# THE ZWELETHEMBA MODEL: PRACTICING HUMAN RIGHTS THROUGH DISPUTE RESOLUTION

Jan Froestad and Clifford Shearing

## 1. INTRODUCTION

In this paper we look to activities of people living primarily in informal housing within South Africa to explore how they have thought about articulating and protecting the sorts of values thought of as human rights. The concept of human rights has meaning within these collectivities even though they may never have encountered a professional human rights discourse. For example, even though the vast majority of South Africans have never read the South African Constitution they know that it exists and that it protects human rights. Similarly most South Africans have an idea as to what sorts of values are referred to by human rights even though they may not be able to articulate what these are and may not endorse all or some of these values. In short, human rights exist as part of South Africans' life world.

In what follows we consider how groups of South Africans who practice a dispute resolution process (that has come to be called the Zwelethemba model) articulate and practice human rights within in the context of the processes this model promotes. We do so to explore how looking to the practices of ordinary people might contribute to our understanding of what human rights mean in the day-to-day circumstances of peoples lives and to

**Crime and Human Rights**
**Sociology of Crime, Law and Deviance, Volume 9, 193–214**

**ISSN: 1521-6136/doi:10.1016/S1521-6136(07)09008-2**

see how these meanings might be articulated with the meanings given to human rights within professional discourses. Our primary purpose is to consider how such an articulation might contribute to debates taking place amongst professionals within contemporary human rights discourses. That is, our objective is to see what, if anything, a bottom-up perspective might contribute to contemporary debates about human rights.

## 2. HUMAN RIGHTS DISCOURSE(S)

Discourses on human rights have been conceived as the last grand narrative (Alves, 2000), characterized as an international communication about human freedom and dignity that can be thought of signalling an emergent or "overlapping consensus" about justice and core human values in a world of doctrinal fragmentation and insecurity (Donnelly, 2001). One consequence of this, it has been argued, is that "the language of universal rights has been seized by the oppressed and excluded as a weapon in the fight for freedom and dignity" (Goodhart, 2003, p. 959). This claim is not without its critiques and many scholars have expressed reservations about the continued value of human rights as a source of freedom, critique and reinvention.

In *The End of Human Rights*, Douzinas maintains that the human rights discourse has been loosing its value as an inspirational source of human emancipation as it has been used to constitute to a language that strengthens state powers and expert knowledge (Douzinas, 2000). Baxi (2002) argues that the human rights discourse is being hijacked by powerful groups and that, as a consequence, it is being uncoupled from the suffering and needs of the poor and the oppressed (see also Twining, 2006). Similarly Guilhot (2005) argues that human rights, through a process of "professionalization" and "technical specialization", has been translated into a language of state administration and institutions. These arguments identify human rights as a resource that can be mobilized in a variety of ways for a variety of purposes. The challenging question, that these and other observers raise, is how to uphold the "critical intent" of human rights. Central to this challenge is how human rights as a resource may be mobilized by the poor and oppressed. This, Guilhot argues, requires linking the discourse to perceptions of injustice (see also Erman, 2005). Utilizing the distinction between life-world and system (Habermas, 1988, 1997) Fortman argues that human rights have become a system of:

> Intergovernmental and nongovernmental centres, compliance and complaints procedures with commissions, committees and courts of law, training programmes and academic training courses, often quite removed from the life-world perspectives. (Fortman, 2001, p. 7)



Likewise Stammers (1995, pp. 506–507) argues that this discourse is now almost exclusively tied to states – there is now "little more space for thinking about human rights in any other way". As a consequence private economic powers often evade human rights protections. It is also argued that this top-down way of thinking about human rights is elitist and disabling, constraining the potential for popular mobilization by directing any mobilization that does occur towards the state (*Ibid.*, p. 507). The question is what other spaces can be constituted and used. In criticizing the statist orientation Stammers argues that it:

> Must be superseded by a reconstructed notion of human rights, systematically grounded and understood to challenge existing power relations – a notion of human rights that enables, rather than disables, those whose voices are currently stifled by the dominant western discourses on human rights, both liberal and social democratic. (*Ibid.*, p. 508)

The question that is posed is: What can be done to uphold the critical content of human rights? As argued by Fitzpatrick (2006, p. 15) the "political" element of rights inheres, at least partly, from the ability rights have to go beyond their existent content. Rights have shown a capacity to be something other than what they were intended to be. This in-determinant, "vacuous" or "abstract" character of rights has made them susceptible to occupation by effective powers. In making this point Guilhot (2005) documents how the US, under republican rule, transformed the human rights discourse into a mechanism of domination and aggression, tying it to its foreign policy of exporting "democracy". While human rights used to function as external standards held up against government, especially as a guard against an imperialistic foreign policy, today they have been instrumentalized as weapons to legitimate aggressive interventions. Chandler (2001) underscores how the human rights-based approach to humanitarian aid has undermined earlier humanitarian values such as universality and neutrality and has constructed humanism as an ambiguous concept "capable of justifying the most barbaric of military actions" (*Ibid.*, p. 698). In a similar vein Forsythe (2005) notes how humanitarian arguments were used by the US to legitimate the invasion of Iraq.

The growth and expansion of an international network of human rights NGOs has frequently been interpreted as "a quiet revolution" spawning the emergence of international civil society (Otto, 1996). However, Smith, Pagnucco, and Lopez (1998) draw attention to important dividing lines within such networks as Southern NGOs have to work with substantially less

access to resources than Northern ones. Mertus (1999) questions the democratic status of the NGOs and argues that many of them operate in ways that may threaten local autonomy. Guilhot (2005) points to the fact that traditional forms of NGO activism have to a large extent been transformed because, in order to be successful, international networks have increasingly been professionalized through lawyers, political scientists, media specialists and public relations experts.

