

**SUBMISSIONS OF THE JOHANNESBURG BAR TO THE
PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL
DEVELOPMENT REGARDING THE TRADITIONAL COURTS BILL**

1. INTRODUCTION

- 1.1 The Society of Advocates (Witwatersrand Local Division) is constituted by advocates who normally practice in the Witwatersrand Local Division of the High Court. The Society is referred to in these submissions as the Johannesburg Bar.
- 1.2 The Johannesburg Bar has been in existence for more than 100 years and has a history of providing skilled legal representation to the public in South African courts, including during the apartheid era when many people fell victim to that system's oppressive laws. Its constitution includes provisions aimed at ensuring the transformation of the Johannesburg Bar from a race and gender perspective.
- 1.3 The Johannesburg Bar is aware that the Portfolio Committee on Justice and Constitutional Development has received a number of written and oral submissions on a wide range of issues pertaining to the Traditional Courts Bill.
- 1.4 For this reason, the Johannesburg Bar wishes to focus on those issues which are of particular concern to advocates. These relate broadly to concerns about the

constitutionality of the legislation, its impact on the administration of justice and on the right to legal representation.

- 1.5 One of the concerns of the Johannesburg Bar regarding the Traditional Courts Bill is its potential impact on women. However, the gender implications of the Bill have been commented upon widely, including in a submission made by the Women's Legal Centre. The Johannesburg Bar aligns itself with that submission in particular and does not consider it necessary to deal with the matter in these submissions.
- 1.6 In making these submissions, the Johannesburg Bar emphasises that it recognises and respects the institution, status and role of traditional leadership, according to customary law, as provided for in section 211 of the Constitution. It also recognises and respects indigenous systems of justice. Provided that they are subject to the Constitution, it would appear that indigenous systems of justice have the potential to make a positive contribution to the administration of justice and, in particular, in extending access to justice in rural areas where the reach of the formal justice system is limited.
- 1.7 We proceed to deal with the specific areas of concern in the Traditional Courts Bill.

2. Selection and training of traditional leaders

2.1 Clause 4 of the Bill has the effect of limiting the pool from which presiding officers are selected for traditional courts to kings, queens and senior traditional leaders. They in turn may, in terms of clause 4(4), appoint alternative presiding officers from amongst the ranks of headmen, headwomen and members of the royal family.

2.2 The Johannesburg Bar is concerned that –

2.2.1 this process does not recognise the possibility that persons may emerge organically from within communities at its lower hierarchical levels (eg family, clan and village) as being appropriately qualified and respected as persons capable of resolving disputes in a customary setting who do not come from the ranks of potential presiding officers prescribed in terms of the Bill; and

2.2.2 the focus on the royal family means that where a dispute involves the interests of the royal family or a member of the royal family, there will be a risk of at least the appearance of bias.

2.3 Clause 4(5) makes provision for the completion of a prescribed training programme or course. This is a desirable feature of the Bill. However, clause 4(5)

envisages that the course is completed after a person has been designated as a presiding officer. This is an undesirable feature of the Bill. It has the effect of removing an incentive for the satisfactory completion of the course, an incentive which would be present if satisfactory completion was a pre-requisite to designation.

2.4 Moreover, the exemption provision (in clause 4(5)(a)) and the provision whereby non-attendance of the course may be excused where it is not due to the fault of the person concerned (in clause 4(6)) create the potential for untrained presiding officers to be given the judicial powers provided for in the Bill. This too is not a desirable state of affairs.

3. **Jurisdiction of the court**

3.1 In order for a traditional court to have jurisdiction the dispute must arise out of customary law or custom and the act or omission which gave rise to the dispute must have occurred within the area of jurisdiction of the traditional court in question.

3.2 There is no requirement that all the parties to the dispute subscribe to the particular system of customary law or custom of the traditional court concerned. Indeed, the Bill seems to anticipate this when it recognises in clause 9(4)

that more than one system of customary law may regulate a dispute.

