

# Balancing law and tradition

## The TCB and its relation to African systems of justice administration

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*The African system of justice administration, as epitomised by traditional courts, is inclusive, democratic, open and welcoming to those who seek justice. In contrast to western value-inspired courts, which are intimidating, alienating, complicated, retributive, incarcerating and expensive, traditional courts seek to foster harmony, reconciliation, compensation to the aggrieved, easy and inexpensive access to justice, and the rehabilitation of the offender. It fosters a spirit of communalism, where the individual exists for the benefit of the greater community. Justice is fostered within the family, the clan, the neighbourhood, the village, the tribe and the nation. Traditional leadership is central to the organisation and governance of the community, from the lowest level to the highest. The Traditional Courts Bill, currently before the South African Parliament, needs to be redrafted to ensure that the African system of justice administration encapsulates all the values and features underpinning it. The jurisdiction of these courts will have to be extended to cover the whole of South Africa and be applicable to all citizens; in the same way as tenets of Roman Dutch law and English law are applied without discrimination.*

The South African Constitution states that the courts of the land are the Constitutional Court, the Supreme Court of Appeal, the High Courts, the magistrate's courts, as well as any other court established or recognised in terms of an Act of Parliament. Customary courts or courts of traditional leaders are not mentioned save in Section 16 (1) of schedule 6. This section states that courts of traditional leaders continue to exist and to function subject to the amendment or repeal of relevant legislation and consistency with the Constitution.

The Congress of Traditional Leaders of South Africa (Contralesa) opposed the certification of the final Constitution on the grounds that it failed

to protect the institution of traditional leadership (*ubukhosi*). In response the Constitutional Court stated that courts of traditional leaders did not have to be specifically mentioned in the chapter dealing with courts since they could be accommodated under the paragraph dealing with 'other courts'. Yet, as traditional leaders we regard the omission as an insult to real and authentic African value systems.

The Traditional Courts Bill, currently before Parliament, ostensibly seeks to give the recognition that is due to *ubukhosi* and its role in the dispensation of criminal and civil justice. Its passage into law has been stalled by opposition emanating from women's rights activists and political ideologues, who maintain, respectively, that it promotes women's oppression and the perpetuation of an undemocratic system. Others

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oppose it on the basis that the Bill centralises power in traditional leaders, whereas the African justice systems are based on layered authority. I agree fully with the latter criticism, as much as I reject the notion that *ubukhosi* and its ways are inherently sexist and undemocratic. The Bill does indeed tend to concentrate at the level of the court of the senior traditional leader, disregarding the various other levels above and below it.

*Ubukhosi*, as the custodian of African cultures, customs and traditions, is dynamic, and in this sense, in its operations, it has over time evolved to the extent that women enjoy the right to participate fully in matters of governance, and are eligible to be elected or appointed to leadership positions, excepting, of course, hereditary positions. Succession to hereditary positions is governed strictly by the dictates of a particular clan's directives – deviation from such directives detracts from the legitimacy of the holder of the position.

For this Bill to pass the test of indigenous African constitutional muster, and thereby gain legitimacy in the eyes of traditional Africans, it must meet the requirements outlined hereunder.

Notwithstanding the constitutional disdain and the opposition to *ubukhosi* mentioned above, we are of the firm view that our courts are not just courts of law but are, most importantly, courts of justice. Courts where the search for truth, reconciliation, compensation and rehabilitation are the main goals. This is in contrast to the procedural justice, retribution, incarceration, and revenge that are the hallmarks of the inherited European system of justice administration.

In traditional African communities the head of the family is the person who settles disputes among members of the family and dispenses justice according to the degree of the transgression. The primary aim is at all times the maintenance of good relations and harmony in the family.

At a level higher than the household, disputes involving more than one family are handled by clan leaders or elders. Here again the purpose is

to keep peace among members of the same clan. In instances where antagonists are from different clans or neighbourhoods, the arbitrator is the sub-headman. This is the first formal level of the African judicial system. His court or council consists of himself as head, and prominent heads of the local homesteads.

His court, like those of a rank higher than his, usually sits in the open, normally and literally under a tree. Every adult member of the community is free to participate in the proceedings by way of examining and cross-examining the litigants and their witnesses. The case is literally heard by the peers of the parties locked in dispute. Whilst in all courts of traditional leaders there is a difference between criminal and civil cases, the procedure followed to establish the truth is the same.

The proceedings are conducted in an informal manner and a relaxed atmosphere. In the course of the examination and cross-examination of the witness the members of the court sometimes lead their own evidence to rebut the assertions of the witness. Generally, everybody knows everybody, so in a case of stock theft, for example, if a chicken, goat, or a beast has been slaughtered in a homestead the neighbourhood quickly becomes aware of it. In the same way, if the accused is found to have chicken feathers or a fresh animal skin when he is known not to have fowls or beasts he is required to explain himself if the charge is theft.

The proceedings are fair to the extent that towards their conclusion, especially when evidence appears to be heavily weighed against the accused, he would even be asked to suggest the kind of sanction or punishment he believes would be appropriate. He is, after all, a member of that same court himself.

