Can we mix litigation and mass-democratic mobilisation? Critical reflections on current community-based legal challenges in the Eastern Cape, and the lessons of the 1980s and 1990s

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The last five years has seen a spate of community-bas ed litigation against corrupt and incompetent local state in the Eastern Cape, as well as against heavy-handed interventions by the provincial state. The UPM won a High Court case in January 2020, the provincial state being instructed to dissolve the Makana council for human rights violations arising from abject failures in services and infrastructure. in June 2020, the provincial state settled out of court with Let's Talk Komani in June 2020, fending off a dissolution of the Enock Mgijima municipality by agreeing to a financial recovery plan.

Both municipalities have been also been found guilty of rampant failure in a rash of separate cases. For example, a separate case by the Legal Resource Centre against Makana was heard in May and June 2020: the Centre represented residents afflicted by yeas of sewage spills around their homes. Meanwhile, the Amadiba Crisis Committee has used the courts for relief against planned mining on the Wild Coast. There have been parallel processes in other provinces as well, notably efforts for relief from evictions in eThekwini, or Durban, by the *Abahlali baseMjondolo* shack-dwellers' movement.

What I want to do in this input is three-fold:

- To consider the successes as well as the limitations of litigation as a method of struggle;
- To look back at 1980s and 1990s debates on the use of the law by civil society; and
- To consider the deeper structural roots of the problems that we face.

The overall intent is to open a discussion on the implications of this mode of struggle, for coalition-building, for movement-building and for self-activity by ordinary people.

The possibility for litigation

South Africa's legal system makes numerous commitments to the importance of the citizenry, or human rights, and of democratic and developmental government. These commitments were imprinted on the state by the massive struggles of the 1980s and early 1990s against the authoritarian apartheid state. Although those movements – with the exception of the unions – have largely withered away, their legacy remains in the law.

Successes

This situation has opened up space for community-based litigation to challenge state authorities on the grounds of failure to meet these legal mandates. The outcome of successful cases is that authorities are then ordered to make some form of correction.

This can involve measures to run existing policies and systems better. For example, the 2019-2020 UPM case led to the Grahamstown High Court instructing the provincial state to dissolve the existing municipal council, and place it under provincial administration. Essentially the municipality would be fixed from outside, with its basic systems repaired according to a plan.

Or it can involve measures to change policies. For example, the actions of the Amadiba Crisis Committee led directly to a September 2020 High Court judgment providing mining-affected communities access to private sector development applications for the first time.

Some successes from litigation

We can see several positives from these cases:

1. It is clear that courts can sometimes provide protection for ordinary people, so long as they have some autonomy. Even under apartheid, it was possible to win some cases e.g. the Alexandra Treason Trial, which saw men like Moses Mayekiso on trial for treason, facing death, was won by the defendants.

2. The cases emerge in the context of years neglect and high-handed actions by senior state officials. The cases have shaken these officials, as they have exposed wrong-doing in the highly respected arena of the courts; they have attracted enormous public attention; they have threatened direct material consequences for senior officials, including loss of employment and personal liability for court cases. For example, the judgement in favour of the UPM included costs being charged against the Mayor and Municipal Manager in their personal capacity, as well as to the state. This does shift things a bit, after years of arrogant and evasive replies and empty promises.

3. The cases have led to orders for redress. For example, the 2020 sewage case in Makhanda saw the court order the Makana municipality instructed to act within 15 days to stop the spills at the places indicted by the residents.

4. Several cases have led to rulings that have general application, that is, which apply to the whole country and not just to one municipality or area or problem. The High Court judgement granting mining-affected communities' access to private sector development applications for the first time is, for example, a water-shed in opening up information previously reserved for politicians and big business. Similarly, it may be that the ruling in the UPM case, that a municipality can be dissolved on Constitutional grounds – i.e. not just for doing its job badly, but for doing it so badly that it violates human rights – can set a precedent to be applied in other cases.

5. It is absolutely essential to defend the core human rights that were written into the Constitution, through the force of the mass of the people in struggle in the 1980s and 1990s. Court cases – to the extent that they expose wrong-doing and affirm those principles – play a role in this process.

