

**LEGAL RESOURCES CENTRE**

In re:

**TRADITIONAL COURTS BILL, 15 OF 2008**

**SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT**

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Legal Resources Centre

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**1. Introduction to the Legal Resources Centre and its submissions**

- 1.1 The Legal Resource Centre ("the LRC") is an independent non-profit public interest law clinic which uses law as an instrument of justice. It works for the

development of a fully democratic South African society based on the principle of substantive equality, by providing free legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances. The LRC, both for itself and in its work, is committed *inter alia* to:

- 1.1.1 Ensuring that the principles, rights, and responsibilities enshrined in the Constitution are respected, promoted, protected, and fulfilled;
  - 1.1.2 Building respect for the rule of law and constitutional democracy;
  - 1.1.3 Enabling the vulnerable and marginalised to assert and develop their rights;
  - 1.1.4 Promoting gender and racial equality and opposing all forms of unfair discrimination;
  - 1.1.5 Contributing to the development of a human rights jurisprudence; and
  - 1.1.6 Contributing to the social and economic transformation of society.
- 1.2 The LRC has been in existence since 1978 and operates throughout the country from its offices in Johannesburg, Cape Town, Durban and Grahamstown.
- 1.3 As part of its mandate, the LRC seeks to address the legal needs of those who cannot afford to access the justice system through the organised legal profession. Although the LRC does not itself practice in the traditional courts that are the subject of this submission, many of our clients approach us for the first time after having sought to resolve their legal problems by means of customary dispute resolution processes. It is evident from the experiences of our clients that the “formal” courts are largely inaccessible to a large number of South Africans and that the traditional justice system is therefore the primary form of justice that is practically available to many. The LRC therefore believes that an effective and legitimate system of traditional courts is a key component for ensuring adequate access to justice for all South Africans.
- 1.4 The LRC has been extensively involved in many of the leading cases before the High Courts, the Supreme Court of Appeal and the Constitutional Court dealing with the relationship and interaction between customary law, civil law and the Constitution, for example:
- 1.4.1 *Mhlekwa v Head of The Western Tembuland Regional Authority and Another; Feni v Head of The Western Tembuland Regional Authority and Another* 2001 (1) SA 574 (TK) (dealing with customary law and regional authority courts);
  - 1.4.2 *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) (2003 (12) BCLR 1301); *Tongoane and Others* (currently pending before the Transvaal Provincial Division) (Customary law land and property rights);
  - 1.4.3 *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; SAHRC v President of the RSA* 2005 (1) SA 580 (CC); *Mthembu v Letsela* 2000 (3) SA 867 (SCA) (Customary

law succession);

- 1.4.4 *Kambule v The Master and Others* 2007 (3) SA 403 (EC); *Wormald NO v Kambule* 2006 (3) SA 562 (SCA) (Customary marital property and maintenance); and
- 1.4.5 *Shilubana and others v Nwamitwa and others* (currently pending before the Constitutional Court) (Chieftanship and gender rights).
- 1.5 The LRC welcomes the opportunity to make these submissions to the Portfolio Committee on Justice and Constitutional Development (“the Portfolio Committee”) regarding the Traditional Courts Bill, 15 of 2008 (“the Bill”).
- 1.6 The LRC acknowledges the significant role played by customary dispute resolution processes and the central role of customary law in our society. We welcome the attempt to place existing traditional court structures on a recognized footing, especially in the light of the imminent repeal of the Black Administration Act of 1927, in terms of which traditional courts have previously been regulated. Many South Africans rely on customary dispute resolution processes and institutions as their primary means of access to justice – both because they value these systems and also because in many instances other courts are inaccessible to them. We are deeply concerned, however, about discrimination against women in many customary and traditional courts. We are of the view that legislation concerning customary courts must take particular care to avoid entrenching patriarchal power relations and to provide practical mechanisms towards the realisation of substantive equality for women in the context of traditional courts.
- 1.7 In our analysis, the Bill fails not only in relation to equality for women, but also because it superimposes state-backed structures in place of the many institutions currently engaged in customary dispute resolution processes. In ignoring (and overriding) the courts that operate at village council and family level, the Bill undermines the dynamics that mediate power and contribute to accountability in rural areas. It also subsumes and undermines courts that are used and supported by people who dispute the legitimacy of controversial apartheid boundaries.
- 1.8 It is the LRC’s view that the institutional arrangements in the Bill have been shaped largely by a desire to protect the interests of traditional leaders. As Oomen points out, traditional leaders complained to the Law Commission investigation on traditional courts that it would undermine their authority if people were allowed to “opt-out” of their jurisdiction.<sup>1</sup> The ultimate success of the traditional leader lobby in ensuring that rural people are unable to “opt-out” of their jurisdiction is reflected in the package of controversial laws enacted prior to the 2004 elections: the Traditional Leadership and Governance Framework Act of 2003 (“the TLGFA”); the Communal Land Rights Act of 2004 (“the CLRA”); and the provincial laws enacted pursuant to the TLGFA. The Traditional Courts Bill cannot be understood outside the context of its place within this package of new laws. The TLGFA deems the boundaries established in terms of the Bantu Authorities Act of 1951 to be the default boundaries for Traditional Council jurisdictional areas, and converts existing tribal authorities into “new” traditional

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<sup>1</sup> Barbara Oomen *Chiefs in South Africa* (2005, James Currey: Oxford, UKZN Press and Palgrave New York) at 84 and 251.

councils provided they include a minority of women and "elected" members. The CLRA gives traditional councils ownership powers over communal land. The Traditional Courts Bill entrenches the same controversial tribal authority boundaries, and recognises only senior traditional leaders and those of royal blood as presiding officers.

