

Indigenous legal systems and sentencing: *S v Maluleke* 2008 1 SACR 49 (T)

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OPSOMMING

Inheemse reg en vonnisoplegging

In *S v Maluleke* 2008 1 SACR 49 (T) word die voorstel gemaak dat Suid Afrika opnuut na die inheemse reg moet kyk vir alternatiewe vonnisopsies, veral wanneer daar 'n behoefte is vir die betrokkenheid van die gemeenskap in die herstel van skade veroorsaak teenoor die slagoffer, die rehabilitasie van die oortreder asook versoening met die slagoffer en die gemeenskap. Daar word veral melding gemaak van soortgelyke sukses in Australië. Die artikel ondersoek die aard van die inheemse reg asook die rol van die apologie tydens strafsake, die simbiose tussen inheemse reg en herstellende geregtigheid, en die wenslikheid van die hof se voorstel ten opsigte van die herlewing van vonnisopsies ingevolge die inheemse reg. Die skrywers toon aan dat, in plaas van inheemse reg *per se*, dit eerder die waardes is van kleiner en opmekeer-aangewese tradisionele gemeenskappe wat suksesvol in Australië geïmplementeer word – dit gaan hand aan hand met respek vir die gesag en wysheid van die “elders”. Daar word aanbeveel dat, na ondersoek van elke spesifieke saak ten opsigte van die wenslikheid daarvan, n soortgelyke benadering gevolg kan word.

1 Introduction

The focus of this article is on the indigenous legal approach to punishment and the feasibility of introducing it into the criminal justice system, as suggested in *S v Maluleke*.¹ A comparison is drawn between restorative justice and indigenous legal systems. Furthermore, a brief investigation is undertaken into the Australian position with regard to aboriginal people in the criminal justice system, as well as the position in some systems of indigenous African law.

2 Indigenous Law

Indigenous law, as distinct from Western law, is non-specialised. There is no clear-cut distinction between a crime and a delict and the concepts of

¹ 2008 1 SACR 49 (T).

compensation and punishment are inextricably interwoven. Compensation would, for instance, be awarded to serve as a penalty and restoration simultaneously. This system is flexible and can be applied to meet the demands of the occasion.

Indigenous law has acquired a new lease of life since its constitutional recognition as a system of law on a par with the common law.² The recognition as such has given rise to a number of articles,³ and law reform measures have attracted comments by a wide range of academics.⁴ Furthermore, the courts are duty bound to adjudicate on the application and constitutionality of certain aspects of customary law.⁵ However, its application in criminal law and procedure has so far escaped attention. In regard to criminal law Sanders⁶ noted that:

“On the criminal law of the future the customary law will exercise limited if any influence. European criminal law has effectively replaced African customary criminal law.”

Nonetheless, the case of *S v Maluleke*⁷ has introduced a new debate regarding the application of indigenous law in criminal law, in that the judge said:

“Experience in Canada, New Zealand and also, in particular, in Australia has, however, shown that the introduction of traditional, indigenous legal systems into at least part of the criminal-justice system may increase the existing alternatives to imprisonment, particularly where there is a need to involve the community in the healing of the victims’ hurts, the rehabilitation of offenders and their reconciliation with those they wronged and with society at large. . . . There appears to be little reason why similar results could not be achieved in South Africa.”⁸

He added:

“Eventually, legislative intervention may be required to recognise aspects of customary law – but this should not deter courts from investigating the possibility of introducing exciting and vibrant potential alternative sentences into our criminal-justice system.”⁹

2 The Constitution of the Republic of South Africa Act 108 of 1996 s 211(3).

3 Bekker “How compatible is African customary law with human rights? Some preliminary observations” 1994 *THRHR* 440-447; Kerr “The Bill of Rights in the new constitution and customary law” 1997 *SALJ* 341.

4 Among others, Bronstein “Confronting custom in the new South African state: An analysis of the Customary Marriages Act 120 of 1998” 2000 *SAJHR* 558; Rautenbach & Du Plessis “South African Law Commission’s proposal for customary law of succession: Retrogression or progression?” 2003 *De Jure* 99.

5 E.g. in *Bhe v Magistrate, Khayalitsha*; *Shibi v Sithole*; *SA Human Rights Commission and Another v President of the Republic of South Africa* 2005 1 BCLR 1 (CC); *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC).

