

Traditions of Conflict Resolution in South Africa

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ABSTRACT

In the domain of law, and elsewhere, alternative dispute resolution can be used in more than one way. It may signify a recognition that there are other methods than litigation, and that these may sometimes be more appropriate. But it may also serve as a label for methods which are frowned upon as popular but amateurish. This article is written from the perspective that the deep roots and valid reasons for traditional conflict resolution methods and customs should be taken seriously. They form part of time-proven social systems, in which the objective is usually more than just settling a case. Such methods, whether they include more adjudication or more mediation, are especially oriented towards reconciliation and the maintenance or even improvement of social relationships. Representative examples from a few South African societies are discussed, as well as the current situation of Western and customary law, modern courts and tribal courts, legal professionals and traditional leaders. Possibilities for the future are pointed out, in an increasingly urbanised South Africa, but a South Africa with a new Constitution.

It was my fortune to be well versed in the fundamentals of what is called Native Law and Custom, so I was able to take up my court work with no great difficulty. But my main pleasure in this activity came from the rewarding attempt to reconcile people who were at variance, and from the debate involved. I love the impact of mind upon mind, and I love thrashing things out in the attempt to get at the truth. The procedures of the court give these things orderliness, and getting at the truth is worth while for its own sake. The dying arts of exposition hold great attraction for me.

(Luthuli 1962:56)

1. Introduction

The use of alternative methods of conflict resolution by the traditional societies of South Africa is deeply rooted in the customs and traditions of the various tribes of the sub-continent. These range from the fairly rudimentary processes of the Khoisan of the remote Northern Cape to the sophisticated traditional courts of the Zulu in KwaZulu-Natal.

Some methods of conflict resolution as practised by traditional societies of South Africa, which are representative of the main tribal affiliations in the region, will be considered here. Reference will be made to the provisions of the Constitution and Bill of Rights that will play an important role in the development of South African jurisprudence, especially in respect to customary law, and to the central role of chiefs and headmen in the conflict resolution process (Hammond-Tooke 1993:65).

2. Western and African court processes of dispute settlement

Bennett reflects on the judicial process in an African context and compares it with its western counterpart. The essence of the African process was reconciliation of the parties in an environment quite the opposite of the western model, which seems designed to alienate and confuse the litigant (Bennett 1993:32). Gluckman, in similar vein, points out that in the case of western judges there is some judicial intervention in divorce cases and family disputes designed to getting the parties to settle their differences. He illustrates the point by referring to marriage guidance councilors who

work on disputing parties as Lovedu and Tiv judges do, without authority to lay down decisions or enforce verdicts . For, in the end, though the

methods of tribal courts resemble in some respect those of councillors in our own society, they approximate more to the methods of our courts. They are authoritative.

(Gluckman 1965:187)

The importance of the process, therefore, lies in the goal it has set itself and that, invariably, is to restore a balance, to settle conflict and eliminate disputes.

One of the most important features distinguishing between western and African processes of dispute settlement is the manner in which the social relationships between the parties involved in the respective processes are treated. Nader and Todd, referring to the analysis adopted by Gluckman, argue that these relationships are either simplex or multiplex. The relationship determines the procedural form of the attempt at settlement and thus determines the outcome of the dispute (Nader & Todd 1978:12-13). The ensuing hypothesis is that the parameters of the settlement process are determined by the nature of the relationships involved. Accordingly, multiplex relationships depend upon measures of negotiation or mediation to result in compromises, whereas simplex relationships depend upon adjudication or arbitration to end up in win or lose decisions (Nader & Todd 1978:13).

Save for the paradoxical situation in countries such as Japan, India and South Africa, among others, where traditional approaches are extant and fundamental to the resolution of conflict, even within an industrialised urban setting, the position is generally different in industrialised societies, according to various scholars (Nader & Todd 1978:21). Abel (1982:2) states that western capitalism rejects the values placed on reputation in the face-to-face community. Cappelletti castigates the western orientation towards a rights culture, which looks upon judicial solutions or contentious justice as an ideal, to the exclusion of other possibilities such as are promoted in other civilisations, which he describes as coexistential justice (Cappelletti 1992:34). The parties in the latter situation are interested in mending rather than terminating relationships (Cappelletti 1992:35). In contrasting western court processes of dispute settlement with those of African courts, Bennett notes that the essence of the latter is a tendency to mediate or arbitrate rather than to adjudicate. Reconciliation of disputes was preferred and the impartial application of rules was inevitably of less consequence (Bennett 1991b:54).

