

The constitutional divide of post-apartheid South Africa in the jurisdiction of the traditional justice system

*Nomthandazo Ntlama**

Abstract

The exclusive jurisdiction of the traditional justice system – which in effect is based on racial classification – has been the subject of debate in South Africa since the attainment of democracy in 1994. The debate is drawn from the Constitution, which recognises the general system of customary law, and limits its application to the people who observe it. The debate is further fuelled by the non-explicit recognition of the customary court system within the judicial structure of the Republic. These courts are inferred from the concept of ‘any other courts’ in the Constitution. The inference of customary courts from ‘any other courts’, compromises the legitimate status of these courts in the resolution of disputes that arise from the system of customary law – in line with the ideals of the new constitutional dispensation. This considered, this article critically reviews the constitutional status of the customary court system in South Africa. The objective is to examine the effect of its exclusive jurisdiction in the application of the principles of traditional justice. It is also limited to the review of South Africa’s constitutional perspective on the protection of customary law relating to the advancement of the traditional justice system. It is argued, therefore, that the exclusive jurisdiction of the traditional justice system is a direct racial classification under the guise of the foundational values of the new democratic dispensation. Equally, the status given to customary courts – which is inferred from the concepts of ‘any other’ – constitutes a manifestation of the historic divide that compromises the legitimacy of these courts in the application of traditional justice. The extent, to which the exclusive jurisdiction can move towards

*B. Juris, LLB, (University of Fort Hare); Certificate in Comparative Human Rights, LLM: Public Law, (University of Stellenbosch); LLD, (University of South Africa). Associate Professor and Dean of Research, College of Law and Management Studies: University of KwaZulu-Natal.

a system that inclusively reflects the values of the new democratic dispensation, is also reviewed in general.

1 Introduction

The adoption of the 1996 Constitution¹ – which was characterised as a ‘historical milestone of unprecedented significance’² – provided an opportune moment for the evolution of the system of customary law in South Africa. Customary law was, for the first time, officially recognised as a legitimate system of law alongside other legal systems. The recognition was hailed as a landmark that reinforced the foundation of the South African legal system.³ The system of customary law encapsulates the principles of traditional justice. These principles are a major component in the functioning of customary law relating to the dispensation of justice. Traditional justice entails the resolution of disputes in terms of customary law – as exercised by the institution of traditional leadership in traditional communities.⁴

Notwithstanding the official recognition of customary law, the application of traditional justice has been a thorny issue for policy makers, human rights activists, and other stakeholders – including the institution of traditional leadership itself.⁵ The issue is related to its exclusive application, which is limited to black people, and in particular those living in rural areas and who adhere to the principles of customary law.⁶

¹The Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

²See Mokgoro ‘The customary law question in the South African Constitution’ 1997 (41) *Saint Louis University LJ* 1279 -1289 at 1279.

³See Bennett *Customary law in South Africa* (2007) at 77.

⁴Robins ‘A place for tradition in an effective criminal justice system: Customary justice in Sierra Leone, Tanzania and Zambia’ 2009 *Policy Brief* at 1-5. He substantiates the contention by acknowledging that ‘even though the application of traditional justice may differ from each ethnic group, it is a system that is administered and a method of dispute resolution by traditional leaders in the regulation of the rights, liabilities and duties as a legal system that serve indigenous people’ at 1.

⁵*Ibid*; Robins further acknowledges the challenge faced by governments in the application of the various legal systems which is not limited to the three countries identified in the study but having noted that, for example: First, the Constitution of Sierra Leone 1991 entrenches the protection of customary law in s 170(2) but its application is constrained by the limited jurisdiction of the traditional courts to matters that regulate marriage and divorce and adjudicating land disputes. Second, the Judicature and Application of Laws Act 1920 as amended in 1961 in Tanzania limits the application of customary law to matters of a civil nature as entrenched in s 11. Third, Zambia has stripped traditional leaders of their judicial role and the traditional courts are run by officers of the state who lack both the knowledge of customary law and the respect given to the institution of traditional leaders, at 1-2.

