordinary behaviour which evokes no moral condemnation'. -- Dlamini, 'In Defence of Ignorance of Law', SACJ (1989) 2 SAS, p. 14.

⁷ See Paul Harrison, Inside The Third World, 1993, Penguin, especially pages 153-157.

criminal justice system, which has failed to have much impact on the country's crime rate. A large number of offenders are imprisoned and many of them lose their jobs; family ties become strained, since the offender is very often the breadwinner. This often leads to increased poverty and a greater incentive to reoffend on release from prison. Whatever an individual has taken from the community in a material sense is rarely, if ever, returned and a return to prison takes even more out of the community through increased public spending on the prison service.

Deep concern over both poverty and the escalating crime rate have led a number of non-governmental organisations (NGOs) based in Transkei to consider proposals which would tackle both. One suggestion has been to introduce community service: suspended sentences conditional on the successful completion of public service within the community. Transkei has never had such a programme despite the potential benefits and the fact that the law already makes provision for it⁸.

The repressive culture of imposing harsh sentences and building bigger and stronger prisons merely creates more space for the increasing number of inmates, and results only in greater recidivism. The community is hardly protected, and the criminal rarely deterred⁹. Community service as a penal option could prove very effective in both addressing the poverty and the recidivism of offenders and freeing public funds which could be better used elsewhere.

However, the benefits of community service could be seen as being much wider than just to the individual offender and State budget. With many 'development' organisations facing a similar problem, namely a lack of resources and 'manpower'¹⁰, and with the current theme of development being one of "empowerment" rather than the paternalistic, dependence-creating practices of the past, it makes sense to look to the community itself for solutions¹¹.

A common criticism by and of criminologists is that they lack practical methods through which to implement their ideas. In view of this, what options are available in a region such as the Transkei? Why have past approaches to dealing with offenders proved unsuccesful? Is community service an option compatible with indigenous traditions, and specifically customary legal systems, or is it just another unsuitable western invention? If community service is to be adopted, what must be contained in such a programme for it to be viable? And finally, how will

⁸ s.303 of Criminal Procedure Act 1983 (Act 13 of 1983)

⁹ See R. Graser, op cit. fn 131

¹⁰ Development in Action: Transkei Model, Bureau of Development Research & Training, Univ. of Transkei, 1990, p.36

¹¹ L. Patel, Restructuring Social Welfare, Ravan Press, 1992, also argues for such an approach.

the community respond to the prospect of offenders being released into the community? The answers to these questions are complex, particularly if considered, as they must be, in the context of underdeveloped South Africa.

In the opinion of a South African social scientist working with street children in the Transkei region, the answer to these questions broadly lies in the willingness of people to accept what he calls 'a paradigmatic shift from retributive to restorative justice'¹². After placing the issue in context by providing some background information on the Transkei, this paper will attempt to explain how past strategies for punishing criminals were almost exclusively aimed at protecting the economy, rather than preventing criminality. This will be compared to the approaches of traditional courts to the issue of punishment, and arguments put forward for the incorporation of certain customary legal principles. It will then explain what is meant by community service and illustrate how the South African (and recently the Transkei) courts have dealt with the issue. The relevance of judicial and community attitudes to the sentencing of offenders will also be considered. Finally, this paper will conclude by proposing how community service can effectively "reverse" the unsuccessful and repressive penological approaches of the past, generating social and economic development through legal reform.

Whatever a person's position is on the justification of more 'restorative' penal approaches to tackling crime, they must ultimately appreciate that society cannot hope to tackle crime without also focusing attention on the elimination of poverty. Conversely, one cannot expect to eliminate poverty without also looking towards decreasing the crime rate. By tackling these problems simultaneously through a well-structured programme of community service one is economically and socially in a stronger position to do both.

I. BACKGROUND – THE TRANSKEI¹³

The history of Transkei is one of the more shameful examples of "euro-imperialism", if only because it has lasted so long¹⁴. With the spread of the "New Enlightenment" ideology throughout Europe (and later the colonial territories), the British abolitionists secured the abolition of slavery, only to see labour laws and 'employment contracts' in its place¹⁵. This form

¹² Jacques De Wet, director of the Umtata Street Child Programme, in his (unpublished) research proposal (1993).

¹³ Any uncorroborated facts are based on personal conversations and/or observations.

¹⁴ For an interesting, if conservative, account of the history of Transkei, see Beyond the Cape Frontier, eds. C. Saunders and Robin Derricourt, Longman, 1974.

¹⁵ F. Cooper, 'Contracts, crime, and agrarian conflict: from slave to wage labor on the East African coast', Labour, Law and Crime: An Historical Perspective, eds. Snyder and Hay, Tavistock, 1979, pp. 2280259

of waged labour was also introduced in South Africa¹⁶. It was the basis of a fundamentally unjust and repressive society which criminalised what had previously been traditional practices and fostered a tremendous amount of discontent amongst the indigenous peoples, denied what had for centuries been their way of life.

A. Politics and Political Institutions

Originally under the jurisdiction of the Cape Province in accordance with the Cape Acts¹⁷ (and later the 1913 Native Lands Act), the Transkei was re-established in 1976 as a nominally ‘independent homeland’, recognised only by South Africa¹⁸. It has been unique among the ‘homelands’ as being relatively peaceful, with the former head of the region, General Holomisa, having been a sympathiser with the ANC, though tolerant of other political activity in the region¹⁹.

Following the enactment of the 1993 constitution and recent election, the authority formerly exercised by the Transkei government has been passed on to the National Parliament, with certain powers devolved to the Eastern Cape regional legislature. The regional legislature has certain powers of veto over national legislation, which could prove to be problematic in the area of law reform²⁰, vitally important under the ANC government’s plans of redistribution.

B. Law and Legal Institutions

The laws enacted by Transkei throughout its brief period of “independence” were virtually identical to South Africa’s. Decisions of the Supreme Court of Transkei have occasionally been reported in the South African Law Reports and appeals have been allowed (though rarely taken) to South Africa’s appellate division.

Transkei is divided up into separate magisterial districts, with a Regional Magistrate and various subordinate magistrates in each one. Tribal courts also operate alongside the magistrates courts, with similar jurisdiction. Appeals can be made first to the Regional Magistrate, then to the Supreme Court and finally to the national (South African) appeal court in Bloemfontein. Magistrates, especially those in rural areas, have very little knowledge of the law or procedure

¹⁶ Alan Rycroft, ‘Criminal Sanctions and Labour Relations’, SACJ (1989) 2 SAS, p. 272

¹⁷ Act 38 of 1877. For more on the British governance of ‘Native’ territories (including Transkei), see G. Dold and C. Joubert, The British Commonwealth, Vol. 5 (The Union of South Africa), Stevens and Sons, 1955, pp. 197-244

¹⁸ Status of the Transkei Act 1976, see 15 ILM 1175.

¹⁹ For further reading see R. Southall, ‘Rethinking Transkei Politics’, *Journal of Contemporary African Studies*, Vol 11, No 2 (2991) pp. 1-30

and are inadequately supervised. Tribal magistrates are said to be notorious for their particularly harsh sentences.

Bail is in most cases outside the financial reach of defendants and so they are usually detained until the case goes to trial. The problem is compounded by long trial delays, in some cases lasting up to 3 years. With few able to pay fines, the court almost inevitably sentences offenders to corporal punishment or to a term of imprisonment.

C. Legal Services

There are only a handful of attorneys working in Transkei, and even fewer advocates. Those few who don't handle company matters struggle with heavy caseloads and are increasingly reluctant to represent clients pro bono. Since lawyers of sufficient means often try to find work in the more developed parts of South Africa, the overall quality of legal expertise in the region is limited. Legal Aid is virtually non-existent. There are a couple of under-resourced NGOs offering legal advice²¹, but they are incapable of adequately servicing the Region.

Consequently, defendants who find themselves before a Transkei criminal court, often there for relatively minor offences involving dishonesty (minor fraud, theft) or non-payment of fine, are rarely represented. Based on their experiences, NGOs report that over 90% of defendants have no legal representation at any stage of the proceedings and are often unaware that they have a right to defend themselves in court.

D. Prison System

The conditions of Transkeian prisons are terrible²². There are no beds, only blankets (often infested with lice) and inadequate medical treatment. Assaults are common, juveniles share cells with adult prisoners²³ and communication with the outside world is often limited to one visit and two letters a month. Families travel long distances, only to discover that the prison authorities refuse to let them in. By far the biggest problem is overcrowding, with facilities holding far beyond their official maximum capacity. Rehabilitative programmes are limited.

²⁰ Due to political disagreement.

²¹ Lawyers for Human Rights was the largest with a staff of 5 lawyers (only one who was fully qualified) and 7 support staff. There was also a para-legal project which offered legal advice to the more rural districts.

²² Africa Watch, the regional section of US-based NGO Human Rights Watch, included a section specifically on the conditions of South African prisons in the Human Rights Watch Global Report on Prisons in 1993.

²³ Exposing them to potential physical and sexual abuse.

E. Facilities and Infrastructure

Over 3 million people live in the region²⁴, some in the small city of Umtata, but the majority in the rural areas. As with most ‘Third World’ countries, Transkei suffers from poor roads²⁵, inadequate transport²⁶ (minibus taxis and infrequent buses – many people hitch), under-resourced medical facilities²⁷ and an under-funded educational system²⁸. There is one university in Transkei and 17 technical schools²⁹, but few receive a place; those that do discover large classes, poor facilities and a faculty struggling with over-stretched funds. Students who can afford to, attend universities in other parts of South Africa. Housing is inadequate and a large number of people live in slum-like conditions in Umtata’s Ngangelizwe township. Rural people live in similar conditions, with no running water, electricity, etc. Finally, a lack of social facilities means that people largely depend on shebeens (illegal drinking houses) for their entertainment. Not surprisingly, alcoholism is a major problem³⁰. Though the Transkei Development Corporation has made some effort to improve the situation, a lot more needs to be done³¹.

The few whites living in Transkei are comparatively well-off, many living in high security compounds with few non-white neighbours. They are disliked by some Transkeians³²; and not surprisingly, for those who are in Transkei for “altruistic” reasons (aid workers, etc.) seem equalled in number by those who are there to make a “fast buck”.

²⁴ The region also has a comparatively high population density of 67.2 persons per km². 94.9% are concentrated in rural areas. – Source: SWTBVC Country Statistics (1987).

²⁵ In 1983, Transkei had 8,998 km of roads, of which only 941 km were paved. – Source SWTBVC Statistics (1987). This figure is likely to have increased slightly since then, but personal experience suggests that things have not changed much.

²⁶ In 1985, there were only 59,666 vehicles (1 per 50 people), including motorcycles, tractors, etc. of which 6,475 were government owned in 1985. – Source: SWTBVC Stats. (1987)

²⁷ In 1985, Transkei struggled with 32 hospitals (1 per 94,000 people), 1 health centre and 218 clinics, serviced by 248 doctors, 5,467 nurses and 27 paramedics. By comparison, South Africa had 701 hospitals (1 per 39,500 people) and 1,563 health centres, with 20,477 doctors, 91,633 nurses and 20,179 paramedics. Source: SWTBVC Stats.

