

The Ancient Customs of Reconciliation Today

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ABSTRACT

In our time, the majority of lawyers consider criminal liability as the only method of legal regulation. However, there are a number of regions where criminal law and ancient customs of reconciliation apply concurrently. For instance, the custom of reconciliation of blood relatives in the Caucasus region or a custom by the gypsies who resort to tribal courts in order to resolve disputes are still relevant in modernity. In addition, in South Africa several traditional indigenous customs are still adhered to whilst western law is used to regulate these customs. Panel questions to discuss: Why are ancient customs still in use? Should we restrict the application of old customs? Is it possible to introduce alternatives to traditional criminal justice?

Keywords: *Ancient Customs, criminal liability, South Africa, South Africa law*

1. INTRODUCTION

Since 1994, the newly elected Democratic Government in South Africa has been respectful towards indigenous and ancient customs and practices BUT - Yes; law regulates ancient or indigenous customs and practices in South Africa.

The Constitution of the new democratic South Africa is the supreme law of the land. It is widely regarded as the most progressive Constitution in the world, with a Bill of Rights that reaches very wide and inclusive. The Constitution symbolises an acute awareness of the injustices of the country's non-democratic past. It is the highest law of the land and no other law or government action can supersede it.

A Bill of Human rights features significantly in the Constitution. And it highlights the plea to create a society based on democratic values, social justice and fundamental human rights for all. The South African Constitution recognizes traditional authority and customary law under Section 211. Customary practices are protected by the Constitution but are subject to the stipulations of the Constitution. The challenge in South Africa is that ancient customs and customary law were not recorded on paper since the earliest times and are fluid in many ways. Most customary practices are carried over from generation to generation - often by word of mouth. This brought about changes over time and different interpretations among different groups of people (even within the same tribe or ethnic group). South Africa is globally referred to as the rainbow nation because of the diversity of its people where Western and traditional (African) cultures co-exist. Most South Africans from all race groups prefer to be referred to as South Africans rather than labelled according to their race or ethnic group. However, ethnic groups and their ethnicity determine their unique customs and practices. The South African people especially different Black ethnic groups and tribes adhere to many different customs,

practices and indigenous laws. Nevertheless, acculturation (endeavouring to live a mainly European lifestyle) and modernisation have placed strain on many Black people to either adhere to Western law or still adhere to ancient or indigenous customs. Some choose to adhere to both, while others prefer one above the other. The cementing of European legal texts into Africa, the apartheid legacy, a diverse African indigenous system often at odds with Western values, and the realities of language barriers bring about huge challenges facing the legal profession and policy makers in South Africa. To contextualise the diversity The South African Constitution refers to four main race groups, namely Black, Coloured (mixed race), Indian, and White. It also indicates that 11 official languages exist. To complicate matters, the Black population live as different ethnic groups each with their own unique language, ancient customs and indigenous beliefs. So today the South African population is still a complex mix of different races, cultures, ethnicities and languages. The current 11 official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. Other languages from all over the world are also spoken in South Africa. Surprisingly, the first inhabitants of South Africa were the San and the Khoekhoe people but their language is not recognised in the new Constitution of South Africa.

Many ethnic groups "live" their customs and believes' from day to day and many of these ancient customs do not clash with the law or the Constitution. The notion of developing the indigenous law within the context of an African value system and legal practices must be supported in a diverse society like South Africa but it brings along a conundrum of legalities. The South African law is based in principle on three European legal dogmas, consisting of Roman, Dutch and English law. One can

argue that the recognition of traditional leaders (who often utilise indigenous law) in the Constitution indicates a type of legal dualism that recognizes cultural diversity. However, in reality I believe that the interaction between the two is based on an assumption that the western system dominates the indigenous system. It is a catch-22 mutually dependent situation as long as the ancient customs do not clash with legal prescriptions. I intend to share a few examples to capture the essence of how legal regulation of ancient customs in South Africa occurs.

