

**A submission of the Department of Justice and Constitutional Development to
the Select Committee on Security and Constitutional Development on the
Traditional Courts Bill**

Abstract

The Bill is currently before Parliament, having been introduced into the National Council of Provinces in terms of section 76(2) of the Constitution by the Select Committee on Security and Constitutional Development (the Select Committee) on behalf of the Minister of Justice and Constitutional Development (the Minister). At the time of introduction of the Bill in the NCOP, and because the Bill is now in the hands of the Legislature, the Minister undertook to provide any assistance during the parliamentary process that Parliament might require. The Select Committee has publically called for comments on the Bill and is planning to hold public hearings on the Bill on 18, 19 and 20 September 2012. During the meeting of the Women's Parliament on 30 August 2012, the Minister, in his address, made it clear that he would also be providing comments on the Bill for consideration by Parliament, based on an analysis of the inputs received from stakeholders. The Minister also indicated that these comments would be the collective comments of the other Ministers whose portfolios are most affected by the Bill, namely the Ministers of Women, Children and People with Disabilities, Cooperative Governance and Traditional Affairs and Rural Development and Land Reform.

This submission reflects the views of the Department of Justice and Constitutional Development and incorporates views of the Departments of Traditional Affairs, Women, Children and People with Disabilities on aspects that were discussed jointly by the Departments concerned.

The submission does not preclude any of the above Departments from making a separate submission on the Bill with a view to laying emphasis on matters that are within the mandate of the Department concerned.

1. Background to the introduction of the Bill into Parliament

1.1 After the advent of democracy in 1994 the Courts of Traditional Leaders, as the Constitution refers to them, were retained under item 16(1) of Schedule 6 to the Constitution which provides:

“16(1) Every court, including courts of traditional leaders existing when the 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 it, subject to-

- (a) any amendment or repeal to that legislation; and*
- (b) consistency with the Constitution.”.*

1.2 In 2005 the democratic Parliament repealed the Black Administration Act of 1927 for obvious reasons - the Constitution does not sanction any law or policy that entrenches inequality and perpetuates different norms and standards on the basis of race and any other ground of discrimination. The Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005 paved the way for Africans to enjoy the same benefits and privileges that they were deprived of. Other enactments included legislation which recognised customary marriages as lawful marriages and removed discriminatory provisions regarding intestate succession and the matrimonial property regime. When the Black Administration Act was repealed in 2005, Parliament, through a special Act of Parliament (the Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act of 2005) preserved sections 12 and 20 of the Black Administration Act and the Third Schedule to the Act. The above sections confer jurisdiction on traditional leaders to hear certain criminal cases and adjudicate over certain civil disputes, respectively. The Schedule lists certain criminal offences which can be heard by such courts.

1.3 It is important to note that the Traditional Courts Bill does not seek to establish traditional courts, but rather to regulate the environment within which such courts can operate. The initial introduction of the Traditional Courts Bill in the National Assembly in 2008 was preceded by a policy formulation process

which resulted in the drafting of the Policy Framework on the Traditional Justice under the Constitution. This Policy Framework which was approved by Cabinet in 2008 forms the basis of the Traditional Courts Bill. In particular, Chapter 6 of the Policy Framework contains the fundamental principles on which the provisions of the Traditional Courts Bill are based. In adopting the Principles that form the basis of the Bill the Department considered and in certain circumstances adopted the views of the South African Law Reform Commission (SALRC) which had undertaken a comprehensive study on the reform of the Customary Courts. In drafting the Bill the Department relied on the consultations that were undertaken by the SALRC and decided not to reinvent the wheel. See the SALRC's 2003 *Report on Traditional Courts and the Judicial Function of Traditional Leaders*.

- 1.4 In the process of drafting the Bill and with a view to addressing some of the policy gaps which the SALRC did address itself in its report and deferred to Government, the Department initiated further consultations. These consultations which were aimed at supplementing those conducted by the SALRC and not to substitute same, were conducted mainly through the National House of Traditional Leaders and Local Houses of Traditional Leaders in each province and excluded the broader communities, in particular women in rural villages. These consultations by the Department were criticised for ignoring the plight of women and poor communities who continue to suffer the prejudices of harmful cultural practices that still require alignment with the Constitution (including *ukuthwala* which undermines the human dignity of women).
- 1.5 The withdrawal of the Bill from the National Assembly and its introduction in the NCOP is primarily with a view to extend the consultation on this important Bill to communities that were left out during the initial process of drafting the Bill.
- 1.6 Reference will be made to some of the fundamental principles adopted in the Policy Framework and the extent to which it may be necessary to depart from the premise of any such principles in instances where the ensuing debates

and commentary made on the Bill necessitate a departure from the initial policy position. Any such departure from the initial view may of necessity, be compelling reason for a reformulation of some of the clauses of the Bill as part of the ensuing Parliamentary process. The Parliamentary process unfolding before the NCOP, among others, seeks to address the inadequate consultation with some stakeholders.