²⁸ 1985 figures reveal that there were 2,923 schools and 17,790 classrooms in Transkei and 19,192 teachers, in contrast to South Africa with 17,156 schools and 195,837 teachers. 870,213 pupils attended school in Transkei (4,694,193 in South Africa). Transkei thus had **twice** as many students per teacher as South Africa. Source: SWTBVC Stats.

²⁹ 1985 figures, which are unchanged, indicate that there is only 1 university. South Africa has at least 18 universities and 212 technical schools. – Source: SWTBVC Stats.

³⁰ Bradshaw, McGlahsan & Harrington, Oesophageal Cancer: Smoking and Drinking in Transkei, Institute of Social and Economic Research, Rhodes University, 1983.

³¹ For a discussion on development initiatives in the region, see Development in Action, op cit. Fn 10

³² The tensions which exist between white and non-white residents is made abundantly clear with the graffiti that covers the walls of Ngangelizwe township (outside Umtata), including slogans such as ‘Kill a White Man a Day’ and ‘One Settler, One Bullet’.

F. Employment

Jobs in Transkei are scarce³³. Consequently, many have found work in the ‘informal sector’³⁴. Before the elimination of “influx control”, those who had been lucky to obtain passes³⁵ to work and live in South Africa did so, often leaving their families behind to work in the mines³⁶ or in one of the sprawling cities in South Africa. Transkeians who have found work in the region face widespread exploitation (low wages, summary dismissals), mainly because the employers know that they can easily get away with it³⁷.

It is quite possible that the statistics referred to grossly underestimate the extent of underdevelopment in the Transkei region³⁸, but even based on these figures once can see a gloomy picture indeed.

In the following section, it is suggested that many of Transkei’s present difficulties arose out of a combination of rapid industrial growth and oppressive state control, which were the cornerstones of the South African government’s polices, up until very recently. Approaches to crime have to a large extent focussed on the State’s control of the market, rather than the causes and prevention of crime. This approach has not only proved to be ineffective in tackling the problem, but has exacerbated the region’s considerable socio-economic troubles.

II. SOCIAL TRANSFORMATION AND PUNISHMENT

History has shown that the traditional approach to crime and criminals has not reduced criminality to any marked degree³⁹.

Viewing human actions in isolation from their surrounding circumstances is a common mistake of economists, lawyers and criminologists. One cannot adequately explain human activity in ignorance of specific, historical experience. Therefore, an appreciation of the history

³³ At the time of the 1986 census, unemployment stood at 82.4%, which accounted for ‘transfrontier commuters’ (i.e. those working in South Africa), migrant workers and those in the informal sector (scholars, messengers, hawkers, etc.) It excludes the ‘non-economically active’ population (undefined) – Source SWTBVC Country (South Africa and Dependents) Statistics (1987).

³⁴ The former Transkei government has been hostile to those working in the informal sector, especially pavement vendors. See Nicoli Natrass, Street Trading in the Transkei: A Struggle Against Poverty, Persecution and Prosecution, Development Studies Unit, University of Natal, 1984.

³⁵ Under the misleadingly titled Bantu (Abolition of Passes and Co-Ordination of Documents) Act (Act 67 of 1952), non-white South Africans could only work outside Transkei if they obtained a special permit. The laws have since been repealed.

³⁶ Rian Malan, My Traitor’s Heart, 1990, Vintage, pp. 236-263 describes in sobering detail the working conditions of a South African gold mine.

³⁷ The overwhelming majority of clients seen by Lawyers for Human Rights, a legal NGO operating in Umtata, have sought advice with regard to labour problems.

³⁸ Iraj Abedian, in his 1983 study On the Accuracy of BENSO National Accounts Statistics, Saldru Working Paper No. 53, argues that statistical figures supplied by the government are inconsistent and incoherent and therefore unreliable.

of colonial domination, in particular the effects of its 'social transformation' is essential to an understanding of "real" crime⁴⁰.

Early colonial administrators, in some cases the representatives of large corporations such as the British South Africa and Dutch East India Companies, saw tremendous prospects in Africa, principally in the exploitation of cheap labour and products such as cloves, coconuts and later gold⁴¹. Having found most indigenous peoples living a pastoral way of life in rural areas, the authorities had to find a way to manipulate or "transform" the population both in order to capitalise on the marketing of indigenous products and to harness an efficient labour force. The colonialists' attempts to do so in South Africa were evidenced by draconian labour and criminal laws, largely in accordance with the successive governments' policy of *influx control*⁴².

In this context, one can compare the experiences of Tanzania and South Africa, in which the laws concerning crime and employer/employee relationships had effectively been legal instruments of colonial domination. The particularly coercive means by which a market economy was established in both colonial territories has had a devastating effect on the social and economic conditions of the indigenous peoples of the area⁴³. The desire for the accumulation of wealth over the colonialists' regard for humanitarian concerns was especially evident in South Africa, where the value of a black person's life and property were seen as negligible in the pursuit of economic growth, to the virtually exclusive benefit of a white minority.

The theory of the 'transformation' of societies into social orders which were compatible with the vision of a market economy, as expounded by Karl Polanyi⁴⁴, has proved influential in understanding the history of colonial domination. The reinterpretations of his theory are of significant interest in that they not only help us understand the deleterious effects of colonial intrusion, but provide explanations for both the present causes of crime and approaches to punishment.

Polanyi wrote in length about the evolution of a 'market economy'⁴⁵, the essence of

³⁹ R. Graser, in *Crime and Punishment in South Africa*, McGraw Hill, 1975, p. 201

⁴⁰ Francis Snyder and Douglas Hay, 'Comparisons in the social history of law: labour and crime', *Labour, Law and Crime: An Historical Perspective*, eds. Snyder and Hay, Tavistock, 1979, p.1

⁴¹ See generally, *Labour, Law and Crime: An Historical Perspective*, op cit. fn 40, esp. Cooper, 'Contracts, crime, and agrarian conflict: from slave to wage labor on the East African coast', pp. 228-252

⁴² For further reading, Mark Sher, 'From dompas to disc: the legal control of migrant labour', *Crime and Power in South Africa*, eds. Dennis Davis & Mana Slabbert, publ. David Philip, 1985, pp. 72-89

⁴³ For further reading on this see B. Davidson, *The Search for Africa*, Random House, 1994.

⁴⁴ Karl Polanyi, 'The Great Transformation', Beacon Press, 1944.

⁴⁵ *Ibid.*, p. 57

which was dependent on the State's ability to 'control the economic system'. This has been made abundantly clear in South Africa, where it has been said that 'criminal sanctions are linked to economic and fiscal forces'⁴⁶. By excluding certain persons (specifically non-white persons) from the better-paid part of the formal sector, the government was able to fashion an economic infrastructure which, though of great benefit to the minority, was extremely oppressive to everyone else. Polanyi criticised the fact that state 'control (was) . . . ultimately . . . of overwhelming consequence to the whole organization of society'⁴⁷.

This sort of control formed part of the justification for highly repressive policies, such as South Africa's policy of apartheid, or separate development. In order to maintain these separate economic spheres, the State found itself having to exercise repression and mass-scale redistribution of people and land, which it did with impunity.

The fact that most people in the "marginalised" section of the economy found themselves in increasingly desperate financial circumstances while the minority section thrived is a perfect testament to Polanyi's assertion that 'the emergence of the idea of (a self-regulating market) . . . was a complete reversal of the trend of development'⁴⁸.

Of course, Polanyi's theory went in to much greater depth, far beyond the scope of this essay, but his description of the market economy resulting in the 'smashing up of social structures in order to extract the element of labour from them'⁴⁹ are highly persuasive in understanding South Africa's attempts to create such an economy by forcible means.

Hay and Snyder described what they saw as three, specific historical processes seen to be instrumental in the development of a capitalist economy: the 'emergence of an industrial working class', 'social reproduction of the working class' and 'discipline or control'⁵⁰. It is this latter process which is of particular relevance.

III. DISCIPLINE AND CONTROL

Shivji examined the use of penal sanctions in Tanganyika, and the way in which they had been used to coerce the population into playing an active part in the colony's labour force⁵¹. He

⁴⁶ Alan Rycroft, 'Criminal Sanctions and Labour Relations', SACJ (1989) 2 SAS, p. 271.

⁴⁷ Polanyi, *Ibid*, p. 57.

⁴⁸ *Ibid.*, p. 68

⁴⁹ *Ibid*, p. 164.

⁵⁰ Snyder and Hay, *op cit. fn 40*, pp. 20-23.

⁵¹ Issa Shivji, 'Semi Proletarian Labour and the Use of Penal Sanctions in the Labour Law of Colonial Tanganyika',

held that the colonial state carried out a highly interventionist role, and responded to the 'problems of discipline and desertion' by introducing criminal sanctions. He criticised master and servant legislation (remnants of which remain in some western legal systems) and especially the colonial administrators' justification that these laws were 'in the interests of the servants'⁵².

It might be that the prevailing utilitarian ideology, which saw law as a way of effecting social change, had a role to play in all this, but such structuralist arguments are questionable, given that what the British introduced in East Africa, on the pretext of offering Africans their freedom, amounted to little more than a "modified"⁵³ form of slavery.

Law in South Africa has, throughout its history, been said to have had a 'directive or normative function'⁵⁴. Labour and criminal laws in that country have served as coercive tools as a means of implementing the successive governments' policy of 'separate development'. Criminal sanctions have been seen as 'pivotal features of labour control in South Africa'⁵⁵. Sumner wrote that 'the penetration of capitalism into . . . weaker countries was made by force, not by consent'⁵⁶. This is not difficult to accept, given that the criminal justice system in South Africa was, at least at one time, quite willing to imprison mass numbers of black offenders for several months at a time for contravention of the Pass Laws⁵⁷ or for defying regulations under the Group Areas Act⁵⁸.

Rycroft briefly examined South African legislation regulating the relationship between employer and employee, and specifically how this was used as a form of 'labour control'. He remarked upon how the government used law to control the activities of both employers and employees, but in the case of employers the acts were in certain instances 'simply symbolic politics'⁵⁹ with little enforcement of health and safety regulations, etc. At the same time, the government's provision for the welfare of employees was concessionary, in that they aimed to 'cool' industrial disputes without giving too much power to the trade unions. Furthermore, the State criminalised certain trade union-related activities, using the police and defence forces and emergency regulations to enforce employment laws and break up industrial disputes. Actions

Crime, Justice and Underdevelopment, ed. Colin Sumner, Heinemann, 1982, p.40.

⁵² Ibid., p. 50

⁵³ N.B. Workers were paid, though hardly a living wage.

⁵⁴ As posited by C Sumner and emphasized by Rycroft in his article, 'Criminal sanctions and labour relations', *Ibid.*

⁵⁵ Rycroft, *Ibid.*, p. 273.

⁵⁶ Colin Sumner, 'Crime, Justice and Underdevelopment: Beyond Modernisation Theory', in Crime, Justice and Underdevelopment, ed. Sumner, Heinemann, 1982, p. 30.

