

SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 82

Project 90

**THE HARMONISATION OF THE COMMON LAW
AND INDIGENOUS LAW:
TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF
TRADITIONAL LEADERS**

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INTRODUCTION

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

The members of the Commission are-

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The project leader responsible for this project is Professor R T Nhlapo. The researcher is Ms S N Dube. The Commission wishes to express its gratitude to Professor S Rugege for the preparation of this discussion paper.

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The Commission gratefully acknowledges the financial grant from the *Deutsche Gesellschaft für Technische Zusammenarbeit* (GTZ) which enabled the Commission to conduct the research for this discussion paper.

PREFACE

This Discussion Paper (which reflects information gathered up to the end of April 1999) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The Discussion Paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa Act, (Act 108 of 1996).

Respondents are requested to submit written comments, representations or requests to the Commission by 30 June 1999 at the address appearing on the previous page. The researcher will endeavor to assist you with any particular difficulties that you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information is Ms S N Dube. The project leader responsible for the project is Professor RT Nhlapo.

The Commission is indebted to Professor S Rugege who undertook the research for this Discussion Paper.

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SUMMARY OF RECOMMENDATIONS AND REQUESTS FOR COMMENT

The following **recommendations** are made in this Discussion Paper:

1. Traditional courts should continue to be recognized where they are already established, that is, in rural areas, within the areas of jurisdiction of chiefs and headmen. (5.2)
2. In urban or peri-urban areas where there are no chiefs or headmen, community courts should be established and should consist of members popularly elected by all the residents of a particular urban locality. These community courts should apply the general sense of justice and common sense and should aim at reconciling the disputants and establishing harmony in the community. Decisions should be by consensus or by majority vote. Appeals should go to Magistrates courts. (5.3)
3. (a) Traditional courts should continue to be presided over by chiefs and headmen as part of their role under section 211 of the Constitution. (5.4)
(b) Alternatively, existing chiefs courts could become informal arbitration tribunals while special customary courts or community courts take their place as formal courts similar to the situation in Lesotho.(5.8)
4. (a) Councillors could be popularly elected by the people of the village or ward to sit with the chief or headman in his or her adjudication of disputes. Decisions should be taken collectively, treating the councilors as full members of the court. (5.4)

(b)Alternatively, councillors could be appointed by the presiding chief or headman from a panel elected by the relevant community. (5.5)
5. The traditional element of popular participation whereby every adult was allowed to question litigants and give his opinion on the case should be maintained.. (5.6)

6. To comply with S.9 of the Constitution, the full participation of women members of the community as councillors or presiding adjudicators must be allowed.(5.6)
7. Para-legals should be trained and appointed by the Ministry of Justice to assist traditional courts. These clerks should be trained in customary law and have a basic understanding of the Bill of Rights. (5.7)
8. (a) The Regional Authority courts of the former Transkei, should be abolished. (5.9.2)
(b) In the alternative the Regional Authority Courts could be retained as appeal courts in customary law matters, but in that event similar courts should be established all over the country to maintain uniformity in the administration of justice. (5.9.3)
9. Traditional courts should be regarded as courts of law and given the status and respect of courts of law (4.1)
10. Jurisdiction of a traditional court in respect of persons, should no longer be based on race or colour but on such matters as residence, proximity, nature of transaction or subject matter and the law applicable. (6.2.2)
11. The application of customary law should no longer be subject to the 'repugnancy clause'. This requirement should be replaced by one requiring consistency with the constitution and, in particular, with the values underlying the Bill of Rights. (6.3.2)
12. Matters relating to nullity, divorce and separation with regard to civil marriages should continue to be excluded from the jurisdiction of traditional courts. Such cases should be taken to a family court. (6.4.1)
13. Disputes over customary land rights should be handled by chiefs and headmen and their

courts in their adjudicative rather than administrative capacity and appeals should go to other courts in the usual way. (6.4.2)

14. A monetary ceiling on jurisdiction in civil matters should be imposed. (6.4.3)
15. If traditional courts are to continue to exercise criminal jurisdiction, only relatively minor offences should be within their jurisdiction while the more serious are left to be dealt with by magistrates' courts or higher. (6.6.3) The list of scheduled offences which are outside the jurisdiction of traditional courts, should be reviewed and reassessed with a view to ensuring that these courts only preside over the very minor and simple offences. (6.5.2)
16. If traditional courts are going to be allowed to keep criminal jurisdiction the maximum limit for fines could be raised from R50. Payment of fines in the form of livestock is convenient for the rural poor but the equivalence of stock in money should be revalued regularly.(6.7.1)
17. Fines should go into the general revenue fund either of the provincial or at national level, but to be utilised for the direct benefit of the community from which such fines have been levied.(6.7.2)
18. Traditional courts, need to be alerted that corporal punishment is unconstitutional and therefore illegal. (6.7.3)
19. Formal rules of procedure and evidence should not be imposed on traditional courts as the customary procedure is generally compatible with rules of natural justice. (7.1.2)
20. It is recommended that the proposed para-legal clerks of traditional courts should make summaries of evidence and judgements which can subsequently be relied upon on appeal or review. (7.4.4)

