

**(RE)MAKING JUSTICE
IN SOUTH AFRICA:
POPULAR JUSTICE
IN TRANSITION**

Daniel Nina

CSDS Working Paper No. 8

CENTRE FOR SOCIAL AND DEVELOPMENT STUDIES

UNIVERSITY OF NATAL DURBAN



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The Centre for Social and Development Studies was established in 1988 through the merger of the Centre for Applied Social Science and the Development Studies Unit. The purpose of the centre is to focus university research in such a way as to make it relevant to the needs of the surrounding developing communities, to generate general awareness of development problems and to assist in aiding the process of appropriate development planning.

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'You know,' said Port, and his voice sounded unreal as voices are likely to do after a long pause in an utterly silent spot, 'the sky here's very strange. I often have the sensation when I look at it that it's a solid thing up there, protecting us from what's behind'.

Kit shuddered slightly as she said: 'From what's behind?'

'Yes.'

'But what is behind?' Her voice was very small.

'Nothing, I suppose. Just darkness. Absolute night.'

(Bowles, 1990:88-89)

INTRODUCTION

It is difficult to conceive how organic expressions of popular justice could be preserved in this period of transition in South Africa. It seems unlikely that the current State (in the narrower conception of the Gramscian terminology)¹ would accommodate them, since the general trend is to move away from any structure in which the element of popular participation is highly visible.

The National Party controlled government wishes to maintain the institutions of the State as far away as is possible from the control and accountability of the people. On the other hand, the alliance forces led by the African National Congress (ANC) are arguing formally the opposite: the people shall govern. Since 2 February 1990², the government has initiated many judicial changes. However, these changes still represent the dominant culture of the country, where the elites and minorities retain control; where democracy is reduced to the right to vote, but does not allow the citizen/community to participate actively in the processes of decision making.

The story, thus, is about South Africa. The medium is that of popular justice. The motivation is to discuss, at the socio-legal level, the implications of this period of transition in the organs of people's power, focusing in particular on the institutions of popular justice on the ground. The examples are two: firstly, Alexandra, an African township in Johannesburg, and its civic organization, where committees of dispute

resolution have been established; secondly, a workers hostel of Durban, where a people's structure operates to maintain the needed order within a population of 10,000 dwellers.³

The theory is manifold: legal pluralism, informal justice and the State interrelating with popular justice. The intention of this 'theoretical mixture' is to explore the limits of State law and that of the parallel legal modes created by the popular sectors. The relevance of this paper is to present the case of South Africa: perhaps one of the most interesting current examples of popular justice in a period of political transition in the world. A country where two visions of the 'informal' side of the law are in conflict.

In the first part, I will discuss two cases of popular justice in South Africa. In the second part I will develop a theoretical discussion; and finally, I will present the conclusion to this paper.

PART I: POPULAR JUSTICE IN THE MAKING: SOUTH AFRICA

Popular justice in South Africa emerged in a clear and distinctive way a decade ago. It is an urban phenomenon of the African townships created by the apartheid regime. The emergence of a particular expression of popular justice, the people's courts, originated during the heyday of the revolts against the apartheid regime in the early 1980s. They were part of a broader political project of making the country ungovernable, establishing prefigurative institutions of people's (State) power, led by the United Democratic Front-African National Congress (Allison, 1990).

The apartheid regime led by the National Party government, used all its might to crush any kind of initiative of popular justice (Seekings, 1989). The possibility of losing its monopoly on the rule of law and justice was a real threat against its authority. In Alexandra, for example, by 1986 the State exercised its authority and arrested the leadership that was involved in such activity. Specific legislation was enacted to criminalise press publicity that commented positively about the people's courts. Consequently they were completely banned from public discussion (Shärf, 1988:19).

From the people's side, organizing their own structures of popular justice was conceived as a major break away from the State - as a nerve-centre of racism and as an oppressive bureaucracy. It gave the people the possibility of beginning to regulate and administer their daily lives in their communities. However, all is not what it seems to be. Popular justice exists in a social reality which does not necessarily correspond to the manner in which it is politically represented nor as it appears to the participants themselves. Therefore, one has to disentangle the effect that popular justice has in relation to the State and other social phenomena.

Firstly, it intended to break away from State control. The principle that State-defined legal problems should be reported to the State's authorities has been questioned since the 1980s in the African communities of South Africa. Consequently the State's monolithic authority in the administration of justice has disappeared. At this level, the people's initiative has a political meaning and is a challenge to the State. This is often conceived within a traditional Leninist political view, as two poles of force, struggling to achieve State power (Santos, 1979). However, judged by these Leninist assumptions popular justice failed in South Africa. The whole idea of prefigurative State institutions, such as people's courts, did not end in what was foreseen. Instead of implementing dual power the current transition of South Africa is one in which all the major political forces are negotiating the 'modernization' of the State.⁴ However, if one uses a less orthodox (Leninist) approach, and emphasizes Gramsci's concept of hegemony, the possibility of creating parallel institutions to the State for questioning its authority and power represents just the beginning of a long-term project of political transformation.

Secondly, after initially crushing the initiatives of popular justice in the 1980s, the State allowed some of them to continue operating. In fact, there have been many examples where the South African Police have instructed residents in communities not to bring cases to them, but to report those cases to the people's courts (Seekings, 1992:193). In so far as those courts bring order, reduce crime and reinforce a social morality that is not different from the dominant ethical order in South Africa's society, they reproduce the State function in areas which lie outside the realm of the State's legal arm and where the State's legal/moral authority has been thrown into question.

