SUBMISSION TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT

TRADITIONAL COURTS BILL, 15 OF 2008

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1. Background

1.1 The Programme for Land and Agrarian Studies (PLAAS) of the School of Government at the University of the Western Cape was established in July 1995. PLAAS engages in research, training, post-graduate teaching, policy development and advocacy in relation to land and agrarian reform, rural governance, natural resource management, and poverty and development policy. In accordance with the University's Mission Statement, it strives to play a critical yet constructive role in processes of social, economic and political transformation. At present the programme employs 26 research and administrative staff.

1.2 I am currently undertaking field research in the Msinga District of KwaZulu-Natal on land rights and land administration in communal areas. This also involves questions of the role of traditional councils, recently established under provincial legislation on issues of traditional leadership and governance, in relation to land matters. A key question for land administration is how land-related disputes are resolved, at family, village, ward or higher levels. Some land disputes, when they cannot be resolved at local level are referred to chiefs' courts. I have thus been collecting data on the functioning of such courts as part of my research. The project is at a relatively early stage and my findings are only preliminary in character. Nevertheless, they are relevant to the core objectives and principles of the Traditional Courts Bill, and may be of interest to parliament.

2. Land administration and dispute resolution

2.1 A decentralized system

In the areas where I am undertaking field research, day-to-day land administration, as well as resolution of disputes in relation to customary law and practice, is mostly carried out at the local level, either within the extended family, or between neighbours, or in the wards (*izigodi*) that constitute key governance sub-units within the larger 'tribe' (or nation, *isizwe*). It is a largely decentralized system, and the chief (*nkosi*) and his council, as well as the chief's court, or 'tribal court', play a central role only in certain well defined instances. A key role for the tribal court is to act as a higher 'court of appeal' when disputes cannot be resolved at more local levels.

2.2 Land allocation

'Allocation' here refers to the demarcation of the site for a residential plot to establish an *umuzi* or fields for ploughing (*amasimu*). If a male member of the tribe is married, has children and wishes to establish a new *umuzi* for himself and his family, he must approach the people living in the area (his future neighbours) and seek their approval and agreement on the location of the residential site (and the fields, if arable land is available). Usually the headman of that *isigodi* (the *nduna)* will be involved in this process as well, since he is knowledgeable about the history of land allocation, adjudicates land disputes, and will be aware of the potential for dispute in particular locations. The *ibandla* (a local assembly of men, 'old enough to be wise') can be involved as well. The prospective homestead head must pay a *khonza* ('homage') fee of R15 to the *nkosi* (chief) at the tribal office, which issues a letter of approval (and may require outstanding debts to the tribal office for levies or fines to be paid before the letter is issued).

Land allocation procedures are a little more elaborate in the case of an outsider (someone from outside the tribe) applying for land. A local 'champion' who can vouch for the applicant is needed, who introduces the newcomer to the neighbours and assures them that he will be a law-abiding person. Then the *nduna* of the *isigodi* is approached and his assistance sought. Alternatively, the *nduna* can be approached first. The applicant must bring a 'letter of reference' from the *nkosi* (ie. the tribal office) of the area he is leaving stating that he is of good character and is not subject to criminal charges, and explaining his reasons for moving to the area. If this is accepted by the *nkosi*, the *nduna* then calls a meeting of the *ibandla* and the neighbours, the applicant provides beer, and the land is demarcated in front of everyone present as witnesses. A *khonza* fee of R15 must be paid to the *nkosi*. In some areas it seems that an additional fee of R15 must be paid to the *nduna* as well.

2.3 Payment of fees and fines

A number of 'customary fees' and fines have to be paid to the tribal office, only some of them related directly to land. Some are fines for living as a couple without being properly married according to custom (involving payment of *lobolo*), some are fees due when a beast is slaughtered and a beer drink is held (requiring the *iphoyisa* of the *isigodi* to attend and help prevent fights occurring), and others are administrative fees due when bringing a case to the tribal court, or for issuing letters of proof of residence enabling people to apply for ID documents or birth certificates, or open bank accounts.

