

https://dspace.org/

Reconciliation and revenge in post-apartheid South Africa: rethinking legal pluralism and human rights

Wilson, Richard

1987-02-09T09:40:21Z
http://hdl.handle.net/10539/8146

Downloaded from a DSpace repository. https://dspace.org/

Reconciliation and Revenge in Post-Apartheid South Africa: Rethinking Legal Pluralism and Human Rights

Dr. Richard Wilson
AFRAS, University of Sussex
Brighton, East Sussex
BN1 9SJ, United Kingdom
Tel: 44-1273-606755, x.2278
Fax: 44-1273-623572
Email: R.Wilson@sussex.ac.uk

Keywords:
Anthropology of human rights, truth commissions, legal pluralism, South Africa.

Abstract:
Human rights are a central element in the new governmental project in the 'New South Africa', and this article traces some of the specific forms of connection and disconnection between notions of justice found in townships of the Vaal and rights discourses as articulated by the Truth and Reconciliation Commission. Human rights in post-apartheid South Africa have had varied social effects which are understood through the categories of 'adductive affinities' and 'relational discontinuities'. Religious values and human rights discourse have converged on the notion of 'reconciliation' on the basis of shared value orientations and institutional structures. There are clear divergences, however, between human rights and notions of justice as expressed in local *lekgotla*, or township courts, which emphasized punishment and revenge. The article concludes that the plurality of legal orders in South Africa results not from systemic relations between 'law' and 'society'. Instead, pluralism emerges from multiple forms of social action seeking to alter the direction of social change in the area of justice, within the context of the nation-building project of the post-apartheid state.

Two Vignettes of 'Reconciliation' and 'Justice"

September 21, 1996. Street Theatre sponsored by the South African Council of Churches at the Central Methodist Church during a meeting of the victims' organization the Khulumani Support Group.

A black minister presents a white Afrikaans-speaking policeman to his congregation. The policeman confesses to the daughter and widow of a dead African man that he was present at the torturing and murder. The policeman says, 'I'm sorry. I was afraid. I would like to seek to reconcile with you'. The women react angrily and the mother shouts 'You are a bastard and you deserve to die.' The minister puts himself between the two parties and protects the policeman. An old man, a relative also of the deceased, enters and quotes Genesis. He says that he forgives the policeman, 'I forgive but I won't forget. I want to build a new South Africa.' The pastor extols his virtue, saying, 'You have set an example for the others'. He sends the two women to a trauma counselor.

Duma Khumalo was sentenced to death with five others in 1986 for the murder of a local Vaal councilor, Mr. Dlamini, which he always claimed he never committed.. The 'Sharpeville Six' became a cause célèbre, a case which was taken to the United Nations and became an international symbol of the lack of justice for blacks under apartheid. When Duma was released in 1993 after seven years on death row, he demanded a retrial, but was ignored. He staged a sit-in at Sharpeville police station for 27 days in November 1995. In December the police took him to meet with the chief prosecutor and white magistrate in Vereeniging who said that he didn't have a legal case to hear, as there was no new evidence. On the 5th of January, 1996, Duma hid an axe in his coat, entered the Vereeniging court while it was in session, and went berserk. Duma Khumalo is an imposing figure at over 6 feet tall and weighing over 200 pounds. The prosecutor cowered under his desk and shrieked 'Don't kill me!' As others fled screaming, he swung the axe at desks, chairs, furniture, and the court's PA system. He attacked no one, and when armed police arrived he put his axe down calmly and put his hands in the air. In minutes, he had caused pandemonium,

wreaked $15000 worth of damage, and hewn a large pile of expensive teak firewood. When I interviewed him in late 1996, Duma told me, 'I just wanted justice[3].'

Legal Pluralism and Human Rights in South Africa

South Africa's first post apartheid government, led by the African National Congress (ANC), has embarked upon a nation-building project consciously predicated upon the creation of a 'culture of human rights'. This involved a number of classic liberal institutional reforms such as the incorporation of international human rights law into the Bill of Rights of the 1996 Constitution, and the setting up of an array of new bodies such as the Human Rights Commission and the Truth and Reconciliation Commission (TRC). This article evaluates the manifold consequences of state formulations of human rights in African 'townships', by looking at local responses to the view of 'reconciliation' commonly espoused during TRC Human Rights Violations hearings. It attempts to answer questions such as: how does transnational human rights talk relate to everyday moralities and normative understandings of justice? Do human rights concepts have any purchase in areas affected by political violence and if so, then how and why?

Over the past fifteen years, there has been a lively dialogue between anthropologists and colonial historians regarding the relationship between state law and informal moralities and mechanisms of adjudication which are sometimes referred to as 'customary law'. A key and contested notion in this debate has been 'legal pluralism'; both a descriptive term and analytical concept which attempts to address the existence of more than one legal system in a single political unit. In general, anthropologists have found the term useful, whereas historians of colonialism have objected to it, and this article asks whether legal pluralism is valuable for thinking about legal consciousness in the unique historical phase of the dismantling of apartheid, an institutionalized regime of racial segregation and dominance.

Legal pluralism originated in anti-positivist legal philosophy in the early twentieth century, as a reaction to an exclusionary state centralism which only regarded state law as 'law'[4]. In reality, argued pluralists, state law was far from absolute, and in many

contexts was not particularly central in the normative ordering of society. Against legal monism, Malinowski (1926), asserted that social norms in non-state societies perform the same regulatory functions as legal norms, thus raising non-codified social rules to the status of 'law'. The insight that law does not have absolute privilege in dealing with conflict was an important one[5], even though it came with normative functionalist assumptions about organic stability and stasis.

Legal pluralists such Jane Collier (1975) and Sally Engle Merry (1988) reinforced Malinowski's stance, by conceptualizing legal and social norms as equivalent and mutually constitutive. Judicial rules and extra-state norms (e.g. found in customary or 'community' courts) are both 'law', on the grounds that both are codes of social thought expressing moralities and social identities[6]. The legal and non-legal relate to each other as competing normative discourses, and there is no inherent *categorical* hierarchy between them although it was recognized that the state usually enjoys an institutionalized dominance over private moralities[7].

However, the emphasis on the importance and autonomy of social norms rather than positivized rules often entailed a neglect of the colonial state in the writings of mid-century legal anthropologists of Africa such as Schapera (1938). Legal anthropology in the colonial context often characterized state law and informal law as co-existing, but unconnected, spheres of authority and adjudication, which employed different procedures embedded in distinct moralities. Discussions of the relationship between state and informal law often portrayed the two systems as static and isolated, thus fuelling parallel debates about universalism and cultural relativism within human rights.

Within Southern African legal anthropology, an isolationist perspective is adopted in Comaroff and Roberts' (1981) influential book *Rules and Processes*. This characterized 'Tswana law' as a forum for individual negotiation separate from the interventions of colonial and postcolonial legal regimes. Although the authors have moved on to look in greater depth at the place of 'customary law' within colonial policy (Roberts 1991), others have maintained a view of customary law as fundamentally controlled at the level of local communities and culture, rather than by colonial and post-colonial states. Gulbra[illegible] for one, argues that the colonial

encounter did not erode the local political-juridical bodies of the Northern Tswana of the Bechuanaland Protectorate (now Botswana), which were able to safeguard a 'genuinely Tswana normative repertoire'. The stress in Gulbrandsen's (p.128) study is upon the preservation of 'cultural integrity' and the 'autonomy of Tswana jurisprudence' according to culturally specific ideas about gender, hierarchy and space, to the detriment of a thoroughgoing analysis of the transformation of 'customary law' by successive states.

The anthropological consensus on legal pluralism was directly challenged in the mid 1980s onwards by 'legal centralist' critiques which have argued that collapsing legal and social norms into the same category mistakenly turns all social norms and values into 'law'. This move makes defining law problematical since every norm is defined as 'legal'. Legal pluralism, it is argued by legal theorists such as Brian Tamanaha (1993), loses sight of how the rules of state law are created by specialists within state institutional structures and backed by a monopoly on means of physical coercion. Legal rules and social norms are constructed through quite different processes: positivized, written legal rules are generated by specialists within rationalized bureaucratic structures. Moreover, Tamanaha correctly points out that legal anthropologists never formulated a cross-cultural definition of law that did not somehow rely upon the state[8].

The primacy that anthropologists give to Africans' juridical autonomy has been subjected to a recent critique by colonial historians, who generally take the view that 'customary law' was utterly transformed by, controlled and integrated within the administrative apparatus of the colonial state[9]. Instead of legal pluralism in Africa, there was only ' a single, interactive colonial legal system'[10]. The most influential and consistent advocate of the centralist approach to African legal history has been Martin Chanock (1985, 1991) whose work focuses primarily on the place of the legal regime in the policies of the colonial state. He asserts that legal ideology has been a central part of the domination of society by the state. In his materialist reading, colonial and customary law were welded into a single instrument of dispossession and were part of a wider administrative policy of creating and maintaining a particular type of peasantry[11]. Rather than being the product of immutable tradition, 'custom' was

manufactured as a legitimating device for maintaining the status quo after dispossession by reinforcing the position of the chieftancy. Pluralism is but a legal fiction, a part of the ideology of British 'indirect rule' in African and Indian colonial territories. According to Chanock (1991:81), 'An indigenous system of land tenure did not exist under colonial conditions, but its shadow was summoned into existence by both colonial and postcolonial states, essentially to retard the establishment of freehold rights for Africans.'