⁵⁷ Op cit. fn 35. See also John Dugard, Human Rights and the South African Legal Order, Princeton, 1978, pp. 75-77

⁵⁸ Act 36 of 1966. See also Dugard, *Ibid.*, pp. 79-83

⁵⁹ Rycroft, *Ibid.*, p. 275.

such as these were 'not infrequently justified "in the public interest"'⁶⁰.

Rycroft's conclusion was that the 'public interest' was in fact the 'employer's interest', which might lead one to further conclude that the State's interest was not with the welfare of its citizens so much as with the smooth operation of the market. He criticised the appropriateness of criminal sanctions regarded by most of society as 'morally neutral' in that they 'debilitat(ed) the moral impact of the criminal conviction and decrease(d) the overall effectiveness of the criminal law'⁶¹. His argument is, essentially, the same as Polanyi's, that workers were 'subordinated to (the market system's) requirements'⁶².

Apartheid in South Africa was only sustainable to such an extravagant extent, for so many decades, because it succeeded in marginalising the majority of the population and exercised a brutal regime of state control, in order to protect the white-dominated market⁶³. With so many economic and social barriers in place, the majority who still live in abject poverty have few opportunities of finding a way out of their desperate circumstances other than through crime. With past approaches to tackling crime having failed, in large part due to the State's oppressive control of the market, it is imperative that new approaches to dealing with offenders be developed.

For the sake of comparison, it is interesting to examine the way in which customary law has approached the punishment of offenders.

IV. CUSTOMARY LAW AND THE TREATMENT OF OFFENDERS

The sense of community prevails in this . . . society. It is the natural and pervasive background from which no individual can wholly extricate himself in thought or action.⁶⁴

Traditional African legal approaches provide us with some interesting and persuasive precedents for the use of more restorative measures in response to criminal offences.

Much of the research in this subject has focused on "customary law" as it was practised under colonial domination. However, British influence eventually became so entrenched through the policy of indirect rule that much "legal sediment" had permeated into traditional practices, effectively transforming it into a different body of law altogether. This is particularly evident in

⁶⁰ Ibid, p. 282.

⁶¹ Ibid, p. 283.

⁶² Polanyi, *op cit.*, p. 71

⁶³ It eventually proved to be quite unsustainable in the end, due to diplomatic and (most importantly) economic pressures from the international community.

⁶⁴ J.F. Holleman, Issues in African Law, Mouton & Co., 1974, p.40.

Cotran's examination/codification of customary law as practised in the local courts of Kenya⁶⁵, where sanctions such as the use of imprisonment had become common practice, though they were relatively recent developments and a "European import"⁶⁶.

As Read remarks, it is 'not sufficient to compare western notions of punishment with those adopted in traditional Africa'⁶⁷. He maintains that the 'man in Clapham' has little relevance to people living in Africa⁶⁸. Junod observes that:

Western influence through colonial rule has imposed the western system of combating crime, which has notably failed even in western countries.⁶⁹

Many Transkeians living in urban areas have adopted a largely western orientation, with a tendency to identify with European values and practices over more traditional ones. A similar situation exists as in Zambia, where political, legal and social structures which were in place before Europeans arrived have been all but 'wiped out'⁷⁰. It is interesting to note that a growing number of people are of the view that many of the problems which post-colonial societies struggle with today can be traced back to the legacy of colonial rule, the European structures of which were 'transplanted' and entrenched at independence⁷¹.

Institutions best serve those who created them, especially if one considers the relevance of present structures from the point of view of the average citizen. In light of this, it may be desirable to examine **pre-colonial** approaches to punishment and consider how they connect with the notion of community service.

It is evident from writings which adopt a more "afrocentric" position that pre-colonial local courts distinguished differently between what Europeans perceive to be "offences" and injuries to a person⁷². Although little has been written on customary law's approach to crime and

⁶⁵ E. Cotran, Report on Customary Criminal Offences in Kenya, (1962).

⁶⁶ Julius Lewin, Studies in African Law, University of Pennsylvania Press, 1971, writes that 'imprisonment was not a form of punishment known to the Africans (but rather) Europeans introduced them to it', p. 91

⁶⁷ J. Read, 'Crime and Punishment in East Africa' in 1964 Howard Law Journal, Vol 10, p. 164 at 167.

⁶⁸ *Ibid.*, p. 185

⁶⁹ Dr. H P Junod, (1966) East African Law Journal 31

⁷⁰ Mwansa, 'The status of African and customary criminal law and justice under the received English criminal law in Zambia: A case for the integration of the two systems', Z.L. Rev. Vol. 4 1986, p.27, notes that 'Missionaries regarded African law and customs as mere aspects of paganism which had to be wiped out in order to pave the way for christianity and "civilisation"'.

⁷¹ See Basil Davidson, The Search for Africa, Random House, 1994 and Ruth Weiss Zimbabwe and The New Elite, British Academic Press, 1994.

⁷² I. Schapera, A Handbook of Tswana Law and Custom 1938, Oxford University Press, on page 257, describes legal wrongs dealt with in Tswana courts as 'based primarily upon the nature of the offence committed, i.e. of the right infringed,

punishment among the Xhosa (in Transkei), it is evident that much is shared by indigenous legal systems throughout Southern Africa. A common theme among various customary legal systems (in Southern Africa and elsewhere) is a deep concern over what law **does** or **ought** to do, in contrast with European, positivist obsessions over what law **is**⁷³.

In Bechuanaland, as Schapera explains, tribal courts were accorded jurisdiction to deal with both criminal and civil matters under the Native Tribunals Proclamation (No. 75 of 1934), s. 8(1). This jurisdiction extended to all offences except those of a serious nature. However, before the passing of the legislation which, it must be noted, emanated from the British colonial administration, the indigenous courts exercised jurisdiction over all matters, irrespective of their seriousness.

The punishments imposed by the Tswana tribal courts are of particular interest in that they were, generally speaking, far more restorative in nature, in stark contrast to the retributive nature of European-style criminal sanctions⁷⁴. For example, in cases of bodily assault, the tendency of the local courts was to impose a fine, which would then be passed on (in part or in full) to the person injured⁷⁵ as compensation.

So-called 'wrongs against property' were also approached in the theme of restorative justice, by compensating the victim rather than simply punishing the offender. For example, in the event of a settlement not being reached on a boundary dispute the matter was referred to the Chief, as head of the tribal court. Following this, the court considered whether or not to "punish" the trespasser. Schapera describes an offender who had encroached on another's fields as being 'ordered to plough another field belonging to the real owner, as compensation for having wasted his time by involving him in a dispute when he should have been busy ploughing'. Naturally, the corn produced by this field would belong to the owner of the field⁷⁶. Rather than a fine being imposed by the State, or in this case the tribal Chief, the court resolved the matter by attempting to put things right. The matter was settled not only by ordering compensation, but the court also ordered the offender to perform labour for the benefit of the victim, a most unusual approach as

and **does not attempt to distinguish clearly between civil wrongs and criminal offences**' (emphasis added). Lewin, Studies in African Law, op. cit. fn 66, p. 89, holds that there 'is no clear distinction between criminal and civil law'.

⁷³ T.W. Bennett, A Sourcebook of African Customary Law for Southern Africa, Juta, 1991, Chapter 1

⁷⁴ The same can be said of the Sotho, where compensation was the most common approach taken by tribal courts in dealing with offences under Sotho law. Of this, see Patrick Duncan, Sotho Laws and Customs, O.U.P., 1960, pp. 103-115.

⁷⁵ Schapera, Ibid., p.259. Schapera explains that 'the idea underlying this practice was that all tribesmen belonged to the chief, and therefore any bodily injury inflicted upon one of them was a wrong inflicted upon the chief'. He further maintained that in the 'olden days', the law of retaliation was practised (e.g. by ordering the assailant to inflict a similar wound on himself with a similar weapon), but that recently the court was more inclined towards compensation, which increased commensurate to the nature of the offence.

compared to the European practices of the day.

Damage to property was settled in Tswana courts through the 'general principle . . . that the owner of the property damaged is entitled to restitution or compensation'. The court also considered the offender's ability to pay. As with trespass, the tribal courts have ordered offenders who cause damage to others' property (whether intentionally or by accident) to assist the victim replace what has been damaged or destroyed⁷⁷. Theft was also dealt with by way of compensation⁷⁸.

Schapera continued to discuss the procedures of Tswana courts, by describing alternative bodies which dealt with disputes within the community. The scope of these bodies was 'confined mainly to attempting to provide a peaceful settlement of the dispute'. Again, the emphasis was not one of laying recriminations, but on returning the injured party to the position he/she was in before the offence occurred, a restorative approach, as it were, rather than a retributive one.

Similar indigenous approaches to crime have existed in other parts of Africa, as in the Sudan⁷⁹. Howell (a former colonial administrator) explained that, to the Nuer, 'the concept of punishment was unknown'⁸⁰. Stressing the practice among the Nuer of 'collective responsibility'⁸¹, that 'there is rarely an isolated individual wrong or an isolated right', Howell emphasised that it was very much the exception that an individual was simply blamed for his misconduct, but instead his standing within the community was altered somewhat. Sanctions were not punitive in the "normal" sense, but amounted to 'loss of privileges' which the offender had by virtue of his being a member of his community. The severity of the sanction was determined in the context of 'structural relativity'⁸², which decreased relative to the 'closeness' of the relationship between offender and victim⁸³.

Howell further noted the 'resistance' of the Nuer to the State's attempts to punish (especially imprison) a culprit, believing that such matters were best dealt within the

⁷⁶ Schapera, *Ibid.*, p. 269.

⁷⁷ Schapera, *Ibid.*, p. 270, where he gives the example of an offender who set fire to another's hut. He was ordered "to cut new rafters and poles, to provide thatching grass and to pay for the rebuilding of the roof".

⁷⁸ Schapera, *Ibid.*, p. 271. In cases of theft, 'as a general rule . . . the owner of the stolen property is entitled to receive twice the value of the article stolen'.

⁷⁹ P.P. Howell, A Manual of Nuer Law, O.U.P., 1954.

⁸⁰ Howell, *Ibid.*, p. 2.

⁸¹ Howell, *Ibid.*, p.23. This view also expressed by Mqeke, *ante*.

⁸² Howell, *Ibid.*, p. 24. Referring primarily to familial relationships.

⁸³ Although there is a greater likelihood that the wrong will be rectified.

community⁸⁴. He accepted that the practices of the Nuer were deeply affected by the British courts, pointing to a misunderstanding of (or perhaps contempt for) Nuer ideas of justice⁸⁵ on the part of magistrates. However, he seemed to suggest that the views of the Nuer prevailed, in spite (or perhaps because) of the pervasiveness of indirect rule.

Other discussions of customary law have also stressed the 'communal element' which had played a major role in deciding disputes between individuals and those involving an individual against the community generally. There is a general theme of the importance of harmony within the community⁸⁶. When this harmony is broken, the community is unstable and efforts must come from all who are a part of the community to restore it. As one writer put it:

. . . the court is not merely concerned with the question of right or wrong but also with the effect of the judgement upon the future relations between the parties, which are so vital to the life of the community itself.⁸⁷

The conflict, he said, belonged to and was to be decided by 'the **community itself**'.

