SOUTH AFRICAN INDIGENOUS COURTS : CHALLENGE FOR THE FUTURE

by

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submitted in part fulfilment of the requirements
for the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

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APRIL 1994

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SUMMARY

The purpose of this study is to access the viability of traditional African courts in a future legal dispensation in South Africa. The research method used is a study of literature, court decisions and relevant statutes. The development of indigenous courts in South Africa is broadly outlined. As an analogy to the South African court system, the courts of Lesotho, Swaziland and Botswana are used to illustrate the dual systems of courts. Rapid urbanisation is discussed to illustrate that despite the increasing urbanisation, traditional values remain inherent to South African Blacks. The salient features of indigenous courts are analysed to facilitate the development of reform measures that have to be implemented so that the courts can meet the challenge of the future.

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1. INTRODUCTION

Is there a place for traditional courts in a future legal dispensation in South Africa? This crucial question remains a challenge for the future in South Africa's complex and dynamic society. Traditional African courts are at the cross roads in South Africa. They are rejected by the urban African population as part of the apartheid domination and as being backward, since they function mainly in the rural areas. They further lack legitimacy since they are chaired by government appointed chiefs, considered by many to be mere puppets of the regime. The urban Blacks also reject the ordinary courts of the land as being inaccessible and foreign to their values. These allegations portray people's perceptions, but do they reflect the whole picture?

The data for the dissertation was derived from a study of literature, court decisions and relevant statutes. Literature sources entailed textbooks, articles and research papers on African courts. Relevant court decisions of courts in South Africa, Lesotho, Swaziland and Botswana were consulted as well as relevant statutes pertaining to indigenous law in general, and indigenous courts in particular.

The study commences with an overview of the development of indigenous courts in South Africa, both officially and informally. To this end the statutory measures with regard to indigenous courts are considered focusing on the structure and jurisdiction of these courts. The process of urbanisation of the Black population has put these formal structures under pressure. In addition, the growing political transformation of South Africa gives rise to various informal dispute settlement forums. The discussion of both the formal and informal structures provides a basis to analyse salient features of these indigenous institutions with a view to possible measures of reform.

2. INDIGENOUS COURTS IN SOUTHERN AFRICA

2.1 Pre-colonial courts

In pre-colonial days the chief's and headmen's courts were the courts of the day. A chief, as the Tswana themselves point out, was born not

elected. *Kgosi ke kgosi ka madi a bogosi* - meaning: A chief is a chief by the blood of his chieftainship (Comaroff 1970:37). He had exclusive authority over the indigenous coercive agencies and he was also accountable for the well-being of his people. 'The chief was the ruler of his tribe and father of his people. Each and every member of the tribe was his subject under his protection and "belonged" to him' (Bekker 1989:12).

The ruler could not adjudicate alone, and amongst most people he had at least to be assisted by a court council (Vorster 1993a:16). Generally all men present could take part in the court proceedings. In pre-colonial times there was no strict division between civil jurisdiction and criminal jurisdiction.

Headmen's courts functioned as primary courts and had jurisdiction to adjudicate minor disputes arising from their wards. Decisions of these courts were subject to appeal to the chief's court. Headmen were assisted by councillors in their adjudication of cases. Headmen's courts did adjudicate petty crimes, while they were empowered to investigate serious offences before taking them for adjudication to the chief's court.

2.2 Indigenous courts under colonial rule

2.2.1 Colonial rule

Throughout Africa the judicial role of chiefs was conceived as an aspect of their political status as tribal leaders. Colonial governments thought that the combination of administration and judicial powers in the same person would conform to traditional African ideas of leadership. In addition, the absence of formalities and informal proceedings were regarded as attractive features of chiefs' courts besides adjudicating suits in a manner familiar to the African litigants (Bennett 1991:56).

Although the chief was at the bottom of the hierarchy of the government offices, his position was a pivotal one. As agent of the

state, the chief had to carry out the dictates of colonial policy while he was still the traditional leader of his people. The eventual effect of the state support for the chiefs was to undermine their prestige and to subvert the basis of the traditional order. Before colonisation, most chiefs had governed with the consent of their people. This indigenous check on the abuse of power was removed when the chiefs' position came to depend instead on government subventions (Bennett 1991:57).