- 1.9 The Bill complements these other laws by providing formally appointed traditional leaders with state-sanctioned coercive powers to force people who live within a court's jurisdictional boundary but who reject its legitimacy to appear before it, and authorises the court to strip them of their customary entitlements to land, water or community membership and to perform forced labour (see section 10(2)(g) of the Bill).
- 1.10 This, together with the ownership powers provided by the CLRA, means that controversial apartheid boundaries are entrenched, and formally appointed traditional leaders provided with significantly more power than they had under apartheid, at a time when the Constitution is designed to bring about a steady broadening of democracy. The problems associated with formally appointed traditional leaders are set out at page 5 of the Department of Justice and Constitutional Development's 1999 Executive Summary of the Status Quo Report on Traditional Leaders and Institutions. This report refers to the problems of grouping together "communities belonging to different tribes to form a tribal authority", and the resultant boundary disputes.
- 1.11 It is also of concern that the Bill is inconsistent with the recommendations of the South African Law Commission's Report on Traditional Courts and the Judicial Function of Traditional Leaders".<sup>2</sup> We conclude our submission by exploring the apparent reasons for the divergence between the Bill and the SALC recommendations.
- 1.12 In the light of this analysis, the LRC wishes to raise serious concerns regarding the Bill that fall broadly into four categories:
- 1.12.1 Firstly, the LRC submits that the drafters of the Bill have failed to take into account the actual reality of the way that traditional courts are currently exercising judicial powers and functions. In particular, it would appear that the drafters of the bill have taken a "top-down" approach to the institutional arrangements made in the Bill, rather than building on structures that already exist and which, in many cases and with only one major exception (the experiences of women), function successfully. The approach followed in the Bill ignores existing social reality and may have the unfortunate consequence of a valuable and largely effective institution losing its legitimacy.
- 1.12.2 Secondly, the LRC submits that the Bill has serious negative implications for women who utilise and participate in traditional courts.
- 1.12.3 Thirdly, the LRC makes specific submissions, on a clause-by clause basis, pertaining to the constitutionality of the Bill, the practicability and efficacy of the Bill and the drafting of the Bill.

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<sup>2</sup> Available at: [http://www.doj.gov.za/salrc/reports/r\\_prj90\\_tradlead\\_2003jan.pdf](http://www.doj.gov.za/salrc/reports/r_prj90_tradlead_2003jan.pdf)

1.12.4 Fourthly, we examine the types and extent of information that the Committee requires before the Bill can be adequately considered.

1.13 We deal with each of these issues in turn below. Before doing so, however, we wish to raise our concerns in relation to the public participation process that has been followed in relation to the Bill.

## 2. The public participation process

2.1 The LRC is concerned that the duty cast on the legislature in various parts of the Constitution to ensure public participation in the legislative process has not been honoured. The constitutional requirement of public involvement in lawmaking has been fleshed out by the Constitutional Court.<sup>3</sup> The Court has stated that the legislative process must include steps by the legislature to ensure that the public was made aware of the legislation, and could actively participate in the legislative process. The legislature must create conditions that are conducive to the effective exercise of the right to participate in the lawmaking process. It was pointed out that this can be realised in various ways, including through roadshows, regional workshops, radio programmes and publications aimed at educating and informing the public about ways to influence Parliament.

2.2 Apart from not meeting the above requirements, the period for written comment and the time given to prepare and present oral comment are unduly short, particularly having regard to –

2.2.1 the number of days which have been taken with public holidays. The LRC is aware of a number of organisations which were precluded by the short time period from commenting;

2.2.2 the fact that rural, poor people who suffer from a range of disadvantages, including in relation to transport and communication, are the ones affected by the Bill. It is likely to take them some time to muster the resources to engage in the public participation process.

2.3 Non-compliance with the duty to ensure public participation has the potential to render the Bill unconstitutional when passed.

2.4 The impact of this flaw is enhanced when regard is had to the institutional bias inherent in the drafting process. As appears from paragraph 3 of the memorandum on the objects of the Traditional Courts Bill attached to the Bill, the draft is essentially the product of a collaboration between the Department of Justice and a body which has a direct interest in the concentration of powers in the hands of traditional leaders, being the National House of Traditional Leaders. This is an undesirable state of affairs. As is pointed out below, it ignores the widely consultative process engaged in by the South African Law Commission. The result is an inappropriate concentration of powers in the hands of traditional leaders in a manner –

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<sup>3</sup> *Matatiele Municipality & Others v President of South Africa*: February judgment, 2006(5) BCLR 622 (CC); *Matatiele Municipality & Others v President of South Africa*: August judgment, 2007(1) BCLR 47 (CC); *Doctors for Life International v Speaker of National Assembly and others*: 2006 (12) BCLR 1399 (CC).

- 2.4.1 at odds with the democratic values inherent in the Constitution;
- 2.4.2 at odds with customary law itself; and
- 2.4.3 consistent with the colonial and apartheid era co-option of traditional leaders for purposes of autocratic control of the rural citizenry.