The headman, the senior traditional leader (*nkosi, kgosi, hosi, khosi*) and the king each have their own court. The king's court consists of all the senior traditional leaders of his land, some of his senior uncles and brothers, as well as prominent members of the realm, who are renowned for their

leadership skills and knowledge of the history and customs of the people.

At the other level the court of *inkosi* is similarly constituted, with all the headmen being members of the council. The court of the headman is constituted likewise, with the sub-headmen being part of the council. As stated before, the examination and cross-examination of the witnesses is not confined only to the head of the court and his counsellors, but is open to the general community membership in attendance. Even a traveller would be allowed to impart his wisdom to the gathering.

The open and democratic manner in which cases are heard in the courts of traditional leaders instills a sense of confidence in the litigants. It is on rare occasions that appeals are lodged against judgments and sanctions. Cultural norms and customs add legitimacy to both the proceedings and the court officials themselves.

Traditionally and historically women play a very small, if any, part in court proceedings. In matters involving family disputes and laws of succession and inheritance, though, they are consulted as expert witnesses who are endowed with special skills and insights.

Nowadays this practice of excluding women from court proceedings is being reversed. Many regents who act for minor heirs to the throne are women, and mothers to the heirs. Some of the counsellors are themselves women. This trend results in the trials being conducted with compassion and understanding for the plight of both the aggrieved and the offender.

It would be wise for government, in its endeavour to modernise and democratise the institution of traditional leadership, to leave these courts as they are and to let them evolve on their own and adapt to the changing conditions. The procedures followed do not lend themselves readily to the involvement of legal representatives; the people concerned are generally conversant with the rules and anyone is free to point out for rectification conduct that is improper. Lawyers should, if they

want to participate in proceedings, do so like any other members of the public.

These days, however, these courts do not deal only with cultural and custom-related cases; they also handle criminal and civil cases that are based on so-called common and statutory laws, the Constitution and Bill of Rights. It is necessary and imperative, therefore, that the judicial officers undergo some kind of paralegal training to empower them with the requisite skills and knowledge. The courts should all be made to be courts of record. This means that the tribal authority buildings must be upgraded, modernised and equipped with the necessary personnel, as well as office and court equipment.

The courts of traditional leaders should also be established in urban areas to cater for the justice administration needs of African communities who still value the African system of justice. There are many traditional leaders who are resident in those areas and some of them are indeed consulted and called upon to settle various kinds of dispute in accordance with indigenous laws and customs.

The Bill's shortcomings notwithstanding, government should be commended for seeking to entrench African cultural values and mores, which promote the humane treatment of human beings by other human beings – ubuntu.

Having been exposed to both the received western system of justice administration and the African courts, I maintain that the latter are superior to the former. Under the former system justice is for sale. Litigants are required to hire lawyers to represent their interests, and the more expensive the lawyer the greater the chances of victory – and the reverse is equally true. In these courts the litigants are at the mercy of the wisdom or whims of one person – the magistrate or judge – or, where applicable, the one or two assessors. The rest of the community has no say in the search for the truth. As stated earlier, the proceedings are rigid and alienating, the environment austere and the atmosphere intimidating to ordinary participants.

There is the tiresome accusation that African culture discriminates against and oppresses women. This accusation tends to be stated as fact, without investigation, by people who are supposed to be wise as they are educated. Some of these critics take their own personal run-ins with their traditional leaders back home and proceed to label the entire institution as being as bad as those local leaders. When people break western law they are brought to justice. Yet when they pervert indigenous African law, the conclusion is that the law is so bad it warrants the abolition of the entire system from which it emanates. These critics do not bother to study African courts to understand how they interpret indigenous law in a manner that protects the interests of the poor, the weak and the vulnerable.

The traditional councils, through which these soon-to-be recognised traditional courts will of necessity operate, have, under this government, been transformed, democratised and made gender-sensitive. Women have to constitute no less than one third of the entire membership of the council. The aged, the young and the disabled are represented. The critics will not be bothered to acquaint themselves with these developments. They are content with rehashing colonial drivel, which presumes that African culture is inferior to western culture.

As we seek to modernise and move with the times of the globalising world, let us ask ourselves whether we are becoming better or worse human beings; whether we are becoming a more caring, sharing and morally upright world; or whether we are becoming more selfish, greedy, immoral and inhumane.

### Description of traditional systems<sup>1</sup>

At the very top of the hierarchy is the king, variously called *Ikumkani*, *Isilo*, *Ingwenyama*, *Morena emoholo*, *Kgosikulu*, etc., who is the head of the nation comprised of the tribes whose individual head is *Inkosi*. The king has his own Council, which is made up of all Amakhosi of his area, some of the senior

members of the Royal House (uncles and brothers of the king) as well as any other prominent personalities of the nation.

One of the most important forums for decision-making is the people's assembly (*imbizo*). Each one of the authorities has power to convene *imbizo* within his area of jurisdiction. This is the highest policy-making forum (in effect parliament) of the people, where all adult male members of the community have the right to attend and participate in the deliberations. It is not a forum where *inkosi* merely addresses the people, expecting them to do his bidding.