In evaluating this debate, my sympathies are broadly with the legal pluralists, since the above centralist critiques have not fully taken into account more recent studies which conceptualize the relationship between state and non-state legalities in increasingly sophisticated ways. We are not forced to choose between the insights of legal pluralists or legal centralists, who have been moving closer to each others' positions in recent years to look at the interplay between state law and local ideas and institutions of justice.

Because of the way the question is formulated ('What is the relationship between law and society?'), neither tradition is wholly indispensable. Legal pluralism provides an important descriptive model of society as made up of a diversity of modes of conflict resolution, shattering the myth of state law's unchallenged empire[12]. On the other hand, the centralist argument has identified a logical contradiction: when the domains of the legal and non-legal are fused[13], the category of law becomes meaningless, as it includes everything from table manners to national constitutions and transnational convenants of rights. Further, centralists remind us of the Weberian maxim that law is a semi-autonomous discourse created by bureaucratic officials for the purposes of legal domination. Law's norms are positivized ones, often far removed, though not wholly unrelated, to the lived norms of existential experience.

It is possible to take a more synthetic view of the creative tension between anthropologists and colonial historians, and build up a version of legal pluralism that is useful for thinking about the interactions between state officials advocating new human rights ideas and practices, and local moralities and legal institutions in African communities. There has been excellent work by social historians on the interactions

between Africans and European colonial administrators, each pursuing their own interests, with the result being a 'complex patchwork of overlapping legal jurisdictions"' The work of Sally Falk Moore (1978, 1986) provides a useful starting point, as she has maintained a legal pluralist perspective while keeping the state firmly within the scope of the analysis. In Moore's view, 'customary law' is the product of historical competition between local African power holders and central colonial rulers, each trying to maintain and expand their domains of control and regulation. Law is imposed upon 'semi-autonomous social fields', with uneven and indeterminate consequences. We must not over-estimate the power of law to exert its will, as the connection between native courts on Kilimanjaro and the British colonial high court was 'nominal rather than operational (1986:150).' Moore takes us away from a static view of plural legal systems to look at the historical transformations of regulatory practices, and her work oscillates between small scale events (individual court cases) and large scale social processes (colonialism, decolonization etc.). Moore largely accepts Chanock's portrayal of the profound transformation of 'customary law' by colonial rule, yet her more interactionist focus upon the Habermasian 'life world', and more specifically upon the kinship basis of Chagga society, means that she allows more room for local strategizing towards greater political autonomy. She concludes in one essay (1991:125) that 'local law cases reflect the local history of African peoples rather than the history of the Europeans who ruled them.'

Yet there is still some work to do on the notion of legal pluralism in order to replace the stark dualism of pluralism vs. centralism by a redefinition of the subject matter. Instead of adopting over-systematizing theories which construct the 'legal' and 'societal' as two total and coherent cultural systems with distinct logics[15], we must analyze how adjudicative contexts are transformed over time by the social actions of individuals and collectivities, within a wider context of state regulation and discipline. In any locale, there are a variety of institutions and competing value orientations which have emerged via a long process of piecemeal aggregation, rupture and upheaval, and continue to be transformed by social action.

In a revised view of legal pluralism, the question to be answered is how social actors (including both individuals and collectivities) have contested the direction of social

change in the area of justice, and what the effects of this are for state formation, and the legitimization of new forms of authority. This is a legal pluralism of action, movement and interaction between legal orders in the context of state hegemonic projects. In post-apartheid South Africa this involves looking at how state officials, township courts, and Anglican ministers combine transnational human rights talk, religious notions of redemption and reconciliation, and popular ideas of punishment and revenge in an effort to control 'historicity' (i.e., the direction of social change, in the formulation of Alain Touraine 1971, 1995:219, 368)[16]. The struggle over historicity in post-apartheid South Africa presents itself as a struggle over how to deal with the political crimes of the apartheid past, to construct discontinuitie with the past and in so doing to reconfigure legal authority in the present. The plurality of legal orders therefore exist within a context of remarkably rapid movement in the production of norms and values.

Legal institutions, be they local township for a, magistrates' courts or human rights commissions, are simultaneously subjected to *centralizing* and *pluralizing* discourses and strategies. At different historical moments, one set of strategies may exercise dominance over another and become hegemonic. In the mid 1980s, as the internal anti-apartheid movement led by the United Democratic Front reached its crescendo and 'popular courts' punitively enforced counter-hegemonic values and political strategies, the dominant tendencies in the area of justice were fragmenting, decentering and pluralizing[17].

Since the post-apartheid elections of 1994, the main direction of legal change has been towards greater centralization as state officials attempt to restore the legitimacy of state legal institutions. Government officials such as the Minister of Justice 'Dullah' Omar have sought to integrate certain non-state structures (armed units of the liberation movements and Inkatha Freedom Party) within the criminal justice system, and exclude others such as township 'community' courts. Part of my general thesis about the South African Truth and Reconciliation Commission is that it represents an effort on the part of the new regime to reformulate 'justice' and establish a unified and uncontested administrative authority. This is a common strategy of regimes emerging from authoritarianism, which seek to unify a fragmented legal structure inherited from

the *ancién regime*. The notion of 'reconciliation' found in human rights talk is the discursive lynchpin in the centralizing project of post-apartheid governance. Human rights performs a vital hegemonic role in 'democratizing societies' of Africa and Latin America; one which compels social conformity, guiding the population away from punitive retribution by characterizing it as illegitimate 'mob justice"[8].

The new values of a rights culture are formulated primarily by intellectuals and lawyers representing a new political elite which have sought to superimpose them upon a number of semi-autonomous social fields. These values engender new discursive and institutional sites of struggle and their impact is uneven and emergent, raising questions for research such as: has the centralizing project as pursued through the TRC altered the terms of the debate on post-apartheid justice and if so how? How can we more precisely conceptualize the specific continuities and discontinuities between normative codes? In what areas of social life are human rights ideas and practices resisted, when are they appropriated, and when are they simply ignored?

In post-apartheid South Africa there are a heterogeneity of competing discourses and systems of values around justice and reconciliation. Christian discourses on forgiveness advocated by Truth and Reconciliation Commission officials often swayed individuals at hearings, but they also jarred with retributive notions of justice, which are routinely applied in local township and chiefs' courts. In thinking about how to understand the complex negotiations around the TRC's redemptive concept of reconciliation, I eschew categories of 'law' and 'society' in order to examine two forms of connection and disconnection between the TRC and one urban African constituency.

adductive affinities; where the TRC's understanding of reconciliation as forgiveness shared close associations with the religious values of victims and local churches. The positive responses of victims to the idea of national reconciliation can be understood in terms of both the ritualized aspects of hearings and pre-existing value associations between human rights and religious discourses.

relational discontinuities: human rights can diverge with local court formulations of justice, which emphasize revenge and punishment. If 'reconciliation' is

the key category of the new state's centralizing project, then 'revenge' is the main concept around which pluralizing notions of justice coalesce.

These two categories are not static and mutually exclusive and writers such as Minow (1998) and Jacoby (1983) have asserted that retribution need not entail vengeance, and that vengeance and forgiveness can converge[19]. In the South African instance, these categories of justice are reformulated with respect to one another by different social actors. Paying attention to the unintended consequences of moral categories alerts us to the slippage between 'reconciliation' and 'revenge'. Ironically, the threat of punishment through local institutions can facilitate the results which human rights commissions seek, namely co-existence between former pariahs and their neighbors in the townships.

The Structure of the South African Truth and Reconciliation Commission

Along with the Guatemalan 'Historical Clarification' commission, the South African Truth and Reconciliation Commission (1996-1998), or TRC, is the latest in over 15 truth commissions in the world during the last two decades. Truth commissions have become standard institutions in democratizing countries, each set up to investigate certain aspects of human rights violations under authoritarian rule[20]. It is also claimed that truth commissions can revitalize citizen's respect for the rule of law, and promote the creation of a new 'culture of human rights'.

In South Africa, the 1994 Promotion of National Unity and Reconciliation Act mandated the TRC to investigate 'gross violations of human rights', defined as 'the killing, abduction, torture or severe ill treatment of any person' between 1st March 1960 (the Sharpeville massacre) and 5th December 1993[21]. The terms of reference allowed the possibility of including high-ranking intellectual authors of atrocities, as they referred to 'any attempt, conspiracy, incitement, instigation, command or procurement to commit an act.' This was the widest mandate of any truth commission to date, but did not include within its mandate the banality and technicality of apartheid segregation policies. The terms limited investigations to those who went beyond the

already wide latitude of abuse permitted by apartheid laws. Detentions without trial, forced removals and 'Bantu' education policy, all legal under apartheid, were not included under the terms of the Act[22], although they are seen by many as human rights violations.

The work of the TRC was divided into three committees: the Human Rights Violations Committee, the Reparations and Rehabilitation Committee and the Amnesty Committee.