⁶The tabling and withdrawal of the Traditional Courts Bill [B1-2012], first published in *Government Gazette* No 30902, 27 March 2008 attest to the significance of the debates relating to the regulation of traditional justice. See also the submission by Jennifer Williams and Judith Klusener: Women’s

This paper critically reviews the constitutional status of customary courts and its impact on the exclusive jurisdiction of traditional justice. It questions the extent to which the exclusive jurisdiction of traditional justice can move towards a system that inclusively reflects the values of the new democratic dispensation.⁷ The intention is not to advocate the national application of traditional justice because of South Africa's cultural diversity and the flexible character of customary law. Rather, the concept of the extension of the jurisdiction of traditional justice to cover all matters arising from within the traditional authority areas – regardless of whether the litigants are ordinarily subject to customary law or not. The focus is not on the procedural and substantive issues relating to the functioning of these courts, but on their constitutional recognition *vis-à-vis* their jurisdiction as legitimate courts of law in the dispensation of justice. It is also limited to the review of South Africa's constitutional perspective on the protection of customary law relating to the advancement of the traditional justice system. It is argued that the racial classification in respect of the exclusive jurisdiction of these courts – which is limited to black people – undermines the aspirations of the new post-1994 democracy, in ensuring the establishment of a just society in South Africa.⁸

2 The constitutional status of customary courts

As mentioned above, the exclusive jurisdiction of traditional justice has been of great concern for many in South Africa. The concern is related to its recognition as a separate legal system, which has to operate according to its own values, subject to the Constitution – as its force and validity depends on the latter.⁹ The recognition of customary law within the context of the new dispensation was emphasised by Skweyiya J in *Pilane*,¹⁰ when he correctly held that:

it is well established that customary law is a vital component of our constitutional system, recognised and protected by the Constitution, while ultimately subject to its terms. The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs.¹¹

Legal Resources Centre entitled: '2012 Submissions to the National Council of Provinces: Traditional Courts Bill 2012'. This argued against the adoption of the Bill citing several factors – including *inter alia* – the fact that the Bill is nothing more than apartheid legislation which entrenches patriarchy and the subordination of women under the institution of traditional leadership.⁷ See s 1 of the Constitution, which provides that: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; and supremacy of the constitution and the rule of law'.

⁸See the Preamble to the Constitution.

⁹See *Alexkor v Richtersveld Community* 2003 12 BCLR 1301 (CC) at para 51.

¹⁰*Pilane v Pilane* 2013 4 BCLR 431 CC.

¹¹*Id* para 34.

This recognition of customary law entails the affirmation and not 'mere tolerance'¹² of its institutions, such as customary courts – which is directly linked to the functioning of these courts in relation to the dispensation of justice within the context of customary law. Of particular significance is the recognition of customary courts, and the affirmation of their role, which is drawn from Schedule 6 of the Constitution. This provides that:

16(1) every court, *including courts of traditional leaders* [author's emphasis], existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of 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 and any amendment or repeal of legislation and consistency with the new Constitution.

This provision does not establish customary courts; these courts had existed long before the attainment of democracy in South Africa.¹³ The Constitution rather legitimises the status of these courts as courts of law which play a fundamental role in the evolution of the principles of traditional justice.¹⁴ The Constitutional Court in *Alexkor*, had similarly expressed that the Constitution acknowledges the 'originality and distinctiveness of [customary courts] which have become an amalgam of South Africa's legal system'.¹⁵ In essence, the provision seeks to affirm the application of customary law in a manner that gives effect to the delivery of justice which has been in practice and continues to be observed by many people in South Africa. In this instance, the Constitution provides a framework within which these courts should transform and restore their legitimacy – in line with the imperatives of the new constitutional dispensation.¹⁶

The constitutional recognition of customary courts entails the enforcement of traditional justice in a manner that reinforces the communal understanding of resolving disputes. It endorses the application of traditional values which have been inherited and passed on from previous generations – as a system that

¹²Extracted from Langa DCJ in *Bhe v Khayelitsha Magistrate* 2005 1 BLCR 1 (CC) at para 41.

¹³See the South African Policy Framework on the Traditional Justice System under the Constitution at 26.

¹⁴See also Robins 'Restorative approaches to criminal justice in Africa: The case of Uganda' 2009 *Monograph* 57-84 at 60. He highlights that even though the institutionalisation of customary law dates back to colonial times, it has been integrated into a system and continues to be part of the formal Ugandan legal system through the local council courts.

¹⁵See *Alexkor* (n 9) at para 51.