6 *The Internal Conflict of Laws in South Africa* (1990) 10.

7 *Supra*.

8 *Idem* pars 39–40.

9 *Idem* par 41.

3 The Application of Traditional Custom for Sentencing Purposes

The judgment in *S v Maluleke*¹⁰ revolved around the question of an appropriate sentence – a particularly difficult decision in this instance. The accused was convicted of the murder of a young person who broke into her house. The judge remarked that she was guilty of a very serious offence in that the deceased died as a result of a sustained and brutal attack upon him. In the ordinary course, the accused would have been doomed to imprisonment. However, during evidence in mitigation:

“... the defence investigated the question whether the accused had, prior to the trial, complied with traditional custom of her community of apologising for the taking of the deceased’s life by sending an elder member or members of her family to the family of the deceased.”¹¹

In response to this the judge observed that, although there was no expert evidence regarding the custom, it was accepted, as common cause, by both the prosecution and defence that:

“... the traditional custom prevailing in the accused’s community demanded that, in the event of an unlawful killing of a member of the community, the family of the perpetrator send a senior representative to the family of the deceased to apologise and to attempt to mend the relationship between the families disturbed by the death of the deceased.”¹²

This is indeed the general practical experience of customary criminal law. It was never applied in courts, except in courts of traditional authority, and even there it was not satisfactory. After investigating its application, Van Niekerk¹³ came to the conclusion that it lacked legal certainty:

“[T]he dilemma presented by the unsatisfactory administration of criminal justice in indigenous courts and the application of indigenous criminal law in Southern Africa, it is not *per se* due to the existence of legal dualism and the dual court structure. It is rather owing to the anomalies created by the superimposition of western legal ideas and principles which are characteristically specialised, upon a non-specialised system such as the indigenous legal system, and the concomitant subversion of the legality principle.

Indigenous courts in South Africa have failed to realise those ideal, supra-judicial standards of justice embodied in the legality principle, and their administration of criminal justice is characterised by uncertainty.”

In an attempt to address these uncertainties, the South African Law Reform Commission (SALRC) embarked on a project to reform the indigenous courts, which culminated in a Bill.¹⁴ Clause 10(2) spells out eleven orders that a court may make after hearing the views of the parties to the dispute, including “an order that an unconditional apology be made”. These orders constitute a register of what traditional courts may and

10 *Supra*.

11 *Idem* par 13.

12 *Idem* par 14.

13 *A Comparative Study of the Application of Indigenous Law in the Administration of Criminal Justice in Southern Africa* (LLM Dissertation UNISA 1986) 168.

14 Traditional Courts Bill B15 2008 30902, 2008-03-27.

probably do, albeit not in a structured fashion. The list does not really serve a legitimate purpose given the unspecialised nature of customary law. It is virtually impossible to capture indigenous customs and practices in legal parlance. Be that as it may, the list shows that the SALRC is aware of the philosophy of restorative justice within African societies.

The accused in *Maluleke* had not apologised in the prescribed manner, but the mother of the deceased indicated in cross-examination that she would be prepared to receive the accused, and in particular wanted an explanation as to why the accused had killed her child. Ultimately M was sentenced to eight years' imprisonment, suspended for three years on condition, *inter alia*, that she apologised according to custom to the mother of the deceased and her family within a month after sentencing.¹⁵ The court reached this decision on the basis that to ignore the custom would further injure the deceased's family.¹⁶

The application of this custom raises a few concerns. The judge, admittedly, was cautious in that he said that no expert evidence was given. Yet, at the defence's suggestion and the prosecutor's acceptance thereof, the judge continued to discuss the custom as if it were a general rule.

The writers' research of other African legal systems failed to reveal any custom such as was accepted in *Maluleke*'s case. On the contrary, little sympathy or remorse of a perpetrator was revealed:

"The Hurutshe [a Tswana community presently in the North-West Province] experts stated that the punishment would not be reduced since Moledi ga a rêêdiwe (one that cries is not heeded)."¹⁷

In West Africa there were variations in punishment for murder, including fines and compensation to the victim's family, but after elaborating on the possibilities, Elias¹⁸ concluded that death was almost always the invariable penalty for "dastardly acts of homicide – whether these proceeded from motives of revenge, or of gain, or of sadism."

