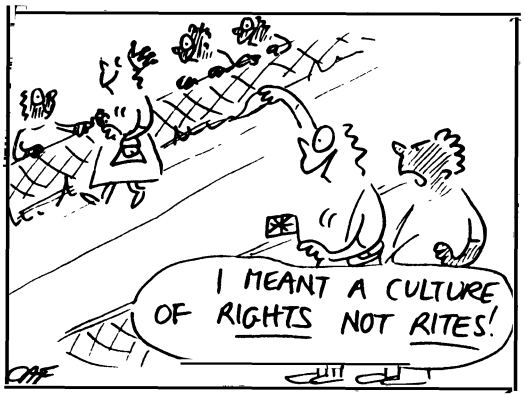
# Rights Vs Reconciliation

*Daniel Nina*

## *Alternative dispute resolution, rights culture and community justice in South Africa.*




*Daniel Nina is a Research Associate at the Institute of Criminology, University of Cape Town.*
The author thanks M. Mncadi for her comments and C. de Villiers for her comments and research assistance in preparation of this article.

The dominant discourse in South Africa tends to argue that in order to achieve a 'rights culture', a new legal framework is necessary — in principle the recent elections, on 27 April 1994, achieved this. In addition, access to state courts, or state controlled mechanisms of conflict resolution, is vital. New judicial and legal profession initiatives are aiming to ease this access. In this regard, the common view among those related to the 'state legal world' is that to have a right means nothing; to be able to exercise and claim that right means everything.

I would like to draw some ideas from the work of Doreen Atkinson, in particular, the concept of 'civility' which she develops, as that of integrating and respecting a culture of rights when dealing with the state or within civil society. However, what she neglected in her analysis is the way in which those rights could be protected and guaranteed, in particular within civil society. In this sense, her contribution should be read parallel to McClure's work, who advances an interesting proposition about 'rights talk' outside the state legal frame.[1]

Historically a rights culture presupposes that the modern state is the sole guarantor of such rights to all its citizens, regardless of race, class, gender and other subjectivities; South Africa then, has finally achieved a total stage of modernity. In this regard, the state courts and state agencies will assist individuals in civil society to exercise their interests/rights. In addition, this same process of claiming rights suggests that a right will be asserted in relation to another right (either the state or a citizen in civil society). To claim a right means to claim it vis a vis another right: it presupposes an adversarial process.

The alternative dispute resolution (ADR) movement, particularly within its mediation and negotiation mode, argues for a distinctively different process: that of reconciling different interests, whilst achieving harmony. In particular, at the community level in South Africa, the role of ADR has so far been one of reconciling conflicting interests in a way that promotes and maintains peace.

I would like to advance an argument on the nature and scope of 'community justice' in South Africa. In particular the focus will be on how a culture of rights could be instilled at the level of society where alternative means of providing 'justice' operate. As currently conceived, I will argue that there is a contradiction between a culture of rights advanced through the state and a culture of reconciliation and harmony advanced through ADR. It is interesting, that already in 1993, during a Community Courts Conference held in Port Elizabeth, this argument was advanced. The idea of creating community courts, with lay judges trained to understand the Bill of Rights of the (new) constitution was seen as an important element in advancing a culture of rights at the grassroots level.

In comparative terms, in Mozambique the 'popular tribunals' were effectively used to advance a culture of rights, which in fact helped to

improve the social status of a particular underprivileged sector, that is women.

Three main sources of conflict resolution (of *justice* dispensation?) operate today in South Africa at the community level: state justice, private justice, and popular justice.[2] State justice is still located primarily within a framework of formal conflict resolution mechanisms, although the past decade saw many initiatives in the direction of informal justice. The apartheid regime from the early 1980s until the early 1990s, began to take concrete measures by which it decentralised sources of conflict resolution at a local level. For example: the *Small Claims Court Act 1984*; *Mediation in Certain Divorce Matters Act 1987*; and the *Short Process Court and Mediation in Certain Civil Matters Act 1991*.