Throughout 1996 and 1997, the Human Rights Violations Committee held 80 hearings in town halls, hospitals and churches all around the country, where thousands of ordinary citizens came and testified about past abuses. This process received wide national media coverage and brought ordinary, mostly black, experiences of the apartheid system into the national public space in a powerful way. The South African TRC took more statements than any previous truth commission in history (over 21000) and the Human Rights Violations Committee faced the daunting task of checking the veracity of each testimony, choosing which would be retold at public hearings and passing along verified cases to the Reparations and Rehabilitation Committee. The TRC also took on a limited investigative role, and by issuing subpoenas and taking evidence in camera, it constructed a fragmented picture of the past. In its final report published in October 1998, the TRC produced findings on the majority of the 21298 cases brought before it, and it named 400 perpetrators of violations, unlike the Argentine and Chilean commissions. The 'truth' of the South African truth commission lay in its officially confirming and bringing into the public space what was already known, rather than discovering hitherto 'hidden truths'.

The efforts of the Reparation and Rehabilitation Committee to facilitate 'reconciliation' represented the weakest of the three committees' activities . Part of the problem lay in the fact that the TRC had no money of its own to disburse to survivors; instead it could only make unbinding recommendations to the President's Fund. The TRC made it abundantly clear that victims should expect little from the process and only a fraction of what they might have expected had they prosecuted for damages through the courts. In the end, it recommended that those designated 'victims' should receive

approximately US$3500 per year over a six year period. It remains to be seen whether the reparations process, a key element in 'reconciliation', will even begin to address the needs and expectations of survivors.

Finally, the South African TRC was unique in bringing the amnesty process within the truth commission, whereas in other countries it had always been a separate judicial mechanism. The final deadline for amnesty applications was 10 May 1996 and the TRC was overwhelmed with over 7000 applications. To receive amnesty, the applicant had to fulfil a number of legal criteria, including convincing the panel that the crime was political: i.e., not committed for personal gain, malice or spite. Crucially, the applicant had to fully disclose all was known about the crime and its political context, including the chain of command which authored the act. If amnesty was refused, or if it was later found that the applicant did not fully disclose all material evidence in their cases, then they could be prosecuted in future.

In amnesty hearings, former members of the security police divulged information never made public before such as the existence of a covert body called 'Trewits' which drew up lists of activists to be 'eliminated' (i.e., killed). Amnesty applicants also confirmed much of what was suspected, for instance; that in 1989 President P.W. Botha ordered the bombing of Khotso House, the national office of the South African Council of Churches. The amnesty hearings were a theatricalization of the power of the new state, which compelled key actors in the previous political conflict to confess, when they would rather have maintained their silence. Perpetrators were compelled to speak the new language of human rights, and in so doing to recognize the new government's power to admonish and to punish.

This theatricalization of power gives us one clue as to why democratizing governments set up truth commissions rather than relying upon the existing legal system: truth commissions are transient politico-religious-legal institutions which have much greater symbolic potential than dry, rule-bound and technically-obsessive courts of law. The TRC's legal status was ambiguous: one the one hand, it was not a court of law which could prosecute nor sentence, but on the other it was administered by the Ministry of Justice and had powers of subpoena, seizure and could grant legal indemnity from

prosecution. The South African truth commission inhabited a liminal space between state institutions and this liminality granted it a certain freedom from both the strictures of legal discourse and the institutional legacy of apartheid. National legal discourse did not contain within itself the language to undertake its own rehabilitation, so the liminality of the TRC allowed it to plagiarize from a religious idiom. The TRC's position as a quasi-judicial institution allowed it to mix genres-of law, politics and religious- in particularly rich ways and this makes it an interesting case study for understanding how human rights interact with wider moral and ethical discourses.

Reconciling Races?

The dominant view on 'reconciliation' in the TRC was created through an amalgam of transnational human rights values and a Christian ethic of forgiveness and redemption. It was propagated through dozens of Human Rights Violations (HRV) hearings where selected 'victims' spoke of the violations which themselves or relatives had suffered. In the HRV hearings, Commissioners would lay a redemptive template across testimonies as they responded to victims' stories, which conjoined individual suffering and a narrative of nation-building. Commissioners' responses were formulaic, predictable and they regularly contained the following stages: a recognition of suffering, the morally equalizing of suffering, the portrayal of suffering as a necessary sacrifice for the 'liberation' of the nation, and finally the forsaking of revenge by victims. There was a progressive movement built into these stages, from concentrating on the individual testimony, to moving away from the individual towards the collectivity and the nation, and finally back to the individual, all in order to facilitate forgiveness and reconciliation.

Recognizing and Collectivizing Suffering

The first stage involved expressing an appreciation of the evidence and sympathy for the witness. The individual circumstances were given recognition and value by Commissioners. From the idiosyncratic individual circumstances, Commissioners quickly moved to the universal aspects of suffering under apartheid. When Peter Moletsane[23], recounted how he was tortured in police custody in 1986 after he

protested against the killing of his uncle, TRC Chairperson Desmond Tutu replied, 'Your pain is our pain. We were tortured, we were harassed, we suffered, we were oppressed.' Tutu was not actually claiming that he had been actually tortured like Moletsane. Instead, Tutu was constructing a new political identity, that of a 'national victim', a new South African self which included all the dimensions of suffering and oppression. Thus, individual suffering, which ultimately is always unique, was brought into a public space where it could be collectivized and shared by all, and merged into a wider narrative of national redemption. At ritualized HRV hearings, suffering was lifted out of the mundane world of individuals and their profane everyday pain, and was made sacred in order to construct a new national collective conscience[24].

The Moral Equalizing of Suffering

In the HRV hearings, commissioners repeatedly asserted that all pain was equal, regardless of class or racial categorization or religious or political affiliation. Whites, blacks, ANC comrades and Inkatha Freedom Party members and others all felt the same pain. No moral distinction was drawn on the basis of what actions a person was engaged in at the time. Whether they were informing to the police or placing explosives for the Azanian People's Liberation Army (APLA): the fact that they suffered was enough.

For instance Susan van der Merwe, told of how her husband, a white Afrikaner farmer, had been killed by MK (the armed wing of the ANC) guerrillas whom he picked up hitchhiking along the border with Botswana. His vehicle was found but his body remained missing, hidden somewhere in the scrub brush of the desert. Archbishop Tutu responded to the story by saying:

> I hope that you feel that people in the audience sympathize with you. Our first witness this morning (an African man, Gardiner Majova, whose son had disappeared in 1985) also spoke of getting the remains of a body back. It is wonderful for the country to experience that-black or white-we all feel the same pain.

This moral equalizing is a common strategy adopted by reconciling post-war regimes to avoid public identification with one side in the conflict. Eric Santner (1992:144) writes how in Bitburg, Germany in 1985 at a public ceremony of reconciliation, there was a 'sentimental equalization of all victims of war,' which he understands as part of a wider rehabilitation of the SS within a narrative of 'Western' resistance to Bolshevism. Public rituals such as the TRC hearings in South Africa and the Bitburg memorial service in Germany are complex mnemonic readjustments designed to defuse political discord by denying the ideological reasons which called the conflict in the first place[25].

Liberation and Sacrifice

The embedding of an individual's account into an allegory of liberation began straight after the testimony. The first question by a commissioner leading the cross-examining was almost always about the context of the township or area at the particular time, not the individual event or unique circumstances of the victim. In this way, individual events were sutured to a social context of chaos, resistance, rioting against police, rent and school boycotts and therefore part of a wider liberation struggle. 'Sacrifice' provided the main symbolism to graft individual pain onto wider political narratives and social processes and this provided new meaning for death by creating a heroic figure of self-sacrifice in a new mythology of the state. Meaning was attached to the death by a process of teleologizing-of mapping onto the experiences of the dead and the survivors a narrative of destiny which portrays an inexorable progression towards liberation and the place of the specific individuals within it. This teleologizing of senseless loss and pain is a common feature of 'survivor's syndrome', and has been documented for the Holocaust (Bettelheim 1952) and Argentina (Suarez-Orozco 1991).

The message was that people died not in vain but for the liberation of the nation. Commissioners often referred to victims at hearings as 'heroes'. The history of the new South Africa is a history of suffering which was necessary for its liberation and redemption. A clear link was forged between religious interpretations of suffering emphasizing sacrifice and martyrs, and a more secular liberation narrative, with its imagery of national heroes. A unifying symbol which brought these two narratives together in a particularly powerful way was the figure of the Black Consciousness

leader Steve Biko. It emerged in the testimony of a security policeman applying for amnesty that Biko had been chained to a gate in the crucifix position before he died[26], symbolizing him as a Black Christ of the oppressed African nation.

Benedict Anderson (1991) has drawn our attention to how nations are imagined through their war dead, focussing upon cenotaphs and tombs of the unknown soldier, which are filled with the ghostly imaginings of the nation. On certain memorial days, the whole nation participates in a simultaneous event to memorialize their dead. Similarly, HRV hearings often ended with the chair asking the audience to stand and observe one minute's silence for the new nation's fallen heroes. This has been institutionalized in South Africa with a Day of Reconciliation each December 16th; ironically also the day in which the ANC celebrates the instigation of the armed struggle in 1961, and Afrikaner nationalists celebrate the 'Day of the Covenant' in memory of the white settler's defeat of 12000 Zulu warriors at the 'Battle of Blood River' in 1838. This is the day on which the TRC started its work in 1995.

Redemption through Forsaking Revenge

I believe that we all have the capacity to become saints.