1.7 The extensive and at times robust debates and comments on the Bill highlight the importance of the Bill and bear testament to the vibrancy of our participatory democracy which is consistent with our constitutional democracy.

2. Commenting on the calls to withdraw the Bill

2.1 Some commentators have made pleas for the Bill to be scrapped in its entirety and to be redrafted from scratch. This call is based mainly on the contention that there was insufficient consultation, in particular with communities in rural areas mainly women, a factor which has been acknowledged above.

2.2 Perhaps the extract from the speech delivered by Minister Radebe when he addressed the Women's Parliament on 30 August 2012 provides a logical response to these calls. In his address the Minister reiterated that:

“Let us be mindful of the urgency in finalising this Bill, as further delays would mean the extension of operation of the saved provisions of the Black Administration Act No 38 of 1927. These saved provisions I have mentioned above are hopelessly inadequate and unsuited for the post 1994 democratic society. The current abuses experienced in some traditional communities are as a result of the absence of a comprehensive and effective regulatory and legislative framework which the Traditional Courts Bill seeks to address, in accordance with constitutional imperatives. I therefore urge that we all allow the Parliamentary process to take its course and would like to discourage commentators from calling for the scrapping of the Bill. Doing so will be throwing the baby out with the bath water. Parliament and the courts have the competence of capacity of preserving the baby and dispensing with the unwanted water”.

2.3 It is our contention that some of the abuses complained of are as a result of the absence of a comprehensive and effective regulatory and legislative framework and the lack of monitoring and evaluation mechanisms which the Bill seeks to address, in accordance with constitutional imperatives.

3. AN ANALYSIS OF THE COMMENTARY MADE AND DEBATES ON THE BILL

3.1 Absence of provisions to protect and promote the rights of women and children (clause 3)

3.1.1 Several commentators have raised a concern that the Bill only contains vague and general provisions relating to the participation of women in these courts as members of the court and as litigants and that the absence of concrete provisions in this regard to protect the rights of women to participate in these courts is glaring. It has been argued that the Bill, in its current form, falls far short of advancing the promotion and protection of the rights of women.

3.1.2 Several comments and literature on the Bill highlight the extent to which inequality and gender prejudices continue to plague women and children who are subject to the various institutions of traditional leaders, including traditional courts, the following , among others: ¹

- Women are still treated as minors, in the family and community
- Lack of consultation with women in decisions affecting them
- Women are not made members of courts
- Women are not guaranteed ability to represent themselves
- Women's inability to avoid unfair decisions
- Women not afforded adequate protection from harm
- Traditional courts that decide family and land disputes generally dominated by older men

¹ These were highlighted by Dr Sindiso Weeks in her presentation to a workshop organised by COSATU

3.1.3 Some of the concerns raised highlight the plight of women in rural areas. Women in rural areas are regarded as people of lower social status and without economic power. Such women have a very limited chance of participating in traditional councils as men who control such bodies are biased against women are resistant to sharing real authority with women. ²

3.2 Over concentration of powers on traditional leaders

3.2.1 The designation of traditional leaders as presiding officers is perceived as centralising power in traditional leaders and gives rise to fears that the Bill gives more powers to traditional leaders than they currently have. Those who object to the presiding powers of traditional leaders base their argument on the understanding that the “presiding” role of traditional leaders in traditional courts is analogous to presiding judges and magistrates in the courts of law.

3.2.2 There is a view that in conferring powers on traditional leaders to act as presiding officers, the Bill does not prescribe parameters within which traditional leaders must exercise such powers.

3.3 Oath or affirmation of office (Clause 15)

3.3.1 Divergent views have been raised in this respect, some within the traditional leadership institution being opposed to the taking of an oath, while others feel that the oath should not be administered by magistrates/judges in view of the peculiar status of a traditional leader.

3.4 Failure to provide the right to opt out

3.4.1 Conferring civil and criminal jurisdiction on traditional courts is seen as being in conflict with the right of access to courts in the Bill of Rights. Not allowing parties the right to opt out of the traditional justice system has become a thorny issue raised during public hearings on the Bill. The Women’s Legal Centre³ argues that traditional courts operate in an environment which is subject to change and tension. There is uncertainty about the nature and extent of the authority exercised by traditional leaders in some instances.

² Refer to views by KZN Rural Women’s Movement , 08TCB06

³ 08TCB01

There is also a continuing debate about the role of women in traditional communities. All this can give rise to the risk of abuse of power. Women who are asserting themselves more and more and who are participating more as full and equal citizens, are particularly vulnerable. They conclude that the Bill in its current form can give rise to the situation where women who assert themselves and act inconsistently with custom face the risk of being brought before the courts and punished.