### 3. The institutional arrangement of traditional courts in the Bill

The LRC raises the following concerns regarding the institutional arrangements in the Bill:

- 3.1 The Bill entrenches false (and in some instances fraudulent) colonial and apartheid-era boundaries and jurisdictions that were determined on the basis of often-illusory ethnic differences and distinctions. This is achieved by section 4(1) of the Bill, read with section 28 of the Traditional Governance Framework Act, 2003 which, in turn, deems apartheid-era tribal authority areas to constitute the jurisdictional areas of traditional councils.
- 3.2 The Bill fails to recognize the social reality of the resilient customary structures that continue to exist outside of approved and imposed colonial and apartheid-era structures<sup>4</sup> and fails to recognize that customary dispute resolution commonly occurs at the level of village councils or headmen's courts, (i.e. at levels "lower" than the traditional council level at which the Bill will allow for the recognition of traditional courts).<sup>5</sup> In this regard, Oomen refers to a range of "unofficial customary courts, those not recognised by the state but associated with the 'traditional authority hierarchy', and varying from courts convened by traditional leaders who do not have state recognition but are recognised by their people, to courts convened by headmen or ward-heads, or even *ka setso* (traditionally), *mo lapeng* (in the yard) or with the larger family".<sup>6</sup>

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<sup>4</sup> There are a number of documented instances of fully legitimate customary courts being convened by authorities other than officially recognised chiefs or state-sanctioned traditional leaders. Examples are those of the (e.g. Makuleke/Mhinga: Kalkfontein/Ndzundza), which are dealt with in the *Tongoane* case (referred to above). Existing customary courts that are not headed by official chiefs (e.g. at Dixie and Kalkfontein) are not recognised under the Bill and have no status. This replicates the apartheid misconception that no structure qualifies as being "customary" unless it is presided over by an approved traditional leader.

<sup>5</sup> See John L Comaroff and Simon Roberts *The Cultural Logic of Dispute in an African Context* (1981, University of Chicago) which describes the hierarchy of administrative and dispute resolution processes that exist in Tswana society. In practice, the vast majority of customary dispute resolution takes place at levels "below" traditional courts. These are also the levels "closest to the people" and enable most participation, which is an avowed purpose of the Bill.

<sup>6</sup> According to Oomen, (*supra*) procedures in "official" and "un-official" customary courts are broadly similar: "both parties and their supporters can state their case, after which the opinions of all present are collected, followed by a period of *go aga* (building) and searching for a solution. Men wear a jacket and stand up when speaking, while women cover their heads and remain seated. The procedure is thus a mixture of adjudication and negotiation, in which the adjudicator can be the *kgosi*, headman or family head, alone or with some councillors, who have either inherited the function or been elected or appointed. The involvement of women varies as well: in some courts women can only be witnesses or silent listeners, in others they have won the right to present a case themselves or even to adjudicate in the role of *kgosigadi* or councillor (regent)." (at p. 207)

- 3.3 It is submitted that these other levels of dispute resolution, which act as a valuable tool of ensuring separation of powers by ameliorating the concentration of power and allowing for a division of labour, will be undermined relative to the official status of those courts that are officially recognised. This point is also made by the Department of Justice and Constitutional Development's 1999 Status Quo Report referred to earlier. On page 10 the report refers to the headmen's courts and states that: "It was generally held that these structures make an essential contribution towards the effective functioning of a traditional community....[they] also ensure that a chief does not rule in an autocratic manner but acts on the advice of relatives and councillors." The Bill entrenches and reinforces the power of state-sanctioned traditional councils and silences the other voices currently engaged in the definition and adjudication of customary law;<sup>7</sup>
- 3.4 The Bill replaces the existing "upward referral" system of indigenous accountability mechanisms which ensures that a court's authority derives primarily from the legitimacy and confidence it enjoys in society, with an imposed, "top-down" system that operates as a system of indirect rule and delegated power. Of primary relevance in this regard is the fact that under section 4, the Minister (after consultation with the Premier) designates "senior traditional leaders" to be presiding officers of traditional courts, but is restricted to designating traditional leaders already recognised by the Premier in terms of the TLGFA,<sup>8</sup>
- 3.5 The hierarchical structure imposed by the Bill (emphasising the role of the chief<sup>9</sup> as the "presiding officer") is at odds with current practice and embodies colonial and apartheid misconceptions about the nature of customary law. The Bill centralises power in the hands of individual<sup>10</sup> traditional leaders and makes them

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<sup>7</sup> Oomen argues that the parallel existence of all these courts (with their varying degrees of formality) contributes to accountability by enabling a certain degree of "forum-shopping" by disputants. This "stimulates dispute resolution fora not only to come up with negotiated settlements acceptable to all parties, rather than decisions that benefit only one side, but also to legitimise their own position and actively 'solicit' cases". (p. 208). Oomen further says: "All the fora described above invoke and create a tissue of norms and values best described as *negotiated law*. This term draws attention to the fact that law making, for all its references to rules, takes place squarely in the context of local power relations, and is crucially shaped by them." She concludes that "real change has to be forged locally, laboriously negotiated within local power relations. Here, returning the 'power of definition' to the people means empowering those marginal voices involved in the negotiation of local rule with additional resources." (p. 251).

<sup>8</sup> The only exception is that the Minister may, at the written request of king, queen or traditional leader designate a headman or someone of royal blood as an alternative presiding officer – but only in the absence of the king, queen or senior traditional leader

<sup>9</sup> In fact, however, in many instances it is councillors who preside over traditional courts: see SALC report (2003) at para 4.2.