2.4 Dispute resolution

Disputes over land (eg over the location of boundaries, or the destructionof crops by uncontrolled livestock) and other issues such as stock theft, are resolved at the local level in the first instance, the *ibandla* and the *nduna* acting as mediators and adjudicators. If the dispute cannot be resolved at this level then it will be taken to the tribal court presided over by the *nkosi*. These courts meet on a weekly basis, and are sometimes presided over by senior traditional leaders other than the *nkosi* – for example by the chief *nduna* (*nduna nkhulu*). In some very large tribes, and in particular those where some members of the tribe live on commercial farms as labour tenants (or did so in the past, before land reform policies began to transfer some of those farms to labour tenants or land restitution claimants), there are several such courts, often presided over by different *izinduna nkhulu.*

2.5 Checks and balances

There appear to be at least four important mechanisms that can, or are intended to, ensure that the administration of justice in these areas is carried out in a fair and equitable manner.

(a) Widespread agreement and adherence to on the cultural norms and values that inform key judicial principles of restorative justice and reconciliation. These act as a form of 'cultural pressure' on community members and traditional leaders, at different levels of society, to mediate, adjudicate and help resolve disputes in a manner that is consistent with deeply-held beliefs about what constitutes appropriate action and behaviour.

(b) The decentralized nature of judicial institutions and processes means that many voices are heard whenever a dispute arises, that opportunities exist within the system for all those affected by a dispute to present their views and provide evidence, and that when a case is heard by a tribal court it has already been discussed and deliberated over by actors at local levels of society who are well informed about the context and meaning of the actions and behaviours in question. These 'other voices' are represented in the tribal court by the *izinduna.*

(c) The presence at tribal courts of *ndunas* and councillors who are charged with assisting the *nkosi* or *nduna nkhulu* in the interpretation of customary law and practice mediates the powers and decisions of the 'presiding officer'.

(d) The availability of other judicial institutions, such as magistrate's courts, that can be appealed to when the judgements handed down in the tribal court are felt to be unfair or inequitable.

Of course, this is an 'idealized' or normative view, and actual practice is sometimes reported to be at variance with the ideal.

2.6 Weaknesses or deficiencies in the model

The major deficiency in the idealized model presented above is in relation to gender equity. In some areas women are not allowed to speak (eg to present their case, or to question others) in a tribal court, although they often appear to do so at more local levels.

There is also evidence that practice in this regard is changing in some areas, just as it is changing in relation to land allocation to single women with children, or, in some areas, to single women with male children.

The reasons for this kind of adaptive change in customary practice (if not yet in 'official' versions of customary law) are complex, including rapid processes of social change on the ground (eg the decline of traditional forms of marriage involving payment of lobola to the family of the bride, alongside the payment of child support grants to women with children under the age of 14).

It is evident in my field research sites that another important influence is widespread acceptance of the democratic values enshrined in the Constitution and the Bill of Rights, that involve the right to dignity, the right to equality (including gender equality) and the advancement of human rights and freedoms.

Of course the degree of such acceptance is uneven, and this means that adaptive change is often contested by different people and interest groups. For example, women are often in the forefront of those who propose that female voices and experience must be fully acknowledge and heard within traditional judicial processes, at all levels – but some men oppose these changes. This is a little simplistic, however, since there are instances where some older women are opposed to practices such as the payment of child support grants, on the grounds that such grants 'undermine our culture', while some men are in favor of gender equality and the direct representation of women by themselves within judicial processes.

2.7 The 'living customary law' vs the codified, official version

My fieldwork reveals that customary law is a dynamic and adaptive form of law that is capable of responding to changing circumstances and evolving social norms and values. This means that it is often misleading to refer to official or codified versions of 'custom' as described in legal textbooks or older ethnographic texts.