Although denying State authority, in most of the cases the communities have adopted 'legal definitions' that are a reproduction of those of the State. However, in defining certain practices as not acceptable in the community, regardless of the fact that they (the community definitions of order) coincide with those of the State, the communities have exercised a right of autonomy - a right to be free of an undemocratic (central) State. The community denies the universality of certain values and places the local before the regional; the regional before the national. Is this a post-modern conception of the law (Santos, 1987)?

The denial of the State law, and its (re)appropriation at the local level, does not deny the need for maintaining order. There is always a definite societal need for some kind of order within those who constitute the social tissue. But what distinguishes the community initiative from that of the State is the participatory element and democratic nature in the definition of such order.

Thirdly, the distinction between popular justice and State justice is not that of a revolutionary rupture and a conservative maintenance of the status quo. The real distinction, on the one hand, is between State legal machinery operating at a distance both physically and geographically from the people on the ground, and, on the other hand, popular justice which involves local people in exercising legal and moral authority over their immediate community. The substantive issues may well be the same between these two forms of implementing justice. But what critically distinguishes them is the manner in which they are implemented.

Fourthly, since the unbanning of the African National Congress and other progressive forces last 2 February 1990, there has been a re-definition of the role of the structures of popular justice. In a few consultative conferences on the issue (Seekings, 1992:195)⁵, some guidelines were suggested. For example, it was recommended that organs of popular justice should avoid dealing with cases of murder and rape. The guidelines suggested the total elimination of physical punishment.

These modifications affecting the organs of popular justice are certainly important. The progressive movement understood the limits of the relationship between practices of popular justice and State intervention. Cases of murder with the imposition of a 'people's sentence' of death could

also result in members of the people's court being charged with seditious crime and murder by the State. Similarly, enforcing other types of physical punishment, like whipping, could also represent being charged with assault or an analogous type of crime.

In this sense, the changes in the practice of popular justice have been determined by a recognition of the power of the State and its potential capacity to intervene against those organs of people's power (Nina, 1992a:20-21). Fundamentally in this period of transition the communities have abandoned the notion of dual power which embodies concomitant *rights* to exercise all accompanying authority in one's own liberated domain. What lies behind this shift is a recognition of the legitimacy of the State to exercise legal/moral authority in regard to more serious crimes, and in return the recognition that organs of popular justice have the concomitant legitimate right to exercise legal/moral authority in regard to other social problems.

Fifthly, the development and consolidation of organs of popular justice in South Africa varies depending on the level of organization of the communities (Seekings, 1992). The level of organization is determined by multiple factors: the strength of the organs of the civil society, consolidation of political parties in those communities, State repression, and political violence.

I have conducted research in two provinces of South Africa: Transvaal and Natal. In Transvaal, in the community of Alexandra where I conducted the research, the levels of community organization were quite impressive. The discussion affirmed the need to maintain the organs of civil society independent from, and autonomous of, the political party (i.e. the African National Congress) and the State (i.e. governmental bureaucracy). In Natal, on the other hand, since the early 1980s there has been a war taking place between two political organizations: the United Democratic Front/African National Congress and the Inkatha Freedom Party.⁶ The level of development of civil society in the African communities of this province is very low. The political organizations are the ones that govern. The organization of such communities, therefore, is determined by the party political line.

Since the early 1980s the State has consistently repressed, or attempted to

co-opt, different expressions of popular justice in the country. In certain places, for example in Alexandra, this made the community drastically modify their way of handling disputes. In Alexandra people's courts were changed to establishing yard and street committees engaged in mediation. Consequently the State eased repression against those communities that were not replicating State courts. This coincided with such communities beginning to deal with the State authority in a more pragmatic way (Nina, 1992a).

In Natal, on the other hand, State repression has been very severe from the mid-1980s right through to the present. The reaction of the people has been to maintain some form of people's courts (even if only in name) in a campaign that represents a defiance of the State authority.⁷ The most that they have done is to eliminate physical punishment and to limit the jurisdiction of their courts.

Sixthly and finally, the communities examined have specific subjective elements and the people involved also have specific qualities which make the case studies unique. The stability of the communities, the long term relationship between yard members or hostel residents, and the rural values, create the adequate environment for exercising popular justice. The role of the mature activists, of the elders, and the strength of the political organization, are also factors to assess. These factors in regard to these two case studies, make favourable in this period of transition, a positive correspondence between State authority and popular justice.

In this sense, the external political environment, for example, which in Natal exercises a political monopoly of authority, is not able to turn the organs of popular justice as mere expression against the State. Instead, the social stability, interpersonal connections, existing social mores, traditional modes of resolving conflict, inherited forms of respect, that is to say a social and institutional fabric derived from a larger, more traditional context, imposes itself upon that community and acts as a countervailing power neutralizing the political context which is destructive to the community.

A. In Alexandra, an African township

Alexandra is an African township in Johannesburg, with an estimated population of 350 thousand dwellers. It was founded in 1912 as a freehold

place for Africans and Coloured people. In the 1950s, in the early days of apartheid, the dwellers lost their rights over the land. This conditioned their struggle against the regime as one to maintain their right to remain as a community. From its early stage, this community developed a culture of struggle and resistance.

Through its involvement with the UDF in the mid-1980s, the community began to organize their organs of people's power. This included, amongst other things the people's courts, which were launched in early 1986. The State acted quickly against this particular initiative and by the end of the year most of the leadership was incarcerated. This impacted on developing community structures and during 1986-9 community organization was very low (Nina, 1992a).

Despite this process of repression, in 1989 a new community organization emerged, the Alexandra Civic Organization (ACO). The ACO began, in the late 1980s, the difficult enterprise of organizing civic structures on the ground including the yard and street committees. One of the duties of these structures was to develop community mechanisms of dispute resolution.

