



# LRG

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Research Unit



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15 February 2012

The Chairperson: Mr. Tjheta Makwa Harry Mofokeng, MP  
Select Committee on Security and Constitutional Development  
Parliament Cape Town

Att: The Secretary  
Mr. Gurshwyn Dixon  
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Dear Sir,

## **Submission on the Traditional Courts Bill (B1-2012)**

### **Executive Summary**

The LRG submission describes 6 key problem areas with the Traditional Courts Bill. Of particular concern is that only one of the rural interest groups directly affected by the Bill is recorded as having been consulted during the drafting process: traditional leaders. In consequence the Bill overtly privileges the interests of traditional leaders over those of other rural residents, in particular rural women.

In essence, we argue that the motivation of the drafters to enhance the powers of traditional leaders has resulted in a Bill that is inconsistent with customary precedents and would undermine the intrinsic character and accountability of existing customary dispute resolution processes. Thus, instead of suggesting amendments to specific provisions we recommend that the consultation process be broadened to include the constituency directly affected by the Bill. Moreover, the current Bill is inappropriate as a starting point for such discussions. The starting point has to be the way in which customary courts currently function and how this can be enhanced, supported and improved.

Our submission is divided into 2 parts. The first outlines the problems with the current Bill. The next focuses on developing an alternative approach more in keeping with the character and dynamics of current indigenous dispute resolution processes. The first half of part B, drawing on extensive research, describes the key features of existing customary courts

explaining how the TCB would undermine these. The latter half of part B then sets out an alternative framework that would address the problems with the current Bill.

In conclusion, we argue that the current Bill is fatally flawed and should be withdrawn, and a proper consultation process embarked on to ascertain the views and experiences of a proper cross-section of ordinary rural people, paying particular care to enable rural women to participate fully.

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## Introduction

The Law, Race and Gender (LRG) Research Unit was established in 1994 as a research and training unit in UCT's Faculty of Law. Presently, the main project of LRG is the Rural Women's Action-Research (RWAR) project. The RWAR project is part of a wider collaborative initiative that seeks to support struggles for change by rural people, particularly women, in South Africa. The project focuses on land rights, but includes related issues of poverty, inheritance, succession, marriage, women's standing and representation in community structures and before traditional courts, rural governance, citizenship and access to human rights in general by rural women. An explicit concern is that of power relations, and the impact of national laws and policy in framing the balance of power within which rural women and men struggle for change at the local level. The RWAR project seeks to understand the complexities and opportunities in the processes of contestation and change underway in rural areas and aims to provide targeted forms of support to those engaged in struggles that challenge patriarchal and autocratic power relations in former homeland areas.

In that context, LRG is concerned that the legislation regulating customary courts be appropriate. We agree that customary courts play an important role, that the Black Administration Act provisions are inappropriate and that a new legislative and regulatory framework is required. Moreover, based on reports coming from members of rural communities throughout the country, there is the need for legislative intervention to restore the indigenous accountability mechanisms that were undermined by apartheid legislation and perpetuated by more recent statutes. LRG's informed view is that the Traditional Courts Bill B1-2012 (hereinafter, the Bill or TCB) will not serve the function of democratising, protecting and supporting ordinary rural people in their pursuits of justice and attempts to gain legal and socio-economic security.

Therefore, while LRG embraces government pronouncements that the reintroduction of the Bill in the National Council of Provinces (NCOP) is to ensure that rural consultations are conducted on the Bill, we regret that the Department of Justice and Constitutional Development has disregarded warnings that the TCB is based on too flawed a framework to be made constitutional by mere adaptation. Put differently, we maintain (as we have repeatedly alerted the Department and Portfolio Committee on Justice and Constitutional Development) that the best chance of making the TCB conform with the Constitution and living customary law is to start afresh in drafting legislation based on (i) the views of ordinary rural people and (ii) a framework that does not rely on apartheid boundaries and precedents.

The Bill seeks to regulate the customary courts that operate in communal areas and bring them in line with the Constitution. However, in adopting a model that is very much in keeping with the centralised and patriarchal framework that the Black Administration Act 38 of 1927 and Black Authorities Act 68 of 1951 ingrained, it rather entrenches the flaws that these courts developed under apartheid.

Customary law continues to play an important role in the lives of many of the 17 million South Africans living in rural areas. Hence, traditional courts – as the structures that primarily administer justice in those contexts – retain an important role, as the first ports of call in many places. In some areas, they work well; while in others they are dysfunctional. Part of the problem is the inconsistency in their operation: not necessarily because they take different forms in different settings but because of insufficient accountability and oversight to ensure that, where they are dysfunctional, they can be remedied and improved. Indeed, even in the places where they do work, there is a need for greater resources and support for them. This is what the TCB is meant to do, but fails to achieve.

Unfortunately, the Bill reflects inadequate appreciation for the real life experiences of the people on the ground. The Memorandum to the Bill acknowledges that it was drafted in collaboration with the National House of Traditional Leaders and in consultation with only traditional leaders. It disregards most of the recommendations made by the South African Law Reform Commission (hereinafter, SALRC), which consulted extensively with diverse sectors of society, including women.

The main problems with the TCB may be summarised as follows.

1. Consultation on the Bill's content was unequal;
2. Power is centralised to a 'senior traditional leader', hence living customary law is distorted;
3. Choice is denied in that opting out of the jurisdiction of a traditional court is not permitted and people living in the former homelands are forcibly 'subjected' to traditional authority according to apartheid-defined jurisdictional boundaries;
4. The proposed substantive jurisdiction of the courts is very broad while the protections afforded to parties are limited; and, traditional leaders are granted unaccountable powers to impose highly coercive sanctions and the ability of parties to appeal or review their decisions is limited;
5. Gender inequalities are not improved, but rather exacerbated;
6. The Bill is therefore arguably unconstitutional.

These concerns are detailed below (part A).

In light of the listed problems with the Bill, LRG maintains that the only way forward is for the TCB as currently worded to be withdrawn and replaced with legislation based on a framework that fully accommodates the well-documented practices of local communities. Such a framework is proposed in the last part of this submission (part B). Our argument is legislation as important as this should be drafted in light of extensive consultation with affected rural communities.

