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**RESORTING TO COMMUNITY JUSTICE WHEN STATE POLICING
FAILS: SOUTH AFRICA**

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Resorting to Community Justice When State Policing Fails: South Africa

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ABSTRACT

In reviewing the response of South African communities to crime, one is struck by the two contradictory reactions – on the one hand, there is adherence to the formal structures of the criminal justice system, whilst on the other, communities are taking it upon themselves to mete out justice for crimes committed. Reports indicate that practices of community justice are especially prevalent amongst the poorer black communities of South Africa and are often a response predicated on a fundamental mistrust of the police and a belief that state policing has failed the community. Proponents of community justice argue that poor service delivery, weaknesses with the criminal justice system and processes and police corruption are key factors causing people to support community justice and vigilante activities (see <http://www.iss.co.za/CJM/SpecialInterest/Vigilantism.html>). In short, the resort to community justice is symptomatic of the state's evident incapacity to secure the people and the people's rights.

On the other hand, whilst it is understandable for all people to wish to protect themselves, the question that one must answer is whether community justice and vigilante activity help or hinder the maintenance of law and order. South Africa is a constitutional democracy, striving to uphold the principles of natural justice, due process, and the rule of law. In her paper presented at the 22nd Law and Society Conference in Brisbane, Singh (2004) posed the question: 'For how long can a country sustain such blatant disregard for the rule of law before sliding into lawlessness and anarchy?' However, a more apposite enquiry might have been: 'Is there any manner of developing a synergy between the traditional practices of the criminal justice system and community justice?' In its conclusion, this paper responds briefly to the question, considering specifically the option of restorative justice and its place in creating a synergy between community justice and the current formal state processes.

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Resorting to Community Justice When State Policing Fails: South Africa

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Introduction

South Africa's historic memory is one of colonisation, apartheid and oppression. In his work *The Nation and its Fragments*, Chatterjee (DeHay 2004:1) provides a succinct definition of 'the colonial project' describing it as 'the preservation of the alienness of the ruling group' by representing the 'other' as radically different and 'incorrigibly inferior'. In South Africa, the inferiority factor was emphasised in the dismissal of the social, cultural, and religious practices of the colonised/oppressed group (being the black majority) and the substitution of the practices of the coloniser.

This paper, however, does not deal with the resistance to the colonising regime or apartheid: Rather, the discussions focus on specific issues of public safety and security in the nascent democracy (post-1994) and the consequences when state policing fails (or is perceived to have failed). However, the effects of apartheid cannot be avoided in the systemic problems that continue to prevail in the area of safety and security in South Africa. Furthermore, the author does not intend to imply that community justice is the norm in South Africa. This article focuses on the existence of community justice and vigilantism in South Africa and the reasons for such activities within the new democratic state.

Police Inability in the Aftermath of Apartheid

In order to understand the events cited in this paper, the reader is provided with a brief background of the specific circumstances prevailing in South Africa in or about 1994.

Firstly in respect of policing in the country, it should be noted that during the period between the years 1970-1980 the police force in the apartheid state was primarily focused on quelling the political resistance spreading across the country. The result was that essential policing activities such as crime prevention were

neglected. Further, most of the political resistance in the years prior to 1994 was focused in the black townships. There is no gainsaying the reality that the violent interaction between police and the communities has left an indelible imprint that, ten years after the advent of democracy, is still alive in the memories of many South Africans resulting in a lingering lack of trust between police and community.

Secondly, prior to 1994, South Africans were legally required to live in designated areas determined by their race. The apartheid state ensured the privileges of the white minority by various practices which also included assuring their safety as best as possible. The consequence of this is that the geographic spread of police stations, resources and services were situated in favour of the designated so-called white areas. Whilst there is currently a concerted effort to redress the imbalance created by the apartheid government, the effect of this tradition remains and for the rural (black) communities and persons living in historically black townships the very act of getting to a police station can and still does pose a problem. The communities are often economically disadvantaged, the townships are under-resourced, telephones are a luxury, and transport is often infrequent, unreliable and expensive.

Thirdly, after 1994, the state-enforced geographic residential boundaries were removed from the statutes and many black people moved to the better developed, better opportunity/potential, urban areas of the country. Housing was at a premium and no contingency plans had been made by the newly elected government to accommodate the influx of people. The result was an emergence of 'informal settlements' with groups of black people unilaterally appropriating and settling on tracts of open land where they built basic homes of iron, wood and cardboard. There was no electricity, no running water, no sanitation, and no formal design or structure to these townships.