On the other hand, organs of popular justice emerged in a more politically distinctive way during the 1980s as part of a political agenda of 'organising people's power'. The forms taken by organs of popular justice have been diverse: from street and yard committees, to disciplinary committees and other structures of conflict resolution and ordering. Such phenomena existed in a climate in which the national state was substituted or denied at the local level; however, the 'legal order' created at the local level ends up, in many instances, reproducing the state by other means.[3]

It is the area of private justice which has been studied least in South Africa so far.[4] This example of dispensation of 'justice', has operated primarily through ADR mechanisms in labour disputes and commercial disputes. The political transition in South Africa saw the emergence of a new range of services in the area of conflict resolution, tailored to the problems emerging from the same transition.

I will concentrate exclusively on the argument for private justice/ADR within the context of what has been defined in South Africa as 'community conflict resolution'. Moreover, I will locate the discussion on the question of conflicts, with particular emphasis on 'interpersonal conflicts'. In addition, the line of enquiry that interests me on this occasion is that of examining the possibility of reconciling a culture of rights between state courts and the ADR movement in South Africa.

## Private justice/ADR?

To advance a culture of rights, within the framework of the modern nation-state, means that we need to claim rights that are defined within the legal codes and the constitution of such a state. In addition, it has traditionally been thought that a culture of rights could be claimed through the state courts and state institutions. To claim rights outside the domain of the state means that they are exercised within the private domain — and here, the recognition of state rights and duties is very discrete. I refer here, for example, to the flexibility of 'due process' when engaging in a mediation exercise.

The dilemma of modernity, then, is that the rule of law, where a rights culture exists, is the foundational element in understanding the concept of justice. Within that legal frame, Rawls is correct to argue that

> . . . the usual sense of justice . . . is essentially the elimination of arbitrary distinctions and the establishment, within the structure of a practice [courts of law], of a proper balance between competing claims.[5]

This type of state justice guaranteed through statutes, the constitution and the courts of law, still symbolises justice. Yet private justice/ADR, has not been able to challenge the element of justice embodied in state justice. The literature explaining the reasons for the emergence of ADR is vast.[6] What is of particular importance to the argument that I am pursuing is the question of whether one could advance a rights culture through this particular model of conflict resolution. As the discussion above suggests, this is still the crucial area where ADR has not been successful. Also, it could be argued in a more contentious way, that ADR has not yet been able to question the state hegemony in the dispensation of justice.

The argument that has been traditionally raised by the sponsors of ADR, is that it is an expedient process, in which the parties are in control, and in which the adversarial tendency of the courts of law is eliminated. In other words, what is under question by the ADR movement is the adjudicatory nature of the courts of law, where rights (entrenched within a constitutional dispensation), are defined.In fact, if one follows the international debate/literature on this issue, one can find that there has been an interesting shift from a critical theory analysis to a more pragmatic approach. For example, in the 1980s, the contribution of Abel, Matthews and Harrington, amongst others, stimulated the drive to understand — in a critical way — the meaning of the ADR movement and its connection with the state.[7] Nowadays one can find a more practical approach, which recognises a need to reconcile different modes of conflict resolution, including the state courts of law, but also other non-state mechanisms of conflict resolution.[8] In more practical terms, this has come to mean that state justice has been incorporating an increasing diversity of mechanisms of conflict resolution based on ADR principles. There has been a clear process of co-option by state law (in the natural sense of the expression), in which ADR mechanisms are brought within a broader state system of dispute resolution, which precedes the formal courts.

Despite a tendency to reconcile both mechanisms of conflict resolution (at least as an initiative of the state), and a greater move by the state to incorporate ADR into its domain, the question of the rights culture has not been solved. The argument advanced by Fiss a decade ago is still prevalent.

> In my view, however, the purpose of adjudication should be understood in broader terms. Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative text such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.[9]

The argument advanced by Fiss poses interesting considerations that need to be taken seriously, particularly in a country like South Africa which is developing a new democratic culture within the legal frame defined by the new constitution. The argument has to address how ADR, with its particular way of settling disputes, could incorporate the principles embodied in the new constitution.

Nonetheless, for me the whole debate poses an interesting question: is justice, particularly in this peculiar postmodern era, still linked to the state?