This literature calls for a social science and political practice that is more committed to a change from below. This may well require forms of decentralization operating to some extent outside of state and corporate power and that link to international efforts to deepening democracy and human rights (Fields & Narr, 1992). According to Donnelly (2001) the key to human rights progress in the coming decades lies in creating more creative and effective efforts by a multitude of agencies – states, citizens, and other national and international actors. Freeman (1994) emphasizes the need to conceptualize human rights in a manner that is flexible enough to allow space for the very human creativity it seeks. Langlois (2002) sees the human rights discourse as a tool for co-operation, providing a forum that will permit multi-cultural traditions of justice to find expression. The call here is for greater and more varied forms of participation that give life to human rights. Preis (1996) makes the point that underlying the "progressive" assumptions of many human rights texts, is the often subterranean assumption that development must emanate from centres of powers, such as states or international interests, through a staged process. What is needed, he argues, is better knowledge of human rights as actual existing practices, which accords priority to an understanding of human rights within everyday life (*Ibid.*, pp. 13–15).

What Preis and other scholars suggest is the importance of de-stabilizing the dominant human rights discourse; to move it out of its statist and legalistic orientation in ways that open it up to a plurality of voices – especially the marginalized. Again a similar question arises: How can new practices be developed that confront such challenges in human rights? In raising this and similar questions the issue put on the table is how to contribute to finding the spaces that enable human rights to continue to express emancipatory possibilities. How can the poor and the oppressed better use human rights possibilities to promote their emancipation?

In what follows we will explore which insights might be drawn in responding to these questions from the practices of poor South Africans who participate in a process of dispute resolution that harnesses human rights values, as they are locally conceived as tools in the construction of peaceful



existences. While these processes were not developed explicitly to address the questions raised above, they are certainly relevant to them, and they can be read as addressing elements of the debates we have just reviewed. We turn now to briefly outline these processes.

## 3. THE ZWELETHEMBA MODEL

Zwelethemba is the name of the urban area in the vicinity of Cape Town, in which the processes to be outlined were developed as a model for resolving local disputes in the townships (see Johnston & Shearing, 2003 for a fuller discussion of this development). The Zwelethemba – a Xhosa word that means country or place of hope – model creates a set of sustainable processes for resolving local disputes by using local resources. These resources are mobilized through a deliberative process constituted through the gathering together of local people who are invited through deliberation to develop a plan of action that will reduce the likelihood of the dispute continuing. This deliberative work is facilitated by local residents who constitute themselves as Peace Committees. Peace Committees vary considerably in size but are usually made up of between 10 and 20 people. In some of the areas were the model is operating (some 20 at the time of writing) Peace Committees operate along side state institutions (particularly police) that refer disputes to them and that receive cases from them. Peace Committees deal with a wide range of cases. The following break down of 13,544 cases processed from February 2000 to end of December 2006 provides an indication of the range of issues handled. Money lending was an aspect of the dispute in nearly half of all cases (47%) and other kinds of property offences nearly as often (43%). Domestic violence occurred as an issue in 21% of all cases, assaults in 15% and substance abuse in 10%. Approximately one forth of all conflicts arose as disputes among neighbours. Sixty four percent of the participants at the peace gatherings were women. Exit interviews conducted from 1998 to date show that approximately 95% of all participants experience the peacemaking process as very fair and an equal percentage that the gathering had improved the matter a lot. Average resolution time for a dispute was 2.7 days and 98% of the implicated reported that they thought the dispute was resolved quickly enough.

A key feature of the activity is that it is highly regulated. There are several features to this regulatory environment – a code of practice, procedures for facilitating deliberative forms, review sessions, exit interviews with persons

attending gatherings and community surveys. This set of regulatory tools seeks to promote values associated with human rights, both civil and political rights and economic, social and cultural rights.

In the following paragraphs, we draw on the results of a recent study of the activities facilitated by Peace Committees (that used both observational and interview methods) to explore the questions within the human rights debates we canvassed briefly above.

## 4. RECONCILING UNIVERSAL RIGHTS WITH LOCAL NORMS

In 1947 the American Anthropological Association issued a statement rejecting the idea that the Declaration of Human Rights had universal application, asserting that "rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single culture" (for a more recent discussion, see Pollis, 1996). Notwithstanding the influence of this position, a number of scholars have recently begun to look for ways of rescuing the idea of universal values. In trying to do so, the challenge has been to steer a path between strong versions of both universalism and particularism (Twining, 2006). In developing this line of thought Perry (1997) and Tilley (2000) distinguish between different versions of the relativist argument. Tilley demarcates methodological contextualism (the position that every custom, belief, or action must be studied in the context of the culture in which it occurs) from the claim of ethical or moral relativism, holding that any event or action can only be properly judged or appraised from within the normative context of the culture within which it arises. Radical relativism leads to absurdities, such that to morally criticize the norms of one's own culture is by necessity a wrong or ridiculous act. In challenging radical relativism he notes how some moral statements, like "torturing children, only for the fun of hearing them screaming is wrong" (*Ibid.*, p. 529) are difficult to reject from any cultural perspective. As Perry argues, claiming that cultural contexts are relevant "is a far cry from claiming that nothing, no act or failure to act, is bad and nothing is good for every human being" (Perry, 1997, p. 482; see also Fields & Narr, 1992, p. 20 and O'Manique, 1990, pp. 482–83).

Freeman (1994) in canvassing this issue distinguishes between those who emphasize contingency, construction and relativity, and those who try to locate objective foundations for human rights in reason or morality.



