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**THE JUDICIAL FUNCTION OF TRADITIONAL LEADERS:
A CONTRIBUTION TO RESTORATIVE JUSTICE?**

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1. INTRODUCTION

It is now almost ten years since South Africans went to the polls in the country's first democratic election and, by that act, ushered in a period of great excitement, optimism and challenge in the field of law. It is generally acknowledged that reference to these beginnings of South Africa's transformation as a "miracle" essentially describes the fear in the minds of many at the time that a smooth transition from apartheid and entrenched race-based privilege to a non-racial democracy was not possible. Resistance, bloodshed or worse were routinely expected. This is a point worth remembering when one considers that, ten years later, the process of transformation is far from complete: indeed the issues remain as complex as they ever were, some pockets of resistance are emerging daily, and the temptation to retreat to the comfort zone of previously entrenched positions is becoming a real threat.

The reason for the "miracle", it is again generally accepted, lay in the nature of the settlement that was reached between the warring factions. That settlement was in the form of a negotiated constitution pervaded by the principle of compromise, rather than a political fight to finish. This was felt to be the essential ingredient in ensuring a quick return to the peace and stability required for rapid transformation and economic development. The constitution in attempting, for good reason, to be everything to everybody, gives full recognition to customary law and puts it on a par with the general law; it guarantees the right of every person to participate in the cultural life of his or

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her choice; and it makes all these grants subject to the bill of rights, which contains a strong equality and non-discrimination clause.

South African society today has to negotiate various categories and kinds of relationship. It sometimes seems as if nothing is destined to remain untouched. In the educational sphere, schools and universities are negotiating new relationships with staff and students, on the one hand, and with the government on the other. In industry, employers and workers' unions are struggling to fashion mutually acceptable accommodations, again with government as a participant in the not-too-distant background. What seems clear is that all of these relationships that have to be negotiated, the ones that have ethnicity and/or culture at their centre are the ones which suffer most from the legacy of the past. African customary law is doubly vulnerable. The imperatives of transformation require that this law not only re-negotiate its own content, but also the "political" relationship between itself and the rest of the legal system. This has to be done against the background of a dominant legal system and a dominant culture whose relationship with African culture has not in the past been very positive.

This cultural inequality underpins many battles and skirmishes in various pockets of the South African legal landscape. In the field of administration of justice, the competing ideas have been those reflecting the classical "western" approach where the task of a court is to adjudicate and punish, and those African notions reflecting values of reconciliation, restoration and compromise. To put this differently: ten years after the advent of democracy, South Africa is still grappling with the tension between the western notion of retributive justice and the traditional African concept of restorative justice.

This short paper attempts to contribute to the debate by showing that the value of restorative justice is deeply embedded in African thinking and that it would conduce to an improved system of administration of justice if this value were incorporated into the mainstream. The paper argues, however, that

failing such incorporation (or in parallel with it), the institution of traditional leadership can make a significant contribution to restorative justice in South Africa if their judicial function were regularised, strengthened and enhanced. In particular, it will be argued in this paper that evidence now exists to prove that African traditional methods of dispute settlement always entailed a strong restorative element and that current debates on the topic, in relation to criminal justice and youth offences in particular, should not obscure that fact. The paper concludes with an analysis, drawn exclusively from the work of the South African Law Reform Commission¹, of selected areas of importance in strengthening the judicial function of traditional leaders.

2. RESTORATIVE JUSTICE

As alluded to indirectly above, the restorative justice debate in South Africa is conducted largely in the context of the criminal justice system in general, and youth offending in particular. It is also couched in terms that reflect the preoccupation of South Africans with (and their reaction to) the high crime rate². As this paper seeks to argue, dispute settlement in the traditional African sphere tends to have the same objectives, whether the core of such dispute is criminal wrongdoing or some other transgression. Nevertheless, it is useful to have a working definition of restorative justice for the purposes of the present discussion.

In its Issue Paper on Sentencing the Commission discussed restorative justice, including compensation for victims of crime and victim empowerment.

The paper defines Restorative Justice in the first instance, as a form of criminal justice based on reparation.

