

# POPULAR JUSTICE AND CIVIL SOCIETY IN TRANSITION: A REPORT FROM THE 'FRONT LINE' - NATAL

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## Introduction

Throughout 1992, I examined organs of popular justice - a little 'corner' of civil society - in Natal. I tried to understand the reasons behind many communities' initiatives to organise their own mechanisms of dispute resolution. Also, I followed their mechanisms of community dispute resolution and tried to assess the positive aspects of such mechanisms that could be preserved in the 'new' judicial system of the future South Africa (Nina, 1993).

This report is based on research conducted in the communities of Imbali in Pietermaritzburg, in Clermont and in a workers' hostel called Ethekwini, the latter two on the outskirts of Durban. It also includes findings of a survey on perceptions of justice conducted in formal and informal settlements in the communities of Umlazi and Clermont (Nina and Stavrou, forthcoming).

In Natal, remarkably enough, dwellers of the African communities still attempt to organise organs of self-governance within civil society. However, all the indicators suggest that the path towards organising a vibrant civil society is becoming more and more problematic in this province. Furthermore, the period of political transition that is being experienced in a more distinctive way in other regions of the country, is affecting this province less strongly.

Moreover, the specificities of this province make difficult any kind of close examination of black communities. In this sense and unlike other regions of the country where I also have conducted research (eg Transvaal and the Eastern Cape), structures of popular justice in Natal are still very much in their infant stage. Police brutality (either by the South African Police or the KwaZulu Police), army harassment of communities and their leadership, and the heavy hand of the political organisations over the daily life of communities, contribute to the precarious development of organs of popular justice in particular, and of civil society in general.

It is the aim of this paper to make a contribution, by examining popular justice, towards grasping the importance of civil society for the process of democratizing political society, ie the state. This aim has to be contextualized within the current

period of political transition in South Africa, where the nature of the transition itself determines the character of the struggle for how radical will be the eventual democratization of the state (see in general Nina, 1992a; 1992b).

In the first part, I will develop a basic theoretical framework on popular justice, including an overview of the South African experience. In the second part, I will discuss the three case studies. In the third part, I will deal with the findings of the survey research.

### Popular Justice?

The idea of popular justice within the realm of community organisation can be applied both to the practical area of dispute resolution and to the conceptual development of its own legitimacy as law. Both dimensions of popular justice exist parallel to similar state legal institutions. In periods of political transition, popular justice has been examined in the context of the political response given by the popular sectors against those institutions representing the ruling class (Santos, 1982). However, popular justice has also been studied in countries where there is no political transition, where the state (ie political society), first, lacks complete control over its territory (Santos, 1977); or, second, where state law and popular justice co-exist, enriching both sectors' legitimacy and re-defining the rights of the oppressed within the structures of state law (Baxi, 1985); or, third, where the state coopts community initiatives for dispute resolution in order to maintain order when the state has no legitimacy or access (Fitzpatrick, 1989). There are also the cases of post-independence Africa or post-revolutionary situations, for example Cuba, which have incorporated into the state legal system, popular institutions of dispute resolution (Sachs and Welch, 1990; Salas, 1983). In such cases, the form and content of these structures reflect the emergence of a new period of political and legal dispensation.

But, in any of the above circumstances, popular justice will emerge within a dialectical relation with the state. In this sense, the level of development and organisation of community structures for the dispensation of justice will be determined by: economic factors, social class/es contradictions, lack of legal resources, lack of legitimacy of the state judicial system, and inefficiency of the formal legal system in its daily operation. But the ability of organic community structures to operate will be determined by the level of interference posed by the state. The level of development of organs of popular justice is continuously shaped by state intervention, either in condoning or sanctioning this type of community-based organs.

I would like then to advance my argument with two quotes, one of popular justice and the other on its relation with the state. In defining the nature of popular justice, Santos suggests in the first place that:

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 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).

In its many expressions, popular justice adheres to at least one of the principles raised by Santos. Reflecting on the case of South Africa in the current period of political transition, I would like to emphasise, however, the aspect of popular sovereignty. The possibility of maintaining alive this principle in a post-revolutionary transition, even when it is a negotiated political settlement, provides the opportunity: firstly, to maintain people's power at the horizontal level; secondly, to decentralize the role of the state and create more mechanisms for its accountability; and thirdly, to allow direct popular participation in matters belonging to daily life.

This is a process in which, I suggest, the sovereignty of the people is constantly reproduced and its delegation to the central government is limited. Nonetheless, the intention of this process is that of enriching the state with democratic practices, in a long-term process aiming towards the radical transformation of society.

