

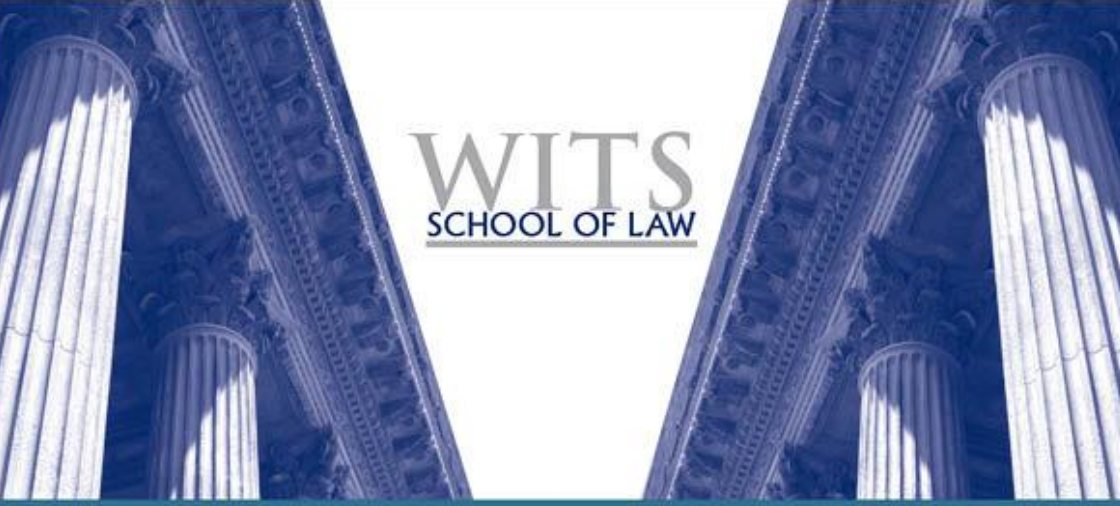
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by

Daniel Nina

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> The intellectual's role is no longer to place himself "somewhat ahead and to the side" in order to express the stifled truth of the collectivity; rather, it is to struggle against the forms of power that transform him into its object and instrument in the sphere of "knowledge", "truth", "consciousness", and "discourse".
> Michel Foucault[1]

> On aura cependant une idée plus exacte du personnage, plus conforme en tout cas aux intentions de son auteur, si l'on se demande en quoi Meursault ne joue pas le jue. La réponse es simple: il refuse de mentir.
> Albert Camus[2]

INTRODUCTION

Imagine a "new South Africa" in which, to borrow an idea from a former bureaucrat of the US State Department, history has

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[1] Extract from Michel Foucault and Gilles Deleuze discussion on "Intellectuals and power" (Foucault, 1977:207-8).

[2] A rough translation to English would say that: "One could have, however, a clear idea of the character, more according to the intentions of the author, if one raises the question of how Meursault did not play the game. The answer is simple: he refused to lie". Albert Camus "Avant-propos" (preface) to L'étranger (Camus, 1963:1).

come to an end.[3] A new society in which class, race and gender are no longer necessary categories to define the social phenomenon. South Africa will be, then, the "terrestrial paradise". However, I am afraid to remind the reader that in this particular African country, history has not come to an end. This country experiences the most open and rude expression of struggle (class, race and gender), and it is difficult to foresee that in this period of transition, history or the struggle, will come to an end.

Popular justice vis à vis state justice is, perhaps, one of the best examples in which the struggle between the oppressed and the oppressors is manifested. But the popular justice that I am thinking of, is that particular experience of "people's legality" that has emerged in South Africa since the popular revolts of the mid-1980s. It could have its origins in African (customary) traditions (Bapela, 1987), but the cultural experience that emerged during the last decade went beyond its traditionalist roots (Suttner, 1986). Thus, the distinctive element of popular justice is that it has been ingrained in a democratic movement for empowering the people.

What people?[4] Whose justice? In the specific context

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[3] This phrase was originated by a former member of the US State Department, Francis Fukuyama, who proclaimed in an article that after the collapse of the Eastern European regimes and the end of the Cold War, history has come to an end (Fukuyama, 1990). Mr Fukuyama now works for the Rank Corporation, a think-tank organisation.

[4] By people, equal to the popular sectors of society, I am referring to a Gramscian conception of an "historic bloc", which should include the urban working class, the rural peasantry, and their correspondent organic intellectuals (Gramsci, 1986:421). However, the conception of the "historic bloc" has to be enhanced today by the particular struggle that different social sectors with their own characteristics are carrying: for example,

of South Africa, by people I understand the working class and working classes, unemployed and marginal sectors, and different social sectors that are struggling for equality (ie the youth, women, gays and lesbians, and others). By justice, I mean the development of a new legality that will take into consideration the many gains that have been achieved within the Western legal system of "rights and obligations" (Pashukanis, 1978:100), and that goes beyond that model in the construction of a democratic society with wider social participation.

So far, it has been in South Africa's black townships that an incipient expression of popular justice has emerged.[5] The 1980s people's courts represented a synthesis of a popular project defining its own structures of legality. State repression over these popular structures did not represent the end of the project. In contrast to other points of view that have viewed this experience as a prefigurative enterprise that did not accomplish its aims (see in general Allison, 1990), I argue that the experience of popular justice of the 1980s laid the foundation

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woman's struggle. The case of South Africa has its own national characteristics that could determine the nature of the historic bloc; for example the racial question as imposed by colonialism and apartheid.

[5] I have to emphasize the argument that it is "so far" and that a coherent and well developed project of "popular justice" in South Africa, is still to be made. As I said above in the text, the experience in the black townships is the closest to this project in which a radical conception of democracy could be constructed. Nonetheless, I am aware that it is a long process, still in the "making". (I am grateful to Ms P J Schwikkard, from the Law School of the University of Natal, Pietermaritzburg, for raising this argument in relation to my case study of Alexandra. I certainly agree with her that the experience of Alexandra, in spite of many mistakes, has laid the foundations for a more democratic way of living; nonetheless, Alexandra still does not represent the final solution - the process is certainly a long one).

for a (long term) project leading towards a radical conception of democracy (Laclau, 1990:chapter 6).

This paper is a provocative invitation to reconsider the role of popular justice within a wider on-going discussion of the role of the civil society in the "new South Africa". The exercise is developed through the particular case of Alexandra (a black township, in Johannesburg), where, in 1986, the people created the people's courts and now have established the community courts.[6] In the first part I will develop the theoretical foundations of popular justice and its role within a conflictive civil society. In the second part, I will address Alexandra's experience from people's courts to the community courts. In the third part, I will propose a reconciling project that takes into consideration different initiatives, however, maintaining popular justice within the hegemony (in Gramscian terms) of the popular sectors. Finally, I will provide the conclusion to this paper.

