

SOUTH AFRICAN LAW COMMISSION

PROJECT 90

CUSTOMARY LAW

**REPORT ON
TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF
TRADITIONAL LEADERS**

21 JANUARY 2003

**TO DR PM MADUNA, MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the *South African Law Commission Act, 1973* (Act 19 of 1973), for your consideration the Commission's report on *Traditional Courts and the Judicial Function of Traditional Leaders*.

**MADAM JUSTICE Y MOKGORO
CHAIRPERSON: SOUTH AFRICAN LAW COMMISSION
21 JANUARY 2002**

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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Black Administration Act, 1927 (Act No 38 of 1927)

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KwaNdebele Traditional Authorities Act, 1984 (Act No 8 of 1984)

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SUMMARY OF RECOMMENDATIONS

A summary of the recommendations contained in this Report is given below. In this summary, reference is made to relevant page numbers of the Report where each recommendation is to be found, as well as to the relevant clauses of the proposed draft Customary Courts Bill. These recommendations relate to the following issues:

1. Establishment of customary courts

It is recommended that customary courts should be established by the Minister and that they should have full powers of hearing and determining cases in both criminal and civil matters subject to limitations prescribed in the draft Bill. (Pages 4-5, clause 2 of the draft Bill)

2. Hierarchy of customary courts

In recognition of the diversity of customary dispute settlement systems in the country, a hierarchy of customary courts should be recognised and established. These courts may range from the headman's court to the court of the paramount chief or king of a particular ethnic group. (Pages 5-6, clause 3 of draft Bill)

Headmen's tribunals which are currently not recognised as courts should be granted formal recognition. (Page 6)

3. Composition of customary courts

The composition of a customary court should be in accordance with customary law of the area in which the court is established. In constituting the court, however, regard should be had to the constitutional values of democracy and equality. Councillors making up the court should be generally representative of the community as a whole and, in particular, should include a reasonable proportion of women. The Report contains alternatives, one of which could be adopted in the final version of the bill. (Pages 6-9, clause 4 of the draft Bill)

4. Jurisdiction of customary courts

4.1 Civil jurisdiction

In civil matters, customary courts should have jurisdiction over cases arising out of customary law. These courts should, however, not determine matters relating to dissolution of marriage, whether customary or civil, custody and guardianship of minors or maintenance. (Pages 10-12, clauses 5 and 8 of the draft Bill)

4.2 Criminal jurisdiction

Customary courts should have criminal jurisdiction in those cases where the offence is committed in the area of jurisdiction of the court. Offences listed in the schedule are excluded from the jurisdiction of customary courts. (Page 12, clause 6 of the draft Bill)

4.3 Monetary ceiling

A monetary ceiling on jurisdiction of customary courts should be fixed by the Minister from time to time. (Pages 15-17, clause 8 of the draft Bill)

5. Applicable Law

The law applicable in customary courts should be customary law and any other law, which the court may be authorized to administer. Thus, in criminal cases, the courts may apply the common law or statutory law. Customary courts should be required to have regard to sections 9 and 39 (2) of the *Constitution* in their application of the law. (Pages 13-15, clause 7 of the draft Bill)

6. Procedure in customary proceedings

The procedure to be followed in customary courts should be in accordance with the customary law and practice in the area of jurisdiction. A customary court should have the power to summon witnesses and to punish for contempt of the court. (Pages 18-20, clauses 10 and 14 of the draft Bill)

7. Record of proceedings

The customary court should keep a record of its proceedings consisting of a summary of each case heard. Every three months the court should submit a list of cases heard by it to the Registrar for customary courts of its province. (Pages 20-22, clause 12 of the draft Bill)

8. Legal Representation

Legal practitioners should not have audience in customary courts. However, a party should have the right to choose any other person to speak on her or his behalf in accordance with customary law. (Page 22, clause 15 of the draft Bill)

9. Penalties

A customary court should have the power to impose penalties for offences including fines, orders to keep the peace, suspended sentences and community service. However, such a court should have no power to pass a sentence of imprisonment or corporal punishment. The Minister should determine the maximum fines that can be imposed. (Page 25-27, clauses 16, 21, 22 and 23 of the draft Bill)

10. Paying of fines into a special account

Each customary court should open a special account in which fines shall be deposited. The account should be administered by the traditional authority in whose area of jurisdiction the court operates and the money should be used for the development needs of the community in the area. (Page 26, clause 19 of the draft Bill)

11. Registrar for Customary Courts

It is recommended that a Registrar for Customary Courts should be appointed for each province where customary courts are established. The role of the Registrar for Customary Courts should be to guide and supervise customary courts, deal with complaints from members of the public about the operation of customary courts, consider the needs of customary courts, arrange for the training of members and clerks of the customary courts and where necessary transfer cases

from one customary court to another and from customary courts to other courts. (Page 31, clause 24 of the draft Bill)

12. Opting out of jurisdiction and transfer of cases

In criminal matters, it is recommended that a defendant should have the right to opt out of the jurisdiction of a customary court in favour of any other court. In civil matters, a transfer may be obtained by application to the Registrar for Customary Courts'. (Page 32, clause 28 of the draft Bill)

13. Appeals

A litigant who is dissatisfied with a decision of a customary court has a right of appeal to a higher customary court and either to a customary court of appeal [if one is established] or to the magistrates court and further to the high court. (See alternatives discussed in chapter 8 and presented in clause 27 of the draft Bill)

14. Regulations

The Minister has the power to make regulations for giving effect to the provisions of the Act as set out in clause 31 of the draft Bill.

CHAPTER 1

BACKGROUND TO INVESTIGATION

The administration of justice in rural South Africa is predominantly carried out by chiefs' courts, which administer justice largely on the basis of customary law. The operation of these courts is governed by a number of statutes, both of the old South Africa¹ and of the former homelands and self-governing territories.² The continued operation of homeland statutes is sanctioned by item 2 of Schedule 6 of the 1996 Constitution. The President has by proclamation assigned these laws to the relevant provinces.³

There is a need to consolidate the different provisions governing these courts and to modernise them so that their operation is in conformity with the principle of democracy and other values underlying the Constitution. To this end, a discussion paper entitled "*Traditional Courts and the Judicial Function of Traditional Leaders*", was prepared by the South African Law Commission and circulated for public discussion and comment. Submissions were solicited in the form of comments and suggestions for reform of the traditional court system with a deadline of 30 June 1999. Comments and representations were received by the Commission from academics, magistrates, women's groups and other interested persons.

On 9 September 1999, an academic workshop entitled "Customary Courts" organised jointly by the Centre for Indigenous Law (UNISA) and the Congress of Traditional Leaders of South Africa (CONTRALESA) in cooperation with the Commission, was held in Pretoria. Sixteen presentations were made at the workshop.

During June and July 1999, workshops were held in all the provinces that have traditional leaders and traditional structures, namely the Eastern Cape, Free State, Kwazulu-Natal, Mpumalanga, North West and Limpopo, formerly, Northern Province. These workshops were well attended with most stakeholders represented. In particular, traditional leaders of all ranks (chiefs, headmen and sub-headmen), magistrates, prosecutors, representatives of the regional

¹ The *Black Administration Act* 38 of 1927.

² For instance the *Bophuthatswana Traditional Courts Act* 29 of 1979; the *KwaNdebele Traditional Authorities Act* 8 of 1984, the *Chiefs Courts Act* 6 of 1993 (Transkei), the *KwaZulu Amakhosi and Iziphakanyiswa Act* 9 of 1990.

³ Assigned in terms of item 14 of schedule 6 of the *Constitution of the Republic of South Africa* 108 of 1996.

offices of the Department of Justice, academics and ordinary people under the leadership of traditional leaders attended the workshops. In some provinces, representatives of provincial houses of traditional leaders, women's groups and local council members also attended.

At the workshops, discussion centred around the recommendations of the Commission contained in the Discussion Paper. The recommendations had been translated into all major African languages used in South Africa. Some of the issues were the composition of the customary courts, their civil and criminal jurisdiction, the position and role of women, legal representation and the coordination and monitoring of these courts.

On the whole, the participants agreed with the recommendations of the Commission. Reservations on certain recommendations by some of the participants and those made in written submissions are discussed in this report. A concern was, however, raised with the Commission that women had not been sufficiently represented at these workshops. After discussions on the matter between the Law Commission, the Commission on Gender Equality, the Centre for Applied Legal Studies and the National Land Committee, it was decided to host more workshops and consultations with women's groups to solicit their views on the operation of traditional courts and hence allow for a more balanced picture.

Workshops with women and women's groups were held between 7 and 20 September 1999, in KwaZulu-Natal, Limpopo, Eastern Cape and North West provinces. The workshops and consultations concentrated on rural women and field workers active in the rural development context who would provide a perspective different to that advanced by traditional leaders.⁴ The views gathered in these workshops and consultations are contained in a report of the consultation process (which is available from the Law Commission on request) and in a paper prepared and submitted to the Commission jointly by the Centre for Applied Legal Studies (CALs), the Commission on Gender Equality (CGE) and the National Land Committee (NLC). These views are referred to from time to time in this report where relevant.

It is clear that wide consultation with stakeholders took place and many written submissions were made to the South African Law Commission on the Discussion Paper. The task team set

⁴ Joint Submission to the South African Law Commission on Discussion Paper 82 "Traditional Courts and the Judicial Function of Traditional Leaders" by Centre for Applied Legal Studies (WITS), the Commission on Gender Equality and the National Land Committee, December (1999) 1.

up by the Project Committee on Customary Law to draft a bill on customary courts had a wealth of information to guide its deliberations. This report attempts to convey a sense of the discussions and debates that went on in the different *fora* during this process and to express the dilemmas faced by the project committee and the Commission in choosing whatever options were eventually adopted in the draft Bill.

CHAPTER 2

ESTABLISHMENT AND NATURE OF CUSTOMARY COURTS

2.1. Traditional court or customary court?

During consultations on the Discussion Paper, the question arose as to whether these courts should be called traditional courts, chiefs' courts or customary courts. The predominant view from the responses⁵ to the Discussion Paper was that they should be called customary courts as their application of African customary law in the majority of cases they handle, is a distinguishing factor. There was also a suggestion from one of the respondents⁶ that these courts should be called 'indigenous courts' partly because the law applied by these courts is largely indigenous to South Africa. Another suggestion was that they should be called customary law courts rather than just customary courts. In the workshops in the provinces, different terms were suggested, for instance, African traditional courts, indigenous community courts, *kgotla* etc. In the draft Bill the term 'customary courts' is adopted as the most popular. Moreover, 'customary law' and 'customary courts' are the terms most widely used in the rest of Africa.