TRC Chairperson Desmond Tutu[27]

In this final stage, the spiritual recompense for the loss of a family member was accentuated in the hope that it would preclude any need for individual acts of retaliation. The experience of the TRC would 'heal wounds' and smooth over resentments. Once individual suffering was valorized and linked to a national process of liberation, then Commissioners urged those testifying to forgive perpetrators and abandon any desire for retaliation against them. Commissioners never missed an opportunity to praise witnesses who did not express any desire for revenge. When Desmond Tutu replied to two cases of murder where the body was not found, he gave out clear signals about his views on retaliation. In the case of Susan van der Merwe[28] who had lived in relative penury after her husband's disappearance, Tutu said:

> It is good to see that you are not bearing any grudges. You state that your story of pain is but a drop in the ocean, but it is still pain that happened to you. I hope that God will anoint your wounds with the Holy Spirit and heal them.

The hearings were structured in such a way that any expression of a desire for revenge would seem out of place. Virtues of forgiveness and reconciliation were so loudly and roundly applauded that emotions of revenge, hatred and bitterness were rendered unacceptable, an ugly intrusion on a peaceful, healing process.

What were the responses to the TRC's narrative on reconciliation in the townships of South Africa: that is, how did local actors respond to the transnational human rights discourse when it was introduced to their communities via the TRC? My ten months' research focussed on the Vaal Triangle to the south of Johannesburg, an industrialized and urban region of approximately two million people. It is an area with a long and intense history of political violence; from the Sharpeville massacre in 1960 to the necklacing of black councilors in 1984, to the undeclared war between the ANC and the Inkatha Freedom Party (IFP) in the 1990s. This conflict led to a number of massacres in 1991-2, which temporarily derailed the peace talks between Mandela and De Klerk. Politically motivated massacres continued into late 1993, just months before the non-racial elections.

My analysis of this research identifies no single definable relationship between human rights and 'society', instead the language of rights has had uneven and varied social effects. Religious values and human rights discourse converged on the notion of reconciliation on the basis of shared value orientations. There was a clear divergence however between human rights and popular notions of justice as expressed in a local township court.

Adductive Affinities Between Religion and Rights

This category draws its inspiration from Weber's notion of 'elective affinities' which drew attention to the reciprocal effects resulting from a resonance or coherence between frameworks of values in different social fields. In post 1994 South Africa there has been a discernible correspondence between the state's nation-building discourse on reconciliation and the social doctrine of large sections of the 'progressive' Catholic and Protestant churches. This section of the religious community has been a fountainhead of symbolism for the TRC's own conceptualization of reconciliation. It also provided the main societal infrastructure for the TRC.

The collective effervescence of ritualized hearings became the mechanism through which the TRC's idealization of reconciliation was transmitted to participants. TRC hearings positioned individuals and their private narratives within a public narrative structure which made them aware of themselves as particular types of subjects. The creation of new identities ('victim', 'perpetrator') engendered new types of attitudes and dispositions (forgiveness, repentance), which bound the subjects to the TRC's own reconciliation project. This process drew upon a context of existing value-dispositions or affinities, and new values were forged in the ritual hearings themselves. The important thing here was the ability of the ritual process to create loyalties and identities which had not existed before.

The TRC's organizational structure was intertwined with a number of societal institutions, but none like the church sector. The use of the same networks of personnel by both institutions led to an overlapping of structures and the transmission of national narratives on reconciliation to individual victims. The TRC relied on the churches rather than conflict resolution NGOs or any new mediating structures, as it saw them as the authentic representatives of the 'community' and 'civil society'.

Due to the overlapping of TRC and religious personnel in the process of statement taking, religious values were conveyed to victims even before the hearings. The majority of statements taken in the Vaal were written down by religious activists in church settings. Statement takers were the first point of contact between the commission and victims. During interviews with statement takers, the TRC's message on reconciliation was woven into their written testimonies as the oral testimony of the

victim was rendered as text. This pre-structuring of the discourse in testimonies even before the public hearings commenced was a vital part of the shift away from retribution and towards a view of justice as emanating from 'truth' and 'reparations'.

Two of the Vaal's most active statement takers were church stalwarts. One of them, Thabiso Mohasoa of Sebokeng's Zone 7 is an International Pentecostal Church activist. Perhaps strangely for a person writing down oral histories of political violence, he explained that 'Reconciliation means to forget what happened.' When asked how he responded to victims' feelings of revenge during statement writing, Mohasoa described how he steered a victim's perspective in order to, in his words, 'uplift reconciliation':

> I had understood those feelings before...I understood retaliation. People don't don't know any better. Life in South Africa means fighting one another and retaliating. If he does it to me, I will do it to him and to his grandchild and then I will be satisfied...when taking a statement, people would be aggressive, saying "I want these perpetrators to be hanged." But the TRC will be a failure if people send negative ideas to it.

Beyond the overlapping networks of TRC statement takers and church activists, there was an institutional fusion of churches and TRC structures in the Vaal. The TRC relied heavily on a religious infrastructure to carry out important functions such as statement taking, arranging hearings and reconciling conflicts of the past. Religious groups were the only local organizations in the Vaal explicitly working with the TRC towards the goal of 'reconciliation'. Before the HRV hearings in Sebokeng in August 1996, a group of churches led by local Catholic priests led a prayer service in Sebokeng's notoriously violent Zone 7 to encourage victims to testify. Local township clergy helped the TRC to identify victims, their members took the vast bulk of the statements and they advised in the selection of cases to come to public hearings.

In addition to direct organizational links, the work of the Commission was indirectly reinforced by the conflict resolving agendas of local ministers. A key actor in the Vaal was a red-haired, ruddy complexioned, fluent SeSotho-speaking Irish priest called Father Patrick Noonan. The priest activist had run Nyolohelo Catholic Church in Zone

12 of Sebokeng for 25 years. He had radical political sympathies and was known affectionately by local ANC youth as 'Comrade Patrick'. Father Noonan was a political firebrand in the 1980s when the Vaal was made ungovernable by rent and school boycotts, barricades on street corners, and necklacings of alleged 'apartheid collaborators'. Now his mission is to pursue reconciliation through forgiveness:

> The truth commission is like a national confession. There is an injection of morality and ethics and that is good...The majority of victims have never gone to counseling, but those that do go mostly through the parishes That was my program of renewal.

Father Noonan has had a significant impact on the individual members of his congregation. One, Cecilia Ncube, has had to cope with the murder of her husband David killed at the Sebokeng Night Vigil massacre on 11-12 January 1991. David and Cecilia had been attending the night vigil of their nephew Christopher Nangalembe at 11427, Zone 7, Sebokeng. Christopher, a member of the ANC Youth League and a Peace Committee monitor, had been killed by a petty criminal Victor Khetisi Kheswa whom he had brought before a court run by the comrades. Cecilia left Christopher's night vigil at 10pm on Friday the 11th and went back to her house across the street. She was awakened at 1AM when members of Kheswa's gang (Kheswa was in hospital with a gunshot wound in the stomach) attacked the gathering of mourners with hand grenades and AK-47s: 'I heard shooting and big explosions, like a bomb or hand grenade and then sirens.' Press reports at the time placed the death toll at between 36 and 42 people, and the number of wounded at least at one hundred[29].

Instead of being consumed by a desire for revenge, Mrs. Ncube now embraces the new ethos of reconciliation in the country and credits Father Patrick Noonan for guiding her:

> He is the man who gave me the strength to forgive these people. They didn't know what they were doing. That is how I survived. I just forgave and moved on. I was on a local renewal committee and I had to be strong. From Father Patrick I learned that I couldn't bear a grudge and just had to forgive.

Cecilia Ncube distanced herself from the other relatives of those killed at Night Vigil Massacre who combined to form the organization 'Vaal Victims of Violence', the leader of which is a member of an African nationalist political party which opposed the TRC's amnesty provisions in the Constitutional Court. Cecilia commented on the unveiling of the memorial with the 36 names of those killed, 'the other victims were still sick. They were aggressive and violent and calling for revenge. I am a teacher and understand better. They are just ordinary people.'

In addition to their role in promulgating the values of reconciliation as forgiveness and their symbolic duties, ministers continue to play an important role in mediating in ongoing armed conflicts arising from decades of apartheid[30]. Reverend Peter 'Gift' Moerane of Sharpeville has urged militarized youth of both the ANC and IFP to negotiate an end to their cycle of violent revenge killings. He is perhaps the only non-political party leader with any real authority among ANC 'comrades' in Sharpeville. Similarly, Father Noonan has used his credibility with armed militants to try to end the cycle of revenge killings begun in the anti-apartheid years.

From the above instances in the Vaal and elsewhere, we get a picture of the TRC as having close affinities to religious institutions; sharing personnel and organizational structures, values of forgiveness and reconciliation and ritual symbolism. This close association between human rights and religious doctrine remains on of the best explanations for why the TRC could convert many to its cause of reconciliation. As Chanock (1985:79-84) has demonstrated, this involvement in legal consciousness on the part of Christian missionaries is nothing new. During the colonial period, missionaries sought to shape African attitudes to legal transgression by introducing ideas about individual and humanist rights, and Christian guilt and sin. Nevertheless, local actors also pursued other notions of justice which were less shaped by Christian values, throwing into relief the limitations of religion in resolving political conflicts.

Revenge and Retribution in a Local Court

Juxtaposed to religious affinities to human rights were strong discontinuities which were articulated primarily through local courts. I term these disjunctures 'relational discontinuities' in order to distinguish them from early legal pluralist accounts of customary law and to draw attention to the mutual influences between local, national and transnational formulations of justice.