His own position is to see human rights as contingent, while at the same time insisting that core human rights values, like well-being and freedom, are not arbitrary, because they are respected across a wide range of cultures (see also Donnelly, 2001).

Others have sought to re-conceptualize how the universal character of human rights relates to the particularities of diverse collectivities. Langlois (2002), for example, argues that the concept of human rights does not make sense without a reference to universalism. The problem for him is that current discourses are often dominated by the moral and political interests embedded in Western concerns. A solution for Langlois would be to understand human rights as "a proposal for the rules under which people who pursue diverse goals in a complex, rapidly changing and highly interdependent world might hope to live in dignity and peace" (*Ibid.*, p. 495).

### *4.1. Zwelethemba-Reconciling the Universal and the Contextual*

These are similar to the debates that took place in the formation of the Zwelethemba process. These debates were embodied in a process of trial and error experimentation. A major concern during this process was the fact that participatory forms of governance within local South African communities have had a very chequered history, sometimes producing limited change and sometimes being hijacked for repressive ends. In response regulatory structures were developed that drew upon popular understandings of human rights. These debates look to general values as constraints that would regulate the way in which local knowledge and capacity were mobilized. While local knowledge and capacity should be given much reign in problem-solving, it should not, it was felt, reign supreme. Central to the regulatory constraint that the model embeds is a set of steps (rules) that structure the deliberative processes in ways that give all participants "rights" to be heard as well as a set of over arching values (seen as having wide community support) in the form of a code of practice. "Universalism" was introduced into this code through a reference to the South African constitution and to South African law. The code requires respect for law and the constitution. Within the model this code constitutes, and is seen as constituting, a "constitutional framework" that guides and limits what takes place locally. It establishes a language and meanings that are used in constituting "cases" and in developing resolutions. At this level of practice the universal and the local are seen as usually complementary. The universal here, however, is not understood as universal values that South Africans through the

processes that had founded a new South Africa had embraced. The assumption was there had been and would continue to be deliberative processes at the state level that canvassed and then endorsed proposals for values that would be treated by South Africans as universal in Langlois' sense. The universal here was seen as a product of a democratic state that had the support of local people and local collectivities. The universal-local distinction was constituted as a distinction between multiple deliberative forums (from general forums such as the national parliament all the way down to very local forums such as peace gatherings) with more general forums, both setting the frameworks for and trumping more local ones.

In the case of this process Peace Committees constitute themselves deliberately as having no adjudicative power or coercive powers, arguing that these are properly powers that only belong to state processes and state officials. For them, acting ways that respected the human rights of persons meant respecting state sovereignty in these realms, a classic Hobbesian position. What the processes of the model seek to do is to carve out a space for the local level, in which rights endorsed by deliberative forums at the state level, can be mobilized effectively to enhance democratic self-direction. This means that local people develop plans for creating peace in their lives that enable the voices of the poor and the marginalized to shape courses of action. Within the Zwelethemba model rights have a meaning within nested deliberative forums that promote self-direction.

One of the features of the code linking the universal with the particular is its argument that out of deliberative engagements – that draw on notions of deliberative democracy – dispute resolutions must be sought. These deliberations are structured to promote a future orientation that sees members of the Peace Committee acting as facilitators, rather than as judges, of local engagement. The key right mobilized within these processes is the equal right of every participant to democratic engagement. The character of these nested processes is illustrated in the following comments by Peace Committee members:

> ...Yes, I have the experience now. But I must still be able not to work as a judge. I must ask the questions that contribute to the solution, but I must remember not to be a judge. I have some questions to ask, like, "What do you think that the Peace Committee can do for you". And the second question, digging the root cause, we can ask is "What do you think caused this to happen..."[1]

> And we also ask the disputants; How do you think we [the participants at the Gathering] can deal with this, how can we help you?, so that we will have their input...[2]



### 4.2. Promoting Self-Direction

The Zwelethemba model uses general values that shape its regulatory architecture to promote spaces in which local knowledge (and values endorsed locally) can be mobilized to promote self-direction. In accomplishing this, the model encourages disputants, and others mobilized to assist in dispute resolution, to constitute spaces in which they can take charge of their lives directly – this is seen as "deepening democracy". One way to do this is by encouraging disputants to find consensual resolutions that will avoid disputes being transferred to state forums where resolutions will be imposed.

By way of illustration consider the following dispute involving a conflict between a married couple and the wife's brother and his girlfriend. The older sister of the siblings attended the gathering constituted to pursue a resolution. The married couple had allowed the brother to live in a dwelling in the backyard of their house with his girlfriend. For sometime their co-existence had not been peaceful. In particular, conflicts had arisen over the use of shared facilities. The unmarried couple used the main house for water and for toilet facilities. This had become a source of much irritation that lead to one conflict after another arising. Both couples had, it was claimed at the gathering, "spread rumours" about partners "sleeping around". The conflict had escalated into verbal and physical abuse – the wife of the married couple reported the incident to the police, who in turn referred the case to the Peace Committee. This referral took place within an arrangement whereby the local police recognized the Peace Committee as promoting forums for consensual resolutions that would avoid the necessity of having a resolution sought and imposed through criminal justice processes.

After an initial exploration of the incidents that led to the abuse, a Committee member drew attention to the norms of Xhosa culture as a way of building a platform around which to build a consensual resolution:

> The things you said about affairs are things that are said about single people, people who are not married, not to a married woman. This is a married woman, what you did was wrong running to her husband and telling him what she did. This is your sister, no matter what. I had a sister who just passed away, she used to curse at me and say I am a priest of the devil, but I never hit her, not even once. I used to live in her backyard ... I never answered her back because, really, it was her house.