The sociology of law, as discussed by Santos and Merry, will tend to obviate the answer to this question, although both authors have recognised that there exists a diversity of 'legal modes' — paraphrasing Fitzpatrick.[10] It is not because we have more mechanisms for conflict resolution that justice as such, in its traditional modern sense has been achieved. In

fact, the tendency experienced in many countries, of incorporating ADR mechanisms into the formal courts, leaves the question unresolved: as a two-stage process, ADR before or after courts, still means that justice needs to be provided by the formal courts. In the Australian context, for example, Thornton has addressed the situation in the case of discrimination complaints within what I would define as 'spaces of restorative justice', meaning spaces to redress social imbalances. Justice in its traditional modern sense, is not only to be found in the courts of law, but in administrative and state-controlled ADR processes. However, without any doubt, justice is to be promoted through the state, regardless that the form and venue of the dispute resolution process changes. Tamanaha, for example, has recently explored a similar type of critique of the sociology of law, and in particular of Merry's contribution.[11]

I personally do not have an answer to the above question, particularly if I place myself within a paradigm of modernity and the role of the state. If we are prepared to change the terms of the debate, as Albie Sachs once suggested, we should be able to talk about justice without the state; or, to conceptualise another type of 'justice' which still uses state principles but which goes beyond them. This prospect will be examined later in this article, but first I will examine the situation in South Africa.

## South Africa's perspective

As discussed above, this particular domain outside the state has been defined as 'private justice'. In the past, I have argued for it to be more closely linked to, or representative of, the needs of citizens according to the new constitutional dispensation in South Africa.[12] Although this sphere has its own virtues, I think that it also has a role to play in consolidating a culture of rights — a culture which becomes uniform and applies not only when people are engaging at the vertical level with the state, but when they are engaging at the horizontal level in civil society.

In terms of definitions it is important to advance the following propositions:

- Community is a social construction. The community does not exist; we invent it all the time. In the particular context that I am addressing, community stands for a residential area, which creates its own struggles for achieving common interests. This invented community is composed of individuals who then are related through different social forms, such as the 'family'. Use of the term 'family' here involves all forms of social relationship accommodated in the same 'home' including heterosexuals, homosexuals, bisexuals, single parents, multiple parents, 'loners' and of course extended family relationships.
- Community justice should be seen as a network of different modes of legality or legal pluralism providing resolution to different types of conflicts in the community. This will include, at least, state justice, popular justice and private justice.
- Community conflict includes different types of interpersonal conflicts, such as crime, family matters, personal disputes and small contractual disputes. I am not including, in the realm of conflicts solved at the community level, those areas such as labour disputes, commercial disputes and corporate disputes. These are part of another 'type' of community, which have different methods of solving their disputes.
- ADR mechanisms provide a service to the areas discussed above and include services such as: victim/offender mediation; interpersonal conflict resolution; divorce mediation; consumer mediation; intergroup mediation and others.

These definitions can be conceptualised using *Table 1* below which locates particular types of interpersonal conflicts at the community level in South Africa.

**STATE**

| LABOUR DISPUTES<br>COMMERCIAL DISPUTES<br>CORPORATE DISPUTES<br>ENVIRONMENTAL DISPUTES | | CIVIL SOCIETY |
|---|---|---|
| **COMMUNITY** | | |
| **STATE JUSTICE** | **PRIVATE JUSTICE / ADR** | |
| 1. Small Claims Court Act, 1984<br>2. Mediation in Certain Divorce Proceedings Act, 1987<br>3. Short Process Court and Mediation in Certain Civil Matters Act, 1991 | 1. Interpersonal Dispute Resolution<br>2. Victim Offender Mediation<br>3. Divorce and Family Mediation<br>4. Community Conflict / Intergroup Mediation<br>5. Consumer Dispute Resolution | |

As described in *Table 1,* the state does not monopolise the resolution of conflict at the community level. The state has to compete with different types of mechanisms of conflict resolution, which — paraphrasing Fiss — practice the culture of 'settling' disputes. In this regard, by limiting the scope of analysis to that of the community and interpersonal conflicts occurring at that level, the state is interacting with other types of specialised institutions of private justice.

Not all the various mechanisms of conflict resolution operating at different levels are framed within a culture of rights. For example, at the level of interpersonal conflict or intergroup/community conflict resolution, a culture of rights is absent. What prevails is the need to reconcile different interests and restore harmony.

Although these types of conflict resolution mechanisms are not without their contradictions, they have achieved a great deal of success and positive publicity. It is still not clear how they deal with a culture of rights, particularly because both at the interpersonal level and at the intergroup level, gross violations of people's rights (from human rights, to civil and constitutional rights) occur.