In the yards (where around 10 families live) residents learned that the only way to survive in apartheid conditions of overcrowding, lack of basic hygienic facilities and poverty, was through cooperation. Solving disputes at the yard level involved educating and politicizing the parties in controversy. In theory, the whole civic structure operated on the basis that each structure should try to solve their immediate problems: eg., the yard was the first step for sorting out any conflicts amongst the dwellers. Lack of resolution at this level resulted in the conflict being elevated up the structures of dispute resolution: from the yard, to the street, and then, to the area committees. However, in practice people tended to go directly to the Advice Office.

In 1990, ACO established the Advice Office where residents could come to report any problem that had legal repercussions, either dealing with the State authorities or being an intra-community conflict. In the Advice Office a 'community trained' registrar would assess each case on its merits and determine the most appropriate solution. For example, if the case was not too difficult (e.g. a yard dispute over the use of a water tap), the registrar

referred it back to the grassroots structures (e.g. the yard committee) for a solution. In other cases, the 'civic registrar' could decide to refer the case to the police, social worker, or to a lawyer (including the law clinic of the University of the Witwatersrand or the Legal Resources Centre).

The Joe Modise Camp is one of the 14 areas into which Alexandra is divided, corresponding to one of the administrative regions of the civic organization. It represents an average population of 12 to 15 thousand people, encompassing avenues 11 to 13. The civic structure of this region handles many of the different problems confronted by the dwellers. It also serves as a political forum to discuss many current political issues and to bring political discussions into line with the ANC's political position, although some space has also been gained by other political organizations.

The yard and street committees are not functioning as ideally conceived. The political violence that has affected Alexandra in general since early 1991 has affected the level of organization on the ground. There is fear amongst some of the dwellers of getting involved in the civic structures and becoming easy targets of the vigilante groups or of violence from Inkatha followers. Nonetheless, the Joe Modise Camp has managed to organize and develop certain aspects of community responsibility. The proceedings of dispute resolution are very organized in the Joe Modise Camp. They are conducted on Tuesday evenings and Sunday mornings in the yard where the conflict is happening. For this purpose the region has elected a committee of 12 (male) persons to compose a 'rapid dispute resolution' body. Between four to six of those mediators are actively involved and in most of the mediations in which I participated three mediators were always active.

In the Joe Modise Camp, unlike other areas of Alexandra, the mediators are composed only of men: the only explanation given was that women did not want to participate in this duty. Nonetheless, in other regions of the Alexandra women have taken a very active role in mediation.

There are two ways to raise a complaint. One immediate way could be for any community member of this region to speak directly to any of the yard representative of the civic structure or to any of the community-elected mediators of the Joe Modise Camp. Depending on the seriousness of the case, the representative or the mediator would suggest dealing with the

problem immediately or 'booking' it for the next ordinary meeting either on Tuesday evening or on Sunday morning. The other possibility could be that a member of the community that has a serious grievance against another member would go to the Advice Office of the Alexandra Civic Organization. The Advice Office would determine what to do with the case, and if appropriate would refer the case back to the region structures (in this case the Joe Modise Camp) in order for the community mediators to intervene.

The community mediators have not received any formal legal training. However, their political engagements in the community and outside of it, through the work place, have provided them with many skills to deal with mediation. Some of them are teachers, other are factory or construction workers; one of the mediators works in an industrial legal aid office, where he gained a great deal of experience in industrial relations mediation and arbitration. What brings them together is their interest in improving the living conditions of their community and creating a democratic society where the people would have a participatory role in their daily lives.

Most of the proceedings in the Joe Modise Camp were conducted according to basic common sense. The interest being to reconcile the parties in dispute, avoiding any kind of confrontation between the parties or other community members. The intervention of the mediators is as facilitators of the proceedings and at no time they are interested in imposing their will or points of view. What they always emphasize is the need for both parties in dispute to feel free to expose their case, without any type of fear or coercion. The community mediation encourages the participation of other community members who are not part of the conflict. The intention of this is to facilitate, with other members of the community, the collective understanding of what was done wrong and to find out a 'collective truth'. No one holds the final truth of any event, but through the community's active participation a clearer understanding of the events could be found. Punishment of any type is not part of the mediators' duties. In fact the mediators are basically interested in finding a solution which satisfies the parties involved in a controversy, helping to strengthen the community bounds.

The mediators are at all times in control of the proceedings. No participation is allowed out of the established order. In fact, people will

follow the proceedings respecting the leadership of the mediators and those who are not behaving within the established order would be asked to leave the proceedings. From the very beginning of the mediation the mediators would define the rules for participating. The identification of the mediators with the civic structures as a non-political partisan organization in the community is established from the beginning: the civics are for representing and defending all the community dwellers regardless of their political belief.

Two 'cases' could help to illustrate my arguments.

Case I. Conflict over the ownership of a house. The mediators read the letter of communication sent by the Advice Office of the Alexandra Civic Organization. The mediators explained who they were and their intentions. The only rule established by the mediator leading the proceedings was that anyone attending the mediation could participate, provided that they respected the order of the proceedings. In addition to the two parties, the four mediators and the two observers, there were also 12 members of the community participating in the mediation.

A, the complainant, put his case forward. His communication skills were not too good, thus a friend was assisting him. It was explained that he had the right to a shack in the yard. He had started the construction of it, but had to leave for his 'homeland' to deal with some family matters. He left a friend in charge of the shack. Some members of the yard that were participating in the proceedings agreed with A's position. When A came back from the homeland, B did not want to move out from the house. There was violence between them.