In a second quote, Baxi explores this type of political exercise concretely for India. In the case of India's rural communities, Baxi describes the relation between organs of popular legality and state legality, in which the former influences the democratization of the latter. Baxi suggests 'people's law' is influential in the enforcement of state law but also contributes to its modifications:

Recognition of people's law does not necessarily mean denial of state law but rather an acceptance of a plurality of legal systems and the underlying systems of power and authority. The Rangpur experience shows that people's law and people's power can be

used to reinforce the positive (for the people) values of State law as well as to combat its negative aspects. The involvement of the Lok Adalat in fighting corruption and exploitation demonstrates the latter aspect; the Ashram activities in support of the debt relief legislation demonstrates the former. In both respects, people's law and people's power are used for fostering the values of self-reliant development of the rural poor. In both situations, the existence of a people's court, or more aptly a people's adjudicatory forum, plays a vital role (Baxi, 1985:184).

Thus popular justice (a little 'corner' of civil society) influences the nature of the state law and state practise. But this influence can potentially continue to institutionalise democratic participation, through which exploitation and oppression within the state may be tackled and eliminated.

South Africa in general is a good testing ground for this hypothesis. Popular justice, as a conscious decision of certain communities to develop their own organs of dispute resolution outside state control, is a phenomenon which started in the 1980s. Under the guidance of the United Democratic Front, communities in South Africa launched a campaign for 'organising people's power' in 1983, including the creation of the people's courts.

There were enough material grievances in African communities to launch these courts: lack of affordable legal resources and inaccessibility in terms of the person's understanding of the legal proceedings; a judicial system that was tainted with apartheid; and, a legal system which either did not recognise the diversity of cultures in co-existence in South Africa or failed to adapt to changing circumstances in African experience. All these factors contributed to the emergence of people's courts or people's mechanisms of dispute resolution, which gained considerable strength and roots throughout the country (Seekings, 1989).

However, state intervention and repression affected the functioning of these popular structures. Mature and experienced leadership was arrested and most of these courts were taken over by the inexperienced and immature youth. The gross violation of basic human rights committed by these courts run by the youth in the late-1980s has been widely documented by the press. However, what *has not* been widely documented by the same press, is that many communities throughout the country maintained alive the memory of positive experiences of popular justice and also initiated a process of re-organisation of those structures of dispute resolution, to make them accountable and legitimate to the communities again (Nina, 1993). This renewal was initiated in the late-1980s and early-1990s and gained a positive momentum with the unbanning of the political organisations and release from prison of the leadership of those organisations after 2 February 1990.

Moreover, there have been attempts to make these people's structures operate in a more efficient way. In a few consultative conferences, for example, on the issues of people's courts held by the ANC and the National Association of Democratic Lawyers (NADEL) in 1990, guidelines were suggested for the operation of these popular organs (Seekings, 1992:195). In particular, it was recommended that these organs do not deal with matters of rape and murder and other more serious cases involving violence. Also, it was recommended that these structures eliminate any kind of physical punishment as a way of sentencing a party. These guidelines are very similar to those that are in practice in other regions of the country.

The experience of Natal is partly similar to that of the rest of the country. Organs of popular justice mushroomed in the 1980s throughout the African communities of the province, and state repression of the community leadership or its physical disappearance (either by the 'third force' or through the Inkatha Freedom Party [IFP] and African National Congress [ANC] war) led to their degeneration. However, unlike in other regions of the country, for example Alexandra in the Transvaal, where political transition is strengthening the functioning of organs of popular justice today (Nina, 1992a; 1993), the revival process has not managed to consolidate in Natal. This has precluded the development of the organs of popular justice, civic organisations and civil society in general. In some regions of the country, like the Eastern Cape, communities are now more keen to work together with the state in issues that are of concern to the communities. By doing this they can aim at engaging in a hegemonic practice within the state.<sup>1</sup>

The communities examined in Natal have not been able to develop their dispute resolution structures optimally. The current situation precludes the development of a constructive relation between communities, civic structures and the state. The level of hostility between communities and the state has not evolved enough beyond that of the period before 2 February 1990. Communities have not been able to engage in a relation with the state in which community initiatives could influence the state.

### **Popular Justice at the Grassroots Level**

Yet, a Natal example, that of Imbali (Pietermaritzburg) represents perhaps the only case in South Africa where the community has been able to produce a draft proposal for the institutionalization of people's courts. This document is the result of a series of workshops organised by two lecturers from the law faculty of the University of Natal, Pietermaritzburg.<sup>2</sup>

Unlike other models of community dispute resolution that have been 'introduced' elsewhere (eg Alexandra) (Nina, 1992),<sup>3</sup> the Imbali project originated organically from the activists in the community who participated in

the workshops. It proposed concrete suggestions for establishing people's courts in the community, with limited jurisdiction, defining the way to organise the procedures and other matters relevant to the organisation of a 'court'.

