LEGAL REFORM OF TRADITIONAL COURTS IN SOUTH AFRICA: EXPLORING THE LINKS BETWEEN *UBUNTU*, RESTORATIVE JUSTICE AND THERAPEUTIC JURISPRUDENCE

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Abstract: Traditional justice in the rural areas of South Africa is dispensed by official traditional courts, where they are presided over by traditional leaders. The Black Administration Act 38 of 1927 currently makes provision for two types of courts depending on the nature of the facts before the court, *viz* criminal or civil. The relevant provisions in the Act stand to be repealed when the Traditional Courts Bill, currently being debated in parliament, is transformed into law, but traditional courts' civil and criminal jurisdiction will continue in future, albeit with a few additional guarantees in accordance with natural law and the constitutional law. The ideals of justice expressed in the Bill and the parallels between *ubuntu*, an African concept, and other contemporary ideas such as restorative justice and therapeutic jurisprudence are recognisable. This contribution investigates the links between *ubuntu*, restorative justice and therapeutic jurisprudence in the context of formal traditional courts. Firstly, an overview of the legal position of traditional courts in South Africa — the past, the present and the future — is given. This is followed by a discussion of the scope and application of the notions of *ubuntu*, restorative justice and therapeutic jurisprudence and, finally, the plausible links between these three notions in the context of formal traditional courts in South Africa are discussed. In contrast to the punitive character of a conventional justice system that focuses on retaliation, *ubuntu*, restorative justice and therapeutic jurisprudence call for a more holistic approach that promotes reconciliation of everyone caught up in the justice system. All of them have one thing in common — the well-being of all individuals and communities touched by injustice in some form or other.

Keywords: *traditional courts; customary courts; ubuntu; restorative justice; therapeutic jurisprudence; traditional justice; customary law; traditional leaders; legal pluralism*

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I. Introduction

The relationship between two or more legal systems in a pluralistic legal order remains a highly topical theme, especially in a postcolonial setting where transplanted and indigenous laws exist side by side. South Africa's legal system consists of two distinct legal traditions: transplanted uncodified European laws (referred to as the common law)[1] and inherited indigenous laws (referred to as African customary law).[2] For many years, customary law often had to take a back seat if its rules were deemed to be contrary to common law values.[3] Since 1994, however, customary law has been regarded as a parallel legal system on a par with the common law.

The main catalyst for this development has been the two successive post-apartheid South African Constitutions, which placed the customary law on an equal footing with the common law.[4] In *Alexkor Ltd v Richtersveld Community*[5] it was stated:[6]

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1 In this context the expression "common law" refers to the uncodified system of South Africa, the core being derived from Roman-Dutch law and subsequently influenced by English common law. The English influence is most apparent in procedural aspects of the legal system and methods of adjudication (such as procedural law, company law and the law of evidence), and the Roman-Dutch influence most visible in its substantive law (such as the criminal law, law of contract, law of delict, law of persons, property law and family law). The common law of South Africa was described in *Pearl Assurance Co v Union Government* 1934 AD 560, 563 as a "virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society".

2 A contemporary definition of "customary law" is contained in the Recognition of Customary Marriages Act 200 of 1998, namely: "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples". From this definition it should be evident that customary law is neither uniform nor fixed. Finding a workable legal definition of customary law has been part and parcel of an on-going debate in South Africa. *See* Christa Rautenbach and Jan C Bekker (eds), *Introduction to Legal Pluralism in South Africa* (Durban: LexisNexis, 4th ed., 2014) pp.18–24.

3 Nomthandazo Ntlama and Dial Dayana Ndima, "The Significance of South Africa's Traditional Courts Bill to the Challenge of Promoting African Traditional Justice" (2009) 4 International Journal of African Renaissance Studies — Multi-, Inter- and Transdisciplinarity 6, 12.

4 First, s.181 and Constitutional Principle XIII of sch.4 of the interim Constitution (Constitution of the Republic of South Africa 200 of 1993) gave recognition to the institution of traditional leadership and customary law. Constitutional Principle XIII provided as follows: "Indigenous law [customary law], like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith". The interim Constitution was replaced by the final Constitution (Constitution of the Republic of South Africa, 1996) on 4 February 1997. Section 211 of this Constitution continued with the trend of giving formal recognition to customary law. It reads:

> "(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

In the light of the superior status of the final Constitution, it is not numbered.

5 2003 (12) BCLR 1301, [51] (CC).

6 Although the status of customary law is more or less settled, some authors argue that it will always be treated as inferior to the common law, because its recognition is subject to authorisation by the state.

> "While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution".

South Africa's justice system also reflects this plurality of legal systems. On the one hand we have the mainstream justice system based on Western values and principles, which include "procedural justice, retribution, incarceration and revenge", and on the other a traditional system with African values and principles based on the "search for truth, reconciliation, compensation and rehabilitation".[7] One of the core values of the African system is *ubuntu*, an equity principle which has seeped into the legal landscape and continues to play a major role in the reasoning of the South African judiciary.[8]

The judicial authority of South Africa is vested in the courts,[9] which are creatures of statute. In terms of s.166 of the Constitution the courts are the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates' Courts, and any other court established or recognised in terms of an Act. In addition, the Constitution confirms the continuation of traditional courts by providing that "[e]very court, *including courts of traditional leaders*, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it".[10]

The South African Constitution thus endorses the continuance of a pluralistic justice system. The plurality exists not only between the mainstream and traditional court structures but also among the structures of the various traditional communities.

Depending on how one conceptualises legal pluralism, customary courts can be divided into different categories. The most prevalent distinction is between formal (official) and informal (unofficial) traditional courts. The official ones are those established in terms of legislation as stipulated in s.166(e) and para.16(1) of sch.6 of the Constitution. Currently, they are the traditional courts established in accordance with the Black Administration Act.[11] Although they are creatures of statute they operate on the basis of living customary law.[12] Although the parallels

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See Gardiol J van Niekerk, "The Challenge of Legal Pluralism: *Fosi v Road Accident Fund* [2007] JOL 19399 (C)" (2008) 23 SA Public Law 208.

7 Phathekile Holomisa, "Balancing Law and Tradition" (2011) 35 SA Crime Quarterly 17, 18. Also *see* the explanation of the different approaches to justice by Tom Bennett, "Ubuntu: An African Equity" (2011) 14 Potchefstroom Electronic Law Journal 29, 35, available at http://dx.doi.org/10.4314/pelj.v14i4 (visited 8 May 2015); Zingisile Ntozintle Jobodwana, "Customary Courts and Human Rights: Comparative African Perspectives" (2000) 15 SA Public Law 26, 26–27.

8 *See* the discussion at Section II.

9 Constitution, s.165(1).

10 Emphasis added. *See* Constitution, para.16(1) of sch.6.

11 *See* the discussion at Section I.

12 They apply customary law, which is totally different to the formal rules applied in the western courts. Contrary to official customary law, which includes those rules that can be found in legislation and court

between the notions of *ubuntu*, restorative justice and therapeutic jurisprudence are relevant to formal and informal traditional courts, this contribution focuses on the formal ones only — in other words, those recognised in terms of legislation.[13]

The administration of justice within formal traditional courts is multi-layered, complex and flexible, varying from area to area and the type of law applicable in a given situation. The reason for this is that existing legislation allows the procedure observed in connection with the hearing of matters in the traditional courts to be in accordance with the laws and customs of the traditional community in question.[14] In general, the proceedings take place in an open court and are informal. The primary aim of the proceedings is to obtain reconciliation between the parties. All the parties involved must be present and the proceedings are normally attended by a large number of community members who may all participate in the process, led by the traditional leader. Legal representation is not allowed and female members of the community are usually excluded from the proceedings but may partake through a male member of the family.[15]

It has been said that the punitive character of the western courts has had little effect on the crime rate in South Africa thus far and that indigenous responses to crime needed to be experimented with.[16] In the High Court case of *S v Maluleke*,[17] Bertelsmann J noted that countries such as New Zealand and Canada have drawn on their indigenous cultures to improve their criminal justice systems. The advantages of African justice have also been recognised by the South African Constitutional Court on a few occasions, especially with reference to the notion of *ubuntu*.[18] One such case is *Dikoko v Mokhatla*,[19] during which Mokgoro J said:

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judgments, the term "living customary law" refers to the original customs and usages of traditional communities, which are constantly changing as the dynamics of the community change. The judiciary are more and more in favour of applying living customary law instead of its official version. *See* Rautenbach and Bekker, *Introduction to Legal Pluralism in South Africa* (n.2) pp.29–31.

13 Over the years, other unofficial administrative and legal institutions have developed in urban areas to administer some or other form of justice between the inhabitants of the former townships. The popularity and successes of these institutions varied quite considerably. For more information on the unofficial court structures and their operation in rural and urban areas, *see* Gardiol J van Niekerk, "People's Courts and People's Justice in South Africa – New Developments in Community Dispute Resolution" (1994) 27 De Jure 19–30; SA Law Commission, *Project 94: Discussion Paper 87 on Community Dispute Resolution Structures* (31 October 1999); Sanette Nel, "Community Courts: Official Recognition and Criminal Jurisdiction – A Comparative Analysis" (2001) 34 CILSA 87–108.

14 *See* Rautenbach and Bekker, *Introduction to Legal Pluralism in South Africa* (n.2) p.240.

15 *Ibid*., pp.242–244.

16 DOJ&CD, "Restorative Justice: The Road to Healing", available at http://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf (visited 4 May 2015).

17 2008 (1) SACR 49, [30] (T).

18 Tom Bennett and James Patrick, "Ubuntu, the Ethics of Traditional Religion" in TW Bennett (ed), *Traditional African Religions in South African Law* (Cape Town: UCT Press, 2011) p.223 provide a general discussion of *ubuntu* as an ethical system underlying traditional African religions.