¹⁶See, for example, the Preamble to the Traditional Leadership and Governance Framework Act 41 of 2003. This requires the institution of traditional leadership – as a custodian of the principles of traditional justice – to be transformed in order to give effect to the Constitution.

regulated the communal way of living in traditional communities.¹⁷ Basically, it features an important characteristic of customary law, which is seeking reconciliation in the resolution of disputes in order to bring social harmony in communities. This contention is similarly expressed by Toomey, as follows:

the most significant characteristic of [traditional justice] dispute resolution is that it seeks to deliver restorative justice in order to achieve social reconciliation among the parties and with the community ... the aim is to carry out what has been called “reintegrative shaming” which separates the person from the harmful act that person has committed.¹⁸

Notwithstanding the recognition of customary courts and their envisaged role in the new dispensation, they are not explicitly recognised as legitimate courts within the judicial structure of the Republic.¹⁹ These courts may be retrieved under section 166(e), as ‘other courts’ that may be developed in terms of legislation to be passed by parliament. It is drawn from this provision that these courts fall under the concept of ‘others’. The Constitutional Court in the *Certification*²⁰ judgment, had earlier justified the ‘other’ status of these courts, and pointed out that they are protected under section 166(e) of the Constitution – which protects the judicial structure of the Republic. It also linked the ‘other’ status of customary courts to section 170, which entrenched the functioning of the magistrates courts and ‘any other courts’.²¹

The ‘other’ concept compromises the legitimate status of customary courts in the dispensation of justice. This concept entails and reinforces the ‘mere’ status of customary courts – as in the past. This means that they are not courts of law entitled to resolve legal disputes. They are in fact reduced to nothing more than being mediating tribunals, which do not have a binding authority in the outcome of the case presented before them. For example, when a matter has been brought before a customary court, no other party or anyone acting on behalf of them can raise such a matter again. This means that the outcome of the court is binding on both parties and the matter cannot be re-opened on the same facts. In essence, these courts exercise their jurisdiction in the application and enforcement of customary law as a legitimate system of law, which is essential in the resolution of disputes. However, the ‘mere’ status of these courts

¹⁷See Tobiko ‘The relationship between formal rule of law and local traditional justice mechanisms’ presented at the 18th IAP Annual Conference and General Meeting, Moscow, Russia, 8-12 September 2013, at 1-22.

¹⁸Toomey ‘A delicate balance: Building complementary customary and state legal systems’ 2010 (3)1 *The Law and Development Review* 156-208 at 164.

¹⁹See s 166 of the Constitution.

²⁰*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 1996(10) BCLR 1253 (CC).*

²¹*Id* para 199.

compromises the quality of protection accorded to them as envisaged in Schedule 6 – as legitimate courts of law that should continue to dispense justice which in this instance, in line with the ideals of the new dispensation.

It is drawn from the ‘other’ concept that the ‘mere’ status given to these courts is an affront to the general system of customary law itself – as a legal system that regulates the lives of many people of South Africa. It stigmatises the legitimacy of these courts in the resolution of disputes. The negative impact of the past continues to manifest itself in the ‘other’ status currently accorded these courts.²² It brings back the anger and bitterness flowing from the reality that the system of customary law was never given an opportunity to develop alongside other legal systems in South Africa. The impact of the past – which continues to be felt today – is correctly captured by Skweyiya J in *Pilane*, when he held that:

our history, however, is replete with instances in which customary law was not given the necessary space to evolve, but was instead fossilised and “stone-walled” through codification, which distorted its mutable nature and subverted its operation.²³

This is similarly and earlier expressed by Nhlapho, when he points out that ‘the history of indigenous law in South Africa has been one of neglect, limited recognition and marginalization [and] both the colonial and settler states intervened in indigenous law only when such intervention was deemed necessary to control the African population or to advance segregationist policy’.²⁴ The marginalisation of customary law is directly linked to the general history of inequality in South Africa, which affected black people the most. The post-apartheid divide deepens the racist impact of apartheid. As explained by O’Regan J in *Brink v Kitshoff*,²⁵ ‘the apartheid system allowed the systematic discrimination of black people in all aspects of social life and the deep scars of this appalling programme are still visible in our society’.²⁶ The current constitutional division constitutes the manifestation of the impact of the past, which ‘touches on the raw

²²See also the preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, hereinafter referred to as the ‘Equality Act’ which acknowledges the impact of the past which still manifests itself today.

