Summary and Analysis of the Traditional Court Bill B 15 – 2008

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INTRODUCTION

This document is written to assist people living in rural areas to come to grips with the issues arising from the Traditional Courts Bill so that they are better able to participate in the legislative process. It compares the content of the current Bill with that proposed by the South African Law Commission in 2003. It also explains the connection between the Traditional Courts Bill and the 2003 Traditional Leadership and Governance Framework Act.

BACKGROUND

The parliamentary process and the timeframe for the new law

The Traditional Courts Bill was introduced to parliament in March 2008. In May 2008 the Justice Portfolio Committee called for submissions concerning the Bill and held public hearings. At the public hearings organisations representing traditional leaders supported the Bill. However, COSATU, the Council of Churches, the Commission for Gender Equality and various civil society organisations as well as organisations representing rural women and various rural communities opposed it.

The Bill was withdrawn after the hearings, partly because of opposition, but also because there was not time to complete the legislative procedures required by section 76 of the Constitution. Section 76 deals with bills that affect the provinces, including bills that impact on customary law and traditional leadership. Such bills require the National Council of Provinces to follow a longer and more consultative process than legislation that does not affect the provinces.

The 2008 Bill was revived this year with the exact same wording. The Department of Justice explained that the Bill replaces the provisions of the Black Administration Act of 1927 which deal with the powers of chiefs and headmen to settle disputes and try offences. The Black Administration Act was repealed in 2005, but these sections were extended pending the introduction of new legislation concerning traditional courts. After the Bill was withdrawn in 2008, the Repeal of the Black Administration Act and Amendments of Certain Laws Act was amended to extend the repeal date of those sections until 30 December 2009. A further amendment extending the repeal date until December 2010 has been tabled but not yet enacted. This indicates that the Department of Justice plans to enact a new law dealing with traditional courts before the end of next year.

What happened to the South African Law Commission recommendations?

Between 1999 and 2003 the South African Law Commission considered customary courts and how best to reform the law to support and enhance them. After extensive discussions, submissions and workshops in rural areas it submitted a report and a draft Bill to the Minister of Justice in 2003. The members of the customary courts project committee of the Law Commission included Prof Maithufi, Prof Bennett, Judge Mokgoro, Ms Baqwa, Prof Dlamini, Prof Himonga, Prof Mqeke, Ms Mbatha, Mr

Mawila, Prof Rugege and Ms Mashao. Some people have criticised the Commission for not consulting adequately, but it consulted with a far greater cross section of rural people than was done in respect of the current Bill.

Various women's organisations criticised the Commission's first discussion document for failing to address the problems rural women face in customary courts. In response, a series of consultation meetings with rural women were jointly convened by the Commission for Gender Equality, the Centre for Applied Legal Studies at Wits and the National Land Committee. These took place in partnership with land NGOs in the different provinces, including AFRA and TRALSO. These consultation meetings were used as the basis for a joint submission by the three organisations, which is included in this publication. The Commission's 2003 final report refers to the concerns raised in the women's submission and how it attempted to address these.

The current Bill by contrast, states that it was drafted in collaboration with the National House of Traditional Leaders and attaches a list of consultative workshops, all of which involved traditional leaders. It appears that no attempt was made to consult ordinary rural people or to consult rural women as a specific interest group. The inadequacy of the 2008 consultation process was one of the complaints raised during the Portfolio Committee public hearings held during May 2008.

In the light of the extensive deliberations undertaken by the Law Commission, it is surprising that the current Bill differs substantially from the Law Commission's recommendations and makes no reference to that prior process. In the discussion of the 2008 Bill which follows, the provisions which are markedly different from the Law Commission's recommendations will be discussed where relevant.

Links to the Traditional Leadership and Governance Framework Act

The Law Commission recommendations were submitted in January 2003. In late 2003 the Traditional Leadership and Governance Framework Act was enacted. It provides a national framework for provincial laws dealing with traditional leadership. These provincial laws have since been enacted in all the provinces. Section 20 of the Framework Act provides that national government may provide a role for traditional leaders and traditional councils in a respect of a range of issues including land administration, agriculture, health, welfare, safety and security, and the administration of justice.