## **A. Problems**

### **1. Unequal consultation on the Bill's content**

By the Department's own admission in the Memorandum to the TCB, the Bill was drafted on the basis of consultation with traditional leaders, almost exclusively. Ordinary rural people were not consulted. Of the 17 million South Africans living in rural areas, traditional leaders form a small minority and are almost all male. This means that they are limited in their ability to accurately or fully represent the interests of the ordinary people who live under traditional authority. Moreover, they clearly have an interest in the content of the TCB and the powers that it grants them relative to their people that would make it difficult for them to represent rural people's interests objectively vis-à-vis their own.

We draw the Select Committee's attention to the fact that women and children make up the overwhelming majority of people living in the former homeland areas, and often find themselves in a vulnerable position in relation to adult male-dominated traditional institutions. Women face particular problems in customary courts and are therefore the people most adversely affected by the Bill's failings. The problems with the Bill that are set out below reflect the exclusion of women's voices and experiences from the drafting process.

By contrast, the SALRC conducted a more inclusive process of consultation. It heard from not only traditional leaders at national and provincial level – i.e. people who make up the very institutions at issue – but also ordinary people from diverse quarters, albeit that it did not reach all sections of society. The SALRC paid particular attention to the needs and difficulties encountered by women. We strongly encourage the Select Committee to ensure that ordinary rural women – i.e. not just women who form part of formal institutions like traditional councils – are separately consulted as a specific interest group, in circumstances that address the inherent problem of unequal power relations in rural areas. Women cannot be expected to be able to speak freely about problems with traditional leaders in the presence of those leaders.

## **2. Power is centralised to a ‘senior traditional leader’, hence living customary law is distorted**

The Traditional Courts Bill centralises power to the ‘senior traditional leader’ in a manner that is inconsistent with ‘living customary law’. The Constitutional Court has repeatedly held that customary law is the ‘living law’ developed by the people through their practice.<sup>1</sup> This is inconsistent with a single individual being empowered to determine the content of customary law unilaterally.

The TCB fails to recognise the important role played by councillors in current dispute resolution processes. The Bill provides no specific role or function for the councillors who, in practice, are the bedrock of the system. Instead, it focuses all power and responsibility in the presiding officer. This is contrary to the operation of the traditional justice system in real life where the councils, along with the senior traditional leader, actually constitute the traditional court, providing for significant participation by ordinary members of the community.

The so-called presiding officer is a ‘senior traditional leader’. This disregards the fact that (ordinary) family courts are a legitimate part of the traditional court system. The only persons to whom the senior traditional leader may – by the Minister’s written approval – delegate his/her responsibilities, in terms of section 4(4), is a headman, headwoman or member of the royal family – and only when s/he is absent. The Bill thus turns the traditional courts into an elite establishment in a manner contrary to practice, including practice as recorded by the South African Law Reform Commission (SALRC). The Bill simply fails to recognise the full range of traditional courts that currently operate – family, clan, ward, village councils and meetings. Traditional leaders themselves say that this failure to (specifically) recognise lower level courts is inconsistent with customary law. (2003 Report, p.9 and Contralesa website as at 27 April 2010)

From the TCB’s one substantive reference to ‘traditional councils’ in relation to the auditing of traditional courts’ records, one might assume that the traditional councils created by the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) could be the structures that act as traditional courts. However, this is not substantiated by anything else in the Bill contributing to ambiguity and lack of clarity. Moreover, if the implication is that officially established traditional councils will, in all instances, form the councils of traditional

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<sup>1</sup> *Alexkor Ltd and Another v the Richtersveld Community and Others* 2004 (5) SA 460 (CC); *Bhe and Others v Magistrate, Khayelitsha and Others*; *Shibi v Sithole and Others* 2005 (1) SA 580 (CC); *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) and *Gumede v President of the Republic of South Africa and Others* 2009 (3) BCLR 243 (CC)

courts, a further range of problems is created. Some areas have established a TLGFA council that is, in fact, separate from embedded and active traditional institutions, which persist alongside it: traditional dispute-hearing amabandla are, in many areas, among pre-existing and co-existing traditional forums and institutions. The assumption that the TLGFA council will serve as the ultimate traditional court in all communities is inconsistent with current reality. Recognition should instead be accorded to the existing amabandla that hear disputes (unrelated to the TLGFA councils) existing at multiple levels of the community. These bodies are constituted by active parties beyond the senior traditional leader and manifest the inclusive nature of customary forums that can include any (male) member of the community.

The Bill's exclusion of the involvement of ordinary members of the community who would ordinarily participate in the hearing and resolution of traditional court cases silences countervailing voices. It therefore undermines the development of a living customary law that reflects all the different voices currently involved in dispute resolution and in debates about the content and interpretation of changing customs and practices, instead of encouraging it.

There are indications that decentralised power enables women greater possibilities for influencing the living customary law (i.e. customary law as it exists and develops in practice on the ground). While women and children are often denied voice under patriarchal traditional structures, they are more empowered to express their voice by being able to exploit the opportunities provided by diverse forums and processes of change underway in the context of a fluid, living customary law. The centralisation of power to traditional leaders without providing ordinary people with sufficient protections or agency in the TCB will serve to close down the few avenues that women have for improving their circumstances and obtaining greater security for themselves within community structures. The Bill's present formulation even precludes strong women councillors from emerging through participation and experience in co-existing decentralised dispute resolution forums.

As a matter of comparison, the SALRC recommended the recognition of the potential contribution of respected councillors (male or female) who emerge organically from within communities at its lower hierarchical levels and have a proven track record of resolving disputes in a customary setting. It noted that

‘in most cases the chief will not normally preside over the proceedings. A trusted councillor will be appointed to preside. The chief is briefed about the proceedings and will not normally differ from the general view of his councillors.’ (2003 Report, pp.6-7)

The SALRC also observed that:

‘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.’ (2003 Report, p.5, and section 3 of the SALRC draft bill)

Hence, the SALRC's draft bill provided for appeals, within the community's multileveled traditional courts system as well as in relation to the state courts system. (Section 27 of the SALRC draft bill) The TCB is very different. It makes no provision for the significant role played by community members and councillors (at multiple levels) and instead centralises all decision-making powers to the ‘senior traditional leader’, thereby distorting custom in the ways outlined below.