Part I: POPULAR JUSTICE IN SOUTH AFRICA'S CIVIL SOCIETY

A. The Western-European conception of justice, entrenched in the "rule of law" failed in South Africa. In fact, it never gained total legitimacy throughout the national territory: a variety of legal modes (Fitzpatrick, 1983) have co-existed ever since the arrival of the Europeans. The variety of legal modes with their correspondent means of adjudication, have included from the

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[6] Community courts refers to a new initiative of mediation recently launched in Alexandra. The project was developed by the Community Dispute Resolution Resource Committee (CDRRC) - a joint project of the National Association of Democratic Lawyers and the Centre for Applied Legal Studies of the University of the Witwatersrand. More on this below in the text (Part II, section B).

central state judicial system, to the commissioners courts, the tribal/chief dispute mechanisms and the makgotla courts. In one way or another, all these institutions of dispute resolution operated within the state control and sanctioning (Motshekga, 1987). The democratic movement that emerged in the 1980s, transformed the nature of the alternative mechanisms of dispute resolution that until then had operated within the authority of the state. People's courts represented a major break away from the state authority and control; they represented the most coherent manifestation of a project of popular justice - which indeed has remained in different forms since 1986.

What is popular justice? It is an alternative to the state legality. It is an alternative to the legality defined in a class-based society - rule by the bourgeoisie. It is an alternative to the rule of the oppressors over the oppressed. It tends to have a democratic character. It has been mainly studied or conceived in periods of transition, in which the "ancien regime" is about to collapse. However, the fundamental question is: who is leading the organisation and development of the popular justice?

Foucault reminds us, that during the French revolution of the 18th century, the people's courts that emerged, because of their class composition, were not addressing any radical change for the benefit of the people (the peasants and urban marginal sectors). These courts were representative of an intermediary sector (petty bourgeoisie) that articulated a project of justice within the ideology (this is, the way of conceiving and defining reality) of the new emerging ruling class: the bourgeoisie (Foucault, 1980:3). Although in contradiction and conflict with the old regime of the aristocracy, the people's courts of France in 1792 did not foster a new order that would alter the situation for those oppressed sectors, either in the ancien or new regime.

> "This is why, in this court, they convicted not only refractory priests, or people involved in the events of 10 August - quite a small number of people - but they also executed convicts, that is, people who had been convicted by the courts of the Ancien Regime. They executed prostitutes, and so on.... So it is clear that it had reoccupied the 'median' position of the judicial institution just as it had functioned under the Ancien Regime. Where there had originally been the masses exacting retribution against those who were their enemies, there was now substituted the operation of a court and of a great deal of its ideology." (Foucault, 1980:3-4).

Therefore, the first manifestation of popular justice should be to re-define the values and morals of the new legality. That is, to create a good sense (Gramsci, 1986:323), that supersedes the way of conceiving, amongst others, the notion of justice within a bourgeois society. It represents a reformulation of the basic categories of rights and obligations, of ownership, of wrongs and responsibilities as defined by the current society.[7]

Although this particular aspect was addressed by Foucault in his contribution towards a popular justice,

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[7] Portugal in 1974, during the so-called "roses revolution", provided examples of spontaneous manifestations of popular justice in which the values of the legality of the ancien regime were re-defined by the people (peasants and urban workers). The concept of private ownership and of crime (as defined by the authoritarian military regime, in coexistence with the landlord ruling class) were re-formulated and overcome into a new conception based on democratic principles (Santos, 1982).

Pashukanis (1978) in the early 1920s formulated a similar point of view but from a socialist (in contrast to a capitalist) perspective. Pashukanis' conception of a socialist legality has to be seen within a revolutionary Soviet Union (before the arrival of Stalin to power), in which a new conception of legal order was attempted from a peasants/workers movement. The main factor for Pashukanis was to formulate a socialist legality that could operate outside the bourgeois legal frame: individual responsibility of rights and obligations. In other words, following a close Marxist approach, Pashukanis argued that the bourgeois notion of law was concomitant to the bourgeois rule in which the relations of production (between workers and the owners of the means of production) conceal an unequal relation: the commodity produced [and its exchange value] is not more than a fetishism, an idea that conceals the laborious hours of sweat and sacrifice that a worker put into a product (Pashukanis, 1978:chapters 3 & 4).

Bourgeois legality for Pashukanis is nothing more than a legal fetishism of rights and obligations, that pretends to make every single human being equal (Pashukanis, 1978:96-97). This legal ideology, then, in the same way that a commodity conceals the unequal relations of production, also conceals the disadvantages that some social sectors have in society. 'Equality before the law' is what some people tend to argue.[8]

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[8] This discussion could be expanded or concretised into the so called formal and substantive justice. By the former should be understood the rights that are guaranteed within the formal (or positive) law. By the latter should be understood what in real life happens to those rights sanctioned by law: are they effective and protective of every human being, regardless of her/his particular subjectivity?

Curiously enough, from the beginning of the bourgeois legal rule (founded on constitutions, legal codes and the reign of the "rule of law"), different social sectors and classes have been openly defying the regime. Broader equality (this is substantive justice) has been achieved in some

However, it is an apparent equality. Unfortunately Stalin did not allow Pashukanis to live longer, and his contribution did not manage to flourish. Nonetheless, Cain's contribution (1988) on popular justice (or collective justice as she tends to define it) presupposes the same principle addressed by the soviet scholar at the beginning of the century (Cain, 1988:58). A fundamental aspect of popular justice should be to overcome (if it is fostering a working class/classes project) the bourgeois legality - this should promote the understanding of the social nature of the human being (Cain, 1988:56), and, borrowing an idea from Negri (1988), the social aspect of life. Therefore, a project of popular justice should address from the beginning the nature of the legality that it is trying to establish. On the one hand, and following Foucault (1980), it could not pretend to operate within the terminology or definitions of the ancien regime. It should overcome it. On the other hand, and following Pashukanis' socialist legality (Pashukanis, 1978) and Cain's collective justice (Cain, 1988), it should dismantle the whole principle of bourgeois legality focused on individual responsibility. Life, more than ever should be seen as a collective experience, and although there is always an individual responsible to a particular act, this event should not be separated from the social context in which the individual exists.

The above argument brings my discussion onto another level. What form or institutions should be developed by a project of popular justice? In contrast to Foucault who argued that a project of popular justice should also reject the forms of justice of the ancien regime (Foucault, 1980:6-7), I argue that

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social instances after arduous battles. In particular I am thinking of women rights and gay/lesbian rights - this does not mean that there is complete equality for these social sectors to live at ease with their particular subjectivities, but certainly that in the last 30 years major victories have been achieved by them (see in general De Haan, 1987).

the same bourgeois forms could be re-appropriated by an emerging project of popular justice. The question would be how those same institutions are modified and transformed into a popular project (to use a broader term) that should lead to the eventual transformation of society. How, for example, the court room could be transformed into an institution of democratic practices, in which people do not feel alienated from the whole structure and proceedings, is a fundamental duty of a project of popular justice.

It could be a court, even with a prosecutor, rights to cross-examine witnesses, jury panel, etc, but what will make it different is the nature of the content and symbols (principles and ideology) that are put into practice.[9] Santos (1982) provides a clear account of the praxis of a project of popular justice.

> "It is class justice; that is, it appears as justice exercised by the popular classes parallel to or in confrontation with the state administration of justice. It is based on a concrete notion of popular sovereignty (as opposed to the bourgeois theory of sovereignty) and thus on the idea of direct government by the people. Consequently, it requires that judges be democratically selected by the relevant communities and act as representative

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[9] In the particular case of Alexandra, the people's courts that were created in 1986, followed to a large extent the structure of the formal legal system: a court clerk, en banc judges, a division of jurisdiction in the court (family matters, juvenile matters and criminal matters), and the marshals of the courts. This legal system differed from the formal legal system in the ideological content and practices of the proceedings. More on this later in the text (Part II, section A).