Fourthly, the advent of democracy in 1994 did not result in an immediate end to political violence. A new form of political intolerance began to be exposed as internecine conflict between black tribal groups gripped various regions of the country. Additionally, 'taxi violence' became endemic. The movement of large numbers of black persons into the urban locations (which was already under-resourced with public transport) created an entrepreneurial opening for the black

taxi business. However, this new business was characterised by violent clashes between public and private (taxi) transport systems and between the different private taxi owners inter se. Commuters were threatened, transport disrupted, and violence and killings were reported daily in the popular presses. Once again, police resources were extended beyond their limits dealing with these newly emerging problems.

At the same time, for various reasons - both legitimate and disruptive – the country began to see a greater focus being placed on the reporting of crime incidents and statistics in the media and in public and private debate and scientific research. The impression that this created in the mind of the ordinary (often undiscerning) reader/listener was that South Africa's transition to democracy coincided with a definite surge in criminal activity. Whether this is actually true or not remains moot as there are no equivalent comparative statistics with which to compare the pre- and post-apartheid levels of crime. However, as the true extent of crime began to be exposed it also became patently clear that the public police did not have the resources to deal with the problem. The factual reality of policing in South Africa is that the state agency is under-staffed, under-resourced and, by obvious deduction, over-worked. As Dixon and Johns (2004) note in discussing the 'pains of transformation' the police appear to be disabled. Coupled with the fact that the police are not adequately trained, the country is confronted with a very serious problem. This fact was again born out in recent parliamentary discussions. (Eastern Cape Herald, 26 August 2005)

Safety and Economic Inequality

As the perception of the inability of the police service to contain crime in the country began to grow, the real threat to personal safety began to become more relevant.

Members of the public began seeking alternate recourses to satisfy their need for protection. The private security industry had identified a niche during the 1970s and 1980s when public (state) policing was focused on quelling political resistance in the country. During the last ten years, a further opportunity has emerged for the rapid growth of the private security industry.

Community fears and the growing demand for personal safety and protection (and the concomitant lack of confidence in the state police service) has resulted in what Minnaar (2004: 8) describes as the development of a 'siege mentality' where people 'retreat into private fortified enclaves and are willing to submit themselves to a comprehensive range of security measures and procedures, under constant security surveillance and control and more often than not giving up individual freedoms such as open access, free movement and privacy.' Consequently, the South African norm is that those who can afford to pay for the additional comfort afforded by the services of a private security company, do so as a matter of course. In other words, the fact of whether one's life, family and property are properly protected is a matter of economics and income. Unfortunately, not all South Africans can afford this luxury.

With the declining respect for state security and the growing dissatisfaction with the criminal justice system as a whole, an opening was created for the re-emergence of vigilantism and community justice. It must be noted that prior to 1994, vigilante activity was not unheard of. However, pre-1994, vigilante activity targeted primarily police officers, local government officials and persons seen to be acting as agents of the state and furthering the apartheid regime.

Community Justice

The following are a range of random reports extracted from newspapers published across the country. The reports are not intended to be read as an exhaustive list of the acts of community justice in the last four years, nor are they intended to imply that community justice is the norm for law enforcement in the country. The intention is merely to provide the reader with a few examples of the reality of what can and does take place when state law enforcement is seen to have lost credibility.

Report 1:

Four men have been murdered in vigilante-style killings in KwaZulu-Natal, police reported on Sunday.

In the first case, the body of an unidentified man was found naked in the Mkhobosa Reserve. He had been stoned to death. Police were investigating the possibility that the man might have been attacked by members of the community because he was suspected of having committed crimes in the area.

In the second incident two men were killed and a third injured at the Ndindima Reserve. It was reported that unidentified community members had attacked the three after accusing them of crimes in the area. All three victims sustained multiple cut wounds all over their bodies (The Witness, 4 October 2004).

Report 2:

Two men accused of robbery in the informal settlement of Sweet Home Farm in the Western Cape were beaten to death. It was reported that the community had apprehended the unidentified men, aged between 20 and 30 years, and stoned, hit and assaulted them with pangas (SAPA, 4 September 2002).

Report 3:

In Limpopo, police are searching for vigilantes who beat a 19-year-old man to death after accusing him of stealing R1800-00 from a bottle store. After suspecting the deceased of theft, the owner of the bottle store asked friends to assist him in tracking down the suspect. They confronted the accused with the charge of taking the money and using it to purchase clothes and a cellphone. When the accused denied the charge, he was killed.