3.4.2 On the other hand the Johannesburg Bar⁴ views opting out in a negative light, observing that the introduction of an “opting out” provision in the Bill will have negative consequences, i.e it will cause communities to undermine the authority of traditional leaders.

3.5 Conferring criminal jurisdiction on traditional courts may erode the constitutional power of the National Prosecuting Authority

3.5.1 It has been raised as a concern that conferring criminal jurisdiction on traditional courts is not in accord with the letter and spirit of the Constitution as the authority to institute criminal proceedings on behalf of the state lies with the National Prosecuting Authority only. The Bill does not recognise the constitutional imperative that only the National Prosecuting Authority has the authority to institute and conduct prosecutions in criminal matters.

3.5.2 The National Prosecuting Authority derives its authority to prosecute cases without any fear or favour from the Constitution and the law.⁵

3.6 The Bill entrenches the balkanization of traditional communities in accordance with the boundaries of the old tribal authorities of the defunct Bantustans

3.6.1 The determination of territorial boundaries for traditional courts in accordance with the jurisdiction of traditional councils is perceived as entrenching the tribal authorities which were grouped in accordance with ethnicity. This is

⁴ 08TCB23

⁵ Section 179 of the Constitution and the National Prosecuting Act, 1998

seen to be against the grain of the rights in the Bill of Rights, in particular equality, human dignity, cultural, linguistic and religious rights. The traditional justice system should provide a forum which is accessible to everyone who wishes to pursue the resolution of a dispute in accordance with the traditional justice system.

3.6.2 In light of the above conferring both civil and criminal jurisdiction on traditional courts over persons residing in a particular traditional community, is seen as perpetuating the tribal boundaries of the apartheid system. A number of commentators⁶ argue that the boundaries are those largely determined by the apartheid government and section 28 of the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA). The argument is that Traditional Courts Bill simply imposes them as the jurisdictions of the traditional leaders' courts. The argument continues that the Bill in effect creates a separate and authoritarian legal regime for those in the former Homelands.⁷

3.7 Nature of the traditional courts

3.7.1 The Bill is seen to be eroding the salient features of the traditional justice system by failing to recognise the various other levels of dispute resolution in the institution of traditional leadership, namely family, headman/woman and senior traditional leader. The traditional courts are seen as another parallel judicial structure which have overlapping jurisdiction with courts of law. The nature of the traditional courts, the definitions and the scheme of the Bill do not provide a clear description of the traditional court system. There are strong views raised that the Bill imports elements of the courts of law as contemplated in section 166 into the Bill. The Bill does not give recognition to the notion that traditional courts are courts where community members participate and which take place at different layers of dispute resolution.

⁶ Sindiso Mnisi Weeks Traditional Courts Bill a relic that must go-City Press 27 May 2012

⁷ Aninka Claasens *Bill reeks of Bantustan Days*, The Star, 24 August 2012

3.7.2 Some scholars have submitted that the failure to recognise the living justice structures in the legal framework for traditional courts would be difficult to comprehend in light of the fact that recent research has found that these structures do possess positive attributes with regard to accountability, negotiation of power relations at local levels and definition of authentic versions of customary norms.⁸ On the other hand some, in particular traditional leaders, laud the Bill as giving recognition to *ubukhosi* and its role in the dispensation of criminal and civil justice. Some rebut the criticism in regard to the separation of powers as being alien to the traditional justice system, observing that the Inkosi is the legislator, administrator and adjudicator but that what is crucial is that he always acts on the advice and with the guidance of his councillors.⁹

3.8 Perpetuation of certain harmful cultures and practices

3.8.1 Some of the comments lament the traditional justice system for perpetuating harmful customs and cultural practices that offend the rights enshrined in the Bill of Rights.¹⁰

3.9 Exclusion of legal representation

3.9.1 Concerns raised against this principle mainly related to the exclusion of legal representation in the proceedings before the customary courts (excluding representation by a family member). Views were expressed that prohibiting legal representation may not meet constitutional muster. It may be argued that the exclusion of legal representation is not necessary if these are not courts of law.

⁸ Commentary by Prof Chuma Himonga during Submission to the National Council of Provinces on the Traditional Courts Bill[B1-2012],29 May 2012

⁹ See comments by Inkosi Phathekile Holomisa in the article published in the South African Crime Quarterly *The Traditional Courts Bill-A silent coup*, No 35, March 2011

¹⁰ Nomboniso Gasa in contrast argues that the Bill presents a flawed view of traditional custom and practice by amongst other things failing to recognise the changing nature of custom and cultural practice. She further argues that African cultures have always valued individual rights and choices. She is of the view that the Bill provides a basis upon which prejudice and discriminatory practices may be entrenched.