Compensation of the victim's family was, however, a common feature of African punishment for murder. Junod¹⁹ wrote in regard to the Tsonga that:

"If the murder was deliberate, it is punished by death. At least such was the law in former times, when Natives still possessed the power of condemning to death. Now the fine is also the remittance of a woman – literally to bear a child to replace the deceased victim."

The Pedi also put a high premium on compensation. Mönnig²⁰ reported that:

"Sentences of death did not absolve the accused or his successors from paying compensation to the injured parties. Some cases are also known where all the possessions of the accused were confiscated after this death and some distributed among the injured parties while the rest accrued to the chief."

15 Par 22.

16 Par 18.

17 Myburgh (ed) *Indigenous Criminal Law in Bophuthatswana* (1980) 79.

18 *The Nature of African Customary Law* (1956) 142.

19 *The Life of a South African Tribe* (1927) 442.

20 *The Pedi* (1967) 307.

In the absence of evidence on the locality of, and social circumstances prevailing at, the place (albeit in a small village) where the crime was committed, the danger always exists that a custom such as the one raised in the *Maluleke* case may be cited out of context. It is common knowledge that vast “communal” conurbations and sprawling squatter settlements constitute areas where such customs make no sense. In such places, an accused would never consider rendering an apology.

This said, in pre-industrial societies events probably took place in a typical close-knit community. In such communities customs, such as the one in *Maluleke*, would have real meaning. This is Gluckman’s²¹ account of such a community:

“African tribesmen lived mainly in association with their kinsmen of one kind or another, and they fulfilled most of their purposes in life by cooperating with the same sets of fellows. In these small communities they bred, reared and educated their children; they made their living, they formed a political group and a religious congregation attending on the same spirits. Hence, any breach of rules in one set of activities provoked disturbance in a wide range of activity.”

The court *in casu* sat at Lephalele, a rural area, and the deceased, part of the accused’s extended family and well-known to her,²² broke into the accused’s house in a small village in the Limpopo Province. Yet, it appears the accused had not considered an apology until prompted by evidence in mitigation. Though there is no explanation for her omission to apologise in the light of the accepted custom, the court sensed that a sentence requiring an apology would be meaningful to the victim’s mother who was adamant that she wanted one.

If this custom of making an apology were to be applied as a rule of thumb, a definition of “community” would be needed along with a mechanism to determine membership of that community. Community has been defined as having “a range of meaning in anthropology and sociology.” In its broadest sense, it may refer to any group of persons united by a “community of interests”.²³ In a limited sense it may be restricted to a “tribe”, a term which is no longer in vogue. If then, an accused who is convicted in Johannesburg of murder of a Gcaleka whose family lives or lived in the Gcuwa district in the Eastern Cape, sends his apologies to the family in Gcuwa; could he escape a sentence of imprisonment? Or does the benefit of an apology only prevail when all concerned are resident in the particular communal area? Should more accused persons be given an opportunity to apologise as a condition of a suspended sentence – say within three months? The possible ramifications are too absurd to contemplate.

21 Gluckman “Natural justice in Africa” 1964 *Natural Law Forum* 25, quoted by Mqoke *Basic Approaches to Problem Solving in Customary Law: A study of Conciliation and Consensus among the Cape Nguni* (1997) 30.

22 *S v Maluleke supra* par 5.

23 Seymour-Smith *Dictionary of Anthropology* (1986) 46.

The above illustrates that in the case of heinous crimes it is neither feasible nor advisable to resort solely to custom in mitigation of sentence. In *Maluleke Bertelsman J*²⁴ pointed this out and emphasised the strong mitigating factors present in the case, justifying a non-custodial sentence, with or without the observation of the custom. The mitigating factors were: The accused had four minor, dependent children; she was a widow; she was a first offender; there was no indication of her being of a violent nature or of the risk that the crime might be repeated; evidence indicated that she regretted, and at the time of the trial still regretted, the death of the victim; there was no need for society to be protected against her and the deceased broke into her house with the intent to steal. Although the exception in the past, non-custodial sentences have been imposed for those convicted of murder.²⁵

Was the accused in the *Maluleke* case really punished? It would certainly not satisfy the requirement of retributive justice and raises the issues of proportionality and inconsistency.²⁶ The court's sentencing approach and the subsequent outcome should be understood against the underlying philosophy applied in this case. In addition to the aggravating and mitigating factors, the sentence was determined by applying contemporary restorative justice principles, for which the recognised custom served as an impetus.