2.2.2 The South African dispensation

In South Africa The *Black Administration Act*, No. 38 of 1927, formally recognised the application of indigenous law in special courts in so far as it was not repugnant to the principles of natural justice and public policy, or had not been repealed or modified (Van Niekerk 1991:278). This Act provided for special courts for Blacks. In civil matters it provided for chiefs' courts, Commissioner's courts and Appeal courts for Commissioner's courts. Appeals against decisions of the latter courts were possible to the Supreme Court. In 1929 a special Divorce Court was also introduced to deal with matters arising from civil marriages between Blacks. Criminal matters were adjudicated by the chief's court and appeals were made to the magistrates courts. Although these courts were linked to the ordinary courts of the land, they resulted in fact in a dual court system. This implied that only certain courts could apply indigenous law while others could not.

In terms of section 20 of The *Black Administration Act* chiefs, and in communities without chiefs also headmen, were empowered to try offences at customary law as well as common law offences other than those specified in the third Schedule of the Act. These courts can only hear cases involving Black persons. They could also not impose punishment involving death, mutilation, grievious bodily harm, imprisonment and the imposition of a fine in excess of R40,00 or its equivalent stock value (cf. Vorster 1993a:15). Appeal lies to the local magistrate's court.

In terms of section 12 of the Act chiefs were empowered to hear civil claims arising from customary law brought before them by Blacks resident in their area of jurisdiction. Chiefs were not empowered to determine any question of nullity, divorce or separation arising out of a civil marriage (cf. Bennett 1991:64). Appeal lies to the Commissioner's court.

It should be noted that *The Black Administration Act* refers to courts of chiefs and headmen. The courts of headmen are those of headmen of communities without chiefs and do not refer to the traditional courts of ward headmen. The latter functionaries were not recognised by this act as constituting courts. These functionaries continued to adjudicate in the traditional way between members of their areas.

The rules of procedure and evidence to be followed in the chiefs' courts are that of indigenous law. It is an informal procedure requiring all parties and their witnesses to be present at the hearing. This implies that a default judgment was not known. Parties are assisted by relatives since legal representation was not known. Parties are allowed to state their case uninterrupted and are subject to cross-examination by all people present in court, implying an inquisitorial approach. Proceedings are conducted orally and no written record is kept, although a brief written summary of the case is nowadays required. No evidence is excluded in principle since the courts weigh all evidence on merit. The whole process is directed towards accessibility, simplicity and reconciliation of the parties within the community at large (Vorster 1993a:71).

A chief presiding over a civil claim constitutes, in effect, a court of customary law, and his judgement, subject to the right of either party to appeal therefrom, is binding and becomes *res judicata* (Gambushe v Makhanye 1980 AC (N-E)10). In Qwabe v Qwabe (1961 NAC (N-E)3) it was held that a defendant who has admitted liability in a chief's court was stopped from further proceedings in defence. But in Meyiwa v Myezwa (1979 AC (N-E)208) it was held that the principle laid down in Qwabe v Qwabe does not apply in the event of a liability which is not legally enforceable. According to Bekker (1989:16) this

is an illogical approach as it would not be possible to determine whether a liability is legally enforceable if the matter is not taken on appeal. If the chief's written record is vague as to what the claim was and as to what the defendant was admitting, the defendant should not be held to what might be interpreted as an admission and in the interests of justice the case should be heard *de novo*.

If a case was taken on appeal to a Commissioner's court, and if it appeared there that the common law should have been applied, the Commissioner should have begun proceedings afresh in his own court, and the chief's judgement would have been aside as being void for lack of jurisdiction. This limitation on the competence of the courts posed a number of difficulties. The conflict of laws is a complex matter and even the Appeal Courts did not find it easy to decide when common or customary law should be applied. In *Mkize* (1948 NAC 39) for example, 'an action was brought to recover damages for defamation, it was held that the words complained of would not give rise to an action in customary law, and accordingly the chief lacked jurisdiction to hear the claim'.

2.3 Restructuring of special courts

In 1986 with the re-organisation of the court structure in South Africa the chiefs' courts and the Divorce courts were retained. As a result of the recommendations of the Hoexter Commission both the Commissioner's court and the Appeal courts for Commissioner's courts were abolished (Bennett 1991:63). The Commission explained that although in many respects chiefs' courts functioned imperfectly their retention was supported widely by both Blacks and experts in customary law.

