GOVERNABILITY AND FORMS OF POPULAR JUSTICE IN THE NEW SOUTH AFRICA AND MOZAMBIQUE

COMMUNITY COURTS AND VIGILANTISM[1]

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1. Introduction

We start this article by outlining some points which will provide a context for the current links between society and the state in southern Africa. We shall first consider theoretical points concerning the consolidation of the state, such as the governability crisis, the globalisation of democratic and judicial systems, weak, fragile states, and the construction of collective identities in multicultural contexts.

We shall then go on to look at some of the problems of access to justice in Mozambique and South Africa in terms of the lack of financial and human resources (a characteristic of fragile states) and how ill-suited western legal traditions are to the various conflict resolution practices of the different communities in these countries.

Subsequently we shall discuss different cases to draw a distinction between responsible community justice and systems which the state should attempt to eliminate.

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And finally we shall stress the need for a redefinition of the values and principles of these states from a transcultural, 'non-standardising' perspective which can help integrate the values and concepts of African cultures into their legal systems.

There are two main trends in the study of relations between society and the state in Africa: the modernist view, which tends to consider civil society as marginal and embryonic on the continent, and the communitarian view, which stresses that civil society is marginalised in public affairs. A second core area is the debate between the liberal system which places politics within civil society and stresses a regime based on rights, and the 'Africanist' system, which holds that the solution lies in making the old communities the centre of African politics and in defending local culture.

The impasse generated by the differences between modernists and communitarians, between Eurocentrics and Africanists, cannot be broken by siding with and defending the stance represented by either of these views, because each represents a different aspect of the African dilemma. The solution lies rather in arguing them into a synthesis which can transcend both stances. (Mamdani 1996).

In our opinion, if a more in-depth knowledge is to be achieved of African politics we must transcend procedural and institutional analyses to include the inter-cultural, historical dimension. We believe one of the core areas in the advancement of democratic ideas is the ability to imagine that it is possible to create genuinely new institutions based on the diversity of cultural practices and institutions of the non-Western world (Markoff 1996).

2. Links Between Society and State in Africa

(a) The Governability Crisis and the Globalisation of Democratic and Judicial Systems

In its 1992 report the World Bank stated that the failure of adjustment policies in some African countries could be explained by a lack of responsibility, transparency and forecasting ability on the part of African politicians and bureaucrats, by the absence of the rule of law and, in short, by 'poor governance' (World Bank 1992).

Aid and funding in the form of foreign investment and international co-operation

was made conditional on the setting up of structural adjustment policies and on 'good governance'. Ideological convergence on the idea of representative democracy and a particular form of the state was recovered and, some authors maintain, spread throughout Africa in the '90s thanks to the domino effect, contagion theory and political conditionality.[2]

The dominant concept of democracy was that which attempted to make it compatible with capitalism. In this context, the main role of the judicial system is to guarantee the stability of economic transactions, social peace and improvements in the administrative abilities of the state. The legal system atomises the social conflicts arising from inequalities of distribution which are the product of that global capitalism. Collective organisation and action is thus broken up (Serra, Trindade and Santos 2000).

Supporters of the Washington consensus hold that reform of the judicial system is an essential part of the new model of development, and an indispensable basis for good governance. As a result the World Bank[3] and other agencies[4] have given absolute priority, along with the neo-liberal economic consensus, the weak state and the liberal democratic system, to reforms in the judicial systems of various countries around the world.

The judicial reform encouraged by these agencies is limited to guaranteeing free operation of the market. The problems of active participation in, remoteness from and mistrust of the judicial system on the part of ordinary people and the lack of any adaptation of Western legal traditions to a multicultural reality are left as marginal issues on the agenda of reform.

The South African judicial system played a leading role in the construction of the

[2] For a rapid analysis of the relevant literature and the different approaches to democratisation in Africa, see Bratton and Van de Walle (1997: Chap. 1).

[3] The World Bank's strategy for handling this reform was set forth in its 'Comprehensive Development Framework'. The main lines are the experience gained from events in Eastern Europe, the need to combat corruption and organised crime, the stimulating of a market economy and the creation of a legal system which favours policies of sustainable development.

[4] One of the priority lines in the strategy of the OECD's Development Aid Committee (DAC) for the construction of peace and reconciliation is the strengthening of the security and justice systems. See DAC (1997).

new post-Apartheid political order by refusing to continue the basic principles of the justice system, politics and legislation of the previous, racist regime: consider for instance the work of the Truth Commission. The judicial system is being reformed with internal funding, and has proved itself effective in company litigation.

The situation is very different in Mozambique, which, unlike its neighbour, has received considerable external aid.[5] After the drawing up of the constitution in 1990 and the signing of peace agreements between Frelimo (Front for the Liberation of Mozambique) and Renamo (Mozambique National Resistance) the judicial system was on the point of collapse. The new Supreme Court became the driving force for change in judicial matters, and sought support from international agencies while at the same time trying to protect itself from any intrusion by external political conditioning factors through creative, pluralist proposals.