This is achieved by the introduction of national bills by the relevant government departments. For example the Department of Land Affairs introduced the Communal Land Rights Act which provides a role for traditional councils as land administration committees and the Department of Justice introduced the Traditional Courts Bill. Various provisions of the 2008 Traditional Courts Bill cross refer to the Framework Act and will be explained in the context of that Act.

SUMMARY AND DISCUSSION OF THE 2008 TRADITIONAL COURTS BILL

1 Purpose and preamble

The long title of the Bill states the intention to affirm the traditional justice system based on restorative justice and reconciliation. Restorative justice is when dispute resolution is focused on finding a solution that everyone can live with. The primary aim of restorative justice is not to punish offenders but to reach an agreement between the parties about a way forward, which may include punishment as one of its components. The long title states that the Bill seeks to enhance customary law. The guiding principles in clause 3 stresses the need to align the traditional justice system with the Constitution and the rights enshrined in it, together with promotion of African values based on reconciliation and restorative justice.

The Bill emphasizes the position of traditional leaders in the administration of justice. It refers to the Constitution's appreciation of the status, institution and role of traditional leaders and it states that the Traditional Leadership and Governance Framework Act recognises the responsibilities of traditional leaders in legal matters. By contrast, the Law Commission report did not highlight the role of traditional leaders in its draft bill.

2 Composition of the court, presiding officers and the training of traditional leaders

Only traditional leaders and those of royal birth may be presiding officers of traditional courts

Clause 4 of the 2008 Bill provides for the Minister of Justice to appoint traditional leaders who are recognised in terms of the Framework Act, as the presiding officers of Traditional Courts. The Minister may also, at the written request of a king, queen or senior traditional leader (as defined in the Framework Act), appoint a headman or headwoman or a member of the royal family as an alternative presiding officer, in the absence of the king, queen or senior traditional leader. In effect, this limits the pool of people who may become presiding officers to traditional leaders and those of royal blood.

The vast majority of traditional leaders are men, and women's succession to traditional leadership positions remains contested by their male relatives and organisations representing traditional leadership (as the recent Shilubana case attests). Although ultimately the Constitutional Court confirmed Mrs Shilubana's appointment as Hosi of the Valoyi community, her appointment was strongly opposed by her male cousin and by Contralesa. Her cousin challenged her appointment at both the High Court and Appeal Court levels. He won in both these courts which led to Hosi Shilubana's appeal to the Constitutional Court. Her appointment was ultimately confirmed by the Constitutional Court but the judgment does not mean that women can automatically succeed to traditional leadership positions. It is limited to those situations where the royal family and traditional authority of a community *choose* to appoint a women chief in line with the development of living customary law.

Training of presiding officers
Clause 4(5) of the Bill provides that, after a presiding officer has been appointed, he or she should attend a training programme within 12 months. However there is an exemption provision in clause 4(5)(a), and non-attendance may be excused where it is not due to the fault of the person concerned (clause 4(6)). This creates the potential for untrained people to preside over traditional courts.

Centralising power and responsibility to the presiding officer
The Bill defines a "traditional court" as a court "presided over by a king, queen, senior traditional leader, headman, headwoman or a member of a royal family who has been designated as a presiding officer of a traditional court by the Minister…and which includes a forum of community elders who meet to resolve any disputes that have arisen…"

However this "forum of elders" is not given specific powers and functions, and its role and composition are not mentioned again in the Bill. Instead, all power and responsibility is vested in the presiding officer alone. Clause 16 of the Bill reinforces the Western notion of the "court" being identical to the "presiding officer" in that it refers to complaints against traditional courts as being complaints against the "presiding officer." No provision is made for a situation where the court as a whole is at fault, or members other than the presiding officer.

The Law Commission recommendations concerning the role of councillors and how they should be elected or selected

By contrast, the Law Commission report describes current practice as follows: "[I]n most cases the chief will not normally preside over the proceedings. A trusted councillor will be appointed to preside" (p 6). The report goes on to say that councillors are members of the community appointed by the chief or headman.