²³See *Pilane* (n 10) at para 35.

²⁴See Nhlapho ‘Indigenous law and gender in South Africa: Taking human rights and cultural diversity seriously’ 1995 (13) *Women’s rights and traditional law: A conflict* 48-71 at 49. See also Moseneke DCJ in *Gumede v The President of the Republic of South Africa* 2009 3 BCLR 243 (CC). Here (para 20) he analysed the impact of the past on the development of customary law as follows: the great difficulty resided in the fact that customary law was entirely prevented from evolving and adapting as the changing circumstances of the communities required. It was recorded and enforced by those who neither practised it nor were bound by it. Those who were bound by customary law had no power to adapt it.

²⁵*Brink v Kitshoff* 1996 4 SA 197 (CC).

²⁶*Id* para 40.

nerve of South Africans ... [as] a relic of our racist and painful past ... its effect [is] to ossify the principles of traditional justice'.²⁷

On the whole, the 'mere' status of customary courts – which is legitimised by the Constitution – has entrenched the historic subordinate status of the general system of customary law. This is so even though the Constitution is designed to redress the historic divide and 'facilitate the preservation and evolution of customary law as a legal system that conforms to its provisions'.²⁸

3 The limitation of the application of traditional justice to black people

Difficult questions may surface about the reach of customary law, whom it binds, whether people other than indigenous African people may be bound by customary law [and] happily, that matter will have to stand over for decision on another day ... it is not necessary to resolve whether the discrimination is also on the ground of race or whether any of the parties is not bound by customary law.²⁹

It is drawn from the above that the exclusive jurisdiction of traditional justice – which is directly linked to the 'other' status given to customary courts – has been a cause of great concern, even for the South African Constitutional Court. The 'other' status accorded these courts is reinforced by the qualification of having to apply the principles of the general system of customary law to the people who observe it – as was the practice in the past.

It is worth noting that the Constitution does not define customary law.³⁰ It is drawn from the Constitution that the application of customary law is associated with black people.³¹ The association entails the exercise of jurisdiction and application of principles of traditional justice to black people. This is alarming, because it draws a distinction and this constitutes racial classification of South African citizens based on their backgrounds and whether or not they adhere to the system of customary law. Customary law's limitation to black people creates the impression that they are substantially and qualitatively different from other racial groups, and reduces them to being mere subjects, and not citizens of the country. In fact, it undermines the foundational values of the Constitution – as

²⁷See Langa CJ in *Bhe* (n 27) at para 68.

²⁸*Pilane* (b 10) at para 35.

²⁹See Moseneke DCJ in *Gumede* (n 24) at para 23.

³⁰See The Recognition of Customary Marriages Act 120 of 1998 which defines customary law 'as customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.

³¹See s 211(2) of the Constitution which provides that 'a traditional authority that observes the 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'.

mentioned above – in the establishment of a non-racial society, in order to advance a more beneficial understanding of the principles of traditional justice.³²

The limitation of traditional justice to black people even on matters that involve its non-adherents and have arisen within its jurisdiction raises a number of hard-core constitutional and legal questions regarding the exclusive jurisdiction of traditional justice. These questions – *inter alia* – are:

- To what extent should principles of traditional justice be developed and live side-by-side with the general framework of the principles of the new dispensation – without limiting them to black people?
- How would the principles of traditional justice develop and ensure the generation of social harmony among racial groups in South Africa?
- Does the exclusive jurisdiction mean that principles of traditional justice would never develop and embrace everyone, without distinction based on their origin or skin colour?
- Does the exclusion mean that the Constitution entrenches the hierarchy of legal systems, where western conceptions of justice would be preferred over traditional justice?
- Why does the recognition of customary courts not include the broadening of their scope of operation – thus ensuring the extension of the application of the principles of traditional justice on all matters that have arisen within its jurisdiction, without classifying people based on their origins?³³

These questions are an indication of the debates relating to the racial classification associated with the application of traditional justice. The classification is drawn from the Constitution itself, which does not extend the benefits of the principles of traditional justice as a legal system to other racial groups. It portrays the principles of traditional justice as a separate and uncontested space that should not be extended to people who do not observe the system – particularly on matters that have arisen within its jurisdiction irrespective of origin. This serious constitutional shortcoming is traced back to the *Certification* judgment, during the certification process of the South African Constitution. The Constitutional Court, as the final arbiter in constitutional matters,³⁴ avoided

³²See Nwauche 'Distinction without difference: The constitutional protection of customary law and cultural linguistic and religious communities: A comment on *Shilubana v Nwamitwa*, River State University of Science and Technology, Nigeria, 1-20.