“Actions are aimed at repairing the damage caused by the crime, either materially or at least symbolically. When someone wrongs another, he or she has no obligation to make things right. The goal of the process is to heal the wounds of every person affected by the crime. In this context reparation to the victim and community is regarded a duty or obligation on the offender.”³

The Commission goes on:

"Secondly, communities are also affected by the commission of crime. If communities believe that the criminal justice agencies can effectively prescribe solutions to the crime problem, there is a risk that they may cease to look to preventative obligations which are fundamentally in their own hands [21]. It found that crime is best controlled when members of the community are the primary controllers through active participation in persuading offenders to accept the responsibility for their actions, and, having done so, through concerted efforts of participation, reintegrate the offender back into the community of law abiding citizens. Low crime communities are communities where people do not mind their own business, where tolerance and deviance has limits, where communities prefer to handle their own crime problems rather than hand them over to the professionals."⁴

The Commission identified three propositions underlying in general the philosophy of restorative justice:

- Crime results in harm to victims, offenders and communities.
- Not only government, but also victims, offenders and communities should be actively involved in the criminal justice process.
- In promoting justice, the government should be responsible for preserving law and order, and the community for establishing peace.

Guided by these general beliefs, the following components permeate the area of restorative justice and its practice:

- Crime is regarded an injury to victims and community peace.
- It focuses on putting right the wrong.
- The victim, community and offender are active roleplayers in the process.
- Compensating victims for their losses through restitution.
- Empowering victims in their search for direct involvement in the criminal justice process.
- Assisting victims to regain a sense of control in the areas of their lives affected by the offence.
- Holding offenders responsible for their behaviour.

The Commission then puts forward a definition of restorative justice:

“Thus, the process of restorative justice seeks to redefine crime, interpreting it not so much as breaking the law, or offending against the State, but as an injury or wrong done to another person. It encourages the victim and the offender to be directly involved in resolving conflict and thereby becoming facilitators, supporting a criminal justice system which aims at offender accountability, full participation of both the victim and the offender and making good or putting right the wrong.

As part of this process, restorative justice demands consideration of approaches such as that of offering compensation, where appropriate, to the victims and empowering victims in their search for recognition through direct participation in the criminal justice system.”⁵

This is contrasted with the Roman-Dutch legal system where the object is to establish blame and administer punishment – an approach labelled ‘retributive justice’. There is abundant evidence that outside of the formal system, rigid adherence to the principle of retribution is not the norm⁶.

3. RULES AND PROCESSES

Associated largely with the work of John Comaroff and Simon Roberts*, “rules and processes” has become shorthand for the idea that there is a fundamental difference between Western and African conceptions of the purposes of the administration of justice. As the authors explain:

“At its most fundamental, the rule centred paradigm is grounded in a conception of social life as rule-governed and of normal behaviour as the product of compliance with established normative precepts. Consequently, dispute acquires a pathological character; its signals deviance, a malfunction, that the control institutions of a society are essentially designed to put right. Associated with this view of order is the contingent assumption, which goes a long way back in political theory, that societies do not cohere effectively in the absence of centralized authorities, which formulate rules and ensure conformity with them. The opposed standpoint, of course, envisages man as a self-seeking being, whose willing cooperation with his fellows is an expression of enlightened self-interest. Where rules cannot be utilized to achieve such interest, they are disregarded as far as possible, the implication being that individual enterprise is constrained primarily by the actions of others who are located within shared networks of relations and reciprocities. The analytical corollary of this is to seek the dynamics of order in the social process itself and to focus less on institutions than on the interactions of living men in everyday contexts. It follows, too, that the processual paradigm envisions dispute as normal and inevitable rather than pathological or dysfunctional.”⁷

Works such as these have enabled us to see that African customary law is essentially an amorphous repertoire of norms of varying specificity and value, ranging from rules of etiquette and polite behaviour to those accepted values whose breach is taken extremely seriously. It is our argument in this paper that the capacity of traditional leaders in the performance of their judicial function, to enhance restorative justice through this avenue, has been under-estimated.

3.1 The paradigm of argument

Chief among the insights to be gained from the work of Comaroff and Roberts, is the identification of a “paradigm of argument” in customary disputation.