Those present accepted this set of norms as applicable and ones to be drawn upon in establishing a resolution. The brother, however, argued that the problem lay not with the values but with the living arrangements which were

the source of the conflict. This was agreed. The Peace Committee in pursuing a resolution pointed to the availability of a municipal housing office where the dispute could be taken. If taken to these authorities it was argued they may well loose control of the resolution and may have to live with an imposed solution. This mobilization of Galanter's (1981) "shadow of the law" promotes the self-direction while at the same time pointing out that this could only take place so long as more universal norms were respected. In this case, it was the norm that non-state resolutions had to be consensual rather than imposed. In promoting self-direction they affirmed the law and its prescriptions, in particular those concerning the legitimate use of coercion. In responding to this encouragement to embrace self-direction the brother apologized to his sister. Further discussion revealed that the brother had already taken action to move out and that a "shack" had been erected on a site in another informal settlement. The gathering ended with a mutual acknowledgement of "mistakes" and with a Committee member inviting the wife to call on them again if the abuse continued. In making this invitation the Committee member referred to the fact that if self-direction failed, other state operated forums that could impose resolution might have to be engaged. She referred specifically to seeking a protection order from the courts.

This example confirms the model's recognition that deliberative forums are nested and that different forums have different characteristics and different implications for the way in which the value of self-direction is realized. If self-direction is recognized as a human right the Peace Committees can be seen as negotiating the terrain of nested forums to promote it.

## 5. RECONCILING TENSIONS WITHIN THE FAMILY OF HUMAN RIGHTS

A significant arena of debate within human rights discourses has been the extent to which development – economic, social and cultural rights – is recognized within the family of universal human rights. However, most scholars agree that there has been relatively little practical success in getting these "rights" included as genuine universal human rights – something incidentally that the South African constitution formally does. It is indicative that the relation between the human rights discourse and the prestigious Millennium Development Goals project of the United Nations (UN) is described by Alston (2005) as "ships passing in the night". In his view, neither the human rights nor the development communities have embraced this linkage with enthusiasm or conviction. Human rights continue to be debated



mostly at large international conferences and monitored by the UN Human Rights Commission, while development policies are still formulated and implemented by completely different institutions (Sano, 2000). Human Rights NGOs, having a significant voice within the human rights discourse during the last couple of decades, continue to focus almost exclusively on civil and political rights. Skogly (2002) proposes that the main reason that the UN and the human rights community continues to neglect economic and social human rights is that their violations are by far most frequently experienced by poor people. Poor people have been left out in the drafting and implementation of the instruments designed to protect such rights.

A link between development and rights has indeed been forged, but this has taken through the linkage of aid from wealthy nations to the willingness of host nations to support and promote the established conception of human rights as centred on civil and political rights (Skogly, 1990). This approach to rights has been linked within some of the rights literature to structural adjustment programmes promoted by international agencies such as the World Bank and the International Monetary Fund as both sets of initiatives prioritize "northern" concerns over those of the "global south". This has led to arguments from the "South" that southern regions should be wary of adopting policies in any arena that does not arise out of and resonate with their own concerns (Udombana, 2000). Mary Robertson (2004), the UN High Commissioner for Human Rights from 1997 to 2002, argues for the link between economic, social and cultural rights and practices that promote decision-making processes that include the poor and the marginalized.

In arguing along these lines, Felice (2004) questions the possibility of this happening as long as decisions on what should count as human rights are left to forums in which states are the principal players. Similarly Wellman (2000) argues for finding institutional mechanisms that will permit the inclusion of a plurality of actors, knowledges and institutions that extend beyond states. This requires institutional arrangements at various levels to facilitate this. In promoting this, Yamin (2005) proposes a search for innovative strategies in human rights which moves out of the entrenched dichotomy between the public and the private, identifies how power can be devolved to different groups, communities and individuals through their participation in decision-making forums that provide for an authentic transfer of power from the state, and establish forms of collaboration between traditional human rights communities and a broad range of other groups and social movements (*Ibid.*, pp. 1232–1239).

The motivation for the development of the Zwelethemba model lies in a similar interest in building institutional arrangements outside of state

institutions that would promote participatory decision-making. Therefore, we now turn once again to this set of processes and their implications for shifting beyond an understanding of rights that is constructed around political and civil rights.

At the heart of the Zwelethemba process is the notion that economic, social and cultural rights count. Or put differently, civil and political rights are of value if they are associated with processes that promote economic, social and cultural values at local levels. Human rights within the logic of the model must be seen to promote not simply individual rights but community well-being. There are several forms of community well-being that the Zwelethemba model promotes, the well-being that comes from the construction of peace as a foundational order as well as the well-being that emerges when self-direction is realized. In addition, the model seeks to put funds that can be used to promote development directly into the hands of Peace Committees. These committees are required to dispense these resources in ways that respond to local needs and concerns, as measured both through the deliberative processes of peace gatherings and through community surveys and gathering that bring people together specifically to identify collective needs and concerns. For every dispute that is resolved within the constraints of the regulatory framework a small amount of money is accredited to a Peace Building account to support developmental initiatives. Committee members are encouraged to develop plans in collaboration with other community members that use these funds (which have to date been provided by donor funding, in particular from the Finnish Government) to lever other resources both financial and in-kind. The conception lying behind this is to tie a dispute resolution or Peace Making process that respects individual human rights to a process that promotes economic, social and cultural well-being. The objective is to relate self-direction to development by establishing the possibility of self-directed development. This focus on Peace Building means that the emphasis is not simply on disputes but includes broader issues such as public health, food, shelter, waste management, education, recreation and the like. Peace is extended beyond a Hobbesian concept on peaceful co-existence through the provision of physical security to more general questions of human security (Wood & Shearing, 2007).