<sup>10</sup> In fact, the Bill is internally contradictory in a number of instances in relation to who constitutes a traditional court. For example, whereas the definition of a "traditional court" includes "a forum of community elders who meet to resolve any dispute which has arisen", section 16 perpetuates the Eurocentric notion of a "court" as being identical to a "presiding officer" and refers to complaints against traditional courts as being complaints against "presiding officer". No provision is made for the situation where the court as a whole is at fault, or members other than the presiding officer.

the arbiters of customary law in a way that pre-empts the development of a “living” customary law that would otherwise reflect the multiple voices currently engaged in processes of transformative social change in rural areas.<sup>11</sup> In addition, this structure devalues the increasing input of community members in court processes, which is an example of how customary law has responded to the constitutional value of democracy. In her doctoral thesis, which considered chiefly opposition to the Law Commission reform initiatives, and to the repeal of laws such as the Bantu Authorities Act,<sup>12</sup> Oomen concludes that: “[t]raditional leaders, it seemed, did not want the acceptance of their authority to be democratised, to become a matter of free choice, but instead preferred to rely on the continued imposition of apartheid legislation imposing their position so that they, and not their subjects, could determine the pace of change in their areas”.

- 3.6 The Bill also excludes those who are not of “royal blood” from heading tribal courts, which is not only contrary to emerging trends, but is also contrary to actual customary practice in many areas.
- 3.7 Furthermore, the Bill fails to recognise that the content of customary law is contested in many areas, particularly between traditional leaders and ordinary people. By centralising power in the hands of traditional leaders, the Bill enables traditional leaders to enforce controversial versions of customary law that favour their interests and downplay the customary entitlements of subjects (e.g. land rights and rights to participate in decision-making processes). In this regard, there are indications that the Bill seeks to enforce customary law not by the innate legitimacy of traditional courts and the acceptance of customary law, but by coercive measures. For example, in terms of section 20(c), it is a criminal offence not to attend traditional court proceedings when summoned to do so and those in contravention may be fined if they refuse to recognise what may be very controversial traditional court jurisdictional boundaries.
- 3.8 Of particular concern is section 10(2), which allows a traditional court to impose a range of sanctions, including fines, forced labour and the withdrawal of customary benefits. Customary benefits include land rights, access to natural resources such as water, community membership and the issuing of “proof of residence” letters issued by traditional councils necessary for identity document and social grant applications. These provisions therefore enable tribal courts to effectively evict people who refuse to recognise their authority, and to deprive them of basic necessities such as land, water and access to social grants and ID books. This flies in the face of the underlying values and principles of customary

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<sup>11</sup> In at least two instances (the definition of “traditional court” and in section 8), the Bill imposes a requirement that structures or procedures should follow “customary law and practice” but also requires that specified conditions are met (for example that the presiding officer should determine when the court should sit). These two requirements may be entirely inconsistent, especially as custom as “living law” is subject to alteration and change over time. According to Bennett Human Rights and African Customary Law (1995) at 65: “Unless a customary rule is grounded in contemporary social practice, it must in principle be deemed invalid. A critical issue in any constitutional litigation about customary law will therefore be the question whether a particular rule is a mythical stereotype, which has become ossified in the official code, or whether it continues to enjoy social currency.” See also *Alexkor Limited and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) at para 52: “It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life.”

<sup>12</sup> Oomen (*supra*) at 82 – 86.

law. If the Bill's intention was to limit the impact of traditional court sanctions, the opposite has been achieved.

#### 4. Women and the traditional courts

4.1 Although those existing traditional justice structures which have developed organically outside of apartheid legislation are largely supported by the LRC, it is submitted that even they (along with those traditional courts which owe their existence to apartheid era legislation or appointments) suffer from an important defect, namely the manner in which they entrench patriarchal power relations and social and economic practices that are discriminatory towards women. This reality is reflected in the South African Law Commission's 1999 "Report on Traditional Courts and the Judicial Function of Traditional Leaders" and is described in the following extract from the replying affidavit of Professor Ben Cousins in the *Tongoane* case that is currently pending before the Pretoria High Court (referred to above):

*"... [t]he problem of traditional courts discriminating against women ... is well described in recent literature and research reports. This is not to say that traditional courts discriminate against women in all instances, but to highlight the impact of entrenching the powers of patriarchal structures without putting in place adequate checks and balances to address structural inequality.*

*After the South African Law Commission had convened a consultative process which included convening workshops with rural women, its 2003 Report on Traditional Courts and the Judicial Function of Traditional Leaders stated: "Women have strongly argued that customary courts should not have jurisdiction over matters relating to status, maintenance or land on the basis that these courts are biased against women." (11) "With regard to land disputes, the joint submission by CALS, CGE and NLC points out that rural women are unhappy about the administration of land by traditional leaders claiming that women are traditionally disadvantaged by the customary law of land holding and its administration by traditional leaders." (11)*

*The Report indicates that the Commission did not recommend that the draft customary courts bill include jurisdiction over land. On page 18 of its report the Commission noted that the joint submission by the Commission on Gender Equality, the Centre for Applied Legal Studies and the National Land Committee argued that the women's participation in chiefs' courts is prevented or highly restricted, and cited examples where women were not permitted to bring cases before the chief's court, attend court proceedings, or question litigants.*

*The 2006 HSRC report on the effect of the legislated powers of traditional authorities on rural women also cites examples where women suffered exclusion from or discrimination by traditional court processes. One of the problems described in a community workshop was that of widows being represented by their sons during audiences with chiefs and headman, and that this "continues to undermine inheritance, access and control of land by women" (page 38)*

*A 2004 study on the Role of Traditional Leaders in Crime Prevention and Safety Promotion in the eThekweni Metropolitan region, by Ingrid Palmay for the Centre for the Study of Violence and Reconciliation, found that*

*very few women attend traditional court hearings, and even fewer participate.”*

4.2 The disadvantages and discrimination faced by women in traditional courts are also described in the joint submission made by the Commission on Gender Equality, the Centre for Applied Legal Studies and the National Land Commission to the Law Commission’s enquiry.