In spite of these differences, the process of legal reform of the judicial apparatus in the two states has come up against certain common problems:

- Many people have no guaranteed access to formal justice. State law is not necessarily the predominant legal system.
- The new state judicial system must take a stance in regard to community justice structures based on indigenous and popular tradition which enjoy social legitimacy.
- Both states must deal with violent forms of popular justice which call into question the legitimacy of the state and hinder the process of consolidating democracy.

Judicial reform implies fundamental changes.[6] The courts and judges of South Africa and Mozambique must be capable of settling conflicts between two multinational companies based on Western legislation, and at the same time of offering solutions to cases of witchcraft and marital disputes which are adequate for their own social, ethnic, cultural and religious contexts.

[5] Mainly from DANIDA (the Danish Agency for Development Assistance), the World Bank and USAID (the US Agency for International Development). See Serra, Trindade and Santos 2000.

[6] Interview with Supreme Court judge Joao Carlos Trindade; Maputo, 2000/10/17.

(b) The Criminalisation of the State and the New Forms of Social Power

(i) The criminalisation of the state

In terms of our Western notions of political modernity the state has failed in contemporary Africa. Various interpretations of this matter can be found.

Bratton and Van de Walle (1997) point out that authority tends to become personalised (presidentialism), and to use the resources of the state for political legitimisation, drawing no distinction between public and private assets and personal favours (clientelism).

Some authors (Smith 1986; Bayart, Ellis and Hibou 1999) have remarked that the appearance of authoritarian states after the period of independence of former colonies is explainable mainly in terms of domestic factors. Numerous African social groups have built up their strategies and profited on the basis of a situation of continued dependence (from the time of the slave trade through the Cold War period to the colonial period, and even in these years of structural readjustment).

According to Chabal and Daloz (1999) the crisis of modernity in Africa seems to be explained as the result of a process in which African political figures seek to maximise their gains (patrimonialism) in a state of confusion and uncertainty (political instrumentalisation of disorder). In their opinion the state is not structurally differentiated from society. These authors[7] criticise positions which abuse the notion of civil society and which claim that African social movements have the capability and potential to carry out political reform.

In opposition to these neo-utilitarian or patrimonialist analyses of the state, other more regulatory approaches have been put forward which have chosen to focus on studying society. Mamdani (1996) criticises all the literature on corruption and patrimonialism because its ahistorical analogies take the key debate on redistribution out of context. He insists that society and the state remain under the 'institutional' legacy of colonialism. In his opinion, society has not managed to

[7] Chabal and Daloz (1999) have extended the idea that African society is organised in clientelist networks and that it is hard to find any active groups organised along 'European' lines which protest against the state from an anti-hegemonic stance: such groups can only be found where there are politically independent citizens, separate from the structures of government and clearly distinguished from the state.

make the state responsible for guaranteeing democracy, and this has turned the state into a weak leviathan.

In spite of their segregationist nature, the indirect governments of colonial times attempted to incorporate natives into a traditional state order through tribal authorities (Welsh 1971), thus generalising a sort of 'decentralised despotism' which has resulted in the current duality of powers. We find that in the major cities the power structures speak the language of civil society, citizenship and modern law, while in rural areas power continues to lie in the community and in traditional culture.

Efforts to democratise the state at local level are proving to be a failure because of the powers held by local authorities, which sometimes remain capable of extorting from local residents and refuse to accept the new, democratic values. Even today we could speak in terms of subjects and citizens (Mamdani 1996).

In the processes of political reform begun in South Africa and Mozambique, leaders have two choices: they can work to achieve a citizenry bound up in the classic political criteria of procedural democracy, which guarantees docile citizens and governance limited to meeting the interests of the market. Or they can attempt to achieve a more participative citizenry which is more collectively committed and responds adequately to the challenges of cultural plurality.

(ii) The new forms of social power

Investigations of African social organisation have centred on the matter of 'social capital'[8] in the sense of the mutual reliance, regulations and networks which can lead to greater social efficiency. In the field of security and justice, this 'social capital' may express itself predominantly through crime (which helps us to understand some processes of criminalisation and the weakness of the state), or in forms that denounce this legitimisation of corruption and opt for 'social action'.

[8] The work of Putnam (based, curiously enough, on the work of Africanists such as Coleman and Bates) on governability in Italy sparked off this reflection on the concept of social capital. In this context it is defined as the set of configurations and fabrics of relationship which result from a combination of historical trajectories of Sub-Saharan Africa (Bayart and Ellis, 1999).

Some of the forms of social organisation found are the following:

- 'warlords': armed movements and fundamentalist religious movements (Christian or Islamic) which impose their authority through violence. They generally benefit from the access to international trade of their 'illegal' activities, and claim to offer protection to other social organisations;
- traditional chiefs, lineages and other social networks which have their own rules and mechanisms of mutual reliance, working sometimes as mutual reliance and solidarity networks (e.g. tontines or savings clubs, or indeed the community courts which are the object of study here) and sometimes as criminal organisations which seek to 'protect' their own social groups or communities ('vigilantism').