## 6. RECONCILING THE PAST AND THE FUTURE IN HUMAN RIGHTS

In the previous sections we have tried to demonstrate that it is possible to develop local models of dispute resolution that manage to reconcile



universal human values with local norms as well as to integrate different sets of human rights. In this section our focus shifts, as we discuss the role of "rights" in relation to how conflicts may be solved, in particular as to how a concern with the past and the future might be managed.

The criminal justice system has not been immune to the rise of human rights over time. The human rights community has been instrumental in promoting greater attention to the rules of due process for suspects and offenders. Criminal justice continues, however, to be based on some core assumptions as to how human conflicts should be managed: first, that it is reasonable to characterize a conflict as a crime with a defined offender and victim; secondly, that it is reasonable to respond to the crime through a past-oriented logic of retribution; and, thirdly, that a reasonable way of solving conflicts is to organize criminal proceedings as adversarial legal processes.

It is now well established that victims and offenders are frequently dissatisfied with the ways their problems are handled by the criminal justice system (Wright, 1996; Strang, 2002). Feminist legal analysis have questioned whether the dichotomous and adversarial character of legal rights may not be alien to women's experiences and have elaborated on the possibility of organizing legal processes with a stronger focus on outcome (Binion, 1995). Christie (1977), in particular, has been a spokesman for returning conflicts from the criminal justice system back to the society. In his view the criminal justice system "steals" conflicts that are needed within communities as a mechanism for reconciliation and growth.

A potential problem with the manner in which the criminal justice system constructs conflicts is that it is not always well adjusted to empirical realities, where thin and frayed lines may exist between offending and victimization. Parties to conflicts of some duration are often cast in long-lasting relationship where roles frequently alternate; the offender today might have been yesterdays' victim, and vice versa. Putting the blame where it belongs becomes a more complicated matter than thinking about crime as isolated instances of harmful behaviour. Christie (1977) once argued that Barotse law, "allowing the conflicting parties to bring in the whole chain of old complaints and arguments...", might have been a good instrument for norm-setting and problem-solving on many occasions. What this might indicate is that the process of seeking to reveal the chain of causes through which a conflict has nurtured and intensified, and debating the consequences thereof for the parties involved, might be significant elements of a restorative form of problem-solving. Christie seems to suggest that conceiving of the conflict as a one-incident encounter with clearly defined

roles might sometimes constrain the collective attempt to search for fair and reasonable outcomes.

Moore (2004, p. 88) suggests that it might actually be more fruitful to think of conflicts and relationships as "managed", more than resolved, through legal (or restorative) processes. In recommending a more future-oriented way of thinking he claims that "[T]here may be less transformation as a result of the process, and more transformation as a result of the outcome. Change comes from an action plan that is put into practice..." (*Ibid.*, p. 89). Within such a future-oriented approach to justice the primary objective might be defined as to offer disputants a hope for a better and more peaceful tomorrow. The reasoning of these scholars seems to indicate the possibility of a more open-ended experience of justice, beyond the assumption of legal practices (Pavlich, 2002, p. 98).

As argued by Yamin (2005) there are significant limitations when relying too heavily on litigation and court-centric strategies to address human rights violations. She emphasizes the necessity of advocacy strategies that move beyond adversarial, dyadic relationships that state problem solving forums tend to promote to ones that give a greater role to non-state actors. She argues that contemporary innovative human rights advocacy concern itself with:

> Understanding and promoting the enabling conditions in which people can feel themselves to be self-authorized subjects who can then claim and use the tools necessary to enjoy their different rights. (*Ibid.*, p. 1222)

### *6.1. Avoiding a "Crime" Construction*

According to the Zwelethemba model, individuals directly involved in the conflict are understood as participants or "parties" rather than "victims" and "offenders". The victim/offender binary is viewed within the model as serving to separate, exclude and to pre-judge. In practice it is commonplace for a "case" brought to the attention of local peacemakers (called "Peace Committees") to be regarded as no more than a single slice in time that should be located within a history of conflict between the parties. Within this context the "offending" party and the "harmed" party may, and probably do, change places over time. In other words, today's "offender" may have been yesterday's "victim". The model is based on the argument that the language of "victim" and "offender" structures the meaning of what happened in the past in ways that make it difficult for parties involved to understand and articulate their own reality or lived experience.



### *6.2. Identifying Root Causes*

The model does contain a backward-looking mechanism, but not one that is focused on the blaming or shaming of the behaviour of a pre-defined offender. Instead, the disputants and other participants are encouraged to engage in a collective search for underlying "root causes" that have contributed to the dispute. Before a solution is reached, it is regarded as important to reveal the series of events that has contributed to and nurtured the conflict:

> ... It is important to follow the steps. It can be very dangerous to go too quickly for a solution. You must first see what the cause is. For instance, if one of the disputants cries, show regret, that is not enough, you must ask and tell, try to locate the cause. If not, people will do it again. Before the solution, you must find the underlying cause. You must not jump at a solution. That can be very dangerous...[3]

### *6.3. A Future Orientation*

The goal of Peacemaking Gatherings is the establishment of a future-oriented solution to the conflict that will "make for a better tomorrow" that most, and ideally all, parties present agree to. In this regard, the model stresses a deliberative approach that end in consensus building (Shearing & Wood, 2003). The model is designed, to borrow from LaPrairie (1995, p. 80), "...to return the conflict to its rightful owners..." (see also Christie, 1977). During the Peacemaking Gathering, or at its termination, it may indeed be the case that considerable affect (anger, sadness, remorse, etc.) is displayed, but emotional transformation is not the goal of the process. It is regarded as "nice if it happens" but not as essential. The goal is instrumental. The key question guiding the peacemaking process (and the set of steps established for this) is, "how do we make a better tomorrow?" This focus on the future has its roots in the life experience of poor people who are required daily to get on with the business of living. With its instrumental focus on the future, the process may produce the outcome of reintegration as described by Braithwaite (1989) but once again reintegration is a "nice if it happens" consequence but not a goal.