19 2006 (6) SA 235, [68] (CC). This case dealt with a civil claim for damages arising from defamation. For a discussion of the facts of the case, *see* André Mukheibir, "*Ubuntu* and the Amende Honorable — A Marriage between African Values and Medieval Canon Law" (2007) 28 Obiter 583, 586–588. *See* the

> "In our constitutional democracy the basic constitutional value of human dignity relates closely to *ubuntu* or *botho*, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms. It should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant's pocket, something more likely to increase acrimony, push the parties apart and even cause the defendant financial ruin. The primary purpose of a compensatory measure, after all, is to restore the dignity of a plaintiff who has suffered the damage and not to punish a defendant. A remedy based on the idea of *ubuntu* or *botho* could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process. It could indeed give better appreciation and sensitise a defendant as to the *hurtful impact of his or her unlawful actions*, similar to the emerging idea of restorative justice in our sentencing laws".[20]

Her reasoning brings a few things to the fore in the context of traditional justice. First of all, she refers to the idea of *ubuntu*, which is based on "deep respect for the humanity of another". Secondly, she refers to the "emerging idea of restorative justice", which is also based on the idea of *ubuntu*. The interconnectedness of these two ideas, *ubuntu* and restorative justice, is more or less settled. There is enough evidence in the legal literature which points in this direction. Less obvious is the link between *ubuntu* and restorative justice on the one hand and therapeutic jurisprudence on the other, but it is my contention that there are indeed parallels, and they will be explored in this contribution.

In order to investigate the links between *ubuntu*, restorative justice and therapeutic jurisprudence in the context of formal traditional courts, this contribution commences with an overview of the legal position of these courts in South Africa — the past, the present and the future.[21] This is followed by a discussion of the scope and application of the notions of *ubuntu*,[22] restorative justice[23] and therapeutic

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discussion at Section V, where a few views regarding the relationship of customary law with the civil law *amende honorable* are discussed in more detail.

20 Footnotes omitted and emphasis added. *See* Section IV for comments regarding the unintentional linkage between *ubuntu*, restorative justice and therapeutic jurisprudence as manifested in the phrase the "hurtful impact of his or her unlawful actions".

21 *See* Section I.

22 *See* Section II.

23 *See* Section III.

jurisprudence.[24] Finally, a conclusion will be drawn concerning the plausible links between these three notions in the context of formal traditional courts in South Africa.[25]

II. Formal Traditional Courts in South Africa[26]

A. Traditional courts: the past

South Africa's colonial history is partly to blame for the pluralist approach to the dispensing of justice to members of a diverse society. The arrival of settlers from the Western world and what happened afterwards set the stage for what we have today: on the one hand, a highly sophisticated and complex judicial system with its roots firmly in Western values and principles and, on the other, a traditional system based on African values and principles.[27] A detailed historical account falls beyond the scope of this discussion. Suffice it to say that roughly four periods can be distinguished: pre-colonial (before 1652); colonial (1652–1910); post-colonial (1910–1994); and post-apartheid (1994 and afterwards). Each of these periods had a profound influence on how traditional courts were treated in South Africa.

Before colonialism the unofficial dispute mechanisms of the various traditional communities, although quite diverse in nature and form, had one purpose in common, namely reconciliation.[28] The process generally involved the families of the aggrieved parties, usually within a tribunal led by a council of family members.[29] Disputes which could not be resolved within this structure were taken to the next level, usually within a traditional setting headed by a sub-ward head or a ward head. Ultimately, if the dispute could still not be resolved, it was transferred to the chief to deal with the dispute, together with his councillors.[30] The chief, as the

24 *See* Section IV.

25 *See* Section V.

26 This section is based on the author's publications on traditional courts. *See* Rautenbach and Bekker, *Introduction to Legal Pluralism in South Africa* (n.2) pp.232–253; Christa Rautenbach, "Traditional Courts as Alternative Dispute Resolution (ADR) – Mechanisms in South Africa" in Frank Diedrich (ed), *The Status Quo of Mediation in Europe and Overseas* (Hamburg: Verlag Dr Kovač, 2014) p.287; Christa Rautenbach, "South Africa: Legal Recognition of Traditional Courts – Legal Pluralism in Action" in Matthias Kötter *et al.* (eds), *Non-State Justice Institutions and the Law: Decision-Making at the Interface of Tradition, Religion and the State* (England: Palgrave Macmillan, 2015) p.121.

27 According to Clause 2(a) of the Traditional Courts Bill [B1-2012], these values include restorative justice and reconciliation.

28 Digby Sqhelo Koyana, "Traditional Courts in South Africa in the Twenty-First Century" in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds), *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2011) pp.227, 241.

29 There are very few empirical studies on traditional courts in South Africa and the results of those that have been performed are inconclusive. Thomas W Bennett, *Customary Law in South Africa* (Cape Town: Juta, 2004) p.142.

30 Phenyo K Rakate, "The Status of Traditional Courts under the Final Constitution" (1997) 30 Comp and Int'l LJ of SA 179–182; *see* Rautenbach, "Traditional Courts as Alternative Dispute Resolution (ADR) – Mechanisms in South Africa" (n.26) pp.288–329.

executive, legislative and judicial head of the community, performed a number of functions, including the maintenance of law and order. He and his councillors formed a quasi-legal court-like structure which operated on both an inquisitorial and reconciliatory basis with the sole purpose of restoring the imbalance in the community caused by the conduct of one or more of the community members.[31] Justice was the collective responsibility of everyone in the community and was realised when reconciliation was reached between the wrongdoer and the aggrieved party.[32] Though recent empirical results regarding this continuance of processes are almost non-existent, it is believed that they remain fully operational in rural areas where a large number of traditional communities continue to live.[33]

During colonial times, especially during British rule,[34] the colonial powers imposed their own judicial system. The courts were staffed by legal professionals who administered the law in accordance with metropolitan laws and procedures foreign to the local population. The criminal courts were responsible for the entire population, settlers and Africans, but in civil matters they catered for the settlers only.[35] These courts were alien and expensive and thus not popular with the African population. Although the idea of co-opting the services of traditional leaders to settle disputes in their communities was initially unacceptable to the Crown authorities, the traditional communities continued to settle their own disputes anyway. Eventually the advantages of what was known as the policy of indirect rule were appreciated, and it became the solution to many of the administrative problems that the colonial authorities faced.[36] During this time the various territories which were to become the Union of South Africa enacted legislation

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31 Christa Rautenbach, "Therapeutic Jurisprudence in the Customary Courts of South Africa: Traditional Authority Courts as Therapeutic Agents" (2005) 21 South African Journal of Human Rights 323.

32 *See* Rakate, "The Status of Traditional Courts under the Final Constitution" (n.30) pp.181–182.

33 In 1996, the author was a member of a collaborative research venture between five South African Universities and the University of Leiden, the Netherlands, who conducted empirical research on the Administrative and Legal Position of Traditional Authorities in South Africa and their Contribution to the Implementation of the Reconstruction and Development Programme. The final report consisted of 14 volumes but was never published, although a copy of the report was widely disseminated.

34 South Africa was under Dutch rule from 1652–1795, before it fell to the British Crown. It reverted back to Dutch rule for a short period from 1803–1806, after which it remained under British rule for more than a 100 years. Before unification on 31 May 1910, South Africa was divided into four colonies: the longstanding British colonies of the Cape and Natal, and the two former Boer Republics of the Transvaal and the Orange River, annexed by Britain in the Second Boer War. Within these colonies were indigenous Kingdoms (eg, the Zulu and the Basotho Kingdoms). The Union of South Africa was founded as a dominion of the British Empire. It was governed under a form of constitutional monarchy, with the British monarch represented by a governor-general. The Union came to an end on 31 May 1961 when South Africa became known as the "Republic of South Africa". The apartheid era lasted until the 1990s and the first democratic elections were held in 1994.

35 Criminal justice normally resorts in the functional area of the state, and although traditional courts have limited criminal jurisdiction, the position of customary criminal law is far from settled. For a theoretical discussion of the issues, *see* Tom Bennett, "Customary Criminal Law in the South African Legal System" in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds), *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2011) p.363.

36 *See* Bennett, *Customary Law in South Africa* (n.29) pp.135–136.

to regulate the administration of justice within their jurisdictions.[37] As was to be expected, the existence of such a patchwork of laws complicated the administration of justice when the unification of South Africa occurred in 1910. On 1 September 1927 the Black Administration Act[38] came into operation to solve the problem. As explained in its preamble, it was to "provide for the better control and management of Black affairs". The Act consolidated the mass of diverse colonial legislation governing the African population, including traditional courts in existence in the former colonies, and set the stage for many years to come. In spite of the many criticisms raised against it, it became the canon of many traditional rulers in South Africa.[39] Its reign continued into democratic South Africa and, although it has now been almost entirely repealed, the sections dealing with the civil and criminal jurisdiction of traditional leaders are still intact and will remain intact until such time as the envisaged Traditional Courts Bill is transformed into legislation.