B claims that A gave him the right of possession over the property before leaving the community. B also claimed that he finished the house -implying that this made it his. The community mediators were confused: they encouraged the intervention of the neighbours in order to facilitate the solution of the controversy of the right of possession over the property. Many participants intervened saying that A used to lived in the yard and that he left B living there whilst he went to his 'homeland'. This helped to disentangle one of the problems of the dispute: who was the original owner of the shack. It was established, through the intervention of the neighbours, that A was the original owner. B agreed.

The second problem to address was to measure how much was invested by B in finishing the shack. B was asking to be paid back or to be able to take the materials with him. The mediators went to the shack in order to conduct an inspection in loco. After inspecting the place and discussing with the parties, it was agreed that A should return to B the materials used for the construction of the roof or the equivalent of R400.00. Two weeks were given to A in order to satisfy this agreement. The agreement was signed by the parties, two mediators and two observers.

Case II. A, the tenant, and B, the landlady, were having problems: the tenant was asked to leave. The tenant, went to the Advice Office to explain the situation: she and her family did not have anywhere to go. The Advice Office referred the case to the mediators of the Joe Modise Camp.

One of the six mediators who were in charge opened the proceedings explaining the role of the mediators as members of the civic association in this region. The civics are representative of the entire community and not of any particular political group. The community should engage in sorting out any controversy that they have in their own region instead of going straight to the Advice Office. The yard representative was attending the proceedings. The yard members were invited to participate in sorting the controversy between the parties in dispute that Sunday morning. Almost 40 neighbours decided to participate.

A, the tenant and complainant, began explaining her case. She lived with her husband and three grandchildren in a shack next to the house of the landlady. She rented the house from the landlady's late husband almost two years ago. Now the landlady wanted her to leave. A had no place to move and she was concerned with the welfare of her grandchildren. That is why she asked the community mediators to intervene in order to get an extension of her renting contract with the landlady until a new house was found.

Some of the yard members participating in the mediation raised their voices of disapproval. The mediators brought the gathering back to order. B, the landlady, was given the right to talk. B agreed that her late husband made a rent deal with A two years ago for a period of six months. She was now asking A to leave because when A went to Natal to visit her daughter, the mother of her three grandchildren, the children were left uncared for.

On one occasion the children were playing with matches and almost burnt the whole yard. This is why the landlady now wanted B to leave.

The mediators gave the floor to other members of the yard to participate. Most of them agreed to not having any personal problem with A, however, they were concerned with her lack of care of her grandchildren, her continuous trips to Natal and with the incident in which the grandchildren almost burnt the yard. The intervention of the community members provided the mediators with some further information to disentangle the controversy. Although understanding the feelings of the community members, the mediators were concerned with the welfare of the children.

One of the mediators raised some considerations on the housing problem in Alexandra. On the one hand A had stayed for much longer than the six months period of the initial rental agreement, but the shortage of houses in the community forced her and her family to stay there for such a period. On the other hand the mediator could understand that the continuous trips of A to Natal, leaving her grandchildren unattended, represented a real problem to the community. This mediator suggested that a compromise should be reached in which the interests of both sides should be protected. Fundamentally, the safeguarding of the children was a primary problem in this controversy and the 'new' South Africa should always protect the children.

He proposed a compromise agreement: A and her family should be allowed to stay in the yard, for at least six months, until they found a new place to stay. The members of the yard should help A's family in finding a new accommodation. If A needed to go to Natal, she should guarantee before leaving that her grandchildren were under the supervision of an adult person -the community should be informed of all the particulars of her arrangements with her grandchildren. The agreement was written down in one of the mediator's notebook, although it was not signed by the parties.

B. In a workers hostel called Ethekwini

Ethekwini is a workers hostel of Natal.⁸ Its history is related to the consolidation of the apartheid regime, where the pass laws, group areas, and the establishment of the homelands created the conditions for having a

pool of African workers migrating into the urban (white) areas, living in hostels. Their residence in the urban sectors was temporary: they belong to the 'bush', according to the inner lines of the racist policies.

Ethekwini was established in 1974. It is a hostel housing both males and females, with an approximate population of 10 thousand dwellers (eight thousand are men and two thousand women). It is controlled by the Natal Provincial Authority. The dwellers live six to a room. Some alternatives can be provided if the dweller is not prepared to share it with other residents or if his/her family come to visit.

It is mainly a hostel of African National Congress supporters. There is no history of Inkatha violence or attempts to move in. There was an attempt to create a civic organization of hostel dwellers but it failed. The reasons for its failure are, as far as I understand, very related to the political patterns of the Natal province. The political organizations at the ground level are the ones that determine the organization of the communities. There is no civil society as such in the African community of Natal and there is a limited development of structures of people's power independent from political organizations.

In 1990, when the ANC was unbanned, a local branch started to operate in the hostel. There was also an Ethekwini Committee of Concern (ECC), dealing with the daily life problems of the residents. Both organizations were accountable to the ANC. Recently the ECC was dissolved and a new branch of the ANC launched. This new branch is the one that will be taking care of proceedings between the hostel community and the administration, and between the hostel dwellers themselves.

The proceedings of this committee (either the ECC or the new branch) take place on Monday and Thursday evening in the recreation hall of the hostel. They deal with a range of different matters including those related to the Natal Provincial Administration, transportation and the general political discussion of the country. They also concentrate on resolving disputes amongst dwellers of the hostel.

The proceedings for the resolution of disputes begin on Monday evening. During the night, the dwellers gather in the recreation hall of the hostel where they discuss different matters concerning their welfare in the hostel.