Also in Limpopo, vigilantes executed a Limpopo businessman in full view of his family and friends by shooting him 11 times from close range. Nothing was stolen. The police suspect that the 'assassination' may be linked to the son of the deceased who had been recently arrested on multiple murder and armed robbery charges (News24, 19 April 2004).

Report 4:

A 22-year-old man, Mduduzi Maluka, was stoned to death by members of his community after they suspected him of being involved in a murder. The murdered man had been attacked by three men, one of whom had stolen his firearm. Community members believed that Maluka was in possession of the firearm stolen from the murder victim (SAPA, 16 November 2004).

Report 5:

Police and ambulance personnel came to the rescue of a man, Thulo Motapi, after a murderous mob had set him alight after accusing him of involvement in a murder that had taken place on New Years eve. Apparently, one of Motapi's friends had been arrested in connection with the murder. Police made a plea for any information about the incident (News24, 06 January 2005).

The list could continue with repetitive similarity. In all of these cases, the common pattern is:

- (i) the victim is from the so-called black race group,
- (ii) the perpetrators are also from the so-called black race group,
- (iii) the environment is rural or semi-rural, historically black townships,

- (iv) the parties are generally from economically deprived sectors of the population,
- (v) the victims are all persons alleged to have committed a crime,
- (vi) the perpetrators are members of the community or supported by members of the community against which the suspected crime was committed, and
- (vii) the purpose of the perpetrator's conduct is to mete out justice for the suspected wrongdoing.

Formal and informal research¹ has been unable to attain consensus on the impact and effect of community justice. Protagonists favour it as a means of generating security in an environment that could fall prey to lawless behaviour, whilst antagonists have variously described it as the work of brutal and undisciplined mobs who are renegades within their communities, engaged in activities that are determined and dictated by emotions. However, if the latter description is correct, the question that must be answered is (i) why do the communities not report the suspects to the police, rather than taking the law into their own hands?, and more importantly (ii) why are the police often not able to solve these cases of community justice?

The environmental design of many poorer black, rural and semi-rural settlements and in the emerging urban informal settlements – that is, no street lights, proper roads, or maintained pathways – has resulted in a situation where the state police are loathe to patrol such areas. In fact, the police themselves admit being afraid to enter the neighbourhoods after dark for fear of ambush and attack. Consequently, there is little organised or effective policing in the neighbourhoods.

¹ Antagonists describe the actions as 'mob' justice. See for example 'Angry mob bay for cult members blood' 27 June 2003. SAPA. www.iol.co.za/index.php; Graeme Hosken 'Gruesome death for youth at mob hands' 20 January 2003. The Daily News 2; Judy Damon 'Dragged, stripped, bound, stoned and burnt' 24 June 2003. The Cape Times 3; S Govender 'Criminal Beware' <http://www.suntimes.co.za/2003/10/9/news/durban/ndbn05.asp> 2 (Accessed on 9/11/2004).; <http://www.anc.org/ancdocs/pr/1996/pr0818.html> 1 (Accessed on 9/11/2004). Protagonists describe the actions as 'popular' or 'community' justice. See for example the reported comment of the past Minister of Safety and Security Steve Tshwete in Mail and Guardian. 10 November 2000. 'Tshwete gets tough on crime'. www.mg.co.za; Honey P. 9 April. Financial Mail. Copyright I-Net Bridge (Pty) Ltd, 2004; <http://www.iss.co.za/CJM/SpecialInterest/Vigilantism.html> (Accessed on 9/11/2004); P Lawrence. 'Deadly Force'. http://www.hsf.org.za/focus_15/f15_Deadly_force.html 5-6 (Accessed on 9/11/2004).

The communities are further often frustrated by the slow (and sometimes corrupt) machinations of the criminal justice system and its processes. In such circumstances, with state policing activities at a minimum and households being held to ransom by the criminals, communities begin to seek alternative means to take back their space.