At the level of intergroup/political conflict resolution, for example, South Africa's transition saw many exceptional cases, in which mediation/negotiation was used and succeeded regardless of any right. The best example was the last minute intervention of Dr Mangosuthu Buthelezi's Inkatha Freedom Party, who through mediation and negotiation, agreed to participate in the April 1994 elections — regardless of the fact that the deadline for participating in the process was long past.

With the exception of divorce mediation and victim offender mediation, the other models are not necessarily framed within a culture of rights, but within a culture of reconciliation. These two types of mediation will require, at some stage, the blessing of a court of law or a law and order

officer. Hence, the possibility of reconciling a rights culture with an ADR mechanism exists.

In terms of divorce mediation, for example, the agreement reached by two parties still needs to be ratified by the parties' attorneys and then submitted to a court of law for recognition. The judge considering this agreement can declare it null and void. In terms of victim/offender mediation, the fundamental condition for diverting a case from the criminal process into a mediation setting is recognition on the part of an offender of having committed an offence.

The prevalent situation amongst certain areas of community conflict resolution by ADR mechanisms in South Africa poses serious problems in a period of national reconciliation, reconstruction and development. If a culture of rights is to be developed, it would require that people be able to claim against the infringement of their rights. The model that ADR follows at this level, with the exception of divorce mediation and victim/offender mediation, does not necessarily guarantee this.

## Options for developing a culture of rights

What alternatives are available? One possibility, if one is following a paradigm of the state and a rights culture, is to bring the different instances of ADR in line with the state defined rights and obligations of citizens. This will force many mediators in particular (and also facilitators), to be informed of the rights and obligations guaranteed to every citizen under the new political/constitutional dispensation. In particular, this process will force a re-definition of the role of the mediator and facilitator, in terms of his/her neutrality. It will force these people to take positions or make clear recommendations in certain cases when an abuse has been committed against one of the weakest parties in a dispute.

A strong feminist critique against mediation, for example, has argued that mediation processes tend to neglect women's rights and positions.[13] The critique argues that women are better off in a court of law where aspects of due process such as the right to equality are guaranteed.

There is a different option: to break away from the paradigm of the state culture of rights and to promote everywhere a culture of reconciliation and harmony. This process could guarantee that we construct a new social inter-relation in which individuals in a community see themselves as human beings who deserve to have a level of equality and equal access to wealth — it is about reconsidering basic principles of (social) justice without the need to claim those rights in a court of law. Up to a certain point, this is what Atkinson argues when she claims for the need to develop a culture of 'civility'.[14]

A third option is to follow a 'hybrid' model, based particularly on an experience currently being developed in Australia under the 'family conference' concept, which follows Braithwaite's 'reintegrative shaming'.[15] This is a process which establishes a 'community of care' which then could provide solutions to a problem that has occured. Of particular relevance in this Australian model, is the fact of recognition of a culture of rights, however, moving beyond that: the state culture of rights is the first step. The 'making' of justice occurs outside the state paradigm.

It is interesting to note that a similar discussion or experience to that of the Australian model has been taking place in South Africa, through the organs of popular justice. In particular the so-called 'street committees' which operate in most of the African urban communities (i.e. townships), deal with community problems (irrespective of their nature) within a similar type of 'community of care'.[16] Families, relatives, friends, members of the community and the older generation of 'Tatas and Mamas', sit together in a systematic process to deal with problems affecting that community.

What is interesting about this particular mode of popular justice in South Africa, is that in the past few years many of us have argued for developing a culture of rights within those structures, without state co-option or control.[17] In this regard, it has been stated that provided that organs of popular justice conform to the bill of rights of the constitution, their practice should continue in a fairly autonomous way.

In South Africa, then, it is at the level of popular justice where a 'hybrid' model is at an embryonic stage. So far, the ADR/private justice sector has limited itself, either in not recognising a culture of rights (as in interpersonal or intergroup conflicts) or in operating within a legal frame (as in divorce and victim/offender mediation).

## Conclusion

The discussion on this intervention is not conclusive. The end of the democratic transition in South Africa and the emergence of a new constitutional dispensation opens the door to many debates. In particular, as discussed above, there are various dilemmas between multiple mechanisms of conflict resolution and advancing a culture of rights — not to mention social justice.