6. The court cases have also enabled coalition-building in South Africa's fractured towns. Since all residents are affected by issues like failing water and road systems, and threatened ESKOM cut-offs for municipalities who fail to pay for power, there is a common interest. This has led to alliances across suburbs and townships, something almost unheard-of a decade ago. There are some positives to this situation, including township residents getting access to research and legal services. These cases have also helped draw together sectors like churches, youth groups and trade unions.

Some problems with litigation
We can see several problems from these cases:

1. The legal route is just that, a legal route. This includes numerous opportunities for challenges. Former President Jacob Zuma is famed for his use of "Stalingrad" tactics in the courts. This refers to using lawyers to fighting over every single issue in every possible way to drag out the matter as long as possible, effectively preventing implementation of rulings, to remove momentum by creating fatigue with cases as they drag out for years, even decades, and by seeking every possible way to undermine, weaken and if possible, overturn any negative ruling. He is of course not alone in this approach.

   The Makana municipality dragged out the UPM court case throughout 2019, and, after the Judged ruled, has taken the matter on appeals. So, right now, we still have the same council, and even if an administrator came in now, she or he would only have a limited time to work before the next local government elections. So far, however, the municipal council has not been dissolved, and the case – if we count from day one – has taken almost two years.

2. The legal system is geared towards the rich. I simply mean that while the law does indeed, and correctly, deem everyone equal, the use of the legal machinery is expensive.

   For example, officials are usually involved in the sort of cases we are discussing, in their official capacity, such as Mayors. This allows them to draw on state finances to argue their case, and fund their appeals. They are enabled, in this way, to engage in Stalingrad tactics. By contrast, movements have to pay their own costs, or rely on *pro bono* (free) work by lawyers and advice centres.

   So, while the Makana municipality, the provincial government and the Minister dealing with local government can dip into the deep pockets of the state – filled by the very same citizens they are fighting, through taxes and licenses – the UPM relies on the generosity of a leading lawyer in the town.

3. There is a wide gap between a ruling and a reality. This has several parts. There is a long record of municipalities and other parts of the state ignoring rulings. The Makana council, for example, has been found in contempt of court for failing to manage the municipal dump properly. The court ruling to fix the dump was five years ago: September 2015. The Mayor and Municipal Manager were given six-month jail sentence, suspended if the dump is fixed. The municipality now claims to have fixed the dump, but you are welcome to judge for yourself. Makana has twice been sent under special administrators, although not placed under full administration: first Pam Yako (five years back) and then Ted Pillay (three years back) both as turnaround specialists. Each served a limited period and faced staunch resistance by entrenched interests. Yako's turnaround plan was never implemented after she left, while Pillay's tenure was sabotaged by councilors and managers.

4. The problems in the state are not just about the law. The use of litigation reflects widespread frustration and anger with the state. Litigation deals either in seeking redress within the existing framework, or relatively minor changes to the existing framework. The problems however are rather deeper. To understand the crisis on municipalities, for example, we have to consider a host of factors:

   - Many municipalities are under-funded. Although this is often blamed on low rates of payment in township areas, these areas have always made a marginal contribution

to municipal revenues, going back to the 1920s. The bigger picture is that central government grants to municipalities fell sharply by the mid-1990s, with more pressure to raise funds locally, while demands on municipalities ratcheted up as they were tasked with upgrading townships – a job neglected for decades. Meanwhile urban populations grew rapidly.

- Municipal governance has become much more complicated, with a system of decentralized tenders combined with a push to outsource numerous functions to the private sector, and a complex system of drawing down central government grants. At the same time, municipal administrative capacity is often poor, and certainly declining in many cases. Work by Ivor Chipkin and others has shown that there are serious staff shortages at managerial level across the country.
- This problem is worsened by cadre deployment, where people are appointed and protected on the basis of political loyalty rather than skills, and by the revolving-door syndrome, where senior officials in unelected posts develop careers and gain promotions by chasing new government jobs in other departments, levels and areas.
- On top of this, we have serious corruption. This is enabled by administrative failure, by a lack of serious consequences for wrong-doing -- not very much happens besides being chided by the Auditor-General – and by the complexities of the tendering system, that sees individual municipalities dealing with hundreds of separate contractors. Let me stress here that limited municipal capacity did not start in 1994; rather, from 1994 limited municipalities were given bigger mandates, more complex systems and more demands, while losing money and long-term staff.
- Corruption should also not be reduced to the bad behavior of a few, or a relic of the large-scale "state capture" project of the Zumaites. There is a long history of corruption in the Eastern Cape, where the core of the provincial government was inherited from the old Ciskei and Transkei homelands, and where the old "white" part of the state was far from clean. Corruption has developed into an endemic condition, and will not be solved by removing a few individuals. Two major factors drive corruption: one, the formation of a new black bourgeoisie through the state, which is under-capitalised and locked out of major private sector operations by large, historically-white-run corporations, relies on the state to accumulate wealth, especially through the tendering processes and through control of means of production through the state itself, as with ESKOM; and second, the fact that the class survival of this elite *requires* state office, also leads it to engage in systems of patronage within and through political parties and state structures, so as to have a bought base of loyalists.

