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The Role and Place of the Community Court and Chiefs' Courts

Towards A Non-sexist and Non-racial Judiciary
for a Democratic South Africa

INTRODUCTION

In the context of rural communities chiefs' courts or traditional leaders' courts (henceforth "traditional courts") are effectively supposed to be the community courts. This arises from the composition of these courts and the extent of the involvement of the community in the proceedings that take place in them.

Before there can be talk of a place and a role of the traditional court we need to establish whether or not the institution of hereditary traditional leadership, which obtains only within the African aristocracy and is in the main a male domain, can possibly have a future in a democratic, non-racial and non-sexist South Africa.

Without flinching the Congress of Traditional Leaders of South Africa maintains that the institution does have a future and is not incompatible with the above-mentioned principles of democracy, non-racialism and non-sexism. It is nobody's fault that only the African aristocracy produces traditional leaders; this apparent "defect" can be cured by the enforcement by law of the requirement that a traditional leader must at all times deal impartially and fairly with all the people living within his area of jurisdiction without regard to race or colour.

In communities where females are precluded by custom and other practical problems from assuming the post of traditional leadership, the same requirement of a traditional leader having to act fairly and impartially when dealing with affairs affecting women.

The traditional leader acquires his position without being elected. He is decreed by custom and birth to be the leader. Heredity and the fact that he comes from the correct lineage confer legitimacy; this is unlike in the Western system of democracy where legitimacy is conferred by popular elections. The fact that the traditional leader is required to act in the interests and according to the wishes and the will of the people ensures that he does not undermine the democratic rights of his people. Where he violates this principle a mechanism ought to be formulated to ensure that he is appropriately brought into line.

There are various other attributes that attach to the institution which are properly appreciated by the communities who cherish their traditional values and norms. The test, therefore, of the endurance or otherwise of the institution is whether or not those

communities consider themselves as having so developed and become so sophisticated that they no longer see the need for it. We would thus like to warn that the issue be treated with caution and wisdom so as to, inter alia, avoid a Somalia-type of situation where we have war-lords who exploit the division of the nation along clan or ethnic lines.

THE ROLE OF TRADITIONAL COURTS

Composition and Manner of Operation

It goes without saying that the traditional leader, as an individual human being, is not necessarily endowed with congenital wisdom. He relies heavily on the counsel that he gets from recognised and respected elders of the community whenever he is called upon to perform his duties. In other words he acts in - Council.

The traditional court is composed of the traditional leader, who presides, and councillors who normally come from the ranks of lesser chiefs or so-called headmen and people who are either appointed by the traditional leader or elected by the community. Needless to say the element of appointment will have to be done away with in favour of elections.

Proceedings are held either in open space, usually under a tree or inside a hall, but at all times in open court.

One of the councillors leads the witnesses for both litigants. This is the case in both civil and criminal trials. Other councillors and members of the public present are afforded opportunities to examine and cross-examine the litigants and their witnesses. The litigants are allowed to cross-examine each other and each other's witnesses.

The proceedings are conducted in a relaxed and somewhat informal manner. At the end of the hearing the chief-in-Council step aside and confer amongst themselves on the evidence that has been led. They reach a verdict and agree on a fine or an award in damages in favour of the successful litigant.

Sometimes, depending on the facts and background to the case at hand, particularly where the parties are members of the same family or are closely related, the matter is referred back for consideration and settlement by the family members concerned.

The traditional leader, either by himself or through one of the councillors, pronounces the verdict and the type of punishment to be meted out or the compensation to be paid, as the case may be.

The parties are free to appeal against the verdict and/or the punishment if they are not satisfied. The court of appeal can in certain cases be the court of the senior traditional leader or king of the community concerned, particularly where the case involves customs and traditions. Normally, however, "appeals" lie with the magistrate's court where the case is heard afresh without regard being heard to the previous proceedings. The merits or demerits of this state of affairs need to be viewed against the background of the lack of training in law of the officers of the traditional courts.

Usually, however, the parties are satisfied of the outcome of the proceedings because in the course of the trial suggestions are put forward to the litigants as to whether or not they would be satisfied with one course of action or another.

Type of Cases Heard

Both criminal and civil cases are tried in traditional courts. Criminal cases that are heard are those pertaining to petty crimes that do not call for terms of imprisonment or heavy fines.

With regard to civil cases the determinant is the amount of compensation that has to be paid by the wrongdoer. Custom and tradition usually influence the decision of the court and the amount to be paid.

Relationship Between Traditional Courts and the Common Law Justice System

Traditional courts do not send convicts to jail nor do they impose heavy fines.

Litigants, complainants and/or decisions of the traditional courts have the right of appeal to the magistrate's courts. These cases, as said before, are heard de novo as if no other trial has taken place over the same issues.

Traditional courts are interested in the conclusion of amicable settlements that will satisfy both parties to a criminal or a civil case and the restoration of harmony in the community. The aim is to avoid acrimonious litigation which can result in the exacerbation of bad relations as is usually the case in the western justice legal system.

CONCLUSION

Traditional courts cannot escape the impact of technological and economic developments and consequently the types of disputes that arise call for sophisticated and literate arguments.

There is thus a need for the officers of the traditional courts to be caused to improve their level of education generally, and to undergo some form of legal training to improve their skills so that dispute resolution will be enhanced. This would obviate the need to have to take matters to the common law courts when they are not necessarily of a highly intricate nature.

Accordingly rather than try to abolish, side line or ignore these forums it is in the interests of the traditional communities that these courts be retained and improved.