2.2 Should the customary court be a court of law?

Another issue that is raised is whether these courts should be recognised as courts of law or only as arbitration tribunals. Most people agree that they are and should be courts of law. Professor Mqeke prefers the phrase court of law because one is summoned before the chief's or headman's court and has to appear. Appearance is not voluntary as in the case of mediation.⁷ He also points out that existing traditional leaders' courts are recognised in the Constitution in item 16 of schedule 6.⁸ A number of other respondents also agree that

⁵ PB Monareng (Regional Court President: North West), DM Mamashela (University of Natal Pietermaritzburg), HM De Vetta (Psychologist, Rosslyn), Advocate W Olivier SC (Bloemfontein) and participants at the workshops.

⁶ HT Madonsela of HT Madonsela & Co (Attorneys, Newcastle, KwaZulu Natal) I.

⁷ RB Mqeke "Customary Courts: courts or tribunals?" Paper presented at the UNISA workshop on Discussion Paper 82 at the South African Law Commission conference centre on 9 September 1999.

⁸ Item 16(1) states: "Every court, including courts of traditional leaders existing when the new *Constitution* took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable ...".

customary courts should be recognised as courts of law and accorded the necessary powers and dignity.⁹ Finality and enforceability of decisions of these courts are important if they are to be respected and to lessen the workload on the magistrate's courts. At the workshops in the provinces there was unanimity that customary courts must be courts of law. The draft Bill endorses that position in clause 2(2).

2.3. Levels of Courts

In terms of the *Black Administration Act* 38 of 1927, which still applies in most of South Africa, there is no prescribed hierarchy of customary courts. Sections 12 and 20 empower the Minister to confer civil and criminal jurisdiction on chiefs, headmen or chiefs' deputies. There is no provision for appeals from the headman's court to a chief's court.¹⁰ Nevertheless, in many traditional communities the practice is that claims or complaints start at the level of the family council. If a matter is not resolved at that level, it is taken to the headman who, together with his advisors, attempts to dispose of the matter. If it is still not resolved, the matter is taken on appeal to the chief.¹¹ It is from the chief's court that the case is normally appealed to the Magistrate's court.

It is clear that there is variation from region to region as to the dispute settlement processes particularly below the "chief's court proper". The system appears to be fluid but dynamic and there appears to be a need to retain the value in this dynamism but to tidy it up in the form of a formalisation of the system. Thus, clause 3 of the draft Bill provides for different levels of customary courts as recognised in customary law. Whereas the 'chief's court' should remain the centrepiece of the customary system, recognition should be made of prior dispute resolution mechanisms in the form of a court but limited to one level. The number of customary courts above the 'chief's court' should depend on what is decided about the appeals hierarchy.

Thus, it is proposed that headmen's courts¹² be recognised as a specific level of court at the bottom of the hierarchy of customary courts and given the same jurisdiction as chiefs' courts.

⁹ For instance, Professors Koyana and Bekker and Adv W Olivier SC.

¹⁰ Section 12 (4) of Act 38 of 1927 provides for appeals from judgments of a chief, headman or chief's deputy in a civil matter, while section 20(6) provides for appeals from a chief, headmen or chief's deputy in a criminal matter. In each case the appeal goes to the magistrate's court.

¹¹ Joint Submission by CALS, CGE and NLC.

¹² Ibid.

Chiefs' courts would then operate as courts of first instance, as well as courts of appeal from the decisions of headmen's courts.

At the same time, the draft Bill provides that the Minister may establish customary courts of appeal. It is intended that such appeal courts should be on a regional or provincial level serving a number of chiefs' courts. In his response to the Discussion Paper, Professor Mqoke makes the suggestion that there should be a "National Traditional Court of Appeal". This should indeed be seriously considered. However, for the moment it may be unnecessary and expensive for such appeals could instead go to the High Court in civil matters and the magistrates' courts in criminal matters.

There are many headmen who have not been granted jurisdiction to hold courts in their areas under existing legislation. These headmen nevertheless hold what may be termed 'headman's *fora* or tribunals'. These tribunals resolve disputes and if they are unable to resolve them they refer the disputants to the chief's court with the necessary jurisdiction.¹³ It is proposed to recognise these headmen's *fora* as formal courts at the first or primary level. However, this has financial implications as clerks would have to be appointed for these courts.

2.4 Constitution of Customary Courts

Under the *Black Administration Act*, there is no provision regarding the composition of the chiefs' or customary courts. The Act merely provides for the conferment of jurisdiction on a chief, headman or chief's deputy to hear civil matters and try certain criminal matters.¹⁴ However, the Rules made under the Act provide that procedure in civil matters in chiefs' and headmen's courts "shall be in accordance with recognised customs and laws of the tribe...".¹⁵ As far as criminal matters are concerned, section 20(2) provides that the procedure at the trial by a chief or headman or chief's deputy shall, save as the Minister may prescribe otherwise by regulation, be in accordance with customary law. Under customary law, the court formally consists of the chief and his councillors or the headman and his advisors. However, in most cases the chief will not normally preside over the proceedings. A trusted councillor will be appointed to preside.

¹³ Joint submission by CALS, CGE and NLC. FA De Villiers "Customary Courts: Composition and Hierarchy" paper presented at UNISA workshop on customary courts 9 September 1999.

¹⁴ Section 12 relates to civil jurisdiction while section 20 relates to criminal jurisdiction.

¹⁵ Rule 1 of the Chiefs' and Headmen's Civil Courts Rules R2082 of 29 December 1967 (as amended).

The chief is briefed about the proceedings and will not normally differ from the general view of his councillors. The councillors are appointed by the chief or headman from members of the community.

In the Discussion Paper, it is suggested that the chief or headman of the area or his/her delegate should preside over the customary court sitting with councillors. Two options of appointing councillors were suggested (Recommendations 4a and 4b of the Discussion Paper). The first option is that the people of the area of jurisdiction of that chief or headman should popularly elect councillors at a general meeting called for the purpose. The second option is that the chief or headman concerned should appoint the councillors from a panel of persons elected by the relevant community. There is of course a third option: that the chief or headman should appoint the councillors in his/her discretion from prominent persons in the community, as is currently the case.

In addition, the point is made in the Discussion Paper that the customary courts should include women as members in accordance with the values of equality and non-discrimination in the Constitution.¹⁶ Further, it is observed that some traditional leaders support the idea of democratically elected councillors.¹⁷ Whereas the proposal of elected councillors is opposed by Professors Koyana and Bekker as being contrary to the constitution of traditional authorities,¹⁸ it is strongly supported by the joint submission of CALS, CGE and NLC.¹⁹ On the issue of councillors, the joint submission concludes:

“The election of councillors proved to be a popular recommendation in Limpopo, Eastern Cape and KwaZulu Natal. Many respondents indicated that if traditional courts were to serve as dispute resolution structures or agencies for law enforcement...they need to be representative of the community. The election of councillors would, therefore, ensure greater openness and accountability.”²⁰

¹⁶ This suggestion was based on the understanding that customary courts invariably consist of men. In the responses it has been pointed out that in a number of courts in the former Transkei and Ciskei women are represented.

¹⁷ Contralesa (KZN) in written submission to the Constitutional Assembly.

¹⁸ Submission dated 11 June 1999.

¹⁹ The submission is based on research conducted by the researchers of the three institutions in Limpopo, Eastern Cape, North West and KwaZulu-Natal.

²⁰ 13 and 17 of the Joint Submission December 1999.

The joint submission goes further and recommends that chiefs or headmen should not preside over courts and that not only should the councillors be popularly elected but a quota system should be legislated to ensure effective participation of women in customary courts.

As a result of the different views on the matter of composition, the draft Bill is not decisive on the issue. Clause 4 provides that the composition of a customary court should be according to customary law but adds a proviso intended to ensure women's participation as members of the court. There are three alternatives to this proviso. One alternative requires not less than half of the members to be women. Another alternative requires that "in constituting the court regard shall be had to section 9(3) of the *Constitution* and section 8 of the *Promotion of Equality and Prevention of Unfair Discrimination Act*²¹ as to the need for the representation of both men and women in public institutions. Yet another version of the clause states that "in order to comply with section 9(3) of the *Constitution*, a customary court must include both men and women in its composition". The first option would satisfy the concerns of the women's lobby as expressed in the joint submission by CALS, CGE and NLC.²² On the other hand it would not satisfy the traditional leaders and other traditionalists. Koyana and Bekker suggest that:

"The participation of women should not be peremptory. Our research shows that more and more women participate in traditional work. The numbers have grown gradually over the years and will continue to grow in an orderly manner. We think that a more substantial role for women should be left to the traditional leaders themselves. If women are imposed upon the system, it will create undesirable distortions and possibly confrontation and conflict."

It may also be observed that in Limpopo, women stated that they are not prohibited from attending and participating in the court proceedings but they do not attend because they believe that it is a man's job and it would be contrary to culture for them to attend.²³ Thus, the socialisation of women as to their role in society, in the traditional context, is an impediment to their participation in public life and institutions.

²¹ Act 4 of 2001.

²² This option of elected councillors and a quota for women is supported by a woman magistrate at Mount Frere. It was also recommended by 150 women in KwaZulu Natal at a meeting organised by the South African Law Commission on 19 and 20 November 1999.

²³ At a consultative meeting between representatives of CALS, CGE and the Law Commission and some thirty women at the royal kraal of Queen Modjadji in Limpopo.

During the workshops in the provinces, many traditional leaders opposed the idea of quotas for women participation in the work of the customary courts. In one case, councillors of the *Ramokgopa* Traditional Authority submitted a document after the workshop disagreeing with all the recommendations on the constitution of customary courts. Their objections were based on the ground that according to the customs of the *Batlokwa ba Ramokgopa*, councillors are the brothers and uncles of the reigning *kgoshi* or chief. They are not elected. They hear cases together with members of the public. "All persons present (even strangers) take part in the discussion. When the case is fully debated it is referred to *kgoshi* for the verdict. *kgoshi* gives verdict basing his judgement on the deliberations and argument by *kgoro*.... The councillors did not see any problem with this system."

The practice also applies in those areas ruled by women in Limpopo. CALS, CGE and NLC consultations revealed that the woman traditional leader was not a member of the court but received reports from the "uncles" who were the councillors and who carried out the judicial functions.²⁴

A policy decision needs to be taken on the question of election of councillors and on how to ensure meaningful representation of women.

²⁴ Joint Submission of CALS, CGE and NLC at 12. However, it is pointed out that in Ga-Modjadji, the Queen has the power to overrule the judgement that has been given by the councillors.