The closest that a conventional western-orientated court comes to such a process is the stage when an order is taken by consent, usually at the end of protracted negotiations in the course, or at the end of litigation. The judge plays little, if any, role in

the process and it is usually left to the parties to negotiate the consent order through their legal representatives. This is not the usual result of the typical trial process which invariably ends in an arbitrary decision being made by a judge, with no further input from the parties after their respective cases have closed.

3. Recognition and retention of traditional courts in South Africa

In the exercise of their jurisdiction as mediators, the courts of chiefs and headmen are similar to the Lok Adalats and Panchayats of India. The similarity is especially evident in the procedures and mechanisms employed in the courts and the participation of the councillors of chiefs and headmen in resolving conflict within parochial areas. It was only in 1927 that these courts were officially recognised.² Bennett regards the aim of this enactment as the need to build up an African tradition (Bennett 1991b:115).

The next stage of reorganisation of these traditional courts took place in 1986 consequent upon the recommendations of the Hoexter Commission (1983). The following reasons were advanced by the Hoexter Commission (1983:Part I, par 3.4.3.8) for retaining only the courts of chiefs and headmen of all the structures of 1927:

Although in many respects the chiefs courts function imperfectly their retention is widely supported both by Blacks and by experts in Black customary law. These courts represent at once an indigenous cultural institution and an important instrument of reconciliation. For these reasons a rural Black will often prefer to have his case heard by the chief s court.

The establishment of Commissioners courts requires some description and explanation for the sake of completeness in the discourse on traditional conflict resolution. A negative factor in the existence of these courts (the presiding officers of which were white) was that Africans were being subjected to a far lower standard of justice than practised elsewhere (Bennett 1991b:81, note 11). The Hoexter Commission (1983:Part V, par 6.1) called for the scrapping of racially separate courts:

That inhabitants of the same country should purely on the grounds of race be criminally prosecuted in separate courts for any offence whatever is, in the Commission s view, by any civilised standard, unnecessary, humiliating and repugnant. The Commission is satisfied that *with the exception of courts of chiefs and headmen* [emphasis added] the policy of separate courts for Blacks is outmoded and obsolete.

The retention of jurisdiction by traditional courts, however truncated, over certain matters is indicative of the entrenched position occupied by these courts in traditional society, and any alteration to the status quo would have been unwarranted in the circumstances. However, commissioners courts have now been abolished with their judicial functions assumed by magistrates courts. This reform has brought with it other problems. Bennett (1991b:82, note 11) points out that although all courts in South Africa may apply customary law —

Unfortunately these new powers were not complemented by the intimate knowledge of African affairs which gave commissioners their special expertise in African litigation. In the circumstances, magistrates courts cannot be described as accessible to African litigants.

4. Traditional courts and modern courts

In theory a party to a dispute could resist the intrusion of civil law especially where a claim is founded on the traditions of a particular group. However, this does not mean that there would not be occasions where traditional norms will conflict with those of civil society. In that event it would be imprudent to predict the approach that would be adopted by the Constitutional Court in treading its way through a veritable minefield, especially where gender equality and other sensitive issues are involved.

The methods of conflict resolution employed in traditional courts are not unique to South Africa, but are mirrored elsewhere in traditional societies in Africa, Asia and Australia. The debate in South Africa, however, will be whether these methods can or should be extended to cases that did not previously fall under the umbrella of traditional courts, or whether the supremacy of contemporary western-style courts should be maintained. The point worth noting in this debate is that the majority of the population of the country is rural and conceivably still wedded to tribal lore and culture. Even where they reside and work in urban areas, the same appears to be true.