Finally, depending on which 'paradigm' one follows, one could then find a possible solution. If the dominant paradigm is still seen as that of a 'culture of rights' within the domain of the state, it would be important to make accountable [to the state] all sources of conflict resolution. One still wonders if it might be possible, in this postmodern era, to initiate a new discourse on justice which ignores the state. That will remain an open-ended question.

### References


1. Atkinson, D., 'Rights, Politics and Civil Society in South Africa', (1992) May *Theoria*, 43-58; Atkinson, D., 'State and Civil Society in Flux: Parameters of a Changing Debate', (1992) May *Theoria*, 1-28; McClure, K. 'On Subject of Rights: Pluralism, Plurality and Political Identity', in C. Mouffe, (ed.), *Dimensions of Radical Democracy*, Verso, London, 1992, pp.108-27.
2. At the community level there are other less recognised mechanisms of conflict resolution, which deserve further research. This is the case, for example, of the extended family in mostly African communities, which has a great deal to say in mediating cases of domestic conflict between spouses.
3. It is sufficient for what I have to say on popular justice. The aim of this article is to advance a discussion in the area of private justice, and the discussion on popular justice is a limited one. For further information please consult Nina, D., 'Community Justice in a Volatile South Africa: Containing Community Conflict, Clermont, Natal', (1993) 20(3-4) *Social Justice* 129-142.; Nina, D., '[Re]making Justice in South Africa: Popular Justice in Transition', Working Paper No. 8, Centre for Social and Development Studies, University of Natal, Durban, 1993, pp.1-26.
4. Mowatt, J 'Some Thoughts on Mediation', (1988) 105(4) *South Africa Law Journal* 727-39; Mowatt, J., 'The High Price of Cheap Adjudication', (1992a) 109(1) *South Africa Law Journal* 77-86; Mowatt, J. 'Alternative Dispute Resolution: Some Points to Ponder', (1992) 25(1) *Comparative and International Law Journal* 44-58.
5. Rawls, J .,'Justice as Fairness', in R. Solomon and M. Murphy (eds), *What is Justice?*, Oxford University Press, New York, 1990, pp.306-310 at p.306.


*Continued on p.70*

*1987* (NSW). Unlike the case with the Hunter Water Corporation, regulations may not be made to exempt Sydney Water from any provision of the *Trades Practices Act*.

PIAC took a strong stand in the negotiations on the standing rights for third parties. The Trades Practices and Fair Trading Acts allow any person, whether competitors, consumers or interested parties, to take legal action to enforce their provisions. The corporatisation Act also provides for any person to bring proceedings in the Supreme Court for an order to restrain a breach of a customer contract, the instrument that contains the company's service commitment to its customers. The significance of this is that if consumers feel they are not being empowered in the marketplace, they have an alternative — the courts.

There are no surprises for consumers with the corporation's price setting. Prices cannot exceed the maximum prices set by the NSW Government Pricing Tribunal, an independent body that acts as a surrogate competitor on prices to public monopolies. The Tribunal must consider a number of factors in determining maximum prices, including the costs of providing the services, protection of consumers from abuses of monopoly power, the need for greater efficiency in supply so as to reduce costs for the benefit of consumers and taxpayers, and protection of the environment (s.15, *Government Pricing Tribunal Act 1992* (NSW)). The Tribunal has pursued a process of phasing in more cost-reflective pricing for water, removing cross-subsidies from business customers to domestic customers and increasing amounts for hardship relief in the transition period. This is unlikely to change.

Some aspects of this customer focus appear to be very general. Opportunities and mechanisms for information, consultation, complaints handling, redress and compensation will become more developed. Sydney Water has already shown its commitment to disclosure of the rights of its customers by placing full page ads in the Sydney metropolitan press and distributing printed copies of its Operating Licence and Customer Contract.

## Final observations

Implementation of the package will require the dynamic interaction between the Corporation and environmental, consumer and welfare groups that produced the parliamentary settlement.

Implementation will also be affected by the NSW State election. The Labor Opposition foreshadowed that it would overhaul the model if elected to government in March 1995.

The 'New Zealand model' might be further subverted. There are some key differences in Labor's approach to corporatisation and the Government's. These differences were more marked over the Bill as first tabled by the Government. However if the Government's position is that reflected in the *Water Board (Corporatisation) Act* rather than the *State Owned Corporations Act*, the differences are fewer. Labor would establish state owned corporations as statutory corporations, not public companies, and maintain employee representation on boards.