It also does not give expression to the SALRC's conclusion that 'it was generally agreed that popular participation was a cornerstone of the traditional system of justice.' (2003 Report, p. 19) By this omission, it also disadvantages women because the vast majority of senior traditional leaders are men. It ignores the SALRC's recommendation that women's representation in the councils that hear and decide disputes be guaranteed by law. (2003 Report, p.8, and section 4 of the SALRC draft bill)

### **3. Choice denied and rural people forcibly subjected to former homeland jurisdictional boundaries**

The TCB denies rural inhabitants the entitlement to choose their forum by preventing them from opting out of their local traditional courts' jurisdictions. In section 20(c), it makes it an offence for anyone within the jurisdiction of a traditional court, even a passer-by, not to appear before it if summoned. This contradicts the SALRC's recommendation that people be permitted to opt out of traditional court jurisdictions in appreciation of 'the controversy surrounding the issue of the independence and impartiality of customary courts'. (2003 Report, p.32, and sections 28(1), (5) and (6) of the SALRC draft bill) Instead, the TCB supports traditional leaders' arguments that allowing people to opt out would undermine their authority. (See 2003 Report, p.32) But it must be remembered that the jurisdictional authority and boundaries imposed by the TCB are those established by the Black Administration Act, 1927 and Black Authorities Act, 1951.

The jurisdictional boundaries of the traditional courts envisioned by the TCB rely on those of traditional leaders and traditional communities, as demarcated by the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA). The TLGFA, however, simply resuscitates old apartheid boundaries.

Section 28(1) of the TLGFA states the following:

Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been recognised as such in terms of section 9 or 11, subject to a decision of the omission in terms of section 26.

Section 28(3) goes on to deem any "tribe" that, immediately before the commencement of this Act, had been established and was still recognised as such is deemed to be a traditional community contemplated in section 2 ... . Section 28(4) continues in this same vein, stating that any 'tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council ... .'

In *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*,<sup>2</sup> then Chief Justice Ngcobo noted that:

The Black Authorities Act gave the State President the authority to establish "with due regard to native law and custom" tribal authorities for African "tribes" as the basic unit of administration in the areas to which the provisions of [the Communal Land Rights Act 11 of 2004 (CLARA)] apply. ... It is these tribal authorities that have now been transformed into traditional councils for the

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<sup>2</sup> CCT 100-09, judgment delivered on 11 May 2010, at para 24



purposes of section 28(4) of the Traditional Leadership and Governance Framework Act, 2003 (the Traditional Leadership Act). And in terms of section 21 of CLARA, these traditional councils may exercise powers and perform functions relating to the administration of communal land. (emphasis added)

The Court finally declares that ‘[u]nder apartheid, these steps were a necessary prelude to the assignment of African people to ethnically-based homelands.’<sup>3</sup> It is difficult to see how such an undemocratic process can acquire different (that is, democratic) significance in the present but this is what is entrenched by the TLGFA in combination with the Traditional Courts Bill.

Currently, under the Black Administration Act 38 of 1927 system, opting out is possible; the TCB therefore changes current law and practice by outlawing opting out. The Bill also hereby violates the consensual character of customary law.

It is inadequate for the Department of Justice to say – as it did in its briefing to the National Assembly’s Portfolio Committee on Justice and Constitutional Development – that people consent at the stage of entering the community and choosing to live in the traditional authority’s jurisdiction. For a start, it is commonly known that scarcely any rural inhabitants have the luxury of choosing where they are going to live, nor the resources to move should they be unhappy with their living situation.

Secondly, it is worth recalling that the government itself is in the process of addressing land and chieftaincy claims that are based on the recognition of the apartheid history that resulted in people’s being dispossessed of their land, forcibly removed from their homes and relocated, and then also placed under the authority and stewardship of chiefs who were not their own, who observe different cultures to their own. The government thus acknowledges, and has done many times, the need to investigate and weed out the illegitimate traditional leaders and boundaries created by apartheid through attempts such as the Ralushai and Nhlapo commissions. Unfortunately, the Nhlapo commission report dealt only with paramountcies and investigations concerning senior traditional leaders and traditional communities have yet to be conducted eight years after the Commission was established in terms of the TLGFA.

Thirdly, because the TCB entrenches former apartheid homeland boundaries established by the Black Authorities Act of 1951, people do not have the opportunity to choose whether they want to fall under a particular traditional leader’s authority and law – this is imposed upon communities, even those who are presently contesting the existing apartheid boundaries and imposed cultural affiliations.

It is important to note that there is evidence to suggest that having diverse dispute resolution forums from which to choose increases the accountability of traditional courts by permitting people to avoid certain courts if they are thought to be illegitimate, or known to be biased. The converse of this is that, where traditional courts are functional and just, people choose to turn to them and rely upon them for the enforcement of justice and order; the functionality of the courts therefore is what secures their authority.

In the way in which it is practiced, living customary law permits people to choose their forum according to their needs and where they expect that they will obtain a just hearing. People’s choosing not to attend a particular traditional court does not mean that they escape the law; it means that they go to a different forum to have it enforced. This is one of the freedoms bestowed upon South African citizens by the Constitution: living in a plural society with a

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<sup>3</sup> *Tongonae*, para 25

pluralist legal order where people can choose how they wish to live. The Bill effectively establishes a separate legal regime for those living in the former homelands, dividing South Africans once again by apartheid geography

#### **4. Broad powers, limited accountability**

The proposed substantive jurisdiction of the courts, set out in sections 5(1) and 6 of the TCB, is very broad while the protections afforded to parties that would come before them are limited. Moreover, traditional leaders are granted unaccountable powers to impose highly coercive sanctions while the ability of parties to appeal or review their decisions would be limited. In our view such coercive powers are inconsistent with the nature of living customary law.

The substantive jurisdiction that is proposed for traditional courts is extremely broad in that it is defined in the negative (i.e. by only excluding areas concerning which they cannot resolve disputes). Also, while constitutional matters are purportedly excluded by section 5(2)(a) of the Bill, it would be impossible for traditional courts to avoid considering matters of constitutional import if they are required to comply with the guiding principles set out with reference to the Constitution in section 3. Given that it is unavoidable that the courts will deal with constitutional matters it is very serious that some decisions of traditional courts would escape appeal or review. It is similarly very serious that people should not be able to choose whether they want matters having such implications resolved in traditional or state courts, especially since traditional courts do not possess constitutional expertise.

Having centralised power to the individual senior traditional leader and granted him broad substantive jurisdiction, the TCB extends this individual's powers to allow him to determine and impose heavy sanctions. The sanctions available are, in the first place, inconsistent with what the Bill suggests is a non-punitive and, instead, restorative system of dispute resolution. They are coercive whereas restorative justice does not comport with coercive sanctions.