At the end of the deliberations he, together with his councillors, considers the input given by the speakers. The deliberations are thereafter summarised either by himself or through his councillors, and pronounces the resolutions arrived at in accordance with the views of the majority, consensus-seeking being the overriding goal at all times. Each authority in his respective area of jurisdiction strives for unity and is required at all times to desist from showing loyalty to one school of thought to the exclusion of others. In other words, whilst he is deeply involved in politics he has to be above partisan or party politics.

Whilst *imbizo* is the supreme policy-making body, the Chief in Council acts as the cabinet responsible for the implementation of policy. Another forum, whose functions are pivotal to stability, peace and respect for law and order, is the court (*Inkundla*, *Kgotla*). This is the forum where cases are heard and decided and disputes entertained and resolved. Decisions and resolutions are taken in accordance with customs, traditions and precedents. The primary aim of the exercise is not one of retribution, revenge and/or punishment, but more of rehabilitation, reconciliation and compensation.

Family or clan heads are required to seek resolution of disputes where members of the same family or clan are involved, before a matter is brought to the court of first instance. The lowest court is presided over by the sub-headman while the highest judicial

officer is the king. Each of these courts is characterised by openness, with cases usually heard democratically in the open under a tree, with the peers of the parties allowed to examine and cross-examine all the parties and their witnesses.

It is usually easy to establish the truth, because the society being an open one, everybody knows everybody. At the end of the proceedings the procedure followed in the *imbizo* is used in that *inkosi* and councillors confer amongst themselves and return to declare the verdict and punishment where it is necessary. The verdict is generally accepted by all the parties, with reasons for judgment having been given. Also, in the event that the 'accused' is found guilty, the right of appeal to the party who feels aggrieved by the judgment and/or punishment lies with the immediate court of a higher jurisdiction. Through his headmen and/or councillors the traditional leader administers the affairs of the people. He determines, in council, the times for ploughing, planting and harvest, the grazing lands that must be used and those that must be saved for future use, and the times for the holding of cultural events and initiation ceremonies.

His home is home to the poor, the weak, the mentally handicapped, travel-weary strangers and, in times of war, the refuge for victims of such strife. By reason of these responsibilities the people regard it as their duty to provide the maintenance of the traditional leader by tending his livestock and cultivating his fields. In times of need and starvation, the people expect the Great Place to provide for them as a matter of course.

#### **Land**

The traditional leader is the custodian of the land. He holds it in trust for the people as a whole. He cannot do as he pleases with it. He is required to deal with it sparingly and equitably. Every breadwinner or family head is entitled to a piece of land as a residential site for his family, as well as an arable allotment to produce food for the family. He is entitled to graze his livestock in the communal grazing lands. Whenever a young man gets married he approaches the local sub-headman and points out the piece of land he is interested in.

The sub-headman calls a meeting of all the homestead heads of the area to get their views on the young man's application. Once approved, the application is forwarded to the headman who passes it on to the head of the tribe for confirmation. If a single unmarried woman bears children, she becomes entitled to an allotment of her own when it becomes apparent that she is unlikely to get married, for the same reasons that a young newly married man does. The land belongs to the community as whole and no one can alienate his allotment. If the holder abandons his allotment, it reverts to the community and is dealt with within the said procedure. Land is too valuable for a price to be put on it. Sale of land is taboo. One other important function of the traditional leader is that of being the commander of the army. Only he can declare war against, or make peace with other tribes.

#### **Separation of powers**

From the above it is evident that separation of powers, as is practised in the United States of America, is an alien concept. *Inkosi* is the legislator, administrator and adjudicator. What is crucial though, is that he always acts on the advice and with the assistance of his councillors. Furthermore, power devolves from the highest authority, the king, down to the head of the family. The people's assembly, *imbizo*, has power to nullify acts performed by the executive when it sits. Custom and tradition do not permit abuse of power and the traditional leader who is inclined towards authoritarianism exposes himself to rebellion and even assassination, which results in him being replaced by the next person in line to the throne.

#### **Patriarchy**

The society depicted above is naturally one of patriarchy, headed by males. A few tribes, such as you find in parts of Venda and Lebowa, are required by custom to at all times have a woman as traditional leader. The intricacies of procreation of the heir, who will bear the family clan name, is a matter best known by those tribes. Women have however, throughout history played crucial roles in the governance of the tribes. Upon the death of

*inkosi*, the Queen Mothers have been known to exert a tremendous amount of influence over those who act as regents for the minor heirs. In some cases they have themselves acted as regents for their sons. Queens Manthatisi and Nonesi are but two of many who are famous for having led armies of their tribes against colonial invaders and/or other hostile tribes.



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## NOTES

1. Extract from the Contralesa submission to the Constitutional Development and Provincial Affairs Portfolio Committee Public Hearings on “Local Government: Municipal Structures Bill [B68-98]”, 22 July 1998.