3.9.2 Prof Himonga argues that this provision is typical of most African statutes regulating traditional courts.¹¹ She observes that it is attributed to the informality of traditional courts and the need to preserve this feature to retain their accessibility to the rural people they are mostly intended to serve.

3.10 Some of the sanctions are constitutionally objectionable (clause 10)

3.10.1 Some of the objections raised are that some of the sanctions proposed in the Bill cannot be justified under a democratic dispensation as they will limit the peoples' right to freedom of movement, and pursuing a trade or occupation of their choice, among others. It has emerged, from the submissions and concerns raised in relation to the sanctions that may be imposed by traditional courts that sanctions proposed in the Bill, presumably under the influence of the pre-1994 chiefs court dispensation, will erode the values of the traditional justice system that are underpinned by reconciliation and social cohesion. The concept of punishment as used in the Black Administration Act No 38 of 1927 is in direct contradiction to the traditional justice value system. Punitive measures and reconciliation cannot exist side by side. Imposition of fines on persons who are found to have disturbed the legal order in the context of ordinary courts of law is incompatible with the notion of restorative justice promoted in the traditional justice system.

3.10.2 In its 2008 submission the Legal Resources Centre¹² observed that clause 10(2) allows traditional courts to impose sanctions which include deprivation of customary benefits, which include land rights and access to water, among others, enabling traditional courts to evict persons who refuse to recognise their authority. They also argued that the power to impose sanctions in clause 10 is very broad, e.g. the use of the phrase "any other order that the traditional court may deem appropriate and which is consistent with the provisions of this Act". They highlighted that sanctions focus more on punitive sanctions, rather than on mediation aimed at avoiding conflict. They concluded by observing that some of the sanctions can give rise to

¹¹ Submission to the National Council of Provinces on the Traditional Courts Bill[B1-2012], 29 May 2012

unremunerated forced labour and possible evictions (deprivation of customary benefits).

3.10.3 It also emerged during the public participation process that neither provinces nor municipalities have the capacity to collect revenue generated through taxes imposed as fines at the traditional leadership level. The situation becomes compounded if fines are paid by means of livestock which is common in customary law. This presents challenges of accountability for the funds received.

3.11 Objections to the appeal mechanism in the Bill (clause 13)

3.11.1 An appeal to the magistrates' courts is perceived as going against the grain of the traditional justice system as this system and courts of law apply different value systems, namely retributive and restorative justice systems, respectively.

3.11.2 There were also sentiments raised that where an appeal is permissible, it must happen within the structures of traditional institutions. Prof Himonga¹³ argues that one of the shortcomings of the current Bill is that it undermines the right of rural communities to have their disputes resolved according to their cultural rights as enshrined in the Constitution. She further observes that the Commission's Bill attempts to solve this problem by providing for a delayed encounter with common law courts on appeal. She observes that in the Bill an appeal lies to the magistrate's court which is in direct contradiction to experiences in other parts of the continent that show that western law undermines customary law.

3.12 Enforcement of sanctions of traditional courts (clause 11)

¹³ Submission to the National Council of Provinces on the Traditional Courts Bill[B1-2012],29 May 2012

Serious objections were raised against the scheme of the Bill which provides for the enforcement of the sanctions of traditional courts through the magistrates' courts. Not only is this principle seen to be eroding the character of the traditional justice system (of reconciliation and harmony) but is seen to be introducing an arbitrary procedure which is not founded on due process.

4. A NEED FOR A RATIONAL APPROACH TO THE COMMENTS AND DEBATES ON THE BILL

4.1 The maze of comments and the depth of the research that underpin most of the commentary made in respect of the Bill are persuasive and warrant a policy shift on some of the fundamental principles that underlie the Bill. The policy shift does in no way represent a departure from the values of the traditional justice system, of social cohesion, Ubuntu and restorative justice. The shift in policy lays emphasis on the choice of legislative measures which are necessary to give effect to the inherent values of the traditional justice system.

4.2 In the succeeding paragraphs reference is made to constitutional imperatives that give effect to the values that underlie the traditional justice system. These imperatives form the basis for the policy changes that are proposed in the paragraphs thereafter.

5. CONSTITUTIONAL IMPERATIVES

5.1 Recognition of traditional institutions and culture by the Constitution

5.1.1 Not only does the Constitution recognise the institution of traditional leadership but accords customary law equal status with the Roman Dutch and English law which prior to 1994 were superior to the customary legal system. The Constitution is the supreme law of the land and all laws inconsistent with it are invalid. As the supreme law, to which all laws must conform, the Constitution is the basis for the development of customary law. It is in this context that the Bill must be seen as an attempt to regulate existing traditional courts in line with our constitutional framework.