The report discusses various options in relation to the appointment of councillors for the court (p 7). One is that councillors be popularly elected at a general meeting. Another is that the chief or headman appoints the councillors from a panel of persons elected by the relevant community. The last option is that the chief or headman appoints councillors at his discretion.

IMPLICATIONS FOR WOMEN

The 1999 joint submission by the CGE, CALS and the NLC raised the problem of customary courts being either dominated by, or exclusively composed of, male councillors, and of women's inadequate representation before customary courts.

Its report on the provincial consultation meetings stated:

According to our respondents traditional proceedings followed in their communities are as follows: When a woman has a complaint that she wants to report to a traditional court, she firstly has to report the complaint to one of the male elders in her family. The elder will act as her witness and representative and will report the case to the councillors at the headmen's court. During the court proceedings a women only talks when talked to or asked questions and is not allowed to give input

during the court proceedings. Single women and girls are not allowed to attend a court session. In other instances after being asked questions a woman will be told to leave. This means women are only allowed in courts when they are complainants. On the other hand according to our respondents, men can bring their cases to court without a witness, participate during the court proceedings and ask questions.

In the Eastern Cape specifically we were told that traditional courts are situated next to a kraal which is said to be a 'place for men' and where ancestors are. It is said that ancestors relate better with men than with women because women are believed to be un-pure and are associated with witchcraft. As a result women are not allowed near to the court, which is situated next to the ancestral kraal. We were told that, traditionally, if a woman has to attend a court session, she sits very far from the councillors who constitute the traditional court. Women are not allowed to speak or interrogate men. Even if she is a woman chief she is treated in a similar way and she has to appoint a male representative to talk and interrogate people on her behalf. All these procedures which are practised under the label of tradition show discrimination against women.

Ultimately the Law Commission report discussed the issue of **women's representation in customary courts** at some length, again referring to three alternatives.

- The first is that the law prescribe a 50% quota for women.
- The second is that the composition of the court must have regard to various constitutional and legal requirements concerning equality for women.
- The last is simply to prescribe that a customary court must include both men and women in its composition.

The report concludes that a policy decision must be taken by government in relation to the important question of how councillors should be chosen, and on how to ensure meaningful representation of women in customary courts (p 9).

The current Bill does not address the important issues raised by the Law Commission concerning the election of councillors, and the need to include women councillors. It is not clear whether the drafters anticipated that traditional councils established in terms of the TLGFA would act as the "forum of elders" referred to in the definition of traditional courts. The TLGFA provides that 40% of the members of a traditional council should be elected, and that 30% should be women. The women's quota need not be elected, it may be appointed by the "senior traditional leader." Moreover it may be decreased by the Premier if an "insufficient number of women are available."[1]

In the absence of the Bill providing a role for traditional councils in traditional courts, it cannot be assumed that existing traditional councils will constitute the "forum of elders." In any event, the Bill provides no role or statutory authority for the "forum of elders."

Instead all authority is vested in the presiding officer and clause 4 of the Bill has the effect of limiting the pool for presiding officers to those of royal blood. The Bill thus

[1] Section 3(2)(d) of TLGFA.

fails to recognise the potential contribution of respected councillors, male or female, who emerge organically from within communities at its lower hierarchical levels (e.g. family, clan and village) and have a proven track record of resolving disputes in a customary setting.

The hierarchical structure imposed by the Bill (emphasising the role of the chief as the "presiding officer") is different from actual and emerging practice in many areas. The Bill centralises power in the hands of individual traditional leaders and bolsters their ability to interpret and define customary law. This undermines the development of a "living" customary law that reflects all the different voices currently involved in dispute resolution and in debates about the content and interpretation of changing customs and practices.[2] Vesting sole authority in the chief as presiding officer ignores and undermines the input of other community members – including women - in the development of "living" customary law.