CHAPTER 3

JURISDICTION

3.1. Civil Jurisdiction

A customary court should be competent to hear most cases arising out of customary law. However, the question was raised in the Discussion Paper whether they should hear matters relating to dissolution of marriage, maintenance, custody and guardianship of minor children. Due to the patriarchal nature of African society and the apparent bias of customary law and practice in favour of males, it was suggested that these matters be excluded from the jurisdiction of customary courts and rather be handled by family courts. Under the *Black Administration Act* and some former homeland laws, chiefs' courts were not allowed to hear cases of nullity, divorce or separation arising out of a civil marriage. With the recognition of customary marriages, it is suggested that the prohibition be extended to customary marriages. This suggestion takes into account the values of equality and non-sexism in the *Constitution* and the principle of the "best interests of the child".²⁵

According to clause 8 (1), the draft Bill proposes to exclude from the jurisdiction of customary courts the following matters: (1) determination of the validity, effect or interpretation of a will, (ii) dissolution of any marriage (iii) determination of the custody or guardianship of minors and (iv) determination of liability for maintenance or. These are controversial issues on which there are conflicting views.

Currently, chiefs' courts enjoy jurisdiction in these matters except issues relating to civil marriages.²⁶ It is therefore perceived as a diminution of the powers and functions of traditional leaders and their courts to deny them jurisdiction on these matters. Traditional leaders are not happy with these exclusions. Some respondents particularly opposed the exclusion of custody and guardianship of children from the jurisdiction of customary courts. They argue that these

²⁵ See 26-27 of the Discussion Paper.

²⁶ The proviso to section 12 of the *Black Administration Act* states that "a Black chief, headman or chief's deputy shall not under this section or any other law have the power to determine any question of nullity, divorce or separation arising out of a marriage." Until the *Recognition of Customary Marriage Act* 120 of 1998 came into effect only a civil marriage was recognised as a marriage for all purposes.

are areas which have traditionally been handled by traditional courts. On the other hand, 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. This was for instance the view of women in KwaZulu Natal interviewed by representatives of the Law Commission, CALS, CGE and NLC.²⁷ The joint submission from CALS, CGE and NLC argues that besides their patriarchal character, customary courts lack the capacity to deal with maintenance and that in practice many women are already taking their cases to magistrates' courts instead of the chiefs' courts. It was observed in the interviews that women prefer to go to magistrates courts rather than chief's courts because the former have clear legal processes to deal with defaulters while the latter have none and do not have the capacity to enforce payments.²⁸

Professor Mqoke is one of the few people who addressed these issues in his submissions. He agrees that cases of maintenance and interpretation of wills should be handled by the magistrates' courts. He, however, further submits that issues of custody and guardianship of children should continue to be handled by customary courts. He also suggests that these courts should be allowed to determine matters relating to customary marriages.²⁹

The case for excluding family related matters from the jurisdiction of customary courts is sufficiently strong, despite the opposition of traditional leaders, to justify a provision in the draft Bill excluding them. These issues should, more appropriately be handled by family courts, which after all, are dedicated to such matters and where the issue of the "best interests of the child" will be the primary consideration, in conformity with the *Constitution*.³⁰

With regard to land disputes, the joint submission of 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

²⁷ Interviews in KwaZulu-Natal were held on 19 and 20 November 1999. See the Joint Submission on Discussion Paper 82 by CALS, CGE and NLC.

²⁸ Joint submission and Dr HM De Vetta.

²⁹ Prof Mqoke submits that these issues are "deeply emotional and culturally involved" and therefore should remain within the jurisdiction of customary courts.

³⁰ Section 28 (2) provides: "A child's best interests are of paramount importance in every matter concerning the child".

traditional leaders. The Department of Land Affairs is in the process of drafting a law that will govern rural land tenure, allocation of land and resolution of disputes. It is therefore felt to be proper to leave land out of the draft Bill.

3.2. Criminal Jurisdiction

Currently, chiefs' courts have jurisdiction over offences at customary law, common law and statutory offences of a less serious nature. The more serious offences are excluded in terms of schedule 3 to the *Black Administration Act* and similar provisions in the relevant statutes of the former homelands and self-governing territories.³¹ It is proposed to maintain that position. The schedule to the draft bill is the same as the old schedule 3 of the *Black Administration Act*, with a few changes. A significant addition to the Schedule is the exclusion of offences connected with domestic violence in terms of the *Domestic Violence Act* from the jurisdiction of customary courts. These offences include rape, wife beating, child abuse *etc.* Outdated offences such as *crimen laesae majestatis* and sodomy have been omitted from the list. The omission of 'offences relating to stock theft' from the excluded offences implies that customary courts can try offences relating to stock theft. However, this jurisdiction should be subject to the monetary limitation which the Minister may impose in terms of clause 8 (1) (b) of the draft Bill. Thus, a customary court should be able to try a case of theft of a sheep but not a herd of cattle.

Jurisdiction of traditional courts under current law is only over Blacks or Africans in areas where the *Black Administration Act* applies and in a number of areas in provinces incorporating the former homelands. It is proposed to change the basis of jurisdiction over persons to reflect the values of the new non-racial South Africa. Under the draft Bill, a customary court has jurisdiction to hear any criminal matter in which the accused is charged with having committed an offence wholly or partly within the court's area of jurisdiction. This clause makes no reference to race or ethnic origin.

The interesting questions that arise with regard to criminal jurisdiction are whether customary courts should have criminal jurisdiction at all, what kind of offences they should try, what punishment may be imposed and whether the accused may demand a transfer to a magistrate's court. Some of these issues are addressed later on in this Report.

³¹ Act 38 of 1927, section 20. See also Section 6 of the *Bophuthatswana Traditional Courts Act* 29 of 1979; First Schedule to the *KwaZulu Amakhosi and Iziphakanyiswa Act* 1990 for similar restrictions.

As far as criminal jurisdiction is concerned, a comparative study of some countries in Southern Africa shows a variation. In Zimbabwe, courts of traditional leaders (or local courts) have no jurisdiction in criminal matters.³² In Namibia, a traditional authority is authorised to “hear and settle disputes between members of the traditional community in accordance with the customary law of that community”.³³ This seems to refer largely to civil matters but may include criminal matters known to customary law. In Botswana³⁴ and Swaziland³⁵, on the other hand, courts of traditional leaders have considerable criminal jurisdiction. At the workshops, traditional leaders were in favour of extensive criminal jurisdiction. However, other submissions emphasised that customary courts should continue to try only minor or petty offences while the more serious offences are tried by magistrates courts and High Courts.

3.3 Law to be applied

(a) Law applicable in civil matters

The law to be applied in civil cases is customary law. This has always been the case from pre-colonial times. Those customary courts currently operating under the Black Administration Act are obliged to decide cases in accordance with customary law in terms of section 12. This section empowers the Minister to authorise any Black chief or headman recognised or appointed under section two “to hear and determine civil claims arising out of Black Law and Custom brought before him by Blacks against Blacks resident within such chiefs area of jurisdiction” [emphasis added]. The *Bophuthatswana Traditional Authorities Act* 23 of 1978 which was inherited³⁶ and still applies in the North West province has a similar provision.

The application of customary law should no longer be subject to the repugnancy clause. Under section (1) of the *Law of Evidence Amendment Act*³⁷, customary law may not be

³² *Customary Law and Local Courts Act*. Chapter 7:05 Laws of Zimbabwe.

³³ Section 3 (3) (b) of the *Traditional Authorities Act* 25 of 2000. (Namibia Government Gazette of 22 December 2000)

³⁴ Chapter 04:05 *Laws of Botswana (Customary Courts)* sections 11 and 17.

³⁵ *Swazi Courts Act* 80 of 1950 section 12.

³⁶ The *Constitution* provides in item 2(1) of Schedule 6 that “(1) All law that was in force when the new Constitution took effect, continues in force, subject to: (a) any amendment or repeal; and (b) consistency with the new Constitution”.

³⁷ Act 45 of 1988.

applied if it is contrary to natural justice or public policy. The Bophuthatswana Act quoted above contains a similar provision. Repugnancy clauses all over Africa were a colonial creation to prevent enforcement of customary laws or practices if they offended western moral standards.”³⁸ In a constitutional democracy, there might be instances where customary law is not consonant with the values of the *Constitution*. This may be the case for instance in matters relating to the subordination of women and discriminatory practices which may fall foul of section 9 of the *Constitution*. It is for this reason that while recognising customary law, it is required that its application should be subject to the *Constitution*.³⁹ In keeping with this constitutional provision, clause 7(2) of the draft Bill provides that “customary courts must give effect to Chapter 2 of the *Constitution*, in particular section 9 and section 39(2).” Section 9 proscribes unfair discrimination including discrimination based on sex or gender. Section 39 (2) of the *Constitution* provides that “when interpreting the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” These provisions are an attempt to ensure that customary law, which is still largely patriarchal, is developed to conform to the values and aspirations of the new South Africa. At the same time it must be noted that whereas the repugnancy clause was narrowly focussed on African customary law and hence objectionable in a post-colonial setting, the language of the *Constitution* is broader, requiring everything to conform to the *Constitution*. The old repugnancy clause has been overtaken by time and its scrapping should be welcomed by all.

(b) Law applicable in criminal matters

Customary courts have limited criminal jurisdiction relating to common law offences, customary law offences as well as statutory offences over which specific jurisdiction has been granted to them. The law applicable therefore is customary law with regard to customary law offences, common law and provisions of legislation with respect to statutory offences. According to the draft Bill, customary courts will have jurisdiction over “any criminal matter” except matters listed in the schedule. As indicated above, the schedule is the same

³⁸ Bennett TW *Human Rights and African Customary Law* Juta (1995) 58.

³⁹ Section 211(3) of the *Constitution* provides: “The courts must apply customary law when that law is applicable, subject to the Constitution and any other legislation that specifically deals with customary law.” Clause 7 of the proposed Bill states that a customary court is competent to apply (a) customary law, whether codified or uncoded and (b) the provisions of any other law which the court may be authorised by law to apply. Clause 8 reiterates this by stating that a customary court does not have jurisdiction in any case “(a) where the claim is not determinable by customary law.”

as schedule 3 of the *Black Administration Act*, with a few changes. Thus whereas the new schedule would omit some outdated offences and offences which can easily be handled by customary courts such as animal trespass, it would include offences relating to domestic violence among those which may not be tried by customary courts. It is expected, therefore, that customary courts will continue to apply common law as well as customary law and statutory law.

Doubts have been expressed as to the ability of these courts to handle common law crimes. Traditional courts have not in the past handled serious criminal matters⁴⁰ and it is expected, as is evident from the list of excluded offences in the schedule, that customary courts will continue to handle minor criminal cases. Jurisdiction over minor common law and statutory offences is granted to customary courts in order to relieve congestion at magistrates' courts and to ease the burden on accused persons, complainants and witnesses having to travel long distances to the nearest magistrate's court in matters between members of the traditional community.

3.4 Monetary limitation on jurisdiction

In Discussion Paper 82, the issue was raised as to whether the monetary jurisdiction of customary courts should continue to be unlimited, whereas that of lower courts in the "western system" is limited. It was pointed out that in the past, claims arising out of customary law did not involve a lot of money, whereas today inflation and other factors have meant that some claims run into thousands if not tens of thousands of rand. It was also pointed out that monetary ceilings have been introduced in some other African countries for customary courts.