Accordingly the term "reintegration", however, is not an appropriate one to use in characterizing this local capacity model, as it suggest that there existed a prior collectivity (small or large) to which an individual or individuals were bound to, or integrated with. This is certainly not always or even usually the case. The notion of reintegration implies that a certain

relationship or "bundle of life" that needs to be "restored". This may indeed be the case, and this restoration process may indeed be an outcome of a Gathering. However, living in peace and making a better future may simply involve an agreement between parties that they will avoid each other in the future and an agreement by their associates that they will work to ensure that this happens.

An example from Zwelethemba serves to illustrate this. One of the conflicts brought to a Zwelethemba Peace Committee was by neighbours of a family who were worried that the ongoing conflict between a daughter-in-law and her husband's mother would escalate into serious violence. A Gathering was convened of the persons regarded as most likely able to contribute to a resolution of the conflict. The invitation to the Gathering was to persons who were seen in a position to be helpful in an instrumental sense – they were not invited to attend as "supporters" of the conflicting parties. The Gathering quickly concluded that the chances of restoring a "happy family", if there had ever been one, were minimal. The Plan of Action agreed to involve moving the son and the daughter-in-law's informal house to another part of the township far away from the mother-in-law.

### *6.4. Justice as a Future Guarantee of Peace*

The uniqueness of the Zwelethemba model, compared to both retributive and some restorative justice arrangements, is that the matters of dispute are not addressed through a backward-looking process that seeks to balance wrongs with burdens but through a forward-looking one that seeks to guarantee that the disputants' moral goods will be respected in the future. Contrary to what one might expect from the discourses of many moral philosophers with a deontological approach, this is experienced by the parties to the dispute, and by members of the community, as both a just and an instrumentally effective outcome. Justice, as a moral outcome, is given meaning within a future-focused framework (Shearing & Johnston, 2005).

### *6.5. Increasing the Likelihood that Agreements will be Honoured*

Reaching agreements is not sufficient. The credibility of the model also depends on the degree to which the agreements are honoured by the parties to the conflict. The likelihood for future peace, however, is related to the way that agreements are reached. The Zwelethemba model underscores that



resolutions must be reached by the disputants themselves and never enforced upon them by others. It is considered to be important to check if that is indeed the case. As one PeaceMaker pointed out:

> ... It is important to use time, because of the solution and the peace. Both disputants must feel free, be satisfied. We must know that the agreement is the right one. At the end, we will see it in their faces, that it is correct. That it brings the peace. We often ask the friends and relatives who are present if they think that the solution is correct...[4]

Because the status of the Peace Committees is so closely related to the likelihood of agreements being honoured they are forced to take this issue very seriously. A Peace Gathering organized in Khayelitsha in May 2003, attended by one of us, helps to illustrate this point. The dispute concerned a money-lending issue, for which a solution was not so difficult to reach. The agreement entered into by the parties was that the husband of disputant number two would pay disputant number one Rands 200 a month, until the agreed upon amount had been paid. However, when, for a variety of reasons, no one else was present at the meeting beside the disputants and the PeaceMakers they decided to arrange for a new Peace Gathering. The Peace Committee felt that it was necessary to commit additional members of the disputants' families and community to the agreement, particularly the husband of disputant number two, as he was to be the source of the money to be paid.

A follow up study was recently conducted to evaluate the extent to which the peace agreements entered into had been kept by the disputants for a period of three to six months after the gathering. Twenty-five cases of dispute resolution organized by three PeaceCommittees were randomly selected for study and a total of twenty-six disputants were interviewed. In 16 of 17 cases in which the interviewers were able to get hold of one or both of the disputants (others had moved, were drunk or were otherwise un-accessible, witnessing to the fragility of life in the townships) the peace contracts were acknowledged to have been honoured. No disagreement of opinions was registered in those cases when both parties to the dispute were interviewed. Only in one case was the status of the agreement more ambiguous. Twenty-two of the disputants were overwhelmingly positive of the Peace Gathering process they had experienced, confirmed that they would use the model again if required, and stated many reasons for why they preferred Zwelethemba to other forms of public or private justice. Besides being satisfied with the process and the outcome, disputants frequently reported that they preferred the Peace Committee due to its capacity for solving conflicts "in a rational way", "just sitting down and talk", with "no violence involved". Many also emphasized

how the model made it possible to solve conflicts before "things go too far" and without people getting arrested and being put in jail. Four disputants had more mixed feelings towards the process, two of whom were quite negative because they did not get the outcome they wanted from the Gathering.