Discontinuities in legal consciousness were expressed during and in the aftermath of the Human Rights Violations hearings held in the Vaal in August 1996. A large section of the week-long hearings held at the Sebokeng teacher training college dealt with the atrocities committed by Inkatha Freedom Party agents based at Kwamadala hostel at the Iron and Steel Corporation (ISCOR) plant. The most widely known case at the hearing involved the mothers of two murdered youths who had engaged in a factional dispute which led to the death of over 50 in the 1991 Sebokeng 'Night Vigil Massacre' and subsequent retaliatory acts.

The TRC hearing was the first time that Ms Margaret Nangalembe, mother of Christopher and Anna Kheswa, the mother of Christopher's killer Victor Kheswa had met since their sons' feuding had begun 5 years earlier. They both gave their differing accounts of events, and at the urging of Commissioners, shook hands publicly in an act of seeming 'reconciliation'. Ms. Kheswa stated her strong desire to leave the poverty of Kwamadala hostel and return to her old house in Zone 7 of Sebokeng township, across the road from the Nangalembe household. The Nangalembe family expressed no opposition and said that Anna Kheswa need fear no hostility from them. At the time, former Archbishop Desmond Tutu and other Commissioners extolled this case in the media as the apogee of reconciliation within the TRC process.

Yet the ritual enactment of reconciliation, the shaking of hands between the mothers of militarized youth has had little purchase in terms of advancing any 'reconciliation' at the local level. No IFP members from Kwamadala have successfully returned to any of the Vaal townships from whence they fled in the 1990-1 period. To the contrary, some IFP members such as Dennis Moerane of Sharpeville[31] have been summarily executed by armed ANC 'Special Defense Units' when they have tried to return to their former homes in the townships. This resulted in part from the lack of any dispute

resolution mechanisms within the TRC framework to negotiate a lasting local peace and the return of former 'pariahs' of the community. In many townships, the TRC represented little more than a symbolic and performative ritual with little organization on the ground to actually implement its version of reconciliation.

Moreover, there were few initiatives within the TRC to engage with the bodies who actually exercise political authority in the townships-local justice institutions, armed vigilante groups and local political party branches, which were seen as too compromised by their previous role in the violence. Commissioners I interviewed were hostile to the rough justice of local courts, demonizing them as 'kangaroo courts' which were antithetical to human rights. This is ironical since some Commissioners linked to the United Democratic Front actually promoted 'community courts' in the 1980s as prefigurative organizations of revolutionary people's power. In the new culture of human rights, armed units of the anti-apartheid movement must be either incorporated within policing and military structures or isolated and left to wither away.

In return, there was a profound disdain towards the TRC on the part of local political actors. The ANC representative to the 1991-2 Peace Committees in Sebokeng, Watch Mothebedi, scorned the Nangalembe-Kheswa reconciliation, stating

> Those two are only individuals. Their reconciliation has no further weight. Ms. Nangalembe cannot forgive on behalf of the community. She cannot allow Ms. Kheswa's return. This must be done by legitimate community institutions, not by the TRC who come in for one week and then say they've sorted everything out.

If the TRC's policy on reconciliation was not entirely legitimate and effective in some black townships, then how do former 'enemies of the community' negotiate their return? Who absolves them and negotiates on behalf of the 'community'? What does this tell us about the relationship between transnational human rights, state law and local justice?

In the township of Boipatong, there was the kind of overarching 'legitimate community institution' to which Mr. Mothebedi referred-a local court- which did seem to [illegible] ability to protect former apartheid councilors and enforce a more lasting

peace than in surrounding townships. The small township of Boipatong (population about 41000) is located across the highway from the massive, Dickensian ISCOR iron and steel works, and wedged between several packing and canning factories. This urban social space contains a heterogeneous linguistic mixture, including speakers of SeSotho, Pedi, Shangaan, Zulu, SeTswana and a class mixture of wealthy professionals, industrial laborers, domestic workers and large number of unemployed. It holds a special place in the history of violence in South Africa, as the peace talks between Nelson Mandela and FW de Klerk were broken off in June 1992 after armed Inkatha members, allegedly with police accompaniment, streamed across from KwaMadala hostel and slaughtered over 40 residents of the squatter settlement of Slovo Park, in Boipatong[32].

Residents of Boipatong mediate and adjudicate many disputes with little reference to the national legal system or bodies such as the TRC, which was seen by local people I interviewed as weak, ineffectual and as a 'sell-out'. The low level of reparations and the granting of amnesties to perpetrators strengthened the view that human rights violated local understandings of 'justice'. Instead of appealing to human rights commissions to solve problems of social order, local adjudication occurs through a daily *kgotla*, SeSotho for 'meeting' or 'court' [plural *lekgotla*[33]]. This local forum mainly deals with petty crimes and domestic disputes, and its presence also has implications for the legacy of political violence. In particular, it has protected black councilors who participated in the apartheid local government structure-the Transvaal Provincial Administration between 1988-1990. In 1984 during the 'Vaal Uprising' three councilors had been burnt alive by militant crowds and Esau Mahlatsi, the mayor of Lekoa Council, was murdered in 1993. Boipatong is now unique among Vaal townships in that apartheid era councilors can live free of intimidation.

The neighborhood court has a strong patriarchal character. The permanent members of the court are all male and fall into two groups; those over 45, many of whom were former convicted *tsotsis* or 'gangsters' and younger men between 20 and 30, most of whom were combatants in the armed wing of the ANC, umKhonto we Sizwe (MK). This present *kgotla* composition is a fusion of two models of township justice-the patrimonial and gerontocratic courts of the 1970s and the 'popular' revolutionary

courts of the 1980s, and therefore a combination of two groups who were often violent political adversaries during the height of the liberation struggle in the mid 1980s. The religious dimension is not absent, as the court contains a preponderance of members of the Zionist Christian Church (ZCC), a form of African Christianity which has its main bases in rural areas but also appeals to the urban poor. The court hears many family disputes (Tuesdays and Thursdays are 'Ladies Days'), cases of petty theft, assault, inheritance and unpaid debts. It rarely deals with rape cases, and never hears murder cases.

The *kgotla* draws its legitimacy by claiming to be an expression of traditional authority and customary law. Its participants assert that it is 'tribal law' and thus assert a discontinuity in relation to the criminal courts and international human rights. Unlike the white magistrates' courts the sentencing of the *kgotla* avoids incarceration if at all possible. It is said that everyone can speak out fully, and anyone can cross-examine the plaintiffs, and sentencing is made by the 'consensus' of the meeting. Court members claim that unlike human rights commissions, cross-examination from members of the same community always finds out the guilty, and achieves justice through punishment, rather than 'reconciliation' and amnesty. Thus a discontinuity with national and international legal structures is created by local social actors through notions of 'community' and 'tribe'. This is an image of the township dwellers' own alterity as traditional rural, tribal, pre-modern peoples. However, few residents have been on a rural African farm[34] and most live the thoroughly urbanized existence of an industrial community.

Instead of being some vestige of the traditional African past, the notion of tribe and tribal law are part of a more recent political narrative on 'community' and an assertion of autonomous governance vis-à-vis the state[35]. This points to discontinuities between the two legal fora, which are relationally and historically constituted. The pre-1994 legal system was a key institution in authoritarian governance, and opposition to state policing in townships is still shaped by this history. Before 1994, police and magistrates' courts were keen enforcers of an institutionalized bureaucratic framework of racial discrimination. Police were concerned less with controlling common crime than they were with liquor and pass control raids, and suppressing dissident political

activity. The judiciary largely upheld apartheid legislation and relegated blacks to an inferior and dependent position within a dual legal system[36].

There are procedural differences between magistrates and township courts which bear mentioning: those found guilty by the *kgotla* are subjected to both restorative justice, which usually takes the form of monetary payments or free labor and a more punitive justice, which frequently involves a publicly beating with whips, *sjamboks*, and golf clubs. These beatings can be quite severe and the punished often require hospital treatment. The convicted usually consent to a public flogging in their own township rather than face being handed over to the van der Bijl Park police and face possible beatings, torture and a jail sentence. The prevalence of revenge in township courts draws our attention away from transient human rights invocations of reconciliation, and demands a greater focus upon 'justice' as a category which is more important in framing the context of social action.

The place of suffering in the application of justice highlights the differences and similarities between community justice, criminal law and human rights. The TRC called for victims to shun vengeful desires to make the perpetrators suffer. In the place of revenge, victims' would be recompensed by having their stories integrated into a nation-building narrative and through reparations from the state, rather than from the offender. Within the TRC process, only the victims' suffering is brought into the public space. In contrast, public (albeit a different 'public') suffering by the offender is at the heart of justice in local courts. As with the *lex talionis* of the Old Testament, an equivalent and physical exaction of pain compensated for prior suffering. The reciprocal infliction of pain which is witnessed by the victim forms the basis of local court opposition to human rights.

The importance granted to suffering as a form of redress in magistrates' court decisions resonates with local courts' judgments. Sentencing in common law recognizes retribution but seeks to subdue the 'collective will', and rationalize inchoate passions of hatred and vengeance[37]. Due to their shared valuing of revenge, there are a number of connections between local courts and the police. The Boipatong township court was officially recognized by the local magistrate and police station, and the court sends

certain types of cases it cannot resolve (e.g. murder and rape) to the formal criminal justice system. It assists the police in apprehending suspects, and hands over those who will not consent to beatings. This cooperation between systems has increased since the formation of the new South African Police Service, but it is not altoegther unprecedented. During the apartheid years, the state at various historical junctures enhanced the integration of a dual system of justice, and at various historical moments promoted the setting up of customary courts in rural areas and local courts in the townships[38].