5. Litigation, by its nature, is not a movement. A movement can make use of the law, but this is through lawyers, and relies on judges. By its nature, litigation always involves the cost of keeping the movements in the role of spectators during the game – even if they can advise before the game, and at half-time.

Movements and the law: 1980s and 1990s debates on the use of the law by civil society

The South African state, as I have indicated, has long been a legalistic one, despite its many oppressive features. The 1920s, for example, saw the Industrial and Commercial Workers Union (ICU) engage in litigation on a range of issues, as well as the establishment of a state-run industrial relations system that gave (some) unions legal rights subject to them following processes of dispute reosluytio.

The heavy repression of the early 1960s led a significant number of activists to reject use of the state, arguing that it was "fascist." This analysis, while capturing some of the brutality and racism of

the old state, was nonetheless flawed. For example, the leaders of MK – including Nelson Mandela and Vuyisile Mini – did have their days in court, represented by able lawyers like George Bizos, with mixed results: Mandela got a life sentence while Mini was hanged at Pretoria Central.

1) The "registration debate": the law and the unions

In the 1970s and 1980s, the question of whether the courts could be used was placed in sharp relief by the new wave of trade unions. This started in the early 1970s. It involved a mixture of newly formed unions, such as the Metal and Allied Workers Union, the core of what is today the largest manufacturing-based union in Africa, the National Union of Metalworkers of South Africa (NUMSA), and revitalized older such as the Food and Canning Workers Union, dating back to the 1940s, of which Neil Aggett, who died in an apartheid jail cell, was a militant.

Faced with the rise of the new unions, as well as a larger economic and social crisis, the apartheid state took steps to deracialise the existing industrial relations system. This was a state-run industrial relations system which had been established in 1924, but it only applied to some sectors, and only to Coloured, Indian and white workers.[1] By 1982, a reformed system was in place: black African workers were now given the same rights, in the same sectors, as workers of other races.[2]

To use the system, the new wave of unions would have to register with the state, comply with certain rules. But registration would provide access to rights and procedures that could benefit workers, such as industrial courts to resolve disputes, industrial councils which were bargaining forums that could produce legally binding deals, and protected strikes, in which workers could strike without being fired.

On the other hand, the industrial relations system was part of the apartheid state, which was highly oppressive and had laws that could, for example, lead to jail-time for political activities. The apartheid state openly argued that it hoped that involving the new wave of unions in this system would pacify them. The industrial relations system had been established in the 1920s following massive strikes by white works, including an armed insurrection in 1922 in Gauteng, and had certainly helped pull the teeth of the most Coloured, Indian and white unions in the years that followed. It was hoped that the 1980s extension of the industrial relations system would have the same effect on black unions.

The way this worked was the industrial relations system was run by the state and required union leaders to be involved in lengthy official procedures. For example, strikers would only be protected from dismissal if a strike was called after unions followed a lengthy process of engagement, provided notice and agreed to the no-work-no-pay principle. In many cases, more than 30 days would elapse before a protected strike was possible. Union leaders, immersed in the processes, became more distant from the members they represented, with members pushed out of activity.

And last, the reforms in the industrial relations system were part of a larger project by the apartheid state to contain struggles, and to win over black, Coloured and Indian allies.

So, this was the context for what became called the "Registration Debate." The new wave of unions was basically split on the issue.

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[1] It excluded agriculture, domestic servants, and provided minimal (sometimes no) rights in a wide range of sectors deemed essential e.g. the civil service, universities, health, railways and other state corporations.