5.1.2 The traditional justice system remains an important feature of the post 1994 constitutional dispensation, especially in rural communities where an estimated 18 million people embrace or are affected by, customary law and traditional practices that constitute the bedrock of the traditional justice system. The envisaged reforms of the traditional justice system are aimed at enhancing the restorative justice system which traditional courts, in their purest form, sought to achieve. There is compelling evidence that the restorative justice features of the traditional justice system were eroded by colonialism and the apartheid regime which manipulated the institutions of traditional leadership to become government tools to enforce its policy of inequality and oppression. Traditional leaders by virtue of the institution are co-ordinators who are attuned to their role as advisers and mediators.

5.1.3 It is also important to note that Government has enacted several laws to reform various traditional practices to bring them in line with the Constitution, particularly in the area of marriage and inheritance. Similarly, the courts have handed down significant decisions that bring the traditional justice system in line with the ethos that underpins the Constitution. Nomthandazo Ntlama and Gugu Ndima¹⁴ assert that what has come to be known as African customary law is a distinct and original legal system with its own values and norms that formed the jural postulates of its own world view and that South African philosopher Mogobe Ramose distinguishes the basis of African customary law as being different from its Western counterpart in that its basis is *ubuntu*. It is from this unique prism that any discussion of the Traditional Courts Bill should be made.

5.2 Traditional Courts as another vehicle to enhance access to justice

5.2.1 The traditional justice system is necessary for rural communities because it provides speedy justice that is not readily available from our courts of law.

5.2.2 The flexibility and simplicity of the procedures in the traditional courts and the use of languages spoken in the local community concerned are some of the

¹⁴ P7, The Significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems, International Journal of African Renaissance Studies, Volume 4, Issue 1, 2009

elements that ensure acceptance of the traditional justice system by the communities in which they operate.

5.3 Constitutional framework for the transformation of traditional courts

5.3.1 The Constitution provides a constitutional framework in which courts, forums and tribunals, which would include traditional courts, must operate. In particular, the following provisions of the Constitution are relevant in this regard:

Section 34: *“Everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate another independent and impartial tribunal.”* Traditional courts would constitute such forums.

Section 39: It is evident from the provision of sections 39 of the Constitution, that the interpretation and the development of customary law is not the preserve of the courts of law only. The section reads as follows:

“39 (1) When interpreting the Bill of Rights a court, tribunal, or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
- (b) must consider international law; and*
- (c) may consider foreign law.*

(2) When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any right or freedoms that are recognized or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill.”.

5.3.2 The importance of the provisions of section 39 above is that the development of customary law is not the responsibility of the institution of traditional leaders only, but of the community as well. Traditional leaders will, in their organized forums such as the National House of Traditional Leaders and local houses, influence the development of customary law as contemplated in section 39 of

the Constitution. Similarly, a forum of community elders and members which converges as a traditional court has equal opportunity to develop customary law. It is in this context that forums such as the structures of traditional leaders and a community of elders are the rightful custodians of customary law, and may influence its development. No single traditional leader or single member of the community can lay claim to customary law and its development.

5.3.3 Courts of law, in particular the Constitutional Court has the last say in the development of this important branch of the law by virtue of its status as the highest court in constitutional matters.

5.3.4 The Constitution gives recognition to the status and role of traditional leaders according to customary law, subject to the Constitution. Subsections (2) and (3) of section 211 of the Constitution are relevant for this purpose and they provide as follows:

(2) *A traditional authority that observes a system of customary law may function subject to any applicable legislation and custom, which includes the amendment to, or repeal of that legislation or that custom.*

(3) *The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specially deals with customary law.*

5.3.5 Importantly, subsection (2) of section 211 of the Constitution, underscores the view held that customary law and custom are not static but evolve with time and as such may be amended from time to time in accordance with the dictates of the Constitution. Some of the principles of customary law which were amended include the abolishment of corporal punishment (through the Abolition of Corporal Punishment Act of 1997). This was against the view held by traditionalists who perceived whipping as the most effective corrective measure for errant behaviour. Changes effected by the courts include the *Bhe* decision that accorded African women the right to inherit under the law governing intestate succession thereby eroding the custom which regarded African women as a perpetual minors who must be looked after, first

by their fathers, then husbands and upon their passing on, by their own sons; and the recent judgment in *Shilubana v Nwamitwa* which permits chieftainship to devolve to a woman consistent with the right of equality.

5.3.6 It is also important to note that the Constitution in sections 30 and 31 guarantees everyone the right to use the language and to participate in the cultural life of their choice, but that no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. This can be interpreted as an extension of customary law rights and would find relevance and application in traditional courts. Likewise Section 31 of the Constitution provides, among others, that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practise their religion and use their language. These provisions cannot be separated from the function of dispute resolution in traditional communities.