4.3 They are also referred to in Constitutional Development’s Status Quo report on Traditional Leadership and Institutions as follows:

*“The various provinces have different categories of non-formally recognised courts and dispute resolution mechanisms ranging from courts of clan leaders, sub-headmen, headmen and chiefs (inkosi), i.e. the traditional courts, to street courts and kangaroo courts. Among the main issues here were the restrictions imposed on the participation of women and the youth in the traditional courts (they could only participate as complainants, witnesses or as accused) and the lack of a statutory basis for most of these courts.”<sup>13</sup>*

4.4 It is submitted that the formalization and recognition of traditional courts in the Bill presents an ideal opportunity to take proactive and concrete steps to address these inequalities, which the administration of justice in the existing traditional courts has perpetuated. The drafters have, however, failed to take the opportunity to ensure compliance by traditional courts with the requirements of the constitution in relation to the rights of women. The only references to women in the Bill simply serve to entrench the position of women who appear before traditional courts. Examples include:

4.4.1 The use of the phrases “prevent conflict” and “maintain harmony” in section 7 suggest that the purpose of traditional courts is the maintenance of existing (unequal) social arrangements by requiring women to accede to structurally unequal power relations.

4.4.2 While section 9(2)(a)(i) refers to “full and equal participation in the proceedings” by women, it fails to specify that women are entitled to participate in all aspects of the proceedings and not merely as applicants and witnesses and that they may also cross-examine witnesses and take part in debating the merits of the case. The lack of specificity is insufficient given the documented dynamics of inequality, exclusion and silencing of women in tribal court settings.

4.4.3 Section 9(3)(b), which appears to extend a level of equality in relation to rights of representation by women (and even then, only wives), is in fact illusory and disingenuous in that this right is dependent on being “in accordance with customary law and custom”. This is derisory in the face of the reality of discrimination against women under such customs and it is submitted that the real impact of the circular wording of this section will be to enable the continuing representation of women by male family members.

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<sup>13</sup> Department of Justice and Constitutional Development Status Quo Report on Traditional Leaders at p. 19.

**5. Clause-by-clause commentary on the constitutionality, practicability and efficacy of the Bill**

5.1 Clause 2

For the reasons set out more fully below, the Bill does not succeed in aligning the traditional justice system with the Constitution.

5.2 Clause 3

5.2.1 The use of the word “should” in the introductory part of clause 3(1) is inappropriate because it introduces uncertainty as to whether or not the principles listed in this section are intended to apply or to apply in all instances.

5.2.2 It is suggested that the word “should” be deleted.

5.3 Clause 4

5.3.1 Clauses 4(1) and 4(2) of the Bill present as the pool from which presiding officers may be designated the king’s, queen’s and senior traditional leaders recognised under the TLGFA.

5.3.2 The effect of section 28(1) of the TLGFA is that traditional leaders appointed during the apartheid era are protected in their positions under the new statutory regime.

5.3.3 Accordingly, both the constitutionality and the appropriateness of the pool of potential candidates as presiding officer is open to question.

5.3.4 Clause 4(3) of the Bill provides for the designation as presiding officer of a traditional court to be effective from the date of recognition of the traditional leader concerned as king, queen or senior traditional leader under the TLGFA. The effect of this sub-clause is to give retrospective effect to the designation to a date prior to the coming into force of the Traditional Courts Bill.

5.3.5 Our courts have recognised, particularly in the constitutional era, that legislation having retrospective effect is most undesirable.<sup>14</sup>

5.3.6 Clause 4(5) provides for attendance by traditional leaders of the prescribed training programme after designation as a presiding officer.

5.3.7 It is submitted that this is an undesirable arrangement in that-

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<sup>14</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at par 39; De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 5<sup>th</sup> ed at pages 14-15; *Montshioa and Another v Motshegare* 2001 (7) BCLR 833 (B) at para [19].

- 5.3.7.1 It contemplates the possibility of the traditional leader performing judicial functions for a period without completing the prescribed training programme or course;
- 5.3.7.2 It removes any incentive for the optimal performance and diligent attendance of the course.
- 5.3.8 Accordingly, it is submitted that any prescribed course should be satisfactorily completed before any designation as a presiding officer.
- 5.3.9 Clause 4(6) contemplates the possibility of untrained presiding officers in that -
- 5.3.9.1 The Minister “may” revoke a designation on account of failure to attend the training programme or course, but is not obliged to do so; and
- 5.3.9.2 Attendance of the course is not compulsory where the person designated can show that non-attendance was not due to his or her fault.
- 5.4 Clause 5
- 5.4.1 Apart from the limits on the amount in dispute, the category of property in dispute and the other specific matters listed in clause 5(2) of the Bill, clause 5 confers a wide jurisdiction on presiding officers of traditional courts, provided that the dispute arises out of customary law and custom.
- 5.4.2 It may thus include disputes which, whilst arising out of customary law and custom, give rise to causes of action based on the common law or statute law. It is open to question whether traditional leaders will be appropriately qualified to adjudicate such disputes.
- 5.4.3 Moreover, the jurisdiction of the traditional courts is based on the location in which the dispute arose. The consent of the parties to the jurisdiction of the court is not required. Given that one of the parties may not form part of a traditional community or may not wish to have the dispute adjudicated by a traditional court, it is submitted that this clause of the Bill should be amended to require that all parties to a dispute consent to the jurisdiction of the traditional court.
- 5.4.4 This is important. If parties outside of a particular traditional community are drawn into the court’s jurisdiction, then the tradition court is acting beyond the constitutional role allowed for traditional leaders in section 211 of the Constitution. Nor is such a role contemplated by section 212. The LRC is aware of myriad examples of traditional communities falling within the statutory jurisdictional boundaries of another traditional community, but constituting a separate entity not subject to the latter’s jurisdiction under customary law. The Traditional Courts Bill would allow for members of such communities to be dragged before traditional courts of traditional leaders to whom they owe no customary allegiance.
- 5.5 Clause 6

