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## **The Dilemma of Case Withdrawal: Policing in the "New" South Africa**

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### **Abstract**

The transformation of the South African Police Service (SAPS) during the period of democratic transition has been accompanied by both escalating crime and a tendency for complainants to withdraw criminal charges against perpetrators. The trend towards withdrawal presents the SAPS with a dilemma as attempts to legitimise the criminal justice system via community participation is undermined by the reluctance of complainants to pursue it to its conclusion. This paper attempts to explore this dilemma in the context of restorative justice. The escalating rate of withdrawals seems to point to the increasingly visible alternate dispute resolution mechanisms. Some of these mechanisms are long established within traditional community structures. However, far from simply undermining the formal justice system these appear to supplement an overburdened police and prosecution system, by calling on the formal system to initiate proceedings and act as a solution of last resort, that is if the alternate system fails. However, this relationship remains tense and informal.

### **Background to Policing in South Africa**

In South Africa as in other societies in transition, the transition to democracy soon came to be associated with rapidly rising levels of crime levels. Although much of the increase may be attributed to the lifting of the state of emergency there are other causes.

The state of emergency from 1985 to 1990 probably suppressed crime levels, as well as the reporting and recording of those crimes that did occur. Political liberalisation in the early 1990s witnessed an apparent crime explosion as social controls were loosened and police were released from duties of suppressing political violence (May, 1998: 130).

With the advent of democracy the country adopted a human rights culture as enshrined in the Bill of Rights. Only since the transition to democracy and the cessation of political violence has the true extent of non-political crime emerged. Crime statistics released by the South African Police Service (SAPS) Crime Information Analysis Centre (CIAC) indicate that violent crime, particularly rape, murder and robbery with aggravating circumstances has increased steadily over the years since 1992. After the political transition the police had to reorientate themselves away from suppression of rebellion to their core business, crime prevention. In addition, more diligence in investigation of crime and consolidation of cases was required as the liberties afforded the police by the state of emergency were lifted. The political transition also required the amalgamation of eleven police agencies - those from the former homelands and self-governing states with the South African Police (SAP). This inevitably impaired the smooth functioning of the amalgamated SAPS as a whole. Moreover, the police had to learn to work within the framework of a human rights culture.

The transition and restructuring of the SAPS resulted in a number of immediate problems inter alia low morale, poor salaries, a lack of appropriate resources. These problems pervade other agencies of the criminal justice system. Prosecutors encounter similar problems - many have resigned due to poor pay and working conditions, their average level of experience is short and morale is low (Schonteich, 1999). The situation deteriorated to such an extent in 1998 that prosecutors resorted to industrial action in a bid to force the Minister of Justice to pay them more. Both the police and prosecutors generally complain of being overworked and underpaid. Moreover, both are still unsure about their duties and responsibilities within a human rights culture.

The wheels of the criminal justice system turn rather slowly and ineffectively in South Africa. For instance, the backlog at the High Courts and Regional Courts is eighteen months. The prosecution rates for many of the serious crimes is low for example, in 1997 the conviction rate of cases lodged by police with the courts for murder was 32%, car hijacking 19% and rape 16% (Schonteich, 1998). The police clearance rate is determined by calculating the total number of cases disposed of by the police as either referred to court, withdrawn or unfounded as a percentage of the latter total added to the number of cases disposed of as undetected. The latest figures available are those for 1998. The clearance rate for murder was 62%, robbery with aggravating circumstances 19%, rape 68%, serious assault 75% and car hijacking 10% (Crime Intelligence Division, SAPS, 1999). These factors do not instil confidence in the agencies of the criminal justice system.

The escalating crime figures reflect an increase in crime but also, to some extent, people's increased willingness to report crime to the restructured, accountable police. This is primarily due to the new government and the changes it effected, inter alia, community policing. Community policing was officially adopted as the philosophy of the SAPS in 1994. At the same time the SAPS was demilitarised the ranks were removed, there was a shift in emphasis from "law and order" to "safety and security" and civilian oversight over the police was established.