These are intriguing concepts when compared to the approach of other legal systems, where it is apparent even today that many people's perceptions of "justice" are shrouded in the belief that offenders **must** be punished, whether in retribution or to serve as examples to others⁸⁸. The idea that offenders should be rehabilitated is a view not universally popular, even in countries such as Britain, where the "culture of retribution" still persists⁸⁹. "Modern" British society seems more ready to condemn than to forgive, although it is still a country which imposes community service as a sentencing option⁹⁰.

⁸⁴ Howell, *Ibid.*, p. 62.

⁸⁵ Howell, *Ibid.*, p.237.

⁸⁶ Martin Chanock, *Law, Custom and Social Order*, Cambridge University Press, 1985, in his critical analysis of customary legal practices which exposed what he saw as many misconceptions of African custom, disagrees, though he does maintain that 'if harmony is no longer perceived in (indigenous) societies a new view is needed of what the essence of "restoring the equilibrium" was'.

⁸⁷ J.F. Holleman, *op cit.* fn 64, p.3

⁸⁸ Take the recent case of the American teenager who was recently flogged in Singapore as punishment on a conviction for vandalism. Despite calls for clemency from US President Clinton, most Americans were of the view that the sentence should be carried out.

⁸⁹ The vengeful attitudes of many Britons towards sentencing offenders were recently made clear in the 'Bulger case' as against the 2 children who were found guilty of murder. There were even suggestions that the two offenders (aged 10 and 11) should have been hanged.

⁹⁰ In 1992, out of a total of 1.52 million offenders, 44,100 were ordered to perform community service (up from 42,500

Chanock is of the view that ‘customary law is not customary’⁹¹. His criticism of the ‘myth’ that African customary practices were all geared to compromise extended to his firm rebuttal of the approach of certain anthropologists, who he said were trying to ‘reassert the pre-colonial Africanness’. However, he is intensely critical of British colonialism, holding that certain indigenous groups ‘held Europeans responsible for the moral decline’. On punishment, he partly concludes by stating that,

British oppression was contained partly within the legalism of its legal system and also partly in the failure of the system to live up to its promises⁹².

He even refers to a form of community service, imposed by the Native Authorities in Nyasaland in 1937⁹³, which he notes as ‘the element of a different practice surviving’⁹⁴.

Chanock’s observations on the nature of customary law fit well with the belief of many, including Mqeke (supra), that customary law is not static, but intended to be ever-changing. However, customary law has not been allowed to evolve due to the practice of colonial courts to invoke the ‘repugnancy test’ whenever there was a conflict between customary practice and the common law. Bennett observes that, in Transkei, customary law was recognised by the courts provided it was ‘compatible with the principles of humanity observed throughout the civilized world’⁹⁵. In practice, the courts may have chosen to ignore the customs altogether. In any case it seems that customary laws were never really ‘tested’ in the courts and thus remain largely undeveloped, certainly in a formal sense.

Speaking of Transkei, Mqeke asserts that ‘law is or sought(sic) to be a cultural reflection of the people it is intended to serve’⁹⁶. He points to customary law as being ‘group orientated’ and that a ‘breach of rules in one set of activity (causes) disturbance in a wide range of (other) activities’. If this is true, then it seems logical to assume that Mqeke would support the argument

the previous year) Criminal Statistics: England and Wales, HMSO, 1992

⁹¹ Martin Chanock, Law, Custom and Social Order, op cit. fn 86, p. 4

⁹² Ibid. p. 134

⁹³ Malawi has, and still does, operate a programme of extra-mural penal employment very similar to the scheme that existed in Tanganyika (Supra, pp. 37-38) through the Convicted Persons (Employment on Public Work) Act, 1954 and Rules (Cap. 9:03)

⁹⁴ Chanock, Ibid., p. 119

⁹⁵ Bennett, The Application of Customary Law in Southern Africa, reprinted in Bennett, op cit. fn 73, p. 112

⁹⁶ R.B. Mqeke, ‘Traditionalism in Modern African Legal Systems with Specific Reference to the Legal Position in Southern Africa’, Transkei Law Journal 1988, p.2. This was in response to a comment made by an Afrikaans professor that

in favour of community service in that it addresses the 'disturbance' in the community and is more in line with 'group orientation' (i.e. sentencing persons back into the community rather than cells).

Mqeke speaks in favour of the 'export (of) some of the basic notions of indigenous law such as the principle of reconciliation or consensus, social solidarity, flexibility, etc.' He also claims that what is needed is to bring customary law in to parity with the colonial system, with equal application to every person, irrespective of their background⁹⁷.

Koyana also sees law in the Transkei as 'a reflection of the way in which people live' and suggests a direct correlation between customary practice and legitimate⁹⁸ law, provided it is 'long established', 'reasonable', 'uniformly observed' and 'certain'⁹⁹. Seeing, as Howell¹⁰⁰ did, a degree of 'conscious adjustment' in customary law which arose out of resistance to colonial domination, Koyana does not see this as in any way preventing customary law from being accepted by the community.

Koyana concludes by calling for a 'macro-jurisprudential approach' to law reform which, he says, 'implies full understanding of the phenomenon of law as normative rule, sociological fact and ethical ideal'¹⁰¹. Appreciating the "organic" nature of customary law, he nevertheless is of the view that it should to some extent be codified, so as to avoid its 'extinction'¹⁰².

In agreement with Mqeke and Koyana, it is evident that a fundamental re-examination of Transkei's legal system needs to take place. In light of these customary laws, one can see a strong tendency, in dealing with offenders, towards an approach to sentencing based more on restoration rather than punishment. This approach, also being central to the philosophy behind community service, is one which is vitally needed in the Transkei region.

Given the immense confusion and overlap of both traditional practices and the "legacy" of colonial rule, which has so deeply pervaded much of African society, it is unlikely that community sentencing will achieve immediate, universal acceptance. It will take some time, though arguably less than some might expect¹⁰³, before people appreciate the benefits of keeping

to revive customary law was a waste of time since it was, in his opinion, dying out.

⁹⁷ For further discussion on the integration of customary law into European-based legal systems, see Mwansa, Z.L. Rev. Vol. 4 1986, p.23

⁹⁸ In the sense that it is respected by Transkeians.

⁹⁹ Digby Sqhelo Koyana, Customary Law in a Changing Society, Juta & Co., 1980, p. 91.

¹⁰⁰ See supra.

¹⁰¹ Koyana, Ibid., p. 156

¹⁰² Ibid., p. 158.

¹⁰³ Mwansa, op cit. fn 70, reports that 'the vast majority of Zambians do not believe that imprisonment is the best way to control crime (and that many Zambians viewed (that) an increase in employment opportunities was the best method' (for

people out of prison. Indeed some crimes are so horrific that protection of (and from) the community (custody) will be seen as the only option.

In short, it would be difficult completely to dismiss European concepts of punishment, which might in certain instances conflict with customary law, simply because they are not indigenous to the Transkei. The "westernization" of much of Transkei's urban society is such that to completely ignore European approaches to punishment would be denying many citizens what they now perceive to be fundamental. However, there is significant scope and precedent for the "re-establishment" (or at least equal application) of certain customary legal principles, specifically those aimed at reconciliation, restitution and compensation, principles also shared by community service.

V. THE "CONCEPT" OF COMMUNITY SERVICE

Many misconceptions surround the philosophy behind community service, including the belief that it is a "soft option". Whether one is of the view that what is needed is 'a little less understanding and a little more condemning'¹⁰⁴ or of the belief that 'when a person does wrong the aim should be to rehabilitate that person'¹⁰⁵, they are likely to let their emotions dominate their sensibilities, and therefore pre-determine their approach to community service. It is therefore important to illustrate briefly the theory behind community service orders, as practised in England and broadly replicated in South Africa.

Whereas community service in South Africa is a direct alternative to a custodial sentence, or rather one of a number of possible conditions to a suspended sentence, in England it is a sentence in its own right, though some believe that the offender should be made aware of the sentence to which community service is an alternative¹⁰⁶.

Community service was introduced in England and Wales by the Powers of Criminal Courts Act 1973, ss. 14-17 (as amended by s.10 of the Criminal Justice Act 1991) in response to recommendations of the 1970 Wootton Committee. It is a sentence which can be imposed on offenders aged 16 and over, for a period ranging from 40 to 240 hours (120 for 16 year olds)¹⁰⁷.

attacking property crime).

¹⁰⁴ This has been a popular 'catch-phrase' of the conservative government in the UK, in line with its rigid policy of law and order, though it contrasts sharply with certain policy papers, notably the 1990 White Paper, 'Crime, Justice and Protecting the Public'.

¹⁰⁵ Mr R M Matatu, member of the Transkei Legislative Assembly, Hansard, 6th Session of the 2nd National Assembly, 11 June 1984.

¹⁰⁶ Ken Pease, Community Service Orders: A First Decade of Promise, Howard League for Penal Reform, 1981, pp. 23-25

¹⁰⁷ Harding and Koffman, Sentencing and The Penal System, Sweet & Maxwell, 1988, p.213

Community service is very much "welfare-based", in that responsibility for the programme falls under the Department of Health and Social Services in conjunction with the National Association for the Care and Resettlement of Offenders (NACRO), a non-governmental agency.

The government sees two main objectives of a CSO, namely reintegration of the offender into the community through:

- 1) positive and demanding unpaid work, keeping to disciplined requirements; and
- 2) reparation to the community by undertaking socially useful work which, if possible, makes good damage done by offending.¹⁰⁸

There should not be any discrimination on grounds of race or sex, and enforcement of this is the responsibility of the Secretary of State¹⁰⁹. The relevance of the seriousness of the offence, as well as the offender's previous convictions, largely depends on the discretion of the courts. Pre-sentence reports are invaluable in the determination of a particular offender's suitability for a CSO, and his consent to the imposition of the CSO is required by s.2(3) of the PCCA 1973.

Whereas the case law on community service in England has greatly developed since its initial introduction in 1973¹¹⁰, in South Africa the courts have yet to develop a broad jurisprudence which covers many of the outstanding issues connected with community service orders. However, the guidelines enumerated by Mr. Justice Pickering in the Transkei case of S v. Sikunyana¹¹¹ will hopefully be of significant use to sentencers in developing the use of CSOs.

Having examined what community service **is** (at least in theory), it is also necessary to consider what community service **is not**. There have been several examples of "community based" penalties in African countries which, though achieving the aim of diverting offenders away from prison, have other, undesirable aspects as well.

The British in Tanganyika introduced a programme of Extra-Mural Penal Labour in 1933,

¹⁰⁸ 'National Standards for the Supervision of Offenders in the Community', issued by the Secretary of State under the Criminal Justice Act 1991.

¹⁰⁹ s.95, CJA 1991

¹¹⁰ For a comprehensive, recent and well presented survey of the law and practice surrounding community sentences in the UK, see Richard Ward and Sarah Ward, Community Sentences: Law and Practice, Blackstone Press, 1993.