There were a number of responses to the Discussion Paper on this matter. Professors Koyana and Bekker submit that customary courts should continue to have unlimited monetary jurisdiction as this had not created problems in the past. They argue:

"In traditional courts the monetary value of a claim is hardly ever material. For instance, in the claim for damages for adultery the fine in the Eastern Cape is five head of cattle.

⁴⁰ Bekker points out, "On the whole it may be said that the magistrates courts and the supreme courts are the normal tribunals in which Black wrongdoers are criminally charged..." Bekker *JC Seymour's Customary Law in Southern Africa* 5 ed (1989) 13.

That should have nothing to do with the monetary value of the beasts.”⁴¹

Professor Mqeke also opposes a monetary ceiling on the civil jurisdiction of customary courts on similar grounds. He argues:

“[I]n civil matters it will be difficult to put a monetary ceiling as the value of livestock differs from area to area. In matters of seduction and pregnancy a chief’s court should be competent to award damages fixed by the custom of the tribe in question, e.g. five head of cattle or their monetary value.”⁴²

The above reasoning is problematic. The number of animals payable was fixed at a time when ordinary people normally held large numbers of cattle. The scarcity of cattle today has made such payments more burdensome.

On the other hand, other respondents have submitted that customary courts should have the same monetary ceiling as Small Claims Courts, that is R3000,00 in civil matters, and a maximum of R500,00 fine in criminal cases.⁴³ Traditional leaders have objected to the suggestion that their jurisdiction be equated with that of Small Claims Courts in civil matters on the ground that the ceiling is too low. Nevertheless, at the workshops with traditional leaders in the provinces, there was general agreement that a monetary ceiling be imposed in civil cases although no amount was agreed upon. Suggestions ranged from R100,00 to R50 000,00.

Although limits are imposed on the jurisdiction of traditional courts in a number of countries, **African Rights** reports that in Zimbabwe, chiefs and headmen have found the upper limits of their civil jurisdiction ‘particularly problematic’. The chiefs say:

“We feel we are very much restricted over which cases we should sit and over which we should not. Take for instance *lobola* cases where one claims five or six head of cattle. If you value them [at Z\$500], this court has no jurisdiction to try that case or settle the

⁴¹ Koyana DS and Bekker JC – submission.

⁴² Mqeke’s submission.

⁴³ GH Van Rooyen (magistrate Greytown).

dispute between the parties. We have to refer them to the magistrates.. The claimants don't like to go all the way to the magistrate's court..."⁴⁴

The draft Bill provides for the imposition of a ceiling, but leaves the decision to the Minister to determine the ceiling from time to time. Thus, in clause 8(1) of the draft Bill, it is provided that a customary court may not hear a matter in which the claim or the value of any article claimed exceeds an amount to be determined by the Minister by notice in the Gazette, and clause 8(2) allows for the variation of the maximum amount by the Minister from time to time as circumstances require. An initial ceiling needs to be determined.

⁴⁴ *African Rights* "Justice in Zimbabwe" 1996 quoted in Joanna Stevens *Access to justice in Sub-Saharan Africa the role of traditional and informal justice systems* Penal Reform International (2000) 54.

CHAPTER 4

PROCEDURE AND EVIDENCE

4.1 Procedure in customary courts

According to the *Black Administration Act* and the statutes dealing with customary courts in former homelands, the procedure to be followed in resolving disputes is the customary law of procedure. Most commentators on customary procedure agree that it is simple, informal and flexible and puts the parties at ease.⁴⁵ This in turn makes them willing participants in seeking a resolution of the problem at issue. Each party is allowed to present his or her side of the story, to introduce witnesses and to question the other party and his or her witnesses. The procedure takes an inquisitorial form where the presiding adjudicator and his advisors do a lot of the questioning of the parties and the witnesses. In the absence of lawyers, the court does the examination and cross-examination. Even people who are not members of the court, but who are present in court may participate in the proceedings by posing questions to the parties. This community participation adds to the acceptability of the customary legal process.

The draft Bill confirms the use of the above procedure in customary courts by providing that "subject to this Act and other enactments, the customary law of procedure and evidence shall apply in customary courts."⁴⁶ There were no negative responses to the suggestion to maintain the traditional position in as far as the simplicity of proceedings, the inquisitorial nature of trials and public participation were concerned. However, the Joint Submission of CALS, CGE and the NLC took issue with the idea of public participation in the present chiefs' courts. It argued that in a number of areas women's participation is denied or highly restricted. It is said for instance that in the Mchunu tribe in KwaZulu-Natal, women are not permitted to bring cases before the chief's courts. The submission further refers to findings of research done in a village in Limpopo for this particular submission where it was found that "women are neither allowed to attend court proceedings, nor to question litigants. They are only allowed in court as complainants". On the other hand male members of the community were permitted to question litigants and participate

⁴⁵ For instance Dlamini C (supra) 24; Koyana DS "The indigenous constitutional system and the role of the customary courts today." Presented at the Public Hearing on Traditional Authorities and Customary Law and Practice. Constitutional Assembly, 12-13 May, 1995. See also Elias TO *The nature of African Customary Law* (1956).

⁴⁶ Clause 11.

in proceedings. The submission recommends that legislation expressly state that women are accorded equal status in traditional courts and should be allowed to participate freely.⁴⁷ It may, however, not be necessary to make such a specific reference to women's equal participation since clause 7(2) of the draft Bill already states that customary courts must give effect to Chapter 2 of the *Constitution*, in particular section 9 and section 39(2). Nevertheless, the further point made in the joint submission that there should be public awareness campaigns on this issue is appreciated and should be pursued.

During workshops with traditional leaders there was consensus that women should participate in proceedings like other members of the community. It was generally agreed that popular participation was a cornerstone of the traditional system of justice.

4.2 Penalty for false evidence

In the interest of simplicity and in order to encourage popular participation and rendering of assistance to the court to arrive at just decisions, the strict rules of evidence are not adhered to in customary courts. For instance, the rule against hearsay evidence does not apply in these courts.

In the Discussion Paper it was suggested that the giving of false evidence should be prohibited. Thus, in the first draft of the bill it was provided that persons who give evidence, whether on oath or not, which they know or believe to be false shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand. However, this would be a departure from traditional customary procedures where perjury is no offence.⁴⁸ The project committee on customary law decided to maintain the customary position and not to criminalise what may be false testimony.

⁴⁷ However, Mqoke argues that in most traditional authorities there is no gender discrimination.

⁴⁸ Bekker JC *Seymour's Customary Law in Southern Africa* 5 ed (1989) 29.

4.3 Summoning of witnesses and parties

In order to give credibility and respect to customary courts, the draft Bill includes a provision that empowers the court to summon any person who is a defendant in an action or who is required to give evidence.⁴⁹ The customary court is further empowered to order the arrest of a person who fails to appear or fails to remain in attendance until excused by the court. Such a person may be arrested and brought before the court by a messenger of the customary court, or if unable to do so, by a messenger of the magistrate's court or a police officer.⁵⁰

4.4 Contempt of Court

The draft Bill strengthens the hand of the customary courts further by providing for the offence of contempt of court. As Mqeke argues, people need courts with teeth otherwise they resort to kangaroo courts. A person commits the offence of contempt of the customary court if (1) he/she disobeys an order given by a customary court without lawful excuse, (2) insults a sitting of the court or wilfully disturbs the peace or the order of the proceedings in the court. A person found guilty of contempt of court may be summarily sentenced to pay a fine not exceeding fifty rand.⁵¹

4.5 Paralegals and record keeping of court proceedings

The proposal in the Discussion Paper that paralegals be appointed by the Ministry of Justice to customary courts, did not find favour with Koyana, Bekker, Kerr and participants in the provincial workshops.⁵² In the provincial workshops, the general feeling was that paralegals would undermine traditional leaders, and councillors would be rendered redundant. In those provinces where there was agreement with the suggestion of appointing paralegals, it was suggested that traditional leaders should recommend specific people to the Minister for appointment. Only in the North-West was there unreserved support for paralegals.

⁴⁹ Clause 8

⁵⁰ Clause 8(3)

⁵¹ Clause 17.

⁵² Mqeke on the other hand supports the use of paralegals in view of the abundance of such persons who are not adequately utilised. Advocate Peter Manda of the National Paralegal Institute strongly supported the use of paralegals in customary courts, especially as there are institutions to train them.

There was, however, unanimous support for the continuation and improvement of record-keeping in customary courts as recommended in the Discussion Paper. Traditional leaders were generally of the view that existing tribal authority clerks or secretaries should be trained in better record keeping. The question remains whether customary courts should be courts of record involving the recording of complete proceedings and whether the record should be used on appeal. The general view appears to be that customary courts are not equipped and are not likely to be equipped, both in material and human resources terms to carry out such a task. Rather, customary court clerks should make concise summaries of the case similar to the situation under existing chiefs' courts rules, "where immediately after pronouncement of judgement ...the chief shall prepare or cause to be prepared a written record in quadruplicate, containing the following particulars:-

- (a) Name of plaintiff
- (b) Name of defendant
- (c) Particulars of claim
- (d) Particulars of defence
- (e) Judgement
- (f) Date of judgement⁵³

The record must be forwarded to the magistrate of the area in which the defendant is resident.

Under the draft Bill, it is proposed that customary courts must keep written records of their proceedings containing the particulars of the case and the judgement.⁵⁴ Copies of these records of the cases heard by each court must be sent to the Commissioner for Customary Courts for the province in which the court falls. Currently, the original record is sent or delivered by messenger to the magistrate's court in whose area of jurisdiction the chief's court falls. Under current regulations, the traditional leader or a person designated by him or her compiles the record. The Rules provide that where due to illiteracy, the record cannot be made by the chief or someone under the chief, he or she may verbally furnish either personally or by messenger, the particulars of the case heard by him to the clerk of the magistrates court.⁵⁵ It is envisaged that under the new system, the customary courts will have a clerk who is literate

⁵³ Rule 6(1) of Chiefs and headmen's civil courts Rules, No R2082 of 1967 Government Gazette Extraordinary No 1929. See also clause 12(2) of the draft Bill.

⁵⁴ Clause 12

⁵⁵ Rule 6(6).

and who can compile a record for the purposes of the Act. It is not suggested that the full record be sent to the Commissioner because it is felt that the Commissioner would not have the capacity to peruse all the records. Rather, the Commissioner has the power to demand the record where it becomes necessary for purposes of an investigation into a complaint or for another purpose.