“We will show that , in presenting a case, Tswana disputants construct and rely upon a “paradigm of argument” : that is, they attempt to convey a coherent picture of relevant events and actions *in terms of one or more (implicit or explicit) normative referents*. Any such “paradigm of argument” is sited in the requirements of a particular case, and is not fixed or pre-determined upon several factors, such as the oratorical ability of the disputant, his expectations concerning the strategies of his opponent and his own strategic intentions. Moreover, the construction of the paradigm may vary over a number of hearings of the same dispute before different agencies, since the perceptions, expectations and strategies of the opposing parties may change or become progressively refined. The important point to note is that the complainant, who speaks first, establishes such paradigm by ordering facts around normative referents which may or may not be made explicit. The defendant, in replying, may accept these normative referents, and hence the paradigm itself; under these circumstances he will argue over the facts *within the paradigm*. Alternatively, he may assert a competing paradigm by introducing different normative referents, in which case he may not contest the facts at all. At the higher levels, where the mode of settlement becomes one of adjudication, (a headman or the chief) may order his decision within the agreed paradigm, choose between competing paradigms, or impose a fresh paradigm upon the issues under dispute. We will attempt to demonstrate that the isolation of such paradigms of argument, and the dynamics of their interaction, is crucial if we are to account for the invocation and utilization of norms in the dispute settlement process.”⁸

They go on to say:

“Drawing these observations together, it seems that norms are explicitly invoked by a disputant only when he wishes to question the paradigm of argument elaborated by his opponent, and tries to assert control over (or change) the terms in which debate is proceeding. The complainant has no need to do this in the normal course of events, because the very manner in which he presents the alleged facts established his paradigm. Although it did not occur in either of the cases reported above, a Tswana complainant appears to enunciate a norm (or set of norms) only when he anticipates an effort on the part of the defendant to question his construction of the dispute itself. Thus, while norms are expressly invoked most frequently by defendants, a complainant may also do so when he wishes to erode his opponent’s prospective paradigm in advance.⁹”

We will explain these propositions and elaborate on their application as we analyse the judicial function of traditional leaders below.

3.2 Bangindawo and Hlantalala

Mention must be made also of the two important cases of **Bangindawo and others v Head of Nyanda Regional Authority and another; Hlantalala v Head of the Western Tembuland Regional Authority and others 1998 (3) SA 262 (Tk)**. Both sets of applicants challenged the constitutionality of various sections of Transkei’s Regional Authority Courts Act 13 of 1982. In addition to the main argument that these courts did not allow legal representation there were other criticisms levelled at the regional authority courts, particularly by the first applicants. Amongst these criticisms were arguments such as that “the presiding officers are not legally trained”; that these courts follow a “truncated procedure” unlike that followed in the magistrates’ courts; and that their judicial independence and impartiality are compromised because of the absence of the notion of separation of powers in the concept of African chieftainship. Madlanga J dismisses these latter arguments as unhelpful, noting that it makes little sense to judge customary courts, predicated on a different value system and seeking to achieve a different result, by the standards of magistrates’ courts.

The judgement is important in that it acknowledges that the necessary implication of constitutional preservation of a measure of legal pluralism is the retention of a certain level of recognition for parallel value systems, at least for the time being. It says that a court that is situated within walking distance of both the complainant and the accused, access to which does not cost a fortune, whose proceedings are in a language familiar to both and whose style and culture do not alienate, has a role to play in society even if the accused does not enjoy the right to apply for a discharge at the close of the prosecution case, or to call for further particulars. This judgement confirms that there is a place in the new South Africa for traditional modes of dispute settlement, underpinned by a traditional value system.

4. STRENGTHENING THE TRADITIONAL JUDICIARY: THE SALRC PROCESS

To take their rightful place as contributors to restorative justice in South Africa, traditional courts need to be strengthened and empowered. Below I discuss the process, embarked upon by the South African Law Reform Commission, which culminated in the production of an interim report to the Minister¹⁰ in October 2002.

A brief review of the provisions in the draft bill is useful in identifying some of the issues that continue to be topical in South African legal discourse, especially in the area of traditional courts. Some of the more interesting issues include: levels of customary courts, gender in the composition of customary courts, sentencing options, procedure and language, legal representation, and administration of the court system.

Below is a selection of provisions from the draft bill which have a bearing on our discussion.

Preamble

To provide for the establishment and jurisdiction of customary courts; the consolidation of the different provisions governing chiefs' courts and to modernise them so that their operation is in conformity with the principle of democracy and other values underlying the Constitution and to provide for matters connected thereto.