This African social structure has been and continues to be marked by racism and segregation. In colonial times the colonists, governed by direct authority, enjoyed all manner of political and social freedoms which were denied to the Africans, who were governed by traditional authorities in the service of the colonial power.[9] Natives of urban descent were to a certain extent excluded from traditional law and made subject to a clearly racist and discriminatory civil legislation.

The struggle against colonialism was an embryonic struggle by sectors of the middle and working classes who rebelled against this situation. With independence the state 'deracialised' and set up policies of positive discrimination and Africanisation for the benefit of the victims of colonialism. However, redistribution policies (at ethnic, religious and regional levels) were never actually implemented because of the collapse of the fragile civil society which the state eventually dismantled (Mamdani 1996). The governed continue to be divided up on the basis of ethnic and rural/ urban cleavages, thus fostering the formation of a society comprising first class citizens, citizens discriminated against and serfs.

The failure of redistribution is reflected in the lack of equality in access to justice. Santos (1991) states that African civil society is made up of three concentric rings: the central ring of 'intimate' civil society linked to the power of the state and therefore enjoying easy access to justice; 'intermediate' civil society, comprising layers of society or groups which have some access to formal justice; and 'outside' civil society, made up of groups and classes excluded from the state and

[9] A clear historical view of the racist construction of the South African state is offered by Welsh (1971) through a description of the origin, nature and development of native policies in Natal and their determining influence on the policies of the South African Union and subsequent governments under apartheid.

from the services of the judicial system. Most people in third world countries belong to this last group.

In our opinion a new, democratic citizenship cannot be constructed in isolation from the distribution factor of society. In the case dealt with here the survival of classes marginalised or excluded from access to justice not only calls into question individual rights and the access of citizens to decisions and to political representation, but also compromises the whole idea of civility in the sense of an ethical commitment to the common good (Meyenberg 1999).

(iii) Construction of a collective identity in multicultural contexts

The debate on modernity and tradition in Africa cannot take place in isolation from a consideration of African identities and political cultures. In general, modernisation is understood as the development of a Western form of identity, but it is wrong to project European academic, military, civil, administrative and judicial systems onto Africa, because this merely perpetuates colonial institutions and a type of state which is less than adequate for the realities of African life (Sow et al. 1982).

The relationship between politics, the economy, society, culture and religion in Africa is different from that which prevails in the West. As a gross generalisation, Africans develop intense and diverse community identities (family, clan, tribe, local, regional, national, professional, etc.) and thus various forms of organisation and political behaviour. The concepts of 'individual' and 'collective', the concepts of legitimacy, representation and political opposition are also different. In this sense it would be appropriate for the new African citizenship (and indeed a new universal citizenship) to be built on the basis of an intercultural project[10] not

[10] Interculturality is understood as a political project

> *que partiendo del pluralismo cultural ya existente en la sociedad - pluralismo que se limita a la yuxtaposición de la cultura y se traduce únicamente en una revalorización de las culturas etnogrupales - tiende a desarrollar una nueva síntesis cultural. … Esta definición resalta la idea de nueva síntesis, la idea de la creación de algo nuevo, de expresiones culturales nuevas* [which, on the basis of the cultural pluralism already existing in society (which pluralism is limited to the juxtaposition of culture and results solely in a revaluation of ethnic group cultures), tends to develop a new cultural synthesis. … This definition

envisaged in the classical definitions of Western citizenship.

To this we must add the fact that to obtain Western scientific knowledge people must distance themselves from local knowledge. This results in a cultural hegemony that displaces judicial practices which transcend the legal form of the nation-state. If modern state law can be said to contain large doses of bureaucracy and violence, and weak rhetoric, then indigenous law can be seen as stressing persuasion, argumental resources as a means of communication and decision-making processes which impose themselves on authoritarian decisions based on procedures and on the threat of physical force. To construct a discourse of emancipation one must learn about the suppressed, marginalised traditions which some oppressed people continue to possess. (Santos 1991, 1998).

3. Popular Justice in South Africa and Mozambique after the Transition to Democracy

The New Scenario of Democratisation in South Africa and Mozambique

South Africa has been seen as an exception in analyses of the African continent, since the processes of urbanisation and industrialisation are more firmly consolidated there, and civil society is therefore larger (Chabal and Daloz 1999). However the movement towards democracy in South Africa shows practically the same weaknesses as in other African countries: these movements are moulded by the two-way split in the nature of the state (native power and state power), and suffer from the lack of an agenda for the democratisation of traditional power and the lack of a consistent perspective of democratisation (Mamdani 1996).

Both South Africa and Mozambique entered a period of democracy in the 1990s, but the new states have had to struggle against many patrimonialist and/ or oligarchic practices inherited from the past. They have had to face up to the problems arising from the coexistence of multiple centres of power in their territories and have had to tailor reforms of the system of state law to the judicial plurality which actually exists there.

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stresses the idea of new synthesis, of creating something new, of new expressions of culture] (Harresiak Apurtuz and Hegoa 1997).