> members of the masses, who are autonomously exercising social power. It operates at a minimum level of institutionalization and bureaucratization (a nonprofessionalized justice with very little division of legal labour and immune to systematic rationality). Rhetoric tends to dominate the structure of the discourse mobilized in the processing and settlement of conflicts. Formal coercive power may or may not exist, but when it does it tends to be used in interclass conflicts for the punishment of class enemies, whereas educative measures tend to be favoured in intraclass conflicts." (Santos, 1982:253-4).[10]

Thus, a project of popular justice not only has to transcend the nature of the bourgeois legality, but also will adopt practices (regardless if they are confined to the old institutions) in which a democratic conception of living is put into effect. This will require, following the above quotation of Santos, the democratic election of the judges, the active participation of the community, the emphasis on re-educating the wrong-doer and contextualizing his/her activities within a community basis. But these formal practices would have also to overcome other more subtle attitudes that are in themselves

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[10] Santos is addressing the question of popular justice in revolutionary conditions. The case of South Africa and its peculiar period of transition, does not allow it to fit the theory too easily. However, as I will discuss below in the text, South Africa also provides the possibility of examining new avenues in which a popular project (national-popular) for bringing about a radical democratic society, could happen. This will require, for example, the development and consolidation of organs of popular power in the foundation of the society.

negative, if not reactionary, such as: the question of gender r oles, the wrong preservation of old values that are anti-democratic and the preservation of a division of labour: manual and intellectual work amongst the members of a project of popular justice (Cain, 1988:63).

The possibility of this project of popular justice in non-revolutionary transitions is real (Cain, 1988). It will require avoiding a mechanistic approach of social transformations, and will also require the elaboration of a popular project that will gain consolidation in different areas of the social tissue. Initially one will prescribe this into the regions of the most oppressed social sectors and classes; however, as Cain has shown, this project could be developed within the foundations of a developed capitalist society - where social class division are more loose and social mobility easier.

The particular case of South Africa allows a re-examination of the theory and practice of a project of popular justice within a broader theatre of an on-going conflict of class struggle. The experience in capitalist societies like the United States, where many experiments with popular justice were attempted in the late 1960s and eventually co-opted by the state, should help to indicate which measures should not be taken in this African country (see in general Abel, 1982; Fitzpatrick, 1989).

However, it is my contention that a project of popular justice in South Africa that is encompassed by a broader national-popular movement leading towards a radical democracy, still could be achieved regardless that the "winter palace" was never taken by assault. The specific stage to be examined, as a terrain for continuing the struggle, is the civil society from which (following Gramsci's model of war of position and war of manoeuvre) this national-popular project

could consolidate. The establishment of its own political institutions, such as popular justice, is only one of the multiple areas to be developed within this project of the popular classes and social sectors.

B. A great deal of discussion is currently taking place in South Africa in relation to the role of the civil society in this period of transition and after (see in general Swilling, 1991; and, Narsoo, 1991). In fact, the discussion is narrowed to a basic equation: ANC + Civics = strong civil society.[11] The independence of the townships civics organisations has been posed as a fundamental element to maintain "popular" accountability over a future black government led by the ANC. However, the question to be asked is, what type of civil society are we talking about? Under whose project is the civil society articulated and organised?

The answer to the above question is not a matter of rhetoric or semantics. In fact, the continuation of a militant struggle (with a history of over 40 years of activism) will depend, amongst many factors, on the development and organization of the civil society. The question is, as already stated, under whose hegemony (Gramsci, 1986:12) will be the development of South Africa's civil society. This consideration brings us into a basic re-examination of the concept as

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[11] I mentioned the African National Congress (ANC) because, so far, it represents the most articulated and broader opposition to the apartheid regime. This argument also assumes that in the consolidation of a new regime with a new government, the ANC will win the majority of the support in the polls. However, I cannot deny that the political spectrum in South Africa also includes other important opposition groups, such as the PAC and AZAPO. (I owe this argument to the critical commentaries given to me by Ms Jennifer Klot).

discussed by Gramsci (via Hegel, Marx and Engels).

Civil society for Grasmci represents the fundamental theatre of conflict in a class-divided society. It is where the hegemony of the ruling class (or classes) is exercised over the non-dominant classes. However, there is a transformation in his understanding of civil society over the same concept as examined by Hegel. For Hegel (1976), for example, civil society has to be seen as a transitory period in the development/construction of the nation-state. The mediation of individual [subjective] conflicts are conciliated amongst the different needs, giving way to an objective (if not national) comprehension of everyone's needs (Hegel, 1976:126-128). The transition from the civil society into the state, within Hegel's perspective, will produce the creation of mechanisms of control, ie police and the judiciary, in order to conciliate everyone's needs, and duties.[12]

Gramsci's conception goes beyond Hegel's view (Hegel, 1976:129), in relation to the emphasis that he puts into the class nature of the civil society and of the state that is a reflection of those dominant social relations. Civil society is, then, where the bourgeoisie has consolidated its hegemony - by this it is meant, its capacity to rule and lead over other classes. This hegemony could be exercised through coercion or through reproducing a consensus/consent over the non-dominant classes. But, as Grasmci pointed out, in order for the bourgeois rule to last, it would need to incorporate into its "rule" some demands of the non-dominant classes (Gramsci, 1986:210).

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[12] The importance of this argument has to be seen also in the context of the state traditional roles, such as the monopoly of justice (police, laws and the judiciary).

The above argument explores, then, new dimensions of the bourgeois rule, which go beyond Marx and Engels' (1974:80) interest in the role of the bourgeois state. Gramsci's division of the state between the political and civil society (Gramsci, 1986:263), allows us to explore the nature of the "struggle" (following Foucault's (1980) concerns over the nature and the content of the struggle); and how, the bourgeoisie consolidates a political project, in a conflictive (civil) society in which there are tensions in the economic, cultural and social instances.

If we agreed with Gramsci that the bourgeois hegemony operates over a "mine field", then it becomes relevant to explore what constitutes the counter-hegemonic project of those popular sectors that are questioning the authority and rule of those in power. In other words, we need to examine the *forms* that the organic manifestations of the national-popular sectors adopt (Gramsci, 1986:132).[13] This is important, and leads my argument to a reformulation of the theory of popular justice in capitalist society which is not in a revolutionary process, because the counter-hegemonic project is a more long term venture which will require the gaining of small victories that after many years and battles (once they consolidate in a political movement) could help in the transformation of the unequal relations of power and domination in the society - from the factory to the bed.