B. Traditional courts: the present

There is no doubt as to the constitutionality and status of traditional courts in post-apartheid South Africa. Section 16(1) of sch.6 states that:

> "Every court, *including courts of traditional leaders*, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to – (a) any amendment or repeal of that legislation and (b) consistency with the new Constitution".[40]

In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa*, *1996*,[41] the Constitutional Court confirmed that:

> "Traditional courts functioning according to indigenous law are not entrenched beyond the reach of legislation. NT 166 does indeed provide for their recognition. Subsection (e) refers to 'any other court established or recognized by an Act of Parliament'. This would cover approximately 1 500 traditional courts recognised in terms of the Black Administration Act 38 of 1927. The qualification 'which may include any court of a status similar to either the High Courts or the Magistrates' Courts' can best be read as permitting the establishment of courts at the same level as these two sets of courts. It does not, as the objectors contended, provide for a closed list. This interpretation

37 *See* Rautenbach and Bekker, *Introduction to Legal Pluralism in South Africa* (n.2) p.232.
38 38 of 1927.
39 This became apparent during the fieldwork done during our performance of the research project referred to in n.33.
40 Emphasis added.
41 1996 (4) SA 744, [199] (CC).

> is supported by NT 170, which says that '[m]agistrates' courts and all other courts may decide any matter determined by an Act of Parliament' – it does not say magistrates' courts or all other courts of a similar status. More directly, NT sch 6 s 16(1) says that '[e]very court, including courts of traditional leaders … continues to function'. In our view, therefore, NT 166 does not preclude the establishment or continuation of traditional courts".[42]

The present legal framework for official traditional courts consists of a patchwork of national and regional legislation,[43] including the uncodified customary law rules applicable in the various communities. The customary rules are in general not widely publicised and it is often challenging, if not impossible, for an outsider to know what they entail.

Official traditional courts are established in rural areas, where they are presided over by traditional leaders. The Black Administration Act makes provision for two types of courts depending on the nature of the facts before the court, *viz* criminal[44] or civil.[45] Since this distinction is based on the common law distinction between criminal and civil cases, it has been criticised in the legal literature as not representing the true position in customary law. Traditional courts normally

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42 NT refers to the new text of the final Constitution. In *Mhlekwa v Head of the Western Tembuland Regional Authority* 2001 (1) SA 574 (Tk); *Feni v Head of the Western Tembuland Regional Authority* 2000 (9) BCLR 979, 999 (Tk), the court held that the passage quoted above is not authority for the view that traditional courts may act unconstitutionally — they remain subject to the Constitution. A bone of contention is that the Bill will exclude traditional courts from the judicial structure established in terms of s.166 of the Constitution, which creates the impression that the legislature will no longer regard them as part and parcel of the judicial system in future. *See* the criticisms raised by Ntlama and Ndima, "The Significance of South Africa's Traditional Courts Bill to the Challenge of Promoting African Traditional Justice" (n.3) pp.20–21.

43 For a discussion of the relevant legislation, *see* Rautenbach and Bekker, *Introduction to Legal Pluralism in South Africa* (n.2) pp.235–236.

44 Section 20(1)(a) of the Black Administration Act stipulates:

> "The Minister may- (a) by writing under his hand confer upon any Black chief or headman jurisdiction to try and punish any Black who has committed, in the area under the control of the chief or headman concerned- (i) any offence at common law or under Black law and custom other than an offence referred to in the Third Schedule to this Act; and (ii) any statutory offence other than an offence referred to in the Third Schedule to this Act, specified by the Minister: Provided that if any such offence has been committed by two or more persons any of whom is not a Black, or in relation to a person who is not a Black or property belonging to any person who is not a Black other than property, movable or immovable, held in trust for a Black tribe or a community or aggregation of Blacks or a Black, such offence may not be tried by a Black chief or headman".

45 Section 12(1) of the Black Administration Act reads:

> "The Minister may-(a) authorize any Black chief or headman recognized or appointed [...] to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within his area of jurisdiction; (b) at the request of any chief upon whom jurisdiction has been conferred in terms of para (a), authorize a deputy of such chief to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within such chief's area of jurisdiction: Provided that a Black chief, headman or chief's deputy shall not under this section or any other law have power to determine any question of nullity, divorce or separation arising out of a marriage".

hear cases without consciously distinguishing between civil and criminal matters.[46] Nevertheless, the distinction is now widely entrenched in legislation, and the same pattern is followed in the Traditional Courts Bill.[47]

Section 12 of the Black Administration Act confers civil jurisdiction upon traditional leaders. A civil traditional court may hear a civil claim only if four conditions are met. First, the claim must have arisen from customary law.[48] Secondly, all of the parties must be African.[49] Thirdly, the incident giving rise to the civil dispute must have occurred within the area of the court, and finally, the claim may not involve any question of nullity, divorce or separation arising from a marriage.[50] The procedure to be followed is also the customary law procedure, provided it is not repugnant to the Constitution or any legislation dealing with customary law.[51] Ancillary regulations pertaining to the practice and procedure to be followed in civil traditional courts were issued in 1967.[52] The regulations confirm that the procedure in the court shall be in accordance with the customary law of a particular community, and include additional safety measures to ensure fair trial procedures. Legal representation is excluded and although it has been argued that such exclusion is contrary to s.35(3) of the Constitution,[53] future exclusion from the traditional court proceedings appears to be a given.[54] The execution of a traditional civil court's judgment is essentially in accordance with customary law. It is possible for a creditor to apply to a magistrate's court for the enforcement of a registered judgment, if the execution must be effected on property outside the jurisdictional area of the traditional leader.[55] An aggrieved party may appeal the finding of the

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46 Traditional leaders are required to classify a cause of action as either civil or criminal, whilst their knowledge of the common law is generally not good. *See* Bennett, *Customary Law in South Africa* (n.29) pp.144–145.

47 The Bill, Clauses 5 and 6.

48 A common law claim must be referred to an ordinary court.

49 Digby S Koyana and Jan C Bekker, *The Judicial Process in the Customary Courts of Southern Africa* (University of Transkei, 1998) p.3 argue that the second condition constitutes an unfair limitation to the jurisdiction of traditional courts in respect of persons. As an example, they refer to the possibility of a non-African trader impregnating an African woman, resulting in a customary law claim, in which event the perpetrator could not be tried in a traditional court because he is not an African. Likewise, if a non-African person lent money to an African to pay for his daughter's dowry, that person would not in the case of non-payment be able to sue the father in a traditional court.

50 The Bill does not contain a similar qualification.

51 *See* Koyana and Bekker, *The Judicial Process in the Customary Courts of Southern Africa* (n.49) pp.6–11.

52 Government Notice R2082 in Extraordinary Government Gazette 1929 of 29 December 1967.

53 The relevant subsections read as follows:

> "Every accused person has a right to a fair trial, which includes the right- […] (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly […]".

Also *see* Chuma Himonga and Rashida Manjoo, "The Challenges of Formalisation, Regulation, and Reform of the Traditional Courts in South Africa" (2009) 3 Malawi Law Journal 157, 180.

54 *See* the Bill, Clause 9(3)(a).

55 Jan C Bekker, "Court Structure and Procedure" in WA Joubert, JA Faris and Joan Church (eds), *The Law of South Africa* (Durban: LexisNexis, Vol 32, 2009) pp.261, 266.

traditional civil court to a magistrate's court, from where it would be treated as any other proceedings in the mainstream courts. Section 12 stands to be repealed when the Bill becomes law, but traditional courts' civil jurisdiction will continue in future, albeit with a few additional guarantees in accordance with natural law and the Constitution.[56] The ancillary regulations, however, will continue to apply in traditional courts until such time as replacement regulations are made.[57]

As already alluded to, members of a traditional community may also be tried for certain criminal offences in terms of s.20 of the Black Administration Act. The jurisdiction of the traditional leader is limited — he may try only Black African people and only for offences committed in the area under his control. The exclusion of some racial groups from the jurisdiction of the traditional courts is controversial, especially in the context of the new constitutional dispensation, which guarantees equal treatment before the law.[58] The Bill makes no reference to race, and it is envisaged that any person may be tried in a traditional court if the offence was committed within the court's area of jurisdiction.[59] This development certainly holds the potential of creating future conflict between litigants from other racial groups and the traditional courts. Although the High Court in *Bangindawo v Head of the Nyanda Regional Authority*[60] found that there was no justifiable reason for the prohibition of legal representation and that the rule had to be struck down for both criminal and civil proceedings in regional authority courts, the prohibition of legal representation has been retained in the Bill.[61]

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56 *See* the discussion at C.

57 The Bill, Clause 23(6).

58 The Constitution, s.9.

59 *See* Ntlama and Ndima, "The Significance of South Africa's Traditional Courts Bill to the Challenge of Promoting African Traditional Justice" (n.3) pp.21–22 argue, however, that the absence of a clause expressly extending the jurisdiction of traditional courts to all races will keep racial discrimination alive.

60 1998 (3) SA 262 (Tk). Two cases were brought before the Transkei High Court. The first case dealt with the conviction of Nyanisile Bangindawo and two others in terms of the Stock Theft Act 25 of 1977 (Tk) in the Nyanda Regional Authority Court established in terms of the Regional Authority Courts Act 13 of 1982 (Tk) and the Transkei Authorities Act 4 of 1965 (Tk). The second case was brought by Kutete Hlantlalala against the Western Tembuland Regional Authority also established in terms of the Regional Authority Courts Act and the Transkei Authorities Act. The two applicants attacked the constitutionality of the two regional authority courts on a number of points, for example, that they denied litigants the right to legal representation. The court found the exclusion of legal representatives to be unconstitutional. A similar conclusion in the context of the new Constitution was reached in *Mhlekwa v Head of the Western Tembuland Regional Authority* 2001 (1) SA 574 (Tk). The regional courts have since been abolished and the viewpoint of the SA Law Commission is that the right of an individual to legal representation is outweighed by the general interests of simplicity and informality. SA Law Commission, *Project 90: Discussion Paper 82 on The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* (30 June 1999) pp.36–39.

61 The Bill, Clause 9(3)(a). However, the Bill makes provision for the representation of a party to the proceedings by the following categories of persons: his or her wife or husband, family member, neighbour or member of the community in terms of customary law — *see* Clause 9(3)(b). It is thus not unimaginable that any one of these categories of people may happen to have a legal background, which could place the party that he or she represents in a more favourable position than the other party.