Traditional courts have a major advantage in comparison with other types of courts in that their processes are substantially informal and less intimidating, with the people who utilise these courts being more at ease in an environment that is not foreboding.

Keesing describes the process of settling cases out of court as informal litigation which underlines the need to look for more subtle and undramatic legal processes

side by side with more formal legal systems (Keesing 1981:322). The headmen or chiefs who preside over traditional courts are generally charismatic and familiar with the populace that use the courts, are revered to an extent that judges are not, are wont to play an active role in the proceedings and are not shy to suggest mediation at almost any point in the proceedings in matters susceptible to that form of resolution.

Contemporary courts that are western-orientated are mired in procedures and processes that do not lend themselves to such activism on the part of presiding officers who may do so at the risk of entering the arena and thereafter being taken on appeal or review by any of the parties or a superior court intervening in the proceedings. In any event, the ethos of these courts is to deter such intervention by judicial officers trained in a different school of precedents, rules of court, statutory interpretation and similar devices designed to attempt justice between man and man. This is not to say that traditional methods of conflict resolution, as they prevail in traditional courts for example, are devoid of the devices referred to earlier.

5. The jurisdiction of the chiefs courts

The jurisdiction exercised by chiefs courts is strictly territorial and is confined to persons resident within a chiefdom, regardless of their tribal affiliation (Bennett 1991b:67). Jurisdiction is also automatically conferred by reason of the defendant being resident within the area concerned. Traditional courts, particularly chiefs courts, enjoyed a junior status in relation to magistrates courts and matters could be taken on appeal to the latter, even though they had not reached finality in the chiefs courts. Bennett points to the undesirability of this overlap in jurisdiction which could lead to forum-shopping and actions being removed from a wrong court to the correct forum, with consequent loss of time and money (Bennett 1991b:69-70).

6. Deficiencies in traditional conflict resolution processes

Criminal matters proceed in traditional courts without a tribesperson being afforded any legal representation. Bennett argues that in the face of such penalties that are likely to be imposed such as banishment or dispossession of land, there ought to be a right of representation although sound reasons exist for the exclusion of legal practitioners from traditional courts. One such reason is the aim to preserve procedural informality and to ensure that neither litigant would be given an unfair advantage by being allowed to engage counsel to argue the case (Bennett 1991b:80).

7. The chief as mediator and final arbiter

The role of the chief was not just restricted to participating in conflict resolution mechanisms, but also to anticipate and, therefore, intercept conflicts. An example of activism by a tribal leader is given by Sansom in his illustration of a Zulu headman applying a criterion of proximity in granting grazing rights (Sansom 1974:141). In making his decision in relation to a particular pasture the headman determines whether the man's kraal is near enough to, or too far from, the coveted grazing land. The Nguni tribesman is forced to pursue his subsistence activities within a zone centred on his kraal (Sansom 1974:141).

Schapera studied the handling of civil and criminal wrongs according to Tswana law and custom (Schapera 1955). In the case of a civil wrong, it is expected that the victim will first look to the wrongdoer for satisfaction by direct negotiation (Schapera 1955:47). Should this fail, then the matter proceeds to the local court, and if necessary, through the hierarchy to the chief's court. The matter is tried at the instance only of the victim or the victim's representative. A criminal wrong incurs the intervention of a traditional court, not necessarily that of the chief which is at the apex of the dispute resolution or adjudication structure. A Tswana chief is also provided with advice from his senior male relatives. They intercede with the chief in the event that a man feels aggrieved by some action or decision of the Chief (Schapera 1955:76). Schapera also notes that all matters of public concern are dealt with finally before a general tribal assembly of the men (Schapera 1955:80).

8. Modern litigation and tribal courts

Abel (1991:83) has drawn attention to the incompatibility of tribal social structures and modern courts:

The introduction of the latter into the former leads to a decline in tribal litigation. We are constantly rediscovering multiplex, enduring, affective relationships in economic life, in the extended family, within large institutions, in residential groupings, even between criminals and their victims. Tribal litigation is integrative; it preserves and even strengthens those relationships. If courts are modernised, one forum for tribal litigation is removed. Furthermore, the mere availability of modern courts seems to undermine tribal dispute processing elsewhere in the society.