In an open class war, within the sphere of the civil society, the popular sectors will learn to orchestrate their

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[13] This could be re-interpreted, within a different theoretical approach, as part of studying the resistances to the bourgeois legality; the different expressions of subversion, boycott and sabotage that operate within the society against the state and class domination. Foucault (1980) could provide a great number of theoretical tools in this area.

actions in what Gramsci defined as a "war of manoeuvre and a war of position" (Gramsci, 1986:110-111). By war of manoeuvre he meant, the actions taken by the popular sectors in their counter-hegemonic project against the ruling class. It represents the political activities taken in order to win space (political, economical, cultural and social) that traditionally were occupied by the ruling class. This also means, to force the ruling class to modify their hegemony, if they want to preserve their rule more on practices of consent than on coercion, adopting the demands of the non-dominant classes. However, what it is important to emphasize, is the fact that those spaces gained by the popular sectors, should be transformed into "liberated zones", in which the popular sectors' hegemony exercises control over the counter-hegemonic of the bourgeoisie. On the other hand, by war of position, Gramsci meant the control and struggle by the popular sectors to maintain those "liberated zones" that have been gained in the past.

The question at this stage is how do we relate the above discussion of civil society and counter-hegemonic project to popular justice. I will argue that a combination of Gramsci's theory and some basic tools from the sociology of law (Santos, 1985; 1987) could allow one to explore the possibility (and this is certainly another provocation) of maintaining practices and institutions of popular justice in the "new South Africa" as part of a national-popular project still to happen.

Santos has analysed in the past how the dominant legal mode, that is the state preemption (what he called the "citizenplace", Santos: 1985:16) and monopoly over the rule of law (and with its coercive mechanisms) co-exist with other legal modes; these are: the worldplace, the workplace, and the householdplace (Santos, ibid). This theoretical argument gives

the possibility of suggesting, that within those alternative legal modes, also emerges a movement of resistance that could elaborate its own institutions and organs - in fact what this also suggests is that the state monopoly over the rule of law is not exclusive and that in certain areas the state is prepared to give-up this monopoly.[14] This situation should allow us to explore the possibility of engaging in a counter-mode (within the legal sphere), that could run parallel to the state dominant legality, but that in its practices is fostering not only more formal equality but also substantial equality.

I argue that popular justice could be used as part of this project of creating a counter-mode to the state dominant legality - provided that its development takes place parallel to a broader political movement led by the popular sectors. It certainly would require some practical concessions, in order to avoid state repression. But those concessions should not occur in areas in which the spirit and foundations of popular justice are put into question. In this sense, popular justice within a capitalist society not in a revolutionary process as is the case of South Africa,[15] could represent one of the different social

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[14] In fact in his research on Brazil's poor shanty towns (*Favelas*), Santos examined how a particular community managed
to organise its own internal legality, which co-existed with the state external legality (Santos, 1977). A kind of transaction in which the people of the community managed, borrowing a phrase from Poulantzas, to achieve some "relative autonomy".

[15] Although South Africa is a capitalist society going through a very peculiar "revolutionary" process, its history of struggle and resistances allows the possibility of arguing that a project of popular justice is viable. The particular specificities of this country (eg a militant and organised labour force), I suggest, allows the exploration to continue the struggle into other levels aiming towards a radical democracy.

instances in which the popular sectors elaborate a counter-hegemonic project in the civil society.

South Africa provides a unique testing ground for exploring the possibility of "keeping popular justice alive". The state, on the one hand, is exercising all its influences for co-opting different popular initiatives that have emerged within the civil society in the last seven years. On the other hand, however, it is important to ask what kind of initiatives have been taken by the popular sectors to keep the counter-hegemonic project alive, which certainly includes the continuation and strengthening of the organs of popular justice.

Alexandra, as one of many townships where the so-called "organs of people's power" emerged in the 1986 revolts, provides a particular testing-ground for future developments. After the disappearance of the people's courts, the civics[16] took over some instances of popular justice. Today, the emergence of the so-called community courts, have to be examined in the context of a popular counter-hegemonic project. This could allow, then, a re-think of the appropriateness of the initiative or perhaps the way to continue forward.

Part II: FROM PEOPLE'S COURTS TO COMMUNITY COURTS IN ALEXANDRA

A. People's courts in Alexandra were organised after the "six

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[16] The term "civics" refers to the organic institutions of the community which are involved in many different aspect of the daily life of the members of the community. This includes from a central civic organisation down to yards, blocks, streets and regional organisations.

days war" in February 1986.[17] They represented a major break-away from the state authority. They also represented the implementation of a political project leading towards the organisation of "people's power". However, the experience as such (the real people's courts!) did not last more than six or seven months, and before the end of the year the leaders were incarcerated or in hiding.[18] But, this did not mean that the spirit initiated by this popular experience was finished. In fact, the principles defended and established by the people's courts have persisted, at least, in Alexandra.[19]

The people's courts were organised as a court with three main jurisdictions: juvenile matters, family matters and criminal matters. The hearing used to begin in the late afternoon (after 3 pm), after the registrar/clerk of the courts (who initiated duties early in the morning) had divided the case-work. The main aim of the court was to reconcile parties in dispute, substitute any goods that had been wrongly appropriated, and, fundamentally educate and make the parties politically aware and conscious of the on-going struggle against apartheid in South Africa.

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[17] The following discussion above in the text is part of my on-going field work research in Alexandra. A great deal of information came out of interviews with people who have participated in structures of popular justice since the 1980s.

Alexandra is a black township located in the northern region of Johannesburg. It has an approximate population of 350 000 dwellers.

[18] See *S v Mayekiso and others* 1988 (4) SA 738 (W); and *S v Zwane and others* 1987 (4) SA 369 (W).

[19] The state identified that in the heyday of people's courts in 1986, there were approximately 400 such courts operating throughout the country (Seekings, 1989:123).

The feared "necklacing" was not one of the punishments which could be imposed. In fact, so far the research has proved that within the period of existence of the people's courts, this type of punishment was not used. Nonetheless, state censorship over these courts has fostered a perspective making them equal to barbaric institutions. However, for those who have participated in the culture established by these courts, the assessment of them is different.

What is the positive legacy of the people's courts? These institutions of popular justice created a culture of mass participation in the resolution of disputes in the community. They created a culture in which the people learnt to sort out their internal/community problems without having to look to the state. They developed forums, through the mediation of community disputes, in which the people learnt to participate openly, and collectively to find solutions to their common problems. However, state repression and censorship over these institutions, attempted to obliterate any of the positive aspects of this popular experience.

The spirit of these courts continued through other mechanisms established by the community for dispute resolution. The civics structures of Alexandra, from the Alexandra Civic Organisation to the area, street, block and yard committees, have proved to be useful for sorting out disputes in the community. The principles that they defended are still very similar, if not the same as the people's courts, although the format has changed.

In the yards (where around 10 families live) the people have learnt that the only way to survive in apartheid conditions of overcrowding, lack of basic hygienic facilities, and poverty, was through the cooperation of each yard dweller. The solution

of some disputes at the yard level has always carried the message of educating and politicising the parties in dispute. In theory, the whole civics structure operates from the basis that each immediate structure should try to solve their problems. In this sense, the yard is the original step for sorting out any conflict amongst the dwellers. The inability at this level would move the conflict upwards in the structure of dispute resolution: from the yard, to the block, to the street, to the areas committees. However, what tends to be more a common practice is that, since its establishment in 1990, the people tend to go directly to the Advice Committee.

In the Advice Committee of the Alexandra Civic Organisation, a "community trained" registrar would assess each case on its own merits and determine what is the most appropriate solution. For example, if the case is not too difficult (eg a yard dispute over the use of a water tap), the registrar will refer it back to the grassroots structures (eg the yard committee) where a solution should be found to the problem. In other cases, for example, the "civics registrar" could refer the case to the police, social worker, or to a lawyer (from the law clinic of the University of the Witwatersrand or the Legal Resource Centre or other volunteer body).