Moreover, certain of the sanctions provided for by the TCB are controversial because of the nature of the far-reaching and unaccountable powers they provide to traditional leaders; for example, according to section 10(2)(g) the traditional court may issue:

“an order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court”.

This provision permits that even a person who is not a party to the dispute before the court can be ordered to provide ‘free labour’. In light of most people in the rural areas being women and children, who already bear the brunt of manual labour, this work is likely to fall on their shoulders. Moreover, the persons most likely to benefit from the ‘free labour’, are the traditional leaders, who publicly claim that it is customary for their ‘subjects’ to provide labour in the ‘fields of the realm’ and royal kraal.

The SALRC prescribed that:

“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.” (Section 23 of the SALRC draft bill; emphasis added)

These important limitations are absent from the TCB.

The SALRC draft bill sought to provide protections in cases of abuses by traditional leaders and councillors serving as the traditional courts. Sections 20 and 28(6) of the SALRC draft bill provided for sanctions against traditional court members who acted contrary to the bill. Amongst these sanctions, it provided for imprisonment and fines: for accepting bribes and hearing matters not permitted by the draft bill, respectively.

By contrast, looking at its terms, the TCB seems primarily concerned with consolidating the powers of senior traditional leaders acting as traditional courts, attributing extensive powers to them without providing matching degrees of accountability or constraint on them. While the TCB provides for sanctions against contravening traditional leaders, it defers their details to the TLGFA. (This legislation has already been described as a problematic reference point for traditional courts because they are not necessarily the same structures as the traditional councils formed in terms of the TLGFA). It does not make provisions for either conviction or fines against traditional leaders although, in the case of fines, these are levied against members of the community who appear before the courts, who are less able to pay them.

In light of women’s vulnerability to eviction, the 1999 Commission for Gender Equality / Centre for Applied Legal Studies / National Land Committee submission to the SALRC raised serious concerns about disputes concerning land rights coming before traditional leaders who have the ‘executive’ role of administering and allocating land, on the one hand, overlapping with their power to decide disputes about land rights, on the other. Discounting such concerns, section 10(2)(i) authorises traditional courts to deprive defendants of benefits that accrue in terms of customary law and custom. Customary entitlements to land are one such benefit; community membership is another. Even though section 10(1) limits the traditional court’s right to impose banishment in criminal matters, there is no such limitation in respect of civil disputes. Effectively, therefore, traditional courts are permitted to revoke people’s customary rights to land, and strip them of their community membership. All of this is consistent with the powers that the apartheid government gave traditional leaders under the homeland system but is inconsistent with the Bill of Rights that applies equally to all South Africans.

Recent studies have shown that levying practices continue and are widespread<sup>4</sup> despite the fact that there is a strong argument that the Constitution does not permit levying by traditional institutions.<sup>5</sup> ‘Tribal levies’ include annual taxes, as well as ad hoc levies. Such ad hoc levies might be for the maintenance of the chief – for instance, to purchase a car for the

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<sup>4</sup> See (July 2009) Draft Report on the Consultative Process on Communal Contributions Paid in Traditional Communities Within KwaZulu-Natal, Maurice Webb Race Relations Unit, UKZN

<sup>5</sup> The Constitution (in sections 43 and 104) vests powers of this kind in national and provincial government only, and permits provinces to delegate only to their municipalities, as per section 104(1)(c). Chapter 13 of the Constitution, which (in sections 226 through 230A) deals specifically with ‘Provincial and Local Financial Matters’, anticipates that revenue will be raised only by national, provincial and local government. Strict procedures are put in place by the Constitution for Money Bills in section 228(2)(b) to check the provincial power of taxation:

The power of a provincial legislature to impose taxes, levies, duties and surcharges — ...

(b) must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

chief, or a traditional skirt for his wife, or even to send his children to school. The latter category of taxes is difficult to dissociate from the ‘special rates’ levied during colonialism and apartheid.<sup>6</sup> Other ‘special’ rates include fines for cohabiting while unmarried, and for falling pregnant out of wedlock; levies for the removal of mourning clothes, and for hosting a traditional feast; and charges for obtaining proof of residence, and for obtaining an RDP house from government. When people object and/or cannot pay these various taxes they are punished by being denied the proof of residence stamp that they need to obtain an identity document, open a bank account and function in the formal economy.

Members of rural communities complain about this being double taxation (they pay VAT and then have to pay tribal levies). They speak of finding ever-increasing and inflated tribal levies particularly burdensome in light of rural poverty and the desperate need for development rather than further extortion. Women make up the majority of rural people (59% of the population of ‘tribal areas’ according to census data) and many of them are unemployed. Yet they have no option but to pay expensive levies out of the child, disability or pension grants that they receive from government..

The prevalence of the widespread practice of extorting tribal levies that are inconsistent with the Constitution is but one indication of the unequal power relations in rural areas. Instead of the Traditional Courts Bill providing mechanisms to address such abuse of power, it would further empower traditional leaders to enforce the payment of these illegal ‘tribal levies’. Some traditional courts refuse people access to courts if they are not ‘up to date’ with outstanding levies. The broad, coercive and unaccountable sanctioning powers assigned by the TCB would permit traditional courts to continue both the levying practices and the denial of access to justice to poor people who will not, or cannot afford to, pay such levies. Access, to a local traditional court can be construed as a customary benefit and denied as punishment in terms of the provisions of the Bill.

The Bill provides no mechanisms to balance or debate a traditional leader’s determination of what constitutes customary law or his own powers under customary law. Moreover the Bill limits the grounds for review and appeal of decisions made by the traditional leader as presiding officer. Thus aggrieved parties would have little scope for challenging a traditional leader’s decisions or imposed sanctions. The selection of which sanctions are appealable and which are not appears arbitrary. For example, of the two forms of compulsory labour that may be imposed, only one is appealable, labour for another party. Labour for the community at large, which is that most open to potential abuse, is unappealable. Most serious is that the broad, general sanctioning provision at the end of the available list in section 10(2)(1), “any other order that the traditional court may deem appropriate and which is consistent with the provisions of this Act,” is unappealable.