The Black Administration Act of 1927 set the precedent for centralising statutory authority for dispute resolution in individual chiefs and headmen. Section 12 of the 1927 Act authorises officially appointed chiefs and headmen to hear and determine civil disputes and to try certain offences and, like the 2008 Bill provides no recognition for the customary role played by councillors in resolving disputes.

The provisions relating to women in the 2008 Bill

While it does not address issues pertaining to the composition and role of councillors in traditional courts, the 2008 Bill does contain provisions concerning women and traditional courts. Clause 9(2) provides that the presiding officer must ensure that the rights contained in the Bill of Rights are observed and respected, and in particular "that women are afforded full and equal participation in the proceedings, as men are."

Because the Bill as a whole does not provide a role for councillors in the proceedings of the court, the implication is that this clause refers to women's participation as litigants and accused people before the court, and not as members of the court itself. Furthermore instead of the Bill prescribing specific protections for women to address the specific problems they face, it puts the onus on the presiding officer to ensure that women are fairly treated. The pace of change is put in the hands of the presiding officer, rather than in the hands of women themselves. A woman who decides to take up unequal treatment in a traditional court would have to focus her challenge on the failure of the presiding officer, rather than the enforcement of a clear legal provision. This is a heavy burden to place on women given the unequal power dynamics in rural areas, and the isolation and poverty of many rural women.

One of the specific problems facing women in many traditional courts is that they are not allowed to speak or represent themselves, but have to rely on male relatives to represent them. This puts women at a serious disadvantage, particularly in cases arising from disputes with their male relatives, or where they have no adult male relatives available to represent them.

Clause 9(3)(a) bars lawyers from traditional courts. Clause 9(3)(b) provides that a party may be represented by "his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom."

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[2] 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."

Instead of providing explicitly that women should be allowed to represent themselves if they so choose, it enables the continuation of the practice of male relatives representing women "in accordance with customary law and custom." This is justified on the basis that men too may be represented by their wives, a far fetched possibility which attempts to cloak the continuation of inequality in even-handedness.

3 The geographical boundaries (area) of the courts' jurisdiction and the debate about whether people should be allowed to "opt out" of traditional courts

Clause 4 of the 2008 Bill provides that only traditional leaders who are recognised in terms of the Framework Act (TLGFA) can be designated at presiding officers of traditional courts. The court's area of jurisdiction is the same as that of the traditional leader's area of jurisdiction, which is also determined by the TLGFA. Section 28 of the TLGFA provides that those traditional leaders who were officially recognised before the Act came into effect in 2003 remain in office as "recognised traditional leaders." It deems pre-existing "tribes" to be "traditional communities", and pre-existing tribal authorities (created and delineated in terms of the Bantu Authorities Act of 1951) to be "traditional councils."[3]

This entrenches the controversial tribal boundaries established during apartheid as the jurisdictional areas of traditional courts. Tribal authorities were created virtually wall-to-wall in the former homelands. Some of them cover large areas and include groupings of people who have, or claim, independent identities or land rights and dispute the boundaries and authority of the tribal authority.

The Bill makes it an offence for a person to refuse to appear before a traditional court, or to leave the court without the permission of the presiding officer (s 20). An order made by a traditional court has the effect of a civil judgment of the magistrate's court having jurisdiction and is enforceable in terms of the provisions of the Magistrates' Courts Act (clause 11 (2) (d))

Discussion
A number of issues arise concerning the court's jurisdictional area.

These include:

- The consequences of ignoring and undermining "lower level" dispute resolution forums that may exist within a court's official jurisdictional area.
- The consequences of entrenching traditional leaders' authority within contested tribal boundaries.
- Issues arising from the fact that more than one system of customary law may apply within a court's boundaries.
- Issues concerning choice and people's right to "opt out" of official traditional courts and use other courts or dispute resolution forums instead.

Centralising power undermines lower level dispute resolution forums

[3] Traditional councils must comply with the composition requirements set out in s 3 of the TLGFA. These require that 40% of the members of a traditional council must be elected, and 30% must be women.