The resulting new states not only fail to protect the people, but are responsible themselves for a high level of violence. The political past of the police force and of the representatives of the justice system in South Africa (Schärf 1991; Schärf and Nina 2001), and the access to the state enjoyed by some clientelist networks and organised criminals, along with the continued hostilities between the hegemonic parties in Mozambique[11] have led the people of these countries to seek alternative ways of protecting themselves against these arbitrary forces.

In the case of South Africa the European colonisers exercised *de facto* control over the state up to the 1990s through an 'exclusive democracy' in which the dominant racial minority used the instruments of law to deny the freedoms of the black majority. After a pact with the white oligarchy the challenging work began of extending the state and citizenship to society as a whole. Among the challenges faced was that of reconstructing a judicial system which up to 1994 had served just 5-6 million whites, and now needed to serve a population of almost 40 million.

During colonial times in Mozambique formal justice was available only to the small middle class, while 'second class' justice for the indigenous populations was handed down by colonial administrators (Sachs and Welch 1990). After a long civil war, a transition began from a single-party, plebiscite-based regime to a multi-party regime. As a result, the difficulties encountered by the new central power in extending citizenship rights and the services of the state to the whole population were even greater than in South Africa. The fragility of the formal justice system is evidenced by the fact that there are currently no more than 250-300 people with higher-education qualifications in law, concentrated basically in the capital, to deal with a population of over 16 million.[12]

Aside from the problem of the small number of judges and lawyers, the judicial infrastructure of South Africa (Schärf 1997) and Mozambique (Serra, Trindade and Santos, 2000) is scant, and remote from those who need it most.[13] In spite of

[11] The killings which took place when RENAMO occupied the government institutions of the northern provinces and the murder of the journalist Carlos Cardoso in November 2000 are clear examples of this.

[12] Interviews with Supreme Court advising judges José Norberto Carrilho (Maputo, 2000/10/14) and Joao Carlos Trindade (Maputo, 2000/10/17).

[13] A more detailed analysis of the shortcomings of the judicial authorities can be obtained by reference to the investigations of the South African Law Commission

profound changes after the arrival of democracy, the underlying structure of their formal justice systems is still largely colonial, which makes them highly bureaucratic, incomprehensible (they operate in the colonial language), procedurally expensive and complicated. This results in large groups of people being excluded from the official systems (e.g. the many poor blacks in the poorer city districts and rural areas).

In spite of this, most people were confident that the new democratic states would guarantee redistribution and protection, and as a result both the 'responsible' and the 'irresponsible' mechanisms of popular justice slowed their expansion in the first half of the decade,[14] acting solely in cases of types that could only be solved at this informal level.

The appearance of the state on the scene helped that embryonic society which we mentioned earlier to begin to demobilise.[15] This is an important phenomenon in the case of South Africa, since the 'intermediate' ring of civil society has grown bigger, resulting in greater access to justice. However in Mozambique most of civil society remains excluded in the 'outside ring', remote from any participation or sharing in the structures of the state.

However in the second half of the decade, as evidence emerged that the state was seriously limited in its ability to control crime and as security services became privatised, examples of popular justice reappeared.

There have been positive experiences of participation in the realm of justice (the former community and traditional courts with reforms, and new experiences of

(SALC, 1999) and the accounts drawn up by the Mozambiquan and Portuguese team headed by Serra, Trinade and Santos (2000).

[14] Some popular justice organisations began to regulate themselves in a process of shared responsibility with the state. Many others dissolved or turned into civil structures (Nina, 1995; Nina and Schwikkard 1996).

[15] A tendency towards over-centralisation of the power of the state and a weakening of civil society, together with financial difficulties in the non government sector and the move by the leaders of the anti-apartheid movement into the structures of the new government go a long way towards explaining this demobilisation (Wilmot, 1996).

justice, community security and legal assistance provided by various NGOs[16]), but also a strong resurgence of illegal and 'irresponsible' redistribution and security mechanisms (vigilante groups, organised criminals, religious fundamentalist organisations, clientelist networks and community courts acting illegally).

After the political transition of 1994 in South Africa, what seemed to be a moment of weakness of the emergent state resulted in the appearance of several vigilante-style movements which must be analysed in the particular context in which they arose. These popular movements arose to 'protect' their communities from imminent damage from internal (criminals) or external (drug market) aggressors.

The dividing line between self-regulation based on human rights and open brutality is a very fine one.

[16] Many such experiences and forms can be listed:

- Community security schemes with the recognition of the state and with public or private funding (community patrols, community security forums). Examples include the *Community Safety Forums* project backed by UMAC, and the *Community Policing Forums* and *Neigbourhood Watches* funded by the public authorities in South Africa.
- Legal aid organisations which facilitate access to justice among the most seriously excluded people (para-legal organisations, 'law clinics', etc.). Examples include the *Conflict Dispute Resolution Trust* in South Africa and the *Liga Moçambicana de dereitos humanos*.
- Community justice schemes which attempt to reorganise grass-roots communities by adapting the mechanisms of conflict resolution to the new democratic context (NGO pilot schemes, skill provision and training courses, etc.). Examples include the *peace committees* project in the *Community Peace Programme* in South Africa.