The low morale and understaffing of the police is aggravated by the withdrawal of cases - an increasingly prominent feature. This refers to the situation in which victims lodge complaints with police only to withdraw them at a later date. Withdrawal of cases are not confined to minor offences, and of particular significance are the withdrawal of serious assault and rape allegations. Thus the police allocate resources to investigations that are not followed through by the victims. In some instances this has resulted in police being remiss in their investigations as they 'assume' the case will be withdrawn. The frustration experienced by the criminal justice system and the significance of the escalating withdrawal rate raises important questions about the legitimacy of the system and its ability to function effectively. The focus of this paper is consequently on the impact and reasons for the subsequent withdrawal of cases. In order to examine these issues, two case studies were carried out.

## **Methodology**

Research was undertaken in two areas. In both police dockets were analysed and interviews were conducted with various stakeholders. The first area was Khutsong, a poor township serving the depressed mining industry of Carletonville, on the Western side of Johannesburg. This study specifically focused on the reporting and subsequent withdrawal of cases in the context of policing in the 'new' South Africa. Many of the people living in Khutsong are from geographically and socially dispersed communities including those beyond South Africa's borders. The second area was the Northern Cape (a region with the highest per capita of crime in South Africa) and the towns included were Kimberley, Upington, Victoria West and De Aar. Here the dynamics of 'social fabric' crimes, considered to be, murder, rape, serious assault and indecent assault, were examined. The economy of the Northern Cape is not declining as in Khutsong but it is depressed with high unemployment.

In Khutsong all crimes including housebreaking and theft, murder, serious assault and rape reported for the month of February 1998 were examined. Of the 242 cases recorded by the police in February 1998, 32 were allocated to external units for investigation. The 32 dockets were not consulted as these cases were being investigated by units not based at the station but at an area level. Two hundred and ten cases were to be dealt with by the local police. At Khutsong, the following information was extracted from the dockets: the date the crime

occurred, when it was reported, the type of crime, the gender and age of the victim and perpetrator, the nature of the violence, the relationship between the perpetrator and victim and the outcome of the incident. Interviews were conducted with randomly selected police officers and members of the Community Police Forum. A survey was also carried out in the community to ascertain the public's views on crime and policing in Khutsong. In the Northern Cape 773 police dockets were analysed. The latter study focused on the crime statistics for 1997. In the Northern Cape, the same information was extracted as in Khutsong but, in addition, the place where the crime occurred, substance usage (drugs or alcohol) and previous convictions of the perpetrator was recorded. Focus group interviews were conducted with criminal justice personnel, representatives of the department of welfare and community leaders. Face-to-face interviews were conducted with randomly selected victims of crime.

## Findings

### Results of docket analysis

Both Khutsong and the Northern Cape are characterised by poor communities, high unemployment, lack of investment and high crime rates. The reporting of crime is believed to be high. In Khutsong the mines were the main employers in the area and no other industry of note has developed in the wake of its slow demise. Many of the residents used to be employed by the mines but due to the decline of the mines many of the workers have been retrenched. It is said that the mines have a life expectancy of only another fifteen years. The people are so economically dependent on the mines for their livelihood that their lives seem inextricably intertwined with its destiny. In 1997 in Khutsong (with a population of 65, 000) 614 serious assaults were reported to the police. Docket analysis revealed that women were the main victims of serious assault, common assault, rape and attempted rape. 'Social fabric' crimes and property crimes are amongst the highest reported and recorded. Forty percent of the respondents in the community survey had been victims of a crime.

In the Northern Cape, high crime rates and poverty are also prevalent. In the same year in the Northern Cape with a population of less than two million, 13,069 cases of serious assault were reported to police.

Violent crimes like murder, assault, rape and child abuse, often associated with alcohol and familiarity among victims and offenders, are comparatively high. A higher rate of reporting is likely given the high police presence, relative efficiency, a predominant single language (Afrikaans), the relative lack of alternative community and family support networks, and ongoing campaigns in the province since 1992 encouraging the reporting of violent crimes. Nevertheless, in a 1996 survey Northern Cape recorded a higher rate of personal experience of crime than any other province (May, 1998).

That trend continues until this day.