Yet there are also disjunctures between informal and formal law-the retribution of state law is of a different sort to popular justice: it involves not the blood, sweat and screams of the spectacle of public flogging, but a more a silent administrative incarceration behind the doors of police stations and prisons. Suffering is still the basis of justice, but it is a slow, hidden suffering which victims can not witness. In assuming the right to punish, the state deprives the victims of their role in inflicting suffering upon offenders.

These historically produced relationships take on new meanings in the post-apartheid period as the urban tribal court in Boipatong has dealt relatively successfully with the political violence of the past. It is no coincidence that two former National Party members and councilors from 1988-90 have remained in their homes in the township, whereas such 'apartheid collaborators' have been killed or chased away from their homes in all other townships of the Vaal. During interviews, former councilors reported that since 1994, they are no longer verbally or physically assaulted and feel protected by the neighborhood court, which they say is prepared to act punitively against anyone who threatens them. This contrasts strongly with the situation in neighboring townships without local courts such as Sharpeville, where no councilors have returned to their former homes, but are 'banished' to shantytowns or special barbed wire enclosed camps constructed by the police. The existence of an overarching justice institution in Boipatong has created an environment less conducive to revenge killings.

The unintended consequences of 'popular justice' are worth remarking upon here. Despite the opposition in Boipatong to the TRC, the local court realizes many of the objectives of human rights institutions around conflict mediation. I hesitate to use the word 'reconciliation' since no one in Boipatong thought that it accurately described the process of co-existence with former 'apartheid collaborators.' Yet it is ironic that a neighborhood court which portrays itself as a punitive 'tribal' authority and which rejects the TRC's humanitarian view of human rights for a more retributive view of justice in the end facilitates the kinds of solutions extolled by the TRC. It does so not through notions of reconciliation and restorative justice derived from Christian ethics and human rights talk, but through expressions of traditionalist male authority and the likelihood of physical sanction against any who flout its decisions[39].

Conclusions

Until the early 1960s, 'Legal Pluralism I' held sway in the field of legal anthropology. It proposed an equivalence and continuum between all types of legal rules and social norms, and operated with a static and isolationist view of customary law which too readily assumed the existence of different systems. Over time, it moved from codifying customary rules to advocating a processual approach which portrayed local law as characterized by open and seemingly limitless individual negotiation and choice-making. Legal Pluralism I has been the dominant intellectual paradigm in decades of writings on 'the Tswana', in what is now South Africa and Botswana. From Schapera (1938) in the early part of the century, to Comaroff and Roberts (1981) to more recent writers such as Gulbrandsen (1996), studies of legal practices and discourses among Setswana-speaking peoples largely accepted the dualistic colonial and apartheid legal system at face value and ignored how state law transformed local adjudicative institutions. This paradigm may have resulted from the actual historical experiences of Setswana-speaking peoples, but is in my view more likely to have been the result of an entrenched analytical frame which reproduced assumptions of isolation and autonomy. Certainly those people forcibly categorized as 'Tswana' in the former South African 'homeland' of Bophuthatswana, run by the corrupt Lucas Mangope, had an intimate knowledge and experience of legal coercion from a violent state.

'Legal Pluralism II' emerged in the early 1970s from within 'critical legal studies' and the cross-disciplinary 'law-and-society' movement. The emphasis in studies of legal pluralism soon became the dialectical relationship between state institutions and local normative orders and the relations of dominance and resistance between them. Marxist legal anthropologists such as Snyder (1981) argued rightly that the processual approach treated dispute processes as too self-contained and thus tended to ignore the wider political context. Local moralities and norms were in a subordinate but resistant relationship to state law, demanding recognition on their own terms[40]. Studies in this tradition then began to look at the politics of judicial processes, drawing from Gramscian notions of hegemony which where law is an ideology which expresses and maintains structures of inequality. Foucauldian readings also took hold, seeing law as a disciplinary apparatus and a site of struggle and contestation between dominant and resistant discourses of power[41].

Legal Pluralism II is adequate in many ways for understanding the uniquely polarized history of apartheid legality. It is particularly well-suited to analyzing the dualistic legal system administered by a white-run political and legal bureaucracy and resisted by local political actors who carved out a sphere of 'popular justice' in the 1980s. Yet Legal Pluralism II, with its narrative of dominance and resistance is predisposed to ignore the real connections between local and state law, and the ways in which especially elite Africans (in chief's courts and 'Bantustan' bureaucracies) have participated in, and acquiesced to, state policies. Relations between formal and informal justice institutions in the initial post apartheid context are even more volatile and contradictory than before, and they present a socio-legal environment that prior formulations of legal pluralism or centralism cannot fully encompass.

A revised legal pluralism would have to preserve from Legal Pluralism II the idea that many states engage in centralizing efforts to resolve their hegemonic crises, but it could not accept that there is always an inherent asymmetry between centralizing and pluralizing processes. Instead of the stark polarity of dominance and resistance which reduces the complexities of a historically produced political-legal context, we must turn our attention to shifting patterns of dominance, resistance and acquiescence,

which occur simultaneously. As we have seen in the Vaal townships, local courts are both connecting up with policing structures and bypassing them in order to exercise a certain degree of autonomy to judge and punish. Religious moralities and institutions, on the other hand, encourage a more favorable disposition towards human rights values. The notions of elective affinities and relational discontinuities take us away from generalizations about 'law' and 'society' and offer more concrete ways of theorizing the uneven reception of human rights in a locale.

In this multivalent context, the degree of plurality of legal fields is often a matter of the strategic perspectives of social actors. The legal system may appear quite pluralistic from the Olympian vantage of the Justice Ministry, which surveys hundreds of unregulated armed units and local courts across the country, each dispensing different version of 'justice' over which it has only a tentative control. However, from the perspective of a petty criminal apprehended by Boipatong *kgotla* members and handed over to the police in van der Bijl Park, the institutions of justice look relatively unified and integrated.

There are multiple connections between state institutions, religious organizations and local courts, to the extent that we see a splintering of the unified fields of 'state' and society', and an eradicating of their hard boundaries. Diverse social fields in African countries are too complex and emergent to be constrained by any explanation which sees 'law' and 'society' as *a priori* structural categories to be understood by a single explanatory framework. Instead of two coherent unified systems which are locked in a structurally determined struggle, we see combinations of actors and collective groups who are involved in the production of norms and who create new historical experiences and experiences of history. The direction of social change in post-apartheid South Africa, what Touraine refers to as 'historicity', is the product of the social action of individuals and collective actors (political parties, local courts, religious organizations etc.) engaged in the reflexive self-production of 'society'[42].

Just as 'civil society' implies too much common purpose among non-state actors towards state versions of human rights, neither is the 'state' itself unified and coherent in its policies. The diversity in human rights practices within the South African state

can be well demonstrated by juxtaposing the activities of different arms of the state in the Vaal in 1995-6. Only months before the TRC was taking statements from victims, arranging its one week hearing in the Vaal townships and carrying out public education on human rights in the area, policemen in the Murder and Robbery Unit at the nearby van der Bijl Park police station were routinely torturing criminal suspects using methods honed during years of defending successive National Party regimes (1948-1994). Due to successive litigation from human rights lawyers[43], four Vaal policemen were suspended in late 1995 for torturing thirty prisoners. The presiding judge struck down the prisoners' confessions exacted through torture, and recommended an internal police investigation. When I re-interviewed a staff member at the Vaal Legal Aid Centre in 1998 and asked if the situation had improved, he replied, 'Yes. Prisoners awaiting trial are no longer being tortured. They are only being assaulted.'

The post-apartheid South African regime is in an agonizing process of state reformation; its ANC ministers are unifying, consolidating infrastructure, and desperately trying to transform institutions such as the police, prisons and magistrates' courts tainted by their involvement in administering apartheid. Such a hegemonic crisis is not unique to South Africa. Jean Francois Bayart (1993:249) understood the tentative and emergent hegemonizing projects of post-colonial African states when he wrote;

> In order to understand "governmentality" in Africa we need to understand the concrete procedures by which social actors simultaneously borrow from a range of discursive genres, intermix them and, as a result, are able to invent original cultures of the State.

Human rights are a central discursive genre within governmentality in the 'New South Africa', and this article has traced some of the procedures through which state officials combine human rights with religious notions of redemption and forgiveness and how these formulations either resonate with local perspectives (adductive affinities) or are repulsed (relational discontinuities). The procedures work in different directions simultaneously, both reinforcing and obstructing the introduction of human rights values into a context of semi-autonomous legal and moral fields. If revised, then legal pluralism remains one useful category which allows us move beyond stark formulations

of 'state' and society', to chart the concrete consequences of social action which contest historicity in the area of 'justice' and 'reconciliation'.

C:\my documents\trcsa\publications\legal pluralism.doc
Last printed 04/28/99 6:12 PM

References

Abel, Richard. 1995. *Politics by Other Means: law in the struggle against apartheid, 1980-1994*. London: Routledge.

Anderson, Benedict. 1991. *Imagined Communities: Reflections on the Origins and Spread of Nationalism*. Second edition. London: Verso.