- 5.5.1 Read together with clause 9 of the Bill, clause 6 of the Bill appears to confer a criminal jurisdiction which operates outside of both the Criminal Procedure Act and the fair trial provisions of section 35(3) of the Constitution, including section 35(3)(c) which confers on every accused person a right to a public trial before an ordinary court.
- 5.5.2 Whilst the LRC recognises the need to address problems of lawlessness and disregard for the rule of law in the rural areas of South Africa, the LRC is of the opinion that this clause will not withstand constitutional scrutiny.
- 5.5.3 Serious consideration needs to be given to whether it is either appropriate or constitutionally permissible to confer any form of criminal jurisdiction on traditional courts in the constitutional era in South Africa. The LRC is of the view that other strategies need to be considered to address problems relating to crime in rural areas, which will not set up a separate and unequal system of criminal justice in rural areas, not aligned with the constitution.
- 5.6 Clause 7
- 5.6.1 This clause purports to set up traditional courts as a court system distinct from the courts referred to in section 166 of the Constitution.
- 5.6.2 However, section 166 of the Constitution delineates the full extent of the judicial sphere of government.
- 5.6.3 Accordingly, it appears that the traditional court system as provided for in the Traditional Courts Bill is constitutionally impermissible both in that-
- 5.6.3.1 it provides for courts not recognised by the Constitution; and
- 5.6.3.2 the system runs contrary to the doctrine of separation of powers which has been held to underlie and be implicit in the Constitution.<sup>15</sup>
- 5.7 Clause 9
- 5.7.1 Clause 9(2)(a) is ambiguous and can be read as limiting the range of rights contained in Chapter 2 of the Bill of Rights which are applicable to the proceedings of traditional courts.
- 5.7.2 As pointed out above, there are problems of incompatibility between section 35 of the Bill of Rights and the provisions of the Traditional Courts Bill.
- 5.7.3 Clause 9(2)(b) of the Bill seeks to introduce two common law administrative law rules as the foundation for the provision of the necessary procedural protections in proceedings of traditional courts. The LRC questions –

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<sup>15</sup> *President of the RSA v Hugo* 1997 (4) SA 1 (CC) at para 11.

- 5.7.3.1 the resort to common law expressions of administrative law principles when administrative law has been codified in section 33 of the Constitution and in the provisions of the Promotion of Administrative Justice Act No. 3 of 2000;
- 5.7.3.2 whether the simple application of those common law administrative law rules provides sufficient structure for and protection of rights in the proceedings of a traditional court system.
- 5.7.4 Whilst the LRC understands the need for informality underlying the exclusion of legal representation in clause 9(3)(a) of the Bill, the LRC is of the view that this is in conflict with the Constitution.
- 5.7.5 Clause 9(5) purports to provide an accountable financial system in relation to the imposition and collection of fines.
- 5.7.6 The LRC has extensive experience of the unfortunate abuse by traditional authorities of their powers in relation to fines as well as other forms of levies purportedly justified in terms of customary law. The LRC seriously questions whether the traditional authorities have in place the necessary resources, checks and balances, to administer fines in a reliable and accountable manner and fears that, notwithstanding the provisions of clause 9(5), the power to impose fines will give rise to serious abuse.
- 5.8 Clause 10
- 5.8.1 This clause provides for the forms of sanction which may be applied by a traditional court.
- 5.8.2 Notwithstanding the limitations in clause 10(1), the power to impose sanctions conferred by this clause is extremely wide and expressed in the broadest of terms. Reference is made in this regard to the words “any appropriate order” and to clause 10(2)(l) which provides for “any other order that the traditional court may deem appropriate and which is consistent with the provisions of this Act”.
- 5.8.3 The LRC is of the opinion that the powers as conferred are constitutionally impermissible both because of their breadth and because of the absence of an appropriate structuring of the legislative discretion thus conferred.<sup>16</sup>
- 5.8.4 Moreover, the nature of the powers is focused more on the imposition of punitive civil and criminal sanctions, rather than the mediation of appropriate conciliatory solutions aimed at avoiding conflict.

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<sup>16</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; A Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837); *Janse Van Rensburg NO and Another v Minister of Trade and Industry and Another* NNO 2001 (1) SA 29 (CC).

- 5.8.5 The potential sanctions include forms of unremunerated, forced labour which may well be at odds with South Africa's treaty obligations under international labour law (see section 10(2)(g)).
- 5.8.6 They also include possible evictions, having regard to the power afforded a presiding officer to deprive a person of a benefit that accrues in terms of customary law and custom (see section 10(2)(i)), which may include land.
- 5.8.7 It must be remembered that the rural poor will generally lack the resources to challenge excesses of power under these provisions.