These bodies may interfere positively or negatively in the regular activites of community courts, but in any case they have little chance of sustaining themselves or becoming generalised without major outside funding.

The 'Responsible' Community and the 'Irresponsible' Community: Self-managed, Participative Societies in the Face of Organisations based on a Break between Society and the State

(a) The 'irresponsible' community: the disintegratory example of vigilantism

'Irresponsible' forms of popular justice have gradually taken on a more leading role in comparison to 'responsible' forms such as community courts. A low level of political institutionalisation, especially at local level, a fragile legal system and an excessive degree of privatisation of security have allowed 'irresponsible' forms of self-defence such as vigilantism to reappear.

According to Johnston (Nina 2000), the purpose of this vigilantism is to protect the community against crime and social decadence. This form of vigilantism assumes the sovereignty and powers of the state, and therefore represents a threat to the state. It is a private, sporadic phenomenon which aims to establish a particular order through force and threats to personal and community safety. During the years of struggle against apartheid in South Africa and the war between Frelimo and Renamo in Mozambique, some violent practices were recognised and legitimised by communities.

What in the past could be defined as 'political violence' can now be defined as 'vigilantism'. In the current context this counter-power is obviously a reactionary power which undermines the strength of the sovereign powers of the state and contributes to the failure of democratisation at local level. This is a further example of the legacy of 'decentralised despotism' and patrimonialist practices.

During the war in Mozambique Renamo tried to destroy the infrastructure of the state and discredit the policies of Frelimo, especially in rural areas. To that end, it set up a clientelist system which survived and subsequently managed to turn itself into an opposition. Along with the political conflict there was the criminal action of the warlords, who used violence as the main instrument of their economic activity (Bayart, Ellis and Hibou 1999).

After the peace agreements a new period of reform began in a state that was led after the first democratic elections by Frelimo, though Renamo was not punished by the voters: it received a third of the votes cast. The main task facing the new government of Mozambique was to construct a state from practically nothing: the state was so weak in regard to the former warlords and clientelist networks that it could not guarantee personal security, the rule of law, freedom of expression or equal opportunities.

The massive increase in crime in South Africa, the development of connections with organised criminals abroad and the privatisation of violence by armed security groups linked to the NP, but also to the ANC and Inkhata, and by the leaders of the townships who controlled the housing and transport markets cannot be dissociated from the country's history of indirect government, anarchic urban growth, racial segregation, banditry and the fight to maintain or bring down the apartheid regime (Bayart, Ellis, and Hibou 1999).

With the ending of restrictions on movement, South Africa became a major transit area for criminal activities (drugs, the arms trade, etc.). This led to the appearance of civil violence linked to fundamentalist religious groups such as PAGAD (People Against Gangsterism and Drugs), vigilante groups such as CATA (Cape Amalgamated Taxi Association) and the *Mapogo*.[17]

[17] A brief description of these vigilante organisations follows:

- PAGAD appeared in Capetown in 1996, as a response by Muslim communities to the problems of drugs and gangsterism which were ravaging numerous communities while the state was incapable of controlling the situation. PAGAD turned from a community protection vigilante movement into a movement that broadly challenged the authority of the state. Eventually it became a semi-terrorist organisation which spread to other cities and was finally repressed by the state, with many of it leaders being imprisoned. It is worth mentioning that several judges, public prosecutors, investigating officers and witnesses in cases against PAGAD members have been murdered (Nina, 2000).

- CATA was a short-lived movement which arose in response to the needs of a community called Guguletu in Capetown, to deal with a crime wave there and with the absence of police vigilance. Once the situation was brought under control at community level the group gave up the role it had assumed and returned to representing the interests of the community's taxi drivers (Nina, 2000).

- *Mapogo* is a highly organised vigilante organisation which arose after the murder of eight businessmen in South Africa's Northern Province. To join the organisation and enjoy the security services it offers a fee must be paid in line with personal income. In spite of its methods, which are more than questionable, it is highly popular: it is seen as a successful response to the failure of the state to protect its citizens. It is also seen a typically African form of punishment in contrast to the incomprehensibility to some citizens of some features of the new criminal justice system. *Mapogo* groups have also spread to other provinces of South Africa (Oomen, 1999).

These movements were active mainly between 1996 and 2000, and arose to defend the immediate interests of their communities. Although each represented the interests of its regional community, they all came at national level to epitomise concerted movements for protection in the face of the inability of the state to provide assistance and, in particular, security, for its citizens.

In the post-apartheid period these vigilante schemes represent a break with earlier traditions of popular justice. As movements representing popular sovereignty they continue the tradition of popular justice which existed prior to the political transition, and therefore call into question the sovereignty and legitimacy of the state. However we must not forget the difference in context: the current background is one of construction of a democratic, participative, inclusive state. To that extent these movements could be seen, in view of their prominence, as having turned partly into promoters of sedition against the state.