2. THE LAW VERSUS GENDER AND TRADITION

To highlight one such a conundrum is the current struggle the South African government has to ensure gender equality. Most African traditional social organisations are male centred and male dominated. Authoritarian male dominance traditionally guides decisions in the family, extended families, or ethnic groups. South Africa have long-standing beliefs concerning gender roles, and most are based on the premise that women are lower on the hierarchy than males or do not have the same status or power, compared to men. Therefore, in a family, the father will make the most pressing decisions and his word is usually the “law”. This authoritarian stance runs through all the race groups in South Africa but it has very unique and specific characteristics in the different Black ethnic groups. For example, polygamy for males is acceptable in some of the Black ethnic groups but not acceptable according to western laws in South Africa. The official law has been adapted however to accommodate polygamy. Polygamy is legal under certain circumstances in South Africa. All polygamous marriages entered into in accordance with the provisions of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) and performed under African customary law, including polygamous marriages, are recognised as legal marriages. With regard to gender relations and dominance many women in South Africa suffer some form of gender inequality or violence in their matrimony. The United Nations often highlight the levels of violence against women in Africa and more specifically South Africa. Violence against women in South Africa is rife. The South African Government has implemented many strategies to curb this ongoing violence with limited success. A survey conducted by the Council for Scientific and Industrial Research (CSIR) with 1000 respondents in six of the nine provinces in South Africa, found that 62 percent of the respondents reported that domestic violence (DV) was a common occurrence in their communities and only 24 percent of them did not have friends who were in abusive relationships at the time when the survey was conducted. It must, however, be taken into account that a separate category for DV does not exist in South African police statistics and thus one has to rely on other sources such as victim surveys to determine the extent of the crime. If we only consider official police statistics regarding sexual

offences against women in South Africa, I can report that 52 420 sexual offence cases were reported in the 2018/19 financial year. Most of these were cases of rape, namely 41 583. The other cases included sexual assault (7 437); attempted sexual offences (2 146) and contact sexual offences (1 254). Why is the sexual assault rate so high? Is it because of displaced aggression towards women? Is it because of lust and the inability to control sexual urges? Can it be because of the perception that women are subservient to and less important than males? Is it because ancient tradition or culture endorsed actions that will be deemed gender violence in modernity? We will have to find the answers soon as sexual assault is increasing in South Africa. Currently in 2020 the South African President, Mr Cyril Ramaphosa is considering to sign amended legislation to implement Sexual Offences Courts to specifically deal with these matters. The solution could lie in addressing the belief system that women are less important. To contextualise this I will turn to an ancient custom in South Africa amongst certain Black ethnic groups known generally as Ukuthwala. Ukuthwala is a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman’s family to endorse marriage negotiations. This raises the question: Can culture be used as justification for Ukuthwala?

In this regard The Department of Justice and Constitutional Development (2020) state:

Culture as a way of life for a group of people, is given a place in our Constitution. But no culture is above the law. The Constitution is clear that cultural rights are protected subject to the Constitution. Section 31 of the Constitution recognises cultural rights of communities and groups provided that such rights are not exercised in a manner inconsistent with any of the provisions of the Bill of Rights. Ukuthwala and the cruelty it inflicts on the girl-child by denying her of her right to be a child, among other things, are further inconsistent with the African value of ubuntu. It must also be borne in mind that culture is dynamic and communities sometimes discard practices that were seen as benign in the past as they develop as a people. In this day and age, the kidnapping and abduction of girl-children that have barely reached puberty cannot be reconciled with the ancient practice of Ukuthwala, which was condoned by communities but subjected to delictual sanctions. It’s often said that some apparent victims of Ukuthwala feign crying when they are happy and have tacitly consented to their “kidnapping”. As is the case with modern law on rape, the law requires consent, not a secondguessing of the girl’s wishes. The Recognition of Customary Marriages Act also requires consent.