Abel (1991:84) notes that in contemporary Africa there are three major deviations

from the ideal type of modern litigation:

First, there is a decline in the accessibility of the court to individual litigants, and warning of a much more radical curtailment in the future, as primary courts are thoroughly professionalized. In modern society, where much interaction occurs between strangers who are not bound together by any relationship, individual disputants confronted with an increasingly inaccessible tribunal will simply terminate the relationship — they will lump it. Second, there is growing dominance of the court by criminal prosecution, and especially by administrative offenses, which renders it less attractive to potential litigants. Third, adjudication in modern courts, whether civil or criminal, becomes increasingly superficial — a rubber-stamping of decisions reached elsewhere.

All these factors are absent to a large extent within traditional courts and, instead of replacing or usurping the jurisdiction of these courts, resources should be diverted towards enhancing the visibility of traditional courts as a trusted conflict resolution mechanism. These courts are readily accessible, serve towards restoring and binding the relationship between traditional people and are highly visible with a transparent decision-making process in which there is community participation.

9. The Pedi and conflict resolution

M nnig notes that Pedi tribal law emphasises group relationships and rights rather than those of the individual. Stress is placed on restoring relationships as well as the reconciliation of groups:

The court takes great pains to reconstruct the cause of any dispute, to show individuals who are not accused how their actions may have given rise to the complaint, and frequently advises the accused that he may have a counter claim. The court always enquires whether the disputing parties have tried to come to a mutual settlement beforehand, and frequently refers a case back to the families involved to attempt by private discussion to resolve their dispute. The accent is always on arbitration rather than on punishment, and the legal institutions of the Pedi have the characteristics of a number of agencies for arbitration on various levels.

(M nnig 1967:308)

Furthermore, the majority of disputes are resolved through the mediation process

within or between family groups . In fact, the latter is the principal vehicle for settling disputes outside the official courts (M nnig 1967:314).

In effect it becomes obvious that only the more serious and complicated cases are referred to the official courts (M nnig 1967:315). M nnig notes, however, that serious efforts are made to settle disputes out of court and matters may be postponed so that the parties involved can secure the assistance of yet more relatives to assist them (M nnig 1967:316).

The Pedi have a highly evolved system of conflict resolution, and parties are actively encouraged to resolve their differences without intervention from the chiefs or their delegates through the medium of family processes as courts of first instance . The processing of the matters through the Pedi hierarchy of courts and related structures takes place as a result of the failure of the conflict resolution process at the lower levels. However, the primary role assigned in Pedi society to maintaining harmony is manifested in fresh attempts in the chief s court to drive the disputants to reconsider resolving differences without intervention.

Another aspect of conflict resolution, the religious manifestation of expiation of guilt, is reported as occurring among two tribes, the Sotho and the Tswana where every sacrifice had to be preceded by a confession of possible strife between family members or neglect of custom (*Weekly Mail & Guardian* 1994a:27). According to tribal custom, the religious aspect took a special turn towards reconciliation when a special ceremony of reconciliation was necessary if a member had quarrelled with the family head, before the ancestors could be approached (*Weekly Mail & Guardian* 1994a:27). Mkhize has referred to the position of ancestors in the context of conflict resolution, noting that family conflicts had to be swiftly resolved lest they incurred the anger of the ancestors and attracted illness or misfortune within the family (Mkhize 1990:21).

10. The Pondo and mat associations

According to Kuckertz the institution of *mat associations* is one of the conflict resolution mechanisms prevalent among the Pondo (Kuckerts 1990). Mat associations are similar to *izithebe* or hospitality groups which Hammond-Tooke had referred to in his study of the Mpondomise (Hammond-Tooke 1975:52). It is through such hospitality groups or mat associations that the distribution of food and drink at social gatherings is organised.