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<sup>6</sup> See Native Affairs Act 23 of 1920, Native Taxation and Development Act 41 of 1925, Bantu Authorities Act 68 of 1951 and Bantu Taxation Act 92 of 1969

## **5. Gender inequalities are not improved, but rather exacerbated**

### **Section 9(3)(a) and (b) – Representation**

There are still many places where women are not allowed to appear before or address customary courts directly, instead they must be represented by male relatives. This puts women at a severe disadvantage especially when the matter before the court concerns a marital or family dispute, or the status of the women's rights vis-à-vis those of male relatives. Widows are at a severe disadvantage because women in mourning face particular restrictions in relation to entering court spaces. A well-known problem is that of the eviction of widows arising out of disputes following the death of their husbands.

Instead of directly addressing this serious problem, the TCB reinforces current patterns. It does not provide explicitly that women should be allowed to represent themselves if they so choose; the TCB rather enables the continuation of gender-discriminatory practices in this regard. Specifically, section 9(3)(a) bars people appearing before traditional courts from being represented by lawyers and section 9(3)(b) reads –

“A party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom.” (emphasis added)

This is an example of formal equality that masks substantive inequality because it is unheard of for wives to represent their husbands in customary courts. In terms of most 'customary law and custom' women must be represented by male relatives. This puts women in a disadvantageous position if they are without adult male relatives, or if their relatives are the ones with whom they have the dispute. In other words, the TCB reinforces the status quo of women being represented by men rather than protecting women and enabling them greater participation in traditional courts.

### **Sections 5(2) and 9(2) – Exclusion of Matters of Women's Status and Specific Protections for Women**

The composition of traditional courts and their patriarchal character tend to favour male interests and render women particularly vulnerable. Consequently, when women present their particular concerns before the courts they are often at a disadvantage, and do not get a fair hearing, let alone a fair outcome.

To remedy this, the 1999 CGE/CALS/NLC submission to the SALRC, for instance, recommended excluding all matters relating to the status of women from the jurisdiction of traditional courts. They specifically recommended that matters relating to the following be excluded:

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

Section 5(2) of the TCB does not pay these legitimate concerns much heed but rather consists of a relatively shorter list of exclusions.

The Bill says, in section 9(2), that the presiding officer must ensure that the rights contained in the Bill of Rights are observed and respected, and in particular 'that women are afforded

full and equal participation in the proceedings, as men are'. This section must be read in light of the concern, explained above, that the Bill does not make any provision for the role of councillors in traditional courts and does not advance increased women's representation on traditional court councils. Therefore, this provision is limited to women as litigants and does nothing to encourage increased women's representation in the constitution of traditional courts, or to improve their participation in other ways.

Furthermore, whereas in practice, in many traditional courts, the senior traditional leader may be absent and decisions made by the council, the Bill places no responsibility to ensure women's rights are protected on any other members of the court.

Lastly, instead of the Bill providing specific protections for women to address the particular problems that they often face, the Bill puts the onus on the senior traditional leader to ensure the participation of women. This means that rural women would have to challenge the actions of the senior traditional leader to invoke their rights – a daunting task, given prevailing power relations in rural areas. Moreover, according to the limited conditions of review set out in section 14(1), they would have to meet the high bar of showing that the traditional leader acted 'ultra vires', outside the scope of the Act, was guilty of a gross irregularity in the course of the proceedings, or was in some way partial, biased or malicious.

## 6. The Bill is unconstitutional

We have presented several arguments that the TCB is likely to be unconstitutional. We summarise these here.

The terms of section 30 and 31 of the Bill of Rights and the general spirit of the Constitution are such that group rights cannot simply override individual rights. Section 30 specifically says that 'everyone has the right ... to participate in the cultural life *of their choice*'. Section 31 is worded in such a way as to emphasise the rights of individuals forming a collective to choose 'to enjoy their culture... and to form, join and maintain cultural ... associations'. This provides a strong basis on which to argue that individuals could not simply, by virtue of their residing in the former homelands, forfeit such rights to choose as the Constitution guarantees them. This is one basis upon which opting out of the jurisdiction of customary courts should be permitted.

The fact that people are not permitted to have legal representation before customary courts (even in criminal matters), coupled with the fact that they are not permitted to opt out of the courts' jurisdiction, creates a direct conflict with the Constitution. Section 166(e) of the Constitution establishes the national courts. The Department of Justice and Constitutional Development has argued that customary courts are to be exempted from this section. The Department says that customary courts are given recognition in terms of section 34, instead.<sup>7</sup> Note that section 34 and the forums it provides for are subject to the rest of the Bill of Rights and Constitution, such as section 35(3)(f), as are other courts and institutions.<sup>8</sup> Also note that section 34 is a right primarily to have one's case heard in a court as established in terms of section 166(e).<sup>9</sup> Secondly, if it is deemed appropriate that the matter be heard in an

<sup>7</sup> See PMG report, <http://www.pmg.org.za/report/20090901-department-justice-constitutional-development-traditional-courts-bill>

<sup>8</sup> See n 6 below

<sup>9</sup> See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paras 31-35; *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) at para 15; *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) at paras 30 and 40

alternative tribunal or forum, that alternative to the court must be independent and impartial in the way in which state courts are required to be.

Customary courts generally are not independent and impartial; they therefore must exist outside of section 34. Thus, if people are to use customary courts, they must use them as people use professional negotiators and arbitrators: by *opting into* them, specifically. Put differently, if people are to make use of customary courts, people have to *choose* to abandon the forums required by sections 166(e) and 34. They cannot be forced to use forums other than the state courts or comparable tribunals and forums.

Furthermore, traditional institutions are not consistent with the separation of powers doctrine envisioned by the Constitution.. Traditional leaders allocate land and are eligible for a significant array of powers under section 20 of the TLGFA. The TCB would give them law- and decision-making powers as well. In other words, traditional leaders would have executive, legislative and judicial powers. We grant that judging customary law by the standards of the doctrine of separation of powers raises inherently complex dilemmas; however since the TCB entrenches distortions that undermine indigenous accountability mechanisms it cannot turn to customary law to shield it from the separation of powers doctrine. In effect, the current Bill shields traditional leaders from both indigenous accountability mechanisms and western ones. In adopting the western ‘presiding officer’ court model at the expense of the layered and inclusive nature of customary dispute resolution mechanisms, the Bill loses any possible claim that traditional leaders should be exempt from the separation of powers doctrine.

In accordance with the right to gender equality, section 8(1) which applies the Bill of Rights to *all* law and section 21(3) which subjects customary law to the Constitution, women are entitled to all of the same democratic rights as men. This means that, to the extent that men are permitted to represent themselves in cases under living customary law, women are entitled to the same. The TCB must specifically provide for this corrective articulation of customary law, in effect developing customary law as envisaged by sections 8(1), 8(3) and 39(2) of the Constitution.