### *6.6. Monitoring the Peace Agreements*

An important function to increase compliance with the peace contracts is to monitor the implementation of action plans. One or several of the participants at a Gathering, frequently, but not always, members of the Peace Committee, are selected to make sure that those who have committed themselves to the peace contract fulfil their promises. Compared to other community structures involved in solving local conflicts the Peace Committees appear to put more emphasis on this function, as one representative of a civic organization (SANCO) in Khayelitsha noted: "We do see that the peace committee uses much more time to follow up cases, we do not have the capacity for that."[5] The members of the Peace Committees recognize that the capacity to monitor agreements is an important and advantageous feature of their practice:

> ... Most of the disputants follow up the agreement. If some do not, we try to encourage them to keep their promises. For instance, in money-lending cases, we ask: "Could you manage to pay 50 R a month", like that. We try to encourage the disputants to keep their promises. People say to us: "We like the way you follow up". The monitoring, it is important for being trusted. Monitoring, we think of it as marketing...[6]

### *6.7. Preventing Escalation*

In considering the activities of Peace Committees, it is not just the work that they do that is significant, but the counterfactual possibilities avoided. While disputes are for the most part minor, and easily handled, they could easily have escalated into more serious disputes. The dispute resolution activities of Peace Committees are seen, from a police perspective, as a demand reduction mechanism that frees valuable resources for other activities. Further, had disputants taken their dispute to other less regulated popular forums the "resolution" itself might have escalated the disorder (Nina, 2001).

From the standpoint of transition to a democratic society PeaceMaking gatherings operate as a terrain in which democratic and human rights values are being enacted as routine local practices. This contributes to a culture of democratic deliberation.



## 7. CONCLUSION

As Goodhart (2003) has suggested, one way of thinking about the universality of human rights is as a question of effectiveness in achieving particular values. If so, we need to distinguish between different ways of structuring processes which we organize to attain such values. Uncoupling values from processes opens a conceptual space that allows one to scrutinize the extent to which such values can be effectively realized through different kinds of institutions and mechanisms (Shearing, Wood, & Font, in press). It is quite possible that justice is delivered and human rights protected through forms of practices that are not explicitly established or normally recognized as promoting such values.

In this paper we have presented a model of local conflict management, developed in South Africa that, while not being conceived as a Human Rights NGO, in practice promotes as range of such values. We have underscored the capacity of the model to reconcile core tensions in human rights, as conceptualized by scholars and practitioners. The model negotiates a terrain of nested PeaceMaking and PeaceBuilding forums that mobilize local knowledge and norms within the limits of rules and principles associated with universal rights, that allow for a dual approach to civil/political and developmental human rights, and that combines a concern for the past with a strong emphasis on the prospects of building a more peaceful tomorrow.

As a conclusion we hope to have illustrated that a bottom-up perspective, emphasizing the relevance and potential of local human rights-oriented practices, such as the Zwelethemba model developed by poor and marginalized communities in South Africa, might have something to offer the human rights discourse and the human rights community. The time seems to be ripe to embrace a "nodal approach" to human rights. It is becoming more and more obvious that a state-centred focus is insufficient. The future challenge lies in finding new ways of building alliances among a range of actors, knowledges and capacities in human rights.

## NOTES

1. Member of the Khayelitsha Peace Committee, individual interview, May 2003.
2. Member of the Mbekweni Peace Committee, group interview, May 2003.
3. Member of the Nkqubela Peace Committee, interview no. 1, May 2003.
4. Member of the Mbekweni Peace Committee (Lonwabo), group interview May 2003.

5. Member of the civic organization (SANCO) in Khayelitsha, interview no. 14, May 2003.
6. Member of the Khayelitsha Peace Committee, interview no. 11, May 2003.

## REFERENCES


Alston, P. (2005). Ships passing in the night: The current state of the human rights and development debate seen through the lens of the millennium development goals. *Human Rights Quarterly, 27*, 755–829.

Alves, J. A. (2000). The declaration of human rights in postmodernity. *Human Rights Quarterly, 22*, 478–500.

Baxi, U. (2002). *The future of human rights*. Delhi: Oxford University Press.

Binion, G. (1995). Human rights: A feminist perspective. *Human Rights Quarterly, 17*, 509–526.

Braithwaite, J. (1989). *Shame and reintegration*. Cambridge: Cambridge University Press.

Chandler, D. (2001). The road to military humanitarianism: How the human rights NGOs shaped a new humanitarian agenda. *Human Rights Quarterly, 23*, 678–700.

Christie, N. (1977). Conflicts as property. *British Journal of Criminology, 17*, 1–15.

Donnelly, J. (2001). The universal declaration of human rights: A liberal defense. *Human rights*. Working Papers, No. 12, http://www.du.edu/humanrights/workingpapers/papers/12-donnelly-02-01.pdf

Douzinas, C. (2000). *The end of human rights*. Oxford: Hart Publishing.

Erman, E. (2005). *Human rights and democracy. Discourse theory and global rights institutions*. Aldershot: Ashgate Publishing.

Felice, W. (2004). Respecting, protecting and fulfilling economic and social rights: A UN security council? *Human rights & human welfare*. Working Papers, No. 12.

Fields, A. B., & Narr, W-D. (1992). Human rights as a holistic concept. *Human Rights Quarterly, 14*, 1–20.

Fitzpatrick, P. (2006). Is humanity enough? The secular theology of human rights. *Human rights & human Welfare*. Working Papers, No. 32.

Forsythe, D. P. (2005). International humanitarianism in the contemporary world: Forms and issues. *Human rights & human welfare*. Working Papers, No. 22.

Freeman, M. (1994). The philosophical foundation of human rights. *Human Rights Quarterly, 16*, 491–514.

Gaay de Fortman, B. (2001). Laborious law. *Human rights*. Working Papers, No. 15, http://www.du.edu/humanrights/workingpapers/papers/15-degaayfortman-09-01.pdf

Galanter, M. (1981). Justice in many rooms: Courts, private ordering and indigenous law. *Journal of Legal Pluralism and Unofficial Law, 19*, 1–48.

Goodhart, M. (2003). Origins and universality in the human rights debates: Cultural essentialism and the challenge of globalization. *Human Rights Quarterly, 25*, 935–964.

Guilhot, N. (2005). *The democracy makers*. New York: Columbia University Press.