The mat leader is the first person whom a disputant approaches with his problem. Cases are first discussed at the *izithebe* level. Hammond-Tooke indicates, in cases involving two such groups, that the members of the two hospitality groups would meet and attempt to settle the matter between themselves.

Hammond-Tooke also states that most disputes were settled in the courts of headmen (Hammond-Tooke 1975:172). The lineage court endeavours to settle matters between kinsmen in an effort to avoid washing its dirty linen in public, to use the phrase employed by Hammond-Tooke (1975:173). He also described an unusual feature of this court in the use of *ukuzidla*. This is a self-imposed fine and is employed thus:

If a person realises that he is in the wrong, or it is apparent to him that his fellow lineage members deem him so, he may impose a fine of a sheep, goat or even a beast on himself to indicate his contrition and to wash away his offence. This *ukuzidla* is sometimes also resorted to in the headman's court, constituting an admission of guilt. It is known as *imali yoku zithandazelo* (money of begging for mercy) and is an indication to the court of the sincerity of repentance. In a case where the guilty party imposes a fine on himself that the members of the *inkundla* regard as inadequate, they regard this as proof that he is not really sorry, and may increase the fine; on the other hand, if he fines himself too heavily, they are likely to reduce it.

(Hammond-Tooke 1975:173)

It is clear that the *izithebe* are unable to compel a statement. This power to compel obedience was a preserve of the court of the headman to which the matter would ordinarily proceed in the event that it remained unresolved (Hammond-Tooke 1975:53). In the event that the person remains dissatisfied, one of the options available is to refer the problem to the court of the wardhead, thence to the chief. This accompanies a request to establish a separate mat association which, in effect, secedes from that of the leader whose conduct is the subject matter of the complaint (Kuckertz 1990:87).

The dissatisfaction is expressed publicly to the chief in a tactful manner (Kuckertz 1990:87-88). What emerges is that the conflict is avoided by the subtle, diplomatic use of language designed to achieve secession, with the reluctant approval of the chief, who, at the same time, is faced with a *fait accompli*. The chief, therefore, has little option but to acquiesce in the announcement as, in all probability, it represents the wishes of the majority of those affected.

Proceedings in the chief's court are formal when compared to those of the preceding court of a headman. The emphasis is no longer on mediation and reconciliation, but on the correlation between testimony proving culpability and the sanctions imposed by the court. This is the most important difference between the lower courts (which proceed on the assumption of, or work for, the restoration of mutual trust) and the chief's court (Kuckertz 1990:144-145).

Quite apart from the role of mediators in small-scale conflict resolution, such as those within families or between neighbours, conflict resolution mechanisms emanate substantially from courts of headmen and chiefs in all the traditional societies of South Africa. These courts enjoy some formal structure in terms of their method

of operation albeit they frequently operate from backyards and beneath trees. The South African judicial system accorded formal recognition to these courts (South African Law Reports 1960(3):490E (R v Dumezweni)).

It could be said that the geographical distance between the courts is equalled by the gulf that widens between the parties as they progress towards these courts. In the process a social conflict is transformed into a legal case with a suprasocial (abstract) correlation between an offence and its punishment (Kuckerts 1990:151).

As far as possible small-scale conflict should be resolved closer to home. Once the adjudicatory process fails at a local level, the progress of the conflict becomes embroiled in legalities, the eradication of which will not necessarily leave the parties at peace with one another. This is accentuated by the growing distance between the parties, on the one hand, and the adjudicators on the other. There is not the same degree of familiarity between the disputants and mediators at a more parochial level, such as the homestead heads and mat leaders, as with the headmen and chiefs. Krige (1950) refers to a similar system of conflict resolution among the Zulu.