¹¹¹ Op cit. fn 121

which was effectively prison labour without incarceration. Based on a similar programme introduced by the British authorities in Palestine, it ‘played a vital part in preventing even greater overcrowding in prisons’¹¹². Eligibility was limited to those who would otherwise have been sentenced to imprisonment of 6 months or less or a fine of 1,000 shillings or less. The choice was the offender’s, provided he had not been barred by the magistrate. The programme was fairly successful. For example, in 1961, only 764 offenders ‘failed to co-operate and were sent back to prison’, out of a total of 15,569 offenders that year¹¹³.

However, the work which was carried out was largely in the State’s, rather than the local community’s interests and there was no ‘link’ between the nature of the work and the crime committed¹¹⁴. Eligibility was limited to those offenders who would otherwise have received a short prison sentence or small fine, thus excluding a large number of offenders who might otherwise benefit. What was desirable about the programme was that it not only kept the offender out of prison, but required his consent, which undoubtedly played a large part in its relative success.

Swaziland recently introduced a programme of Extra-Mural Penal Employment (EPE)¹¹⁵. Largely under the remit of the prison service which refers offenders to the scheme (though magistrates also have the power to refer), it involves placing the offenders in unpaid employment, with 40 hours of work per week equivalent to a week in prison. Like the programme in Tanganyika, it is an alternative way of dispensing with a prison sentence. The success of the scheme has been measured by not only the money saved, but that approximately a third of those taking part in the scheme obtained full-time employment as a result of their placement. Some evidence even suggests that some offenders have been ‘decriminalised’ by the experience.

But as with EPE in Tanganyika, the work carried out doesn’t appear to be directly in the interests of the local community. The Swaziland programme involves work in businesses as well as State agencies, which would seem to bear little relation to the crime committed.

The community service programme ultimately introduced certainly must not amount to the sort of prison labour which was practised in South Africa during the era of apartheid, where

¹¹² J. Read, ‘Kenya, Tanzania and Uganda’ in African Penal Systems, ed. Alan Milner, Routledge, 1968, pp. 148-152

¹¹³ Ibid., p. 149

¹¹⁴ Discussed in more detail in the following section.

¹¹⁵ Information based on a report of the 1989 Conference on penal reform, organised by Penal Reform International (reference unknown).

prisoners were ‘subordinated to the aims of making a profit’¹¹⁶. In addition to the matters considered in the following section, the work done should largely be voluntary, though there has been a suggestion that there be ‘some form of remuneration’¹¹⁷, which might form part of a trust fund, for the benefit of the victims or to help support the offender’s family.

VI. JUDICIAL RESPONSES TO COMMUNITY SERVICE

It is indeed a mark of civilization that nations seek to prevent crime and reform offenders.¹¹⁸

The Criminal Procedure Act, 1983 (Transkei Act 13 of 1983), s.303(1)(a)(i)(cc) [South Africa Act 51 of 1977, s.297] provides as follows:

Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion - postpone for a period not exceeding five years the passing of sentence and release the person concerned - on one or more conditions, whether as to - (compensation, rendering to the victim of some specific benefit/service, good conduct, etc. or)... **the rendering of some service for the benefit of the community** (my emphasis).

Community service in South Africa and Transkei is not a sentence on its own; it is a condition which may be attached to a suspended sentence and therefore a direct alternative to a custodial sentence. The significance of this becomes apparent when one considers the underlying philosophy behind the imposition of a Community Service Order (CSO).

If a prison sentence is generally seen to reflect the severity of the crime committed, then the CSO must, as the cliche goes, be punishment that fits the crime. Put another way, ‘the difficulty (of the sentencer) is whether to find some link between the service that has to be performed and the crime or offence that was committed’¹¹⁹. This quote by a magistrate in Durban highlights the problems sentencers face when deciding whether or not a CSO order is

¹¹⁶ T M Corry, Prison Labour in South Africa, NICRO, 1977

¹¹⁷ See supra ‘Judicial and Community Attitudes to Sentencing’

¹¹⁸ William Clifford, An Introduction to African Criminology, Oxford University Press, 1974, p. xi

¹¹⁹ T.D. Reid, ‘Community Service as an Alternative to Imprisonment: A Judicial Perspective’, 8 SACC/SASK 1984,

appropriate. He cites the example of a person convicted of reckless driving, where voluntary work helping to provide first aid to crash victims would be appropriate, but that 'in other cases, the link may be very remote or non-existent and it is not any easy matter to decide whether a sentence of community service is justified at all'.¹²⁰

The importance of his emphasis on 'link' cannot be overstated. Sentences cannot simply be arbitrarily "plucked from the air", as certain magistrates and judges seem wont to do. Although sentencers are endowed with a great degree of latitude as to which sentence they ultimately decide to impose on an offender, it is imperative that society demand a certain degree of justification (i.e. judicial reasoning), particularly in the case of community sentencing where a convicted offender is to be "released" into society. It is also extremely important that the offender be made to realise the consequences of his actions.

The landmark case of S v. Sikunyana¹²¹, heard in the Supreme Court of Transkei in 1993, was the first of its kind in the former 'homeland' (and the rest of South Africa for that matter) seriously to address the issues which a magistrate should consider in deciding whether or not to impose a sentence of community service. Mr Justice Pickering, while commending the magistrate for his initiative in ordering community service, was concerned at 'the manner in which he approached the whole issue'¹²² of the imposition of the CSO.

Pickering, J. urged that, in future, magistrates take an approach of 'clarity and precision' and undertake 'a proper investigation into all relevant issues'. He then went on to lay out a number of guidelines which had been in use by magistrates in Capetown and were endorsed by the South African Attorney-General. Although he stressed that they were not drafted by him, but by NICRO¹²³, no Transkei judge before him gave them any consideration. He also emphasized that the guidelines were merely for the purposes of guidance to magistrates and a certain degree of flexibility was expected on the part of the sentencer. In other words, they are not to be seen as 'immutable'.¹²⁴

The guidelines (as amended by Pickering, J.) are as follows:

p.129

¹²⁰ Ibid, p.129.

¹²¹ The State v. Sikunyana, 1994 (1) SACR 206 (Tk), Supreme Court of Transkei, Review Judgement.

¹²² Ibid., p. 209.

¹²³ National Institute for Crime Prevention and the Rehabilitation of Offenders.

¹²⁴ Sikunyana, Ibid., p.215

(1) Minimum age of 15 years

It is difficult to see any reason why a person younger than 15 years should *prima facie* not be subject to a community service order. If seen, as it should be, not only as a penal measure but also as a welfare initiative, then it seems a good idea that younger persons who find themselves in trouble with the law be dealt with at an early stage. Some believe that preventing criminal tendencies is easier with younger offenders¹²⁵.

Whether or not a young offender is suitable for community service will obviously depend on a number of factors, but in some instances it may be found that the trouble a young offender is in hides a deeper problem¹²⁶. Taking a "welfare approach", therefore, is in any case bound to be desirable.

(2) The accused must be employed and have a permanent residence.

In the matter of employment, Pickering, J. doubted both its relevance and necessity, recognising the high rate of unemployment in the region. As for the requirement that an accused have a permanent residence, it is clear that this is intended as a safeguard to ensure compliance with the order, in the same way in which such a condition is attached to an order releasing an offender on bail. As desirable a provision as it may be, given that the housing situation in South Africa, and particularly Transkei, is woefully inadequate, it is difficult to imagine a CSO being rejected simply because the accused was homeless.

(3) An employed accused is to perform a maximum of 16 hours of community service per week. An unemployed accused is to have no weekly limit.

Community service, to the extent that it is aimed to be rehabilitative, is not intended to put people out of work, and therefore if a person is employed at the time of his conviction, it would be foolish to jeopardise his employment which could put him in a position where he would be tempted to reoffend. It should therefore be seen as ideal that a CSO is carried out during a person's "leisure time". In this respect, it is also a justifiable criminal sanction on a person's liberty, which gives the CSO its punitive edge. With an accused who is unemployed, as

¹²⁵ Clifford, Introduction to African Criminology, op cit. fn 118, pp. 162-180 advocates this approach.

¹²⁶ Ibid., p. 169

is often the case¹²⁷, there are no such concerns.

(4) Community service should range between 60 and 300 hours.

This maximum limit seems reasonable on the face of it, in that it is broadly in line with South African and British community service programmes¹²⁸. However, if Transkei were to adopt a programme similar to Extra-Mural Penal Employment, as operated in Swaziland¹²⁹, in which the length of such an order is equal to that which the offender would have spent in prison, this point could prove to be problematic.

(5) Community service should be completed within one year.

The idea that a CSO should be carried out within a year is possibly in part meant to ensure that an offender is not subjected to unreasonably lengthy servitude, at the mercy of the State¹³⁰. Growing opinion that the benefits of custodial sentencing are reduced the longer a person spends in prison¹³¹ might equally apply to a CSO. The same "hard man" mentality that is developed by long-term prisoners could conceivably be acquired by those carrying out long sentences of community service. People eventually, albeit reluctantly, grow accustomed to something they despise if they spend a long time doing it, which renders worthless any penal measure meant to rehabilitate.

(6) Persons convicted of virtually any kind of offence can be sentenced to community service, but persons with aggressive tendencies, alcoholics, drug addicts, mentally disturbed persons and sexual offenders are not suitable candidates.

Pickering, J. referred to the South African cases of S v. Russouw¹³², in which it was held that a CSO was inappropriate for an offender who had a propensity to resort to dishonesty when

¹²⁷ Pickering, J. makes note of Transkei's high rate of unemployment on p. 214, *Ibid*.

¹²⁸ CSOs in England and Wales are between 40 and 240 hrs.

¹²⁹ See *supra*.

¹³⁰ In other words, one should avoid the sort of 'penal labour' which has been practised in the past. For more on this, see generally, T.M. Corry, *op cit. fn 118*

¹³¹ R. Graser, 'The Pre-Sentence Investigation as an Aid to Rational Sentencing', *Crime and Punishment in South Africa*, McGraw Hill Publishers, 1975, p. 201, notes that 'there is little, if any, scientific evidence that severe sentences or the anticipation of these effectively deters actual or potential law-breakers'. 'In fact', he says, 'it is obvious that imprisonment has a detrimental effect on the offender and his family and, through its negative consequences, to society itself.' In England, similar views of many senior advocates and judges are expressed.

¹³² 1991 (1) SACR 561.

faced with a crisis; and S v. Louw¹³³, which held that community service was appropriate for a second offender whose first conviction was for a dissimilar offence in respect of which he was not sentenced to a term of imprisonment. It is evident from these two cases and others that jurisprudence on community service has not developed to the point where it adequately clarifies whether or not an offender will be suitable for a CSO.

Cases such as Russouw tend to undermine the credibility of community service as a sentencing option without offering a great deal of justification. Indeed in Russouw, Berman, J. held that community service 'should be reserved for deserving or "special" cases', referring to the offender's conduct in the case as 'a character defect which renders him prone to criminality'. The judge was apparently keen to address the issue of retribution, for which a CSO, in his opinion, would not do, though he still insisted that community service was a valuable penal measure.