1. Definitions

In this Act, unless the context otherwise indicates –

'customary law' means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples;

'customary court' means a customary court [other than a customary court of appeal] established under the provisions of section 2;

'Commissioner for Customary Courts' means an officer appointed under the provisions of sections 24 or 25;

'traditional leader' means any person who in terms of customary law or any other law holds a position in a traditional hierarchy.

2. Establishment of customary courts

- (1) The Minister may, by notice published in the Gazette, establish a customary court for an area to be specified in the notice.
- (2) A customary court established under subsection (1) shall be a court of law and may, within the area specified in its authority, exercise the jurisdiction conferred by this Act, unless that jurisdiction is specifically limited in the authority.

- (3) The Minister may, by notice in the Gazette, suspend, cancel or vary any authority issued under subsection (1).

3. Levels of customary courts

- (1) Customary courts shall be of such different levels as are recognised in customary law and may exercise jurisdiction only within the limits prescribed for such level.
- (2) The authorisation for a customary court must specify the level to which the court belongs, together with the limits within it may exercise jurisdiction.

4. Constitution of customary courts

A customary court must be constituted in accordance with customary law: Provided that in accordance with section 9 of the Constitution and section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, no less than half the members constituting the court must be women.

ALTERNATIVELY

4. Constitution of customary courts

A customary court is constituted in accordance with customary law: Provided that in constituting the court regard shall be had to section 9 (3) of the Constitution and section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 as to the need for the representation of both men and women in public institutions.

ALTERNATIVELY

4. Constitution of Customary courts

- (1) Subject to subsection (2) a customary court is constituted in accordance with customary law.
- (2) In order to comply with section 9 (3) of the Constitution a customary court must include both men and women in its composition.

5. Civil Jurisdiction

Subject to this Act and any other enactment, a customary court has jurisdiction to hear any civil case in which customary law is the law applicable where –

- (a) the defendant is normally resident within the court's area of jurisdiction;
- (b) the cause of action or any element thereof arose within such area; or
- (c) the defendant consents to the jurisdiction of the court;

Provided that, in proceedings relating to immovable property, action may be instituted only in the customary court within whose area of jurisdiction the property is situated.

6. Criminal jurisdiction

- (1) Subject to this Act and any other enactment, a customary court has jurisdiction to hear any criminal matter in which the accused is charged with having committed an offence wholly or partly within the court's area of jurisdiction or with having been an accessory to the commission of such an offence.

- (2) Notwithstanding the provisions of subsection (1), a customary court has no jurisdiction over any of the offences listed in Schedule 1 of this Act.

7. Laws to be applied

- (1) Subject to this Act and any other enactment, a customary court is competent to apply –
- (a) customary law, whether codified or uncodified; and
 - (b) the provisions of any other law which the court may be authorised by law to apply.
- (2) Customary courts must give effect to Chapter 2 of the Constitution, in particular section 9 and section 39 (2).

8. Matters beyond the jurisdiction of customary courts

- (1) A customary court does not have jurisdiction in any case –
- (a)
 - (b)
 - (c)
 - (d) to dissolve any marriage;
 - (e) to determine the custody or guardianship of minors; and
 - (f) to determine the liability of any person to maintain order.
- (2) A traditional leader shall not be precluded from engaging in, with the consent of all the parties, a dispute resolution exercise aimed at reconciling the parties to a dispute relating to marriage.

9. Procedure in customary courts

Subject to this Act and any other enactment, the customary law of procedure and evidence shall apply in customary courts.

10. Language of customary courts

- (1) Subject to the provisions of subsection (2), the proceedings of a customary court and the records thereof must be in the language most widely spoken in the area of the court's jurisdiction.
- (2) If any of the parties does not understand the language of the court, an interpreter must be provided.

11. Open court

- (1) Customary courts are open to members of the public both male and female: Provided that a court may, if it deems it necessary at any stage of a trial involving marital relations, order that all members of the public or a particular person or group of persons may not remain in the court.
- (2) Court proceedings must be conducted in the presence of both parties to the matter and the court must allow the full participation of all interested parties without discrimination on grounds of race, sex or gender.

12. Representation

A person who is party to a matter before a customary court, may be represented by any other person of his or her choice in accordance with customary law.