³³Hinz 'Traditional courts in Namibia – part of the judiciary?: Jurisprudential challenges of traditional justice' at 152 in Horn & Bosl (eds) *The independence of the judiciary in Namibia* (2008). He raises questions on the legitimacy of traditional courts which creates an uncertainty on whether these courts are: actually courts at all? In fact courts of law? They subject to the same constitutional requirements as state courts are, *ie* are they subject to the rules on the independence of the judiciary? And if so, will they be able to comply with these rules?

³⁴See s 167(3)(a-c).

making a definite ruling on the implications of extending the application of the principles of traditional justice to its non-adherents, and held that:

the Constitutional Assembly cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.³⁵

The failure to deal decisively with the application of traditional principles and to extend their jurisdiction to non-adherents was further endorsed by the Court in *Gumede*, as indicated above. The classification of traditional justice as a 'complicated' legal system is difficult to comprehend – considering the historic legacy of inequality which has affected the general framework of customary law. The classification furthers the constitutional divide and compromises the non-racial identity which the Constitution seeks to achieve. The classification does not echo the ethos of the preamble of the Constitution – in terms of determining the cohesive nature of the society that South Africa is striving to develop. As it stands, the Constitution is an instrument of exclusion, even though it supports the new democracy. It advances the historic divisions between black and white people – by restricting the application of traditional justice to black people. As mentioned above, the Constitution reinforces the impact of the past, where customary law was regarded as the 'poor cousin' that encouraged the fossilisation of its rules and practices.³⁶

Furthermore, the constitutional divide defeats the whole purpose of the recognition of customary law, with its values, with the aim of ensuring that:

- it is brought into harmony with the supreme law;
- it is saved from its stunted and deprived past; and
- the pluralistic character of our legal system – which now sits under one umbrella, which is the Constitution – is reaffirmed.³⁷

It is drawn from these factors – as the Constitutional Court pointed out in *Bato Star*³⁸ – that 'the new dispensation is fashioned in a manner that seeks to ensure transformation of a grossly unequal society to one in which there is

³⁵*Certification* (n 20) at para 197.

³⁶See Brown 'Customary law in the Pacific: An endangered species?' 1999 (3) *Journal of South Pacific Law* 1-13 at 7. See also Ogora *Moving forward: Traditional justice and victim participation in Northern Uganda* (2009). He reinforces the contention and holds that the application of customary law through the traditional justice system will 'remain as it was in the beginning, is now and forever amen', at 1-12.

³⁷See *Gumede* (n 24) at para 22

³⁸See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC).

equality between the people of all races'.³⁹ The contention was further contextualised by Moseneke,⁴⁰ as he affirms that the 'Constitution set for itself the object of healing the divisions of the past, by establishing a common citizenship in an undivided country which must strive to be united in its diversity'.⁴¹ Thus, in this context, the principles of traditional justice should not be seen as an external system to the principles which shape South Africa's constitutional order. The principles are grounded in socio-political and cultural factors – that enable the shaping and changing of practices, attitudes and beliefs, not only relating to black people, but also to the broader community. These principles are shaped and motivated by the fact that they:

- are flexible and adaptable, and therefore can be applied to situations and disputes in order to reflect the pace of social transformation;
- represent a powerful code of values of those living in customary groups, and consequently are unlikely to be treated lightly; and
- have the capacity to adapt, and in a modified form will undoubtedly continue as the legal regime for many.⁴²

These factors are essential for the development of a non-racial understanding in the extension of the principles of traditional justice to non-adherents. Such an understanding has the potential to harmonise the principles of traditional justice, and to develop them into becoming a substantive part of South Africa's new democracy. For example, customary courts are required to apply customary law in line with the values of the new dispensation. This means that the application of customary law has to conform to the Constitution, and be subject to it.⁴³ The quest for conformity of customary law with the Constitution acknowledges that the application of traditional justice is interrelated with the values of the new dispensation, and therefore is *not an island unto itself*.⁴⁴ In this context, this means that customary law does not operate in a vacuum, as it regulates the lives of many people. Accordingly, its exclusive application

³⁹*Id* para 71.