Though traditional criminal courts are established by virtue of legislation, the procedures and evidence followed in the courts are in terms of the customary law of the particular area. Sentencing is also in accordance with customary law, and the Black Administration Act limits the jurisdiction of the court. It "may not inflict any punishment involving death, mutilation, grievous bodily harm or imprisonment or impose a fine in excess of R100 or two head of large stock or ten head of small stock or impose corporal punishment".[62] The idea of imprisonment is unfamiliar in customary law. The main object of the sentence is to restore the balance in the community disturbed by the wrongful conduct of the offender. It is not uncommon that a case could end with a penalty as well as an award. The end result should always satisfy the offender, the aggrieved party and the community.[63] The Black Administration Act makes provision for an appeal procedure against a conviction or sentence to a magistrate's court in the area where the trial in question took place, from there to the High Court, and finally to the Supreme Court of Appeal or, if the facts involve a constitutional issue, to the Constitutional Court.[64] Although ordinary and traditional courts may have concurrent jurisdiction regarding certain offences, an offender may not be tried twice on the same facts. A person who has been convicted in a magistrate's court may offer a plea of *autrefois convict* (previously convicted) or *autrefois acquit* (previously acquitted) if prosecuted on the same facts in a traditional court, and conversely.[65]

Sections 12 and 20 of the Black Administration Act stand to be repealed when the Bill becomes law, but the new Bill does not deviate drastically from the current position. The Bill generally confirms the continued existence of traditional civil and criminal courts and provides a new national framework for both types of courts.

C. Traditional courts: the future

Traditional courts are in all likelihood here to stay. Their advantages outweigh their disadvantages by far.[66] In 1996 the SA Law Commission[67] established a committee to investigate "The Harmonisation of the Common and Customary Law".[68] In 1997 traditional courts were also placed on the agenda of the Commission and a Discussion Paper which outlined the main issues was published in 1999.[69] Finally, in 2003, a report was published.[70] The report contained a draft Bill for the regulation of

62 Black Administration Act, s.20(2).

63 *See* Rautenbach, "Therapeutic Jurisprudence in the Customary Courts of South Africa: Traditional Authority Courts as Therapeutic Agents" (n.31) p.332.

64 Black Administration Act, s.20(6).

65 NJJ Olivier (snr), NJJ Olivier and WH Olivier, *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (Durban: Butterworth, 3rd ed., 1989) p.589.

66 *See* Koyana, "Traditional Courts in South Africa in the Twenty-First Century" (n.28) pp.230–238.

67 The name of the Commission was changed to the SA Law Reform Commission during 2003.

68 The investigation was named *Project 90: Customary Law*.

69 *See* SA Law Commission (n.60).

70 SA Law Commission, *Project 90: Report on Traditional Courts and the Judicial Function of Traditional Leaders* (21 January 2003).

customary courts (renamed traditional courts in the final Bill), which was presented to the Minister for Justice and Constitutional Development. For reasons unknown, the draft Bill was never introduced in parliament, and in 2008 the Department of Justice and Constitutional Development (DOJ&CD) issued a policy document titled "Policy Framework on the Traditional Justice System under the Constitution", which culminated in the final Bill.[71] This Bill was introduced in parliament to commence with deliberations on its viability.[72] After its submission to the National Council of Provinces,[73] the Bill was withdrawn on 2 June 2011 as a result of numerous concerns raised against it. Its withdrawal sparked speculations in the media regarding its status, and in order to curb the rumours the DOJ&CD issued a media statement in February 2014 clarifying the Bill's status.[74] According to the statement the general belief that the Bill has reached a dead-end is misguided. The Bill may be revived at any time when the consultation processes have been finalised.[75] In the meantime, the provisions of the Black Administration Act dealing with traditional courts remain in place and traditional justice continues to be dispensed as usual.

Like the Black Administration Act, the Bill provides for the designation of traditional leaders as presiding officers of traditional courts with civil and criminal jurisdiction for certain areas.[76] Civil jurisdiction is granted with regard only to disputes arising out of customary law, and certain disputes are excluded from the jurisdiction of the court, such as constitutional matters, divorce, the custody and guardianship of children, the interpretation of wills, claims above a certain amount which has yet to be determined, and property. Criminal jurisdiction is limited to certain offences[77] committed in the jurisdictional area of the traditional court and

71 The policy is available at http://www.justice.gov.za/legislation/tradcourts/20090303_tradcourts.html (visited 13 May 2015).

72 The parliamentary procedure the Bill was subjected to is described in the Memorandum on the Objects of the Traditional Courts Bill, 2012 as attached to the text of the Bill. The Bill with its Memorandum is available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/bills/120125b1-12.pdf (visited 3 May 2015).

73 In terms of s.76(1) of the Constitution, a bill that affects the provinces must be referred to the National Council of Provinces, which must either pass, amend or reject the Bill.

74 http://www.justice.gov.za/m_statements/2014/2014-02-27-trad-courts.html (visited 28 Apr 2015).

75 A detailed discussion of the concerns raised against the Bill will not be explored in detail in this contribution. Mnisi S Weeks, "The Traditional Courts Bill: Controversy Around Process, Substance and Implications" (2011) 35 South African Crime Quarterly 3, 5–8 has at least five concerns regarding the Bill, *viz*: (1) the consultation-process did not include ordinary people, including women and the youth, in rural areas; (2) the Bill does not recognise lower-level or unofficial traditional courts; (3) the wide powers of the traditional courts pertaining to sanctions increases the scope for abuse and excludes legal representation; (4) people do not have an option to choose whether or not they want to fall under a particular traditional leader's authority, neither do they have the choice to opt out of the jurisdiction of the traditional court and, finally (5) the Bill pays only lip service to gender equality and does not afford substantive equality to the female members of a traditional community. Also *see* Holomisa, "Balancing Law and Tradition" (n.7) pp.18–20; Nomboniso Gasa, "The Traditional Courts Bill: A Silent Coup?" (2011) 35 SA Crime Quarterly 23, 24–25.

76 The Bill, Clauses 4–6.

77 In terms of the schedule to the Bill, they include the following: theft, malicious damage to property, *crimen injuria* (these three offences are subject to a limited amount to be announced in future) and assault (where grievous bodily harm has not been inflicted).

the court's powers are limited to certain sanctions and orders.[78] The procedure to be followed in the court continues to be in terms of customary law,[79] but the Bill introduces two principles of natural justice, *viz audi alteram partem* (hear both sides) and *nemo iudex in propria causa* (the impartiality of the judge).[80] The links between the mainstream courts and the traditional courts are confirmed in various provisions of the Bill. The magistrate's court remains the final forum of execution of the orders of the traditional courts. Any party may lodge an appeal to a magistrate's court or take the proceedings on review before a magistrate's court.[81]

The future of the Traditional Courts Bill hangs in the balance, because it is feared that the Bill pays too much attention to indigenous values which are not yet in line with the demands of human rights. For now, anyway, these fears outweigh the advantages of the Bill, and the courts continue to function in terms of the patchwork legislative provisions available to them.[82]

The ideals of justice expressed in the Bill and the parallels between them and other concepts such as *ubuntu*, restorative justice and therapeutic jurisprudence are observable. The following three provisions of the Bill take centre stage in this discourse:

> "Objects of the Act[83]
> The objects of this Act are to—
> (a) affirm the *values of the traditional justice system*, based on *restorative justice and reconciliation* and to align them with the Constitution;
> (b) affirm the role of the institution of traditional leadership in—
> (i) promoting *social cohesion*, *co-existence and peace and harmony* in traditional communities …"

And:

> "Guiding principles[84]
> (1) In the application of this Act, the following principles should apply:
> (a) The need to align the traditional justice system with the Constitution in order for the said system to embrace the values enshrined in the Constitution, including—

78 The Bill, Clause 10. Sanctions which may not be imposed include: corporal punishment, banishment from the community, imprisonment or any other inhumane punishment, and a fine exceeding an amount which will be announced in future.

79 The Bill, Clause 9(1).

80 *Ibid.*, Clause 9(2).

81 *Ibid.*, Clauses 11–14.

82 *See* Jobodwana, "Customary Courts and Human Rights: Comparative African Perspectives" (n.7) pp.47–48 and Bennett, *Customary Law in South Africa* (n.29) p.142 for a discussion of some of the advantages of a traditional court system.

83 The Bill, Clause 2 (in part). Emphasis added.

84 *Ibid.*, Clause 2 (in part). Emphasis added.

(i) the right to human dignity;
(ii) the achievement of equality and the advancement of human rights and freedoms; and
(iii) non-racialism and non-sexism;
(b) the need to promote access to justice for all persons;
(c) the promotion of *restorative justice* measures;
(d) the enhancement of the quality of life of traditional communities through mediation;
(e) the development of skills and capacity for persons applying this Act in order to ensure the effective implementation thereof; and
(f) the need to promote and preserve *African values which are based on reconciliation and restorative justice*".

And also:

"Nature of traditional courts[85]
Traditional courts are distinct from courts referred to in section 166 of the Constitution, and operate in accordance with a system of customary law and custom that seeks to—
(a) prevent conflict;
(b) maintain *harmony*; and
(c) resolve disputes where they have occurred, in a manner that promotes *restorative justice and reconciliation* and in accordance with the norms and standards reflected in the Constitution".

The aspirations expressed in these three provisions are reconcilable with the notions of *ubuntu*, restorative justice and therapeutic jurisprudence, which will be explored hereafter.