[Note: Ubuntu means we are all connected in some way and it encapsulates "humanity" and being humane towards others].

The dilemma is therefore that the fabric of the legal machinery is woven out of two cross-cutting strands namely the interface between European influenced current law and indigenous law; and the interaction between principles rooted in different progressive European systems and indigenous traditions. Although kidnapping is

against the Constitution and the Criminal laws of South Africa a fair amount of tolerance is shown in cases of Ukuthwala. Something parallel to this is the so-called “blesser” phenomenon in South Africa. This is a situation where young girls are exploited by older males who pay them for sexual favours (“blessers”). Older men date young girls, who are often very vulnerable because of broken homes and poverty and buy them expensive gifts in turn. There are even social media platforms (e.g. “Blesserfinder”), where girls apparently “meet” rich “sponsors”, in exchange for sexual favours. Currently the human immunodeficiency virus (HIV) is spreading faster among teenage girls and young women than in any other group in South Africa. It is believed that almost four out of every 10 new HIV infections in the country occur among women between the ages of 15 and 24 years. This infection rate is up to four times that of their male peers. Many credit unprotected age disparate sex as the key reason.

3. WITCHCRAFT AND THE LAW

Some unique forms of executing elders in South Africa occur because they are deemed to be “witches”. Often community members will take law into their own hands and execute a “witch” to either prevent the witch to cast spells or to break a spell in unimaginable brutal fashion. One of the most significant challenges facing the post-apartheid government is the tension between the modern world and traditionalism. In some Black ethnic groups elderly women are mostly accused of witchcraft. Although males and sometimes a child can be accused of witchcraft the older females in a community are often vilified as the magic workers. Witchcraft fall into two broad categories: events that “explain” something that occurred or some misfortune someone, a family or the community is experiencing and something magic which occurs and cannot be explained by normal human behaviour. Whether witchcraft is a reality or not it is still governed by the Witchcraft Suppression Act 3 of 1957. In Section 1(a) of the Witchcraft Suppression Act 3 of 1957 as amended, reads as follows:

‘Any person who –

(a) imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard; ... shall be guilty of an offence ...’

Often when misfortune occurs, it is believed that it is the work of a witch. Subsequently illness and other bad occurrences such as drought or bad crops are often related to witchcraft. In some cases traditional healers are labelled as witches who have the ability to bring bad luck to a person, family or community. A witch is therefore a person believed to harm others through exercising magical powers. A cloud of secrecy surrounds witches and their trade, and “practising” witches are therefore careful to avoid detection. Being accused of apparent witchcraft is therefore a very serious issue as it can be life threatening.

When an elderly women is identified as the witch who causes the bad fortune she will probably be murdered as a result. In present times, this usually occurs in poor rural areas where people live in poverty and under strained conditions where illnesses or bad fortune cannot be explained. In many cases, a large part of the community is involved in the killing of the “witch”, which makes legal processing almost impossible. If a perpetrator is identified they will be prosecuted and go on trial.

4. TRADITIONAL HEALERS AND THE LAW

South Africa is a diverse country where many people believe in indigenous medicines and religious ways of curing illness. This ancient custom in South Africa still has significant importance in the lives of many people. It is not uncommon for Black South Africans to consult with a traditional healer when they feel emotionally disturbed or physically ill in some way. In some cases, other race groups also consult with traditional healers. Traditional healers are an important source of health and psychological support in South Africa. Two types of traditional healers exist, namely a sangoma and an inyanga. A sangoma uses traditional medicines, but relies primarily on divination and communication with the ancestors for healing powers/purposes (in some cases this is seen as witchcraft). The inyanga is an herbalist who is concerned with medicines made from plants and animals. The World Health Organization (WHO) defines a traditional health practitioner (THP) as ‘a person who is recognised by the community where he or she lives as someone competent to provide healthcare by using plant, animal, and mineral substances and other methods based on social, cultural and religious practices’. Some researchers believe that eight in ten Black South Africans utilise traditional healers exclusively or in conjunction with Western medicine. It is believed that more than 200,000 traditional healers care for more than half of the South African population. Since traditional healers are a diverse population, it is difficult to accurately predict the number of traditional healers and their ratio to the general population. In South Africa, traditional healing consists of a combination of healing practices such as divining, herbalism, and spiritualism. The functions of traditional healers are deemed fundamental in the day to day existence and because of that the Traditional Health Practitioners Act (No. 35 of 2004) were promulgated to regulate the actions of these healers. Different categories of healers can register under this act, namely herbalists (izinyanga or amaxhwele), diviners (izangoma, umthandazi or amagqirha), traditional surgeons (iingcibi) who mainly do circumcisions, and traditional birth attendants (ababelethisi or abazalisi)’.

