

A CRITIQUE ON TRADITIONAL COURTS, COMMUNITY COURTS AND CONFLICT MANAGEMENT

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The lawyers would have to prove that they understood the customs of tribes such as the Pondos or Sothos as well as being familiar with procedures. We want an Appeal Court of our own traditional leaders, which is equal to High Court composed of Judges. The days of our customs being 'rediculed' by people schooled in Roman Dutch Law are over (Nkosi Mwelo Nonkonyane, *City Press*, 1 August 1999:4).

ABSTRACT

There is an ongoing debate about the place of traditional and community courts in South Africa. Some people feel that both traditional and community courts have previously operated in a brutal manner to address problems. Therefore they are regarded as a threat to communities and must be abolished. On the other hand, some believe that both courts should be given a chance. Those who are in favour of traditional courts are traditional leaders themselves, as well as rural communities which value these institutions. There are also people from urban settings who still see the need for the existence of traditional courts. Those who are against the traditional courts are mostly the youth and urban adults who do not value African culture any more. Another perspective on the existence of community courts is that which is prevalent in most of the South African townships. Community courts were popular during the period of political struggle to get rid of apartheid. Most of the community courts were dominated by the youth and there was a lot of bias in terms of handling cases. As a result many people were not impressed by community courts' management style. The focus of this paper is on both the traditional and community courts and their modus operandi in terms of conflict management. The major focus is on factors that make people feel uncomfortable about these courts. The research methodology employed in this research is personal experience of community courts, for example, previously seeing how street committees and 'kangaroo courts' operated, informal interviews, as well as secondary data from newspapers, texts, magazines and electronic media (videos). In the final instance, the paper attempts to suggest some solutions to the problems.

INTRODUCTION

There is an ongoing debate about the place of traditional and community courts in South Africa.

Some people feel that both traditional and community courts have previously operated in a brutal manner to address problems. Therefore they are regarded as a threat to communities and they must be abolished. On the other hand, some believe that both courts should be given a chance.

The crucial issue which is left unattended by those who are against these institutions is that the Constitution of South Africa recognises the existence of traditional leaders. It is clearly stated in Chapter 12 of the South African Constitution that:

...the institution, status and role of traditional leadership, according to the customary law, are recognised, subject to the Constitution. 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. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law (The Constitution of the Republic of South Africa, Act 108 of 1996:119).

Those who are in favour of traditional courts are traditional leaders themselves, as well as rural communities which value these institutions. There are also people from urban settings who still see the need for the existence of traditional courts. Those who are against the traditional courts are mostly the youth and urban adults who do not value African culture any more. Another perspective on the existence of community courts is that which is prevalent in most of the South African townships. Community courts were popular during the period of political struggle to get rid of apartheid. Most of the community courts were dominated by the youth and there was a lot of bias in terms of handling cases. As a result many people were not impressed by community courts' management style.

The focus of this paper is on both the traditional and community courts and their *modus operandi* in terms of conflict management. The major focus is on factors that make people feel uncomfortable about these courts. And in the final instance, the paper attempts to provide some solutions to the problems. The research methodology employed in this research is personal experience of community courts, for example, previously seeing how street committees and 'kangaroo courts' operated; informal interviews; as well as secondary data from newspapers,

texts, magazines and electronic media (videos).

Traditional courts are based in rural areas and they are popularly known as dikgoro/makgotla among the Sotho-speaking people while known as inkundla/ibandla among the Nguni-speaking people. Community courts are mostly found in urban areas and they are popularly known as 'kangaroo courts'.

According to Becker (1974:69), a traditional court is a place where the chief and his headmen and councillors interview subjects, visitors, messengers and supplicants. He further mentioned that it is an old-age court of justice for days gone by, where squabbles between tribesmen are discussed and settled, it is also a place where transgressors are tried and, if necessary, punished. Traditional courts are based on gerontocracy, a government under the leadership of old men. Women and children are strictly excluded from traditional courts unless they are involved in a dispute being heard or summoned by men to bring beer or food.

Traditional courts are not unique to the South African situation as they are also found in other countries, for example, the Bakhtiari of Iran. The Bakhtiari of Iran also have traditional courts where old men sit under a tree and solve problems (Ember & Ember 1985:376-377).