The Law Commission report describes that in many communities claims or complaints start at the level of the family council, and are referred "upwards" only if they are not resolved at the lower level, going for example from family level to village level (headman's council), and from there to the level of the chief's council (p 5). The report recommends that headmen's courts be recognised as a specific level of court and be given the same authority as chiefs' courts.

However the 2008 Bill does not refer to, or recognise, courts at village level, or courts convened by headmen. The only role the Bill provides for headmen is dependant on whether a "senior traditional leader" delegates his authority as presiding officer of a traditional court to a headman. This is in contrast to the 1927 Black Administration Act which enables headmen to hear disputes and try offences on the same basis as chiefs, albeit only headmen who are officially recognised.

There are also other types of dispute resolution forums which rural people use, such as those run by civics, development committees and councillors. None of these kinds of forums are recognised by the current Bill. Instead the senior traditional leader of the "tribal authority" area is given sole statutory responsibility for dispute resolution and people living within his boundaries have no option but to appear in his court if summoned to do so. Yet the existence of alternative forums contributes to accountability because people avoid forums they consider to be unfair or biased.

Entrenching traditional leaders' authority within contested tribal boundaries

The problem is compounded where groups of people with other identities and land rights are included within contested tribal authority boundaries. These boundaries derive from the controversial 1951 Bantu Authorities Act. In many instances traditional leaders who co-operated with the Bantustan agenda were "rewarded" with larger areas and higher status, while those who resisted it were demoted and placed within the boundaries of collaborators.

Apart from the issue of disputed tribal boundaries a wide variety of different types of African settlement were put within one or other tribal authority boundary during the process of Bantustan consolidation. Thus ethnically mixed groups of people with diverse histories including labour tenancy, mission settlement, land purchase, removal from "black spots", farm evictions or quitrent ownership find themselves within tribal authority boundaries they have no historical connection with.

Apartheid land policies which dumped black people in the former homelands and restricted movement out of these areas created forced overlapping of land rights on a massive scale. The creation of ethnically separate Bantustans heightened tensions between people with different histories and over-lapping rights to the same land. In that context the powers proposed for "officially recognised" traditional leaders are controversial. The current Bill provides traditional leaders with the power to summon fine and punish all those who live within their "tribal" boundaries regardless of the history of the area and contestation about boundaries and ethnic identity.

More than one system of customary law within a court's jurisdictional boundaries

Where land rights and identities overlap the different groups living within a court's jurisdictional boundaries may use different systems of customary law. Clause 9(4)

provides that where two or more systems of customary law are applicable in a dispute, the court must apply the system of customary law the parties agree on. It provides that where there is no agreement between the parties the system of customary law applicable in the area of jurisdiction of the traditional court takes precedence, or the court may apply the system of customary law with which the parties have their closest connection.

It is left to the court (in the person of the presiding officer) to ascertain this. Yet it is precisely issues of identity, origins and customary law that are in dispute between groups with overlapping land rights. In such disputes there is unlikely to be agreement about which system of customary law applies, and even about which is prevalent in the area. The Bill enables a presiding officer to assert jurisdiction over people who subscribe to a different system of customary law, and people who have no connection with customary law.

Clause 8 provides that sessions of the traditional court will be held at the time and place determined by the presiding officer, in accordance with customary law and customary practices. Again, this ignores the reality that disputed versions and interpretations of customary law may exist within the court's jurisdictional area, and gives the presiding officer the authority to unilaterally determine the content of custom.

"Opting-out" and choice of courts

The issue of whether people have the right to "opt out" of traditional courts was debated by the Law Commission. Ultimately the Law Commission recommended (p 32) that people must be allowed to "opt out" of appearing before customary courts because of the "controversy surrounding the issue of the independence and impartiality of customary courts." It concluded that it was "safer to leave the door open for objecting to the jurisdiction of the customary court and opting out in favour of a magistrate's court or other court, particularly in criminal proceedings." This was despite the report noting "strong opposition" by traditional leaders to the idea of opting out.