Atkinson, D. and S.Friedman. 1994. *The Small Miracle: South Africa's Negotiated Settlement*. South African Review 7. Johannesburg: Ravan Press.

Bayart, Jean-François. 1993. *The State in Africa: the politics of the belly*. New York: Longman.

Bettleheim, Bruno. 1952. *Surviving and Other Essays*. New York: Vintage Books.

Buzzoli, Belinda. 1998. 'Public Ritual and Private Transition: the Truth Commission in Alexandra Township, South Africa 1996", *African Studies* Vol. 57, No.2.

Burman, Sandra and W. Sharf. 1990. 'Creating People's Justice: street committees and people's courts in a South African city.' *Law and Society Review* 24:693-745

Chanock, Martin. 1985. *Law, Custom and Social Order: the colonial experience in Malawi and Zambia*. Cambridge: Cambridge University Press.

_____ 1991. 'Paradigms, Policies and Property:a review of trhe customary law of land tenure. In K. Mann and R. Roberts (eds.).

Cohen, A.P. 1985. *The Symbolic Construction of Community*. London: Routledge.

Collier, Jane. 1975. 'Legal Processes.' *Annual Review of Anthropology*. 4:121-144.

Comaroff, John and Simon Roberts. 1981. *Rules and Processes: the cultural logic of dispute in an African context.* Chicago: University of Chicago Press.

Davies, Margaret. 1996. *Delimiting the Law: Postmodernism and the politics of law.* London: Pluto Press.

Das, Veena. 1987. 'The Anthropology of Violence and the Speech of Victims.' *Anthropology Today.* Vol.3(4):11-13.

_____(ed.) 1994. *Mirrors of violence: communities, riots and survivors in South Asia.* Delhi: Oxford University Press.

Dembour, Marie-Bénédicte. 1990. 'Le pluralisme juridique: une démarche parmi d'autres, et non plus innocente.' *Revue interdisciplinaire d'études juridiques* 24:43-59.

Dugard, John. 1984. *The Denationalization of Black South Africans in Pursuance of Apartheid,* Johannesburg: University of the Witwatersrand Press

Ensalaco, Mark. 1994. 'Truth Commissions for Chile and El Salvador: A Report and Assessment', *Human Rights Quarterly.* 16:656-675.

Fitzpatrick, Peter. 1987. 'Racism and the Innocence of Law.' *Journal of Law and Society.* Vol. 14, No. 1, pp.119-132.

Garton Ash, Timothy. 1997. 'True Confessions.' *New York Review of Books.* July 17, 1997.

Geertz, Clifford. 1983. 'Fact and Law in Comparative Perspective.' In *Local Knowledge: further essays in interpretative anthropology.* New York: Basic Books.

Goodhew, David. 1993. 'The People's Police Force: Communal Policing Initiatives in the Western Areas of Johannesburg, circa 1930-1962,' *JSAS* 19, 3 (Sept).

Guillet, D. 1998. 'Rethinking Legal Pluralism: Local Law and State Law in the Evolution of Water Property Rights in Northwestern Spain.' *Comparative Studies in Society and History*. 40(1): 42-70.

Gulbrandsen, Ørnulf. 1996. 'Living their lives in courts: the counter-hegemonic force of the Tswana *kgotla* in a colonial context.' In O. Harris (ed.) *Inside and Outside the Law: anthropological studies in authority and ambiguity*. London: Routledge

Hamber, Brandon and Richard A. Wilson. 1999. 'Trauma, Liminality and Symbolic Closure: the legacy of political violence in South Africa.' in Edward Cairns (ed.) *Social Memory in Post-Conflict Situations*. Proceedings of the American Psychological Association. London: MacMillan.

Hayner, Priscilla B.1994. 'Fifteen Truth Commissions-1974 to 1994: A Comparative Study.' *Human Rights Quarterly* Volume 16:597-655.

Humphreys, Sally. 1985. 'Law as Discourse' *History and Anthropology* (1):241-264.

Hunt, Alan and Gary Wickham. 1994. *Foucault and Law*. London: Pluto Press.

Huyse, Luc. 1995. 'Justice After Transition: On the Choices Successor Elites Make In Dealing With the Past.' *Law and Social Enquiry*. (1):51-78.

Jacoby, Susan. 1983. *Wild Justice: the evolution of revenge*. New York: Harper and Row.

Kleinman, Arthur et al (eds.) 1996. Issue on Social Suffering. *Daedelus*. Winter issue. Vol.125 (1).

Klug, Heinz 1995. 'Defining the Property Rights of Others: political power, indigenous tenure and the construction of customary law.' Center for Applied Legal Studies, University of the Witwatersrand: Working Paper 23.

Krog, Antjie. 1998. *Country of My Skull*. Johannesburg: Random House.

Llewellen, Karl and E. Adamson Hoebel 1941. *The Cheyenne Way: conflict and case law in primitive jurisprudence*. Norman: University of Oklahoma Press.

Lodge, Tom and Bill Nasson. 1992. *All, Here, and Now: Black Politics in South Africa in the 1980s*. London: Hurst and Co.

Malinowski, Bronislav. 1926. *Crime and Custom in Savage Society*. London: Kegan Paul.

Mann, Kristin and Richard Roberts (eds.). 1995. *Law in Colonial Africa*. London: James Currey.

Mayer, Phillip. 1971. *Townsmen or tribesmen? Conservatism and the process of urbanisation in a South African City*. Cape town: Oxford University Press. Second edition.

Merry, Sally Engle. 1988. 'Legal Pluralism' *Law and Society Review* 22 (5): 869-901.

_____1990. *Getting Justice and Getting Even: legal consciousness among working class Americans*. Chicago: University of Chicago Press.

Minow, Martha. 1998. *Between Vengeance and Forgiveness: facing history after genocide and mass violence*. Boston: Beacon Press.

Moeller, Robert G. 1996. 'War Stories: the search for a usable past in the Federal Republic of Germany.' *American Historical Review*. (October) Vol. 1008.

Moore, Sally Falk. 1978. *Law as Process: an anthropological approach*. London: Routledge.

_____ 1986. *Social Facts and Fabrications: 'Customary law on Kilimanjaro, 1880-1980*. Cambridge: Cambridge University Press.

_____1991. 'From Giving and Lending to Selling: Property Transactions Reflecting Historical Changes on Kilimanjaro.' In K. Mann and R. Roberts (eds.).

Nietzsche, Friedrich. 1969. *Thus Spoke Zarathrustra.* Translation by R.J.Hollingdale. London. Harmondsworth.

Panizza, Francisco. 1995. 'Human Rights in the Processes of Transition and Consolidation of Democracy in Latin America.' *Political Studies.* 43:168-188.

Pauley, Matthew A.. 1994. 'The Jurisprudence of Crime and Punishment from Plato to Hegel.' *American Journal of Jurisprudence. (39):97-152.*

Pavlich, George. 1992. 'People's Courts, Postmodern Difference and Socialist Justice in South Africa,' *Social Justice* 19, 3.

Renteln, Alison. 1990. *International Human Rights: universalism versus relativism.* London: Sage.

Roberts, Simon. 1991. 'Tswana Government and Law in the Time of Seepapitso, 1910-1916.' In K.Mann and R. Roberts (eds.).

Rosenberg, Tina. 1995. *The Haunted Land: facing Europe's ghosts after communism.* New York: Vintage.

Sachs, Wulf. 1996. *Black Hamlet.* Baltimore: Johns Hopkins Press.

Santer, Eric. 1992. 'History Beyond the Pleasure Principle' in Saul Friedlander (ed.) *Probing the Limits of Representation: Nazism and the Final Solution.* Cambridge, MA: Harvard University Press.

Santos, Boaventura de Sousa 1995. *Toward a New Common Sense: law, science and politics in the paradigmatic transition.* Routledge: New York.

Sarkin, Jeremy. 1998. 'The Development of a Human Rights Culture in South Africa.' *Human Rights Quarterly*. 20(3). August.

Scarry, Elaine. 1985. *The Body in Pain: the making and unmaking of the world*. New York: Oxford University Press.

Schapera, Isaac. 1938. *A Handbook of Tswana Law and Custom*. London: Oxford University Press.

Scheper-Hughes, Nancy. 1995. 'Popular Justice and Human Rights in a South African Squatter camp.' *Social Justice* Vol. 22, No. 3.

Seekings, Jeremy. 1995. 'Social Ordering and Control in South Africa's Black Townships: an historical overview of extra-state initiatives from the 1940s to the 1990s.' Presented at the South African Sociological Association, Rhodes University, 2-5 July 1995.

Sharf, W. and Baba Ngcokoto. 1990. 'Images of Punishment in the People's Courts of Cape Town 1985-7' in C. Mangananyi and A. Du Toit eds., *Political Violence and the Struggle in South Africa*. London: Macmillan.

Strathern, Marilyn. 1985. 'Discovering "Social Control"' *Journal of Law and Society*, 12(2):111-134.

Suarez-Orozco, M. 1991. The heritage of enduring a 'Dirty war': Psychosocial Aspects of Terror in Argentina, 1976-1988. *The Journal of Psychohistory*, 18(4), Spring, pp. 469-505.

Tamanaha, Brian. 1993. 'The Folly of the "Social Scientific" Concept of Legal Pluralism.' *Journal of Law and Society* 20(2):192-217.