Based on the magnitude and the general belief in traditional healing and medicine it became evident that the human rights of the client and the traditional healer needed to be protected through a legal mandate. In this context,

the purpose of the Traditional Health Practitioners Act (No. 35 of 2004) was to:

- Establish the Interim Traditional Healers Council of South Africa.
- Provide for the registration, training, and practice of traditional healers.
- Serve and protect the interests of the public who use the services of traditional health practitioners.

The need for this act was precipitated by the significant political and social changes that have occurred in South Africa since 1994. Since democratisation, a very high premium is placed on human rights which entail the equal, just, and fair treatment of all people. Unfortunately traditional medicines and healing have been marred by incidents where human body parts have been used in the medicine concoctions some THP's prepare for customers.

5. MUTI-MURDERS AND THE LAW

Traditional healing in general is not against the law and is a normal part of everyday life in South Africa. The concept of muti is familiar to most South Africans. In many cases it is used to refer to an innocent cure of some sort, but in other cases it denotes something far more sinister. Unfortunately, some traditional health practitioners go beyond herbal concoctions and "strengthen" their concoctions with pieces from human body parts. The organs such as the heart, liver or genitalia must be harvested from a living individual to make the concoction more potent. Even criminals consult with traditional healers or traditional herbalists to concoct medicines or "muti" to make them invincible or bullet proof before they commit a high risk crime. In some instances, traditional healers use animal matter and bones, and in the extreme forms, human organs or body parts, to concoct specialised muti. In cases where muti does contain human body parts, a special concoction is usually made to order for a client. Muti murder may be loosely defined as a murder where the intention is to gather or harvest human body parts for use in traditional African medicine for different specialised reasons. Some refer to the act of harvesting body parts as muti killing and others to muti murder. The reason why some prefer muti killing is the fact that the taking of someone's life for the purpose of muti has a strong cultural and medical meaning and does not imply "murder" in the judicial sense of the word. Cultural and medicinal value aside, someone had to pay with their life for another's gain. When someone is killed for another's gain, it is deemed a crime in Western law and they will be prosecuted. When a muti killing occurs, a violent crime is implicated and the judicial system is obliged to act. In most cases the body parts for medicinal and ritualistic purposes are removed while the victims, mostly women and children, are still alive to make the muti more potent (harvesting of live organs).

6. TRADITIONAL MARRIAGE AND THE LAW

In South Africa, the custom of lobola (negotiations between the two families regarding an agreed upon settlement [e.g. money, cattle, furniture, alcohol etc.]) is widely practiced. In the Xhosa and Zulu ethnic groups cattle are a very popular minimum means of lobola. Lobola differs in different ethnic customs and within various regions of South Africa. The process of lobola negotiations can be time consuming and expensive. The practise differs between ethnic groups but usually involves many family members from both sides. Fathers and uncles are usually the prime negotiators to get the wedding process underway. Time and again the groom is not allowed to participate directly in the actual negotiations. Often he may not speak directly with the father of his future wife but is the responsible party to "pay" the negotiated lobola. The total "payment" often takes many years to settle. In some ethnic groups women may be present in the negotiations but they usually have very mundane position. In some instances traditional believes are still adhered to and no women may actively participate in the negotiations. It is odd that women often do not have high status in the family but the family reap huge benefits when she gets married in customary fashion via the lobola system. In some instances lobola is abused in modernity and the family of the bride are demanding huge amounts of money or assets (e.g. a new vehicle) from the groom and his family. It appears to be a money-generating-scheme rather than a unique customary wedding. Some believe this also fuels the male partner to see his wife as a possession or as his property and promotes his male superiority as he had to "pay" exorbitant amounts for his bride.