III. Traditional Courts Bill and *uBuntu* Jurisprudence

The Traditional Courts Bill does not mention *ubuntu* explicitly but affirms the role of traditional leaders in the "promotion of social cohesion, co-existence and peace and harmony in traditional communities", which are core elements of *ubuntu*. The Bill has also been linked to *ubuntu* in the media. According to one media report, the Congress of Traditional Leaders of South Africa (CONTRALESA)[86] voiced their

85 *Ibid.*, Clause 7. Emphasis added.
86 CONTRALESA is a non-governmental group who represents the interests of the majority of traditional leaders in South Africa. For more information, *see* http://contralesa.org/html/about-us/index.htm (visited 4 May 2015).

support for the Traditional Courts Bill because, according to it, the customary court system is the only system that still upholds the values of *ubuntu*.[87]

uBuntu is a value-laden concept which has drawn a fair amount of both criticism and praise.[88] Although historically an African ethical philosophy of life,[89] it has been introduced into the legal landscape by the postamble of the interim Constitution which provides, amongst other things, that there "is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation".[90]

The interim Constitution did not elaborate on the meaning of *ubuntu* but the judiciary and several legal scholars gave content to it.[91] It was first brought into the legal discourse by the Constitutional Court in 1995 in the highly acclaimed case of *S v Makwanyane*,[92] which dealt with the abolition of the death penalty. Mokgoro J embraced *ubuntu* in her concurring but separate judgment and has been an active

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87 Jan Willem Bornman, "Challenging the Constitution for Tradition" (*Joburg Justice*), available at http://journalism.co.za/indepth/joburgjustice/?page_id=881 (visited 4 May 2015). Although CONTRALESA supported the drafting with the Bill, it does not agree with its outcome, because it imposes a Western perspective on traditional courts which is unacceptable to African communities and leaders. *See* Anon, "Traditional Courts Bill 'Inadequate'" *News24* (22 February 2012), available at http://www.news24.com/Archives/City-Press/Traditional-Courts-Bill-inadequate-20150430 (visited 4 May 2015).

88 It has been hailed as instrumental in South Africa's transition from apartheid to democracy — Else Bavinck, "Conflicting Priorities? Issues of Gender Equality in South Africa's Customary Law" (2013) 5 Amsterdam Law Forum 20, 21. On the other hand, Irma Kroeze, "Doing Things with Values: The Role of Constitutional Values in Constitutional Interpretation" (2001) 12 Stell LR 252, 260 argues that the concept is bloated and "simply collapses under the weight of the expectations". *See* also, the discussion of some of the criticisms by Chuma Himonga, Max Taylor and Anne Pope, "Reflections on Judicial Views of *Ubuntu*" (2013) 16 Potchefstroom Electronic Law Journal 371, 376, available at http://dx.doi.org/10.4314/pelj.v14i4 (visited 4 May 2015). For informative collections of material on *ubuntu* in a legal context, *see* Drucilla Cornell and Nyoko Muvangua (eds), *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (New York: Fordham University Press, 2012); Frank Diedrich (ed), *Ubuntu, Good Faith and Equity* (Cape Town: Juta, 2011).

89 Kenneth D Kaunda, *A Humanist in Africa* (London: Longmans Green, 1966) pp.22–28 has traced the historical roots of *ubuntu* back to small scale communities in Africa where the only life that was known was community life. *See* also, Ilze Keevy, "*Ubuntu* versus the Core Values of the South African Constitution" (2009) 34 Journal for Juridical Science 19, 26–28. As explained by Drucilla Cornell and Karin van Marle, "Exploring *Ubuntu*: Tentative Reflections" (2005) 5 African Human Rights Law Journal 195, 206:

> "The community … is always being formed through an ethic of being with others, and this ethic is in turn evaluated by how it empowers people. In a dynamic process the individual and community are always in the process of coming into being. Individuals become individuated through their engagement with others and their ability to live in line with their capability is at the heart of how ethical interactions are judged".

90 This section is partly based on the author's discussion of *ubuntu* in Rautenbach and Bekker, *Introduction to Legal Pluralism in South Africa* (n.2) pp.27–29.

91 The reasons for omitting the word "*ubuntu*" from the final Constitution are unknown. Some scholars have been concerned about the negative effect this omission might have had on the development of *ubuntu* jurisprudence. However, as the numerous judgments utilising *ubuntu* in their judicial reasoning have illustrated, the concept is now fully entrenched in the legal arena and these fears have been unfounded.

92 1995 (6) BCLR 665 (CC). *uBuntu* was mentioned by five of the eleven judges who delivered judgment in the case.

advocate for the application of *ubuntu* values in constitutional adjudication ever since.[93] What then is *ubuntu* and what does it mean for South African law? It has proven to be difficult, if not impossible, to answer these two questions in a tangible way. Some authors have remarked that the inability to pin down *ubuntu* is not necessarily bad for its development as a legal concept, because the understanding of the nature of *ubuntu* reflects and adapts to the demands of a diverse legal landscape. The value of *ubuntu* lies in the fact that it is an open-ended concept available for further development as the circumstances demand.[94] This does not mean that *ubuntu* should not be taken seriously, but rather that it is indicative of diversity of humankind, which is the state of affairs in South Africa anyway.[95]

Against this background, the fluid definition of *ubuntu* offered by Mokgoro J is all the more understandable. She says:[96]

> "Generally, *ubuntu* translates as humaneness. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*,[97] describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation".

The essence of *ubuntu* is captured in the belief that the welfare of the individual and of the community is inextricably linked — the one cannot exist without the other.[98] According to Mokgoro, *ubuntu* is a founding principle of law,[99] which holds the potential to reshape South African jurisprudence in general and customary law

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93 She declared at para 300:

> "… when our Courts promote the underlying values of an open and democratic society in terms of section 35 [of the interim Constitution] when considering the constitutionality of laws, they should *recognise that indigenous South African values are not always irrelevant nor unrelated to this task*. In my view, these values are embodied in the Constitution …". (Emphasis added.)

Her ensuing dialogue on *ubuntu* leaves no doubt that she was referring to *ubuntu* as an indigenous South African value.

94 *See* Himonga, Taylor and Pope, "Reflections on Judicial Views of *Ubuntu*" (n.88) p.389.

95 *Ibid.*, p.376.

96 *See s v Makwanyane* (n.92), [308].

97 The phrase *umuntu ngumuntu ngabantu* literally means that "a person is a person by or through other people".

98 Gardiol J van Niekerk, "Succession, Living Indigenous Law and *Ubuntu* in the Constitutional Court" (2005) 26 Obiter 474.

99 Because it coincides with the founding values of the Constitution set out in s.1, *viz* "human dignity, equality, promotion of human rights and freedoms and multi-party democracy". *See* Yvonne Mokgoro, "*Ubuntu* and the law in South Africa" (1998) 1 Potchefstroom Electronic Law Journal 14, 21, available at http://www.nwu.ac.za/p-per/volume-1-1998-no-1-1 (visited 4 May 2015). Also *see* Cornell and van Marle, "Exploring *Ubuntu*: Tentative Reflections" (n.89).

in particular. The examples she gives to illustrate her point show a noteworthy resemblance to the idea of both restorative justice and therapeutic jurisprudence. To quote her:[100]

> "… the original conception of law perceived not as a tool for personal defence, but as an opportunity given to all to survive under the protection of the order of the communal entity; communalism which emphasises group solidarity and interests generally, and all rules which sustain it, as opposed to individual interests, with its likely utility in building a sense of national unity among South Africans; the conciliatory character of the adjudication process which aims to restore peace and harmony between members rather than the adversarial approach which emphasises retribution and seems repressive. The lawsuit is viewed as a quarrel between community members and not as a conflict. The importance of group solidarity requires restoration of peace between them; the importance of public ritual and ceremony in the communication of information within the group; the idea that law, experienced by an individual within the group, is bound to individual duty as opposed to individual rights or entitlement. Closely related is the notion of sacrifice for group interests and group solidarity so central to *ubuntu(ism)*; the importance of sacrifice for every advantage or benefit, which has significant implications for reciprocity and caring within the communal entity".

Sachs J, on the other hand,[101] sees *ubuntu* as more than a collective concept, *viz* a unifying motif of the Constitutional Bill of Rights that combines individual rights with a communitarian philosophy. Such an approach links the individual and collective aspects of restorative and therapeutic justice and the role *ubuntu* plays or could play in the context of the Traditional Courts Bill.

In *MEC for Education: KwaZulu-Natal v Pillay*,[102] the court explained as follows:

> "The notion that 'we are not islands unto ourselves' is central to the understanding of the individual in African thought. It is often expressed in the phrase *umuntu ngumuntu ngabantu* which emphasises 'communality and the inter-dependence of the members of a community' and that every individual is an extension of others. According to Gyekye, 'an individual human person cannot develop and achieve the fullness of his/her potential

100 *See* Mokgoro, "*Ubuntu* and the law in South Africa" (n.99) pp.22–23. Also *see* the evaluation of Mokgoro's stand on *ubuntu* by Drucilla Cornell, "A Call for Nuanced Constitutional Jurisprudence: *Ubuntu*, Dignity, and Reconciliation" (2004) 19 SA Public Law 666, 669–71.

101 *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268, [37] (CC).

102 2006 (10) BCLR 1237, [53] (N).

without the concrete act of relating to other individual persons'. This thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity".