However not all experiences can be classed under the same heading: a future must be sought for community courts and other expressions of 'responsible' community justice. Ways must be put forward which can reinforce the role of the state in an original, characteristic fashion. Attempts must be made to eliminate those acts which go against basic rights, and at the same time firmly to support those schemes which provide better access to justice for people who are excluded from the system by economic or cultural factors.

(b) Participative and self-management schemes: the community courts of Mozambique and South Africa

In South Africa indirect British rule and the subsequent apartheid regime created a society divided into subjects and citizens. To that end these regimes officially recognised certain indigenous legal practices (Welsh 1971; Mamdani 1996). Under Portuguese colonial rule in Mozambique, indigenous legal structures lay completely outside the official practices of the colonial state (Sachs and Welch 1990).

Indigenous legal systems are not exclusive to rural areas (through traditional courts, religious courts, etc.). Many urban dwellers excluded from the formal system tend to replicate traditional African behaviour patterns. This gives rise to numberless social organisations including traditional forms of saving (tontines or savings plans) and popular or community courts which attempt to offer the social and/ or legal protection that state institutions fail to provide.

With the arrival of democracy, the community courts strove to fill the vacuum which resulted from the elimination of the people's courts which had operated during the years of the struggle against apartheid in South Africa and the *tribunais populares* of the period of construction of socialist society in Mozambique.

Over the last decade popular justice has been regulated in a way hitherto unknown in these countries. In the words of Daniel Nina (2000) three objectives have been attained:

- external assistance for popular justice organisations has been incorporated to train them in human rights and self-regulation;
- with the introduction of the culture of human rights limits have been set on 'popular sovereignty';
- the view has been introduced and consolidated that the bodies of popular justice should be incorporated into the formal justice system.

In the new, democratic context there are still 'responsible' popular justice systems integrated (in the case of Mozambique) or not integrated (in the case of South Africa) into the formal judicial system which abide by the logic of the new democratic state.

In South Africa the Department of Justice (1997) urged state institutions to reflect on the capabilities of these popular organisations in the fight against crime, and encouraged the establishment of structures common to the state and civil society.

The South African Law Commission undertook a process of dialogue at the request of the state which tried to involve all affected parties (SALC 1999), and which was to culminate in a proposal for the regulation of community courts by 2000. This has not happened, so these courts continue to occupy a position of 'alegality'. The state continues to look into the possibility of setting up an alternative, uniform system in which community conflicts can be settled more quickly and more effectively than in the ordinary courts.

In Mozambique community courts were incorporated into the official justice system through *Ley orgánica* (basic act) nº 4/92 of May 6th 1992.[18] In November 1990 the country's community courts had abandoned the Popular Justice judicial

[18] Community courts occupy the first tier of the system and operate within an informal, indigenous framework. An appeal can always be made to a higher court (at departmental, provincial or state level) in which written law prevails (Serra, Trindade and Santos, 2000).

system (thus replacing district and town courts) which had been set up in 1978 in opposition to the elitist, discriminatory colonialist legal system. The Community Courts Act[19] envisages the need to evaluate and consider in depth the ethnic and cultural diversity of Mozambican society. Outside of this legal framework, the state has granted no further support to these courts.

The virtues of these courts include the following (Schärf and Nina 2001):

- They engage in preventive work in resolving 'minor' offences and problems characteristic of extended families (such as marital disputes, housing problems, division of property, slander, abuse of trust, witchcraft and some physical and sexual aggressions) which the official justice system does not consider or cannot resolve, but which may nevertheless lead to more serious conflicts. Cases of rape and violent crime are dealt with only on exceptional occasions.

- They are simple mechanisms which are accessible to the most seriously excluded sectors of the population (being cheap and with little red tape, settling disputes at a single level, through proceedings handled in the local language by people close to the situation with knowledge of the immediate circumstances and the cultural reality of the community in which they work).

- They draw no distinction between civil and criminal matters, and follow no traditional separation of powers, so that there is a blend of morality, law and legitimacy of their leaders based on a form of social support and control.

- They operate on principles of restorative justice and voluntary jurisdiction. Their goal is to restore the relationship between the parties and the community, and they therefore avoid punitive resolutions (following the African culture of *Ubuntu* as opposed to the Western culture of imprisonment). Remedies and punishments are based on restitution, on serving the aggrieved party, on compensation or on community service.

- They are participative, involve people in community business and therefore

[19] *Ley orgánica* (basic act) nº 4/92 of May 6th 1992 envisages the setting up of bodies which "will enable citizens to resolve small-scale disputes within their communities, thus contributing to the harmonisation of the various forms of justice and to the enrichment of rules, usages and customs leading to a creative synthesis of Mozambican law" (quoted from the Foreword to the Act).

help strengthen grass roots society with feelings of belonging and empowerment. They are run by volunteers who receive no official financial or material reward for their work. They are generally run by elders, but with the opening up to democracy women and younger people have also begun to take an active part in them.

- Community courts are just one of the resources available to the residents of poor, marginal districts to attempt to resolve their conflicts. The parties in dispute can always resort to other methods, such as the police, the official courts, organisations which offer para-legal services, religious and neighbourhood associations, and family mechanisms.