Interestingly enough, what the people of Alexandra learnt from the repression of the 1980s, is that their counter-hegemonic project of creating people's structures and developing popular justice has to deal, in quite pragmatical terms, with state repression. By now the activists of Alexandra know the might of their "enemy". However, the interaction with the police or state institutions, does not mean that they have became, what is popularly known as a "sell-out". In fact, the police are still not trusted by most of the people in the community, but the interaction with them [police] is determined by the community itself. When and for what reason to call the

police is a community decision.

Serious matters such as rape and murder, will require the police (a decision taken since 1990). But other crime-related matters such as theft or burglary, will be sorted out, most of the time, between the community structures.[20] In other words, the community has learnt to operate, developing its own culture and practices of popular justice so that when necessary it interacts with the state legality. This, at least from my own understanding, could be seen as part of a popular project that has developed its own autonomy in relation to the state (and certainly to the [bourgeois] class interests that it represents); the distinction between this popular project and other projects of "populist justice" (Shärf and Ngcokoto, 1990), is that it is led by political ideology towards a more equal and democratic society - ideology that until recently was mainly linked to the ANC but that now is emerging (within the on-going discussion of the autonomy of the civics) as part of the popular sectors political project.

B. The so-called community courts are part of an initiative launched at the beginning of this year (1991) by the Community Dispute Resolution Resource Committee (CDRRC) -a joint project of the Centre for Applied Legal Studies (CALS) of the University of the Witwatersrand and the National

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[20] The community has developed its own definitions of order and legality. In many situations the community follows, up to a certain point, the state definitions on crime (eg rape, murder). However, the community draws a line based on their internal needs, between "crimes" committed within the community area and those committed outside it. It is certainly an interesting area to be further explored and researched. (I owe this consideration to the critical commentaries raised by Professor Edwin Cameron from CALS).

Association of Democratic Lawyers (NADEL).[21] It represents an outside intervention into the community structures and proceedings. However, this intervention has happened with the sanctioning of the community central structure - Alexandra Civic Organisation (ACO). The only reason to explain the consent given by ACO, is that in receiving this training, they have felt the possibility of "learning" some new skills. On the political side, it could represent the vision of the community to entrench some practices of popular justice in the "new" era. However, it is my contention that as it has been implemented the CDRRC might not lead towards this aim.[22]

A criticism to this project has to be seen, in the context of the above discussion in a twofold way: first, the relation of this project to a broader discussion in South Africa that includes the role of the state (in the "new South Africa")[23] and

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[21] From early May until the beginning of August 1991, I participated in CDRRC training of mediators in Alexandra. The core of my discussion in this section of the essay is based on my observation, discussion and participation in the proceedings of those training sessions. I also interviewed members of the executive committee of CDRRC. An early criticism of the project was stated in a personal communication to CDRRC dated 2 August 1991, entitled "a song of frustrations". A copy of the letter has been deposited at the Documentation Centre at CALS.

[22] The CDRRC project was opened last September 1991 in Alexandra. It would require new research, after perhaps six months of operation, to argue in more conclusive terms the position above-mentioned in the text.

[23] The discussion during the presentation of this paper at CALS, October 1991, raised concerns over what should be done at this particular period of transition in South Africa. My proposition and criticisms are more oriented towards a new era in which the government would be democratically elected by all the population. As far as I am concerned the present period of transition is still controlled by a racist/apartheid government. This limits a great deal the space of manoeuvering of the popular/progressive forces

the role of the dispute resolution mechanisms (either the formal or informal sector of the law). Secondly, the impact of this new initiative on the on-going projects of popular justice within a civil society led by the popular sectors. It is not a question of semantics, however, informal justice is not equal to popular justice (Fitzpatrick, 1989).

In the vivid history that we all are experiencing in South Africa, the struggle (either class, race or gender) is certainly a real thing. Thus, any intervention within this on-going process has indeed a social consequence that could mould the future of this "new" society. CDRRC is certainly drawing the lines of public policy of what could be a solution for the judicial crisis that the "new" era will confront; and in launching this new model, this initiative is filling the gap of the other initiatives.[24]

However my contention is (and this is certainly another provocation) that this initiative has succeeded because: first, it does not represent in any way a threat to the still racist state; secondly, because the state (under the leadership of the National Party) is fostering a neo-conservative policy that requires less state intervention in the civil society and certainly that any private initiative to deal with justice (provided that my previous argument is also valid) is at the moment welcome. In this sense, and for different circumstantial reasons, there is a "point of encountering" between the state agenda and that of

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in defining the role and structures of the state.

[24] Beyond CDRRC, I am only aware of another initiative that was originated at the University of Cape Town. This is the "Legal Education Action Project" (LEAP), which is arguing for the establishment of para-legals as a means of resolving the legal crisis of the country. However, I am not sufficiently informed of the developments of this project in order to voice any kind of critical view.

some progressive (ie liberal) sectors of the civil society.[25]

This is not a matter of arguing about "smoke screens". It is, I suggest, trying to identify why a particular initiative could be launched, having an implicit sanctioning from the state. Therefore the reading of the situation should incorporate factors such as: on the one hand, from mid-1980s the racist state in South Africa has been taking measures to deal with the crisis of legitimacy that their regime has created over the judicial system; this has included, amongst others, the creation of Small Claims Courts. This argument should also incorporate other factors that encourage that crisis of legitimacy such as lack of legal resources (lawyers!) and lack of financial resources for paying those that are available; a judicial system that in itself lacks legitimacy for many political and social reasons (one of them being the language in which the proceedings are conducted is foreign to most of the population).

On the other hand, the new neo-conservative policies of the National Party (or free market economy - expansion of the civil society under the hegemony of capital, within a

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[25] I am aware that this is a controversial argument. In fact, during the seminar at CALS a great deal of the discussion was focused on this particular argument. Indeed, I initially used the term "collusion" to define the encountering of positions/agendas between the state and the liberal sectors of society. However, many reflections and discussions/conversations with Mr Edwin Molahlehi and Professor Dennis Davis, both from CALS, since the seminar have helped me to understand the delicate meaning of such a word. Nonetheless, using a different terminology ("point of encounter") I still believe on the validity of the criticism. As I will discuss below in the text (Part III) the construction of the "new South Africa" will require a uniform legal system that will dispense justice on equal terms throughout the national territory. Alternatives of "private justice", such as CDRRC, cannot represent the ultimate solution for the new era still to come.

conservative ideology) will encourage any initiative coming from the civil society that will reduce the burden of financial and political responsibility of the state.[26] If the initiative arises from sectors that are less problematic to the state authority, then those initiatives are most welcome. This is fundamentally important, because the CDRRC, for example, has led the process of developing the informal justice sector in apolitical and acontroversial terms.[27]

Secondly, in relation to CDRRC and my particular training in Alexandra, I have a few considerations to discuss.[28]

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[26] Most of the theoretical discussion that I have come across in the last few months in South Africa is on the question of the civil society. I have not yet read anything on the relation of the role of the state in the new society: a state that could help to reduce the burden of inequality that apartheid has created.