By the end of 1991 the draft proposal was completed. Political violence and its destabilization of the civic structures in this community has never allowed its implementation. The development of community structures in Imbali has been linked to the broader political process in the country. During the 1980s, many campaigns organised in the community were directly linked to the UDF. In the early-1990s, an Imbali Rehabilitation Programme was launched to develop different areas of community life, one of them, that of popular justice. Imbali, as many other communities of Natal, has suffered a great deal of political violence from the IFP/ANC war in the region. In addition, the security forces (in particular the SADF 32 Battalion) have intervened heavily. The result has been that efforts have concentrated on stopping the violence rather than developing the community structures.

Clermont has a different story to that of Imbali. It has been a very militant community, with a history of people's courts in operation during the 1980s and 1990s. Clermont is a community which has not experienced the political violence that prevails throughout the province. There has been, however, a great deal of police and army repression against those activists involved in community mechanisms of dispute resolution. In the region of Clermont where I conducted my research, let us call it avenue ZZ, neither the street committees nor the people's courts were operating efficiently.

Civic organisation in Clermont lost legitimacy and collapsed in the late-1980s and early-1990s, and were replaced by similar structures (street and area committees) under the ANC. These structures on the ground are responsible for the welfare of the community residents. One of the areas where the ANC structures are operating is that of community dispute resolution. In avenue ZZ, the dwellers elected in early 1992 a 'case committee', composed of four members. The responsibility of this committee is to deal with disputes arising in this particular avenue of Clermont.

The proceedings are conducted in a quite formal way, between the parties in dispute and any relevant witness to the controversy. Although this process was defined as a people's court, it lacks most of the characteristic figures of the people's courts of the 1980s: there are no judges, prosecutors or people's marshals. The role of the four members of the 'case committee' is to mediate in the controversy between two parties and to assist in finding a solution to it. Physical punishment has been almost eliminated, although there have been allegations against the 'case committee' for having lashed a person. Matters of rape, murder and divorce are referred to the appropriate state agencies.

What I found in avenue ZZ was a poorly developed system for dispute resolution. The proceedings did not have the sophistication of other communities, for example Alexandra, and the street committee in itself lack control over the area where it operates. Regardless of having good intentions to deal with dispute resolution, the street committee and the 'case committee' were more inclined to fulfill those responsibilities related to ANC organisational needs than to those of the community (street) members; the political needs always precede the community/civic needs. This situation marginalises the operation of the 'case committee' to the point that makes it inefficient.

Finally, Ethekwini, a workers' hostel with a population of 10 000 inhabitants, provides an interesting and perhaps more positive example.<sup>4</sup> It is a hostel peopled mainly by sympathisers with the ANC and there is no history of political violence between political organisations. Throughout the 1980s, the hostel was organised according to instructions given by the UDF. After 1990, an Ethekwini Committee of Concern (to deal with internal problems in the hostel) and a branch of the ANC, were launched. Subsequently, the ANC branch took all the responsibilities of the ECC and is now effectively running the hostel dwellers' daily affairs.

One of the responsibilities of the ECC/ANC has been that of dealing with the resolution of disputes between hostel dwellers. Of all the three case studies, this is the most sophisticated and organised example of popular justice in the making. The proceedings happen in the recreation hall of the hostel, where a 'people's structure' meets twice a week to deal with problems affecting the hostel. On the first evening of the gathering, which usually happens on a Monday, after discussing many matters relating to hostel's problems, the secretary of the structure will ask for any complaint to be lodged. Matters are noted on this night and on the second meeting night of the week, which usually takes place on a Thursday, the parties of dispute will be heard by the committee and the participants in the hall, ie 'the floor' (Nina, 1993:13-15).

Both parties will expose their case to the 'floor', which will act as judge, prosecutor, marshal and jury. Each party has the right to bring its own witnesses. After listening to both parties, the 'floor' will deliberate and find a solution. Physical punishment is not allowed and most of the 'sentences' are fines, retribution or compensation to aggrieved party. As in the above examples, cases of rape and murder are not dealt with by this 'people's structure'.

Both police repression and the power of the political organisation in the daily life of the hostel's affairs, have interfered with the development of an independent civic structure in this location. As in Clermont, the first priority of the ANC branch in the hostel is that of political organisation, making the hostel dwellers' needs and problems a secondary consideration. The 'people's structure' is genuinely efficient but its functioning is determined by the needs of

the political organisation. It happened on several occasions while conducting research that the proceedings of dispute resolution were disrupted due to the need to discuss other issues of a political nature. The immediate outcome of this situation, as in the case of Clermont, is to reduce the effectiveness of the structure from the point of view of justice. On such occasions, there is no time to deal with the 'simple' disputes of the dwellers; there is only time to deal with the 'complex' political matters of the organisation.