Again, we reiterate the fact that the Constitutional Court has been unequivocal on the point that living customary law is what the Constitution protects as customary law. For instance, to the extent that the democratic participation of ordinary people under living customary law mechanisms of dispute resolution is removed by the TCB, the Bill falls foul of the Constitution which protects customary law as practiced and developed by the community that abides by it. To the extent that the Traditional Courts Bill is inconsistent with living customary law (as we have described in detail in this submission) and also inconsistent with the Constitution, it cannot survive constitutional scrutiny.

## **B. Proposed alternative framework**

### **1. Contextualising the alternative framework**

The first part of this submission has drawn attention to the problems with the TCB. The final part seeks to propose an alternative framework to that adopted by the TCB. It does so by focusing on three of the main areas of critique above: namely, the centralisation of law- and decision-making power to the traditional leader, the recognition of only one level of courts (the chief’s court) and the denial of the right to opt out of traditional courts’ jurisdiction. We detail the following vis-à-vis each of these:

- (i) What do we know about the way customary courts actually function and how people use them?
- (ii) What are the implications of that for the regulatory framework that the Traditional Courts Bill adopts?

We round off with a summary of what we suggest to be necessary aspects of a framework for successfully regulating customary courts.

Our submission in this regard is based on recent ethnographic studies conducted by researchers at the Law, Race and Gender Research Unit (LRG) at the University of Cape Town. These confirm the findings from (a) a survey of 20<sup>th</sup> century ethnographies, (b) 20<sup>th</sup> century contestations brought to the civil courts to challenge state misinterpretations, distortions and impositions as well as (c) recent research and consultations conducted by the South African Law Reform Commission (SALRC) in 1998-2003. These sources are in basic consensus on key features of customary courts – which are ignored or undermined by the Traditional Courts Bill.

Furthermore, a detailed study of the former statutes regulating this area (such as the Black Administration Act 38 of 1927 and the Black Authorities Act 68 of 1951), illustrates that the faulty approach adopted by the TCB is built on, and reflects, the architecture used by the apartheid government (and contested by communities themselves) and, in some cases, even modified or abandoned by the apartheid government due to its failure. Some of the features and faults of the approach are listed below.

Instead, we recommend legislation that is less interventionist and more democratic, that emphasises accountability to the community and is, hence, consistent with the Constitution and customary practices. The underlying basis for the regulatory framework proposed is the notion that government must protect individual choice as the basis of both group identity and culture. Customary law is an inherently consensual system that derives its strength and vitality from the fact that people subscribe to it and choose to use it in their daily lives and dealings with one another. The essentially democratic and participatory nature of customary law is destroyed when it is imposed on people who do not choose to use it. This problem is reinforced when the jurisdictional areas of the court are not determined by self-identification and affiliation but by contested apartheid boundaries. We therefore argue that the recognition of customary law and courts must be contingent upon people being given the right to choose, or to opt out of the jurisdiction of, customary courts on the basis of their right to choose their own culture and identity. For group identities and arrangements to remain a viable choice, they must be supported and improved in ways that make them an attractive option. Moreover, people must be resourced with the necessary information and means to effect their choices, whether in favour of or away from the group and its social and institutional arrangements.

Put differently, the Constitution requires that the agency and choices of individuals (including those living in the former homelands) be respected and supported. At the same time, and in balance with this role, the state should assist in regulating and supporting customary dispute resolution forums that rural people use and value. By the same token, the state retains the duty to capacitate individuals to choose effectively. This duty on the state includes the need to reconceptualise formal laws and institutions so as to make them more accommodating of alternative contexts and realities, and thereby also make formal laws and institutions a more viable option for rural people who wish to use them.

In terms of the mechanisms the law should use, this is summarised in a three-fold manner: (i) they should be lighter on assigning power to traditional institutions, (ii) heavier on assigning



them responsibility (tempered by an emphasis on the limitations of the powers assigned to them by apartheid), (iii) they should strengthen indigenous accountability mechanisms that make courts responsible, primarily, to the community the traditional court serves and avoid the apartheid precedent of courts being accountable upwards to the state as opposed to downwards to their people. Moreover, adequate state funding should be made available to cover their running costs, so that these are not extorted from rural people.

a) Centralisation to the traditional leader as presiding officer

i. What Do We Know about the Way Customary Courts Actually Function and How People Use Them?

Customary courts are essentially non-professional institutions. Rather, they are community forums in which mature members of the community participate.<sup>10</sup> The notion of a presiding officer who acts as a judge and is the single decision-maker has no real place in these forums as they are shared discussion spaces in which all present can participate in the hearing, questioning, deliberation and decision. Also, the variability between different communities (even within a single cultural group or locality) in the extent of the chief's participation in the court – ranging from non-participation to active participation – makes the notion of presiding officer an untenable notion to adopt and impose on all communities. The notion of a presiding officer, derived from western court systems, is misleading in the context of these forums. Several studies detail that, even where the chief formulates and pronounces the decision in a customary court, he is bound by what the council and/or community has found in hearing that case.

ii. What are the Implications of What We Know for the Regulatory Framework that the Traditional Courts Bill Adopts?

By empowering a single actor as constituting the traditional court and having power to make law and decisions in traditional courts, the TCB centralises and professionalises the customary courts. The TCB thereby violates the proven record of what is customary in the nature of customary courts – which is broad community involvement in all cases.<sup>11</sup> The TCB also imposes this false model on all customary communities and thus undermines the localised nature and consequent variability between communities themselves and the functioning of their respective courts which allows for them to operate in a manner that meets the needs created by the communities' immediate contexts.

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<sup>10</sup> Women were traditionally excluded from participating in customary courts except in cultural systems where they had their own systems of courts (as in Pedi culture) or, as in the case of the Swazi, where the Queen would hear appeals in the court immediately beneath that of the King who was her son or where, as in the Lovhedu, a woman was the figurehead in the court, as chief.

<sup>11</sup> Yet, by failing to specifically provide for women in the constitution and operation of customary courts (except as litigants, and even then without the protections they need), the TCB reinforces the widespread problem with customary courts, which is women's continued exclusion from them.

b) Recognising only chiefs' courts

i. What Do We Know about the Way Customary Courts Actually Function and How People Use Them?