4.6 Legal Representation

One issue that has been a subject of debate is whether legal practitioners should have audience in customary courts. On the one hand, it is noted that in most African countries where customary courts or traditional courts are found, including South Africa, legal practitioners are barred from appearing in these courts on behalf of clients. On the other hand it is recognised that in the new South Africa, exclusion of legal practitioners from these courts could be in conflict with section 35 of the *Constitution*, at least with respect to persons accused of committing criminal offences.⁵⁶

A number of reasons have been advanced for excluding legal practitioners from traditional courts. Firstly, litigants in these courts are normally the very poor who cannot afford lawyers' fees, which means that in civil cases a poor litigant confronting or confronted by a wealthy opponent is likely to be prejudiced.⁵⁷

Secondly, the issues that come before these courts are usually simple cases, which do not need complicated legal arguments by counsel.⁵⁸ Participants in the process, as indicated above, are generally knowledgeable in customary law and need no assistance from lawyers.

Thirdly, lawyers tend to dwell on technicalities of law and procedure, which cause delays and in traditional courts would undermine the very essence of such courts, that is, expeditiousness in disposing of cases, flexibility and simplicity. As Chief Justice Cotran once said in respect of

⁵⁶ Section 35(3) states that every accused person has a right to a fair trial, which includes "(f) to choose, and be represented by a legal practitioner and to be informed of this right promptly".

⁵⁷ In this connection see also TW Bennett *Human Rights and African Customary Law* (1995) 78-9.

⁵⁸ Kerr, however, argues that customary law cases are not simple. He maintains that questions dealing with inheritance or marriage or land tenure may be complicated requiring argument by lawyers to assist the court. However, it may be countered that a lawyer addressing a complex issue to a group of lay men and women may not be assisting the court but making things more difficult.

a similar debarring of practitioners from Lesotho's customary courts: "there are several dozen local courts dotted around the country. They are easily accessible to most people, and at little expense, the disputes are simple and can adequately be dealt with by those courts. If representation was allowed as of right, cases would not be completed and one or the other party would be able, through delay, virtually to defeat the ends of justice."⁵⁹

Fourthly, legal representation would introduce a problem relating to language. One of the advantages of traditional courts, as indicated above, is that the language of the court is the local language of the community in the area of jurisdiction. The preferred lawyer may not speak or understand such language and may have to address the court in a language that members of the court do not understand. This would then necessitate the introduction of interpreters with the possible risk of distortion, not to mention additional cost.⁶⁰

In their submission on the Discussion Paper, Koyana and Bekker argue against introducing audience for legal practitioners in customary courts. They argue such a move would entail employment of court staff such as interpreters and clerks of court, providing equipment such as computers and fax machines to deal with lawyers. It would also mean training for presiding officers, rules of court, arranging legal aid on par with other courts etc.

On the other hand, some respondents have argued for audience for legal practitioners. Kerr for instance, argues that customary law and practice has always recognised the right of a person to speak on behalf of another in court as the latter's spokesman although such a person did not have the sole right to address the court. He refers to a 19th Century source where the phrase 'advocate for the defendant' is used.⁶¹ Kerr argues that those with skills should be allowed to speak irrespective of their qualifications. He opines: "if a court wishes to do justice according to customary law, it needs the participation of lawyers whose questions to those involved on the other side and whose arguments on the law will assist the court". However, it may be argued that the traditional leaders and their councillors are supposed to be the experts, the custodians of customary law, and should not need the expertise of lawyers to guide them on the law. At the same time any person attending the court is free to speak, whether in favour of a particular litigant or generally on the case, in accordance with customary law.

⁵⁹ *Mahloane v Letele* H.C. Civ/Apn/93/1974 quoted by Koyana and Bekker.

⁶⁰ Koyana and Bekker agree with this contention in their submission.

⁶¹ *Colonel McLean's Compendium of Kafir laws and Customs* (1858) 41 referred to by Kerr.

In short, the main reason for excluding legal practitioners is the real danger that allowing them would irrevocably change the very nature of conducting business in customary courts and rob the system of customary dispute resolution of many of its virtues. The purpose of the draft Bill is not to introduce customary courts that are unrecognisable by the people they are supposed to serve but to rationalise and make more efficient the traditional courts that have served communities for centuries.

On the question of possible prejudice to an accused person before the customary court, it is argued that the customary procedure to a large extent assures that justice will be done for the accused. This includes the fact that the accused is assisted by any person he or she chooses, that the presiding person can ask questions for clarification and that any person attending court may ask questions and speak on the matter before the court in a way that may assist the court to arrive at the truth. It is thus suggested that exclusion of legal practitioners in their professional capacity from representing clients in customary courts would not fall foul of constitutional requirements but on the contrary is consistent with the purpose of the *Constitution* to respect cultural diversity and the place of customary law in the national legal system.

During the provincial workshops, a specific question was asked of the participants as to whether legal practitioners should be allowed in customary courts. The general view in all the provinces was that they should be barred from appearing in these courts. The preponderance of academic opinion in the submissions was also that legal practitioners should continue to be excluded from customary courts.

The draft Bill comes out with a position that allows for representation in accordance with customary law. The understanding here is that by implication legal practitioners are excluded since they are not known to customary law. 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 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.⁶²

⁶² The provision reads as follows: "A person who is a party to a matter before a customary court may be represented by any other person of his or her choice in accordance with customary law." (Clause 15)

CHAPTER 5

PENALTIES

5.1 Penalties in criminal matters

5.1.1 Maximum fines

The responses to the Discussion Paper were not very helpful in making suggestions to come up with an acceptable maximum amount of fine. One respondent suggested that the fine should not exceed R200,00⁶³ while another suggested that it should be the same as that of the Small Claims Court, that is R500,00.⁶⁴ Although the matter was specifically raised during provincial workshops, no consensus emerged. Suggestions of a monetary ceiling in criminal matters ranged from R1 000,00 to R10 000, 00. Considering the nature of the offences and the level of poverty in rural areas, the amount of R500,00 would seem to be a reasonable ceiling. However, the problem is how to determine the equivalent in terms of stock if the payment of fines in the form of stock is to continue to be permissible. In Limpopo it was suggested that a goat should be valued at R200,00, a sheep at R300,00 and a large beast at R1 000,00. In KwaZulu-Natal the maximum fine that can be imposed is R1 000,00 or one large beast, implying that one large beast is equivalent to R1 000,00. If the maximum fine is to be fixed at R500,00 as with small Claims Courts, it should mean that fines should be paid in money or small stock. There should be no problem with this, given the less serious nature of offences triable in these courts. On the other hand, the Minister could adopt the KwaZulu-Natal limit of R1000,00 and make that equivalent to a large beast.

5.1.2 What happens to the fines levied?

A matter that turned out to be controversial during the consultation process was where the money from fines should be deposited and how it should be used. In the Discussion Paper, the recommendation was that fines should go into a general revenue fund either at the provincial or national level to be utilised for the direct benefit of the community from which such fines have been levied. This was intended to avoid the situation whereby the fines are appropriated for the

⁶³ Mqoke RB.

⁶⁴ Van Rooyen GH (Magistrate Greytown).

personal benefit of the traditional leader. There was mixed reaction to this suggestion during the provincial workshops. On the one hand, in some provinces there was support for the fines being deposited in the provincial revenue fund, leaving it to the provincial government to take care of the customary courts and other needs of the communities. On the other hand in other provinces, the view was that the fines should be deposited in the account of the tribal authority in whose area they were collected, to be applied for the needs of the community.⁶⁵ In the latter case, it was suggested that the funds should be audited and their spending monitored by the provincial treasury. Provision for such monitoring and auditing should be provided for by ministerial regulations.

The draft Bill comes up with a compromise that leaves the fines in the community concerned but attempts to guard against misappropriation. Clause 19 states that:

- “(1) A customary court must keep a special account into which all fines paid to the court must be deposited.
- (2) Monies from an account established under subsection (1) must be used for the development of the area over which the court has jurisdiction.”

This provision should satisfy most of those who objected to the original recommendation. There will, however, be a need to monitor and audit these special accounts by the office of the Commissioner for Customary Courts, (discussed later in this report).

5.2 Alternative forms of punishment

5.2.1 Corporal Punishment

During some of the workshops, support was expressed by traditional leaders for the reintroduction of corporal punishment in respect of juvenile offenders. It was argued that since the juvenile is likely to be unemployed, if he is fined it is the parents who end up paying and the juvenile does not feel the punishment.⁶⁶ Therefore, it was argued, corporal punishment is the more effective punishment. However, in light of the recent case of *Christian Education of SA*

⁶⁵ Prof Koyana and Bekker support this position on the ground that payment of fines into tribal coffers is traditionally part and parcel of the entire system; that like local government fines, they should be left where they are levied.

⁶⁶ Concerns on corporal punishment were raised in Limpopo, Mpumalanga and North West Province.

*v Minister of Education*⁶⁷ where the Constitutional Court again considered the issue of corporal punishment for children and said there was an obligation on the state to “take appropriate steps to reduce violence in public and private life” and emphasised the duty to protect children, it would not be lawful to allow customary courts to administer corporal punishment to any offender of any age. It will be recalled that in *S v Williams*,⁶⁸ the Constitutional Court rejected the argument that corporal punishment was an effective deterrent and a convenient and beneficial alternative to other forms of punishment. The court held that there were other effective forms of punishment, which were not cruel and degrading, such as community service.⁶⁹ The *Abolition of Corporal Punishment Act* 33 of 1997 now prohibits corporal punishment.

5.2.2 Orders to keep the peace and suspended sentences

The draft Bill provides that a person convicted of an offence before a customary court, may be ordered by the court to keep the peace and be of good behaviour for a term not exceeding three years.⁷⁰ This is a sanction instead of or in addition to any punishment that the customary court may impose. The provision is intended to maintain the spirit of reconciliation and reintegration of offenders into society rather than retribution.

Another sentencing option open to the customary court is a suspended sentence.⁷¹ The whole or part of the sentence imposed may be suspended for a period not exceeding three years and may be subject to conditions such as payment of compensation to the victim of the offence. This option is available to the other courts and is even more appropriate to the customary court where the purpose of the proceedings is reconciliation and rehabilitation.

5.3 Penalty for taking rewards

Under the draft Bill⁷², it is an offence for a member of the customary court to take a reward either for his or her benefit or for the benefit of another person in consideration for doing or not doing an act as a member of the court. This is intended to discourage corruption and to promote the independence of the court. As with any other court, members of customary courts

⁶⁷ 2000 (4) SA 757(CC).

⁶⁸ 1995 (3) SA 632 (CC).

⁶⁹ Clause 23 of the draft Bill. Community service as an alternative punishment was suggested at the workshop in the Free State.

⁷⁰ Clause 21 of the draft Bill.

⁷¹ Clause 22 of the draft Bill.