6. POLICY OPTIONS FOR CONSIDERATION TO ADDRESS SOME OF THE CONCERNS RAISED TO DATE

6.1 The nature of traditional courts

6.1.1 At the outset, it is important to convey the understanding that traditional courts should not be equated with courts of law. A compelling argument is made that traditional courts do not find their basis or source of authority in Chapter 8 of the Constitution that sets out the courts that constitute the judicial system. Therefore the principles that apply to the judicial system, including the appointment of judicial officers, are not applicable to the traditional courts system. These courts are intended to enhance access to justice and find their basis in, among others, sections 34 and 39 of the Bill of Rights and Chapter 11 of the Constitution as already alluded to.

6.1.2 Traditional courts are constituted by community members and therefore fall within the definition of structures contemplated in section 34 of the Constitution and are entrusted with the adjudication of disputes, other than courts envisaged in Chapter 8 of the Constitution. Therefore traditional courts should be distinguishable from courts of law that are part of the judicial

system as contemplated in section 166 of the Constitution. The distinction must be reflected both in the name, description and type of these courts which by their nature are forums of community elders (*makgotla/inkundla*) who meet to dispense justice. It is unavoidable that these *makgotla* must adhere to the requirements such as independence and impartiality, among others, as prescribed in section 34 of the Constitution.

6.1.3 There is acceptance generally that these *makgotla* not only dispense justice expeditiously and cheaply, but deal with some of the matters that could burden the already overstretched court rolls.

6.1.4 In the light of the debates and progress made with regard to the transformation of society and traditional communities in particular, the following dispensation of traditional courts is ideal:

- (a) traditional courts as they currently exist must be integrated into the Traditional Councils, which are democratic institutions where all sectors of society are represented.
- (b) for purposes of the envisaged integration, the Bill must provide for Traditional Councils to adjudicate over disputes that arise within their local communities. The law must determine the jurisdiction or the type of disputes that may be adjudicated upon by Traditional Councils sitting as a court. The determination of disputes that may be dealt with by Traditional Councils sitting as traditional courts must have regard to the jurisdiction of courts of law in relation to some of the matters over which such traditional courts may have jurisdiction;
- (c) special measures must be provided for when a Traditional Council sits for purposes of adjudicating over disputes in respect of which it has jurisdiction. These special measures must:
 - (i) determine the quota of women who must participate in the Traditional Council and their specific role during such a sitting with a view to advancing the right to equality;
 - (ii) allow any elderly member of the community to attend and participate in the Traditional Council sitting as a court;

- (iii) must provide for procedures that must regulate proceedings before a Traditional Council sitting as a court including the manner of arriving at a decision by the Council sitting as a court.

6.1.5 Having in mind the transformation of the traditional courts in the manner described above, the short title of the Bill could possibly take the following line of thought:

“Resolution of Certain Disputes by Traditional Councils Bill,2012”

6.1.6 The integration of traditional courts into Traditional Councils and the development of measures and rules to regulate proceedings at these courts is a factor where there is general consensus amongst the Departments of Justice and Constitutional Development, Women, Children and People with Disabilities and Traditional Affairs. The Departments noted the following benefits of this proposed integration:

- (a) It will eliminate a proliferation of traditional structures. The overlap between the roles and responsibilities of Traditional Councils and traditional courts is a reality;
- (b) The advantage of this approach is that these councils, by law, already have at least 33,3% women and must also comprise traditional leaders and members of the traditional community, some selected by traditional leaders and others democratically elected. A possibility also exists to increase quota for women (for instance 50% as preferred by the Department of Women, Children and People with Disabilities). It is understood that many of these councils already have women representation well in excess of the legal minimum.
- (c) Opening Traditional Councils to all other members of the community for purposes of adjudicating disputes and considering special quotas will enhance the participation of women and restore the true democratic character of the traditional justice system;

- (d) Traditional Councils are already resourced and supported through various government programmes. Creating parallel traditional courts will require additional resources and capacity which are difficult to satisfy from the fiscus;
- (e) It will be conducive for implementing training programmes for the members of the Traditional Councils for purposes of dispute resolution.

6.2 Advancement of gender equality

6.2.1 The integration of traditional courts into Traditional Councils will further the objective of gender equality.

6.2.2 If the policy option proposed in paragraph 6.2.2 above is adopted in terms of which Traditional Councils “double up” as traditional courts, the fear that the Bill is centralising power in individual traditional leaders will largely be addressed. Decisions will be made by the Traditional Councils and not by individual traditional leaders. It is suggested that the provisions in the Bill dealing with the designation of traditional leaders as presiding officers be deleted in their entirety.