It is difficult to understand why the judge in question, who was as enthusiastic about community service as he appeared to be¹³⁴, did not simply alter the **terms** of the CSO rather than the sentence itself. The case was unusual in that the accused, charged with fraud, was of substantial enough means whereby his creditors were likely to be reimbursed, especially since the accused's employer still valued his services, despite his conduct. There was also probably a certain degree of public expectation that Russouw be suitably punished. But the case is atypical of most offences which come before the courts and few offenders will have the earning capacity of Mr. Russouw. It is hoped that this case will not be used to prevent the imposition of a CSO upon an accused of more modest means who, despite a propensity for dishonesty, might be no less prone to criminality after a term of imprisonment than if his sentence were suspended¹³⁵. The case of Louw, where the accused's previous conviction did not render community service unsuitable, in a sense confirms this though it was decided six years before Russouw. Further cases which deal with the matter of suitability will be dealt with later.

Community service would clearly be unsuitable for many dangerous offenders, against whom society is entitled to a certain degree of protection. But the criminal justice system is unlikely to protect society by routinely punishing offenders with a term of imprisonment.

¹³³ 1986 (2) SA 236.

¹³⁴ Referring to community service as 'a most valuable weapon in the armoury for fighting crime', p. 564, *Ibid.*

¹³⁵ It arguably far more common for retribution to be exercised against those who have less. Russouw himself had been found guilty on at least one previous occasion of a dishonesty offence, for which he received merely a suspended sentence!

Penological approaches which depend solely on punishment lack a 'rational basis'¹³⁶ and ultimately do little to protect society when the offender is in most cases eventually going to be released.

The advantage of community service is that it can be specifically designed for individual offenders and relate far more closely to the particular circumstances of their crime. This "individualising" of sentences is the rehabilitative aspect of community service and an integral part of 'the link'¹³⁷.

Certainly it is difficult (if not impossible) to say with any certainty whether a given CSO option will rehabilitate those convicted of a certain kind of crime, but it would be rash to dismiss the possibility of rehabilitation in all cases and **automatically** sentence offenders to a term of imprisonment, or to pay a fine (which, it has already been mentioned, they are unlikely to be in a position to afford). If there is scope for alternative sanctions then one should always opt to keep a person out of custody. Ultimately, the idea is to avoid the "knee jerk" response which holds that "those who break the law should be locked up". As understandable as such feelings are, they are still irrational¹³⁸ and must be seen as such, not only by the general public, but by the sentencer.

(7) Community service should not be used if the offence is so serious that non-custodial punishment would bring the system of criminal justice into discredit in the community.

This guideline is undeniably an important one, but it might be measured against the views of the many people who suffer under South Africa's burgeoning crime rate that the present system has completely failed them. The guideline by NICRO stated that 'convicted persons who would otherwise have been sentenced to a term of imprisonment of more than 12 months do not qualify'. But Pickering, J., agreeing with the decision in S v. Abrahams (discussed in more detail later), disagreed that CSOs should exclude those who have committed more serious offences. The South African community must be made to understand that a CSO is not a "soft option", but is indeed punitive. Those who manage such a programme should make this "community education" aspect as vital a part of their agenda as the content of service itself.

¹³⁶ Rabie and Strauss, Punishment, Lex Patria, 1979, p.7

¹³⁷ See *supra*.

(8) Persons who are socially isolated, purposeless and who have not yet had the opportunity to make a positive contribution to society are regarded as being suitable for community service (emphasis added).

This is an important provision, for it gives magistrates specific examples of what to look for in deciding whether or not an accused is a suitable candidate for a CSO. The characteristics mentioned in the guideline are shared by many offenders who would otherwise be incarcerated, to their further detriment. It includes many young offenders (especially those who have not been able to secure jobs) and those individuals (young and old) who have been unable to get anywhere in life, for whatever reason, and (as suggested in the introduction) eventually saw crime as the only viable alternative¹³⁹. In short, it implies a "welfare approach".

(9) The court must be satisfied that the accused is acceptable to those to whom he is allotted and that he can be of use there and not be a burden.

(10) He must be acceptable to those entrusted to his care. If he is rendering a service to the aged, children or the disabled they should not mistrust or fear him.

(11) It is desirable that the accused agree to perform community service.

Community service in England **requires** that the accused consent to the making of the order¹⁴⁰. South African law imposes no similar condition, though in practice the accused is likely to agree to the making of the order, particularly if he faces a term of imprisonment in the alternative. Certainly it seems logical to assume that an offender is more likely to successfully complete a sentence to which he consents, rather than one imposed against his will.

(12) The envisaged task must be morally justifiable in its relation to the circumstances of the offence.

By this it is apparently meant that the service which the accused completes must not be

¹³⁸ In that such reactions appeal more to people's emotions than their sensibilities.

¹³⁹ R. Schweitzer, 'Towards a community approach in criminal management', 3 SACC/SASK (1979), p. 238 at 239

overly harsh or lenient, given the particular nature of his crime. This is also connected with the "principle" of the 'link', discussed earlier. Both the punitive and rehabilitative nature of the sentence should reflect the severity of the offence.

- (13) The offender must not be given potentially dangerous duties such as with a fire-fighting unit or rescue service¹⁴¹.**
- (14) The service must not be in conflict with the person's religious beliefs and practices.**
- (15) The initiative for the imposition of a community service order should come from the magistrate, but the prosecutor, defence counsel or the accused himself can ask that a CSO be imposed.**
- (16) If the magistrate is of the opinion that community service is appropriate he must ask for a probation officer's report¹⁴², who should be made aware of what the court has in mind so as to facilitate the proper placement of the accused.**
- (17) Courts should approach the whole issue of community service selectively and with care.**

The danger of non-compliance is a considerable, potential problem with CSO's, and it is for this reason that, as far as practicable, there should be agreement on the part of the offender, the person who is due to supervise him and, naturally, the court, of the conditions of the CSO. In the same vein, it is important that the accused is of use and not a burden, that the CSO will not put him (or anyone else) in a position of danger and that it is not in conflict with his religious beliefs. The agreement factor is possibly the strongest element, and may well determine whether or not a CSO will be successfully carried out. As mentioned earlier, one is arguably far more

¹⁴⁰ s.2(3) of the Powers of Criminal Courts Act 1973.

¹⁴¹ In addition to the obvious need for avoiding danger to those he "serves", the offender must not be in physical danger himself. For further reading on the liability for injuries to offenders sentenced to community service see (1981) 30 Buffalo Law Review, pp 387-404.

¹⁴² Pre-sentence reports are discussed later.

likely to carry out something to which they have agreed¹⁴³, and so it should be not only desirable, but a necessary prerequisite, as in England, that the offender agree to the terms of the CSO.

Pre-Sentence Reports

The pre-sentence report is of paramount importance¹⁴⁴, since it is usually the only piece of objective evidence by which a judge decides which type of sentence is appropriate. Pickering, J. expressed that:

The very purpose of obtaining a probation officer's report would be to enable the court to be placed in a position to consider properly the appropriateness or otherwise of a community service order and the terms of such order.¹⁴⁵

He observed that there was a serious shortage of social welfare officers in Transkei, with even fewer of those who would be qualified to prepare a probation officer's report. But, he offered, magistrates should not be 'hamstrung' by these administrative difficulties and should use the best resources that are available.

The success or failure of a community service order will undoubtedly depend on the extent to which it has been conceived and organised¹⁴⁶. These guidelines go a long way towards setting down a "policy" for the use of community service which is likely to develop as the CSO is recognised as a valuable sentencing option by government, the judiciary and the community. Organisations such as NICRO will play a pivotal role in co-ordinating all these interests and in developing viable programmes. Consequently, these guidelines are of as much importance to them as they are to magistrates, perhaps even more so.

VII. SOUTH AFRICAN JURISPRUDENCE

Other cases in South Africa have attempted to address the issue of community service, though the law in this area has unfortunately evolved in a rather "piecemeal" fashion, with little

¹⁴³ The case of S v. Miners, 1992 (2) SACR 359, held that an accused who was aggressive and unwilling to co-operate with the probation officer was not suitable for community service.

¹⁴⁴ R. Graser, 'The Pre-Sentence Investigation as an Aid to Rational Sentencing, op cit. fn 131, greatly stresses the need for pre-sentence investigation, the 'logical first step', as he calls it.

¹⁴⁵ S v. Sikunyana, Ibid., p. 211

¹⁴⁶ For more on the organisation of community service programmes, see Antonia Tzannetakis, Community Service: An

indication of a general consensus on the value and applicability of CSOs. Nevertheless, it is important to consider what has developed.

The case of R v. Khumalo¹⁴⁷, also referred to by Pickering, J. in Sikunyana, was the first to attempt to deal with the matter of the suitability of community service. The accused, a policeman charged with culpable homicide, was found to be suitable for the imposition of a CSO. The case was helpful in that it recognised not only the ‘serious disadvantages which necessarily flow from imprisonment’ but also that ‘the feelings of the community should be adequately reflected in the sentence of the Court’. The decision to impose a CSO, taken by Goldstone, J. (as he then was), noted that it was important that the service the accused was to perform was of benefit to **both** the offender and the community. He noted four reasons why ‘the community would undoubtedly view (CSO) with favour’. They are worth repeating.

- a) the *offender is kept out of prison*, and is thus able to continue to be a productive and useful member of society, and also avoid exposure to the negative consequences of imprisonment;
- b) the *offender is able to continue to support his dependants*, and so prevent them becoming a drain on more remote members of their family, their friends or the State; furthermore, the family unit remains intact;
- c) the fact that the offender is to render a community service free of charge during his own free time *satisfies society’s justifiable demand that an offender be punished*; and
- d) the *community benefits directly* from the work to be performed by the offender.
(emphasis added)

Although impressive, these reasons amount more to judicial recognition of the value of community service as a penal option, rather than practical guidelines. But for the recognition

Organisational Approach, PhD Thesis (unpublished), London School of Economics, London University, 1992.

¹⁴⁷ 1984 (4) SA 642

alone, it is an important decision. It is discouraging that subsequent cases have not been so helpful, and have to an extent eroded the impact of Khumalo.

In S v. Abrahams¹⁴⁸, a case involving public order, the court held that community service was appropriate for certain, more serious offences, provided the offender 'is suitable therefor'. However, Conradie, J. then went on to say that 'the regional magistrate had over-emphasised the seriousness of the offence', which significantly diluted the court's original argument.

Conradie, J. was of the view that imprisonment was only of use where the community has to be protected, where the offender had a 'personality disturbance' or because of his particular characteristics was not suitable for non-custodial punishment. With respect to serious offenders, he said,

our courts should utilise imprisonment as a means of punishment only if the offence is so serious that non-custodial punishment would bring the system of criminal justice into discredit in the community¹⁴⁹.

The case centred around an 18-year-old student convicted of a public order offence for which he was harshly sentenced for 2 years, with one year partially suspended for 5 years. Public Order offences in South Africa were viewed by the government as particularly serious, far in excess of ordinary crimes¹⁵⁰, and so should be seen as unique. The judge gave little general guidance as to when a community service order would be appropriate, and was concerned more with excusing the accused's conduct rather than giving directions.