17. Compensation to aggrieved persons

A customary court may order that any fine or part thereof be paid to a person injured by an act or omission for which the fine was imposed, on condition that such a person, if he or she accepts the payment, may not bring an action to recover damages for the injury he or she sustained.

19. Fines to be paid into special account

- (1) A customary court must keep a special account into which all the fines paid to the court must be deposited.
- (2) Monies from an account established under subsection (1) must be used for all development of the area over which the court has jurisdiction.
- (3) The traditional authority in whose area of jurisdiction the court is situated, shall administer the account.

20. Members of customary courts taking rewards

Members of customary courts who accept or attempt to obtain, either for their own benefit or for the benefit of any other person, any gratification as a reward for doing or not doing an act as a member of a court are guilty of an offence and, may, on conviction, be liable to a fine not exceeding one thousand rand.

21. Orders to keep the peace

Instead of, or in addition to, any punishment to which they are liable, a person convicted of an offence before a customary court under the provisions of this Act may be ordered to keep the peace and be of good behaviour for a term not exceeding three years.

22. Suspended sentences

Whenever a customary court convicts a person of any offence, the court may pass sentence but order that the operation of the whole or any part of the sentence be suspended for a period not exceeding three years subject to any conditions specified by the court, whether as to compensation to be made by the offender for the damage or pecuniary loss, good conduct or otherwise.

23. Sentence of community service

A person convicted of an offence before a customary court may be sentenced to community service under the supervision of the traditional authority in whose area of jurisdiction the offence was committed, for a period not exceeding three months: Provided that community service shall not include service on the personal property of a traditional leader or public official.

24. Commissioner for Customary Courts

- (1) The Minister may, by notice in the Gazette, appoint an officer in the public service to be a Customary Courts' Commissioner for the purpose of this Act in respect of each province in which customary courts are established.

- (1) The functions of the Customary Courts' Commissioner shall include –
 - (a) advising the Minister in respect of the constitution, jurisdiction and membership of customary courts;
 - (b) subject to the general and special directions of the Minister, the guidance and supervision of customary courts;
 - (c) transfer of cases from one court to another where appropriate; and

- (d) such other powers and duties as may from time to time be assigned to him or her by the Minister.

25. Assistant Commissioner for Customary Courts

- (1) The Minister may, by notice in the Gazette, appoint officers in the public service to be Assistant Customary Courts' Commissioners for the purposes of this Act.
- (2) An Assistant Customary Courts' Commissioner shall discharge such of the functions of the Customary Courts' Commissioner under this Act as the Customary Courts' Commissioner may, from time to time by writing direct, and references in this Act to the Customary Courts' Commissioner shall be construed to include an Assistant Customary Courts' Commissioner when acting in accordance with such direction.

5. CONCLUSION

This paper attempts to advance the debate on restorative justice by arguing that, with regularisation, strengthening and empowerment, customary law courts under the direction of traditional leadership can play a meaningful role in expanding the sphere of restorative justice practice in South Africa. This is so because these courts are embedded in a value system based on reconciliation rather than retribution; one that emphasises processes above rules and in that way promotes social healing above punishment. The paper concludes with a recommendation that the South African Law Reform Commission's draft bill of 2002, pertaining to the judicial functions of traditional leaders (or some version thereof), be passed in order to empower customary law courts to play this role effectively.

NOTES

1. SA Law Commission 1997, Restorative Justice. Issue Paper No. 7 (Project 82: Sentencing)
2. op cit, n1. Chapter 3
3. op cit, n1. p8
4. ibid
5. op cit, n1, p9
6. See for instance, Mqoke RB, *Customary Law and Human Rights* in **SALJ** 1995: 364-365; Skelton A, *Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice*, **ACTA JURIDICA** 1996: 193
7. Comaroff JL and Roberts S, **Rules and Processes: The Cultural Logic of Dispute in An African Context** 1981, University of Chicago Press (Chicago and London), 5
8. Comaroff JL and Roberts S, *The Invocation of Norms in Dispute Settlement: The Tswana Case*, in Hamnett I (ed), **Social Anthropology and Law** 1977, Academic Press (London, New York, San Francisco) 86-87
9. ibid
10. SA Law Commission 2002, **Interim Report on Traditional Courts and the Judicial Function of Traditional Leaders** (Project 90: Customary Law)