On the negative side the following can be said:

- When crime levels and the ineffectiveness of the state have become intolerable, some of these groups have gone too far in their punishments.

- Their vulnerability in some leadership situations: some community leaders take advantage of their position and create these structures for their own personal benefit.

- Problems of jurisdiction and recognition of the court by the parties involved when they are linked to civil organisations close to political formations (ANC/SANCO in South Africa, FRELIMO/ *grupos dinamisadores* (literally 'dynamising groups') in Mozambique). Many people resort to these courts only when they feel that their political militancy will positively influence the result.

- These organisations are usually successful in areas where there is homogeneity of language, culture or ethnicity, or a long tradition of organised popular movement. In urban contexts these factors seem to be waning.

Varying positions and predictions of future scenarios can be found in regard to the role of community courts and their response to the lack of access to justice of most citizens of South Africa and Mozambique, and in regard to the crisis in the judicial system (Schärf 1997; Schärf and Nina 2001).

One position claims that these organisations are an obstacle to the consolidation of a state based on the rule of law which can guarantee free market operation, and that they should not therefore be taken into consideration. This position advocates reform centred on the technocratic administration of justice. A second position is that these alternative organisations provide a complement to the formal

administration of justice, making justice more easily and more quickly accessible, and above all cheaper for a state which is short of financial, technical and professional resources.

The scenario under these two positions would be for popular and traditional justice to be absorbed into the state framework and thus disappear (since the community courts would in these circumstances lose their social legitimacy), or at most for them to survive on a marginal basis as a way of saving the state some money. These are neo-liberal solutions which would help maintain the racist approach of there being first class and second class citizens.

A third position denies the state any legitimacy and idealises the cultural value of these alternative justice systems, presenting them as the only way of guaranteeing access to justice for the marginalised layers of society. This requires that the centrality of the community be recognised rather than that of the state. The state would have no control over popular justice systems, and violent expressions of justice could spread still further. This is the communitarian solution, which also fails to respond to the distinction between citizens and subjects.

Finally, there is the position which holds that new ways of organising judicial power should be tried out, involving a collective commitment on the part of the citizenry and seeking to respond adequately to the cultural diversity of the societies in question. This last position envisages a scenario in which the state encourages responsible community and traditional justice systems to accept the values of the democratic state, and at the same time incorporates some elements of indigenous justice into the official legal system to facilitate the participation of the people and their access to justice. This would be a democratic, participative, intercultural solution which would go a long way towards eliminating judicial inequalities between citizens.

The current situation of uncertainty in which community courts find themselves is leading to a variety of situations. Some courts continue to be highly active, while others cannot withstand the competition coming from other forms of conflict resolution and are therefore on the way to disappearing. Some try to be more formal and official, while others place political loyalty first, and still others make the pragmatism of survival their priority. Some are autonomous of the local administrative or religious authorities and others are subordinate to them, with multiculturalism being assumed in specific cases of witchcraft and family matters (Serra, Trindade and Santos, 2000).

4. Conclusions

The lack of access to formal justice in major sectors of South African and Mozambican society originated because the structures of the state are not suited to that society: a situation which has existed since colonial times. There is a state which represents only a part of civil society and which runs itself according to Western legal systems and traditions, while the intermediate and outside rings of society continue to fall back on alternative systems of justice based on traditional or indigenous patterns.

Some of these community organisations should not be allowed to continue: they directly call into question the legitimacy of the state, and the state must therefore suppress them. But other community justice systems may have a place in the new democratic legal system, and indeed may enrich it by ensuring the involvement and participation of society and by redefining values and principles from an intercultural perspective which takes the values and concepts of African cultures into account.

If the community organisation is backed by the state, the groups excluded may to dissolve. Otherwise they may continue, beyond the social control of the state, which may entail advantages and disadvantages. Is an intermediate solution possible?

The state in both South Africa and Mozambique must not only recognise and favour the work of community courts, but must also 'indigenise' its official judicial institutions and bodies of law to some extent. An intercultural dimension needs to be incorporated into the concept of political and civil liberties. A transcultural view of legal practices may help the freedoms which the state is attempting to guarantee to begin to become meaningful for those layers of the population for whom they still have little or no meaning. Official judges need to be aware of and recognise the work of community judges. Once that stage has been reached, the next step would be to establish mechanisms for co-operation and co-ordination between formal and popular justice.

As pointed out by Mamdani (1996), the reform of the split state must involve a reformulation of the relationship between rural and urban areas and between other opposing elements such as law and custom, representation and participation, centralisation and decentralisation, civil society and the community.

Community courts help to consolidate this broad approach to a new citizenship: a citizenship which stresses the right to self-development based on free determination and tolerance in the face of diversity which is encouraged from a

position of coexistence and active participation in processes of deliberation. Pre-requisites for this are the direct participation of the citizenry, the regulation of the basic institutions of society and the setting up of an open institutional system which constantly allows experimentation with new political forms (Meyenberg 1999).