4 Restorative Justice and Indigenous Legal Systems

In *Maluleke*²⁷ the court took the willingness, and indeed the need of the deceased's mother to enter into a conversation with the accused, as an opportunity to involve the community and to begin to heal the wounds that the commission of the crime caused to the family of the deceased and the community at large. The recognition of the custom, and willingness of the accused to observe it, convinced the court of the suitability of the application of the new, and haphazardly applied, approach of restorative justice,²⁸ defined as:²⁹

24 *S v Maluleke supra* pars 7–11.

25 The court referred to *S v Potgieter* 1994 1 SACR 61 (A). See also *S v Ingram* 1995 1 SACR 1 (A); *S v Larsen* 1994 2 SA 149 (A). Note also the recent Constitutional Court decision of *S v M (Centre for Child Law as amicus curiae)* 2007 2 SACR 539 (CC), in terms of which the court has an obligation to consider the best interests of children when a custodial sentence is considered for the sole caregiver of children.

26 See Terblanche *Guide to Sentencing in South Africa* (2007) 177. See also in general Von Hirsch *et al Restorative Justice and Criminal Justice: Competing or Reconciling Paradigms* (2003).

27 *Supra* par 24. The court noted that the two women started to talk even before the court formally adjourned.

28 See Skelton & Batley "Restorative justice: A contemporary South African review" 2008 *Acta Criminologica* 49 who hold the view that restorative justice has clearly emerged in South African writing, practice and jurisprudence and is here to stay. Contrast Terblanche *supra* pointing out that restorative justice is clearly not a central part of the current basic sentencing principles.

29 *S v Maluleke supra* par 28. Tshela "The restorative justice bug bites the South African criminal justice system" 2004 *SACJ* 17.

“Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by the crime – victim(s), offender and community – to identify and address their needs in the aftermath of the crime, and seek a resolution that affords healing, reparation and reintegration, and prevents further harm.”

The court further highlighted the possibility, introducing customary law principles into the formal criminal justice system by way of a supple restorative justice approach.³⁰ Aimed at addressing shortcomings in the formal system, relevant features of African legal systems include: expression of community repugnance but reincorporation of the offender thereafter; a focus on community affairs aimed at reconciling the parties and restoring harmonious relations within the community and full involvement of the families of the parties involved. Tendering an apology with a view to reconciling the parties and restoring harmonious community relations could be viewed as part of victim-offender mediation and possibly family-group conferencing, both recognised as prominent forms of restorative justice.³¹ The senior representative of the family of the accused could fulfil the role of the neutral mediator.³² Another facet of restorative justice, met in *Maluleke*'s case, is reflected by the involvement of the indirect victim in the sentencing process by allowing the deceased's mother to provide information relevant to sentencing by means of an oral statement indicating the hurt and loss that the deceased's family had suffered.³³

Not only is this case one of the first reported cases to apply restorative justice principles explicitly, but it is also the first to impose a suspended sentence conditionally upon an apology by the accused.³⁴ Tendering an

30 *S v Maluleke supra* par 30. “Introduction” in Maepa (ed) *Beyond Retribution – Prospects for Restorative Justice in South Africa* (2005) 16. See also Prinsloo “Crime prevention in South Africa utilising indigenous practices” 1998 *Acta Criminologica* 75.

31 SALRC *Report on a New Sentencing Framework* (2000) 70 par 3.3.30.

32 Skelton *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (2005) 179 explains victim-offender mediation as the bringing together of the “victim and offender for a dialogue that is facilitated by a neutral person. The parties will talk about how the incident has affected them and come to an agreement about restitution, which will normally be reduced to a written plan.”

33 See clause 2 of the *Service Charter for Victims of Crime in South Africa* (2004) at <http://www.doj.gov.za/2004dojsite/policy/vc/2004vc.pdf> (accessed 2005-01-03) that created *inter alia* the right for victims of crime to give information before sentencing. See also Müller & Van der Merwe “Recognising the victim in the sentencing phase: The use of victim impact statements in court” 2006 *SAJHR* 647.