During a focus group interview with 26 youth from eight black townships, aged from 16 years to 23 years, the sentiment that was often repeated was that whilst the state exhorted community members not to take the law into their own hands and to report the criminals to the police, when such reports were made ‘most often nothing is done by the police’. A further issue raised was the lack of police resources to effectively deal with crime and the criminals. One interviewee stated, ‘It is discouraging to try and catch criminals because even if they are caught and the police are called, police officers tell us [the residents] that they do not have the vehicles to come to the crime scene.’ Other responses exemplifying the community frustrations included, ‘If an arrest is made by the police, the accused is out on bail in the quickest possible time’ and ‘Why bother to report the criminal because the courts will always release him on easy bail conditions’, and ‘If the matter reaches the court, the overburdened judicial system results in the case being adjourned again and again’, and ‘It is a reality that the accused are rarely tried and sentenced within a short space of time because there are always delays in completing the investigation’, and ‘In many instances cases are actually dismissed because of poor investigation and the actual delays in bringing the matter to court’. Three of the interviewees argued that communities should have greater empathy for the police because ‘they [the police] are trying’. However, the view expressed by the group members was that there exists, currently within the townships, little confidence or trust in the police or the criminal justice system.

The reported comments of the focus group and other statements made resonate almost verbatim with the sentiments expressed by Meshoe (2003) who wrote in the South African Parliament News Digest, ‘Members of the public are encouraged to come forward with information to the police, yet in many cases, if the police do not pass on that information to the criminals, then they do not follow up the leads they are given by the public. This is why communities close ranks and refuse to offer information to the police ... they no longer trust the law. ... An

increase in mob justice is nothing but a wake up call to government to take drastic measures to end crime before the nation slides into anarchy.’ Interestingly, a study by Transparency International representing the world corruption barometer was presented to the United Nations at their anti-corruption day session on 7 December 2004. In evaluating public perceptions of police corruption in South Africa, the study cites a figure of 3.8 out of 5 (Die Beeld, 8 December 2004: 4).

And again the expressions of the focus group were confirmed by Paschke (2003) who, in his report to the South African Law Commission, identified the poor conviction rate as being a major factor contributing to victims of crime giving up on reporting crime and resorting to vigilantism. Reports of a discussion at an ANC plenary meeting indicates further that government itself, is not unaware of the fact that acts of vigilantism and the resort to community justice are symptomatic of frustrations and a lack of confidence in the ability of the criminal justice system to effectively deal with crime (ANC 1996).

Even the police admit this as a factual truth of some South African communities. The South African Police Service Annual Report 2002/3 notes as follows, ‘Because of a fear of crime and feelings of insecurity, some people may lose confidence in the official structures of law enforcement. This may cause them to start creating their own parallel structures to enforce safety and security’ (South African Police Service 2004).

In response to community perceptions that state policing is not in control of the initiative to combat crime, there have been various government initiatives to promote police-community partnerships. However, these have failed in most instances because of the continued lack of trust between the community members and the police, instances of police corruption, the persistent scarcity of resources to ensure effective policing, and political ramifications. In the circumstances, the last resort for the poor thus appears to be to organise their own policing and justice system or face the threat of being ruled by crime and the criminal gangs.

It is trite that communities ravaged by lawlessness and scarce policing activity will find ways to protect themselves by whatever means. Consequently, one reads of communities either (i) resorting to community justice, where members of the community come together to mete out punishment for a specific alleged crime or (ii) vigilantism, which is also accepted by many as a legitimate effort to maintain

a semblance of law and order in the environment of a perceived inadequate policing and justice system. Vigilante activity may be distinguished from community justice on the basis that the former is often a more organised form of community protection and the participants view their role as being that of defenders of the moral community – a view which is premised on the simple reality that (i) there is a community in danger requiring protection, and (ii) the police have proven incapable of serving this function. The following report is an interesting synthesis of community, vigilante and police attitudes:

Two carloads of young men spilled out into the night and took up their positions around the house, one holding a whip at the ready. Their leader pushed the door open. No luck – the suspected thief was not in the house but his brother was hauled out of bed for questioning. It was a nightly round by the vigilante group Mapogo a Mathamaga. In defending the conduct of the group, Mapogo's founder stated that 'criminals should get a whip on the buttocks because they are not listening. They kill people so that they can go to jail for twenty years and get free meals. They are not people. They should not enjoy human rights.' The community also supported the action of Mapogo seeing them as 'their only protection in the face of ineffectual, corrupt or outgunned cops'. Even the police acknowledged the effectiveness of the vigilantes. However, they were quick to add that the actions, though effective, were 'not the right way' (Mercury, 13 July 1999: 5).