The people's courts of the period before the transition to democracy helped to consolidate a new outlook of participation by the people in the new society (Schärf and Nina, 2001). By nature popular justice is ephemeral, volatile and quick to change. We must be aware that, while it may develop towards progressive forms of popular participation, it may also come to represent undemocratic, brutal forms which are negative for the development of the countries in question. This is the case currently with the vigilante movements of South Africa.

References

BAYART, Jean F., Stephen ELLIS and Béatrice HIBOU
1999 *The Criminalization of the State in Africa*. London: James Currey and Indiana University Press.

BRATTON, Michael and Nicolas VAN de WALLE
1997 *Democratic Experiments in Africa. Regime Transitions in Comparative Perspective*. Cambridge: Cambridge University Press.

CHABAL, Patrick (ed.)
1986 *Political Domination in Africa: Reflections on the limits of power*. Cambridge: Cambridge University Press.

CHABAL, Patrick and Jean-Pascal DALOZ
1999 *Africa Work:. Disorder as Political Instrument*. London: James Currey and Indiana University Press.

DAC (Development Assistance Committee)
1997 *DAC Guidelines on conflict, peace and development co-operation*. Paris: OECD.

DEPARTMENT OF JUSTICE (Department of Justice South Africa)
1997 *Five Year National Strategy for Transforming the Administration of Justice and State Legal Affairs. Justice. Vision 2000…And Justice for All!* South Africa: Ministry of Justice.

HARRESIAK APURTUZ and HEGOA
1997 *Dossier Inmigración y racismo: Sociedad democrática, sociedad multicultural*. Bilbao: Harresiak Apurtuz/Hegoa.

HUNTINGTON, Samuel P.
1991 *The Third Wave: Democratisation in the Late Twentieth Century*.

Norman: University of Oklahoma Press.

MAMDANI, Mahmood

1996 *Citizen and Subject: Contemporary Africa and the legacy of late colonialism*. London: James Currey.

MARKOFF, John

1999 *Olas de democracia. Movimientos sociales y cambio político*. Madrid: Tecnos S.A.

MEYENBERG, Yolanda

1999 'Ciudadanía: Cuatro recortes analíticos para aproximarse al concepto. *Perfiles Latinoamericanos*.' *Año 8, Nº15, julio-diciembre*, FLACSO. 9-26.

NINA, Daniel

1995 *Re-thinking popular justice. Self-regulation and civil society in South Africa*. Cape Town: Community Peace Foundation.

2000 'Dirty Harry is back: vigilantism in South Africa - the (re)emergence of the 'good' and 'bad' community.' *African Security Review* 9 (1).

NINA, Daniel and Pamela J. SCHWIKKARD

1996 The 'Soft Vengeance' of the people: popular justice, community justice and legal pluralism in South Africa.' *Journal of Legal Pluralism* 36: 69-87.

OOMEN, Barbara

1999 'Vigilante justice in perspective: the case of Mapogo a Mathamaga.' *Acta Criminologica* 12 (3).

SALC (South African Law Commission). 1999. *Community Dispute Resolution Structures. Discussion Paper 87. Project 94*. Pretoria: South African Law Commission.

SACHS, Albie and Gita Honwana WELCH

1990 *Liberating the Law: Creating Popular Justice in Mozambique*. London: Zed Books.

SANTOS, Boaventura de Sousa

1991 *Estado, Derecho y Luchas Sociales*. Bogotá: ILSA.

1998 *La globalización del derecho. Los nuevos caminos de la regulación y la emancipación*. Bogotá: ILSA

SCHÄRF, Wilfried

1991 *Report of Mr Wilfred Schärf. State versus Sipati and 4 others. Case No. G/SH 405/91*. Cape Town: Institute of Criminology, University of Cape Town.

1997 *Specialist Courts and Community Courts. Position Paper, Commissioned by the Planning Unit, Ministry of Justice*. Cape Town: Institute of Criminology, University of Cape Town.

SCHÄRF, Wilfred and Daniel NINA (eds.)

2001 *The Other Law: Non-state ordering in South Africa*. Cape Town: Juta

Law.

SERRA, C., J.C. TRINDADE and B. SANTOS (eds.)
2000 *Conflito e Transformaçao social. Uma Paisagem das Justiças em Moçambique*. Maputo/Coimbra: Centro de Estudos Africanos da Universidade Eduardo Mondlane e o Centro de Estudos Sociais da Universidade de Coimbra.

SMITH, Tony
1986 'The underdevelopment of the development literature. In Atul Kohli (ed.), *The State and Development in the Third World*. Princeton: Princeton University Press.

SOW, Alpha I, Ola BALOGUN, Honorat AGUESSY, and Pathé DIAGNE
1982 *Introducción a la cultura africana. Aspectos generales*. Barcelona: Serbal/Unesco.

WELSH, David
1971 *The Roots of Segregation: Native Policy in Colonial Natal, 1845-1910*. Cape Town: Oxford University Press.

WILMOT, T. J.
1996 'Renewing civil society.' *Journal of Democracy* 7 (1).

WORLD BANK
1992 *Governance and Development*. Washington DC.: World Bank.