6.3 Doing away with apartheid boundaries

6.3.1 A revised Bill should avoid the concept of “jurisdiction” as far as possible. In practice, persons who approach the traditional courts for redress will inevitably have a connection with the court in question, which may be by reason of residence, affiliation, family ties or cause of action arising in the area in question. Such an approach will, for instance, enable persons who live in urban communities but who have some affiliation or family ties with a traditional community to approach a Traditional Council sitting as a traditional court for redress should they not wish to pursue their matters in a court of law.

6.3.2 This approach could also be expanded to allow persons living in close proximity to a traditional community to use these courts should they so wish, for instance neighbouring farmers.

6.4 Addressing the concept of “opt out” of the traditional justice system:

6.4.1 The concept of jurisdiction in customary law is not as defined as in the conventional justice system. There is no watertight distinction between criminal and civil jurisdiction in customary law. A concept of dispute resolution without categorising a dispute into a criminal or civil dispute is preferable. A guiding approach would be to empower traditional courts to deal with any dispute, whether it is criminal or civil in nature and which is not pending before or has not commenced in a court of law. It is suggested that traditional courts may only deal with a limited range of disputes, or matters arising out of customary law and custom, the ambit of which is determined by notice in the Gazette by the Minister.

6.4.2 However, once a matter or a dispute is pending before or has commenced in a civil or criminal court then it is excluded from the ambit of the Bill. Further in this regard, if a matter is not pending or has not commenced in a court of law it is suggested that a person who receives a notice to appear before a traditional court, must so appear. However, if such a person, due to some reason does not want to submit to the authority of the traditional court, he or she should submit reasons for non-attendance to the court. The court may then proceed with the case in the absence of such a party, although a court may not take any decision that has a legal effect on the party who does not want to submit himself or herself to the authority of the court. The court may however, provide the party present in court with assistance, advice or counseling in respect of the dispute/matter. It is also suggested that the Bill should specifically exclude certain matters from being dealt with formally by traditional courts but allow them to advise, guide, mediate or refer these matters to appropriate persons or institutions for resolution. The areas in respect of which these exclusions should apply are domestic violence, maintenance, deceased estates, matrimonial matters, issues relating to children in conflict with the law and issues relating to land allocation. (This latter aspect might require further discussion since traditional courts have a role in matters of this nature.)

6.5 Addressing the concerns of absence of legal representation

- 6.5.1 The insistence on the exercise of criminal and civil jurisdiction by customary courts, coupled with the notion of the role of traditional leaders as presiding officers and punitive sanctions as contained in the Bill at present heightened the call for legal representation to be a feature of the traditional court dispensation. The retention of the purist character of the traditional justice system will obviate the necessity for legal representation, which is unsuited for dispute resolution in the context of the traditional justice system. It is therefore suggested that a person should be entitled to be represented by a person of his or her choice.
- 6.5.2 The integration of traditional courts into Traditional Councils will obviate the necessity for legal representation. The Council may, however, engage the services of a legal expert in exercising its constitutional role of developing customary law or adjudicating over disputes.

6.6 Departure from retributive sanctions

- 6.6.1 It has emerged from the submissions that the sanctions proposed in the Bill, presumably under the influence of the pre-1994 chiefs court dispensation, will erode the values of the traditional justice system that are underpinned by restorative justice, reconciliation and social cohesion. The concept of punishment as used in the Black Administration Act No 38 of 1927 is in direct contradiction to the traditional justice value system. Punitive measures and reconciliation cannot exist side by side. The imposition of fines that are in the context of ordinary courts of law on persons who are found to have disturbed the legal order is incompatible with the notion of restorative justice. It also emerged during the public participation process that neither provinces nor municipalities have the capacity to collect revenue generated through taxes imposed as fines at the traditional leadership level. The situation becomes compounded if fines are paid by means of livestock which is common in customary law. This presents challenges of accountability for the funds received.

6.6.2 Only compensation aimed at the restoration of harmed relations between parties to a dispute or aimed at the restoration of harmony in the community itself should be provided for. Traditional courts should be limited to giving an award or directive in the following forms:

- (i) Compensation (in monetary terms or livestock);
- (ii) an apology;
- (iii) an order to discontinue the harmful act;
- (iv) a reprimand;
- (v) any form of training, orientation or rehabilitation consistent with customary law and the Constitution and which is aimed at enhancing reconciliation and nation building (Ubuntu);
- (vi) customary cleansing; or
- (vii) guidance, counselling or advice.

6.6.3 It is suggested that awards in the form of compensation should be commensurate with the harm or grievance leading to the hearing by the court. No fines may be collected by way of taxes.