⁴⁰See Moseneke 'Transformative adjudication in post-apartheid South Africa – Taking stock after a decade' 2007 (21)1 *Speculum Juris* at 2-12.

⁴¹See also the Preamble to the Equality Act, which acknowledges that the basis of addressing the historic divide lies in the Constitution.

⁴²See Brown (note 36 above) at 13. See also Among 'The application of traditional justice mechanisms to the atrocities committed by child soldiers in Uganda: A practical restorative approach' 2013 (13) *African Human Rights Law Journal* at 441-463. He emphasises the importance of the traditional justice system as a measure that is designed to advance the application of customary law in line with the ideals of promoting accountability in relation to the harm done, at 443.

⁴³See *Alexkor* (n 9) at para 51. See also Penal Reform International *Access to justice in Sub-Saharan Africa: The role of traditional and informal justice system* (2000).

⁴⁴Extracted from Sachs J in *PE Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) at para 37.

compromises the potential of its values to evolve and influence other value systems consistent with the Constitution.

The rural areas where traditional justice is mostly applicable,⁴⁵ are constituted by large areas of land and forest under the control and jurisdiction of traditional leaders.⁴⁶ Access to these areas is regulated by traditional by-laws which are under the authority of traditional leaders – who have to exercise and enforce principles of traditional justice if they are violated. It is therefore possible that people who do not adhere to principles of traditional justice may flout these principles with impunity, when accessing these areas to collect wood and to undertake other related activities. In this instance, there is no reason not to extend the application of traditional justice to a person who does not adhere to its principles, so that they can be charged according to applicable customary laws which are essential in the regulation of traditional justice. The customary courts should have jurisdiction in such matters and be able to penalise offenders in accordance with local custom – because they ought not to have a different status in post-apartheid South Africa. The extension of the principles of traditional justice to non-adherents would ensure a positive development – when the knowledge, experience and values of various legal systems are allowed to influence and enrich each other, without one being a subordinate legal model.⁴⁷ As Brown further substantiates:

if [traditional justice] is to be marginalised by being observed and practiced only in its traditional heartland of land tenure and personal law then the profile it enjoys will be akin to that it had in the [pre-democratic dispensation].⁴⁸

It is therefore worth affirming that the extension of traditional justice to non-adherents would ensure that its principles are not treated as ‘an inconvenience to be tolerated but as a heritage to be nurtured and preserved for posterity, particularly in view of the many distortions and abuses under the apartheid regime’.⁴⁹

⁴⁵See Elechi ‘Human rights and the African indigenous justice system’ paper presented at the 18th *International Conference of the International Society for the Reform of Criminal Law 08-12 August 2004, Montreal, Quebec: Canada*. He also affirms that the ‘African indigenous institutions of social control remain relevant in the affairs of the people especially in the rural areas where the majority reside’, at 1.

⁴⁶For example, Qalathethe Forest at Thamarha Location in King William’s Town in the Eastern Cape is under the traditional leadership of uNkosi Ludwe ‘Ngubeszwe’ Siwani.

⁴⁷Alberdi ‘Legislative reform lays foundation for advancing gender equality and women’s rights’, a presentation held at the *Third Meeting of the Africa-Spain Women’s Network on 12 May 2008*.

⁴⁸See Brown (n 36).

⁴⁹See Mogoeng-Mogoeng CJ and Nkabinde J in *Pilane* (n 10) at para 78.

4 Conclusion

This article has raised more questions than answers. The question of the exclusive jurisdiction of traditional justice remains uncertain and continues to be debated. After two decades of the new constitutional dispensation, the exclusive jurisdiction of traditional justice sadly remains limited to black people. The limitation of traditional justice to black people is directly linked to the 'mere' status given to customary courts. This is nothing more than a subordinate status which befell the system of customary law before the attainment of democracy in South Africa. This creates the perception that the values of customary law – to extend its application in respect of matters that have arisen in its jurisdiction – would never apply to its non-adherents. This is a reminder of the past which 'was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone ... [and which] accepted, permitted, perpetuated and institutionalized pervasive and manifestly unfair discrimination against [the majority of the South African population]'.⁵⁰

⁵⁰See Mahomed J in *S v Makwanyane* 1995 6 BCLR 665 at para 262.