In *Afri-Forum v Malema*,[103] in order to answer the question whether the publication of pejorative words ("shoot the Boer") in a political song constituted hate speech, the Equality Court referred to the "*ubuntu*-based jurisprudence" which has been developed by the Constitutional Court, establishing *ubuntu* as an important source of law "within the context of *strained or broken relationships amongst individuals or communities and as an aid for providing remedies* which contribute towards more mutually acceptable remedies for the parties in such a case".[104] According to the court, *ubuntu*:[105]

"1. is to be contrasted with vengeance;
2. dictates that a high value be placed on the life of a human being;
3. is inextricably linked to the values of and which places a high premium on dignity, compassion, humaneness and respect for humanity of another;
4. dictates a shift from confrontation to mediation and conciliation;
5. dictates good attitudes and shared concern;
6. favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the plaintiff without ruining the defendant;
7. favours restorative rather than retributive justice;
8. operates in a direction favouring reconciliation rather than estrangement of disputants;
9. works towards sensitising a disputant or a defendant in litigation to the *hurtful impact of his actions* to the other party and towards changing such conduct rather than merely punishing the disputant;[106]
10. promotes mutual understanding rather than punishment;

103 2011 (6) SA 240 (EqC). The court summarised the political history of South Africa and the arrival of the European settlers in an informative way. This is a special court as referred to in s.166(e) of the Constitution. They have been established to deal exclusively with equality cases in terms of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000.

104 *Afri-Forum* [18] (n 103). Emphasis added.

105 *Ibid*.

106 Emphasis added. The unintentional links between *ubuntu*, restorative justice and therapeutic jurisprudence are evident in the use of phrases such as the "hurtful impact of his actions". Although it has been used here in the context of *ubuntu*, it has also been used in the context of restorative justice (*see* the quote of Mokgoro J indicated at n.20), and it is also prominent in therapeutic jurisprudence discourses.

11. favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful;
12. favours civility and civilised dialogue premised on mutual tolerance".

The majority of these meanings relate to restorative justice as well and, as argued later, can also be linked to the principles of therapeutic jurisprudence.[107] Of course, *ubuntu*, especially in its traditional context, differs depending on a person's status; for example, on whether a person is male or female, royalty or common, old or young, an insider or an outsider, and so on.[108] Nowadays, however, *ubuntu* is a fluid concept evolving togetherness in society, and there is no reason why it should not be embraced for its good qualities instead of focusing on its negative aspects.[109]

In light of the importance attached to *ubuntu*,[110] the concept's omission from the Traditional Courts Bill is questionable. Instead, the Bill refers to restorative justice, social cohesion and reconciliation as values of the traditional justice system. Granted, social cohesion and reconciliation are two meanings attributed to *ubuntu*, but one would expect that the latter is nowadays so entrenched in South African law that it is no longer necessary to defend its existence by means of legal gymnastics. There are other statutes operating in the mainstream legal sphere that explicitly refer to *ubuntu*, and it does not make sense that a bill which regulates traditional courts contains no reference to *ubuntu* at all, but other legislation does.[111]

IV. Traditional Courts and Restorative Justice Jurisprudence

As we have seen, the Traditional Courts Bill embraces the principles of restorative justice wholeheartedly in its objects, guiding principles and description of the nature of traditional courts. *uBuntu* as a legal notion has been developed considerably in the restorative justice literature and, although the Traditional Courts Bill does

107 *See* the discussion at Section IV and Section V.

108 *See* Keevy, "*Ubuntu* versus the Core Values of the South African Constitution" (n.89) pp.39–50 for a discussion of few examples.

109 Also *see* the arguments of Narnia Bohler Muller, "Beyond Legal Narratives: The Interrelationship between Storytelling, *Ubuntu* and Care" (2007) 18 Stell LR 133, 145–149. Freddy Mnyongani, "De-linking *Ubuntu*: Towards a Unique South African Jurisprudence" (2010) 31 Obiter 134, 144–145 is, however, of the opinion that *ubuntu* should be reclaimed as an African value unconnected with the Western legal paradigm.

110 A list of other cases that also made reference to *ubuntu* would include: *Azanian Peoples Organisation (Azapo) v President of the Republic of South Africa* 1996 (4) SA 671 (CC)*; Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC)*; Hoffmann v South African Airways* 2001 (1) SA 1 (CC)*; Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) BCLR 1 (CC), 2005 (1) SA 580 (CC).

111 For example, the Promotion of National Unity and Reconciliation Act 34 of 1995 contains a reference to *ubuntu* in its preamble. Also *see* the Child Justice Act 75 of 2008, s.2.

not refer to *ubuntu*, there is enough evidence in the literature and court judgments that *ubuntu* and the principles of restorative justice are inextricably linked to one another.[112] In this regard, Himonga, Taylor and Pope[113] are of the opinion that the judicial application of *ubuntu* and the implementation of restorative justice frequently go hand-in-hand. Schoeman's[114] analysis of literature on *ubuntu* also brings her to the conclusion that "the same values and principles that underpin the African philosophy of *ubuntu* are embodied in restorative justice".

There is widespread agreement in the literature that the meaning of restorative justice in a South African context is analogous to the content given to it by the Economic and Social Council of the United Nations (ECOSOC). The ECOSOC Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters,[115] for example, view restorative justice as: "an evolving response to crime that respects the dignity and equality of each person, builds understanding, and *promotes social harmony through the healing of victims*, *offenders and communities*".[116] Notable is the fact that the definition section of the ECOSOC Basic Principles does not define restorative justice *per se* but only the "restorative process", which is described as "any process in which the victim and the offender, and, where appropriate, any other individuals or *community members affected by a crime*, *participate together actively in the resolution of matters arising from the crime*, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles".[117] The meaning of a "restorative outcome" is an agreement reached as a result of the restorative process and it includes programmes "aimed at *meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender*".[118] These descriptions of restorative justice are also well matched with the aspirations of therapeutic jurisprudence which are discussed in the subsequent section.

The Traditional Courts Bill is not the only legislation incorporating restorative justice. The Probation Services Act[119] was amended in 2002 to provide for a definition of restorative justice, *viz* "the promotion of reconciliation, restitution and responsibility through the involvement of a child, and the child's parents, family

112 Marelize Schoeman, "A Philosophical View of Social Transformation through Restorative Justice Teachings – A Case Study of Traditional Leaders in Ixopo, South Africa" (2012) 13 Phronimon 19.

113 *See* Himonga, Taylor and Pope, "Reflections on Judicial Views of *Ubuntu*" (n.88) p.374.

114 *See* Schoeman, "A Philosophical View of Social Transformation through Restorative Justice Teachings – A Case Study of Traditional Leaders in Ixopo, South Africa" (n.112) p.20.

115 ECOSOC Resolution 2002/12, available at http://www.un.org/en/ecosoc/docs/2002/resolution%20 2002-12.pdf (visited 4 May 2015). Hereafter the "ECOSOC Basic Principles".

116 ECOSOC Basic Principles, preamble. Emphasis added.

117 *Ibid*., para.I.2.

118 *Ibid*., para.I.3. Emphasis added.

119 Probation Services Act 116 of 1991. This Act provides for the establishment and implementation of programmes aimed at the combating of crime, as well as the rendering of assistance to persons involved in crime.

members, victims and the communities concerned".[120] According to the Child Justice Act,[121] restorative justice means:

> "an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation".[122]

The Child Justice Act makes a direct link between *ubuntu* and restorative justice through its objectives, which provide, amongst other things, that one of the objects of the Act is to "promote the spirit of *ubuntu* in the child justice system through supporting reconciliation by means of a restorative justice response".[123]

The DOJ&CD has embraced the idea of restorative justice wholeheartedly as something grounded in customary law. In a booklet distributed by the Department, it declares that there "is a similarity between restorative justice and justice as practised by Africans through community and customary courts".[124] Interestingly, the subtitle to the booklet is "Road to Healing", which reminds one of the "healing" ideals expressed in the therapeutic jurisprudence literature.[125]

The South African jurisprudence on restorative justice is on the rise, including in the Constitutional Court.[126] In *Le Roux v Dey*[127] the court referred to the *amende honorable*, a specific form of apology imposed under the direction of the court, but which is no longer applied in South African law. Although the court did not find it necessary to trace the origin and history of the *amende honorable* or to propose its reinstatement in South African law, it emphasised that the development of the law should be "in accordance with equitable principles also rooted in Roman-Dutch law", because:[128]

> "Similar roots are to be found in customary law and tradition, but their interrelation with the Roman Dutch remedies, and their melding into the single system of law under the Constitution, requires mature reflection and consideration on a future occasion".

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120 *Ibid*., s.1 under the lemma "restorative justice".

121 Child Justice Act 75 of 2008. This Act establishes a criminal justice system based on the principles of restorative justice for children who have committed crimes.

122 *Ibid*., s.1 under the lemma "restorative justice".

123 *Ibid*., s.2.

124 *See* DOJ&CD, "Restorative Justice: The Road to Healing" (n.16).

125 *See* the discussion at Section IV.

126 For a discussion of some of the cases, *see* A Skelton and M Batley, "Restorative Justice: A Contemporary South African Review" (2008) 21 Acta Criminologica 37, 41–42; and also Himonga, Taylor and Pope, "Reflections on Judicial Views of *Ubuntu*" (n.88) pp.396–410.

127 2011 (3) SA 274 (CC).

128 *Ibid.*, [199]–[200].

Mokgoro J in *Dikoko v Mokhatla*[129] also made a direct link between *ubuntu* and restorative justice in a defamation claim. The *amende honorable* (apology)[130] is, according to her, compatible with the notion of *ubuntu*. An apology would restore the relationship between the parties[131] because, in her words:

> "… an apology serves to recognize the human dignity of the plaintiff, thus acknowledging, in the true sense of *ubuntu*, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant. Whether the *amende honorable* is part of our law or not, our law in this area should be developed in the light of the values of *ubuntu* emphasising restorative rather than retributive justice. The goal should be to knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and social inter-dependence. It is an area where courts should be pro-active encouraging apology and mutual understanding wherever possible".