### Which justice in any case?

Even if the above three case studies leave the reader questioning the level of organisation and development of popular justice, the cases reveal, nonetheless, attempts to break away from state justice. The origins of these organs of popular justice are closely linked to a period of political contestation during the people's revolts in the mid-1980s, when communities were organising themselves for 'people's power'. However, their existence today cannot be linked anymore to that project (Nina, 1993:3). What becomes important, then, is to redefine the value of organs of popular justice in this period of transition. In particular, to examine how concrete practices of self-governance operating within the realm of civil society can influence the transformation of the state. In addition, we need to articulate how, through constructing organs of popular justice, the transforming state can become more democratic.

Popular justice in this period of transition is trying to find ways to accommodate certain aspects of its initial aims within the realm of state law. Communities are prepared to recognise state legality in particular types of cases, provided that they retain control in the solution of some problems. Implicitly there is a recognition that the legal principles are in principle not very different. What is different is the level of community participation in the process of dispute resolution and dispensation of justice (Nina, 1993:4, 22-23).

In a recent survey conducted in Natal, evidence was found to support the above analysis (Nina and Stavrou, forthcoming).<sup>5</sup> One of the questions asked was whether the concept of justice within the rule of law was limited to state law or whether it could be community created. An equal number of respondents (46%) supported state and community participation. Those who supported the state did so because they understood that the state, in the new society, could guarantee equality through the law. Those who supported community intervention did so because it was their understanding that community participation was the only way to guarantee their own interests.

Over 50% of those interviewed supported the idea of keeping the people's courts in the new South Africa. However, two-thirds of these respondents suggested that the jurisdiction of the people's courts be limited to petty crime

and low levels of violence and that those involved in running the people's courts receive proper training.

However, when asked which legal institution (either the state or community) was best equipped to deal with certain crimes, and with the exception of matters of domestic violence, physical assault and witchcraft the respondents felt that the state was best equipped. Communities are keen to participate in the process of dispensation of justice, but recognise their own limited capacity to solve certain types of problems. As most of the respondents stated that people's courts or similar community organs should be maintained in the future society, but integrated to the formal judicial system via the magistrate's courts or an arrangement similar to that of the tribal courts.

At least fourth-fifths of the respondents argued for community participation in the new judicial system of South Africa. There were, however, a range of options, none of them with majority support. A quarter of the respondents supported the establishment of community courts working along a jury system; another quarter supported community-based (elected) judges; and another quarter supported community-based mediation mechanisms.

## Conclusion

The situation in Natal regarding popular justice and its development within (the organs of) civil society is, up to a certain extent, bleak. Many political factors, which are predominant in this province, preclude the development of those organs and initiatives at the community level.

The case studies epitomise the many problems that community members face when trying to organise themselves. Even the hostel case, which is fairly organised and functioning, reveals the lack of autonomous development of the grassroots organisations in the province. As has been argued before, organs of civil society in the African communities should evolve through an autonomous relation with the political organisation and the state (Nina, 1992b; Shubane, 1992).<sup>6</sup> However, this autonomous relation is not one of complete separation. On the contrary, it is one of engaging in struggle for the democratization of the state, in which each social sector has the ability to express itself and contributes to the end of oppression and exploitation.

Even these communities' initiatives manifests interest in having a greater say in the running and administration of the dispensation of justice. They are keen to work towards the construction of a new judicial system in South Africa, provided that the community participation is limited and regulated and that those involved receive adequate training.

Finally, this concrete example of one little 'corner' of civil society suggests the possibility and the necessity of engaging in the development of grassroots

organisations which could influence and shape the functioning of the state, in particular within this period of political transition in South Africa. It is a process of radicalizing the interaction between civil society and the state, aiming towards a democratic transformation.

## NOTES

1. I will have to document in another article the experience in the Eastern Cape, through the South African National Civic Organisation (regional and Port Elizabeth) in areas of community organisation and popular justice. However, space and topic constraints do not allow me to do it in this article.
2. I am referring to Ms B Grant and Ms P Schwikkard.
3. I am referring to the Alexandra Justice Centre, organised by the Community Dispute Resolution Trust, based at the University of the Witwatersrand. This project is designed upon a US model of community mediation.
4. Ethekwini is the Zulu word for being 'in Durban'. For the protection of the dwellers of the hostel (as in the case of avenue ZZ in Clermont) I could not disclose the name of their residence. I am thankful to my research assistant Mr Nathi Ngeobo, for conducting the fieldwork research.
5. The research was conducted in formal and informal settlements of Umlazi and Clermont. The sample was of 100 interviews, 56% of those were men and 44% were women. The average age of the respondents was 32.
6. I am well aware that the focus of my research and analysis concentrates in the African communities. This is a result of the fact that the social phenomenon under study is almost exclusively located within such communities. Nonetheless, as I have argued before, civil society has to be seen within the whole social spectrum and not limited to 'township' politics (Nina, 1992b).

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