The abolition of the Commissioner's courts and their appeal courts resulted in an integrated and unitary court system. Decisions of chiefs' courts were made subject to appeal to the local magistrate's courts. In addition, all courts were empowered to take judicial note of indigenous law.

2.4 Indigenous courts in Lesotho, Swaziland and Botswana

An outstanding feature of modern African legal systems is their dualism. This dualism, which is found in the substantive rules as well as in the structure of the courts, is the result of the introduction by the former colonising powers of their own legal system, while at the same time retaining for the indigenous population the already existing regime of customary law (Pain 1978:164).

In Lesotho the courts which deal with indigenous law problems are called the Basotho courts, that is the Central and Local Courts. These courts administer the indigenous law prevailing in the country in so far as it is not repugnant to justice or morality or inconsistent with any law in force in Lesotho (Poulter 1970:314). The special courts are empowered to apply customary law in cases where both parties are Basotho (Olivier 1993:79). The courts in Lesotho which apply Roman-Dutch law are the Judicial Commissioner's Courts, the Subordinate Courts, the High Court and the Court of Appeal. From the Basotho courts which apply indigenous law an appeal is allowed to the Judicial Commissioner's Court or Subordinate Court in criminal cases; further appeal from the Judicial Commissioner is possible to High Court only when a legal question is involved.

The position in Swaziland is that the Swazi Courts and the Swazi Courts of Appeal are used exclusively for the application of indigenous Swazi law; further appeals may be instituted in the Higher Swazi Court of Appeal, High Court and the Court of Appeal for Swaziland. Customary law may not be applied where one of the parties is not African (Olivier 1993:80). Swazi courts are governed by Proclamation 80 of 1950 (*Swazi Courts Proclamation*). Section 10 provides that a Swazi court shall administer Swazi law and custom prevailing in the territory so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in the territory. The courts of Swaziland applying Roman Dutch law comprise of the Subordinate courts (e.g. the magistrate's court) and the Higher courts, such as the Swazi Court of Appeal, the High Court and the Court of Appeal for Swaziland.

In Botswana we also have a dual system of courts under which the general law based on Roman-Dutch is applied in the High Court and Subordinate Courts and customary law in a separate framework of customary courts. *The Application and Ascertainment Act*, 1969 governs the application of customary law in disputes between tribesmen and non-tribesmen. Non-tribesmen are under certain circumstances subject to the jurisdiction of the customary courts (Roberts 1970:261).

In Botswana indigenous courts are also empowered to apply the country's penal code. This may well result in the eventual abolition of unwritten indigenous and criminal law and would bring the indigenous law position more in line with the position contained in the penal code (Van Niekerk 1991:284).

From the above brief exposition it is clear that Lesotho, Swaziland and Botswana adhere to a dual court system. This is in contrast to the present position in South Africa where the courts are integrated and all courts may apply indigenous law. In all these countries indigenous law is subject to the repugnancy clause to bring it in line with public policy. The urbanisation process in South Africa poses new problems to indigenous courts in contrast to the position in Lesotho, Swaziland and Botswana.

3. INDIGENOUS COURTS AND URBANISATION

3.1 Urbanisation

The present demographic situation in South Africa with regard to the Black population indicates that about 80% of the population is Black. By the year 2000 more that 56% of the Black population will be urbanised (*Urban Foundation Race Relations Survey* 1992:331). There is also a move away from tribalism among the urbanised Black. According to Bennett (1991:93) the emerging Black middle class with its emphasis on western outlook and modernism often regard tribalism as outdated and reactionary. The processes of urbanisation and labour migration set in motion significant changes, mostly in the multicultural context.

Urban Blacks have access to the law of the land, originally through local commissioners and since 1986 through magistrate's courts. The State tried continuously to control indigenous communities and their alternative institutions. In 1902 the first Advisory Board consisting of township residents was instituted in the Uitvlugt township. In 1926 provision was made for the election of the members of these advisory boards by the inhabitants of the different townships.