The outcome of the cases examined are shown in the table below. Despite the severity of the cases reported, 30% and 61% were withdrawn in Khutsong and the Northern Cape respectively. Police and prosecutors can not force complainants to proceed with cases they wish to withdraw.

Outcome of case	Khutsong	Northern Cape
Undetected	40%	14%
Withdrawn (at police station\in court)	30%	61%
To court	11%	24%
Declined to prosecute	0.8%	

False	2%	0.7%
Still under investigation	9%	
Filed	2%	
Duplicate	0.4%	
Cancelled	0.4%	

Note: In Northern Cape all the police dockets examined had been finalised whereas in Khutsong about 5% of the dockets, the balance, were assumed to still be 'open'.

The highest incidence of withdrawal is found in serious cases. These are withdrawn by the complainant either at the police station or in court. Petty cases were not as a rule withdrawn. The dockets revealed that in many of the serious assault cases, the victim and perpetrator know each other and the incidents typically occur in either of their homes. Alcohol is prominent in some cases. Perpetrators use virtually any object at their disposal to inflict injury on their victims. Objects such as knives, sharpened sticks, stones and iron rods are commonly used. In addition, victims are often beaten, kicked and stabbed. The withdrawal of cases by complainants appears to be enormously frustrating for police and prosecutors. Police, in particular, are of the opinion that their time is wasted by complainants who report crime only to withdraw the case shortly afterwards. The shortest period noted from the docket analysis was within a day. Most withdrawals were within two weeks or a month. Police feel that their time could be used more effectively by attending to more serious cases that are more likely to result in a conviction. The paperwork entailed in opening a case is disliked by many officials as is the paperwork involved in withdrawing a case. Complainants who withdraw a case at the police station have to make an affidavit to that effect. It must be noted that this procedure is not strictly adhered to since withdrawal statements were not always found in the police dockets as required by protocol.

Some complainants withdraw their cases in court to the chagrin of prosecutors and magistrates. Given the backlog of the regional courts, prosecutors and magistrates are rather annoyed at what they perceive as a waste of precious time and resources. In focus group interviews in the Northern Cape, prosecutors stated that complainants would come to them and request the case is withdrawn. When probed for a reason, complainants would say that the perpetrator has offered money for the injury suffered. This parallels the situation in Khutsong. The amount of money varied considerably between Khutsong and the Northern Cape. In the former, a substantially poorer area, a perpetrator may offer an assault victim as little as R20 (A loaf of bread costs R3.) Substantially more, over R100, would be expected in the Northern Cape. However, if the perpetrator reneged on an agreement the complainant would prevail upon the prosecutor to reopen the matter. Prosecutors felt this amounted to an abuse of the system and a waste of their time. Consequently, prosecutors in the Northern Cape have adopted a firm attitude to such complainants - they have warned them that if they have reached an agreement with a perpetrator they (the prosecutors) will not reopen the case again. The mere fact that complainants choose to resolve matters in this manner implies that they have found a more suitable alternative outside the criminal justice system<sup>[1]</sup>.

Given the small monetary values involved, police and prosecutors in both areas were at a loss to describe the thinking behind the withdrawal of cases. Reasons forwarded could be that the criminal justice process is perceived as slow and time consuming. The costs to a complainant in terms of time and money spent on travelling to court as well as staying out of work are too much of an inconvenience to endure. The long delays and repeated postponements in the overburdened courts are enough to dissuade many complainants from putting up with the judicial process. Furthermore, the justice system has been viewed as cold, impersonal and far removed from the reality of every day life. This results in a degree of alienation that is aggravated by the language of the courts that is not easily understood by the average person in the street. In addition, the victim is often not satisfied with the outcome of the case. In a criminal matter specifically the victim is not compensated. However, it is possible for a magistrate or judge to make an order in terms of s300 of the Criminal Procedure Act. This is done after the accused has been convicted and is only made upon

application by the complainant or by the prosecutor acting on instruction from the complainant<sup>[2]</sup>.