This negotiation is a crucial step towards a valid customary marriage which is now also recognised by law. In the past this union was concluded in terms of customary law, but is now governed under the Recognition of Customary Marriages, 1998 (Act 120 of 1998). The Act is a South African statute in terms of which marriages performed under African customary law, including polygamous marriages, are now recognised as legal marriages. In the past a couple that was united in customary wedlock were not allowed to engage in legal contracts (e.g. signing a contract together for a financial loan). This changed after 2000. The act was signed by the late President Nelson Mandela on 20 November 1998 but was only enacted on 15 November 2000. Some key requirements for a customary marriage to be recognised as a valid (legal) marriage is that the marriage must be negotiated (lobola), entered into in accordance with customary law. Furthermore, the prospective spouses must be of the age of 18 years, and both prospective spouses

must consent to the marriage. The spouses are obliged to register the marriage with the Department of Home Affairs within three months. The act also declares that a wife in a customary marriage has now gained equal legal status and capacity as her husband, including the ability to buy, own and sell property and the ability to enter into contracts. Before, under customary law a wife had been regarded as a minor permanently and under the control of her husband. He had all the power, he signed contracts and he made all the decisions. All customary monogamous marriages contracted after 2000 are in community of property, meaning that all assets and liabilities belong to both spouses equally, unless an antenuptial contract is drawn up as part of the negotiations. If a man wants to contract a second concurrent marriage he must apply to the court to

6. CONCLUSION

Supremacy of the Constitution implies that it supersedes all forms of law, practise and custom in the country. In sync with the Constitution, many laws have been promulgated to guide legal practitioners in cases where ancient custom or practices are tried in court. The Constitution is the supreme law of the Republic and allows all human rights to be respected. Against this background one could say that the South African legal machinery is very flexible and “placid” with ancient customs BUT if any indigenous custom, practise, law or conduct is inconsistent with it, it is invalid and will be dealt with as a wrongdoing. An important warning came from the ruling in the Supreme Court of Appeal in the matter of *Kievits Kroon Country Estate (Pty) Ltd v Mmoleli* 2014 (1) SA 585 (SCA) where the South African courts were cautioned not to make ill-informed verdicts on spiritual or cultural matters. In this case Cachalia JA stated as follows:

‘Our courts are familiar with and equipped to deal with disputes arising from conventional medicine, which are governed by objective standards, whereas questions regarding doctrine or cultural practice are not. Courts are therefore unable and not permitted to evaluate acceptability, logic, consistency or comprehensibility of the belief. They are concerned only with the sincerity of the adherent’s belief, and whether it is being invoked for an ulterior purpose. This of necessity involves an investigation of the grounds advanced to demonstrate that the belief exists.’

The current legal machinery in South Africa is therefore a result of the diverse heritage the country is known for, the extensive conflicts the country and its people have experienced as well as the distinctly local adjustments regarding ancient customs and practices that were acknowledged by the new government.

approve a contract regulating the financial relationships between him, his current wife or wives and the new wife.

In the past divorce was very difficult out of a customary wedding. When a traditional wedding is not working divorce is now possible in customary marriages. Now only the High Court or a regional magistrate’s court can divorce the parties united by a customary wedding. The parties must both show irreparable breakdown of the marriage. The power of traditional leaders and other customary institutions to grant divorces was ended with the new law. They may still mediate in spousal disputes before the legal divorce in the court.

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