- 3.3 Thus a presiding officer in a traditional court would be entitled to assert a jurisdiction over someone who belongs to a community which subscribes to a different system of customary law and falls under different traditional leaders.
- 3.4 This has the effect of extending the role of traditional courts beyond that which is envisaged in section 21(1) of the Constitution, which limits the institution status and role of traditional leaders to that conferred upon them by customary law.
- 3.5 To the extent that clause 5(1) potentially draws in parties who are not part of the particular system of customary law concerned, it may for this reason be in conflict with the Constitution.
- 3.6 In the view of the Johannesburg Bar, it would be far preferable if jurisdiction could be conferred on traditional courts through the consent of all parties to the dispute. Such a model would be consistent with the tradition of alternative dispute resolution which has developed in South Africa. It would afford far greater legitimacy to the decisions of such traditional courts and would remove the element of compulsion inherent in the powers conferred by the Bill.

4. Criminal jurisdiction

- 4.1 Clauses 6 and 9 of the Bill introduce a criminal jurisdiction on the part of traditional courts.
- 4.2 The criminal jurisdiction of the traditional courts appears to operate outside of both the Criminal Procedure Act and the fair trial provisions of section 35(3) of the Constitution, including section 35(3)(c) which confers on every accused person a right to a public trial before an ordinary court.
- 4.3 In the view of the Johannesburg Bar, the Constitution does not allow for the existence of such a parallel system of criminal justice.
- 4.4 Of particular concern to the Johannesburg Bar is clause 9(3)(a) which provides as follows:

“No party to any proceedings before a traditional court may be represented by a legal representative.”

- 4.5 Section 35(3) provides as follows in this regard :

“Every accused person has a right to a fair trial, which includes the right –

(a) ...

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly.”

- 4.6 To the extent that the Bill excludes legal representation in criminal proceedings, the Johannesburg Bar has little doubt that it is unconstitutional.
- 4.7 The Bill also proceeds on the assumption that legal representation is a negative factor in the administration of justice. This is not so. Advocates owe duties to both their clients and the courts and have the potential to play a role in assisting traditional courts in arriving at decisions which are respectful of and compliant with the Constitution and the rule of law.
- 4.8 Accordingly, it is submitted that parties in civil disputes should also be allowed the benefit of legal representation.

5. **Inappropriate sanctions**

- 5.1 The concerns of the Johannesburg Bar regarding the inappropriate conferral of criminal jurisdiction are enhanced by the conferral in clause 10 of a broad power to impose sanctions, notwithstanding the exclusion of certain forms of punishment in clause 10(1) of the Bill.
- 5.2 Quite apart from questions of potential unconstitutionality, this clause appears to be at odds with the long title of the Bill which refers to its being “based on restorative justice and reconciliation”.

- 5.3 The sanctions are punitive in nature and are open-ended – see in this regard the reference to “any appropriate order” and “any other order that the traditional court may deem appropriate and which is consistent with the provisions of this Act.” These provisions create a strong potential for abuse of power. In this regard it must be remembered that it is very difficult for members of remote rural communities to challenge abuses of power.
- 5.4 Some of the sanctions are of particular concern. Clause 10(2)(g) provides for a sanction which may include certain forms of unremunerated, forced labour. This provision may well be in conflict with –
- 5.4.1 domestic law;
 - 5.4.2 the constitutional right in section 12(1)(e) of the Constitution “not to be treated or punished in a cruel, inhuman or degrading way”; and
 - 5.4.3 South Africa’s duties in terms of international labour law.
- 5.5 Further, given that land rights constitute benefits that accrue in terms of customary law and custom, there is the potential that an order in terms of clause 10(2)(i) depriving an accused person or a defendant of a benefit under

customary law or custom may give rise to evictions in conflict with section 26(3) of the Constitution.