⁷² Clause 20 of the draft Bill.

should conduct the cases before them “impartially and without fear, favour or prejudice” in accordance with section 165(2) of the *Constitution*.⁷³

⁷³

Members of customary courts need to be trained on the constitutional imperative of judicial independence. Consideration should be given also to the question as to whether they should be required to take an oath to act impartially, without fear or prejudice as per item 6(1) of schedule 2 of the Constitution.

CHAPTER 6

SUPERVISION OF CUSTOMARY COURTS

The idea of supervision or monitoring of customary courts by an official of the Ministry of Justice was floated in the Discussion Paper. The idea was to set up a secretariat to supervise traditional courts, to act as a complaints directorate, channel reviews, oversee the budget and conditions of service, and generally to regulate and promote traditional courts in a way that acknowledges how they differ from western-style courts in their culture, composition and functioning. This would be similar to the office of the Commissioner for Customary Courts in Botswana and the Judicial Commissioner in Lesotho and Swaziland. Respondents to the Discussion paper were asked to comment on whether such a secretariat was advisable in South Africa.

Most of the responses on this issue were positive. For instance, Professor Mqoke states:

“The office of a Commissioner for Customary Courts would be a great improvement as such an officer would coordinate judicial services in the chiefs’ courts and promote training of the court personnel. Such an officer would also strive for uniformity on such crucial issues as jurisdiction, the imposition of appropriate sentence and the identification of areas where training is urgently needed in order to upgrade the quality of justice in these courts.”

On the other hand, Advocate Olivier argues that a separate secretariat should not be set up but rather that coordination and supervision should be done within existing structures of the Ministry of Justice. He argues that a separate institution would be an unnecessary burden on the tax payer. PB Monareng also opposes the idea on the ground that it would undermine the authority of the traditional leaders.

During the workshops with traditional leaders and other stakeholders in the provinces, there was support for the establishment of a secretariat and the office of a Commissioner for Customary Courts (which is called the ‘Registrar for Customary Courts’ in the draft Bill) and especially for the coordination and training aspect thereof. The only exception was KwaZulu- Natal, where the view was expressed that supervision should be done by the local magistrate in his/her area of jurisdiction as is the case at present. Professor Kerr supports the view of KwaZulu-Natal.

The different views were considered in the project committee. It seemed to the committee that the preponderance of opinion was in favour of a Commissioner for Customary Courts or secretariat. The preponderant view was that keeping the supervision and monitoring of customary courts away from magistrates courts and leaving the process to a dedicated office would insulate customary law and its adjudicatory procedures from encroachment by the common law through too much association with magistrates' courts. The commission would preserve a strictly customary universe, sufficient unto itself until human rights and constitutional considerations compelled referring out of a matter to the general law system where it could progress all the way to the Constitutional Court if necessary. Thus, the creation of the office of a commissioner to supervise the customary courts does not mean shielding customary law abuse from constitutional or further judicial scrutiny or review. Such a dedicated office together with the creation of customary appeal courts would keep the promise to the rural people that the reform process would honour the way they dispense justice and would deliver to them customary law that was recognisable and that would hold sway in the bulk of their affairs. At the same time, the system would ensure that the law and procedure of customary courts was consistent with the values of the Constitution. Based on the above responses and considerations, the draft Bill provides for the establishment of the office of Commissioner for Customary Courts (which is called the Registrar for Customary Courts in the draft Bill).⁷⁴

Although the original idea was to have one national secretariat with a Commissioner for Customary Courts assisted by assistant Commissioners in the relevant provinces, the project committee on customary law decided that it is better to decentralise the process and have a Commissioner for Customary Courts with a secretariat in each province where customary courts exist. The draft Bill reflects this position.⁷⁵

The other issue that arose in relation to the office of Commissioner for Customary Courts is whether the commissioner should have judicial powers or only administrative powers. On the one hand, it was argued that cases emanating from customary courts, especially civil cases, should be kept out of the "western" magistrates' courts. In such cases, reviews would go to the Commissioner for Customary Courts who would dispose of them. The Commissioner would then have the power to vary the decision of the customary court or refer the case back for retrial by the same or another court. On the other hand, there was the view that the Commissioner should not have any judicial powers but should serve purely administrative and fiscal duties as

⁷⁴ Clauses 24 and 25 of the draft Bill.

⁷⁵ Ibid

the controller of the courts and as a kind of jurisdictional traffic officer directing matters out when the need arises or keeping them where they are if no injustice has or is likely to occur. It is thought that in accordance with the principle of separation of powers, a person performing predominantly administrative functions should not at the same time function as a judicial officer.⁷⁶

A middle way is adopted in the draft Bill. According to clause 24 the Commissioner for Customary Courts shall largely have administrative functions. His or her functions include: (a) advising the Minister in respect of the constitution, jurisdiction and membership of customary courts, (b) subject to the general and special directions of the Minister, the guidance and supervision of customary courts and (c) such other matters and duties as may from time to time be assigned to him by the Minister. In addition to these powers, the Commissioner may, on application by one of the parties to a dispute or by an accused person appearing before a customary court, inquire into a matter and, if it appears to him to be in the interests of justice, order the transfer of the matter for hearing by another customary court or a magistrate's court of competent jurisdiction. The Commissioner may, however, decline to exercise the power to transfer if such transfer is not justified.

⁷⁶ See *De Lange v Smuts NO* 1998 SA 785 (CC), 1998 (7) BCLR 779 (CC); *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC). The principle of separation of powers does not appear to apply to traditional leaders and their councillors but should apply to a non-traditional creation such as a customary court's commissioner.

CHAPTER 7

OPTING OUT OF THE JURISDICTION OF A CUSTOMARY COURT

It is indicated above that the Commissioner for Customary Courts (Registrar for Customary Courts) shall have the power to transfer cases to other courts upon application by one of the litigants. This may happen if a party to a dispute, which would ordinarily be heard by a customary court, considers that such a court: “(a) is unreasonably delaying adjudication of the dispute; or (b) has unreasonably refused to hear and adjudicate upon that dispute”.⁷⁷ He or she may report the matter to the Commissioner for Customary Courts to have the matter transferred to another court. The question is, however, can a party to a dispute demand transfer of his or her case to a magistrate’s court purely on the basis that he or she does not want to have the case heard and determined by a customary court.

In the Discussion Paper, the question was raised whether opting out should be permitted particularly for accused persons in criminal cases.⁷⁸ A number of respondents supported the idea of opting out.⁷⁹ On the other hand, during workshops in the provinces there was strong opposition by the traditional leaders to the idea of opting out. They argued that it was degrading to the customary courts for the litigants to demand transfer to other types of courts and that opting out would undermine the status of the courts and the confidence that the people have in them.⁸⁰ They further argued that an aggrieved party always has the right to appeal. This is perhaps to be expected. Nevertheless, given the controversy surrounding the issue of the independence and impartiality of customary courts, it seems 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. Thus, in clause 28(5) the draft Bill provides for opting out of the jurisdiction of a customary court in favour of another court of competent jurisdiction.

⁷⁷ Clause 28 of the draft Bill.

⁷⁸ Para4.4.1

⁷⁹ eg. Professor Kerr, Advocate Olivier SC, Professor Mqoke and the Joint Submission by CALS, CGE and NLC.

⁸⁰ PB Monareng argues that: “If opting out is permitted, the Traditional Courts will be regarded as second class courts and this will tarnish the dignity of those who preside in them.”

CHAPTER 8

APPEALS

The hierarchy of courts for purposes of appeals from customary courts remains an unresolved issue. The main issues of debate are: the number of tiers in the customary system and once the tiers are decided, where such courts should fit in the general hierarchy of courts in the country. A major question is whether customary courts should be below the magistrates' courts with appeals going to the latter or whether customary courts should have a unique and distinct hierarchy including customary courts of appeal (notionally at the same level as magistrates courts) from which appeals would go to the High court, the Supreme Court of Appeal and, where applicable, to the Constitutional Court.

One view has been in favour of including the magistrate's court in the system of appeals and reviews on the ground that it is in a better position to check on customary courts for any inconsistency with the Constitution and respect for human rights in their decisions. Another argument for appeals to the magistrate's court is that it eliminates the need and expense of setting up customary courts of appeal. The other view is that magistrates are likely to reinterpret customary law in a way that undermines the whole system of customary justice and that to avoid this the customary system should remain distinct with its own court of appeal but with the possibility of further appeals to the superior courts.

The draft Bill includes a number of alternatives which are proposed in clause 27. The first alternative envisages appeals going from the lower level customary court to the higher level customary courts and if there is no higher level customary court, to the magistrate's court.⁸¹ This would leave the customary court of appeal out of the system, making the magistrate's court an important step in the appeal system.

The second alternative in the draft Bill envisages appeals from the lower customary court to a higher level customary court and where there is no higher level customary court, to a customary court of appeal.⁸² This model leaves out the magistrate's court and emphasises the uniqueness

⁸¹ Clause 28(1)(a) and (b).

⁸² Second alternative to clause 27(a) and (b).

of the customary system. Further appeals would go to the High Court, the Supreme Court of Appeal and the Constitutional Court.

The third alternative envisages a role for both the magistrate's court and the customary court of appeal without increasing the number of tiers in the administration of justice. It provides for civil appeals (where the law applicable would be customary law) to go from the customary court to the customary court of appeal. At the same time it provides for appeals in criminal matters to go to magistrates' courts, which would have better expertise on such matters. Another justification for criminal appeals going to magistrates' courts would be that accused persons would be allowed to have legal practitioners representing them and would be able to invoke the application of section 35 of the Constitution regarding the rights of accused persons.

Two further alternatives were debated by the project committee on customary law but were considered unsatisfactory and therefore left out of the draft. One model would have seen appeals from customary courts going straight to the High Court and thus equating the higher level of customary court to the magistrate's court. The advantage of this model would be cutting down the number of tiers in the system to a minimum. However, it would clutter the High Court with simple cases that would better be resolved at a lower level. The other model not included in the draft would have seen appeals from customary courts going to the customary court of appeal with a further appeal to the magistrate's court and then the superior courts. This model would have the highest number of tiers in the system and was rejected on the ground that it would unnecessarily prolong finality of cases. It would also give a demeaning impression of the customary court of appeal.

In terms of the length of the appeal process there will be variation from area to area. Some areas have formal courts at village level under the control or oversight of the headman. It is from such lower level customary courts that appeals will lie to the 'classical' or typical customary courts under chiefs (higher level customary courts). In other areas, however, no formal headmen's courts exist. At most, there are arbitration forums performing a quasi-judicial role and from which unresolved cases go to the customary court under a chief. However, it is envisaged that where a request is made to convert such informal forums to courts, they will be recognized as lower customary courts.

The final decision has to be made from the three options: the one which allows appeals from customary courts to a customary court of appeal, that which allows such appeals to go to the

magistrate's court and hence to the superior courts and that which would have civil appeals go to the customary court of appeal while criminal appeals went to the magistrate's court. Whichever option is adopted will involve a 5-tier court system, excluding the Constitutional Court.