Habermas, J. (1988). Law and Modernity. In: S. M. McMurrin (Ed.), *The tanner lectures in human values* (Vol. 8). Salt Lake City: University of Utah Press.

Habermas, J. (1997). *Legitimation Crisis*. Cambridge: Polity Press.

Johnston, L., & Shearing, C. (2003). *Governing security: Explorations in policing and justice*. London: Routledge.





Langlois, A. J. (2002). Human rights: The globalisation and fragmentation of moral discourse. *Review of International Studies, 28*, 479–496.

LaPrairie, C. (1995). Some reflections on new criminal justice policies in Canada: Restorative justice, alternative measures and conditional sentences. *The Australian and New Zealand Journal of Criminology, 32*, 139–152.

Mertus, J. A. (1999). Doing democracy differently: The transformative potential of human rights NGOs in transnational civil society. *Third World Legal Studies (1998–1999)*, 205–234.

Moore, D. B. (2004). Managing social conflict – The evolution of a practical theory. *Journal of Sociology and Welfare, 31*, 71–91.

Nina, D. (2001). Popular justice and the 'appropriation' of the state monopoly on the definition of justice and order: The case of anti-crime communities. In: W. Scharf & D. Nina (Eds), *The other law: Non-state ordering in South Africa* (pp. 98–120). Lansdowne: Juta.

O'Manique, J. (1990). Universal and inalienable rights: A search for foundations. *Human Rights Quarterly, 12*, 465–485.

Otto, D. (1996). Nongovernmental organizations in the United Nations system: The emerging role of international civil society. *Human Rights Quarterly, 18*, 107–141.

Pavlich, G. (2002). Deconstructing restoration: The promise of restorative justice. In: G. M. Weitekamp & H.-J. Kerner (Eds), *Restorative justice. Theoretical foundations* (pp. 90–109). Cullompton, UK: Willan Publishing.

Perry, M. J. (1997). Are human rights universal? The relativist challenge and related matters. *Human Rights Quarterly, 19*, 461–509.

Pollis, A. (1996). Cultural relativism revisited: Through a state prism. *Human Rights Quarterly, 18*, 316–344.

Preis, A-B. S. (1996). Human rights as cultural practice: An anthropological critique. *Human Rights Quarterly, 18*, 286–315.

Sano, H.-O. (2000). Development and human rights: The necessary, but partial integration of human rights and development. *Human Rights Quarterly, 22*, 734–752.

Shearing, C., & Johnston, L. (2005). Justice in the risk society. *The Australian and New Zealand Journal of Criminology, 38*, 25–38.

Shearing, C., & Wood, J. (2003). Governing security for common goods. *International Journal of the Sociology of Law, 31*, 205–225.

Shearing, C., Wood, J., & Font, E. (in press). Nodal Governance and Restorative Justice.

Skogly, S. I. (1990). Human rights reporting: The "nordic" experience. *Human Rights Quarterly, 12*, 513–528.

Skogly, S. I. (2002). Is there a right not to be poor? *Human Rights Law Review, 2*, 59–80.

Smith, J., Pagnucco, R., & Lopez, A. (1998). Globalizing human rights: The work of transnational human rights NGOs in the 1990s. *Human Rights Quarterly, 22*, 379–412.

Stammers, N. (1995). A critique of social approaches to human rights. *Human Rights Quarterly, 17*, 488–508.

Strang, H. (2002). *Repair or revenge. Victims and restorative justice*. Oxford: Clarendon Press.

Tilley, J. J. (2000). Cultural relativism. *Human Rights Quarterly, 22*, 501–547.

Twining, W. (2006). Human rights: Southern voices. Francis Deng, Abdullahi An-Na'im, Yash Ghai, and Upendra Baxi. *Review of Constitutional Studies, 11*, 203–279.

Udombana, N. J. (2000). The third world and the right to development: Agenda for the next millennium. *Human Rights Quarterly, 22*, 753–787.

Wellman, C. (2000). Solidarity, the individual and human rights. *Human Rights Quarterly, 22*, 639–657.
Wood, J., & Shearing, C. (2007). *Imagining security*. Cullompton, UK: Willan Publishing.
Wright, M. (1996). *Justice for victims and offenders. A restorative response to crime*. Winchester: Waterside Press.
Yamin, A. E. (2005). The future in the mirror: Incorporating strategies for the defense and promotion of economic, social and cultural rights into the mainstream human rights agenda. *Human Rights Quarterly, 27*, 1200–1244.

# JUSTICE AND HUMAN RIGHTS FOR ABORIGINAL PEOPLES IN SASKATCHEWAN: MAPPING THE ROAD AHEAD

James P. Mulvale

## 1. INTRODUCTION

Aboriginal peoples living in what is now known as the province of Saskatchewan, Canada, have experienced great troubles and systematic injustices in their dealings with the white man since his arrival in their territory over three centuries ago. In this chapter, I will outline the effects of racism, internal colonialism, and cultural genocide as manifested in the interactions of Saskatchewan's Aboriginal peoples with the contemporary criminal justice system. I will also examine proposals for changes in the criminal justice system, and more broadly in the relationship between Aboriginal peoples and political institutions and social formations in Canada. Specifically, I will examine how the reports and recommendations of three landmark public commissions of inquiry into Aboriginal peoples and the criminal justice system have shaped and advocated these proposals for change. The Royal Commission on Aboriginal Peoples worked at the national level and carried out a very comprehensive examination of the social, legal, constitutional, and institutional relationships between

**Crime and Human Rights**
**Sociology of Crime, Law and Deviance, Volume 9, 215–238**

**ISSN: 1521-6136/doi:10.1016/S1521-6136(07)09009-4**