11. Cleansing and other forms of conflict resolution

A more recent example of cleansing and expiation involves the debacle following upon a visit by President Mandela to Ulundi to meet with the King of the Zulus. Supporters of the Inkatha Freedom Party (IFP), the leader of which is Chief Mangosuthu Buthelezi, demonstrated against the visit outside the palace of the king. Chief Buthelezi is both a minister in the Government of National Unity and Prime Minister to the Zulu King. A news report states that Chief Buthelezi had offered the

king two head of cattle as a self-imposed penalty for the demonstration by the IFP supporters at the meeting of the two leaders (*Weekly Mail & Guardian* 1994c:2). The report specifically alludes to a resolution of the matter along traditional lines where if the monarch had accepted the cattle, both would have probably been present at a cleansing ceremony where the hatchet would have been buried (*Weekly Mail & Guardian* 1994c:2). It is obvious, therefore, that the status of the disputants is irrelevant to the traditional processes involved in the resolution of the conflict.

In a similar context Van der Vliet (1974:224) refers to family conflict resolution and discusses the case of a parent being neglected:

A commonly used sanction, particularly in the hands of the peer group, is mockery or ridicule, often in the form of chants or songs. The threat of ostracism is also a powerful force for conformity. As in our society, bogeys and threats of supernatural punishments are often resorted to in an attempt to frighten a child into obedience.

Clearly these are not adjudicatory mechanisms at work in resolving conflict, but the obvious end is the same, and that is to restore a balanced relationship and thus to intercept conflict and discord.³

12. The impact of the Constitution

Though chapter 12 of the Constitution of the Republic of South Africa (Act No. 108 of 1996)⁴ provides for the recognition of traditional authorities and indigenous law, reservations have been expressed about the future of traditional leaders and customary and indigenous law in the light of chapter 3, relating to Fundamental Rights. Bennett (1993:37) anticipated these concerns and stated that

with growing political power, Africans are demanding the repatriation of their culture from the province of western scholarship. In summary, culture is in the process of being rehabilitated. This does not mean that a bill of rights should be abandoned. Specific issues, such as amelioration of the status of women and children, may be addressed in a bill of rights without implying that an entire cultural heritage is to be overthrown. If the failures of past legislative reforms in Africa teach us anything, it is that programmatic and thus gradual change is more likely to succeed.

Referring to the African National Congress Bill of Rights and the Bill proposed by the South African Law Commission in respect of the provisions relating to gender equality, Bennett commented that enforcement of gender equality would involve a complete overhaul of the present system of customary law (Bennett 1991a:26). This would be anathema to the proponents of customary law and adherents to tribal traditions in South Africa, especially in view of the far-reaching consequences it would entail to giving women equal rights to property, powers of joint decision-making, and freedom from physical assault (Bennett 1991a:26-27). Whilst it would be presumptuous of any person to prescribe a solution to the potential for conflict between customary law and the modern jurisprudence of human rights, Bennett (1991a:32) concludes that the

most powerful argument in favour of sustaining customary law, and hence allowing free pursuit of cultural rights, is that this law (provided it is modified to take account of prevailing sentiments) endorses current social practice, and therefore rests on a foundation of popular acceptance. The present talk about human rights has an echo of the 1960s, the heady days of law and development and law and modernisation, when it was believed that customary law was primitive and backward and should be swept aside to make way for a brave new legal order imported from the West. The failure of these schemes to take root and to transform the newly independent African nations into images of their European and American benefactors has bred a certain respect for the resilience of local cultures.

So there is yet the prospect that our indigenous systems of law and the accompanying conflict resolution structures will survive the human rights legislative and judicial onslaught.

Channock (1991:68-69) expounds upon what emerges as a problem on the part of South African lawyers who will be forced to confront the existence of another system of law alongside that in which they have been trained:

South African lawyers, the products of an authoritarian state and legal system may have difficulties in rethinking their model of the legal world, in which the state's law stands in an hierarchical relationship to a wide variety of customs, and in which courts render authoritative decisions which have far-reaching effects on behaviour. Courts, as Galanter points out, deal with only a small fraction of disputes, and most of these are settled by negotia-

tion by parties using bargaining endowments given by law, as well as by culture.