34 *Maluleke* was followed in *S v Saayman* 2008 1 SACR 393 (E) 402H–403A though an apology as condition to a suspended sentence in this fraud case was found to contravene the constitutional requirement of dignity since the offender was required to parade around the magistrate's office with a placard around her neck and not to apologise face-to-face to the victim(s). See also *Dikoko v Mokhatla* 2006 6 SA 235 (CC) acknowledging the power of an apology (in keeping with *ubuntu* and the constitutional principle of dignity). Note *S v Tabethe* 2009 JOL 23082 (T) for the most recent example of the application of restorative justice in a rape case and where, *inter alia*, an apology emerged during victim offender mediation.

apology is usually perceived as a possible, but not guaranteed, outcome of victim-offender mediation.³⁵ Victim-offender mediation is usually an option available under the broader condition of correctional supervision. It is likely that the ruling has contributed to a more meaningful sentence from the perspective of the deceased's family. Care must be taken to allow the human process to evolve in a victim-offender encounter, irrespective of whether or not it culminates in an apology. Generally, when an apology emerges the legitimacy of the process is underscored.

Though it is clear why compensation was not considered in *Maluleke*, it is submitted that a further condition to the suspension of the sentence could have been of value, the condition that the accused perform a service to the family of the deceased.³⁶ Such a condition would satisfy both restorative and retributive justice values, and contribute to a greater sense of balance between the crime, the criminal and the interests of society. Skelton³⁷ highlights the importance of the apology in restorative justice processes and suggests that, where the offender is unable to pay back the victim, or the deceased's family, he or she could do some community work for the victim or the victim's family. It is possible that the parties in *Maluleke* in fact agreed on some kind of service or benefit during their discussions.

From the above it is clear that there are certain points of contact between restorative justice and punishment in African societies.³⁸ They share similar ideals such as reconciling the parties and restoring harmonious relations within the community. They recognise the practice of victim-offender mediation and family group conferencing as a mechanism to fulfil those ideals. The recent Traditional Courts Bill³⁹ confirms this by stating that its aim is recognising the traditional justice system and its values based on restorative justice and reconciliation. It also includes in the list of sentencing options an order for an unconditional apology by the wrongdoer.⁴⁰

5 Indigenous Legal Systems and the Criminal Justice System in Australia

Bertelsman J⁴¹ referred to the particular success with deriving alternatives to imprisonment in Australia by incorporating traditional indigenous law

35 Note Braithwaite "Principles of restorative justice" in Von Hirsch *et al supra* 8–14 as referred to by Skelton & Batley 2008 *Acta Criminologica* 39, indicating that an apology is considered most likely to emerge only after victim-offender mediation.

36 Criminal Procedure Act 51 of 1977 s 297(1)(a)(i)(bb).

37 "Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa" 2007 *Acta Juridica* 228 237.

38 See Skelton *Child Justice* 231–237 for a more comprehensive investigation into the similarities and differences between traditional courts and restorative justice processes.

39 Bill of 2008.

40 Cl 10(2).

41 *Maluleke supra* par 39.

into parts of their criminal justice system, especially when there is a need to fulfil aims similar to those of restorative justice. Therefore, a brief analysis of the Australian approach is undertaken to gain some understanding of their position.

The Australian movement towards developing specialised sentencing initiatives for indigenous offenders, with meaningful community contribution, as part of the criminal justice system appears to emanate from an extensive reconciliation process between the Aboriginal people and the Australian government.⁴² In Victoria, separate courts for the Aboriginal people were created and were motivated, *inter alia*, by a desire to do justice for those on the periphery and to facilitate meaningful access to law.⁴³ Koori courts, as well as the office of an Aboriginal Justice Officer, were established pursuant to the Magistrates' Court (Koori Court) Act.⁴⁴ Mechanics and symbolism are equally attended to within a relatively informal court setting. Practices such as welcoming the family of the defendant and the participation of elders or respected members of the Aboriginal community sitting with magistrates in each case are adhered to. Only guilty pleas are dealt with and cases involving sexual assault and breaching of domestic violence orders are excluded. The sentencing discretion, however, remains with the Magistrate, subject to commentary from elders, and the court may inform itself with regard to the sentencing order by, *inter alia*, inviting the victim's views, after being informed of her or his presence by the prosecution.⁴⁵ Briggs and Auty⁴⁶ describe the frequent apologies of defendants and highlight that the "depth of responses are often surprising . . . and the expressions of remorse overwhelming". The elders would also speak to the defendant about the impact of the crime on the community and victim(s). Objectives of the court include redressing the over-representation of Aboriginal people in the criminal justice system; reducing rates of re-offending amongst Aboriginal people; decreasing rates of non-appearance at court which has the effect of reducing bail opportunities and having a positive impact on those who appear before court.⁴⁷ An unintended but significant consequence is that of enhancing the prestige of respected indigenous persons and elders in indigenous and non-indigenous communities.⁴⁸