Other cases have tried to expand upon when a CSO would be inappropriate, namely where a fine would otherwise have been imposed¹⁵¹ or where the accused was found guilty of fraud involving several million Rand¹⁵², but the approach has been very much "ad hoc". In S v. De Bruin¹⁵³, Khumalo was distinguished, the reason being that Khumalo was a first offender, whereas De Bruin had previous convictions. Furthermore, the present offences of culpable homicide, reckless or negligent driving and driving under intoxication, were so extreme as to render community service undesirable.

¹⁴⁸ 1989 (1) SASV 172 (K)

¹⁴⁹ Ibid.

¹⁵⁰ It was the student boycotts and other forms of public demonstration which eventually led to a state of emergency being declared on a number of different occasions.

¹⁵¹ S v. Van Der Westhuizen 1990 (1) SACR 531

¹⁵² R v. Guntenhoner 1990 (1) SACR 642

As much as one might agree with the result, it might have been more helpful to critically consider **why** this particular accused was not suitable, rather than simply refer to the fact that the crime was serious. The sentence was nothing more than retributive punishment. Deterrence was not really an issue since the accused had been convicted several times previously for similar offences. To say that one offence or another renders an accused unsuitable misses the point and leaves the sentencer with as much discretion, and no real guidance. The question that **should** be asked is whether the family of the victims, and indeed society generally, would be best served by the offender serving a 3 year sentence of imprisonment, of which he is likely to serve far less. It certainly appeals to one's sentiments that such horrific crimes be severely punished, but whether it offers society any greater protection or benefit is questionable.

Gordon, AJ stated in S v. De Bruin that the question of sentence is for the court to determine, and rightly so, provided the court can be objective in the matter. To his credit, he did remark that he would like to see community service imposed where possible, in preference to a term of imprisonment, referring to 'supermarket thefts', where 'heavy fines and/or imprisonment (were) imposed on impecunious women', but that there needed to be an increase in 'the number and scope of suitable non-profit organisations'¹⁵⁴.

The decision in S v. Van Vuuren¹⁵⁵ diminished the importance of retribution as a justification for punishment. While still recognising that it was 'one of the essential elements', the judge felt that it 'carried less weight' where the accused compensated the victim, in which case community service is appropriate. Encouragingly, the reasoning of the judge in this recent case compares favourably with the approaches of customary legal systems, which prefer more restorative measures over retributive sanctions¹⁵⁶, but such decisions are rare.

Finally, the courts have considered whether community service should be limited to first offenders. In S v. Brown¹⁵⁷, the court held that, since previous sentences 'had not brought (the offender) to his senses', community service was not considered to be desirable. This decision directly conflicts with S v. Mogara¹⁵⁸, in which it was held that 'community service orders were not restricted to first offenders'. Clearly it will be some time before the CSO is widely accepted as a credible penal option and judges more often address the use of it, rather than simply argue its

¹⁵³ 1991 (2) SACR 158

¹⁵⁴ Ibid., p.162

¹⁵⁵ 1991 (1) SACR 127

¹⁵⁶ See supra.

¹⁵⁷ 1992 (1) SACR 571

¹⁵⁸ 1990 (2) SACR 9

value in the abstract.

It could be said that the idea behind community service, from a penological perspective, is that offenders be deprived of their liberty, but not to the extent that it renders them incapable of appreciating their actions. To go some way towards achieving this, and to make some effort in convincing the community that such a programme is of direct benefit to them, probation officers and the like should ensure that, in every sense, the work the offender carries out is useful¹⁵⁹. The CSO should benefit the community (and hopefully, ultimately, the offender as well) in counter-action to the way in which his crime was a detriment to the community.

Community service necessarily implies an individualistic approach to sentencing, the consequences of which often result in a barrage of criticisms about sentencing disparity¹⁶⁰. To the extent that this disparity discloses obvious prejudice and/or lack of objectivity, sentencers can (and should) justly be held to account, but where disparity reveals nothing more than differences in the particularities or abilities of offenders or the limitations of a programme, community service must be seen as a "flexible" option.

As the legal system in South Africa re-adjusts to greater accomodate the needs and desires of the community, customary law must receive greater recognition as part of 'South African Law'¹⁶¹. Community service fits more favourably with customary legal principles than do the repressive measures taken by colonialists in the past. If the law with respect to community service orders develops in this way, as it should, then the further integration of customary law will prove inevitable.

Equally, as the following section will illustrate, the courts are more likely to be effective, and a "barometer" of community attitudes if more efforts are made to ascertain their views. A failure to do so ignores some of the most fundamental tenets of customary law and continues to put the criminal justice system in danger of 'foundering without legitimacy'¹⁶².

VIII. THE SIGNIFICANCE OF JUDICIAL AND COMMUNITY ATTITUDES TOWARDS COMMUNITY SERVICE ORDERS

A significant objective of the community service order is to "reintroduce" a convicted

¹⁵⁹ N.B. The guideline in S v. Sikunyana that the accused be 'of use and not a burden'.

¹⁶⁰ Various newspaper articles in the UK have described sentences as a 'lottery', with disparity widest for less serious offences.

¹⁶¹ A. Sachs, Protecting Human Rights in a New South Africa, O.U.P., 1990, pp. 90-103

¹⁶² Burman and Scharf, 'Creating People's Justice: Street Committees and People's Courts in a South African City', (1990) 24 Law & Soc. Rev. 693 at 738

criminal back into society, and so the current attitudes of the community are, naturally, of some relevance. How will people feel about the prospect of a convict being set "free" into the community? In particular, will they be supportive of such a person, or will the stigma of an offender's crime leave them hopelessly alienated from the community, rendering them more likely to reconvict? And, most importantly, will society's arguably justifiable desire for retribution be satisfied by what many may see as a lenient sentence?

The attitude of the judiciary is also of importance since it is them, after all, who will be deciding how the offender is to be best dealt with. It is necessary to consider whether judges and magistrates will be supportive of such a comparatively radical option, given their tendency to impose sentences of a retributory nature¹⁶³.

As with all public figures, the judiciary is prone to criticism; it is particularly focused with regard to sentencing patterns. In England, the argument that "individualised justice" demands an 'unfettered' judiciary is often diluted by highly publicised instances where society cries out over a sentence which is seen to be either too harsh or too lenient¹⁶⁴. In South Africa, there has been a high level of disparity in sentencing, with white offenders receiving relatively "soft" sentences for serious offences¹⁶⁵ and non-white offenders receiving severe sentences for relatively minor offences, particularly if the case was of a political nature¹⁶⁶. In addition, many offenders have ended up in prison because they could not afford to pay the fine (even if only 100 Rand = £20!). For these reasons, and many others, many South Africans have been left with the feeling that there are 'two systems of justice'¹⁶⁷.

Judges and magistrates should be aware of what society demands. This is of special

¹⁶³ This is particularly true in a region such as the Transkei where magistrates are generally unaware (because of insufficient training) or unable (because of the general trend of criminal legislation to impose minimum sentences) to consider alternative sentences.

¹⁶⁴ These criticisms have led to calls in England for greater legislative control over judicial decision making, which has in turn provoked criticisms that such moves threaten judicial independence and may in fact be unconstitutional. Discussed generally on pages 99-114 in Harding and Koffman, Sentencing and The Penal System, Sweet and Maxwell, 1988.

¹⁶⁵ There was a highly publicised case recently, where a farmer who murdered one of his labourers over the allegedly 'intentional' death of his dog, received only a suspended sentence, a fine and an order of compensation to the victim's widow of a relatively small sum in monthly 'maintenance'.

¹⁶⁶ J. Jackson, Justice in South Africa, Secker & Warburg, 1980, wrote about a youth in Port Elizabeth who, on his first offence, was sentenced to 18 months' imprisonment for throwing a rock at a police vehicle, causing negligible damage. Long sentences are not unusual in the Transkei today. Based on the experiences of local lawyers in Umtata, a first offender found guilty of car theft can realistically expect a 3 year prison sentence. A crime said to be politically motivated can still result in a disproportionately harsh sentence, as in a recent case in Transkei (citation unknown), where certain ex-civil servant workers connected with the previous administration were sentenced to an average of 16 years imprisonment for minor cases of fraud.

¹⁶⁷ J. Jackson, *Ibid.*, strongly criticised the South African criminal justice system, based on his many years of legal practice in Port Elizabeth. He argued against the notion that South Africa's judiciary was independent, but rather heavily weighted in favour of white interests and Afrikaaner nationalist ideology, with the few rights given to the non-white majority

importance in a country such as South Africa which lacks a jury system to decide a person's guilt. The judiciary are almost invariably selected from amongst the privileged sector of society, with the result that the balance of justice in South Africa rarely favours the "dispossessed".

In a relatively recent attempt to alleviate this imbalance, defence counsel in the case of R v. Khumalo and 25 Others¹⁶⁸ commissioned an empirical study of community attitudes to sentencing¹⁶⁹. They found that the majority of the people in Paballelo (the community in which the crime took place) were in favour of releasing the defendants, with only '2% expressing strong reservation against release'. They cited the most common reason for this as being 'empathy for the (defendants) and their families', with the second most common reason being that the defendants 'had already been punished sufficiently'¹⁷⁰. Surprisingly, the authors of the study further went on to say that 'this community would have been prepared to have the accused back in their midst, to serve sentences of **community service**' (my emphasis).

The response of the judge, that the study was the 'opinion of a bunch of faceless and uninformed people'¹⁷¹, was frustrating. It was especially so, given that the very same judge eventually did sentence some of the offenders to community service. The authors of the study were particularly dismayed at the judge's reasoning, which 'regarded the evidence on the opinions of the community to be inherently irrelevant', rather than unreliable, etc.¹⁷²

The South African Journal of Criminology in 1985 referred to the community service order as '**potentially** the most positive penological measure of this century -- for both the offender and the community'(sic)¹⁷³. The judiciary has been fairly slow to respond to this "call for action", though apparently it has become 'reasonably well established in Capetown and Wynberg'¹⁷⁴. Indeed, NICRO¹⁷⁵ in Capetown recently established an office in Umtata, with a view to ultimately provide support for a programme of community service in the Transkei.

It appears that judicial opinion in the region is swinging in favour of community

brutally pushed to the side.

¹⁶⁸ S v. Khumalo & 25 Others (1989) -- Unreported, though discussed in Hansson and Fine, 'Expert testimony on community attitudes to sentencing: The case of the Upington 26, Towards Justice? Crime and State Control in South Africa, Hansson and Van Zyl Smit, 1990, O.U.P., p. 173.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid., p. 187.

¹⁷¹ Ibid., p.191.

¹⁷² Ibid., p.192.

¹⁷³ Editorial, 9 SACC/SASK 1985, p. 211.

¹⁷⁴ Reid, 8 SACC/SASK 1984, p.130.

¹⁷⁵ National Institute for Crime Prevention and the Rehabilitation of Offenders.

service¹⁷⁶. But the spread of judicial awareness is thin, particularly amongst magistrates who are responsible for handling the majority of criminal offences. Furthermore, organisations like NICRO are seriously underfunded, and able to cater for only a limited number of offenders.