The attendance of the proceedings varies from thirty people to a hundred people. All hostel dwellers are welcome to participate. It is almost a three hour meeting, led by a chairperson and a secretary. Towards the end of the proceedings, the chairperson asks the participants if there is anyone who wants to raise a complaint. On Thursday evening the chairperson opens the proceedings assisted by a secretary. Initially the chairperson and a secretary for the evening were elected from the floor on a meeting to meeting basis. However, with the new changes in the dwellers organization, the branch chairperson chairs the proceedings in the evening.

The structure of the proceedings in the hostel are quite unique. The formal court has been reproduced by other means (Nina 1992b). Let's call this institution a 'people's structure', in which a fusion between the judicial practices of the State have been appropriated and transformed by the community. The only problem is that there is no judges. The 'floor' would have a multiple role: judge, prosecutor, counselor, jury, and marshall of the of the people's structure. The chairperson's role is limited to calling the complainant to testify and to recount the event. Witnesses are requested to leave the hall, whilst the complainant is giving his/her account. Once this party has finished the 'floor' proceeds to 'cross-examine'. Then, supporting witnesses are called into the hall to explain what happened and be questioned. The defendant is then allowed to put forward his/her version of the case. The same proceedings that applied to the complainant are used in the case of the defendant and his/her witnesses.

After the 'floor' has listened to both parties (and their respective witnesses), they proceed to open a long discussion and deliberation. Has the case of the complainant been proved or has the defendant proved that he/she is innocent? Were there any mitigating factors? Is there any argument of self-defense? After this process of deliberation the floor begins to establish consensus on the different aspects surrounding the controversy, leading to their final decision. Once the decision has been reached, the chairperson regains control over the proceedings.

The chairperson then, opens the discussion and deliberation for finding an appropriate sentence. This process might last as long as that of reaching a decision. Many different factors would be considered by the people before deciding on a sentence (e.g. self-defence, mitigating factors, etc.). Once a sentence has been reached, the 'floor' instructs the chairperson on how to

implement it. It could be a matter only of paying a fine to the people's structure, or of retribution, or of fulfilling a responsibility to the complainant. It also could involve giving advice to one of the parties. On certain occasions the 'floor' could ask for a physical punishment. However, at the moment physical punishment is reduced to whipping, and it is seldom used.

In the sentencing that accompanies a decision the 'floor' becomes the executer: the process involves everyone participating in the house. This was quite clear when imposing (lashes) physical punishment. The assessment of the people's structure is that the application of physical punishment tends to diminish the legitimacy of their organization, divides the community, and involves the State authority potentially. Therefore, the 'floor' has reduced its use in favour of other remedies.

Although the proceedings of this people's structure sounds quite formal and rigid, there is also a great deal of flexibility. The 'floor' uses a great deal of pragmatism when deciding with a case. A people's 'due process' is always guaranteed: the parties must be heard, they are entitled to bring their own witness(es), and to raise any defence that could help to explain their cases. There is no right to cross-examination, nor a right to legal representation. There is a right to not testify publicly if the testimony could put the party in jeopardy; but the party would have to testify before a special commission of the 'floor', behind closed doors.

In contrast with Alexandra, for example, the 'floor' or the chairperson does not use time to explain the role of this structure or to discuss the oppressive nature of apartheid. The 'people's structure' is determined by the political context of the over politicized province. Its primarily role is that of dispensation of justice.

Two cases help to illustrate the proceedings at Ethekewini.

Case I. This is a case of a contractual relation between two parties, in which one party alleged that the other did not satisfy their verbal agreement. A, the complainant, owns a radio-cassette player. It was out of order and A took it to B, the defendant. B has a radio repair stall in the hostel. He is one of many dwellers who constitute part of a strong service sector living and operating within the hostel.

A had already paid R50.00 to B for fixing the radio-cassette. B finished his job. A was not satisfied with the job, and B asked for more money to finish the job properly. This provoked disagreement and A decided to take B to the people's structure.

After listening to the two parties and raising some questions, the 'floor' felt that the payment of A to B was valid and should be preserved. Some work has been done in repairing the radio-cassette. However, the 'floor' felt that B should examine the radio-cassette again and bring it back to the next meeting of the people's structure. The 'floor' would determine if the radio-cassette was working properly.

The following week, B brought the radio-cassette to be examined by the 'floor'. They found that it was working adequately. A, the complainant also examined it and felt the same. A was satisfied. The case was closed.

Case II. This case dealt with many things including, theft, assault and stabbing. It is related to a triangle between A, the complainant who is the lover of C. B, the defendant and accused, was the lover of C. C, one of the victims of B's attack, was previously having a relationship with B, and now is having a relationship with A.

A argued that he was living with C. One day, when he was not there and C was in the room, B came and appropriated money and clothing that did not belong to him. On a second occasion B came again, this time A was there, demanding to 'have his girlfriend back'. They fought, and B stabbed A in the arm. He then left the room.

B, the defendant had a version not too different from A. He agreed to have gone only once to the room where A and C were living. He went there because that happened to be the place where his (former) girlfriend used to live. Now he found A living there. His relationship with C was not too good. B alleged that he only asked for his clothes. However, he also wanted to be with his girlfriend again. According to B, A hit him first. In self-defence B stabbed A.

The 'floor' deliberated extensively, trying to identify what the controversy in the case was. They concentrated on the reasons for the assault and stabbing. The 'floor' understood that no one has a right to invade

someone's privacy without the other party's consent. Moreover, the people also argued that once you finish a love relationship, a person should respect the will of the former lover. The 'floor' agreed that the stabbing was done in self-defence (by B) and that it was a superficial stabbing in the arm, although they understood that it was wrong.

