LEGAL REFORM OF TRADITIONAL COURTS IN SOUTH AFRICA: EXPLORING THE LINKS BETWEEN UBUNTU, RESTORATIVE JUSTICE AND THERAPEUTIC JURISPRUDENCE

Christa Rautenbach*

Abstract: Traditional justice in the rural areas of South Africa is dispensed by official traditional courts, where they are presided over by traditional leaders. The Black Administration Act 38 of 1927 currently makes provision for two types of courts depending on the nature of the facts before the court, viz criminal or civil. The relevant provisions in the Act stand to be repealed when the Traditional Courts Bill, currently being debated in parliament, is transformed into law, but traditional courts’ civil and criminal jurisdiction will continue in future, albeit with a few additional guarantees in accordance with natural law and the constitutional law. The ideals of justice expressed in the Bill and the parallels between ubuntu, an African concept, and other contemporary ideas such as restorative justice and therapeutic jurisprudence are recognisable. This contribution investigates the links between ubuntu, restorative justice and therapeutic jurisprudence in the context of formal traditional courts. Firstly, an overview of the legal position of traditional courts in South Africa — the past, the present and the future — is given. This is followed by a discussion of the scope and application of the notions of ubuntu, restorative justice and therapeutic jurisprudence and, finally, the plausible links between these three notions in the context of formal traditional courts in South Africa are discussed. In contrast to the punitive character of a conventional justice system that focuses on retaliation, ubuntu, restorative justice and therapeutic jurisprudence call for a more holistic approach that promotes reconciliation of everyone caught up in the justice system. All of them have one thing in common — the well-being of all individuals and communities touched by injustice in some form or other.

Keywords: traditional courts; customary courts; ubuntu; restorative justice; therapeutic jurisprudence; traditional justice; customary law; traditional leaders; legal pluralism

* Professor of Law, North-West University, Potchefstroom, South Africa. The financial support of the National Research Foundation of South Africa and the Alexander von Humboldt Foundation of Germany is acknowledged with appreciation. The opinions expressed and errors, however, are those of the author.

[(2015) 2:2 JICL 275–304]
I. Introduction

The relationship between two or more legal systems in a pluralistic legal order remains a highly topical theme, especially in a postcolonial setting where transplanted and indigenous laws exist side by side. South Africa’s legal system consists of two distinct legal traditions: transplanted uncoded European laws (referred to as the common law)\(^1\) and inherited indigenous laws (referred to as African customary law).\(^2\) For many years, customary law often had to take a back seat if its rules were deemed to be contrary to common law values.\(^3\) Since 1994, however, customary law has been regarded as a parallel legal system on a par with the common law.

The main catalyst for this development has been the two successive post-apartheid South African Constitutions, which placed the customary law on an equal footing with the common law.\(^4\) In *Alexkor Ltd v Richtersveld Community*\(^5\) it was stated:\(^6\)

---

1 In this context the expression “common law” refers to the uncoded system of South Africa, the core being derived from Roman-Dutch law and subsequently influenced by English common law. The English influence is most apparent in procedural aspects of the legal system and methods of adjudication (such as procedural law, company law and the law of evidence), and the Roman-Dutch influence most visible in its substantive law (such as the criminal law, law of contract, law of delict, law of persons, property law and family law). The common law of South Africa was described in *Pearl Assurance Co v Union Government* 1934 AD 560, 563 as a “virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society”.

2 A contemporary definition of “customary law” is contained in the Recognition of Customary Marriages Act 200 of 1998, namely: “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”. From this definition it should be evident that customary law is neither uniform nor fixed. Finding a workable legal definition of customary law has been part and parcel of an on-going debate in South Africa. See Christa Rautenbach and Jan C Bekker (eds), *Introduction to Legal Pluralism in South Africa* (Durban: LexisNexis, 4th ed., 2014) pp.18-24.


4 First, s.181 and Constitutional Principle XIII of sch.4 of the interim Constitution (Constitution of the Republic of South Africa 200 of 1993) gave recognition to the institution of traditional leadership and customary law. Constitutional Principle XIII provided as follows: “Indigenous law [customary law], like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith”. The interim Constitution was replaced by the final Constitution (Constitution of the Republic of South Africa, 1996) on 4 February 1997. Section 211 of this Constitution continued with the trend of giving formal recognition to customary law. It reads:

>“(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”.

In the light of the superior status of the final Constitution, it is not numbered.

5 2003 (12) BCLR 1301, [51] (CC).

6 Although the status of customary law is more or less settled, some authors argue that it will always be treated as inferior to the common law, because its recognition is subject to authorisation by the state.
“While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution”.

South Africa’s justice system also reflects this plurality of legal systems. On the one hand we have the mainstream justice system based on Western values and principles, which include “procedural justice, retribution, incarceration and revenge”, and on the other a traditional system with African values and principles based on the “search for truth, reconciliation, compensation and rehabilitation”. One of the core values of the African system is ubuntu, an equity principle which has seeped into the legal landscape and continues to play a major role in the reasoning of the South African judiciary.

The judicial authority of South Africa is vested in the courts, which are creatures of statute. In terms of s.166 of the Constitution the courts are the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates’ Courts, and any other court established or recognised in terms of an Act. In addition, the Constitution confirms the continuation of traditional courts by providing that “[e]very court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it”.

The South African Constitution thus endorses the continuance of a pluralistic justice system. The plurality exists not only between the mainstream and traditional court structures but also among the structures of the various traditional communities. Depending on how one conceptualises legal pluralism, customary courts can be divided into different categories. The most prevalent distinction is between formal (official) and informal (unofficial) traditional courts. The official ones are those established in terms of legislation as stipulated in s.166(e) and para.16(1) of sch.6 of the Constitution. Currently, they are the traditional courts established in accordance with the Black Administration Act. Although they are creatures of statute they operate on the basis of living customary law. Although the parallels

---


8 See the discussion at Section II.

9 Constitution, s.165(1).

10 Emphasis added. See Constitution, para.16(1) of sch.6.

11 See the discussion at Section I.

12 They apply customary law, which is totally different to the formal rules applied in the western courts. Contrary to official customary law, which includes those rules that can be found in legislation and court