13. Is there a place for traditional leaders in the new South Africa?

During multi-party constitutional negotiations in 1993, traditional leaders were not slow to vent their concerns at a Bill of Rights that would undermine them. A newspaper report at the time stated that the traditionalists — kings, chiefs and headmen — are worried that the proposed bill of rights, drawing heavily on western principles of equality, will undermine their authority (*Sunday Times* 1993:18). After listing a series of burning questions, the report quotes a chief as stating that

there are serious problems if the law says all citizens, including chiefs, kings and ordinary people, are equal in status. There are also serious problems presented by the clause which says there shall be no discrimination based on race, gender and creed.

(*Sunday Times* 1993:18)

The Interim Constitution has been so negotiated as to take account of the realities that prevail in the many traditional communities which still exist in the mainly rural areas of the country. Therefore, it is not surprising that a role for traditional leaders at both the national level and the provincial level has been enshrined in the Interim Constitution (1993) and the Constitution of the Republic of South Africa (1996). The role of traditional leaders will be reinforced by such structures as their courts and cultural norms in terms of which their pre-eminent positions as mediators and judges are acknowledged. This recognition of traditional leaders in the Constitution also amounts, to an extent, to their political rehabilitation. In the past the State President was entitled to appoint chiefs and headmen, a power which was often used for political expediency.

Sachs (1973:96-97) provides a different perspective to the tribal administration of justice and states that

in traditional African society every man was his own lawyer, and his neighbour's too, in the sense that litigation involved whole communities, and all the local men could and did take part in forensic debate. When pre-judicial attempts to resolve disputes failed, the arguments could be pressed to judgement before the chief, whose word was law; but the chief

invariably acted as spokesman for his councillors, who in turn sought to uphold and reinforce the established norms of the tribe.

Sachs (1973:96) also describes the quintessential role of the chief in maintaining harmonious relations between his charges thus:

(I)n this context the good chief was reckoned not by the terror he could inspire or the magnanimity he could display, but by his skill in articulating the sense of justice (just-ness) of a relatively homogeneous community, which involved his applying universally accepted rules and precedents to particular disputes in a manifestly appropriate way.

Sachs illustrates this point in his reference to Chief Albert Luthuli, once President of the African National Congress as well as chief of his tribe at Groutville on the north coast of KwaZulu-Natal. Chief Luthuli derived great pleasure from trying cases, and enjoyed both the debate and the reconciling of people at variance with each other (Sachs 1973:115).

Methods of dispute and conflict resolution as extant in traditional courts of South Africa do not slavishly follow precedent. Indeed, it may even be argued, the failure to follow precedent was a criticism of the methods of resolution employed indigenously. However, those who utilise such courts do so out of choice in many cases, and believe that they have more in common with the adjudicators and methods of adjudication, in contrast to the prevailing judicial system. In any event, it would be expensive and a gross waste of time and resources to use the fine tuned dispute resolution methods that prevail as alternatives to the conventional judicial system. Those conventional methods are designed largely as alternatives to litigation in an urban western context for complex cases where literally time means money .

14. People s courts and informal justice

This form of conflict resolution has emerged in relatively recent times. People s courts are not recognised by the government, but function mostly in urban areas, sometimes under the aegis of civic organisations. The creation of people s courts, a feature of the previous decade, has been ascribed to a rejection of apartheid structures and an attempt to return to the precepts of African communitarianism: of participation and consensus in all aspects of life as happened elsewhere in Africa at the time of independence (Radipati 1993:25). These courts are neither indigenous nor are they traditional but are so deeply entrenched in the architecture of informal

justice in peri-urban areas as to warrant brief consideration.

Radipati has stated that indigenous dispute resolution institutions in urban areas were Europeanised to the extent that there were two groups of Blacks, rural and urban. The former alone continued to enjoy access to their customary law and institutions (Radipati 1993:24). He has also suggested that urbanised Blacks, through the virtual non-availability of such structures as well as their proximity to formal law institutions, were serviced by informal dispute resolution structures such as civic associations (Radipati 1993:24).

Hund and Kotu-Rammopo (see Radipati 1993:24) refer to *Makgotla* (people's courts):

in the rural areas still governed by indigenous law and custom. Cultural movements also exist in the townships, and some of these have taken over as part of their function peace-keeping and dispute-settlement activities.