Despite attempts to combat perceptions of courts that would impose community-based options in the majority of the cases as being soft options, the establishment of a seventh Koori court elicited fierce criticism. Faris⁴⁹ argues that, since any court can take into account sentencing

42 Briggs & Auty "Koori Court Victoria – Magistrates Court (Koori Court) Act 2002" 2004 at www.isrcl.org/Papers/2004/Briggs.pdf (accessed 2009-02-14) 1.

43 *Idem* 2-4.

44 27 of 2002.

45 Magistrates Court (Koori Court) Act 27 of 2002 s 4G(3)(d).

46 Briggs & Auty 13.

47 Victorian Aboriginal Justice Agreement 2000.

48 Briggs & Auty 7.

49 "Koori courts – Separate but equal" 2008 at www.farisqc.observationdeck.org/?cat=33 (accessed 2009-02-15).

information coming from community support groups, the establishment of a costly, special racially defined court is unnecessary. Another contention is that, in the light of the Charter for Human Rights and Responsibilities Act (Vic),⁵⁰ the practice of separate Koori courts with separate procedures and separate, lighter, punishments is repugnant because every person is equal before the law.⁵¹ In addition, the extent of Victorian Aboriginal peoples' cultural and linguistic diversity is questioned.

In Queensland a legislative provision referring to community justice groups of indigenous people to assist the court in sentencing hearings⁵² has created a formal platform for the launch of several Murri courts since 2002.⁵³ Integral features include the involvement of respected indigenous community members, the provision of cultural information to the sentencer, a modified sentencing process and a focus on rehabilitation of the offender supervised by the community. Input from all appropriate organisations in the community, particularly the indigenous community, is viewed as critical. Once again, only guilty pleas are entertained and sexual offences are excluded. Hennessy⁵⁴ emphasises that, as with many other indigenous sentencing practices, *the court does not incorporate customary law*, but rather acknowledges one of the basic tenets of traditional indigenous community values, that is, the authority of and respect for the elders of the community.⁵⁵

"Whilst other customary actions such as banishments from the community or various areas and places, apologies and reparation are taken into account, it is the involvement, [wisdom and knowledge] of the Elders which makes the process so worthwhile. . . . The acknowledgment in a public forum of the Elders' authority and wisdom and their role as moral guardians of the community by the Court honours traditional respect for the role of the Elders."⁵⁶

South Australia has operated Aboriginal sentencing courts since 2002. The model there is not the subject of legislation but provides the template for culturally inclusive courts to sit on one day per week. In both New South Wales (NSW) and the Australian Capital Territory (ACT) circle sentencing, where the circle has full sentencing authority, is practised in cases of serious recidivists. In such instances sentencing decisions are reached by consensus. Briggs and Auty⁵⁷ explain it as follows:

"The philosophy behind circle sentencing is that prison sentences do not deter crime, prisons make people worse not better, and there is an essential

50 2006. The Act came into full force during 2008.

51 Charter for Human Rights and Responsibilities Act 2006 (Vic) s 8.

52 Queensland Penalties and Sentences Act 1992 s 9(2)(p).

53 Australian Institute for Criminology "Evaluation of Murri Courts" 2008 at <http://www.aic.gov.au/research/projects/0138.html> (accessed 2009-02-15).

54 Hennessy "Indigenous sentencing practice in Australia" International Society for Reform of the Criminal Law Conference Brisbane July 2006 *Justice for all – Victims, Defendants, Prisoners and Community* at <http://www.isrcl.org/Papers/2006/Hennessy.pdf> (accessed 2009-02-15) 11.

55 *Idem* 2.