Sachs J, who gave a separate judgment, shared the opinion that the *amende honorable* was far more in line with the spirit of *ubuntu* than the *actio iniuriarium*, which focuses on monetary reparation. The link between *ubuntu*, restorative justice and, to a lesser extent, therapeutic jurisprudence is evident from his words:[132]

> "*Ubuntu - botho* is highly consonant with rapidly evolving international notions of restorative justice. Deeply rooted in our society, it links up with world-wide striving to develop restorative systems of justice based on reparative rather than purely punitive principles. The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation. Encounter (dialogue) enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Reparation focuses on repairing the harm that has been done rather than on doling out punishment. Reintegration into the community depends upon the achievement of mutual respect for and mutual commitment to one another. And participation presupposes a less formal encounter between the parties that allows other people close to them to participate. These concepts harmonise well with processes well-known to traditional forms of dispute resolution in our country,

129 *See Dikoko v Mokhatla* (n.19), [68].

130 The *amende honorable*, rooted in Canon law, formed part of the Roman-Dutch law and thus became part of South African law. However, it fell into disuse in the 1800s. Since 2002 the courts have showed a renewed interest in the remedy and there is an on-going debate about its place in defamation law. *See* Gardiol J van Niekerk, "*Amende Honorable* and *Ubuntu*: An Intersection of *Ars Boni et Aequi* in African and Roman-Dutch Jurisprudence" (2013) 19 Fundamina 397, 402–403.

131 *See Dikoko v Mokhatla* (n.19), [69].

132 *Ibid.*, [114].

processes that have long been, and continue to be, underpinned by the philosophy of *ubuntu - botho*".[133]

The Traditional Courts Bill also contains a provision enabling a traditional court (in both criminal and civil disputes) to order that an unconditional apology be made.[134] This is in line with Sachs' views on the place of an apology in South African law and the key elements of restorative justice, *viz* to encounter (dialogue), reparation (the hurt), reintegration (into community) and participation (the involvement of everyone). However, Van Niekerk[135] is of the opinion that the distinction between forced and free apologies is not always borne in mind. The former has a punitive aspect and although it might satisfy the "retributive thirst" of the plaintiff, it would not be in line with the aspirations of *ubuntu*, restorative justice or, as we will see later, therapeutic jurisprudence.

Some say that the uncritical application of *ubuntu* by the judiciary, without reference to authoritative African sources to illustrate its meaning and compatibility with the Constitution, has to a certain extent weakened its reputation as a moral guide with an African flavour.[136] Nevertheless, it should be evident that *ubuntu* is here to stay. It can be applied to virtually any area of law, in all stages of the western criminal justice process,[137] and it is envisaged that it will continue to evolve as a unique African guiding principle in all matters of law.[138]

V. Traditional Courts and Therapeutic Jurisprudence

The Traditional Courts Bill does not refer to therapeutic jurisprudence at all but the aspirations expressed in its objects and guiding principles are certainly reconcilable. Contrary to *ubuntu* and restorative justice, therapeutic jurisprudence has developed in American literature and is a fairly unknown concept in South African law. Introduced in the scholarly works of Rieff,[139] it has been developed to its full potential by David B Wexler[140] and the late

133 Footnotes omitted.

134 The Bill, Clause 10(2)(d).

135 *See* van Niekerk, "*Amende Honorable* and *Ubuntu*: An Intersection of *Ars Boni et Aequi* in African and Roman-Dutch Jurisprudence" (n.130) pp.402–410.

136 *See* Himonga, Taylor and Pope, "Reflections on Judicial Views of *Ubuntu*" (n.88) p.424.

137 These stages include: pre-trial, trial, pre-sentence and sentence. *See* Skelton and Batley, "Restorative Justice: A Contemporary South African Review" (n.126) pp.42–45.

138 Thino Bekker, "The Re-emergence of *Ubuntu*: A Critical Analysis" (2006) 21 SA Public Law 333, 344 refers to *ubuntu* as a constitutional value with a "local flavour".

139 Philip Rief, *The Triumph of the Therapeutic: Uses of Faith After Freud* (University of Chicago Press, 1966); Samantha Jeffries, *Transforming the Criminal Courts: Politics, Managerialism, Consumerism, Therapeutic Jurisprudence and Change* (Australian Institute of Criminology, 2002), available at http://eprints.qut.edu.au/8613/1/8613.pdf (visited 14 May 2015).

140 Professor of Law at the University of Arizona and Director of the International Network on Therapeutic Jurisprudence, University of Puerto Rico School of Law. For an overview of the development of

Bruce J Winick[141] as an all-encompassing perspective seeks to reach a legal outcome that is focused on the well-being of all involved:[142]

> "Therapeutic Jurisprudence concentrates on the law's impact on emotional life and psychological well-being. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law's role as a potential therapeutic agent should be recognized and systematically studied".

It is evident that therapeutic jurisprudence has been given a meaning that is as wide as possible, and its open-endedness has enabled its development in various areas of law — similar to the open-endedness of *ubuntu*.[143] In the same way as restorative justice, therapeutic jurisprudence uses an interdisciplinary approach that focuses on the process of adjudication from beginning to end and not only on the final result.[144] The application of the principles of therapeutic jurisprudence during the court process demonstrates (or requires) a paradigm shift from law as a punitive agent to law as a healing agent. The social responsibilities of law have centre stage,

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therapeutic jurisprudence from theory to practice in a span of two decades, *see* David B Wexler, "Two Decades of Therapeutic Jurisprudence" (2008) 24 Touro Law Review 17.

141 Former Professor of Law at the Miami School of Law.

142 *See* the *International Network on Therapeutic Jurisprudence*, available at https://law2.arizona.edu/depts/upr-intj/ (visited 8 May 2015). Therapeutic jurisprudence is also referred to as a model, movement or approach which developed as a result of rethinking the traditional approach to law as an adversarial model. *See* N Des Rosiers, "From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts" (2000) 37 Spring Court Review 54.

143 Therapeutic jurisprudence was initially confined to mental health law but has developed as a valuable tool in many other areas of law. Also *see* the discussion of Eric Y Drogin, "From Therapeutic Jurisprudence … to Jurisprudent Therapy" (2000) 18 Behavioral Sciences and the Law 489; Edward A Dauer, "A Therapeutic Jurisprudence Perspective on Legal Responses to Medical Error" (2003) 24 The Journal of Legal Medicine 37, 41–42; Christopher M Moreno and Giorgio H Curti, "Recovery Spaces and Therapeutic Jurisprudence: A Case Study of the Family Treatment Drug Courts" (2012) 13 Social & Cultural Geography 161; Lita Linzer Schwartz and Natalie K Isser, "Neonaticide: An Appropriate Application for Therapeutic Jurisprudence" (2001) 19 Behavioral Sciences and the Law 703; Victoria Weisz, Roger C Lott and Nghi D Thai, "A Teen Court Evaluation with a Therapeutic Jurisprudence Perspective" (2002) 20 Behavioral Sciences and the Law 381; J Wemmers, "Victim Participation and Therapeutic Jurisprudence" (2008) 3 Victims and Offenders 165; Astrid Birgden and Michael L Perlin, "'Tolling for the Luckless, the Abandoned and Forsaken': Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists" (2008) 13 Legal and Criminological Psychology 231, 235; Ken Kress, "Therapeutic Jurisprudence and the Resolution of Value Conflicts: What We Can Realistically Expect, in Practice, from Theory" (1999) 17 Behavioral Sciences and the Law 555; Astrid Birgden, "Therapeutic Jurisprudence and Sex Offenders: A Psycho-Legal Approach to Protection" (2004) 16 Sexual Abuse: A Journal of Research and Treatment 351.

144 *See* Rosiers, "From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts" (n.142) p.55.

and therapeutic jurisprudence informs us about the enormous impact the justice system can have on people's well-being.[145]

Scholars have applied this "mental health approach" to virtually every branch of the law, including criminal law, civil law, disability law, the law of evidence, labour law, commercial law and international law.[146] The ultimate aim of therapeutic jurisprudence is, as explained by Perlin,[147] "to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles". Therapeutic jurisprudence is thus all about bringing about change in the conventional approach of adversarial legal systems by taking into account the impact of the law and the judicial process on all involved. The theoretical framework of therapeutic jurisprudence "asks that we seek to minimize the law's anti-therapeutic consequences and maximise its therapeutic value – without sacrificing due process or other judicial and legal values".[148]

As far as I know, the expression "therapeutic jurisprudence" has not been used by the South African judiciary so far. There are, however, examples where terminology similar to that used in therapeutic jurisprudence literature has been used, denoting at least unintentional links between *ubuntu*, restorative justice and therapeutic jurisprudence. In *Dikoko v Mokhatla*[149] Mokgoro J used terminology typical of therapeutic jurisprudence to explain that a remedy should "give better appreciation and sensitise a defendant as to the *hurtful impact of his or her unlawful actions*".[150] The words "hurtful impact of his actions" were used again in *Afri-Forum v Malema*, in describing the characteristics of *ubuntu*.[151]

Although the South African judiciary has yet to realise the existence of therapeutic jurisprudence,[152] its value as a teaching tool to a new generation of

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145 John Braithwaite, "Restorative Justice and Therapeutic Jurisprudence" (2002) 35 Criminal Law Bulletin 244. For more information on the meaning and application of therapeutic evidence, *see* the essays on therapeutic jurisprudence in BJ Winick and DB Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Durham: Carolina Academic Press, 2003); David B Wexler, "Therapeutic Jurisprudence in a Comparative Law Context" (1997) 15 Behavioral Sciences and the Law 233.