(Bennett 1991b:91)

In a report entitled *Return of the kangaroo court*, a national newspaper records instances of summary justice, which, according to one source, are the clearest message that there is still a lack of confidence in the police, magistrates and the judiciary (*Weekly Mail & Guardian* 1994b:12). The same report also points to a sense of frustration on the part of the communities involved with the provisions of the Criminal Code as well as the Bill of Rights which have apparently led to a more lax approach in matters of bail for those whom local communities perceive as notorious. Also, there appears to be a reluctance of township dwellers to utilise formal structures and most township dwellers turn instead to unofficial agencies of justice such as *makgotla* and also, perhaps increasingly, to other more drastic forms of self-help and violence (*Weekly Mail & Guardian* 1994b:12).

Bennett (1991b:105) draws a distinction between people's courts and the *makgotla* as follows:

Political allegiance aside, the *makgotla* never claimed validity or recognition beyond the communities in which they operated, whereas, at least according to the police, this was an implicit ideal of the people's courts. *Makgotla* in consequence tend to complement state structures rather than to challenge them.

Seekings (1992:194) uses the example of the court in Guguletu township in the Cape Province (now Western Cape) which appears to illustrate the more acceptable

face of informal justice :

In an apparently typical case, a young man was charged with harassing, and finally stabbing (but not too seriously) a young woman. After consideration, the young man was ordered to pay a fine, perform community service, and undergo counselling. A local civic leader described the court's role as reconciliatory rather than enforcing an eye for an eye mentality .

The sentence imposed demonstrates an innovative approach which even courts in the conventional judicial structure could do well to emulate.

The description of popular justice provided by Bennett (1991b:61) is instructive:

Popular justice is rooted in democratic principles, in particular trial by peers in an elected tribunal. So far as possible the tribunal is stripped of legal formality and of any past association with oppressive state institutions.

15. Summary and conclusions

Some of the mechanisms for the resolution of conflict within the traditional societies of South Africa have been explored. Reference has been made particularly to the processes in Pedi, Pondo and Tswana society, to name a few, which are representative of similar mechanisms for resolving conflict within the other traditional groupings in the region. This has also involved a comparison of western processes with their African counterparts. The role of traditional leaders has also been scrutinised as, to an extent, has been the case with informal justice machinery such as people's courts. Thus methods of conflict resolution ranging from the rudimentary to the relatively sophisticated have been considered.

What is common to all these traditional societies is the desire to contain conflict and therefore the potential for disruption. The lifestyles of the members of these societies, be they members of a small band of Khoisan or a large tribe of Pondo, could take a number of forms of disruption in the event that conflicts were allowed to fester. Thus, there would have been feuds and the secession of disenchanted members, to name just two possibilities. Family councils and traditional courts are but the means employed by the traditional societies, as well as their increasingly urbanised counterparts, to maintain and preserve harmony. To this end, these structures have functioned fairly effectively, by and large. In a rural or tribal setting, it would not take much for a simple breakdown in individual relationships to quickly

develop into a feud or worse. In an urban setting, people living cheek by jowl, as well as the historical inequities of the apartheid era, would provide a fertile basis for an assault or dispute or other like conduct to escalate out of control. The existence of traditional courts has historically intercepted such escalation of conflict and demonstrated the need to harmonise relationships at a macro level because these, of necessity, impact upon the greater whole.

The procedures of conflict resolution practised by the various indigenous societies in South Africa have received a new impetus with the migration of rural people to the urban areas and the establishment of the interim and the new constitution. For the first time in our constitutional history a role for traditional leaders in decision making has been enshrined, although in an advisory capacity.

The conflict resolution procedures practised by our indigenous societies will be influenced substantially by social developments in South Africa and will also infuse the latter with ideas around which community conflict resolution centres can function in addition to other work that they render.

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NOTES

- 1 This article has been extracted from Adv R.B.G. Choudree s unpublished LL.M. dissertation (Choudree 1996), submitted at the University of Durban-Westville, Durban, South Africa.
- 2 Through the device of the Native Administration Act No. 38 of 1927.