[2] The same basic exclusions and qualifications remained in place. Moreover, south African law did not allow in self-governing and so-called "independent" homelands, which created additional exclusions that the other races did not face.

One side argued against registration, and against participation in the reformed industrial relations system, on the following grounds:

- The reforms were meaningless, cosmetic measures. The larger apartheid system was the problem, and could not change. What was needed was a new society. Therefore, unions could not use the reformed industrial relations system as it could not deliver any gains.
- Registration would lead to the new wave of unions being captured by the state. Union leaders would be drawn into government processes, and end u controlling the unions on behalf of the government. Mention was made of how the labour laws had pacified the older Coloured, Indian and white unions.

The other side disagreed. Represented by what was then the largest body of unions, the Federation of South African Trade Unions (FOSATU, not to be missed up with today's COSATU), it argued for registration and participation on the following grounds:

- The reforms provided important gains. For example, they would allow black workers the right to go on strike without immediate dismissal. Rather than unions being devastated if they lost strikes, with mass dismissals, they could retreat intact.
- Reforms would allow more reforms. For example, with careful planning, it would be possible to do massive – but protected –strikes, which could win more gains
- Unions could retain their autonomy so long as the leaders involved in the negotiations remained under strict control of the members. For example, all deals had to be agreed by the membership – not unilaterally signed by leaders.
- It is also perhaps worth mentioning that use of the industrial relations system had never completely pacified the Coloured, Indian and white unions. A significant number remained quite political, with older Coloured unions especially, throwing themselves into the new wave of unions and working closely with bodies like MAWU.

In the end, most unions followed FOSATU's lead, and registered, participating in the reformed industrial relations system. They used this to expand the system, which today covers almost every single worker. They combined this with mass action and popular mobilization, which allowed them to block attempts to revise the industrial relations system and the laws on which it was based, to the disadvantage of workers. A notable example was the mass campaign against proposals to reduce rights in 1987-1988, and mass struggles in 1995 to extend the industrial relations system to all workers, including farmworkers, who were previously excluded.

However, ordinary workers' control of leaders using the industrial relations system has generally broken down. Many unions have become more centralized and top-down.

For example, a massive strike in the state sector in 2010 drew together hundreds of thousands of workers from more than a dozen unions, across racial and party lines. The strike was called off by the main unions when the leaders made a deal in the bargaining council. Ordinary members were not given any opportunity to choose whether to accept or reject the deal. They were sent home instead. Many were angry, and felt they could not trust the leaders; also, that they had wasted their time, while union leaders had been focused on making a deal with politicians. This was very different to the 1980s FOSATU approach, when deals could not be signed without members' consent.

Meanwhile employers have become more astute in using the system leading to paralysis in large parts of the system.[3]

I think we can learn a few major lessons from this debate, and from what followed:

[3] Especially the CCMA, which has massive backlogs and in which workers are often poorly represented.

- It is possible for movements like unions to use state-run dispute resolutions systems, including courts, to win gains.
- The playing field is not level. The law and the state-run systems operate in a highly unequal society, where the wealthy and powerful are well-resourced with time, money, expertise and control over the state. This shapes what the laws are, and how the laws work in practice.
- This is exactly why, even if state-run dispute resolution mechanisms are used by movements, this must always be secondary to the building of mass, democratic and popular movements based on the struggle and self-activity of ordinary people. This mobilisation is the single most important resource the masses have, in pushing back against the dominant economic and political elites.
- This means that legal actions must be combined with, and always take second place to, popular struggles which are really the key to winning change: struggles led to the 1924 industrial relations system, to the reforms of the 1980s and 1990s, and indeed to the transition from apartheid, in which unions played a massive role.
- Last, while use state-run dispute resolutions systems can win gains, once ordinary people lose control of their leaders (as we saw in 2010) this can lead to serious problems in the movements themselves. The movements become more undemocratic, which leads ordinary members to participate less, and trust less: in the worst case, leaders can become deeply embedded in the state. (Note that I deny the notion that a popular movement like a union can be "captured" by the state, for the simple reason that a movement that continually neglected members would simply collapse. Even the worst union leader cannot sell-out members 24/7 without the union collapsing, and with it, their job. Therefore, they have to have a balancing act).