[27] By this I mean, that the main spirit behind this project is that it operates in an "ideologically free" framework. This happens to be similar to the principle of the "independence of judiciary". I do have problems with a such position. On the one hand, to expect that a mediator could operate free of its political positions and moral views, although in some instances recommendable, is also in a certain way naive. On the other hand, I argue that the "new South Africa" will require a politicized mind in which many of the inequalities created by apartheid could be diminished. This discussion, indeed, forces a new debate into what constitutes the realm of the political in the 1990s - which goes beyond political partisan positions. However, this whole discussion is out of the scope of this paper. (I owe this argument to the commentaries raised by Ms Jennifer Klot).

[28] These commentaries are very limited to the period of three months in which I participated in the CDRRC training programme. A new research project should be started now to consider and assess how the community, in the implementation of the project, is modifying the whole model, and making it more appropriate to the community values and experiences.

In addition, it is important to mention that the criticism raised here in relation to the experience of the CDRRC in Alexandra, could be valid also

What is the relation between the model of training and the cultural and material practices adopted by the community in the area of mediation and dispute resolution? In what way, if any, has CDRRC incorporated any of the positive experiences coming out of the people's courts or the civic structures? In which way, does the model adopted by CDRRC (a US model of mediation)[29] have any particular relevance to the history of struggle and resistance of the people of South Africa, and in particular the people of Alexandra? Does this model of mediation foster a project of popular justice that is aiming, amongst other factors, towards a transformation of the society?

As far as my research goes, the CDRRC has duplicated other efforts coming out of the community, without paying any attention to them. This happens in contradictory terms, because it was the same community (ie Alexandra Civics Organisation) that asked them to develop the project in the community. However, this possible mitigating factor, does not exclude the possibility of having to take into consideration the way in which the community operates. Being aware of the importance of the existing structures, might have led the CDRRC to adopt a different approach.

For example, at the moment the CDRRC has trained over ten mediators to participate in their scheme, and at least one registrar. This is happening parallel to the existing civics

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for other new initiatives that this project is launching in Johannesburg. Other researchers might be able to contribute in exploring the validity or not of my arguments.

[29] This is not a Caribbean "anti-US" reaction, but a strong criticism arising from many sources consulted in my research that have also criticised the development of the US model (see in general Abel, 1982a; see in particular Abel, 1982b; Fitzpatrick, 1988).

structures which, in the case of the Alexandra Advice Committee, has its own registrar, its own "community trained" mediators, and the legitimacy of most of the community dwellers.[30] Therefore, what is happening at the moment is a duplication of efforts which if the model and method of implementation adopted had been a different one, the duplication of efforts might had been avoided. Instead of creating more structures, why not use the existing ones and share the "knowledge" of mediation within the civics structures?

In addition to the above argument, the nature of the model in itself has no compatibility with the current practices of mediation that are conducted at some level of the civics structures of the community. This is important, because, if those practices had been taken into consideration, instead of having a US model imported to South Africa, we might have had a truly "South African model of mediation".

In the Joe Modise Camp, one of the civics areas of Alexandra, they have also their own "dispute resolution committee".[31] In this particular period of re-organising the civics structures in this area (from the area committee into the respective yard committees), the local leadership realized that

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[30] At the moment there is a great deal of discussion in Alexandra on how to integrate the Alexandra Justice Centre (AJC); name given to this project organised by CDRRC) with the existing civics structures. The situation is not yet clear, but apparently the dominant view suggests that the Advice Committee should continue being the original source to channel any dispute in the community. This certainly includes, the referral to the AJC of any dispute that the civics structures could not initially solve or that are too complicated to be solved.

[31] The Joe Modise Camp (ie civic region) is where I am currently concentrating my research. This area comprises 11th, 12th and 13th Avenues of Alexandra.

they needed a team of "rapid action" mediators that could be floating around the area resolving any dispute that might arise. This happens as a temporary measure whilst the yard committees become organised.[32]

The "team" is composed of approximately 12 mediators that will attend any dispute that has been reported via the Advice Committee of the civics, or by any dwellers of this area. The mediation will happen in the immediate location of the conflict. It is an open event in which the members of the yard, if this is the location, could participate along side the parties in dispute. There is one mediator chairing the dispute, who from the beginning will establish the rule of the proceedings: order must be respected all the time by the parties and by people attending the mediation; witnesses that are interested in helping in the "discovery of the truth" are welcome; and one of the aims of the mediation is to reconcile the parties and to create consciousness, when appropriate, over the many legacies of the apartheid regime.

However, differing from the CDRRC, for example, one of the most important aspects of the team of mediators of the Joe Modise Camp is the education and developing of political awareness between the parties in the dispute and those community members participating. This is certainly a major feature of community mediation conducted by community

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[32] One of the consequences of the political violence in Alexandra, according to many people interviewed, is that people have become more reluctant to participate in the civics structures. The people fear being targeted by a vigilante group, the police or by the Inkatha impis. Therefore, the immediate impact has been the disorganisation of the community at the grassroots levels. However, the tendency at the moment is to move fast into the reorganisation of the community structures on a non-partisan basis: the civics belong to the community not to any political party - this includes the ANC.

members - either in the Advice Committee or in the yards committees. This is something, I suggest (which certainly is another provocation) that will be taken into consideration in the "new South Africa".

In contrast to the community way, the CDRRC landed in Alexandra either without doing the particular and relevant field research to identify community skills, or, perhaps, without paying too much attention to the community experience.[33] The way that the CDRRC scheme has been developed, so far, is alien to the community practices. The model of one mediator secluded in a room only with the parties in conflict, isolated from the parties' environment and community (excluding, for example, other members of the community in finding the "truth"), is something that constitutes a new experience in the community. This represents, perhaps, and following Pashukanis (1978) and Cain (1988), the reduction of the community collective justice (as part of a project of popular justice) into a "neo-bourgeois" justice - individual responsibility, rights and duties.

This might not certainly be either bad or good, but I argue that it is indeed foreign to the community collective approach to their internal models; and, the community approach has being fostering a collective understanding of the conflicts within the community dwellers. This was the experience in the people's courts and certainly throughout the civics structures. In this sense, the CDRRC is a conflictive

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[33] In my letter "song of frustrations" to the CDRRC (dated the 2 August 1991) I identified the second characteristic: a lack of respect of the community experiences and practices. After conducting field work in Alexandra, I came to the conclusion that one of the initial mistakes committed by this initiative was not having conducted research in the community. The reason for that is still unknown to me.

enterprise with the cultural experience and struggle of the community.

Finally, one has to ask the question if through an enterprise like the CDRRC a model of popular justice is promoted, or if in fact it is neutralised.[34] I argue that in the way that it has been conceived, implemented and even theorised the CDRRC is leading to the formalisation of the informal justice[35], and is certainly not interested in dealing with the whole concept of participating in a broader project of developing and strengthening popular justice in the black communities of South Africa.[36] This is not their aim, and as

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[34] I am purposely using the concept of popular justice and not that of informal justice. The state will always try to incorporate informal practices of dispute resolution to deal, amongst many other factors, with its own legitimacy and financial crisis. But popular justice, even if at a particular period (although with resistance from the popular sectors in their war of manoeuvre/position against the state) seems to be hegemonised by the state, should be leading towards an eventual transformation of the society, attempting to eliminate all practices of injustice and oppression.