The 'floor' thus found B behaving improperly. The chairperson took control again, and led the discussion to defining the sentence. Some argument came from the 'floor' that could be used as a mitigating factor in favour of B. In particular the fact that B and C were seen a few times before the incident talking and having a good time. Therefore, there was some concern that C, was up to a certain point, responsible for the situation. The 'floor' reached a complicated verdict: first, that B should submit the knife that he used for attacking A to the 'floor'; second, that he pay all the medical costs of A; third, that although he denies stealing money from A, he should pay a fine (R80.00) that helps to compensate A for losing money. In addition to these conditions of the verdict, the 'floor' decided that B and C should be advised by the elders participating in the proceedings of what the appropriate way of behaving between former couples was. On the one hand, B should understand that once a relationship is finished he should not go back to the house of the new couple -this could create some heavy problems. C, on the other hand, should know that once a relationship ends, she should not initiate a new one immediately.

PART II: POPULAR JUSTICE AND THE STATE IN SOUTH AFRICA

There is a relationship of 'love and hate', as the popular saying goes, between practices of popular justice and State law. On the one hand, expressions of popular justice emerge due to many reasons related to dissatisfaction with the State law. What is the class nature of the State legality? How oppressive is that legal order that moves the people to create their own? Are the organs of popular justice always contesting the dominant power relations of the State?

On the other hand, since the emergence of the modern Nation-State, the principle of the rule of law as part of the central government has been maintained. The law of the State is monolithic over the national territory. It represents (reflecting on Durkheim) the common dominant values of the

society. Any attempt to create legal institutions that are outside the State realm, contesting its authority, would be illegal. The State would exercise repression against those initiatives. However, if those initiatives could be useful in reproducing the dominant ethic (in the Gramscian terminology in which the State, in the broader sense, is a reproducer of the dominant ethic), then they will allow those initiatives to continue. The 'rise and rise', as Fitzpatrick argued, of informal justice (Fitzpatrick, 1988), could support the above argument.

I would agree with Fitzpatrick's point that popular justice could be a myth (Fitzpatrick, 1989). This is basically because it serves to control and reproduce the State order in those areas in which the State could not gain access. Let's reflect on the case of the hostel, as discussed above. In this sense, I agree in principle that the order that is maintained helps in the total reproduction of a particular type of necessary order, that goes beyond the hostel.

Nonetheless, and reflecting on the contribution of Guatarri and Negri (Guatarri and Negri, 1990), it is important to identify when a rupture within the State legality occurs and what it means in the particular context that it is taking place. It is an act of defiance, in which the community decides to take control of areas in which the modern Nation-State traditionally has control. South Africa, however, makes the story more complicated: the initiatives of the people to develop organs of popular justice, to liberate themselves of the oppressive legal order established by the apartheid regime, have been affected by this period of transition in which State authority has gained some legitimacy.

The sociological interpretation of legal pluralism (Santos, 1985), on the other hand, suggests that the State monopoly of law is not absolute. It represents the dominant legal mode over the national territory; however, it coexists with other legal modes which are not necessarily defined (although they are sanctioned) by the central State. An articulation of legal modes occurs (Fitzpatrick, 1983) reproducing the State's -in the broader sense- legality (Gramsci, 1986:12).

The above argument is important, because the State will rely on the reproduction of those different legal modes in order to maintain the necessary social control (Santos, 1985; Fitzpatrick, 1989). Foucault's study

and perception of the realm of the norms outside the formal law is fundamental here (Foucault, 1980). The State, in the Gramscian conception, is a totality of social relations in which the State law articulates, in a dominant role, with the different legal modes.

It would be too naive and simplistic to argue that those legal modes, articulating with a dominant legal mode originated from the central State, are only reproducing oppression and exploitation. The State, in the broader sense, is a locus of social struggles, subversions and resistances. The hegemony of the dominant class, or bloc, would require certain concessions in order to preserve its power and authority (Gramsci, 1986).

The so-called informal justice, for example, could also be examined from the above discussed perspective (see in general Abel, 1982a, 1982b). The emergence of informal mechanisms of dispute resolution, outside the State official court, could be part of a process in which the State is re-defining the boundaries of its hegemony (at least in how to maintain the necessary order). Community mediation, arbitration, counselling bodies, and short process courts, could be seen as part of a process of decentralization, sanctioned (and controlled) by the State. All the logic behind the informalism could serve to reproduce the State and its many forms of domination and control.

However, it could also serve to empower deprived sectors and for organizing, in Gramsci's terms, a counter-hegemonic project that could question bourgeois rule and class legality (Santos, 1977).⁹ This is the argument that has been raised by Cain (1988) in her seminal work on informal justice. There is a possibility, within those institutions of informal justice (that are sanctioned by the State), to create a project of 'collective justice' (Cain, 1988:56-58). This would represent a break away from the State conception of informal justice.

Informal law is a contradiction in terms so far as the working class is concerned. In so far as informal law is law it is destructive of collectivity, the only source of countervailing power to capital. In so far as informalism does not destroy collectivity, that is in so far as it constitutes its subjects in non-individual ways, then this informal procedure is not law. It must be some other form of justice or of social control. (Cain, 1988:56).

Therefore, I would support the informal, the plurality of legal modes, articulating with the State mode, if the institutions involved are creating a rupture with the State and the ethical system that it reproduces. This rupture, as the two case studies suggest, could be in form and not in content. A system that, amongst other things, is fostering a culture in which the collective (or the social aspect of life, paraphrasing Negri) determines the philosophy of the legal order.