6. **Limitation of rights of appeal and review**

6.1 Clauses 12, 13 and 14 impose limits on the right of appeal against an order of a traditional court and the rights to subject an order of a traditional court to judicial review in terms of the right to administrative justice in section 33 of the Constitution.

6.2 Given –

6.2.1 the potential for partiality inherent in a system where powers are conferred on a select royal family and its lineage; and

6.2.2 the particularly vulnerable position in which rural communities find themselves; and

6.2.3 the breadth of the powers conferred on traditional courts to impose sanctions,

it is submitted that the fullest powers of appeal and review are appropriate.

6.3 The limitation of the right of appeal to one in respect of only certain of the sanctions impacts upon the right of access to court enshrined in section 34 of the Constitution.

The linkage between this right and the right to an appeal was recognised in *Pharmaceutical Society of South Africa & Others v Tshabalala-Msimang & Ano NNO; New Clicks South Africa (Pty) Ltd v Minister of Health & Ano* 2005 (3) SA 238 (SCA) at para 30.

6.4 Insofar as judicial review of the decision of a traditional court is concerned, there is an attempt in clause 14 of the Bill to limit the grounds of review to the old pre-constitutional common law grounds of judicial review. This attempt is unlikely to pass constitutional muster because section 33(1) confers a constitutional right upon everyone to administrative action that is lawful, reasonable and procedurally fair. It has generally been recognised by the courts that the impact of this provision of the Constitution has been to broaden the grounds of review substantially beyond those provided for under the common law. See for example *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC).

6.5 The attempt to impose a common law standard of review is also in conflict with the statutory codification of administrative law brought about by the Promotion of Administrative Justice Act No. 3 of 2000 ("the PAJA"). Given the constitutional status of the Promotion of Administrative Justice Act as legislation mandated by

section 33(3) of the Constitution the conflict between clause 14(1) of the Bill and the standard review in section 6(2) of the PAJA may in itself give rise to invalidity of that clause.

6.6 These problems are exacerbated by the absence of any duty in clause 18 to keep a record of the evidence led in a case before a traditional court. This on its own severely hampers the exercise of any meaningful right of appeal or review.

7. Position of traditional courts in the scheme for constitutional government

7.1 Clause 7 of the Bill purports to set up the traditional courts as a court system “distinct from courts referred to in section 166 of the Constitution”.

7.2 The judiciary is recognised as one of only three spheres of government, along with the legislature and the executive.

7.3 The Constitution does not recognise manifestations of the judicial arm of government beyond those expressly and impliedly provided for in section 166 of the Constitution.

7.4 In the circumstances, the entire system of traditional courts may well fall outside of the confines of the Constitution.

7.5 This difficulty would, in the view of the Johannesburg Bar, be remedied if the statutory jurisdiction of the traditional courts were to be based on consent of the parties and not on coercion.

8. Conclusion

8.1 As appears from the submissions set out above, there are a number of provisions in the Traditional Courts Bill that are of concern to the Johannesburg Bar.

8.2 This concern arises from their potential impact on the administration of justice, on the right generally to be legally represented in court proceedings and their potential unconstitutionality.

8.3 Given that the above concerns are in certain respects directed at the entire scheme underlying the Traditional Courts Bill, it is the view of the Johannesburg Bar that the Bill needs to be referred back to the Department from which it originates in order to be re-conceptualised.

8.4 In the process of re-conceptualising the Bill, it is submitted that serious consideration needs to be given to a consensus-based model for the conferral of jurisdiction on such courts. An important consequence and advantage of a consensus-based model is that it would take away the need for a ranking of the traditional courts at the very

bottom rung of the court ladder, with a status below that of the magistrates' courts.

8.5 Moreover, it is the submission of the Johannesburg Bar that in re-designing the legislation, provision should be made for legal representation. As pointed out above, advocates have the potential to play a role in assisting traditional courts in arriving at just, lawful and constitutional decisions.

9. We thank the Portfolio Committee for giving these representations their consideration.

Alan Dodson

Johannesburg Bar
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