In 1961 in terms of *The Urban Black Councils Act*, No. 79 of 1961, the minister could confer judicial powers of a tribal leader upon a resident of such urban areas. Both the advisory boards and the urban Black councils were abolished in terms of *The Community Councils Act*, No. 125 of 1977, which established the community councils.

These councils were seen as instruments in the hands of the apartheid regime and had little credibility in the eyes of the community (Van Niekerk 1993:4). The upgrading of these councils to town councils, in terms of *The Black Local Authorities Act*, No. 102 of 1982, did little to improve their credibility. In 1980 *The Black Administration Act* was amended by Act 94 of 1980, and the minister, in consultation with the community council, could then confer upon any black urban resident the same judicial powers as those conferred upon a chief or headman in terms of *The Black Administration Act*. *The Black Local Authorities Act*, No. 102 of 1982 was yet another attempt to control black urban areas and neutralise the challenge posed by unofficial dispute settlement institutions. In terms of this act, township and squatter leaders could be included into the formal system of local government as official town councillors of the black urban areas. Opposition eventually led to its dissolution in 1986 when the majority of the councillors were forced to leave the township or resign and the remaining councillors could not form a quorum any more. The government had made attempts to involve the Blacks in the judicial and formal system of local government but these attempts were distrusted by the people and did not succeed.

South Africa is at present in the midst of change, politically, economically and socially and the courts of chiefs and headmen do not meet the needs of the urbanised Black. In South Africa, many of the

peculiar problems facing the cosmopolitan urban community today stem from the largely ineffective administration of criminal justice in Black areas (Van der Vyver 1982:316). 'There is a lack of confidence in the present legal system. Western dispute settlement procedures are unsuited to solve their problems as well as problems of social adjustment encountered by urban Blacks' (Smith 1972:223).

3.2 Courts in urban context

The justice meted out under the present legal system is distrusted, therefore urban Blacks resorted to unofficial institutions such as *makgotla's* and later also people's courts (Hund and Kotu-Rammopo 1983:179). The lack of legitimacy of the administration of justice among urban Black people is therefore a problem that cannot be left unsolved (Consultus 1991:3).

The term *makgotla* is derived from the Sotho word stem *(le)kgotla*, which has various meanings. It may mean 'meeting', 'court', the place of a meeting or court session, and also people at such a meeting or only the advisors of a court. In this sense it is comparable to the unofficial court of the ward headman in tribal areas. In urban contexts the term *makgotla* is commonly used to describe the informal and unofficial bodies involved in dispute settlement activities. The term also includes a variety of other bodies varying from vigilante groups, gangs, ward committees, and even counselling organisations. All these *makgotla* have many functions other than legal (Vorster 1993b:102) and cannot be regarded as courts in the ordinary sense.

The *makgotla* which arose in townships such as the Ward Four of Mamelodi and the Nyanga East Youth Brigade Court in Cape Town have features similar to chiefs' courts. The emphasis is on communal participation, accessibility, reconciliation and harmony. Mamelodi, a Black township near Pretoria, was for example divided into a number of 'wards' each consisting of several residential areas. For each of these wards a community councillor was elected, who then appointed a dozen deputies who, along with himself, formed a ward committee.

According to Vorster (1993b:102) during the 1980's alternative government structures were created and since 1986 the notion of people's courts came to the fore. These informal, alternative lawlike structures are in fact more than mere forums for dispute settlement. They are to a certain extent instrumental to the liberation struggle with domination of the local population as an important, through unstated objective. The police diverted their energies to fight the political challenge to the state, thereby leaving a gap in conventional policing. Another impetus to the creation of people's courts was that the political movements decided to create disciplinary structures for other reasons too. The consumer boycotts which had begun in the Eastern Cape during the first few months of 1985 needed to be policed, and the United Democratic Front and its affiliates could, of course, not resort to the state courts and the police forces to do so. There was also a desire among the political movements to demonstrate to the township residents that the movement was capable of running most aspects of township life, including administration of justice. Creating and participating in people's courts also became a way of educating township residents politically and strengthening their dignity and feeling of self-reliance (Bennett 1991:97).

The people's courts sprang up with remarkable rapidity in many African townships throughout the country as part of a community initiative to combat the growing crime rate caused by marginalised members of the townships who were exploiting the political turmoil. By the year 1985 the State alleges that there were 400 people's courts in the country (Schaerf 1989:225).