The fact that the 2008 Bill (in conjunction with the Framework Act) entrenches the old tribal authority boundaries as the default boundaries for traditional courts worsens the underlying problem. Fixed territorial boundaries thereby replace consensual affiliation (support and free choice) as the basis for determining the boundaries of the courts' jurisdiction. The Commission's 2003 draft bill had entailed a more open-ended and flexible approach in terms of boundaries. It provided that customary courts should operate at "such different levels as are recognised in customary law." (see Clause 3(1) of the 2003 draft bill) The Women's Legal Centre, in its submission to the portfolio committee, said that the imposition of fixed territorial boundaries has far reaching implications for the nature of traditional courts, and is inconsistent with the consensual character of customary law.

4 What issues can the court decide? Civil and criminal jurisdiction. Excluding specific matters from the courts jurisdiction. Excluding lawyers.

A civil dispute is a "private" dispute between two people, or parties, for example a claim for damages arising from the fault of one of the parties. Civil disputes are not

prosecuted by the police, they are taken forward by the parties against one another. A criminal offence, on the other hand, is a crime against society (for example theft or murder) which is governed by criminal law. In criminal matters complainants report the crime to the authorities (generally the police), who then prosecute the offender.

Clause 5 of the Bill provides that a traditional court may hear and determine **civil** disputes arising out of customary law and custom. However clause 5(2) excludes a range of issues from the civil jurisdiction of traditional courts. The list of exclusions includes any constitutional matter, divorce and separation, the custody and guardianship of children, wills, and claims above an amount or value determined by the Minister from time to time and published in the Government Gazette.

Clause 6 provides that a traditional court may also hear and determine certain **criminal** offences which are listed in a schedule. The criminal offences listed in the schedule include theft and stock theft up to a value to be determined, malicious injury to property, again up to a value to be determined, assault (where grievous bodily harm has not been inflicted) and crimen injuria up to a certain amount. Crimen injuria is damaging another person's dignity or reputation.

Criminal jurisdiction and excluding lawyers

Section 35(3) of the Constitution confers on every accused person a right to a fair trial which must be a public trial before an ordinary court (s 35(3)(c)) and includes the right to choose, and be represented by, a legal practitioner (s 35(3) (f)).

On the other hand, clause 9(3)(a) of the 2008 Bill provides that: "No party to any proceedings before a traditional court may be represented by a legal representative."

This led to submissions to the Justice Portfolio Committee arguing that the 2008 Bill is unconstitutional because it removes the right to legal representation in criminal matters, and creates a parallel system of criminal justice outside the ordinary courts.

The Law Commission's report in 2003 discussed the arguments for excluding lawyers from customary courts, for example that they are unnecessary and expensive in simple matters and introduce inequality between those who can afford to pay for lawyers and those who can't. They pointed to the danger of lawyers complicating cases by taking up complex technical points and so undermining the straightforward solution-orientated nature of customary courts.

However the Law Commission concluded that to debar lawyers in criminal matters raises difficulties in relation to section 35 of the Constitution. Ultimately the Commission concluded that "since customary law does not distinguish among spokespersons as to whether they are legally qualified or not, it is theoretically possible for a person with legal qualifications to appear in the customary court as a spokesperson for one of the parties. However, he or she would have to conduct himself or herself in a manner suited to the lay nature of the court." (p 24)

In the end, unlike the current Bill, the Commission did not recommend the explicit exclusion of lawyers from traditional courts.

Debates about excluding specific matters from the jurisdiction of traditional courts

The argument against exclusions
Some people argue that since the Constitution recognises customary law, it must also recognise customary dispute resolution forums and processes on their own terms. Supporters of this view argue that prior to colonialism customary courts dealt with all disputes, including those later classified as civil and criminal in terms of "western" law. On this basis they oppose excluding specific matters from the jurisdiction of customary courts.

Others point out that people living in isolated rural areas may not have effective access to other courts and that, in practice, many customary courts routinely deal with civil and criminal matters that are beyond their formal jurisdiction.