146 James M Cooper, "State of the Nation: Therapeutic Jurisprudence and the Evolution of the Right of Self-Determination in International Law" (1999) 17 Behavioral Sciences and the Law 607, 607–608.

147 Michael L Perlin, "'Justice's Beautiful Face': Bod Sadoff and the Redemptive Promise of Therapeutic Jurisprudence" (2012) 40 Journal of Psychiatry & Law 265, 267.

148 Susan Goldberg, *Judging for the 21st Century: A Problem-Solving Approach* (Ottawa: National Judicial Institute, 2005) p.3, available at http://www.nji.ca/Public/publication.htm (visited 15 May 2015). She also makes an interesting comparison between mainstream and therapeutic court procedures at pp.4–5.

149 *See Dikoko v Mokhatla* (n.19), [68].

150 Emphasis added.

151 *See Afri-Forum v Malema* (n.103) — see the characteristic of *ubuntu* mentioned [9], namely that it "works towards sensitising a disputant or a defendant in litigation to the *hurtful impact of his actions* to the other party and towards changing such conduct rather than merely punishing the disputant". Emphasis added.

152 Annette van der Merwe, "Therapeutic Jurisprudence: Judicial Officers and the Victim's Welfare – S v M 2007 (2) SACR 60 (W)" (2010) SACJ 98, 102–105, discusses the case of *S v M* 2007 (2) SACR 60 (W) as an example, where the Court unwittingly applied the principles of therapeutic jurisprudence by focusing on the victim's well-being in particular.

law students has been recognised by two South African law lecturers. They argue that "by teaching our students through the lens of therapeutic jurisprudence, we enhance the outcomes for all interested parties".[153] They see the advantages of introducing therapeutic jurisprudence "enhanced by important constitutional values such as human dignity and *ubuntu*" into South African law.[154] Law students eventually become judges and take their learning experiences with them to the bench, where they incorporate what they have learned. Casey[155] recommends three key steps to adopting the principles of therapeutic jurisprudence in the courts. First, the courts and judges must explicitly recognise and acknowledge their role in producing therapeutic or anti-therapeutic outcomes. Secondly, a network of practitioners of therapeutic jurisprudence must be developed, as must a knowledge base on therapeutic jurisprudence, and thirdly, existing justice procedures must be re-evaluated in the light of the values of therapeutic jurisprudence. Whether therapeutic jurisprudence will remain the topic of academic discussions in South Africa only or will find its way into the reasoning of judges remains to be seen.

VI. Conclusion

The administration of justice in rural South Africa is predominantly carried out by traditional courts, which administer justice on the basis of customary law grounded, amongst other things, on the value of *ubuntu*. The harmonisation of the common and customary law in South Africa seems to be a forlorn idea. So far, traditional or customary courts have been quite capable of withstanding any such attempts. However, the need to consolidate the different legal provisions pertaining to traditional courts and to bring the operation of these courts in line with the values reflected in the constitutional entrenchment of contemporary human rights and the values of the Constitution as a whole has led to the formulation of the Traditional Courts Bill. The preamble to the Bill echoes these sentiments:

> "**SINCE** the Constitution recognises the institution, status and role of traditional leadership, including a role in the administration of justice, as well as the application of customary law, subject to the Constitution;
>
> **AND SINCE** the traditional justice system, which is based on customary law, forms part of the legal system of the Republic;

153 The parties they refer to include everyone involved in the legal proceedings. Elmarie Fourie and Enid Coetzee, "The Use of a Therapeutic Jurisprudence Approach to the Teaching and Learning of Law to a New Generation of Law Students in South Africa" (2012) 15 Potchefstroom Electronic Law Journal 366, 375, available at http://dx.doi.org/10.4314/pelj.v15i1.11 (visited 11 May 2015).

154 Fourie and Coetzee, "The Use of a Therapeutic Jurisprudence Approach to the Teaching and Learning of Law to a New Generation of Law Students in South Africa" (n.153) p.366.

155 Pamela Casey, "Therapeutic Jurisprudence in the Courts" (2000) 18 Behavioral Sciences and the Law 445, 451.

> **AND SINCE** the Traditional Leadership and Governance Framework Act, 2003, recognises a role for the institution of traditional leadership in the administration of justice;
>
> **AND SINCE** it is necessary to transform the traditional justice system, in line with constitutional imperatives and values, including the right to human dignity, the achievement of equality and the advancement of human rights and freedoms;
>
> **AND SINCE** it is necessary to have a single statute applicable throughout the Republic, regulating traditional courts".

Although the Bill does not explicitly refer to *ubuntu*, the general viewpoint is that it is a customary value and is thus inevitably intertwined with the dispensing of justice within these courts. *uBuntu* as a legal notion has been developed considerably in the restorative justice literature, and the links between *ubuntu* and restorative justice are more or less undisputed. The methodological similarities between restorative justice and therapeutic jurisprudence have also been recognised by a few scholars.[156] However, as explained by Braithwaite,[157] restorative justice and therapeutic jurisprudence are different in some respects. Restorative justice has an element of process in it and is grounded on a set of admirable values, whereas therapeutic jurisprudence is mainly a lens for focusing on the consequences of the law on individuals and is thus more of a value-laden motivation for taking a particular type of action than a process. Goldberg also regards therapeutic jurisprudence as the lens through which restorative justice programmes must be developed to minimise the anti-therapeutic consequences of the application of the law.[158]

The idea of therapeutic jurisprudence as a value also corresponds with the understanding I have put forward of *ubuntu* as an African value or a lens rather than a formal process. Contrary to restorative justice, for which processes have been extensively developed, *ubuntu* is less about procedures but more about values. This does not mean that *ubuntu* procedures could not be developed in future (like the development of procedures of therapeutic jurisprudence) but thus far the trend has been to develop restorative justice processes with *ubuntu* values in mind, and not the other way round.

The parallels between *ubuntu*, restorative justice and therapeutic jurisprudence have not yet been explored to the fullest extent, and it is not my intention to do so

156 *See* Braithwaite, "Restorative Justice and Therapeutic Jurisprudence" (n.145) p.244 discusses the similarities and differences between therapeutic jurisprudence and restorative justice. Also *see* RF Schopp, "Integrating Restorative Justice and Therapeutic Jurisprudence" (1998) 67 Revista Juridica Universidad de Puerto Rico 665.

157 *See* Braithwaite, "Restorative Justice and Therapeutic Jurisprudence" (n.145) pp.244, 244–247.

158 *See* Goldberg, *Judging for the 21st Century: A Problem-Solving Approach* (n.148) pp.6–7.

within the limited confines of this contribution.[159] Nevertheless, a cursory perusal of some of the available literature is illuminating. Noteworthy is the fact that some of the discussions on therapeutic jurisprudence have already intuitively recognised the apparent link between therapeutic jurisprudence and indigenous justice, albeit without the South African setting or *ubuntu* in mind:

> "The roots of this new judicial approach [therapeutic jurisprudence] *can be traced back to indigenous and tribal justice systems*, including noteworthy examples in what today constitutes the United States, Canada, Australia, and New Zealand – and a serious effort is now underway to learn from those systems and to introduce some of their perspectives and techniques into western judicial structures".[160]

In another study, in Canada, Goldberg also acknowledges the role of indigenous values in criminal matters, especially when it comes to sentencing:[161]

> "*Members* of Aboriginal communities — overrepresented in our courts and in our jails — have advocated for a justice system that both considers the complex social, economic, and cultural factors that cause Aboriginal people to be in conflict with the law and that takes a healing approach to sentencing".

In South Africa, traditional leaders are unwittingly therapeutic agents — they attempt to foster therapeutic outcomes for the transgressors who come before them — and strive towards restoring the well-being of the community. At least theoretically, the Traditional Courts Bill is a good example of how traditional values such as *ubuntu* may be fused with contemporary ideas of restorative justice and therapeutic jurisprudence, though the latter is not explicitly referred to. While academic discussions use wordplay in their discussion of the commonalities, differences and parallels between concepts such as *ubuntu*, restorative justice and

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159 As far as South African literature concerning therapeutic jurisprudence is concerned, *see* SP Walker and DA Louw, "The South African Court for Sexual Offences" (2003) 26 International Journal of Law and Psychiatry 73; A Allan and MM Allan, "The South African Truth and Reconciliation Commission as a Therapeutic Tool" (2000) 18 Behavioral Sciences and the Law 459; *see* Rautenbach, "Therapeutic Jurisprudence in the Customary Courts of South Africa: Traditional Authority Courts as Therapeutic Agents" (n.31); van der Merwe, "Therapeutic Jurisprudence: Judicial Officers and the Victim's Welfare – S v M 2007 (2) SACR 60 (W)" (n.152) p.98; Anél du Plessis and Ingrid Sinclair, "Therapeutic Jurisprudence: An Assessment of Its Possible Application to Cases of Domestic Violence in Magistrate's Courts" (2007) 18 Stell LR 91.

160 *See* Winick and Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (n.145) p.3. Emphasis added. In another study, the authors do not discuss therapeutic jurisprudence as a traditional form of justice, but argue nonetheless that it could be used to revive indigenous justice methods. *See* Joseph Thomas Flies-Away and Carrie E Garrow, "Healing to Wellness Courts: Therapeutic Jurisprudence" (2013) Michigan State Law Review 403.

161 *See* Goldberg, *Judging for the 21st Century: A Problem-Solving Approach* (n.148) p.1.

therapeutic jurisprudence, the fact remains that they are all ideas in a perfect world to ensure that the administration of justice is just to everyone involved. In contrast to the punitive character of a conventional justice system that focuses on retaliation, these ideas call for a more holistic approach that promotes reconciliation of everyone caught up in the justice system. All of them have one thing in common — the well-being of all individuals and communities touched by injustice in some form or other.