No doubt they will also want to speed up the overhaul of pollution control laws and shake up the Environment Protection Authority.

Even with Labor's concerns there are key features of the outcome that have bipartisan support. Central to this is the modification of economic efficiency by consideration of environmental and social objectives.

### References


1. Public Interest Advocacy Centre, Submission to the Commonwealth of Australia Joint Committee of Public Accounts Inquiry into the Commercialisation of public Sector Operations, 1994.
2. Ernst, J., *The Privatisation Papers*, Victoria University of Technology, Melbourne, 1994, p.53.
3. Taggart, M., 'State-Owned Enterprises and Social Responsibility: A Contradiction in Terms?', (1993) *NZ Recent Law Review* 343-364 at 350.
4. NSW Legislative Assembly, Hansard, 27 October 1994, p.4906.
5. Johnson, Michael and Paddon, Mick, *Keeping Our Heads above Water: Is Privatisation of the NSW Water Industry Inevitable?* Public Sector Research Centre, University of New South Wales, Sydney, 1995.


*from p.66*


6. Fiss, O., 'Against Settlement', (1984) 93(6) *The Yale Law Journal* 1073-90; Merry, S., 'Legal Pluralism', (1988) 22(5) *Law and Society Review,* 869-96; Harrington, C., *Shadow Justice,* Greenwood Press, Connecticut, 1985; Fitzpatrick, P., 'The Rise and Rise of Informalism', in R. Matthews (ed.), *Informal Justice?,* Sage Publications, London, 1988, pp.178-98; Abel, R., (ed.), *The Politics of Informal Justice*, Vols 1 & 2, Academic Press, New York, 1982; Inglebly, R., 'Court Sponsored Mediation: The Case Against Mandatory Participation', (1993) 56(3) *The Modern Law Review* 41-51.
7. Abel, R., above; Matthews, R., (ed.) *Informal Justice?* Sage Publications, London, 1988; Harrington, above.
8. Roberts, S., 'Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship', (1993) 56(3) *The Modern Law Review* 452-70; Menkel-Meadow, C., 'Lawyers Negotiations: Theories and Realities — What We Learn from Mediation', (1993) 56(3), *The Modern Law Review* 361-79; Thornton, M., 'Evocations of Conciliation: The Resolution of Discrimination Complaints in Australia', (1989) 52(6) *The Modern Law Review* 733-61.
9. Fiss, above, p.1085.
10. Santos, B., 'Law: A Map of Misreading: Towards a Postmodern Conception of Law', (1987) 14(3) *Law and Society Review* 279-302; Santos, B., 'State, Law and Community in the World System: An Introduction', (1992) 1(2), *Social and Legal Studies* pp.131-42; Merry, above; Fitzpatrick, P., *The Mythology of Modern Law,* Routledge, London, 1992; Fitzpatrick, P., 'Law's Infamy', in S. Adelman and A. Paliwala (eds), *Law and the Crisis in the Third World,* Hans Zell Publishers, London, 1993, pp.27-50.
11. Tamanaha, B., 'The Folly of the 'Social Scientific' Concept of Legal Pluralism', (1993) 20(2) *Journal of Law and Society* 192-217; McClure, above.
12. Nina, D., 'Popular Justice in a 'New South Africa': from People's Courts to Community Courts in Alexandra', Occasional Paper 15, Centre for Applied Legal Studies, University of the Witswatersrand, 1992, pp.1-41.
13. Thornton, M., above, p.743.
14. Atkinson, D., 'Rights, Politics and Civil Society in South Africa', above, p.47.
15. Braithwaite, J., 'Resolving Crime in the Community: Restorative Justice Reforms in New Zealand and Australia', paper presented in the workshop 'Resolving Crime in the Community', held at the Institute for the Study and Treatment of Delinquency, Kings College, London, 22 September 1994, pp.1-15.
16. Nina, D., 'Reorganising People's Power in the 'New' South Africa: Working on Peace, Safety and Justice with a Guguletu Street Committee', (1994) 1 *Imbizo* April, 1-8.
17. Nina, D., above, ref. 12; Scharf, W., 'Popular Justice Judged by One's Peer', (1994) *The Weekly Mail & Guardian,* 11 to 17 March.