The argument for exclusions – the impact on women
Others point to inherent and constitutional problems with customary courts being given jurisdiction over matters that should be dealt with through the formal courts and in terms of the Constitution. Women's groups in particular have argued that customary courts should not be able to hear and determine a range of matters affecting women because their composition and patriarchal character favours male interests and renders women particularly vulnerable.

For example the 1999 CGE/CALS/NLC submission to the Law Commission recommended excluding all matters relating to the status of women from the jurisdiction of traditional courts.

They specifically recommended that the following matters be excluded:

- Violence against women and children, including rape, attempted rape, indecent assault, domestic violence and child abuse;
- Cases of guardianship and maintenance, including determination of paternity; and
- Marriage, both civil and customary.

They raised serious concerns about disputes concerning land rights in the context of women's vulnerability to eviction and the overlapping "executive" role of traditional leaders in administering and allocating land on the one hand, and deciding disputes about land rights on the other.

Ultimately the Law Commission report and draft bill of 2003 (schedule 1 on p 13 of the 2003 draft bill) recommended a much longer list of exclusions than those contained in the current Bill.

5 The powers of a traditional court to impose and enforce sanctions. Offences and penalties

Clause 10(1) limits the sanctions that a traditional court can impose in criminal cases. In terms of this clause a traditional court may not impose cruel or degrading punishment. Nor may it detain or imprison people, nor banish them, nor use corporal punishment, nor impose a fine above an amount determined by the Minister from time

to time and published in the Government Gazette. These exclusions do not, however, apply in respect of sanctions for civil disputes.

Clause 10(2) gives a traditional court far reaching powers to order and impose a range of orders and sanctions. These include:

- the payment of fines (the maximum amount to be set by the Minister from time to time)
- the payment of settlement awards between parties, including damages and compensation, whether in money or livestock
- an order that a person stop specific conduct
- an apology
- progress reports to the court about compliance with an order
- referring a matter to the NPA
- an order that one of the parties to the dispute, both parties, **or any other person perform unpaid labour for the community** under the supervision of the traditional court
- an order that one of the parties to the dispute, both parties, or any other person perform some form of service or benefit to a specified victim.
- **an order depriving the accused person or defendant of any benefits that accrue in terms of customary law or custom**
- a caution or reprimand in the case of a criminal dispute
- a combination of the above sanctions
- any other order that the traditional court may deem appropriate "which is consistent with the provisions of this Act"

Clause 11 gives the court powers to enforce the above sanctions. For example, in cases of failure to comply with the above sanctions, the court may "deal with the matter in accordance with customary law and custom" and may impose further sanctions. Furthermore orders made by a traditional court are enforceable by execution in the magistrate's court.

Discussion

Forced labour

Certain of these sanctions are controversial because of the nature of the far reaching powers given to traditional leaders acting as presiding officers. For example the power to order people to perform free services, including free labour, for the "community." The Bill gives traditional leaders acting as presiding officers the power to order **any person** to perform free services. The person need not even be a party to a dispute before the court. This provision enables the court to order people to perform forced labour and is controversial in the context of contestation about the "customary" practice of women being required to work in the chief's fields.

In situations where there are different communities, or disputed community boundaries within the court's jurisdictional area the Bill enables the officially recognised traditional leader to order people who dispute his authority to perform free labour. It authorises him to deal with defaulters according to "customary law." This begs the question of which customary law, and which "community." The Bill gives the officially recognised traditional leader sole authority to define the content of

customary law, including in contexts where the content and version of customary law is disputed.

Of perhaps even greater concern is clause 10(2)(i). This authorises the court to deprive an accused person or defendant of benefits that accrue in terms of customary law or custom. Customary entitlements to land are one such benefit, community membership is another. Effectively the court is authorised to revoke a person's customary rights to land, and even strip a person of their community membership. Clause 10(1) limits the court's right to impose banishment in criminal matters. But there is no such limitation in respect of civil disputes.