CHAPTER 9

CONCLUSION

The need for legislation to consolidate and streamline the various laws currently governing the operation of customary laws was recognised by government. The South African Law Commission undertook the task of producing a draft Bill for the above purpose.

A working paper discussing the issues involved and containing recommendations as to how the courts should function in future was circulated for comment and seminars and workshops were organised around the Discussion Paper.

The report collates the different and sometimes widely divergent views on the role and functioning of customary courts. Although there was general agreement on most issues, there were also issues on which there was serious disagreement among stakeholders.

Some of the contentious issues are: the constitution of customary courts, jurisdiction over family matters and over domestic violence; imposition of monetary limitation of jurisdiction both in civil and criminal matters; how to deal with fines; appeals from customary courts, supervision of the courts and the exclusion of legal representation. In resolving the disputes over these issues, the Commission attempted to balance the interests of all stakeholders while taking into account human rights and constitutional considerations.

Some of the problematic issues are not finalised. The draft Bill includes alternatives on such issues leaving room for finalisation after further discussion between the Commission and the Ministry of Justice. One such issue is the constitution of a customary court and another is the process of appeals. Ultimately, these unresolved issues are matters of policy and may have to be decided at a political level.

There was divergence of views particularly between women's groups and traditional leaders. However, it is hoped that the draft Bill will be generally acceptable to all interest groups and represents necessary and desirable progress in the functioning of customary courts.

ANNEXURE A

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To provide for the establishment and jurisdiction of customary courts; the consolidation of the different provisions governing chiefs' courts and to modernise them so that their operation is in conformity with the principle of democracy and other values underlying the Constitution and to provide for matters connected thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

1. Definitions

In this Act, unless the context otherwise indicates -

'customary court' means a customary court other than a customary court of appeal established under the provisions of section 2;

'customary court of appeal' means a customary court of appeal established under the provisions of section 26;

‘Registrar for Customary Courts’ means an officer appointed under the provisions of sections 24 or 25;

‘Constitution’ means the Constitution of the Republic of South Africa Act, 108 of 1996

‘Minister’ means the Minister of Justice and Constitutional Development;

‘prescribed’ means prescribed by regulation made under section 31;

‘Traditional leader’ means any person who in terms of customary law or any other law holds a position in a traditional ruling hierarchy.

2. Establishment of customary courts

(1) The Minister may, by notice published in the Gazette, establish a customary court for an area to be specified in the notice.

(2) A customary court established under subsection (1) shall be a court of law and may, within the area specified in its authority, exercise the jurisdiction conferred by this Act, unless that jurisdiction is specifically limited by the Minister in terms of subsection (1).

(3) The Minister may, by notice in the Gazette, suspend, cancel or vary any notice issued under subsection (1).

3. Levels of customary courts

(1) Customary courts shall be of such different levels as are recognised in customary law and may exercise jurisdiction only within the limits prescribed for such level.

(2) The authorisation for a customary court must specify the level to which the court belongs, together with the limits within which it may exercise jurisdiction.

4. Constitution of customary courts

A customary court must be constituted in accordance with customary law: Provided that in accordance with section 9 of the Constitution and section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, no less than half the members constituting the court must be women.

ALTERNATIVELY

4. Constitution of customary courts

A customary court is constituted in accordance with customary law: Provided that in constituting the court effect shall be given to section 9(3) of the Constitution and section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 as to the need for the reasonable representation of both men and women in public institutions.

ALTERNATIVELY

4. Constitution of Customary Courts

(1) Subject to subsection (2) a customary court is constituted in accordance with customary law.

(2) In order to comply with section 9 (3) of the Constitution a customary court must include both men and women in its composition.

5. Civil Jurisdiction

Subject to this Act and any other enactment, a customary court has jurisdiction to hear any civil case in which customary law is the law applicable where-

- (a) the defendant is normally resident within the court's area of jurisdiction;
- (b) the cause of action or any element thereof arose within such area; or
- (c) the defendant consents to the jurisdiction of the court:

Provided that, in proceedings relating to immovable property, action may be instituted only in a customary court within whose area of jurisdiction the property is situated.

6. Criminal jurisdiction

(1) Subject to this Act and any other enactment, a customary court has jurisdiction to hear any criminal matter in which the accused is charged with having committed an offence wholly or partly within the court's area of jurisdiction or with having been an accessory to the commission of such an offence.

(2) Notwithstanding the provisions of subsection (1), a customary court has no jurisdiction over any of the offences listed in Schedule I of this Act.

7. Laws to be applied

(1) Subject to this Act and any other enactment, a customary court is competent to apply-

- (a) customary law, whether codified or uncodified; and
- (b) the provisions of any other law which the court may be authorised by law to apply.

(2) Customary courts must give effect to Chapter 2 of the Constitution, in particular section 9 and section 39(2).

8. Matters beyond the jurisdiction of customary courts

(1) A customary court does not have jurisdiction in any case -

- (a) where, the claim is not determinable by customary law;
- (b) subject to subsection (2), where the claim or the value of any article claimed exceeds an amount determined by the Minister by notice in the Gazette;
- (c) to determine the validity, effect or interpretation of any will;
- (d) to dissolve any marriage;
- (e) to determine the custody or guardianship of minors; and
- (f) to determine the liability of any person to maintain another.

(2) The Minister may, by notice in the Gazette, amend the monetary limits of jurisdiction of customary courts as determined in accordance with paragraph (b) of sub-section (1): Provided that no such amendment shall have effect in relation to any case instituted in the customary court concerned before the date of commencement of the notice. The Minister may, in making the determinations, prescribe different amounts in respect of different classes of case.

(3) A traditional leader shall not be precluded from engaging in a dispute resolution exercise aimed at reconciling the parties to a dispute relating to marriage.

9. Summoning of witnesses and parties

(1) Subject to this Act or any other enactment, a customary court has the power to summon before it any person who is a defendant in an action or is required to give evidence.

(2) If a person duly summoned under subsection (1) fails to appear or fails to remain in attendance until excused by the court, the court may order that person's arrest.

(3) Where, under subsection (2), a customary court orders a person to be arrested, that person may be arrested and brought immediately before the court either by the messenger or, if the messenger is unable to effect the arrest, by a messenger of the magistrate's court or a police officer and may be dealt with in accordance with section 14.

10. Procedure in customary courts

Subject to this Act and any other enactment, the customary law of procedure and evidence shall apply in customary courts.

11. Language of customary courts

(1) Subject to the provisions of subsection (2), the proceedings of a customary court and the records thereof must be in the language most widely spoken in the area of the court's jurisdiction.

(2) If any of the parties does not understand the language of the court, an interpreter must be provided.

12. Record of proceedings

(1) Customary courts must keep written records of their proceedings, and every three months copies of these records must be sent to the Registrar for Customary Courts for the province.

(2) The record must contain the following particulars:

(a) in civil proceedings –

- (i) a serial number for the case;
- (ii) a statement of the claim;
- (iii) the date on which the claim was heard;
- (iv) the names and addresses of the claimant and his or her witnesses;
- (v) the names and addresses of the defendant and his or her witnesses;
- (vi) a brief description of the case;
- (vii) the decision of the court; and
- (viii) a list of the documentary exhibits, if any.

(b) in criminal proceedings-

- (i) a serial number for the case;
- (ii) a statement of the charge against the accused;
- (iii) the date on which the case was heard;
- (iv) the names and addresses of the accused and her/his witnesses;
- (v) the names and addresses of the witnesses who testified against the accused;
- (vi) a brief description of the case against the accused;
- (vii) the decision of the court and if the accused was found guilty, the sentence imposed; and
- (viii) a list of exhibits, if any.

13. Open court

(1) Customary courts are open to members of the public both male and female: Provided that a court may, if it deems it necessary at any stage of a trial involving marital relations, order that all members of the public or a particular person or group of persons may not remain in the court.

(2) Court proceedings must be conducted in the presence of both parties to the matter and the court must allow the full participation of all interested parties without discrimination on grounds of race, sex or gender.

14. Contempt of customary courts

(1) Any person who without lawful excuse disobeys an order given by a customary court is guilty of contempt of court.

(2) Any person who insults a customary court or any of its members during a sitting of the court or willfully disturbs the peace or order of the proceedings in the court is guilty of contempt of court and the court may order that person to be excluded from further proceedings.

(3) A person who commits an offence under sub-section (1) or (2), may be summarily sentenced to pay a fine not exceeding fifty rand.

15. Representation

A person who is a party to a matter before a customary court, may be represented by any other person of his or her choice in accordance with customary law.

16. Recovery of fines, damages and other monetary penalties

A customary court may order that any fine, damages or other payment be paid in money or in kind, in one payment or by installment and at a time or times it thinks just.

17. Compensation to aggrieved persons

A customary court may order that any fine or part thereof be paid to a person injured by an act or omission for which the fine was imposed, on condition that such a person, if he or she accepts the payment, may not bring an action to recover damages for the injury he or she sustained.

18. Enforcement of judgments

(1) Where a customary court's judgment is not satisfied within the period specified by the court, the person in whose favour the judgment was given may register the judgment at the magistrate's court within whose area of jurisdiction the customary court is situated by lodging with the clerk of the magistrate's court a copy of the judgment certified by the clerk of the customary court.

(2) The clerk of the magistrate's court must, at the request of a person who has registered a judgement under subsection (1), issue an order of execution for the judgement concerned.

(3) An order issued under subsection (2) must be executed by a messenger of the magistrate's court as if the judgement were a judgement of the magistrate's court: Provided that an order may not be executed while the final determination of any appeal which has been lodged against the judgement concerned, is pending.

(4) If more than two years have elapsed since a judgement was pronounced, it may not be registered under subsection (1) unless it is revived either by the court in which it was pronounced or by any other customary court having jurisdiction over the judgement debtor.

19. Fines to be paid into special account

(1) A customary court must keep a special account into which all fines paid to the court must be deposited.

(2) Monies from an account established under subsection (1) must be used for the development of the area over which the court has jurisdiction.

(3) The traditional authority in whose area of jurisdiction the court is situated, shall administer the account.

20. Members of customary courts taking rewards

Members of customary courts who accept or attempt to obtain, either for their own benefit or for the benefit of any other person, any gratification as a reward for doing or not doing an act as a member of a court are guilty of an offence and, may, on conviction, be liable to a fine not exceeding one thousand rand.

21. Orders to keep the peace

Instead of, or in addition to, any punishment to which they are liable, a person convicted of an offence before a customary court under the provisions of this Act may be ordered to keep the peace and be of good behaviour for a term not exceeding three years.

22. Suspended sentences

Whenever a customary court convicts a person of any offence, the court may pass sentence but order that the operation of the whole or any part of the sentence be suspended for a period not exceeding three years subject to any conditions specified by the court, whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise.