The Alexandra Action Committee in Alexandra, a township to the north of Johannesburg, formed people's courts as a mechanism for settling disputes. The formal legal system had lost all legitimacy in the eyes of the township residents and was seen as a tool of oppression rather than an instrument of justice. These courts entertained mostly domestic disputes and problems relating to living conditions in the township. The 'Alexandra Five' case (in Bila and Maleka 1989:596) demonstrates that the state should take cognisance of representative structures which people have devised. The Alexandra Action Committee formed street or

avenue committees in Alexandra so as to unite the people of Alexandra and to look at people's problems in order that they may be solved.

A great number of civil matters were heard in these forums such as disputes between families, love triangles, disobedient children, maintenance of illegitimate children and insults to reputation as well as criminal matters such as assault. People's courts also heard matters concerning rape as well as political matters relating to consumer and rent boycotts, misusing the status of 'comrade' for personal gain, and disobeying stay-away calls (Schaerf 1989:229).

People's courts have been known to order excessive punishments and a court in the Cape Town area was persuaded to change the death sentence of a rapist of an eight year old girl to corporal punishment of 400 lashes (Van Niekerk 1993:9). 'The low-intensity street-war that raged in most townships between the state's armed forces and the residents was also conducive to immediate and often violent punishment such as necklacing' (Schaerf 1989:227). This is born out by the mere fact that children, mostly under eighteen years of age, have been known to run these courts without being held accountable to any higher authority to check and curtail their often inhumane punishment and decisions. Vorster (1993b:102) states an example of this punishment. A woman complained that her husband wanted to divorce her. The informal court's ruling was that the parties were to be reconciled and the husband was forced to have intercourse with her in the presence of the 'judges of the court', in this instance boys between the ages of thirteen and fifteen. This humiliating act was supposed to signify the reconciliation between the parties. It is possible that children under the age of eighteen are deliberately used in these institutions to dominate the local population, knowing quite well that in terms of section 277 of *The Criminal Procedure Act*, No. 51 of 1977, such children, if convicted, cannot be sentenced to death. This is in stark contrast to what Mqeke (1992:465) states: The elders are regarded everywhere in Africa as the repository of tradition and as such their views are accorded great weight in the settlement of disputes. According to Van Niekerk (1993:5) *makgotla's* were run by responsible adults and were mainly concerned with family law matters and the

enforcement of traditional values. This indicates that the tribal courts are at the cross-roads.

It seems that with time the authority of the elders are being eroded and the youth are becoming more militant. Because of the disrespect of the youths towards the elders we find that the people's courts lost the support of elders of the community.

Recognition of the people's law does not necessarily mean denial of state law but rather an acceptance of plurality of legal systems and the underlying systems of power can be used to reinforce the positive (for the people's) values of state law as well as to combat its negative aspects (Sanders 1993:102). Although it is impossible to isolate any comprehensive systematic body of legal rules, it seems that the procedures followed in these courts closely resemble the traditional procedures (Van Niekerk 1993:7). In times of extreme violence and unrest, people were able to unite and form themselves into *makgotla's*. *Makgotla's* utilise concepts of indigenous law like the reconciliation of feuding parties. A future dispensation without concepts based on indigenous law such as reconciliation, harmony and emphasis on agnatic relationships is unlikely to achieve a large measure of success.

It is difficult to evaluate whether people's courts served the needs of the township dwellers. The people's courts were accountable to themselves or the loosely defined 'interests of the people' as they interpreted the phrase. According to Van Niekerk (1993:9) people's courts are witness to the fact that while for the vast majority of the urban population the notion of tribalism is abating, the break with traditional practices is not so clear in domestic relations. Many domestic customs are not incompatible with the conditions of urban life and urban dwellers, as a rule, still regulate their domestic relations according to customary norms and values.

4. FEATURES OF INDIGENOUS COURTS

4.1 Accessibility

Any Black person who is involved in a dispute may take his/her complaint to the headman or chief and the matter is heard and finalised within the shortest possible time. Apart from the complainant it is the duty of every citizen to help bring a culprit to justice whenever the need arises. The language medium used is the mother tongue of the litigant. Indigenous courts have a free system of evidence. No oath is taken by the parties and as a result there is no question of perjury. Anyone present at the court proceedings may ask the witnesses questions and people generally move in and out without strict court procedure being observed. There is no strict adherence to the application of technical rules (Bennett 1991:79; Koyana 1980:129; Vorster 1993a:57).