6.7 Recognition of the different tiers in the traditional justice system, while regulating proceedings at the traditional courts

6.7.1 Dispute resolution in a traditional justice system occurs at different layers, namely:

- It starts at the family, and proceeds to the headman/woman if it is not resolved at the first layer;
- If the headman/woman cannot resolve the dispute it is then escalated to a senior traditional leader;
- If it cannot be resolved at the senior traditional leader the dispute is escalated to the community – customary court.

6.7.2 The traditional court is the last level for dispute resolution in most traditional communities, except in certain communities where there are Kings and Queens who will then be requested to intervene. The escalation of a dispute from one layer to another is not tantamount to an appeal as it applies in the ordinary courts, but is a mere escalation of the dispute to a higher level. The

higher level will hear the dispute afresh, and not rely on the proceedings of the lower level.

6.7.3 At all levels of dispute resolution, the emphasis is on the restoration of harmed relations and not on the form and content, hence the absence of the need for a detailed record of proceedings. Subjecting the proceedings of traditional courts to review by magistrates' courts will fundamentally alter the character of the traditional justice system.

6.8 No appeal should lie against award of traditional courts

6.8.1 Appeals as applied in courts of law should not be equated with the referral of a dispute from one layer to another within the traditional justice system. An appeal to a court of law should not be permissible. The concept of appeal is not known in traditional dispute resolution and appealing from a customary court to a magistrate's court is inconceivable as these two types of courts are founded on different values. It is worth questioning whether appeals to the magistrates' courts may be desirable because the two court systems adopt different value systems. However, this is one issue that Parliamentarians must critically evaluate. It could be argued that traditional courts have the force of social hegemony as opposed to State hegemony and as a result they instil social values and give each given community the particular identity consistent with localised cultures, traditions and values systems. In this regard, traditional courts are responsible for continued social cohesion in traditionally inclined societies and for this express purpose their existence is important to the extent that the majority of people living in those areas view them as collectively desirable.

6.8.2 An appeal to a magistrate's court may therefore be seen to be undermining this exclusive social cohesion that speaks to values that magistrates' courts are not inclined to recognise nor are able to deal with as the sanction of traditional authority is fundamental to the traditional justice system.

6.9 Enforcement of awards

Traditional courts will enjoy enforcement of their awards largely through the public confidence these courts enjoy once they are transformed as envisaged. As recognised tribunals they too fall within the ambit of section 165 of the Constitution and no person or organ of state may interfere with their functioning. Traditional courts will largely enforce their awards through communal obedience to the traditional justice system. Failure to comply with an award or directive of the traditional court will/should? elicit a criminal sanction.

6.10 Enhancing the capacity of the Transitional Council to develop customary law

6.10.1 Reference has been made to harmful cultural practices that continue to undermine the value of the traditional justice system. To date the development of customary law to rid itself of these practices, some of which are archaic and heinous, has been left to the courts. It is important that Traditional Councils are empowered to lead reform in this sector in conjunction with other institutions of state such as the Chapter Nine Institutions and the SALRC. It is important that institutions assigned the responsibility by the Constitution to reform this area of law move from being armchair critics and lead the desired reforms.

6.10.2 As part of establishing such capacity, it is important that a Registrar for the Sitting of Traditional Councils for Adjudication of Certain Disputes?? be established to advise and guide on areas of research that require the attention of Traditional Councils. The Registrar who must be appropriately qualified with an in-depth knowledge of customary law and indigenous practices, will among other, coordinate the interface between the Traditional Councils and courts of law in areas of common interest.

7. STRENGTHENING OF SOME OF THE PRINCIPLES UNDERLYING THE BILL

7.1 Oath of office

There are compelling reasons that traditional leaders, as public office bearers, must swear allegiance to the Constitution, in particular to enhance accountability and curb alleged abuses of public power complained of.

7.2 Dispensing with court records

Traditional courts are not courts of record. It may be necessary to note certain basic information for the record which may be a brief summary of the dispute and the award given by the customary court.

7.3 Training of traditional leaders

Training is an important element of the traditional justice system and should be retained. Training should be extended to all critical functionaries of a Traditional Council acting as a traditional court.

7.4 The need for national legislation to ensure uniformity

The administration of justice is a national competence, implying that there are no functional areas relating to the administration of justice which are devolved by the Constitution to the provincial or local spheres of government. Provinces have legislative competence on matters relating to indigenous and customary law, subject to Chapter 12 of the Constitution and have no legislative competence on matters relating to the administration of justice as provided for in Chapter 8 of the Constitution. It is therefore necessary to enact national legislation to ensure that uniform standards apply across the country.

7.5 Regulations

It is suggested that clause 21 dealing with the Minister's regulation making capacity be retained subject to the removal of regulations that have become irrelevant or redundant.