The experience in India is quite relevant within the above-discussion. Baxi has documented the possibility of articulating the formal law and the informal law in such a way that a rupture is created moving away from the State legality (1985).¹⁰ Baxi examines the experience of the Lok Adalat in India, where in the region of Rangpur Ashram the empowerment and mobilization of the rural communities was initiated. The empowerment took place, amongst other forms, through the organization of mechanisms of dispute resolution in the community; this process led to the consolidation of a 'people's law' (Baxi, 1985:184). This 'law' emerges and exists in opposition to State law. However, as Baxi argues, the 'people's law' is influential in the enforcement of the State law and its modifications. Baxi argues that:

Recognition of people's law does not necessarily mean denial of State law but rather an acceptance of a plurality of legal systems and the underlying systems of power and authority. The Rangpur experience shows that people's law and people's power can be used to reinforce the positive (for the people) values of State law as well as to combat its negative aspects. The involvement of the Lok Adalat in fighting corruption and exploitation demonstrates the latter aspect; the Ashram activities in support of the debt relief legislation demonstrates the former. In both respects, people's law and people's power are used for fostering the values of self-reliant development of the rural poor. In both situations, the existence of a people's court, or more aptly a people's adjudicatory forum, plays a very vital role. (Baxi, 1985:184).

In this sense, and bringing together the different theoretical streams of this section, the relationship between legal modes and the informal practice of the law with that of the State central legality would have to be examined

case by case. Each specific case would determine the levels of oppression, repression and exploitation that are maintained within the State (in the broader sense, representing the articulation of different social forces within a particular dominant legal mode). Each will also suggest where the ruptures with State law could be aiming toward a new social order which is better (more human!) than the previous one.

South Africa presents the two faces of this discussion. On the one hand the State reforms in this period of transition. On the other hand, the community initiatives of popular justice modifying the State authority and central law.

Since the mid-1980s, the regime began to make certain modifications to the judicial system in order to deal with its crisis of legitimacy and authority (at least before the black population). The Small Claim Courts Act (No. 61 of 1984) was established as a speedy court for small contractual claims, in which the parties could represent themselves. This occurred parallel to the development by the legal profession of non-judicial mechanisms of dispute resolution. Mediation and arbitration outside of court were launched. The claims behind both types of initiatives are that they are not expensive (at least not as the court), the parties can have a stronger say in their own case; and, in the case of mediation, it eliminates the conflict (the one who wins takes all) orientation of the court.

The government has continued this trend today, and it has launched new legislation creating mechanisms of mediation and arbitration through the so-called Short Process Court (Short Process Courts and Mediation in Certain Civil Cases Act, No. 103, 1991). The government is also re-establishing the institution of the Justices of the Peace (the Bill is still under consideration by Parliament). It is important to say that the only sectors with a right to make recommendations in the selection of judges and mediators/arbitrators are the Law Society, the Bar Association and the Minister of Justice. The emphasis is on hiring lawyers, former magistrates, or people with a legal background.

These are all reforms from above that the government is implementing in order to deal with the many failures of a judicial system which for most of the two-thirds of the population lacks legitimacy. However, these reforms reproduce a particular understanding of the legal order: it can only be

administered by the legal profession and the judges; the participation of the people, and by this I mean the community, is non-existent; and the values of the system, those that have fomented oppression and exploitation, are not questioned. In this sense, this new informalism and emerging (recognition of) pluralism of legal modes, is helpful and concomitant with broader State interest and the particular order that is beneficial for the dominant sectors of society.

The case of Alexandra and Ethekewini could help in understanding the other side of the argument. The collective nature of their justice is what makes the fundamental distinction. We are dealing with ordinary people, workers, housewives/husbands, unemployed, and marginal sectors, who are ingrained in a collective process of decision making. A process of wide participation, of discussion and debate. It is also a process from which a more clear understanding of the controversy surrounding certain facts could be found. A process through which a culture of popular justice is created.

CONCLUSION

(Re)making justice in South Africa will take much longer than the transition from the apartheid regime to a democratic society. To (re)make justice in South Africa will mean to democratize the processes of dispensation of justice -and those of making law.

Many tensions will arise in this process between the initiatives taken by the government and those practices already being exercised by the communities. Moreover, the nature (form and content) of those initiatives will determine, from the side of the government, if the 'old' days are still alive. From the side of the people in the communities, it might guarantee the level of community autonomy, self-determination and democracy in relation to the central State.

A fundamental feature of this period of transition is that the prevalent theory of the State is one which does not recognize the democratization of the State power. For the government (still representing the apartheid era, although now in transition), democracy should not entitle ordinary human beings to be part of the administration of their daily lives. The people's perception of this is different. The communities that I examined, however,

show that even in this period of transition, people are not prepared to give away what they have gained in the past.

Nonetheless, as explained earlier, the main feature of the of the two case studies examined, is the lack of interest in achieving State power. Instead, in the two communities studied, popular justice has emerged parallel to State justice, dealing with certain community controversies which are not referred to the State judicial system. Different to State's courts, the practices of dispensation of justice and dispute resolution in these communities, are embodied by community participation and democratic involvement of the community dwellers.

Finally, I would like to draw the attention of the reader to the initial quotation of this essay. For the State, 'the sheltering sky', protects us from what is behind it. The State is the sheltering sky. In other words, the State is the centre of any initiative that could provide justice in South Africa. In that sense, and from its perspective, whatever the communities do, in particular the African one, means 'nothing', 'just darkness', 'absolute night'. Contrary to that, I believe that the practices of popular justice that are happening behind the 'sky' in South Africa envisage another type of society, where the collective, the community, would be able to establish a more democratic way of coexisting.