[35] I borrowed this idea from Mr David Storey, who is also conducting research on the impact of the CDRRC in the community of Alexandra.

[36] This argument has been confirmed on several occasions, not only through my participation at the early stage of CDRRC in Alexandra, but also through interviews with some of the leading members of this project.

On the other hand, the broader "liberal" approach taken by the model, would allow it to operate in a kind of "aconflict or apolitical" thinking. By this I mean, that the project becomes then either good for the community dwellers or for the "... businessmen [who] will have an opportunity to play a role too" (Pretorius, 1991:46).

far as I am concerned, it is also their limitation.[37]

Part III: A RECONCILING MODEL - KEEPING POPULAR JUSTICE ALIVE!

This is the final provocation: how to develop a model in South Africa that, within the particular circumstances of this period of transition, could keep a project of popular justice alive. There are three important caveats before presenting this provocative proposal. First, and following Foucault's initial quotation in this paper, the ultimate solution of what happens in the "new South Africa" does not rest in the screen of any intellectual portable computer. Truth, if we make it equivalent to the solution to a problem, is a collective project (see in general, Gramsci, 1986) which will require many long hours of discussion and debating including every single sector of this society: from the people of the townships to the members of the National Party.

Secondly, it is the intention of this proposal to reconcile the history of popular justice in South Africa with the current period of transition. Popular justice has to be kept alive! Some concessions might have to be given-up, in a period of transition, but the ultimate spirit (collective involvement, democratic orientation, struggle for social justice, involvement

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[37] My critical assessment of the CDRRC has deliberately only focused on what I suggest are the "non-positive" areas of this model. The reason for this is due to what I consider to be drastic political differences between the project (philosophy and way of implementation) and my personal points of view. Other researchers (including the members of CDRRC) will have the duty to highlight what they understand are the positive aspect of this project.

of the oppressed sectors and classes, etc), should always be kept alive.

Thirdly, and taking a "license" as a non-national, a foreigner or *L'étranger*, any project that is reconciling the history of popular justice with the needs of the country for dispute resolution, should address the solution towards a national level. Any solution to the problem (in the specific case of dispute resolution and justice) that only aims at black townships of South Africa is, as far as I am concerned, reproducing apartheid by other means. It is certainly that apartheid created the townships, but the "new South Africa" should not reproduce by any means their historical and cultural existence.[38]

Imagine, then, a "new South Africa" which will have a unified system of "community courts" operating throughout the country. From the Cape province to the eastern Transvaal, from SOWETO to Natal. Organised by population districts of a hundred thousand inhabitants, who will elect the members of their own court (a panel of three to five judges sitting *en banc*). The judges will be lay people (although it could be considered that a trained lawyer sit as a judge or advisor to the court), who will have received a basic training given by the state. Their participation as judges will be on a voluntary and free, basis, and the court will only conduct their hearings during some particular evenings of the week and Saturday mornings. The

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[38] I am very sensitive to the basic human needs of the people of the townships, that indeed differ from those of the people of the "northern suburbs". However in the creation of the nation-state in this new era of history for South Africa some social areas, such as dispute resolution and justice, could have a fundamental role in the unification and consolidation of the nation. A homogeneous system of first instance justice, could be extremely helpful.

jurisdiction of these courts will be quite narrow, dealing mainly with certain matters of family disputes, with neighbourhood problems, with some petty crime matters, and with some "public offences" against the humane principles to be defended in the "new South Africa" (such as not tolerating any practice of racial or gender or sexuality discrimination). Also, these courts would have the resource to appeal for help to, for example, a magistrate's court to either enforce a decision or to bring a reluctant party before them (the community court). But fundamentally, these "community courts" will be guided at all times by the principles established in the bill of rights of the new constitution.

South Africa will experience a unique opportunity to launch from the very bottom level of the social tissue an unifying model that will foster, not only in its form but also in its content, a more democratic society.[39] One way might be, perhaps, to incorporate practices of popular justice within the formal structures of the state. However, history is just beginning in this country, and for those popular sectors of this society, it might be opportune to keep advancing some basic steps towards a new "position".

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[39] In the case of Mozambique (Sachs and Welch, 1990) and of Cuba (Salas, 1983), the popular tribunals and popular courts, respectively, proved that at the early stage of their "new" societies these grassroots institutions of justice were fundamental in developing a cohesive national culture of democratic practices. These two countries also have taught us, that after the consolidation of their new societies, these courts or tribunals might lose their impact in the society and become obsolete. In the case of Cuba, by the end of the 1970s they decided to eliminate the popular courts (Salas, ibid). In Mozambique there is currently an on-going discussion to decide what to do with these popular tribunals (interview with Dr Joan Trindade, judge of the Popular Supreme Court of Mozambique. Maputo, 8 August, 1991).

Albie Sachs, leading constitutional lawyer of the ANC, has argued in support of this type of court.

> " I would say that community courts would have a very strong future in South Africa. They would draw heavily on African tradition in that they would function in a less formalistic and professionalised way than the existing state courts, they would look at questions in a multi-faceted rather than purely technical manner, and they would be made up of several members who would try to reach their decision by consensus. They would transform and modernize African tradition, or rather, reflect the new African tradition that incorporates trade unions and church groups and community organizations, through the inclusion of women and men, young and old among the judges, and by applying practical, common sense, and manifestly just solutions to the concrete problems before them. Thus in the case of family breakdown, they would be more interested in the assets of the parties, the question of the home and how the children can be protected, than in pursuing all the ins and outs of the pre-marriage negotiations. The courts would operate at the grass-roots level only, and not have the power to deprive people of their liberty or impose corporal punishment" (Sachs, 1990:103).

Different from other political tendencies (like the new neo-conservative approach of the National Party encouraging free-market policies, that is, less state intervention) I argue that in the sphere of justice and dispute resolution the state in the

"new South Africa" might have a fundamental role to play. State intervention in the economy and social areas, without attempting to monopolise the free-will of the civil society, will be a fundamental aspect of this new era of re-constructing the inequalities created by over 40 years of apartheid, and 300 years of colonialism. State monopoly over certain areas of grassroots justice, like the proposed "community courts", might be fundamental for the eradication of some practices of oppression and discrimination.

Imagine, in addition to the above proposal, that in the "new South Africa" those social sectors that are organised (like the civics structures in the black communities) will be "allowed" by law to continue the practices of popular justice. By this I mean, that the civics, as in the case of Alexandra, will have the power to mediate and sort out a great deal of their internal problems - and will make referrals to the appropriate state agencies when necessary. The jurisdiction of this mediation (as already happens in the Alexandra Civics) would be limited to certain type of cases; physical punishment might not be allowed (as already happens in Alexandra civics structures), although some community work, as a mechanism of punishment might be authorised by law. In addition to this, in a certain way similar to the case of the "community courts", the civics central structure might have the power to call external state agencies to enforce an agreement that has been reached in the case of a community mediation.