2) The APF debate: the law and township-based community movements

Unions, of course, have some unique features. They are far larger than almost any other movement in civil society other than churches and other faith-based organisations. COSATU, for example, has more members than the ANC and EFF combined.[4] They also have a stability and long-term durability that few other popular movements, based on struggle, have. For example, some of the unions in COSATU absorbed older unions, some of them dating back more than 100 years.[5]

So, does any of the above discussion of unions and the law, and the lessons that I have drawn, apply to community-based groupings – especially those in townships? Many are quite fragile. *Abahlali baseMjondolo* is, for example, the only large organization from the wave of so-called "new social movements" that emerged in South Africa from the late 1990s, that still operates. Its contemporaries, like the Anti-Privatization Forum (APF), the Western Cape Anti-Eviction Campaign, the Concerned Citizens Forum and the Landless Peoples Movement rarely lasted ten years. And the big "civic" movements of the 1980s are largely gone nowadays, most having collapsed by 2000.

I think the above discussion does apply, partly because community-based movements face the same dilemmas and challenges, and because very similar debates have emerged in these movements. What I want to do is look at a key debate that took place in one of the most important of the

[4] 1.7 million at present. The ANC reported 750,000 members at the height of the Zuma era, when the party was at its most popular. EFF membership figures are impossible to come by, and claims by party leaders must be treated with skepticism. It is unlikely that the EFF is larger than the ANC, which got eight times more votes in 2019. EFF votes grew modestly form 1,169,259 in 2014 to around 1,872,000, less than half the total union membership in SA: https://www.thesouthafrican.com/news/2019-election-results-eff-every-province/

[5] COSATU's municipal union was, for example largely born from the Cape Town Municipal Workers Association, which started as a Coloured union in the 1920s. See Rudin's history of the CTMWA.

organizations that emerged from the so-called "new social movements," this being the Anti-Privatization Forum (APF).

The APF started with union backing, but was soon basically a coalition of township-based groups and of small left-wing political formations within a few years. From an early stage, the question of the state loomed large in the APF. Most township-based groups in the APF were clashing with the state on a daily basis: issues of electricity and water cut-offs, of evictions, and of broken promises were key drivers of these groups. At the same time, there were local government elections, and a growing interest in the use of the courts.

In 2003, the APF helped form a larger Coalition Against Water Privatisation which included NGOs. It became increasingly interested in using the courts especially as its on-the-ground activity weakened. The centre-piece of this legal work was a court case, brought in 2006 by APF, CAWP and APF affiliate the Phiri Concerned Residents (PCR) against the Johannesburg municipality, against the forcible installation of prepaid water meters. The case also argued that the free basic water lifeline that the municipality provided was inadequate. The APF / CAWP/ PCR were represented by the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand.

The case was successful in the Johannesburg High Court but ended up in the Constitutional Court in October 2009, where it failed. The Court ruled prepaid meters were legal and necessary and that lifeline free basic water was adequate. It also argued that the state was only obliged to engage in a "progressive realisation" of social and economic rights i.e. it must continually improve, but subject to what resources were available.

There were quite deep divides in the APF on this issue, although these are elided in the main history of the organization. Those who favoured this legal route argued on the following lines:

- The APF was weak, with people increasingly scared of government clampdowns, so the legal route was necessary. Indeed, it might work better given that years of struggle had not stopped the roll-out of prepaids, and the practice of water cut-offs.
- A successful case would affect the whole country, as it could make prepaid meters voluntary, as well as increase the free basic water allocation everywhere.
- The core issues were that the state had acted unfairly, providing an inadequate water lifeline, no clear procedures for protection against administrative errors, and in violation of Constitutional requirements.[6]

Critics of using the courts, on the other hand, held that:

- Reliance on the courts distracted the APF from its key work of mobilizing ordinary people, which was the basis of the power of the APF and of the virtues that it can won so far. Reliance on the courts was a short-cut that would not solve the APF's key challenges.
- A use of the courts was in fact changing how the APF operated. Historically the APF's affiliates had bypassed, removed or damaged prepaid water and electricity meters. This method had been used with success, including in Phiri, where few meters were in fact installed. The APF was shifting from flat refusal of meters, based on direct action, to arguing about the fine points of the law, doing research on water needs, and moving into an NGO-type approach that left residents and members as bystanders.
- There was no real understanding of the nature of the state, as part of an unfair system biased towards the wealthy and powerful. The APF's long-term aim was radical change. However, the use of the court to try win the residents' battles assumed that the state represented the people, and that the problems lay with bad politicians, bad judges and bad

[6] http://abahlali.org/node/5658/

policies. This was a major shift in the overall approach of the APF, and was not in fat mandated by APF decisions.