That community justice and vigilantism is a community response to the crime problem is further confirmed by the conspiracy of silence that accompanies the punitive actions with many cases never being reported or, when they are, no witnesses coming forward to assist the police. For example, discussions with residents at an informal settlement in KwaZulu-Natal indicated that members of the community had earlier in the month killed a man whom they 'knew' to be a house robber. The community had asked him to leave the settlement as they 'did not want trouble from the police' and when he refused, fearing that his presence would have negative consequences for all of them, they tried him and upon finding him guilty, they killed him and dumped his body at a spot 5km away. They police were then anonymously telephoned to reveal the identity and location of the body. This was not an isolated incident.

The police also admit that this frontier of justice is growing with the support of the people (Honey 2004: 1). Similar findings were made by the Independent

Complaints Directorate (ICD) who indicated that the non-reporting of crime and resorting to informal sector (and notably vigilantism) for a solution, is becoming a reality in South Africa. Thus, when the police reported a downward trend in crime in the country for 2004, the ICD countered with the fact that in their assessment, vigilantism had increased during this period (Business Day, 6 October 2004: 1). The correlative relationship between the two facts is that the downward trend in reported crime appears to be the direct result of crimes not being reported and communities taking justice into their own hands.

Conclusion

For the present, community justice appears to provide an effective response for the poorer, crime ravaged communities of the country, which was confirmed by the study conducted by the South African Institute for Race Relations focusing on crime and security trends in 2002/3. The study indicates an unequivocal trend for poorer communities to rely increasingly on vigilantism to deal with criminals (iafrica.com 2003).

Recognising the reasons for community justice and vigilantism, there is still absolutely no gainsaying the fact that they pose a real challenge to the democratic rule of law and infringe the fundamental constitutional right to a fair trial. However, it is defended by the participant communities as being a response fuelled by anger and frustration at the state's incapacity to secure the people and the peoples' rights and to meet the promise to provide basic human safety and economic security.

An editorial in the Mail and Guardian (14-20 May 1999: 13) newspaper provides a perspective and defines the intersection of the issues most succinctly:

The fundamental premise of the modern state is that the government must retain a monopoly on violence, and that once this monopoly is ceded the disintegration of the fabric that hold society together is inevitable. The breakdown of the criminal justice system in South Africa has brought with it an increasing tendency for people to take the law into their own hands.

There is an apparent resurgence of vigilante activity in some of the country's poorest, most crime ravaged areas. The brutality of some of this activity is rarely appreciated outside of the area where it flourishes ... The failure of the police to do anything about it can

be attributed either to an awareness of their own shortcomings, or to the fact that people's justice – however repellent – does appear to work.

In her paper presented at the 22nd Law and Society Conference in Brisbane, Singh (2004) posed the question: 'For how long can a country sustain such blatant disregard for the rule of law before sliding into lawlessness and anarchy?' However, a more apposite enquiry might have been: 'Is there any manner of developing a synergy between the traditional practices of the criminal justice system and community justice?'

Drawing on the African traditions of justice which has always involved engaging the community (as opposed to the practice of the criminal justice system which is criticised for making as its primary focus the offender), one begins to incline towards a consideration of restorative justice. In highlighting the essence of restorative justice, Gilman [s a] notes:

- Crime is about harms done to individuals and the community.
- Active community participation is essential to creating safe and healthy communities.
- Those who have been harmed by crime need to have a primary, active role in determining what needs to be addressed, and they need to have a voice in how the resolution should happen.
- Most importantly, (iv) the community as a whole, and not just the justice system in isolation, responds to the harms of crime.

Sketching a likeness from Kennedy who refers to jury trials, one might say also of restorative justice/community justice that it, too, 'exquisitely and democratically combines two aspects of our citizenship – the right to be tried by our fellow citizens for crimes of any serious consequence and the duty to participate in the process when required to do so' (Kennedy 2004: 107). Thus, it is argued that there is a niche for the African tradition – in the form of restorative justice – to co-exist with the current criminal justice processes. However, acknowledging the benefits of restorative justice as a means of defusing a potentially flammable situation in South Africa, one must also recognise the challenges of such a process in relation to the current process. This broadened conceptualisation of justice will have to be

managed firmly and responsibly throughout the process to avoid a slide into lawlessness under the guise of lawful engagement. The crimes to be adjudicated must be agreed in advance, the processes to be implemented must be prescribed and the sanctions clearly delineated. Most importantly, resource allocation, training and community education will have to be an integral part of the roll-out process. Threats, violence and maverick justice cannot have a place in the system. But, if properly implemented, this combination – embracing the ‘sameness’ of the people’s fundamental objective for safety and human dignity – could be another one of the successes of the African renaissance.

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