In a post-apartheid South Africa not only the composition of but also access to the courts will have to be broadened. Few urban Blacks took their grievances to the erstwhile Commissioner's courts or the police. Of the estimated quarter-million Blacks under the jurisdiction of the Pretoria Commissioner's court, one commissioner estimated that less than 2% brought their estate problems in for settlement. Although we have no reliable survey data on the matter, it seems clear that the vast majority of Blacks living in townships do not turn to the official court structures for help in processing their claims or for redressing their grievances. They turn instead to the unofficial agencies of justice such as *makgotla* and also, perhaps increasingly to other more drastic forms of self-help and violence (Hund & Kotu-Rammopo 1983:183).

According to Sanders (1993:99) proceedings should be conducted in a manner and language to which ordinary people can relate to. Formality should be limited to a functional minimum and the court and all accompanying 'legalese' should be translated into ordinary language. In the official courts the language medium is either English or Afrikaans. This language requirement of English or Afrikaans proves to be a disadvantage to the Black litigant who has to conduct his case through an interpreter. The accuracy of the interpreter cannot be guaranteed

and this could be to the detriment of the accused. In the indigenous courts the litigant is able to converse in the language medium he/she understands, making the process accessible to him/her. An important requirement of a court is that people must be able to relate to the court and understand what the court represents, a quest for justice, law and order and the truth. The present formal system failed to facilitate justice within the framework of its own definition of justice.

4.2 Simple proceedings

In former times the various Bantu-speaking societies, generally referred to as tribes and chiefdoms, were divided into wards. This was done for political and administrative purposes. These in turn were subdivided into local agnatic segments, each comprising a number of agnatically related households. Each household was under the authority of a senior male person, generally known as kraalhead (Myburgh 1985:60). The principal dispute settlement bodies were located within these local agnatic groupings. These were arranged according to the same hierarchical basis. Disputes could occur between members of the same household, between members of related households and between members of unrelated households within the same chiefdom. Disputes over tribal boundaries were serious events which could result in intertribal feuding and even war. In any dispute an attempt was first made to settle it in on the lowest level possible. Only where this failed was the matter taken up through successive levels (Vorster 1993b:99). If a dispute arises and settlement cannot be reached by the parties concerned, then the aggrieved party or both parties turn to the ward headmen. The ward headmen first tries to reconcile the parties by acting as a sort of mediator between them. If this is unsuccessful, he decides the case in his capacity as judge. The proceedings are conducted orally in the language of the litigant. Even in the tribal court, the chief first attempted a settlement. The chief first tried through mediation rather than adjudication. The chief attempted to settle disputes in an informal and friendly way.

4.3 Communal participation

Communal participation played an important part in the indigenous judicial process. All men present could take part in the court proceedings and therefore there was communal participation and the judgments handed down tried to maintain the harmony within the community (Koyana 1980:131). The court is open to anybody. Any person present in the court may question the litigants and the people present may profer information.

According to Van Niekerk (1993:12) the creation of forums for dispute resolution in which the community may participate collectively and openly should not only be regarded as the legacy of the people's courts, but also a reaffirmation and perpetuation of the spirit of communitarianism and collectively underlying African indigenous law and social ordering.

4.4 Cost effectiveness

Law suits in the state courts are always expensive and beyond the reach of the majority of the population in South Africa. The cost of hiring attorneys are often beyond the financial means of Black people and so they are forced to go undefended. More than 100 000 undefended accused persons each year receive sentences in lower courts (Consultus 1991:7). Even if Black people are able to afford legal representation, access to legal representation is difficult as lawyers are located within the central business district, in close proximity to the courts, while Blacks living in the rural and peri-urban regions, are effectively limited in securing legal services. It begs the question which the new South Africa will be challenged to answer. How to provide justice that is cost effective and has consensus and accessibility? And here the indigenous courts have a possible role to play.