23. Sentence of community service

A person convicted of an offence before a customary court may be sentenced to community service under the supervision of the traditional authority in whose area of jurisdiction the offence was committed, for a period not exceeding three months: Provided that community service shall not include service on the personal property of a traditional leader or other public official.

24. Registrar for Customary Courts

(1) The Minister may, by notice in the Gazette, appoint an officer in the public service to be a Registrar for Customary Courts for the purpose of this Act in respect of each province in which

customary courts are established.

- (2) The functions of the Registrar for Customary Courts shall include –
- (a) advising the Minister in respect of the constitution, jurisdiction and membership of customary courts;
 - (b) subject to the general and special directions of the Minister, the guidance and supervision of customary courts;
 - (c) transfer of cases from one court to another where appropriate; and
 - (d) such other powers and duties as may from time to time be assigned to him or her by the Minister.

25. Assistant Registrar for Customary Courts

(1) The Minister may, by notice in the Gazette, appoint officers in the public service to be Assistant Registrar for Customary Courts for the purposes of this Act.

(2) An Assistant Registrar for Customary Courts shall discharge such of the functions of the Registrar for Customary Courts under this Act as the Registrar for Customary Courts may, from time to time by writing direct, and references in this Act to the Registrar for Customary Courts shall be construed to include an Assistant Registrar for Customary Courts when acting in accordance with such direction.

26. Customary Courts of Appeal

(1) The Minister may, by notice establish customary courts of appeal to hear and determine such cases as he may specify in the notice.

(2) A customary court of appeal may sit with assessors whenever the court deems it necessary to do so.

(3) A customary court of appeal shall consist of three persons of whom one shall be appointed, by the Minister, to be the president.

27. Appeals

Any person aggrieved by an order or decision of a customary court may, within 30 days from the date of that order or decision, appeal:

- (a) in the case of a lower customary court, to a higher level of customary court or, where there is no higher level customary court, to the magistrates court; and
- (b) in the case of a customary court at the higher level, to a magistrate's court.

ALTERNATIVELY

27. Appeals

(1) Any person aggrieved by an order or decision of a customary court may, within 30 days from the date of that order or decision, appeal to a higher level customary court or, if there is no higher customary court, to the customary court of appeal.

(2) Any person aggrieved by any order or decision of a customary court of appeal may, within 30 days of that order or decision, appeal to the High Court in whose area of jurisdiction such a customary court of appeal is situated: Provided that -

- (i) an appeal to the High Court under this section shall lie only in cases where the status of any person is at issue or where the amount of the judgement exceeds one thousand rand;
- (ii) notwithstanding the provisions of paragraph (i) any judge of the High Court sitting in chambers may, on the application of any court or person concerned, grant special leave to appeal against any order or decision made or given by a customary court of appeal under this Act.

(3) Leave to appeal out of time to any court referred to in this section may be given by that court upon such terms as it deems just.

(4) After making an order or giving its decision, a customary court must advise the losing party of his or her right to appeal.

ALTERNATIVELY**27. Appeals****(1) Civil Appeals**

- (a) Any person aggrieved by an order or decision of a customary court in a civil matter may, within 30 days from the date of that order or decision, appeal to a higher level customary court or, if there is no higher customary court, to the customary court of appeal.
- (b) Any person aggrieved by any order or decision of a customary court of appeal may, within 30 days of that order or decision, appeal to the High Court in whose area of jurisdiction such a customary court of appeal is situated: Provided that -
 - (i) an appeal to the High Court under this sub-section shall lie only in cases where the status of any person is at issue or where the amount of the judgement exceeds one thousand rand;
 - (ii) notwithstanding the provisions of paragraph (i) any judge of the High Court sitting in chambers may on the application of any court or person concerned grant special leave to appeal against any order or decision made or given by a customary court of appeal under this Act.

(2) Criminal appeals

Any person aggrieved by an order or decision of a customary court may, within 30 days from the date of that order or decision, appeal:

- (a) in the case of a lower customary court, to a higher level of customary court or, where there is no higher level customary court, to the magistrates court;
- (b) in the case of a customary court at the higher level, to a magistrate's court.

(3) Leave to appeal out of time to any court referred to in this section may be given by that court upon such terms as it deems just.

(4) After making an order or giving its decision, a customary court must advise the losing party of his or her right to appeal.

28. Transfer of cases

- (1) Where in any proceedings before a customary court any party demands that the case be transferred to some other court, the proceedings shall be suspended forthwith and the matter reported to the Registrar for Customary Courts.
- (2) If any person who is a party to a dispute which would ordinarily be heard by a customary court considers that such court –
 - (a) is unreasonably delaying adjudication of that dispute; or
 - (b) has unreasonably refused to hear and adjudicate upon that dispute, he or she may report the matter to the Registrar for Customary Courts.
- (3) If the Registrar for Customary Courts receives a report under subsection (1) or (2), he or she shall make such enquiry as he may deem necessary and –
 - (a) if he or she considers that it would be in the interest of justice to do so, transfer the case for hearing and determination by some other customary court or a magistrate's court of competent jurisdiction; or
 - (b) notify the party and court concerned that he declines to exercise his powers under this section in relation to that case, whereupon any suspension of proceedings under subsection (1) shall cease.
- (4) If proceedings are transferred from a customary court to another customary court or to a magistrate's court under the provisions of this section, that other court shall commence proceedings afresh.
- (5) In criminal proceedings, the accused person shall have the right to demand that the case be transferred to another court of competent jurisdiction.
- (6) If any court exercises or attempts to exercise judicial authority contrary to subsection (1), the person presiding over such court and every person sitting as a member thereof shall be guilty of an offence and liable to a fine not exceeding two thousand rand or to imprisonment for a period not exceeding six months.

29. Procedure on transfer

(1) When a case is transferred from a customary court to a magistrate's court, whether for trial or re-trial, by an order under section 28 or 30, that customary court shall forward the record of the case to the magistrate's court, and thereupon the magistrate's court shall proceed to the trial or retrial of the case as though in criminal proceedings, a complaint of facts constituting the offence had been made to the court and, in civil proceedings, as though a claim therein had been made or filed in the court.

(2) In any case heard by a magistrate's court under subsection (1), the court concerned may summon to its assistance one or more persons to sit and act as assessors in an advisory capacity. It shall be the duty of the assessor or assessors to give, either in open court or otherwise, such assistance and advice as the officer presiding over the magistrate's court may require, but the decision shall be vested exclusively in the presiding officer. The agreement or disagreement of the assessor or assessors with the decision of the presiding officer shall be noted on the record.

30. Powers of Registrar for Customary Court order retrial

The Registrar for Customary Courts shall at all times have access to any customary court within her or his area of jurisdiction and to the records thereof, and on the application of any such customary court or of any person concerned or of his/her own motion may, for reasons which he shall record in writing -

- (a) order any case to be re-tried either before the same customary court or before any other customary court of competent jurisdiction; or
- (b) transfer any cause or matter, whether civil or criminal, either before trial or at any stage of the proceedings, to any court of competent jurisdiction.

31. Regulations

The Minister may make rules for giving effect to the provisions of this Act including rules prescribing-

- (a) the fees to be charged in customary courts;
- (b) the fees or expenses payable to persons giving evidence under this Act;
- (c) the practice and procedure of customary courts and Customary Courts of

Appeal.

- (d) the disposal and application of fines and fees received by customary courts;
- (e) the employment of messengers in customary courts and providing for the payment of fees to messengers by persons requiring the service of process and the performance of other functions in connection with civil proceedings and civil appeal proceedings therein;
- (f) the duties of and fees payable to clerks and other officers attached to customary courts;
- (g) the custody of records and property of customary courts;
- (h) the levels of customary courts; and
- (i) a period within which existing customary courts will continue to function subject to the provisions of sections 4 of this Act.

32. Repeal of laws

The laws mentioned in Schedule 2 to this Act are repealed to the extent indicated.

33. Short title and commencement

This Act is called the Traditional Courts Act, 2003 and comes into operation on a date to be determined by the President.

SCHEDULE 1

Offences which may not be tried by a customary court under subsection (2) of section 6:

Treason.

Public violence,

Sedition.

Murder.

Culpable homicide.

Rape.

Robbery.

Assault with intent to do grievous bodily harm.

Assault with intent to commit murder, rape or robbery,

Indecent assault.

Arson.

Bigamy.

Crimen injuria.

Abortion,

Abduction.

Bestiality

Bribery.

Breaking or entering any premises with intent to commit an offence either at common law or in contravention of any statute.

Receiving any stolen property knowing it to be stolen.

Fraud.

Forgery or uttering a forged document knowing it to be forged.

Any offence under any law relating to illicit possession of or dealing in any precious metals or precious stones.

Any offence under any law relating to conveyance, possession or supply of habit-forming drugs or intoxicating liquor.

Any offence relating to the coinage

Perjury.

Offences relating to domestic violence in terms of the Domestic Violence Act 116 of 1998

SCHEDULE 2

SCHEDULE OF LAWS REPEALED

No and year of law	Title	Extent of repeal
Act 38 of 1927	Black Administration Act	Sections 12, 20 and 21A
Act 29 of 1979	Bophuthatswana Traditional Courts Act	The whole
Act 13 of 1982	Transkei Regional Authorities Courts Act	The whole
Act 8 of 1984	KwaNdebele Traditional Authorities Act	The whole
Act 16 of 1985	KwaZulu Act on the Code of Zulu Law	Sections 105 and 106
Proclamation No.R151 of 1987	Natal Code of Zulu Law	Sections 105 and 106
Act 7 of 1988	Qwaqwa Appeals from Courts of Chiefs and Headmen Act	The whole
Act 6 1993	Chiefs Courts Act (Transkei)	The whole
Act 9 of 1990	KwaZulu Amakhosi and Iziphakanyiswa Act	sections 28-34

LIST OF RESPONDENTS WHO COMMENTED ON DISCUSSION PAPER 82

1. Centre for Applied Legal Studies, University of the Witwatersrand, Commission on Gender Equality and National Land Committee (joint submission.)
2. Councillors of Kgoshi TM Ramokgopa, Northern Province
3. HM De Vetta, Psychologist, Roselyn
4. Prof AJ Kerr, Rhodes University
5. Prof DS Koyana and Prof JC Bekker (joint submission)
6. M Mamashela, University of Natal, (Pietermaritzburg)
7. P Manda, National Paralegal Institute, Braamfontein
8. HT Madonsela, Attorneys, Newcastle, KwaZulu Natal
9. HT Monareng, Regional Court President, North West
10. Prof RB Mqeke, Rhodes University
11. W Olivier SC, Bloemfontein
12. B Oomen, University of Leiden, Netherlands
13. GH van Rooyen, Magistrate, Greytown