TRADITIONAL COURTS

The focus here is on the tribal court. The tribal court is the main and highest court in the tribe. This court functions under the leadership of the chief, who act as a judge. He also is the only person who may pass judgment. Adult males play a vital role in assisting the chief to execute his duties. Adult males attend the sessions of the court and they may also take part in the cross-examining of the parties to the lawsuit as well as the witnesses. The tribal court powers include, among others, to reprimand the inhabitants of a ward and particularly the headman for allowing disputes to be taken to the tribal court whereas they should have settled it. The tribal court also has the power to refer a case back to the ward court (Pauw 1994:97-98).

Furthermore, Van Niekerk (1993:10) elaborates on the functions and procedure of traditional courts. The procedure in traditional courts is to settle the disputes that involve two parties, for

example, the victim and the offender. In criminal cases, the traditional court will try to reconcile the victim and the offender. Civil and criminal cases arising from the same situation are often heard at the same time. An offender may be sentenced to punishment and to the payment of compensation at the same trial. The accused person must prove his/her innocence, but this does not imply that the chief and his councillors are against the accused or in favour of the complainant. There is no legal representation. The trial usually takes place in public and everybody is allowed to attend a hearing and ask questions, offer any information or give her/his input.

As an example a case brought before a tribal court is related below. A dispute arose in August 1997 in a village called Mononono among the Bakgatla-ba-Kgalefa tribal authority which falls under Pilane's jurisdiction. A woman lost her husband and she objected to the observance of the Bakgatla mourning custom which requires her to sprinkle a herb called 'mogaga' on her pathway each time she left her yard. She refused that because of her religious beliefs which does not recognise this custom. The tribal authority sentenced her to confinement to her yard for the whole period of 12 months (*Sowetan*, May 1998:11).

In my opinion, the widow in Mononono village was aware that as she was living among the Bakgatla-ba-Kgalefa she was expected to subscribe to the culture of Bakgatla. However, the Constitution of South Africa makes provision for individuals to exercise their own rights. This problem is complex because it involves two different belief systems. The widow found herself in a dilemma because of her husband's culture and her own religious beliefs. To add to the complexity of the matter, the Bakgatla tribal authority sentenced her to confinement to her yard for 12 months without taking cognisance of her religious beliefs.

In this regard, a newspaper journalist reported that

What seems to escape the anti-vigilante brigade is that in an ideal society – and ours definitely is not – what today is termed vigilantism would be proper makgotla, the age old institutions passed on for generations, where people solve their own problems according to established traditional norms. Classical examples are namely: Mapogo-A-Mathamaga and People Against Gangsterism and Drugs

(*City Press*, 11 July 1999:6).

COMMUNITY COURTS

People over the world have found different ways of settling disputes. One such way involves action on the part of the community as a whole. The Eskimo, for example, often resolve their disputes through community action (Ember & Ember 1985:378).

The notion of a community court is also prevalent in South Africa. Communities tend to form community courts that are aimed at maintaining law and order. In 1996 a businessman was murdered and while the police were dragging their feet in tracking down the culprit, a group of business people started Mapogo-A-Mathamaga to protect their business and members against criminals. A documentary entitled Mapogo-A-Mathamaga – ‘Business and Community Shield’ has been shown on South African national television. This documentary reflected on this active style of dealing with crime. The organisation was started in 1996 in the Northern Province and it has since spread to Mpumalanga Province. It is based mostly in rural areas. The main aim of this court is to fight crime. Most of its members are business people and it has also attracted white farmers. The general method used to solve problems is a sjambok (whip), while some of the alleged suspects shown were severely punished. At times they also threatened to throw an alleged suspect into a river (*SABC 3*, 1 June 1999).

According to the MEC for Safety and Security in the Northern Province, 68 cases were opened against members of Mapogo-A-Mathamaga for causing injuries to the alleged suspects. It is alleged that the President of Mapogo-A-Mathamaga was involved in two murder cases

In my view, it is quite appropriate for communities to form courts which will bring about stability and deal with culprits, because the police have failed to combat crime over a long period of time. The only problem with these courts is the way they solve disputes. For example, many alleged suspects were killed and some severely injured, only for it to transpire that they were not guilty of the crime/s.