In other words, this type of "community mediation" will operate within the already established civics structures, and will be operating within the basic principles and spirit of popular justice. It is true that there will be some transactions (Garcia-Canclini, 1985) with the state, but there will be certainly a great deal of autonomy to continue developing a culture of popular justice. However, I should clarify that I am not intending to limit

this project to the townships. It could also be developed in other communities, which certainly includes the northern suburbs of the city (where mainly the well-off live). Nonetheless, a fundamental feature of this type of "community mediation" will be, as in the case of the "community courts", to follow as a guiding document, the bill of rights, of the new constitution.[40]

Conclusion

It is certainly a long "road to Mecca", as Athol Fugard might claim. However the debate has just begun in which many different ideas should be put forward for consideration. But, it is important to bear in mind that the final solution might only come after exhausting hours of discussion and debate.

My contention is that South Africa has a very rich history of popular justice (certainly with a lot of mistakes, but also with a lot of achievements), that could be incorporated in this transitory period. However, the incorporation of this popular experience is not intended to mean a co-option and neutralisation by the state or by the ruling class. In fact, the

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[40] Differing from the approach taken by the CDRRC, I argue that mediation in the current context of community matters in South Africa could not be a neutral affair. There should be some philosophical motivation behind a mediator to take an interventionist role (not considered by the CDRRC role; the mediator within their scheme is a mere facilitator). This philosophical guidance, I suggest, should be the above-mentioned bill of rights.

On the other hand, in relation to this "community mediation", I will positively agree that some private initiative led in the training of the mediators. However, before importing any model (either from the US or from Nicaragua, for example), earnest consideration should be given - by intellectuals and community activists - to develop a South African model of mediation.

proposal should lead, on the one hand, to recognising the possibility of using the state and law, in the continuation of the history of this country: that is, an expansion of the struggle (class, race and gender) into new areas of the social organisation.

On the other hand, as I strongly argue, popular justice is part of the reign of the civil society, in which the popular sectors and classes might be able to elaborate a political project. Although some transactions and negotiations may be given away by the popular sectors (as the above argument intends to suggest in relation to the use of the state and the law, ie community courts), this should not preclude these sectors from continuing their struggle towards social justice. It is, indeed, a long project but only through small victories, will we be able to change and transform any social practice of oppression and domination (from the line of production to equal duties and responsibilities at home).

Finally, it is my contention that the role of the intellectuals might be only to contribute (with their ideas, pens and portable computers) to support the cause of the popular sectors in transforming this society. Not "somewhat ahead and to the side", as Foucault argued, but from within as an organic member of the liberation movement. Bearing always in mind, that as in the case of the *L'étranger* of Camus, they (the intellectuals) should refuse to lie.

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References

Abel, Richard (ed) (1982a) *The Politics of Informal Justice* (Vol I). New York: Academic press.

Abel, Richard (1982b) "The contradictions of informal justice", in Abel, Richard (ed) *The Politics of Informal Justice* (Vol I). New York: Academic Press, 266-320.

Allison, John (1990) "In search of revolutionary justice in South Africa", (1990) 18 *International Journal of the Sociology of Law* 409-28.

Bapela, M S W (1987) "The people's courts in a customary law perspective". Paper delivered at conference on *New Approaches in Respect of the Administration of Justice*, Institute of Foreign and Comparative Law, UNISA, 1-23.

Cain, Maureen (1988) "Beyond informal justice", in Matthews, Roger (ed) *Informal justice?*. London: Sage Publications, 51-86.

Camus, Albert (1963) *L'étranger*. London: Methuen and Co Ltd.

De Haan, Willem (1987) "Fuzzy morals and flaky politics: the coming out of critical criminology" (1987) 14 (3) Autumn *Journal of Law and Society* 312-33.

Fitzpatrick, Peter (1989) "The mythology of popular justice", University of Kent, Canterbury, England, 1-31.

Fitzpatrick, Peter (1988) "The rise and fall of informalism", in Matthews, Roger (ed) *Informal Justice?* London: Sage Publications, 178-98.

Fitzpatrick, Peter (1983) "Law, plurality and underdevelopment", in Sugarman, David (ed) *Legality, Ideology and the State*. London: Academic Press, 159-82.

Foucault, Michel (1980) "On popular justice: a discussion with Maoist", in Foucault, Michel *Power/knowledge*. New York: Pantheon books, 1-36.

Foucault, Michel (1977) [conversation with Gilles Deleuze] "Intellectuals and power", in Foucault, Michel *Language, counter-memory, practice (selected essays and interviews)*. Oxford: Basil Blackwell, 205-17.

Fukuyama, Francis (1990) "The 'end of history?' Debate" (1990) 89 *Dialogue* 8-13.

Garcia-Canclini, Nestor (1985) "Cultura y poder: donde esta la investigacion?, *Signos*. Cuba, Mayo, 55-84.

Gramsci, Antonio (1986) *Selection from prison notebooks*. London: Lawrence and Wishart.

Hegel, G W F (1976) *Philosophy of Right*. New York: Oxford University Press.

Laclau, Ernesto, (1990) *New Reflections on the Revolution of our Time*. London: Verso.

Marx, Karl and Engels F (1974) *The German Ideology*. London: Lawrence and Wishart.

Motshekga, Mathole S (1987) "Alternative legal institutions in Southern Africa". Paper delivered at the conference on *New Approaches in Respect of the Administration of Justice*. Institute of Foreign and Comparative Law, UNISA, 1-71.

Narsoo, Monty (1991) "Civil society - a contested terrain", in (1991) 76 *Work in progress* 24-7.

Negri, Tony (1988) *Revolution Retrieved*. London: Red notes.

Pashukanis, Eugene B (1978) *Law and Marxism*. London: Inklinks.

Pretorius, Paul (1991) "Grassroot reform", in *Finance Week* 19-25 September 1991 at 45-6.

Sachs, Albie (1990) *Protecting Human Rights in a New South Africa*. Cape Town: Oxford University Press.

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

Salas, Luis (1983) "The emergence and Decline of the Cuban Popular Tribunals" in (1983) 17 (4) *Law and Society Review* 587-612.

Santos, Boaventura de Sousa (1987) "Law: a map of misreading. Toward a postmodern conception of law", in (1987) 14 (3) *Law and society review* 279-302.

Santos, Boaventura de Sousa (1985) "On modes of production of social power and law". Working paper, Institute for Legal Studies, University of Wisconsin, 1-66.

Santos, Boaventura de Sousa (1982) "Law and revolution in Portugal: the experiences of popular justice after the 25th of April 1974", in Abel, Richard (ed) *The Politics of Informal Justice* (Vol II). New York: Academic Press, 251-80.

Santos, Boaventura de Sousa (1977) "The law of the oppressed: the construction and reproduction of legality in Pasagarda", in (1977) 12 (1) *Law and Society Review* 5-126.

Seekings, Jeremy (1989) "People's courts and popular politics", in (1989) *South Africa Review 5* 119-35.

Shärf, Wilfried and Ngcokoto, Baba (1990) "Images of punishment in the people's courts of Cape Town 1985-7: from prefigurative justice to populist violence", in Manganyi, N Chabani and Du Toit, André (eds) *Political Violence and the Struggle in South Africa*. South Africa: Southern Books Publishers 341-71.

Suttner, Raymond (1986) "Popular justice in South Africa today". Paper delivered at the conference on *Law in a state of emergency* University of Cape Town, 1-27.

Swilling, Mark (1991) "The case for associational socialism", (1991) 76 *Work in Progress* 20-3.