The cost of litigation in indigenous courts is not high because there is mediation rather than adjudication. Matters in the chiefs' and headmen's courts are speedily disposed of. There is no legal representation permitted so that the cost factor is low. The court

session is conducted in the language of the litigant so the services of an interpreter are not required.

The state court system is not cost effective. Some initiatives by the State to facilitate access to justice and to make it less costly have been in the form of the small claims court. Through the medium of the small claims court a simpler less technical procedure has been instituted.

4.5 Reconciliation and harmony

According to Allott (1984:56) at the heart of the African adjudication lies the notion of reconciliation or restoration of harmony. In indigenous law the job of the court or arbitrator is to set right a wrong in such a way as to restore harmony within the disturbed community. Harmony will not be restored unless the parties are satisfied that justice has been done. In most African societies, indigenous courts originally tended to mediate or arbitrate cases brought before them rather than to formally adjudicate these cases.

It is apparent from the above features of the indigenous courts that it manifest characteristics that are acceptable to the people it served. It encompasses popular justice. Sachs (in Grant and Schwikkard 1991:305) described popular justice as follows:

Justice is popular in form, in that its language is open and accessible, popular in its functioning, in that its proceedings are based essentially on active community participation and popular in its substances, in that judges are drawn directly from the people and give judgement in the interest of the people.

5. SOME RECOMMENDATIONS TOWARDS REFORM OF INDIGENOUS COURTS

5.1 Introduction

According to statistics (Cooper 1992:331) 36% of the Black population is still in the rural areas and they still conform to customary law. With

modification and the eradication of present abuses in indigenous courts, state courts applying common law and indigenous courts can be reconciled to function in harmony in a future South Africa. Indigenous law courts have survived remarkably well and its tenacity and the popular support it enjoys is testimony to the fact that these courts can act as co-partners to the official legal system in South Africa.

According to Sanders (1993:101) the message of the people's courts came through loud and clear to both the government and the legal profession, and that the effected and proposed alterations in their laws, rules and regulations were more than just 'amendments' but 'amends' for years of neglecting the interests of the mass of the people. The recent flood of 'top-down' reform measures may, however, soon dry up in a wasteland of 'gap politics'. The reform process had to be channelled.

According to Van Niekerk (1991:281) law reform should not lose sight of the needs and broad consensus of the community. At the grass-roots level chiefs may still have a significant role to play in the judicial administration of rural areas. Confidence in the courts on the part of those subject to their jurisdiction is of vital importance, especially since legal representation is not permitted and the chief accordingly fulfils the role of trusted adviser to all parties concerned in the court's conciliatory proceedings. The court represented both an indigenous cultural institution and an important instrument of reconciliation.

In order to meet this challenge, South African indigenous courts need a system which encompasses communal participation at grassroots level. Thus, collecting data through consultation with all South Africans about their needs and aspirations for a judicial system is vital. Thereafter making the new system accessible to those it serves is imperative. By incorporating this statistical data with qualitative analysis combined with the knowledge of the different existing legal systems, a new more effective indigenous court system may be born. According to Allott (1965:387) a legal system is inevitably a compromise. An imposed law can only work in the long run if it has a measure of popular understanding and acceptance. It is hoped that people's loyalty to

tradition and attachment to familiar values will together with the government's genuine attempt to reform the existing judicial structures ensure that the indigenous courts of the future will meet the challenge that faces them.

5.2 Models for reform

The Hoexter Commission recommended the creation of the small claims courts in South Africa on an experimental basis. It was hoped that they would obviate various difficulties such as the high cost of engaging lawyers, delays and the psychological barrier many litigants experience when appearing in formal tribunals. In terms of Section 15 of *The Small Claims Courts Act*, the court can hear claims that do not exceed R1 500 in value. Small claims courts do propagate ideas of informality, conciliation and adjudication which results in a lower cost to the litigant.

One of the problems that the small claims courts manifests is that the Hoexter Commission did not consider the circumstances of the African litigant in its Fourth Report. Section 14(3) of the Act provides that a court may hear an action between Blacks and that it may apply customary law 'as may be proved'. According to Bennett (1991:88) the latter condition, if interpreted literally, would make the application of customary law impracticable because it means that each rule of customary law must be proved in every action in which the rule occurs.