5.9 Clause 11

- 5.9.1 This clause deals with non-compliance with a sanction of a traditional court. Clause 11(1) provides that in such event, "that traditional court must, in the prescribed manner, call such person to appear before it."
- 5.9.2 Clause 21(1)(h) provides that the Minister of Justice may make regulations regarding "the manner in which a traditional court must cause persons, who have not complied with any sanctions imposed by it, to appear before it, as contemplated in section 11(1)".
- 5.9.3 In the first instance, it is pointed out that insufficient attention has been given in the Act to the entire procedure whereby parties may be summonsed before the court in a matter which does not infringe rights and does not give rise to disturbances of the peace and breaches of human rights. The LRC has experience of unlawful methodology being used to secure the attendance of persons at courts purporting to be traditional courts.
- 5.9.4 The provision for regulations dealing only with the circumstances contemplated by clause 11(1) are inadequate.
- 5.9.5 Clause 11(2)(b) provides for the making by the traditional court of an appropriate order "which will assist the person to comply with the sanction initially imposed" where the failure is found not to be due to the fault of the person concerned. Again, this clause is unduly broad and holds open the potential for abuse and arbitrariness, which may well go unchallenged for the reasons given above.
- 5.9.6 The provision in section 11(2)(d) whereby an order of a traditional court may be enforced in the same manner as a civil judgment of a magistrates court emphasises the need for appropriate provisions relating to notification of proceedings before traditional courts in securing the attendance of persons at such courts.

5.10 Clauses 12, 13 and 14

- 5.10.1 These clauses represent an attempt to accord finality to the order of a traditional court and to limit the grounds of appeal and review.
- 5.10.2 That endeavour, the LRC submits, is constitutionally impermissible because the Constitution submits the exercise of all public power to full

constitutional scrutiny and review by the judicial arm of government in the form of the courts.

- 5.10.3 In particular, the attempt to set up narrow grounds of review based on the common law grounds of administrative law review which obtained before the constitutional era is constitutionally impermissible. Citizens are entitled under the Constitution and pursuant to the rule of law and the principle of legality to exercises of public power which are not only procedurally fair but are also rational and lawful in the sense that they are compliant with all applicable constitutional and legislative provisions.
- 5.10.4 Clause 14(1) purports to subject the orders of traditional courts to a lesser, pre-constitutional standard of review which has been rejected by the Constitutional Court in various decisions including, in particular, the decision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*.<sup>17</sup>
- 5.11 Clause 16
- 5.11.1 Clause 16(3)(a)(ii) suggests that one of the grounds on which a complaint may be made against a presiding officer is “gross incompetence”.
- 5.11.2 In setting a requirement of gross incompetence, it is implicit that incompetence which is not characterised as “gross” represents acceptable conduct on the part of a presiding officer of a traditional court.
- 5.11.3 The same applies to grossly negligent conduct and grossly negligent breaches of the code of conduct referred to in clause 16(3)(b) and (c).
- 5.11.4 It is submitted that this is inappropriate and that complaints ought to be cognisable in respect of incompetence and in respect of negligent conduct on the part of presiding officers.
- 5.11.5 In terms of clause 16(4)(a), the investigative mechanism for purposes of complaints is that contemplated in section 27(3)(a) of the TLGFA. To the best of our knowledge, there is no requirement that such bodies or mechanisms have any expertise in the field of the administration of justice and it is accordingly submitted that they are inappropriate mechanisms for purposes of the investigation of complaints.
- 5.11.6 Moreover, the location of those mechanisms within provincial traditional leadership structures creates the potential for institutional bias in favour of the traditional leader concerned.
- 5.12 Clause 18
- 5.12.1 This clause excuses the traditional court from any obligation to keep a record of its proceedings other than a record of the nature of the dispute

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<sup>17</sup> 2004 (4) SA 490 (CC) at par 22. See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at para 95.

or charge, a summary of the facts of the case and the decision of the court.

5.12.2 It is submitted that this is inappropriate, unfairly truncates the right of review or appeal of the court concerned and offends against the very notion of a court which is an institution whose proceedings are proceedings of record.

5.13 Clause 19

5.13.1 Clause 19(2) provides for the transfer of matters from the ordinary courts of the land to a traditional court having jurisdiction.

5.13.2 The wording of the provision can be read as not requiring the court contemplating transfer to notify the parties beforehand of the contemplated transfer and to afford them a hearing in this regard.

5.13.3 This needs to be remedied in the statute.

5.14 Clause 20

Whilst it is implicit that the offences contemplated in this clause are not within the jurisdiction of the traditional court, regard being had to the schedule to the Bill, this ought to be explicitly provided for in this clause in order to prevent any unlawful assumption of powers in this regard by the traditional courts.

5.15 Clause 23

Clause 23(3)(b) creates the potential for discredited traditional leaders appointed during the apartheid area to obtain powers under the Traditional Courts Bill. This has already been negatively commented on above.

## 6. The information required before the Bill can be adequately considered

6.1 Many of the above submissions (particularly those contained in paragraphs 3 and 4 above) are based on the actual experiences of the clients of the LRC in the context of customary dispute resolution mechanisms as they are practised in multiple configurations in traditional communities throughout South Africa. These experiences provide an insight (albeit impressionistic, and by no means comprehensive) into what is sometimes referred to as the "living customary law":

*"The official rules of customary law are sometimes contrasted with what is referred to as 'living customary law', which is an acknowledgment of the rules that are adapted to fit in with changed circumstances."<sup>18</sup>*

6.2 It is clear from this statement that, in order to properly evaluate whether the Bill is likely to legitimately (and therefore successfully) regulate customary dispute resolution mechanisms throughout the country, it is essential to observe what

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<sup>18</sup> *Bhe* at paragraph 87. See also para 85: "What needs to be emphasised is that, because of the dynamic nature of society, official customary law as it exists in the textbooks and in the Act is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognises and acknowledges the changes which continually take place."

actually happens in practice, and not simply to rely on “official” versions of the law. As the Constitutional Court noted in *Bhe*:

*“In Mabena v Letsoalo,<sup>19</sup> for instance, it was accepted that a principle of living, actually observed law had to be recognised by the court as it would constitute a development in accordance with the 'spirit, purport and objects' of the Bill of Rights contained in the interim Constitution.”<sup>20</sup>*

- 6.3 In undertaking the task of identifying the living law, one has to have regard to the actual practice of each particular community. As the Privy Council observed in the context of land rights in *Amodu Tiani v The Secretary, Southern Nigeria*,<sup>21</sup> in a passage approved by the Constitutional Court,<sup>22</sup>

*“To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.”*

- 6.4 From this it follows that:

*“The determination of the real character of indigenous title to land therefore 'involves the study of the history of a particular community and its usages'. So does the determination of its content.”<sup>23</sup>*

- 6.5 The same applies to the determination of other aspects of the character and content of the customary law of a community. For that purpose, what is required is “*the study of the history of a particular community and its usages*”, It is necessary, however, to obtain information that is accurate and reliable, that goes beyond the immediate experiences of only a few individuals.