The powers given to the court in this regard override inbuilt customary protections which require that serious matters such the cancellation of land rights be debated within the community at various levels, and ultimately require the endorsement of a *pitso,* or a general meeting of the entire community. The structure of the current Bill does not recognise these levels of debate and decision making and instead vests legal authority exclusively in the senior traditional leader in his role as presiding officer. To this extent the Bill is at odds with customary principles and undermines important checks and balances built into customary dispute resolution processes.

Several of the open ended sanctions contained in clause 10 and 11 create the potential for abuse of power. This is particularly problematic given the vulnerability and isolation of many rural communities, and the difficulties they would face in challenging abuse of power. Clause 13 of the Bill provides that people may appeal to the magistrate's court against a decision of a traditional court. However the basis for appeals is circumscribed by clause 14. Appeals are allowed only on the basis that the traditional court acted outside the scope of the Act: that it had no jurisdiction; that the court was biased or malicious; or the procedure followed "grossly irregular." "Irregular" is not enough. The person lodging the dispute has to prove "gross" irregularity.

The Johannesburg Bar (Advocates) submission to the Justice Portfolio Committee argued that limiting the basis for appeals in this way is in conflict with the Constitution

6 Does the Current Bill comply with the Constitution? Clause 7 of the Bill.

Clause 7 – "Distinct from courts referred to in section 166 of the Constitution"
Clause 7 of the 2008 Bill states that traditional courts are distinct from the courts referred to in section 166 of the Constitution and operate in accordance with the principles of customary law which seeks to promote restorative justice and reconciliation.

Section 166 of the Constitution refers to the different courts in South Africa, being the Constitutional Court, the Appeal Court, the High Courts, the Magistrate's Courts and any other court established by law which has a similar status to High Courts or Magistrate's Courts.

Discussion of the implications of clause 7

The drafters could arguably have established customary courts on a par with magistrate's courts in terms of this clause, but chose not to do so. This is probably because some of the Bill's provisions do not comply with some of the constitutional requirements governing courts set out in the constitution. For example section 35(3)(f) of the Constitution provides that every accused person is entitled to be represented by a legal practitioner in criminal matters. Yet the traditional courts Bill excludes legal representation in clause 9(3)(a).

The separation of powers doctrine is a constitutional principle. It prohibits judicial officers from exercising law making and executive powers. Yet traditional leaders claim to have administrative (executive), legislative and judicial powers within customary law. One of the purposes of clause 7 may be an attempt to protect traditional leaders as presiding officers from the separation of powers doctrine. Some lawyers say it cannot do so, and that the Act is unconstitutional for this reason.

Clause 7 also raises questions about whether traditional courts should be named "courts" in terms of the ordinary meaning of the word "court." Section 34 of the Constitution differentiates between a court and an "independent and impartial tribunal or forum" and provides that disputes may be resolved in such tribunals or forums in addition to courts. Some people therefore argue that the term "customary tribunal" is more appropriate than "traditional court" because it clarifies that customary tribunals are different from other courts and therefore cannot be expected to comply with all the provisions in the Constitution applicable to "ordinary" courts.

Since customary law is recognised by the Constitution, and is different from other law, many people argue that the forums which apply it must be able to be different from "ordinary" courts so that they can operate in accordance with the underlying principles of customary law, in particular the principles of reconciliation and restorative justice.

Of key importance here are questions concerning the underlying nature of customary law, and the issue of choice and "opting out." If people are not allowed to "opt out" of the jurisdiction of a particular traditional court, in favour of either another court or another customary tribunal, the consensual basis of customary law is undermined. This difficulty would not arise if the statutory jurisdiction of the traditional courts were to be based on the consent of the parties, and not on tribal authority boundaries, as it is in the current Bill.

Questions for discussion

1. What are the advantages and disadvantages of existing customary courts?

2. What are their advantages and disadvantages for women?

3. What are the advantages and disadvantages of magistrate's courts?

4. What are their advantages and disadvantages for women?

5. What steps need to be taken to improve access to justice in rural areas?

6. What steps need to be taken to improve access to justice for women in rural areas?

The Current Bill

1. What are the advantages of the Current Bill?

2. What are its disadvantages?

3. How could the current Bill be improved?