In urban settings there are various forms of courts, ranging from street committees, that are responsible to run the affairs of that particular street, to ‘kangaroo courts’ that operate at

community level and are responsible for the whole community. The 'people's or kangaroo' courts, aided by street committees, operate in most of the South African townships. These courts are comprised of members from different political affiliations and are aimed at creating stability within communities. The majority of the members are young and they are mostly males.

The 'people's courts' gave rise to abuse by undisciplined youth. In 1986 at the National Education Conference that was held in Durban, South Africa, it was emphasised that there is a distinction between two youth categories. The first category was the 'disciplined, organised youth' and the second category was the 'bands of youth' which formed 'kangaroo courts' (Seekings 1999:79).

These courts operate effectively in some areas but in other places the youth abuse their power. These youth take sides and accept bribes. Their conflict management style seems to be influenced by irrationality in that, for example, they ignore the real causes of a problem.

Examples of the workings of the 'kangaroo courts' can be found in the following case studies:

Case Study 1

A man had a fight with his wife in Everton township in Gauteng. He beat her and she ran away to report the matter to the 'kangaroo court'. Before midnight the same evening, he heard a knock on his door and when he opened the door the 'kangaroo court' members were all over him. 'They pulled up the bed and one guy started hitting me in the stomach. Then they pulled me out of the house and threw me outside on the ground and one of them hit me with a broken bottle on the leg' (*Mail & Gaurdian*, 5-11 November 1999:13).

Case Study 2

A married couple had a problem because the husband had an extra-marital love affair with a schoolgirl. His wife reported him to the Street Committee and because the husband in question and the schoolgirl came from different streets the 'kangaroo court' was the option considered to tackle the problem. One of the adjudicators of the 'kangaroo court' had a grudge against the wife who complained about her husband. This adjudicator then abused his power by asking the wife

unfair questions with the aim to frustrate her and the whole trial lost its original focus (Bogopa 1996:45).

Case Study 3

A young boy in Soweto received what is known as ‘women justice’. He was brutally assaulted by a group of women after being accused of snatching a handbag from a woman. He was beaten and stoned by enraged women. He was also bleeding from cuts and gashes and his head was swollen (*City Press*, 8 August 1999:7).

Case Study 4

The community of Riverband near Randburg in Gauteng Province have their own set of rules that are inconsistent with the Constitution of the country. The Riverband community consists of about 90 households and has its own constitution, with all digressions being punishable by eviction. According to the members of the community, eviction is the only answer to dealing with dissent and criminals. Three executive members of the community were evicted for allegedly embezzling community funds. A community leader was quoted saying ‘We solve our problem our own way, we never report people to the police’ (*City Press*, 15 August 1999:13).

ANALYSIS OF CASE STUDIES

The first case study reflects the irrationality of the ‘kangaroo courts’ in that they act brutally without determining the merits of the case.

In the second example, it is also shown that one of the officials did not tackle the case on its merit but allowed his hatred towards the woman to cloud his judgement of the problem. He was supposed to be neutral and look at the whole problem without taking sides. Adding to that, his colleagues did not call him to order on the matter.

The third example shows how a mob can be irrational at times. The method used here was based on their emotions. It was a good move for women to stand up and send a warning. But in this case the suspect turned out to be the wrong person.

The fourth example, shows how a community has lost trust in the police. The community reacted by developing its own set of rules to deal with mismanagement of their funds as well as crime. The leader is a woman, which shows that it represents the interests of both genders within the community. The only problem, however, is its conflict management style that violates human rights. Eviction is a cruel method of solving problems.

A specific problem is that the officials of this 'kangaroo courts' are often still young and do not have experience in solving marital issues and other crucial issues that affect families.

Communities throughout the world consist of men, women and the youth and it is therefore crucial to include representatives of all these stakeholders in the traditional courts as well as the community courts. It is not an easy task to perform, but there should be some way to include the whole population in these courts.

The traditional authority is fundamentally patriarchal and discriminates against women. The exclusion of women from traditional leadership has resulted in a situation where the Provincial House and Council of Traditional Leaders in South Africa are all males (Mokgoro 1994:7). In many cultures, men are still seen as heads of the households and are therefore considered superior to women. Furthermore, the needs and interests of women are not catered for in the traditional courts.

SOLUTIONS

The list of problems pertaining to how traditional and community courts operate is endless and it is therefore crucial at this stage to come up with some suggestions aimed at solving these problems. This will, however, not be done overnight because it is a process that needs enough time.