- 6.6 Anthropological field studies undertake precisely this task. They involve a study of actual practice in the community. Authoritative studies of this kind are therefore of fundamental importance in establishing actual practice.

- 6.7 Although the concerns set out above have already been identified and confirmed by a range of existing academic studies, it is clear that the existing state of knowledge regarding traditional justice systems in South Africa is limited.

- 6.8 In other words, although these academic studies provide a clear basis for the criticisms of the Bill that are identified above, it is recognised that they do not constitute a comprehensive analysis of customary dispute resolution as it is practised throughout South Africa. Furthermore, and more pertinently, it would appear that no attempt has been made to determine to what extent the model of regulation proposed in the Bill is consistent or compatible with existing practice.

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<sup>19</sup> *Mabena v Letsoalo* 1998 (2) SA 1068 (T).

<sup>20</sup> *Bhe* at paragraph 111.

<sup>21</sup> [1921] 2 AC 399 (PC) at 404.

<sup>22</sup> *Alexkor* at paragraph 56; see also the judgment of Ngcobo J in *Bhe* at para 156.

<sup>23</sup> *Alexkor* at paragraph 57.

6.9 In the circumstances, it is submitted that there is insufficient information before the Committee to adequately evaluate the Bill at this stage.

7. **Conclusion: The Bill has lost its way in the rush to comply with an artificial deadline**

7.1 In conclusion, it is submitted that the Traditional Courts Bill has not been properly considered, before its introduction into Parliament, particularly from the perspective of the compatibility of the entire scheme envisaged by the Bill with the framework and values of the Constitution.

7.2 In addition, the Bill in many respects confers powers which are far too wide and unclearly formulated on presiding officers of traditional courts. This creates the potential for abuses of power. This is compounded by the attempt to shield the traditional courts in the exercise of their powers from full constitutional scrutiny by the courts. This is constitutionally impermissible.

7.3 It is submitted that it is only on the basis of a nuanced and dispassionate understanding of the functioning of existing customary courts in practice that the Bill can be adequately examined. It is further submitted that the only way in which this can be achieved is by undertaking a proper study of customary and traditional courts as they currently exist and operate throughout South Africa. However, even if such a study cannot be undertaken, it is submitted that the Bill as it stands raises serious concerns about the legitimacy of the system that it proposes to institute.

7.4 We conclude this submission by pointing out that, apart from the significant substantive concerns that are raised above, a further concern is that the nuanced and balanced proposals of the South African Law Commission in its report on Traditional Courts, which followed extensive consultation and which grappled with many of the issues that have been raised in this submission, have been largely ignored in the Bill.<sup>24</sup>

7.5 Although the reasons for this are not expressed in the explanatory memorandum that accompanies the Bill, it would appear that the main purpose of the Bill is no longer an attempt to harness the power of restorative justice that customary dispute resolution promises to deliver in support of a broader goal of access to justice by all South Africans.

7.6 Instead, it is submitted that the primary goal is now to fill the lacuna that will imminently be created by the somewhat belated repeal of the Black Administration Act (which currently regulates traditional courts) in the light of the provisions in the Constitution and the Traditional Leadership and Governance Framework Act, 2003 that reserve a role for the institution of Traditional Leadership in the administration of justice. It is to be noted that the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005 (as amended by section 1 of the Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act, 13 of 2007) now stipulate 30 June 2008 as the date for the repeal of the Black Administration Act, whereas the Bill

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<sup>24</sup> See, for example, the failure to accept the SA Law Commission's recommendation that the resolution of disputes relating to land ownership should be excluded from the jurisdiction of traditional courts

specifically states in section 24 that it will come into force on 29 June 2008 at the latest.

- 7.7 The sad irony, however, is that in the laudable but expedient rush to rid South Africa of the Black Administration Act, the drafters of the Bill have replicated in many respects the structures that that abhorrent legislation imposed in relation to traditional courts and have preserved the same vested interests that it helped to create.
- 7.8 In such circumstances – instead of grafting the new system onto the old one – it is submitted that a more prudent approach would be to extend the artificial deadline that has been created and delay the repeal of the relevant sections of the Black Administration Act until such time as the Bill can be re-drafted in a manner that will truly ensure the benefits that it set out to achieve.
- 7.9 In all the circumstances, it is submitted that:
- 7.9.1 the Traditional Courts Bill reflects a disturbing trend towards the concentration of power in the hands of an institution which is not subject to the democratic controls and accountability mechanisms of the three constitutional spheres of government;
- 7.9.2 the drafters of the Bill may have to go back to the drawing board in order to conceive of a scheme for customary law-based dispute resolution mechanisms which are compliant with both their true conception in customary law and with the requirements of the Constitution; and
- 7.9.3 in the process, the recommendations of the South African Law Commission, which reflect the input of a wide section of rural society, need to be considered.