56 *Ibid.*

57 15. See also Gamble "Criminal justice initiatives for indigenous offenders" *Indigenous Law Bulletin* at <http://www.austlii.edu.au/au/journals/ILB/2005/53.html> (accessed 2009-02-15).

imbalance in a procedure which excludes victims from expressing their views or concerns. Circle sentencing is described as a means to 'restorative justice' in that it provides for shared responsibility for resolving offending patterns. Informal community mechanisms can be of assistance in this process, and crime is conceived as an 'injury' not just an infraction against someone else's 'law'. The circle is said to reflect concern about community or holistic 'health' and attempts to make the offender more conscious of the impact of his or her actions."⁵⁸

Notwithstanding these high ideals, the circle sentencing practice has, like the Koori courts, been criticised and a recent study found it failed to reduce recidivism.⁵⁹

In summary, this brief investigation revealed that specialised sentencing initiatives for indigenous offenders that include a meaningful community contribution have developed in both urban and rural Australia in various forms either legislatively based or magistrate driven. The aim throughout is to reduce alienation from the court process and to ensure that court orders are more culturally appropriate for indigenous offenders. However, these courts are controversial and not uniformly valued save by the Aboriginal people and magistrates involved with them.⁶⁰

One should be mindful of the specific context in which the above courts developed. It would certainly not be feasible for South Africa to re-introduce a segregated court systems based on race. However, the inclusion of respected community members in line with the current lay-assessor system existing in some lower courts⁶¹ would strengthen the efficacy of sentencing decisions. These cases will, however, take up much time and our courts are already burdened and backlogs remain a problem. The time factor may deter the implementation of such a system.

6 Conclusion

Despite an initially cautious approach, the writers welcome the judge's remarks in *Maluleke* that:

"[I]ntroduction of traditional, indigenous legal systems into at least part of the criminal-justice system may increase the existing alternatives to imprisonment, particularly where there is a need to involve the community in the healing of the victims' hurts, the rehabilitation of offenders and their reconciliation with those they wronged and with society at large."⁶²

58 See Potas *et al* "Circle sentencing in New South Wales: A review and evaluation" 2004 *Australian Indigenous Law Reporter* 16 <http://www.austlii.edu.au/au/journals/AILR/2004/16.html> for a more detailed discussed of sentencing circles (accessed 2009-02-15).

59 Fitzgerald "Does circle sentencing reduce aboriginal offending?" 2008 *Crime and Justice Bulletin* May 2008 115 at [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB115.pdf/\\$file/CJB115.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB115.pdf/$file/CJB115.pdf) (accessed 2009-02-15).

60 See Charles "Restorative justice, the criminal courts and remote aboriginal communities" 2007 Australian Institute of Judicial Administration Conference Mildura, who questions the successful application of restorative justice principles, specifically the attendance of skills programmes, in remote Aboriginal communities.

61 Magistrates' Courts Act 32 of 1944 s 93ter; Lay Assessors' Regulations 2004 *Determination of Criteria Pertaining to Assessors* s 6(6)(b).

62 *Maluleke supra* par 39.

This suggestion is in line with African legal philosophy. It must be borne in mind from the outset, however, that:

“one finds in studying punishment in traditional African society [the problem] is the fact that in the traditional African setting law was a way of life and not a subject for philosophising, analysis and classification . . .

The main motives of punishment were retaliation and deterrence, although rehabilitation was not entirely overlooked. After the reasons for the crime had been discovered, the ‘judge’ then saw to it that over and above the punishment, proper friendly relations were restored . . .”⁶³

This quotation supports the judge’s call for the introduction of traditional legal systems into at least a part of the criminal justice system, such as sentencing – and not necessarily only after guilty pleas. However, as shown above, the system operated in and in respect of, close-knit communities. To apply it in modern societies might often be impossible – out of sync with real-life situations. Yet the philosophy of reconciliation through discussion and conciliation, shored up by compensation as an alternative to imprisonment is sound and overlaps with contemporary restorative justice principles. A feasible option would thus be not to incorporate traditional law *per se*, but rather to investigate each case carefully in order to acknowledge and incorporate some of the basic beliefs and values of traditional indigenous communities.

63 Ndabandaba “Punishment in African society, past and present” in Sanders (ed) *Southern Africa in Need of Law Reform* (1981) 153.