Another psychological obstacle to easy access is language, and *The Small Claims Courts Act* does not attempt to improve upon the situation in magistrate's courts. Section 5(1) provides that either of the official languages of the Republic may be used. The use of an interpreter is permitted in the small claims court. However, despite the permissive wording of 5(1), the Legislative does not seem to have envisaged the trial being held in an African language.

According to Bennett (1991:108) the law reform measures in South Africa paid no regard to the various unofficial methods that already existed for handling disputes. If, for example, due consideration had been paid

to the tribunals operating in the townships, the legislative might have considered incorporating them into the state system, rather than creating a new and wholly experimental system of small claims courts. It might also have been an appropriate time to reign the *makgotla* and to evaluate the performance of the community council courts.

The Community Dispute Resolution Resource Committee is another model of law reform of which cognisance must be taken. In January 1991 this committee attempted to make justice accessible and accountable to the people it serves. The CDRRC will provide appropriate dispute resolution mechanisms to partners in disputes within the community, primarily by facilitating the voluntary submission to mediation and arbitration. The CDRRC has received formal requests for assistance in the establishment of community dispute resolution centres from ten communities in the Transvaal. These projects will be monitored by faculties of law in these centres (Van Niekerk 1993:14). Since domestic disputes can be settled by a lay court it would be suitable for this method to be used as an extension of the state courts with indigenous court procedures.

5.3 Conditions for reform

There must be full recognition of indigenous law on all levels. Full recognition of indigenous law may be done through the technique of legislation. To achieve success it must have broad consensus of the people and to obtain the consensus of the people certain injustices such as differences and discriminations based on sex and race must be removed.

Harmonisation, integration or even unification of law courts is imperative in a post-apartheid South Africa. There is a need for reconciliation of courts dealing with indigenous law and the state courts of South Africa. Furthermore, effective government is dependant on a legitimate legal system and accessible law courts can provide a vehicle for legitimation through communal participation in the formal legal system. Sanders (1993:102) proposes a centralised multi-door court system, when all the country's courts and tribunals should constitute a single and clearly distinguishable judicial pyramid,

existing side-by-side with, yet independent from the country's legislative and executive.

The courts must be easily accessible to the people. Litigants should be allowed to conduct their case in their mother-tongue. The informality of procedure in the indigenous courts must be maintained.

The courts must become courts of records. This would facilitate legal certainty in the field of indigenous law.

5.4 Implementation

Sanders (1993:103) believes that a practical legal training programme will result in a professional, co-ordinated and representative administration of justice in South Africa. Suggestions have been made by Visser (1990:68) for a University training in indigenous law and the internal conflict of laws so as to better equip the South African jurist for his career. I believe that the professionalisation of the indigenous courts will greatly assist in enhancing the status of indigenous law. Professional personnel are needed to replace the traditional judicial officials. While the earlier training was only in modern law, these personnel must have knowledge of both indigenous law and modern law.

The professionalisation of indigenous courts will require research of the current state of indigenous law in rural and urban areas. The Centre for Indigenous Law of the University of South Africa has undertaken a programme of recording customary law as it is currently practised in the traditional areas. According to Prinsloo (1993:26) restatement of the indigenous law in an appropriate way will provide the courts with the necessary written sources of information. Investigation of the indigenous laws observed and applied in the townships and squatter camps should also be undertaken.

In addition a simultaneous plea is being made for preservation of the advantages of the traditional indigenous courts and procedures, especially the popular, simple and supple administration of justice

(Allott 1965:232-233). For successful reform to be implemented there must be communal participation. Schaerf (in Grant and Schwikkard 1991:313) proposes that community courts could be drawn from representatives of the community. Criminal and civil jurisdiction could be limited and civil claims should not exceed the amount of R1 000. Procedures are to be based on common sense and no legal representation must be permitted. Jurisdiction in regard to sentence should be limited to restitution, service to the complainant or community service. This type of court allows for women to be presiding officers.

According to Vorster (1993b:103) in the rural areas the chief's courts will continue to adjudicate disputes. In determining its functions and jurisdiction its traditional role as a mediating agent should not be overlooked. Various interested parties have advocated the democratisation of chieftainship (Bekker 1991:130). Greater recognition should also be given to the informal courts of ward headmen since these are the lowest level for dispute adjudication on local level in rural areas.

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