First of all, in order to bridge the gap between adults and youth as well as the gender gap, representation of both sexes and all age groups is essential.

It is on record that although the hereditary nature of traditional leadership is widely accepted, its

exclusively male dominance should change, as it is not in line with the notion of 'new democracy'. It is very important for rural women themselves to demand the inclusion of women in the line succession to traditional leadership status (Mokgoro 1994:8).

The inclusion of both sexes and all age groups will pave the way for informal discussions that will ultimately identify problem areas. During these informal discussions officials, regardless of age and gender, can express themselves freely and in that way some of the problems can be solved.

In Stanger, the community of Sakhamakhaya has a legal advice office that falls under the Community Law Centre of the University of Natal. This office is responsible for both legal problems and socio-economic development matters. The community felt that the committee should not only concentrate on combating crime but also look at socio-economic issues that affect the area (Nina 1995:22-25). Initially, the committee was formed in reaction to the fact that the youth in Sakhamakhaya were dominating the political decisions. There was a perception among the men that 'our children mess around with our lives' and therefore 'we should form ikomiti lamadoda' (a committee of men only). There was an outcry from other members of the community, particularly the youth and women. A community meeting was called and after a long discussion it was decided that 'ikomiti elizobhekela izidingo zomphakathi' (a committee to look into the needs of the community) should be formed. This solved the conflict (Nina 1995:23).

Traditional courts have been operating for a long time and therefore it will be senseless to talk about eradicating these institutions. These courts have brought peace and stability in rural areas, though at times some people suffered due to unfair sentences imposed on them by these traditional courts. It also applies to 'people' or 'kangaroo' courts as these institutions have played an important role in urban settings in spite of the misery they caused in some instances.

The South African Law Commission (1999) is currently attending to traditional courts and the judicial functions of traditional leaders and the following recommendations were made:

- Traditional courts should continue to be recognised where they are already established, that is, in rural areas, within the areas of jurisdiction of chiefs and headmen;

- Traditional courts should continue to be presided over by chiefs and headmen as part of their role under section 211 of the constitution;
- To comply with section 9 of the constitution, the full participation of women members of the community as councillors or presiding adjudicators must be maintained;
- Para-legals should be trained and appointed by the Ministry of Justice to assist traditional courts. These clerks should be trained in customary law and have basic understanding of the Bill of Rights.

It further recommended that ‘Traditional courts should be regarded as courts of law and given the status and respect of courts of law, and that traditional courts need to be alerted that corporal punishment is unconstitutional and therefore illegal’.

The challenge is upon all communities regardless of being situated in rural or urban areas to stand up and form forums that will include both representatives of the authorities and ordinary members of communities. The aim should be to ensure that human rights are protected.

CONCLUSION

The youth in South Africa should be made fully aware of the fact that, traditional courts have been around for a long time. They also need to avoid being influenced by outside forces to reject the existence of these institutions. The youth must furthermore accept that the Constitution of the country recognises the existence of traditional leaders and that there is a Congress of Traditional Leaders of South Africa (Contralesa) that, amongst other things, promotes the rights of traditional leaders.

Women should make their existence heard. This will not be an easy task since traditional courts involve cultural issues which at times prohibit women to directly interact with men. However, it does not imply that they should not fight for recognition in this regard.

Traditional leaders should also adhere to the spirit of reciprocity. As much as they need the youth and women to recognise them and respect their existence, as much the traditional leaders should recognise the youth and women and include them in the traditional courts structures.

There are various critical issues regarding the traditional authority system. Firstly, there are no strict measures in place which determine how authorities should fulfil their duties. Secondly, rights are not protected, for example, there is no legal action that can be instituted against the chief if he withdraws a person's residential rights without a valid reason (Hartman 1993:17).

The traditional and community courts' adjudicators need to revisit the manner in which they operate. Their conflict management styles, for example, need to be changed if they are serious about human rights. In this regard, they should note that corporal punishment is not an appropriate manner of disciplining a culprit. Criminal and other cases should be dealt with on merit and courts should avoid at all cost to victimise innocent people. Traditional and community courts should co-operate for the sake of creating peace and stability. Lastly, it is sincerely hoped that the issues raised in this article will provoke thought and promote positive thinking on these crucial issues.

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