Customary courts do not and have never existed only at the chief's court level. Historically, colonial and apartheid governments have tried to ignore and even do away with the lower courts (family, clan and headmen's courts) but failed. These courts are embedded in the communities; they are often formed by members of the local communities meeting to, as they might say, 'resolve problems'. They do the bulk of the work of dispute resolution so that most cases do not even reach the chief's court, which can be located far away from most community members. Due to this, they are almost impossible to do away with and should form the core emphasis of any model of customary courts recognised by government. The Black Administration Act had initially ignored them but, due to necessity, it was later amended so as to include their specific recognition, albeit inadequately still. This was because – regardless of the Act's ignoring these village and family courts – they continued to exist outside of the law.

ii. What are the Implications of What We Know for the Regulatory Framework that the Traditional Courts Bill Adopts?

By not recognising the courts at lower levels than the chief's court, the TCB again centralises power to the chief in a way that is fundamentally inconsistent with customary practices. It ignores the customary courts in which most administration of justice in customary communities in fact takes place. It thereby effectively does away with an indispensable segment of customary forms of justice, which attempt has been proven over the last century and a half to be doomed to failure.

c) Outlawing opting-out

i. What Do We Know about the Way Customary Courts Actually Function and How People Use Them?

Since the colonial and apartheid governments' entrenching of patriarchy in traditional communities and the introduction of state courts alongside customary courts, the possibility of electing to avoid customary courts where they were unjust has served an important function (particularly for women). People's attendance of a particular customary court was always elective. Thus people's choice to recognise a particular court served the function of defining the customary court's jurisdiction. It was a show of the recognition of the legitimacy of a leader and served as an important check on the leader's authority. Indeed, it was also partly what made leaders lead well: they knew that if they did not rule justly or make fair decisions their people would defect. This was only partly disrupted by apartheid legislation that forced limiting boundaries on people. Yet, even with the existence of imposed jurisdictional boundaries for customary courts, the alternative system of courts made available to them (that is, the state court system) served as an important alternate accountability mechanism. In other words, people would turn to the state courts to defend them against, or simply to avoid, their unjust rulers' actions, laws and judgments. In a modest but important way, this caused the customary courts to remain (in part) dependent on their accountability to their people for their legitimacy, relevance and use. To deny rural people the ability to choose whether or not to attend customary courts is to undermine a significant aspect of their ability to secure their own justice and hold their institutions accountable.

- ii. What are the Implications of What We Know for the Regulatory Framework that the Traditional Courts Bill Adopts?

By refusing people the right to opt out of customary courts, and use the civil courts that all other South Africans are permitted to use as an alternative, the TCB strips rural people of several rights and benefits.

First, it deprives them of their right to freely choose to associate with their traditional authorities. Second, it denies them an escape from illegitimate and/or dysfunctional and unjust customary courts (where these are the conditions of their local courts). And, third, it refuses them one of their instruments for holding these institutions accountable.

## 2. Specific recommendations for alternative framework

- (i) Primarily, a fundamental shift of assumptions is necessary.
  - a. As socially embedded and non-professional forums of dispute resolution, customary courts are constructed from the ground up. Therefore, a system for their regulation should *not* focus at the chief's level, or even begin from the chief's court's level and devolve authority downwards. Rather, it should start from the intra-community levels and predominantly rely on community members to assign authority upwards, most obviously by referring their cases upwards.
  - b. Customary courts are elective structures and should not be frozen or imposed by the state. People should be enabled to choose to support and perpetuate them or cause their discontinuation by their withdrawal of their recognition of them as legitimate – that is, their withdrawal of their cases from them.
  - c. The above two points necessitate the following:
    - i. Local courts should be recognised first, before recognising community-level courts. These courts include family/clan courts, ward/village courts and any other (even typically non-customary) courts that communities elect to form to meet their dispute resolution needs at the local level.
    - ii. Provision should then be made for communities to refer cases up to courts at higher levels of formation within their communities, if they wish.
    - iii. Similar provision must be made for people to refer cases outwards to courts that are external to their communities, if they wish. In other words, if they elect to do so, community members should be able to take their cases from the headmen's courts directly to the Magistrate's Court.
    - iv. People should be able to choose which customary court to patronise. In practice, they might most often choose their local courts. However, in some cases, they might choose a customary or

other informal court outside of the boundaries established by apartheid. People should not be forcibly confined to using the courts of officially recognised chiefs (or headmen) where they dispute the legitimacy of that chief, or the tribal boundaries inherited from apartheid and entrenched by the TLGFA.<sup>12</sup>

- v. Rural people should also be able to institute proceedings in outside courts and avoid customary courts entirely.<sup>13</sup> This is most important in the case of criminal matters, where the only way that the denial of the right to legal representation<sup>14</sup> can be justified in terms of the Constitution is if people *choose* to attend the customary court in which they are not permitted to have professional legal representation, and thus *voluntarily abandon* this right.<sup>15</sup>
  - vi. Discrimination by the customary courts against any member of the community (whether on the basis of gender, culture, class, legitimacy, or even on the basis of non-payment of tribal levies and fees) should be outlawed.
- (ii) Community participation in cases should be recognised in both forms in which it generally occurs: through a council and through the general participation of the community. The precise balance between the two (the council and the community) should be determined on the basis of each community's own living customary law. Women must be made a necessary part of the composition of the courts, and thus given an explicit role in decision-making concerning the content of customary law.
- (iii) As above, women's involvement in courts must not be confined to their approaching courts as litigants. However, where women are considered as litigants, the following must be provided for.
- a. Legislation must explicitly provide women with the right to represent themselves in customary courts. Matters concerning the rights and interests of women must not be heard in the litigant women's absences. Even where women wish to be assisted by family or friends, they must be present and able to speak at all times and, especially, their defences.

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<sup>12</sup> With choice, the question arises as to who gets to make it: the plaintiff or defendant. Legislation should possibly provide that, in civil cases, the plaintiff makes the choice by where they initiate proceedings (reserving room and a mechanism for the defendant to object), whilst in criminal cases, the accused should be permitted to make the choice.

<sup>13</sup> A further justification for people's being able to choose to use the Magistrate's Court as against the customary court is that this would do away with the difficulty created by the TCB, for women especially, in requiring them to challenge the chief as presiding officer directly if they feel that his judgment is unfair. People can, instead, just avoid the chief entirely, which subtly says that they think him and his court incompetent/dysfunctional or biased/malicious, but this means does not require direct confrontation between people of unequal power, influence and means.