The reasons for withdrawing cases were obtained from the dockets. These are the reasons offered to police in Khutsong and the Northern Cape to justify withdrawal of cases:

- the perpetrator asked for forgiveness
- the case was withdrawn at the request of the complainant's family and furthermore, the elders spoke and came to an agreement
- the case was withdrawn at the request of the complainant because the suspect is her husband or they work together or the suspect paid her medical costs
- the matter has been sorted out between them
- the matter was sorted out by the family
- the complainant and the suspect discussed the matter
- the complainant does not want to go ahead with the matter
- the complainant has no interest in the case
- because of the baby
- because the perpetrator is the complainants boyfriend
- the complainant can not attend court because of work
- the complainant felt sorry for the perpetrator
- the complainant is too old to attend court
- because the perpetrator is in jail for another case
- there are no ill feelings between them and
- the property was handed back.

In essence, the matter has been sorted out and an alternate resolution found.

The analysis shows that it appears perpetrators against whom viable cases have been lodged approach victims with a view to solving the problem between them. Obviously, this is done to avoid arrest, prosecution and possible incarceration.

The communities in which this has been prevalent are relatively small and everybody 'knows everyone else'. This phenomenon should be understood in terms of the poverty in which people live and the desire to maintain harmonious relations in the community. The imperative is clearly on the side of the perpetrator. However, this begs the question as to why the victim accepts such overtures. This is related to the intimacy between the perpetrator and the victim and the closeness of the community. However, an important catalyst in the role of the alternate dispute resolution mechanisms was the political turmoil of the 1980s when street committees and peoples courts were established.

## Restorative Justice

### The use of traditional African customary law

In Khutsong, various reasons have been suggested by residents, CPF members and police officers for the use of traditional methods in resolving disputes. However, this is not only confined to traditional African communities but has been found to exist in others such as the Coloured people in the Northern Cape. The origins of this practice are said to be in the traditional black culture where people try to resolve disputes amicably between them (consensual decision making). The style, objectives, authority and tone of these alternate dispute resolution mechanisms can be seen to be rooted in traditional dispute resolution mechanisms such as *lekgotla*. For example, the complainant lays a charge of serious assault at the police station but after a short while returns to withdraw the charge. There is a strong precedent for this in traditional African customary law. Consequently, a brief introduction to define the difference between African Customary Law and the formal legal system is appropriate. I quote at length from Bennett:

Customary law has certain obvious qualities that make it quite different. In the first place it is unwritten and without writing, it must survive in an oral tradition. In the second place, customary law is fashioned by processes different to those which formulate Western law. Customary rules are generated by a community's acceptance of certain standards of behaviour whereas, in the case of Western law, the rules are derived from legislative fiat and the authoritative decisions of the courts. Centralized political control enables the Western state to impose its law on all the people within its jurisdiction. In the case of the relatively decentralized or acephalous societies of Africa, however, the authority of customary law extended only so far as the people affected were inclined to accept it. Thirdly, Western law is the preserve of a profession. This group of people is engaged in the esoteric work of interpretation, application and creation of rules. African societies had no professional lawyers. Because no one was specially concerned to systematize or analyse the rules, they remained in an undifferentiated, unsystematic state. The rules were typically general and imprecise. (Bennett, 1985: 17).

Vorster and Whelpton, quoted in Prinsloo (1998), state that indigenous law places greater emphasis on people's duties than on their rights. Furthermore, there is a strong emphasis on harmonious relations or reconciliation within the group and indigenous law focuses on the truth of a matter and not on time, etiquette or procedures. Consequently, indigenous law is said to be concerned with substantive instead of formal justice and always focuses on compromising settlements. The main object (of reconciliation) is the restoration of relations between the disputants and between them and the others involved. The indigenous negotiation and mediation process is aimed at bringing about reconciliation between people who are, for some or other reason, in dispute with one another. Another facet is the availability of government organs to enforce the law, like the police service, courts and officials administering justice, that have a definite influence on upholding the law. Vorster and Whelpton also contend that there are other factors which may play a more significant role than the government agencies listed previously. These are:

the religious element in the law, public opinion, administration of justice is conducted in public and everybody can see what happens, the law has been passed on from generation to generation by word of mouth ... and the younger generation is introduced to the administration of justice at an early age, the awareness that contraventions of the law will be punished and the influence of traditional leaders who see to it that the law is complied with before matters end in court. (Vorster and Whelpton, in Prinsloo, 1998).