In the end, the court case failed. For critics, this confirmed the fact that the state was, basically, biased. Many hundreds of hours had gone into court cases, demonstrations at court, research papers and so on, which could have gone into rebuilding the APF. In fact, the APF was lurching from crisis to crisis, and closed down in 2010. Its ability to foster an alternative politics had been crippled by the case, which reduced the problem to a few bad apples – and fed into the larger rise of Zuma and resurgence of the ANC at this time, where many people reduced all the problems to Thabo Mbeki, and viewed Zuma as a messianic figure.

I think we can learn a few major lessons from this debate, and from what followed:

- Court cases, and the use of state-sanctioned dispute resolution mechanisms, are not just one tactic that neatly co-exists with others. In the case of the union debate over registration, I highlighted how use of the state's mechanisms posed serious threats to the *organisational* character of a movement. Here, I want to add that the APF case shows how use of the state's mechanisms poses serious threats to the *political* and ideological orientation of a movement.
- Court cases are unpredictable: you can lose, or you can win but with little guarantee of a meaningful outcome as the ruling is sabotaged in the implementation phase. This reinforces what I argued earlier: the use of courts must not be ruled out, but it must always take second place to the core work of organizing people. It cannot and should not be used as a substitute for organising, or take place at the expense of organizing. This is especially risky when we deal with relatively small, fragile community-based movements, rather than the sturdier unions. The greatest of care must be taken to ensure that ordinary people, who are the blood and life of a movement, are not reduced to passive bystanders, or to recipients of solutions from above.
- Movements are suprisingly fragile, operating under pressure from the state and the big businesses, and have limited resources in terms of time, energy, expertise and people. Choices must be made. There are always trade-offs. If the choice is between legal action and organising, legal action must be rejected as it cannot itself make a movement, but can certainly drain and disorient one.

In closing: what do we face?

One issue that has emerged throughout this discussion is the nature of the state, including of its courts and of other state-sanctioned dispute resolutions mechanisms. Is the state something that can be won over to the citizenry, or even the broader public, or is it something antithetical to the mass of the people? This is not an easy question, and even FOSATU never quite resolved it, veering between a stress on autonomy from the state, and scepticism, to a fascination with using the courts and viewing the state as a site of struggle.

What is clear is that states operate within larger class systems, and are not above those systems but part of the term. Indeed, I would suggest, states are key organizations that centralise wealth and power in the hands of a few, and in this sense have marked similarities to big private corporations, which do likewise. The logic of the state, like the logic of big business, is a top-down one, run form above and unable to allow any sustained popular intervention into its processes.

This is why states are good at consulting people, through methods like elections, calls for comment, *imbizos* and the rest, but are continually outside the control of the mass of the people. A highly cetrfalised organisation, like a state, operating within a highly unequal class system where a small

ruling class, based on states and big private corporations, simply cannot be run from below; it is centralized precisely so that a minority can control the resources of the whole society, and rule over a majority.

The logic of states, and corporations, is the opposite of mass-democratic, popular processes of self-rule and mobilization and decision-making and class struggle. This is also why popular movements struggle to control what they put into the state, whether representatives to industrial councils, politicians elected every few years, and court cases. It is also why organizations that run on the same basic lines as the state – form the top-down, headed by a few wealthy and powerful people, where the masses are order takers – like political parties remain outside of popular control.

So, what we are really dealing with here are two different systems of organizing society, two conflicting logics, two different processes. And since the power of the mass of the people, call it the broad working class or whatever you like, rests on mass-democratic, popular processes of self-rule and mobilization and decision-making and class struggle, it seems to me that the greatest caution must always be used when engaging the state, or big business, and that the maximum autonomy, democracy and vigilance is needed.

In short, I am arguing for a politics at a distance from the state, a politics at a distance from parties, and a politics of self-activity and popular education. Only this can help us move, in the present, towards some victories and only this, in the long-run, can help us take power directly, and build something better.