In those terms, recognizing that in their 'darkness' there is a better future, strong support should be given to the articulation of those practices of popular justice within informal justice as another legal mode within the State. There articulation should be consistent with the development of a project led by the oppressed and the exploited that could eventually transform the State. When this occurs, one day in the future, 'the sheltering sky' would lose its meaning.

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NOTES

1. I am referring to Gramsci's conception of dividing the State (in the narrowed sense, reduced to the governmental apparatus) in the political society and the civil society (Gramsci, 1986:263)
2. 2 February 1990 signals the beginning of a new era in South Africa. It refers to the speech given by President F W de Klerk in the opening of Parliament. He was presenting the new agenda for a peaceful transition to a multiparty and non-racist democratic society.
3. The research in Alexandra was conducted between May and December of 1991. Political violence since then in the community has changed too much the civic structure. The research in the hostel was conducted between May and July of 1992. This paper reflects the situation in both communities at the time when the research took place.

It is important to state that both case studies represent positive examples of popular justice. It was not my intention to deal with negative examples of popular justice in this paper.
4. Suffice to say that since 1991, multiparty negotiations began in South Africa, leading to a new constitution and a new elected government in which all the population, regardless of their race, will be able to participate.
5. Seeking is referring to two conferences organized by the African National Congress and the National Association of Democratic Lawyers. Both conferences were held in Natal in 1990.
6. This war, which began in the mid-1980s has taken many forms, and taken away many lives. It is a war for power. Although it started in the province of Natal, in the last few years it has spread to the Transvaal and its immediate impact has been the destabilization of the communities (see in general Morris and Hindson, 1991).
7. In Natal, people tend to call people's court to any structure of dispute resolution functioning in the communities, even if such structure does not follow the model of the people's courts established in the 1980s. What I have found consistently, are mechanisms of community mediation.
8. Ethekwini is not the real name of the hostel. In fact, this is the Zulu word for being "in Durban". For the protection of the dwellers of the hostel I could not disclose the name of their residence. I am thankful to my research assistant, Mr Nathi Ngcobo, for conducting the field work.
9. Santos' research on Brazil's shanty towns and their non-governmental legal system, are quite relevant for the discussion on the text (see Santos, 1977).
10. In addition to the experience of India, also see: Santos on his study of Brazil's shanty towns and their non-State legal system (Santos, 1977); and, Sachs and Welch on the experience of popular justice in post-independence Mozambique (Sachs and Welch, 1990).

REFERENCES

- Abel, R (1982a), (ed) *The politics of informal justice (Vol I)*, New York: Academic press.
- Abel, R (1982b), (ed) *The politics of informal justice (Vol II)*, New York: Academic press.
- Allison, J (1990) 'In search of revolutionary justice in South Africa', *International journal of the sociology of law*, Vol 18, 409-428.

- Baxi, U (1985) 'Popular justice, participatory development and power politics: The Lok Adalat in turmoil', in Allot, A and G R Woodman (eds) **People's law and State law**, The Netherlands: Foris Publications.
- Bowles, P (1990) **The sheltering sky**, Great Britain: Paladin.
- Cain, M (1988) 'Beyond informal justice', in Matthews, R (ed) **Informal justice?**, London: Sage Publications, 51-86.
- Fitzpatrick, P (1983) 'Law, plurality and underdevelopment', in Sugarman, D (ed) **Legality, ideology and the State**, London: Academic Press, 159-182.
- Fitzpatrick, P (1988) 'The rise and rise of informalism', in Matthews, R (ed) **Informal justice?** London: Sage Publications, 178-198.
- Fitzpatrick, P (1989) **The mythology of popular justice**, University of Kent, Canterbury, England, 1-31.
- Foucault, M (1980) 'On popular justice: a discussion with Maoist', in Foucault, M (ed) **Power/knowledge**, New York: Pantheon books, 1-36.
- Gramsci, A (1986) **Selection from prison notebooks**, London: Lawrence and Wishart.
- Guatarri, F and A Negri (1990) **Communist like us**, New York: Semiotext(e).
- Morris, M L and D Hindson (1991) 'Political violence and urban reconstruction in South Africa', Economic Trends Research Group, paper No. 3, 1-20.
- Nina, D (1992a) 'Popular justice in a "new South Africa": from people's courts to community courts in Alexandra'. Occasional Paper, Centre for Applied Legal Studies, University of the Witwatersrand, 1-41.
- Nina, D (1992b) 'Signs of (in)justice?: the making of a "court" in a hostel's recreation hall'. Paper presented at the colloquium of The semiotics of political transition, at Vista University, Port Elizabeth, 17-21 August 1992, 1-13.
- Sachs, A and G H Welch (1990) **Liberating the law: creating popular justice in Mozambique**, London: Zed books.
- Santos, B de S (1977) 'The law of the oppressed: the construction and reproduction of legality in Pasargada', **Law and Society Review**, Vol. 12, No. 1, 5-126.
- Santos, B de S (1979) 'Popular justice, dual power and socialist strategy', in Fine, R and R Kinsey, J Lea, S Piciotto and J Young (eds), **Capitalism and the rule of law**, London: Hutchinson, 151-163.
- Santos, B de S (1985) 'On modes of production of social power and law'. Working paper, Institute for legal studies, University of Wisconsin, pp 66.
- Santos, B de S (1987) 'Law: a map of misreading. Toward a postmodern conception of law', **Law and society review**, Vol 14, No 3, 279-302.
- Seekings, J (1989) 'People's courts and popular politics', **South Africa Review**, 5, 119-135.
- Seekings, J (1992) 'The revival of 'People's Courts': informal justice in transitional South Africa', **South Africa Review**, 6, 186-200.
- Shärf, W (1988) 'People's justice', **Sach**, March 1988, 19-23.

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