What this emphasises is that traditional leaders play a more significant role in the lives of such communities than the agencies of government mentioned earlier.

The *lekgotla* is one example of such an initiative wherein an elder is called in to solve problems between husbands and wives, warring families and neighbours<sup>[3]</sup>. The origins of *makgotla*, the plural of *lekgotla*, is said to be in the rural areas although it has been 'transplanted to the urban areas' (Mangokwana, forthcoming). Some of the reasons forwarded for the transplantation of *makgotla* to the urban areas are that:

The courts were inaccessible in geographic terms, ...lawyers were very expensive ... and when someone was sent to prison, the family lost a breadwinner if the person was employed, and the low level of welfare grants was not adequate compensation (Mangokwana, forthcoming).

Mangokwana is also of the view that the development of *makgotla* in urban areas came as a response to the crises that prevailed in the townships at the time. For instance, he says *makgotla* in Soweto developed between 1969 - 1974 as a response to a surge in break-ins, assaults and rapes.

*Makgotla* has been acknowledged as important primarily because it enjoys legitimacy in the rural areas, and secondly, traditional practices, and *makgotla* in particular have had a major influence on popular justice in urban settings. (Mangokwana, forthcoming)

According to Mangokwana, Bapela (another writer referred to by Mangokwana) argues that: in traditional African society legal proceedings are community affairs ... society does not punish through imprisonment. Both the offender and the victim are given a chance to present their stories and have their interests taken seriously.

In this system no distinction is made between minor and serious offences. The elder is both judge and jury and the parties agree to abide by any decisions made. The *lekgotla* appears to be a reconciliatory gesture between the victim and the offender. This is in stark contrast to the western criminal justice system that draws a distinction between minor and serious offences,

purports to punish offenders and is primarily adversarial and confrontational in nature. Moreover, the western criminal justice system is time consuming. Retribution rather than reparation is the desired outcome and it is also for the greater good not to the benefit of an individual. For instance, rape is viewed as a crime against society and is therefore punished on behalf of society rather than specifically for the offence against the individual.

Police officers interviewed were of the view that people in Khutsong and the Northern Cape are largely ignorant of the western criminal justice system and prefer to adhere to their traditional values and beliefs. It is possible that the *lekgotla*, or settling of disputes out of court, gives the victim more satisfaction than the processes of the western criminal justice system. Similar views have been expressed by Vorster who states that:

besides the high costs as a factor, slow access to the justice system and resolution amounts to no access, especially where the expectation in dispute settlement focuses on the continuation of social relationships rather than on a win-or-lose outcome. (Vorster and Whelpton, in Prinsloo, 1998).

People have more of a stake in *lekgotla* and believe in its effectiveness. Victims in particular appear to find the traditional method of resolving disputes more satisfactory than the formal justice system. The traditional system does not inhibit change per se but given that the majority of South Africans are African it is not inconceivable that customs will be relied upon. Hence, the offer of payment (compensation) and acceptance thereof for medical costs incurred due to an injury sustained in an assault. However, what needs to be understood is why people report crime in the first instance to the police. The high withdrawal rate and associated payment confirms that the traditional system seems to be existing quietly alongside the western criminal justice system.

The issue of perpetrators paying the victim to withdraw the case is another element to consider. It could be construed as a variation on the *lekgotla* theme but there may be more sinister motives, such as avoiding arrest by the police, fear of the perpetrator (intimidation) and further violence at play. There are various reasons why victims accept money - such as poverty, 'closure' (so the matter is resolved immediately thus avoiding a lengthy criminal justice process and its concomitant delays). Victims may feel a lack of protection from the police as well as a lack of confidence in SAPS and in the Department of Justice to carry out their mandates. They may have an adherence to restorative justice, or an ignorance of the law and its punishment of offenders. Finally, they may simply have a desire 'get on' with their lives. Focus groups revealed that police, residents and CPF members were aware of perpetrators paying victims but were unable to suggest ways in which the practice might be curbed. There seems to be general acceptance by all of this practice but no plans to eradicate it.