Despite certain judges' insistence that the views of the community in the passing of a CSO are insignificant¹⁷⁷, many jurists seem to be of the opinion that this is not so. Indeed, 'community approval' is said by some to be 'crucial to the long term survival of community service'¹⁷⁸. In view of this, one might turn back to the study prepared by the University of Capetown in the case of Khumalo and 25 Others, which is clearly of the view that society is far less retributive than many judges would care to realise. However, as the authors of the study rightly pointed out, 'the aim of . . . the study . . . was to provide evidence on attitudes to sentencing . . . for a **particular** court case'(sic). A "scaled down" version might be a pre-sentence report, where the judge is provided with a report prepared by a probation officer listing the characteristics of the accused and whether, in his/her opinion, the accused is suitable for community service. Such a report could take account not only of the offender's circumstances, but of the community's as well, since a specific programme must be available to him. This can and should be included in these reports.

In a region such as the Transkei, which has never in its history had a programme of community service, society must be assured that such a programme will be of benefit to them. They must appreciate that they are not only being consulted, but being compensated, and that the defendant is being punished for the harm he has caused. Furthermore, organisations, whether they be independent NGOs, government programmes or businesses, must be convinced that they too will be helping to provide both the offender and the community a valuable service.

In the limited period of time I spent in the Transkei, it became apparent that what the majority of the community desired was better education, cheaper food, more accessible health care¹⁷⁹, adequate legal services, more jobs, fair and equal treatment by the local police¹⁸⁰, better transport, telephones¹⁸¹, etc. The authors of the Paballelo study had similar views, remarking that the 'residents had been concerned about a number of community issues, the most important

¹⁷⁶ S v. Sikunyana, *supra*

¹⁷⁷ Judge in Khumalo and 25 others, *Ibid.*

¹⁷⁸ A ST Q Skeen, 'Community Service Orders', SACJ (1988) 2 SAS, p. 206 at p. 210.

¹⁷⁹ A medical doctor working in the Transkei remarked about the marked lack of resources and suitable expertise. See fn 27.

¹⁸⁰ The police in Umtata are reluctant to respond to crimes which are reported in the poorer districts, especially the township area.

¹⁸¹ The Transkei phone exchange, publicly controlled, is unreliable and very expensive. People claim it is necessary to

of these being high rentals, many evictions, no electricity, streetlighting or tarred roads, poor medical services, high rates of unemployment, and abuse by the municipal police'¹⁸².

As discussed, customary law suggests that the community places a higher value on compensation than on retribution. It appears that what communities desire is not to punish people for "responding" to what many people see as a manifestly unjust system, but to generally improve their standard of living. Put another way, their anxiety over whether they will be able to put food on the table significantly outweighs their concern over whether someone will be punished for stealing a packet of cigarettes. Equally, it appears that most people would prefer to see schools and hospitals which were better equipped, rather than prisons which were bigger and more secure.

It is fallacious for judges and legislators to make the assumption that people desire law and order over all other considerations. On the other hand, it would be wrong to assume that people necessarily want to see offenders released back into society without any sort of punishment at all. It seems that communities would view favourably a properly funded and well-managed programme of community sentencing, especially if they were seen to be directly benefitting.

In addition to 'community approval', local organisations will be one of the primary factors in determining the success of a community service programme. One might expect that organisations would feel uncomfortable about the prospect of taking another person on board with their limited resources, particularly if that person was a convicted criminal. But upon speaking with one of the larger, independent organisations in the region, I formed the view that, after some initial reluctance, people **were** willing to support such a programme. However, there were certain logistical concerns. These included: how the individual was to be transported to his place of service, whether he would be adequately trained and, interestingly, whether he would be **paid**. This latter concern arose out of a certain Dutch manager's conviction that if someone was to do work for him, irrespective of whether or not he was carrying out that work at the instruction of a court, then that person should receive at least some form of remuneration. He did not seem averse to the idea of payment being made to a sort of 'trust fund' to benefit the offender's family members and to cover the costs of the programme, but his firm view was that there should be some form of payment.

"bribe" officials in order to gain access to an extra line.

¹⁸² Hansson and Fine, *Ibid*, p. 175.

A legal system which a large number of South Africans do not understand, much less respect, has to a considerable extent lost its credibility. The judiciary cannot continue refusing to consider the interests of those they judge simply by referring to principles of "judicial independence", particularly if, as Jackson and others suggest, such a concept exists only in theory. As with legislators, judges too need to be made accountable to the needs of the community. As Hansson and Fine put it,

In a future South Africa, it will be necessary for judges to be far more sensitive to the needs and fears of all sectors of the community¹⁸³.

IX. COMMUNITY SERVICE AS A MEANS OF "REVERSAL"

It is evident that a major objective of the South African criminal justice system and corresponding laws of the past has been not to reform (or deter) the criminal and protect society, but to control the labour force and protect the market. Despite South Africa's previously high rate of economic growth, the governments' policies, including that of 'separate development', have ideologically and economically split the population in two. They effectively created "two economies" which inevitably merged, and shattered the economy as a whole. They have sent the value of the country's currency into rapid decline and left an infrastructure which is impressive in some areas of the country, but totally inadequate in others. In short, colonialism in South Africa not only destroyed what had for generations been perfectly sustainable practices, it created a society which was at best contrived, at worst anomic.

The only way in which this destructive trend, of labour control and the use of criminal sanctions as a means of coercion, will be reversed is through comprehensive economic and legal reform. Urgency needs to be coupled with sufficient guarantees that people's legitimate rights to personal and economic development will be met¹⁸⁴. But if the crime rate in South Africa continues to spiral, there will be little left of the country to reform or preserve.

The widespread use of community service could be a significant step towards dragging the country out of its seemingly intractable problems. Firstly, it is very much in the vein of "empowerment", which has the potential to transfer power back into the hands of the powerless (i.e. the community) and enables them to take control over certain affairs in order to provide for a

¹⁸³ Hansson and Fine, *Ibid.*, p. 193

¹⁸⁴ See generally, Albie Sachs, *op cit.* fn 161

more egalitarian and sustainable society. Secondly, rather than shifting blame onto an individual offender, it serves to identify where the system is deficient, without detracting from the need to stress condemnation of the use of crime as the way out of one's problems. In this sense, it concentrates heavily on identifying and addressing the "root causes" of crime (i.e. poverty, unemployment, lack of education, lack of recreation, etc.) rather than merely looking to condemn or condone behaviour. Most importantly, community service recognises that people are human beings, rather than simply part of a 'labour force'.

Community service could also go a long way towards reducing some of the more regressive and destructive elements within the present criminal justice system. The horrific prison conditions and the terrible effects which incarceration has on the family and the economy would be addressed by the use of CSOs. It "re-connects" the community with the administration of justice, something which has been lost through the forced adoption of European approaches to criminal justice.

In addition to a concentrated effort at redistributing the country's wealth must come social awareness and solidarity, that problems within the country cannot be observed at a distance, but must be seen as "everybody's problem". Hopefully this will lead to a collective response, rather than a continuation of the "reactionary" politics of calling for more law and order, bigger and stronger prisons, disciplined labour camps, etc. Most communities in South Africa have suffered in one way or another under the shadow of apartheid. By creating community answers, therefore, one is going right to the heart of the matter.

X. CONCLUSIONS

It is ironic that a region in which community service has never existed should produce what is arguably the most comprehensive South African decision on this subject. It is hoped that the case of S v. Sikunyana¹⁸⁵ will have a significant impact on the judiciary in Transkei and the rest of South Africa. It represents firm judicial recognition of the benefits which community service has to offer a region such as the Transkei and gives 'legal ammunition' to any activist seeking to press forward reforms of this kind. But it is also practical, and with ultimate responsibility lying with magistrates (many of whom are unaware that such a provision even exists), the need for such guidance is vital.

In Transkei, political developments have been slow, given the intensely bureaucratic

nature of the region's government. Following the recent restructuring of South Africa and the reincorporation of the 'homelands', many of the country's public services, including the prison service, welfare, health and education, are likely to be centralised. This should provide for far more accountability and significantly less bureaucracy. In September 1993 there was some indication that the Department of Welfare in the Transkei government was interested in working with NICRO to assist the development of a community service programme. Following the recent political developments, there is likely to be even more support as the Region develops further¹⁸⁶.

Given that the logistical support for community service is at best in a fledgling state, there is likely to be a great deal of discussion as to what should be contained in such a programme. As we have seen, South Africa's past approaches to crime have not only been unsuccessful, but have resulted in an oppressive system of criminal justice which has in many people's eyes lost its legitimacy. Community services helps to "reverse" this trend, not only as a development initiative aimed at empowerment, but to the extent that it diverts prisoners from custody.

The understandable scepticism that people have about community service has much to do with society's and politicians' misconceptions. Community service is not a soft option, nor is it solely meant to rehabilitate offenders. Furthermore, it cannot really be said to be without a punitive element, nor does it ignore what are centuries-old traditions of restitution and compensation¹⁸⁷. Being in large part a welfare initiative, it recognises that people are in trouble, and not just "in trouble with the law". Its biggest virtue is its flexible nature, not only from the point of view of the offender, but from that of society as well. It seeks to address concerns on all sides, and aims to dispel the notion that wrongdoers must simply be punished.

Leila Patel puts forward an impressive model for the future of welfare in South Africa¹⁸⁸ which shares much of the objectives of community service. She argues for:

a developmental approach, which . . . places people at the centre of the development process, discards paternalism, and enhances individual and collective empowerment with

¹⁸⁵ Supra.

¹⁸⁶ For further discussion on the reincorporation of Transkei into the Republic of South Africa, see A. Donaldson, J. Segar and R. Southall, Undoing Independence: Regionalism and the Reincorporation of Transkei into South Africa, Rhodes University, Institute of Social and Economic Research, 1992.

¹⁸⁷ Junod, (1966) East African Law Journal 31, asserts that the necessary approach is one of 'restitution in kind through an overhauled penal system in which institutions become productive'.

¹⁸⁸ Leila Patel, Restructuring Social Welfare: Options for South Africa, Ravan Press, 1992

the goal of achieving fundamental social transformation¹⁸⁹.

Her proposal is by its very nature 'community based', and essentially "legitimises" the programmes which arose out of the protests of many South Africans against what was a manifestly discriminatory and totally inequitable state welfare system¹⁹⁰. In the words of an ex-detainee:

In the struggle it is important to have services like this. . . These people (of progressive grass roots services) are in the struggle. . . When I come here, it makes me think they care about me.¹⁹¹

Already Mandela, the new State President, has laid down the government's proposals for the rebuilding of infrastructure and the redistribution of land through a Land Claims Tribunal. With such tremendous human and natural resources, one expects to see more changes, and far more quickly than many people are presently able to comprehend. The inclusion of community service in these reforms could play a major role, not only in helping to rebuild the country, but in returning to the communities their legitimate need for self-empowerment.

**Final Thesis in satisfaction of requirements for the degree of LL.M.
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¹⁸⁹ Ibid., p. 146.

¹⁹⁰ She cites the example of family allowances, for which only white families were eligible.

¹⁹¹ Ibid., p.61