<sup>14</sup> Section 35(3)(f) gives people the right to legal representation where accused of an offence, and sections 7, 8 and 36 all make the Bill of Rights central to our democracy, subject all laws to it and make it only limitable for constitutionally-compelling reasons. Notably, section 35(3)(f) is a non-derogable right even in a state of emergency.

<sup>15</sup> See the discussion above, concerning sections 34 and 166(e).

- b. Matters concerning issues affecting women adversely should be excluded from customary courts' jurisdiction. We recognise that this is a complicated issue and therefore recommend that the specific list of subject matter to be excluded be debated among stakeholders – and especially women themselves.

(iv) Regarding sanctions, the following restrictions should be put in place.

- a. Orders of community service should be prohibited from being imposed on people not party to the proceedings. These kinds of orders should be specifically prohibited from being interpreted to mean service in the chief or headman's homestead or for the chief or headman's benefit.
  - b. Banishment or denial of land rights or community membership, and other customary rights, should be outlawed as punishments in both criminal and civil cases. Corporal punishment and other forms of humiliating punishment should obviously also be prohibited.
  - c. Orders of a monetary value must be restricted to modest sums that are in reasonable proportion with people's income levels (and the common lack of income) in rural areas.
  - d. Because of the importance (for community members) of victim compensation in the case of a wrong – even a criminal wrong – two things should be done. First, compensation orders in criminal matters (that is, not as a separate civil claim but in the process of the sentencing in a criminal matter in terms of sections 297 and 300 of the Criminal Procedure Act 51 of 1977) should be broadly publicised to the rural public, and made available to rural claimants via both the civil and customary courts. Second, customary courts should have jurisdiction as an alternative forum for civil claims in connection to minor criminal cases within their jurisdiction, where the criminal courts have not granted compensation orders. This acknowledges the void that customary courts often end up filling by hearing 'criminal matters' as essentially civil claims.
  - e. All customary court decisions and sanctions should be appealable to the Magistrate's Court.
- (v) Rights, resources and oversight are essential to ensure that, where they are not, customary courts are developed into more functional and constitutionally just institutions that truly serve the justice needs of their communities. This does not mean trying to make customary courts into Magistrate's Courts. Rather, it requires permitting them to operate in their contexts as they are inclined to whilst subjecting them firmly to the requirements of the Constitution, where they stray, and hence demanding that they conform to it and not undermine people's rights.
- a. Government should provide them with the financial support to enable them to operate well.<sup>16</sup> Certainly, poor people should not be required to pay

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<sup>16</sup> Because customary courts are typically non-professional institutions, their financial needs would be different from those of state courts. For instance, government should ideally provide a meal at the end to those who have participated in a day's court proceedings, as this is one of the costs toward which people's fines are often

(excessive sums) in order to ensure this or because of government's failure to secure this. An example is court fees and fines that, in some places, have crept up to prohibitory levels (and are even accompanied by unconventional gifts on the sides) and therefore make it difficult for poor people to access the courts and create an obstacle to justice. Rural people should not have to pay for access to these forums of justice. But if it proved necessary that they do, these fees should be nominal and consistent. Court finances should be formally accounted for.

- b. Government should also fully familiarise itself with how the customary courts operate and guard that they operate in full recognition of constitutional rights and in accordance with constitutional values. A desirable mechanism for this would be a dedicated department in the Department of Justice and Constitutional Development with trained officers to evaluate them and their reports. (Only basic reporting is necessary or possible at this stage but this must definitely include accurate financial reporting.) This department should conduct site visits as a form of oversight, assessment, modification and training that would allow for course corrections to be made specifically and timeously. The department must also receive, investigate and deal with (anonymous) complaints pertaining to violations in specific courts.
- c. Sanctions must exist for customary courts that refuse to conform. These should be over and above the sanction presumed above (namely, in that people would choose to cease to patronise a dysfunctional and unjust customary court). Removal, prosecution, fining and imprisonment of recalcitrant customary court staff and regular participants should also be available sanctions against the institution and its servants. Where problems with a customary court are systemic and irreparable, the withdrawal of recognition (i.e. official disestablishment) should also be possible. However, this too should ultimately be guided by the will of the community that the court serves and be supported by the active facilitation of the community's use of alternatives; otherwise, it will be ineffectual. Enforcement of these sanctions must be ensured when necessary or disillusionment with government's preparedness to hold traditional institutions accountable will only grow.
- d. In the Magistrate's Court, dedicated officers should be instated to deal with customary law concerns (original applications and appeals). Training should be provided to them to deal with these matters with real understanding of the local systems with which they may be presented in their areas and give effect to (or, where necessary, develop in line with the Constitution) living customary law. In other words, for the integration of customary courts with the state court system, mutual understanding and ongoing communication is required between the respective institutions.

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attributed. In many areas, government already provides modest stipends to headmen, councillors and secretaries, as the people who administratively staff the courts – but only at the chief's court level. As a consequence, many other servants of these courts are often left out e.g. the 'traditional police' (somewhat comparable to the 'sheriff of the court') who, in some instances, does the bulk of the running around for summoning people to the court and enforcing judgments, as well as sometimes even hearing cases and intervening in physical/violent disputes.

Mutual change and development to accommodate and learn from one another is indispensable.

(vi) Summary of Principles:

Regulation of customary courts should be minimalist and –

- a. Lighter on assigning power to traditional institutions,
- b. Heavier on assigning them responsibility and rather emphasise the limits of the powers that traditional institutions might assume to have (in light of colonial and apartheid entitlements), and,
- c. Provide for their accountability directly to the communities they serve first, and to the state second. This means making their existence dependent on their effectively fulfilling this requirement.

## Conclusion

In conclusion, our argument is that the current Bill is fatally flawed and should be withdrawn, and a proper consultation process embarked on to ascertain the views and experiences of a proper cross-section of ordinary rural people, paying particular care to enable rural women to participate fully. Moreover since the subject matter of the Bill is Traditional **Courts**, the consultation process should focus on existing customary dispute resolution processes and how these work in practice; seeking ways to enhance and improve the delivery of justice to those who use them. This important objective should not be made secondary to the demands of traditional leaders for increased powers. The starting point for legislative reform concerning customary law must be living customary law, not the distorted precedents established and entrenched by previous colonial and apartheid laws.