The perception of the communities was gathered from the Khutsong survey. This showed that 28% of the residents interviewed mentioned threats by the perpetrator against the victim that resulted in the withdrawal of cases. Far more (42%) said perpetrators paying victims money was the main reason for victims withdrawing cases. A further 28% stated this entailed police asking or taking bribes from offenders in order to destroy documents and files. CPF members put forward reasons such as, bribery between the victim and perpetrator, talking between the victim and perpetrator and the involvement of street committees<sup>[4]</sup>. Apparently, the street committee takes over the case and tells the victim to withdraw it at the police station so that the street committee can settle the matter. The police said that this often happened in cases of assault and domestic violence where people were known to each other. For example, the first scenario provides verification of the use of *lekgotla* but the second presents a problem with it. The third scenario highlights the dilemma faced by women in abusive relationships.

between husband and wife...husband assaults wife, she calls the police and opens a case. The next day the husband finds out and threatens to divorce her. She withdraws the case to avoid disgrace and the matter is sorted out by *lekgotla* (crime prevention officer).

because the perpetrator pays the victim therefore she withdraws the case. The other one can threaten the one who opened the case, so withdraw the case but don't say she was threatened.. she say she talked to perpetrator (crime prevention officer).

assault GBH where family violence is involved....Women see the home as a place of refuge, [the] husband is the only breadwinner and she wants the beating to stop. For the police to act she has to open a case and for medical treatment she needs a case. So for assault the person pays her medical bill plus they agree upon R20 or R50 as an ex gratia payment. Its the environment of unemployment. If a person has a job it's a risk to stay away from work to

attend court. They feel embarrassed with the employer and are afraid to get a bad image if involved with criminal cases (senior police officer).

In the western criminal justice system reparations are not made in criminal cases but in the traditional African system they are and this may be justification for non-performance by the police. This type of justice fits in very well with the new style of community policing - the need for consensus, consultation, community participation - and slots in better with the skills of police officers. They no longer have to ensure they have a watertight case - they could catch the perpetrator on prima facie evidence and hand him over to the elders. The problem is that given the level of crime and poverty this is an inadequate deterrent because a rapist could go on perpetrating the same crime over and over again paying compensation only when forced by a criminal complaint against them. It falls outside regulations and this is the fundamental flaw in the system. Furthermore, because the process is not regulated people are left with the impression that the police accept bribes.

Once withdrawn police say they cannot do anything about the practice of withdrawing cases (this is borne out by the docket analysis where it seems that victims do not have to withdraw a case but the same effect is achieved by dropping the investigation). The police say that their hands are tied as they cannot proceed without the victim's consent. They cannot force the victim to continue with the matter if he or she is reluctant to do so. All the police seem able to do is insist on a withdrawal statement wherein the victim cites reasons for his or her decision. The police are aware of this problem and this research attempts to explain it. However, the Community Police Forum (hereafter referred to as the CPF), which is a body tasked with civilian oversight of the police at a local level, says there is a solution. They suggest that the police should be strict and refuse to withdraw the case and there must be a charge against the victim who withdraws the case.... Arrest both (CPF member).

Given the prevalence of withdrawals and the effort required as well as the difficulties faced in obtaining adequate evidence, the exploitation of the *lekgotla* system will be attractive to the police. It minimises their workload and relieves them of the burden of searching for the perpetrator and investigating the matter thoroughly. This is reflected in the large number of 'undetected', 'withdrawn' and 'filed' cases. The complainant has to first to lay a charge at the police station and this then forces the perpetrator to seek reconciliation. Thus the complainant appears to be drawing on state resources in order to ensure a relatively private solution to the problem at hand. It contributes to the demoralisation and demotivation of the agencies involved in the criminal justice system. The lodging and withdrawal of cases is an integral component of the quest for justice.