Teubner, G. (ed.) 1997. *Global Law Without a State*. Aldershot, UK: Dartmouth.

Touraine, Alain. 1971. *The Post-Industrial Society. Tomorrow's social history: class, conflict and culture in programmed society.* Tr. Leonard Fox Mayhew. New York: Random House.

_____. 1995. *Critique of Modernity.* Oxford: Blackwell.

van Onselen, Charles. 1982. *Studies in the Social and Economic History of the Witwatersrand, Vol. 2, New Nineveh.* Johannesburg: Ravan Press.

Vincent, Joan. 1990. *Anthropology and Politics. Visions, Traditions and Trends.* Tucson: University of Arizona Press.

Wilson, Richard A. 1996. 'The *Sizwe* Will Not Go Away: The Truth and Reconciliation Commission, Human Rights and Nation-Building in South Africa.' *African Studies.* Vol..55(2):1-20, December, 1996.

_____1997a. *Human Rights, Culture and Context: anthropological approaches.* London, Chicago: Pluto Press.

_____1997b. *The People's Conscience? Civil Groups, Peace and Justice in the South African and Guatemalan Transitions* 1997. London: Catholic Institute of International Relations.

_____1997c. Comment on Charles R. Hale, 'Consciousness, Violence and the Politics of Memory in Guatemala.' *Current Anthropology*, Vol. 38, Number 5, December.

Endnotes

---

[1] This research was funded by the Economic and Social Research Council (UK), Ref. R000222777. Versions of this paper were given during 1998-9 at the London School of Economics, the University of the Witwatersrand in Johannesburg, the School of Oriental and African Studies and Queen's University, Belfast. Many thanks to the participants at those seminars for their valuable comments. I also benefited from discussions with Jocelyn Alexander, Marie-Bénédicte Dembour, Saul Dubow, and Fiona Ross. All errors are my own responsibility.

[2] This account is based upon my own interviews in 1996-7 with Duma Khumalo, Father Patrick Noonan and members of the Vaal Legal Aid Center who provided Mr. Khumalo's legal defense. My 11 months research in South Africa has taken place over a four year period; in 1995, before the TRC began functioning; in 1996-7, while it was in full swing, and in late 1998 after the main regional offices had been closed. I attended three weeks of Human Rights Violations hearings in Klerksdorp, Tembisa and Kagiso and three weeks of amnesty hearings for Northern Province security policemen in Johannesburg. I interviewed nearly half of all the TRC Commissioners and many staff workers such as lawyers, researchers and investigators in the Johannesburg office. Yet much of my research took place outside of the TRC process and in the Vaal, where I made regular trips from my base in Johannesburg. In the Vaal I engaged in in-depth interviews over a four year period with dozens of members of the Khulumani Support group, as well as local ministers, political leaders, legal personnel and former policemen. As for 'perpetrators', few were open about their involvement in acts of violence, but I interviewed three Inkatha Freedom Party members who had been convicted in the courts for their participation in the 1993 Boipatong massacre.

[3] Duma Khumalo later went on to testify at the TRC hearings in the Vaal and become a fieldworker for the victim's organization, the Khulumani ('Speak Out') Support Group.

[4] For a discussion of legal pluralism in legal philosophy and sociology, see Santos (1995, Part II), and Teubner (1997, Part I).

[5] A point extended by Marilyn Strathern 1985.

[6] See D. Guillet (1998) for a thorough discussion of new developments in legal pluralism in relation to law-and-economics studies.

[7] More recently, this approach has found favor within post-modernist jurisprudence which challenges legal positivist claims of doctrinal unity. For the Derridean legal scholar Davies (1996:7) 'law' is not to be confined to the limited conception of positive law. Echoing the distant anthropological voices of Llewellen and Hoebel (1941) in *The Cheyenne Way*, she writes that, 'law is everywhere-in our metaphysics, our social environment, our ways of perceiving the world, the structure of our psyche, language, the descriptive regularities of science and so on.' Legal pluralism and post-modernist legal theory converge primarily upon the (problematic) Geertzian premise that 'law is culture' (Geertz 1983).

[8] An insight stated earlier by Dembour (1990).

[9] A point recognized by historians Mann and Roberts (1991:9). See the watershed work of Chanock 1985.

[10] Mann and Roberts (1991:9).

[11] Chanock (1991:71).

[12] This can also be done within a state-discourse centered approach, such as Fitzpatrick (1987) who analyzes how law operates, without having to adopt an approach 'outside' of state law. My thanks to Marie-Bénédicte Dembour for this observation.

[13] As they are in Foucault's writings and postmodern legal theory such as Davies (1996) and Santos (1995).

[14] Mann and Roberts (1991:16). See also Charles van Onselen's superb work (1982) on vigilantes on the Witwatersrand at the turn of the twentieth century.

[15] An approach found also within the postmodernist legal theory of Santos (1995:116).

[16] Touraine, it must be acknowledged, defines historicity in different ways, as the social change and as a cultural model of knowledge production. I am using historicity in the former sense, which portrays social life as a set of relations between the social actors of change Touraine (1995:219).

[17] See Tom Lodge and Bill Nasson 1992.

[18] On the limitations of human rights in Latin American democratization processes, see Panizza 1995.

[19] For an examination of the place in punishment in legal and political philosophy, see Pauley 1994.

[20] See, for starters, Ensalaco 1994, Hayner 1994 and Huyse 1995.

[21] This cut off date was later shifted to May 10, 1994 due to pressure from the far right Freedom Front. On the South African TRC, see Krog 1998, Sarkin 1998, and Wilson 1996, 1997b as well as the 1998 TRC report itself.

[22] Unless, in extreme cases, the Commissioners decided to include specific cases under the rubric of 'severe ill treatment'.

[23] HRV hearings, Klerksdorp, Monday 23rd Sept, 1996.

[24] See Buzzoli (1998) on sacredness in HRV hearings. There is a growing literature on the self and suffering in medical anthropology and the anthropology of violence; see Das (1987, 1994), Hamber and Wilson (1999) and Scarry (1985) and the Winter 1996 (Vol 125, No.1) issue on 'Social Suffering' edited by Arthur Kleinman, Veena Das and Margaret Lock.

[25] The final report judged that a just war had been fought against the apartheid regime, which was confirmed as a crime against humanity. Yet in the body of the report, all abuses regardless of motivation were subsumed within the same blanket category of 'human rights violation' which made no such moral distinctions.

[26] 'Police 'liar' admits to hitting Biko.' *The Guardian (Manchester and London)*. March 31, 1998.

[27] 'The truth as it was told.' *Weekly Mail and Guardian* December 23, 1997. Tutu was explaining why he went to such lengths to allow Winnie Madikileza-Mandela the opportunity to apologize.

[28] Klerksdorp Sept 23rd 1996.

[29] The case against Kheswa and his gang members collapsed after it was found that the confessions were extracted under torture. Kheswa was later found dead on the road to Sasolburg on 17th June 1993 while in police custody. Several members of his gang similarly died in questionable circumstances. Many observers allege that the IFP gang was killed off one-by-one by their police handlers when they threatened to expose their links with the police.

[31] Dennis Moerane was tied to a lamp post and shot dead with an AK-47 on Christmas Day 1996 by an ANC Special Defense Unit as he passed by the Sharpeville library on his way home.

[32] There are differences in the numbers reported killed, which perhaps demonstrates the need for a truth commission to clear up disputes over the past. The Waddington Commission declared 42 dead, whereas the TRC is asserting that 46 were murdered.

[33] On local courts and 'popular justice' see Burman and Sharf 1990, Goodhew 1993, Pavlich 1992, Scheper-Hughes 1995, and Sharf and Ngcokoto 1990.

[34] Cf. Mayer 1971.

[35] See Seekings 1995. The 'community' became heavily politicized during the years of anti- apartheid struggle and came to represent a cornerstone in the ideology of local ANC cadres opposed to the authoritarian state. Urban communities are not homogeneous, and 'community justice' is not a static concept but is historically produced. The concept of 'community' in the post-apartheid era is subjected to contestation by a variety of actors including new policing forums, as well as advocates of local justice.

[36] See Richard Abel 1995. This last point is not better illustrated than in the case of a man condemned to death for killing a fellow hostel dweller who he believed to be a malignant being sent through witchcraft-see Wulf Sachs 1996 *The Black Hamlet.*

[37] In his characteristic rebuttal of religious and human rights values, Friedrich Nietzsche (1969:162) *Thus Spoke Zarathrustra* speaks of how law attempts to dignify itself through the notion of proportional retribution, all the while keeping its spoon in the pot of hatred: 'The spirit of revenge: my friends, that up to now, has been mankind's chief concern: and where there was suffering, there was always supposed to be punishment.'

[38] The creation of the modern dual legal system is usually traced back to the 1927 Native Administration Act.

[39] See Alison Renteln 1990 on the empirical prevalence of revenge, documented not only in Africa but also among white working class Americans (Merry 1990).

[40] Sally Engle Merry (1990:181).

[41] See Humphreys (1985) and Hunt and Wickham (1994).

[42] These observations are more generally applicable to narratives on history in Latin America and Eastern Europe. On the latter, see Garton Ash 1997, Moeller 1996 and Rosenberg 1995.

[43] Such as Tony Richards and Peter Jordi, then of the Law Clinic at the University of the Witwatersrand.