## Conclusion

The effect of the informal procedures is that perpetrators are able to continue committing crime again and again secure in the knowledge that they will never be punished by the courts while victims will continue to live in fear, feel insecure and lack confidence in the agencies of the criminal justice system. Victims will fail to report crimes in the future with the result that they increase their chances of repeat victimisation.

At a very low level *makgotla* challenged the monopoly of the state in governance and development of the people (Mangokwana, forthcoming). Mangokwana also feels that *makgotla* could play an important role not only in mobilising people's participation but continuing to provide services where the government is unable to do so. Traditional roles like settlement of disputes, informal policing, preservation of customs and traditions will still be the main focus areas of *makgotla*. More to the point, despite the limitations of *makgotla* they provide an opportunity for ordinary people to participate in decisions that affect their everyday life. For the future, a lot will depend on the government's view of what *makgotla* have already achieved and whether the government feels it can build on those achievements. If so, the two systems can coexist and work to the benefit of the community concerned.

The perseverance of the traditional system and the ongoing use of mechanisms such as *makgotla* demonstrate the prevalence of the quest for restorative justice rather than punitive justice metered out by the formal system. Restorative justice is a relatively new concept in the Western criminal justice system discourse. However, it has been in existence in African traditional culture from time immemorial. The essence of *lekgotla* blends in very well with the move towards restorative justice in westernised societies. The difference between restorative justice and retributive justice is striking. Restorative justice inter alia views



crime as a violation of people and relationships, aims to identify needs and obligations, encourages dialogue, mutual agreement, an exchange of information, gives the victim and offender central roles in the conflict and the healing of the individual is encouraged. By contrast, retributive justice views crime as a violation against the state and its laws, focuses on establishing guilt, justice is sought through a conflict between adversaries in which the offender is pitted against the state, rules and intentions outweigh outcomes and one side wins and the other loses. (Zehr,1990).

People in Khutsong and the Northern Cape are practising the principles of restorative justice. For this to continue the SAPS will need to learn to accept a private resolution and *lekgotla* as a legitimate outcome of their efforts alongside arrest and successful prosecution. Without this kind of recognition there will continue to be tension between the formal justice system and African customary law.

## Notes

1 It constitutes tacit acceptance of this practice and the prosecutor's self interest is served by a reduction of his/her caseload.

2 Nevertheless, the decision whether or not to make the order is the court's discretion. An award made in terms of s300 has the effect of a civil judgement. However, not many complainants are aware of this.

3 Lekgotla is a tribally orientated structure that deals with a wide range of issues (for example, settlement of disputes, informal policing, crime prevention and the preservation of custom and disciplinary rules. See Mangokwana, forthcoming.)

4 Street committees were formed in the 1980s in the townships of South Africa as a response to repressive state policing. These street committees were formed by the community and performed functions such as policing in the townships. They were co-ordinated by the local civic .. and became key elements of resistance politics. They also addressed problems such as domestic squabbles between husband and wife, parent and child etc' (Ditlhage, date).

## References

- Bennett, T. W.** (1985). *Application of Customary Law in Southern Africa*. Kenwyn: Juta & Co Ltd.
- Crime Information Analysis Centre (CIAC) of the SAPS.** *Semester Report 1999*. Pretoria: CIAC.
- Ditlhage, G.** (undated). *Associations, Path-dependency and Democratic Governance: A Case Study*. Johannesburg: University of the Witwatersrand.
- May, J.** (Ed.). (1998). *Poverty and Inequality in South Africa*. Durban: Praxis Publishing.
- Mangokwana, A. M.** (Forthcoming). 'Makgotla in rural and urban contexts.' In: W. Scharf and D. Nina (Eds.). *The other law*.
- Prinsloo, J.** (1998). 'Crime prevention in South Africa: utilising indigenous practices.' *Acta Criminologica*, Vol. 11 (2).
- Schonteich, M.** (1999). *Lack of Conviction: Prosecution's Poor Performance*. Nedcor ISS Crime Index Vol 3 No 2. Pretoria: Institute for Security Studies.
- Zehr, H.** (1990). *Changing Lenses: A New Focus for Crime and Justice*. Scottsdale: Herald Press.

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