21. It is recommended that the prohibition against legal representation in courts presided over by traditional leaders, be retained. If customary appeal courts are to be created with greater powers, then consideration could be given to allowing legal representatives in accordance with the decision in *Bangindawo*. (7.5.4)

The Commission requests comment on the following issues:

1. Whether traditional courts are recognized as courts of law or not, should accused persons (if criminal jurisdiction is retained) be able to opt out and demand transfer of the case to a magistrates court? (4.4.1)
2. Many African countries, some within the region (e.g. Swaziland, Botswana), have found some merit in the idea of a traditional courts' secretariat (invariably set up in the Ministry of Justice) to ensure the smooth running of the courts. Usually called the Office of the Customary Courts Commissioner (or Judicial Commissioner) this secretariat functions to supervise traditional courts, to act as a complaints directorate, to channel reviews, to oversee the budget and the conditions of service, and generally to regulate and protect traditional courts in a manner that acknowledges the way in which they differ from western-style courts in their culture, their composition and their functioning. Is it advisable to have this kind of secretariat in South Africa?
3. Given the confusion sometimes generated by the adjective "traditional" (e.g. the existence of religious, and other, traditions), is "customary courts" a better label than "traditional courts" for the new chiefs' and headmen's courts sought to be recognized by the statute developed from this discussion paper?

PRELIMINARY NOTE

1. Background to the Investigation

- 1.1 The investigation into the question of customary courts and the judicial powers of traditional leaders was placed on the agenda of the new South African Law Commission as early as 1996, together with the issue of customary marriages. The decision having been taken to start with the investigation into the recognition of customary marriages, research capacity at the Commission dictated that the issue of customary courts would follow immediately upon completion of the marriage investigation.
- 1.2 In the meantime pressure continued to mount on the Minister to do something about the conferment of civil and criminal jurisdiction upon traditional leaders. Advice to the Minister from various task teams, workshops etc. was inconclusive, partly because of disagreements about the effects of the Constitution on the operation of the courts of traditional leaders. The Minister himself preferred a holistic solution rather than piecemeal reform and he encouraged the South African Law Commission to continue with the research as planned, but to find ways of speeding it up. The Commission successfully solicited donor funding and appointed a specialist researcher to develop a discussion paper.
- 1.3 A noticeable difference between the format of the present discussion paper and that of other discussion papers emanating from the Law Commission is its focus on practical recommendations, avoiding too much academic speculation and analysis. This reflects the urgency with which the matter was undertaken: the researcher was asked to focus on the practical, to draw on legislation in other African countries, and to make use of existing materials in the Department of Justice such as the deliberations and resolutions of the numerous workshops on the subject, and the vast stock of materials from the Constitutional Assembly embodying the

submissions and views of traditional leaders themselves over the years.

- 1.4 This approach vastly helped to speed up the process and a draft discussion paper was ready to go before the Working Committee of the Commission on 9 April 1999, where it was cleared for publication, with amendments.

2. **A note on style**

- 2.1 Because of the reasons set out above, the discussion paper does not attempt to exhaust all possible philosophical, technical and legal arguments surrounding the issues. On many issues the paper opens up the debate by pointing out all the most commonly-heard arguments for and against the courts of traditional leaders.
- 2.2 The paper also tries to stimulate reaction by drawing attention to some of the less-debated options in this area of the law. Throughout, the aim is to generate focused comment and debate on the **principles** which should underpin the recognition, establishment, status, role, jurisdiction and functioning of the courts of traditional leaders. Discussion papers of the South African Law Commission traditionally include a draft Bill for consideration. On this important and sensitive issue, the Commission felt that there was merit in seeking guidance on issues of principle first, so that any legislation which results from the process can be seen to be the joint product of the many interests involved.

TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF TRADITIONAL LEADERS.

1 Introduction

Traditional courts (also referred to as chiefs' courts) still form an important part of the administration of justice in much of rural Africa, including South Africa. Some critics see them as conservative and unable to deliver justice in the modern social economic and political climate while others see them as prototypes of the kind of dispute resolution mechanisms that are desirable in modern society.

There are several reasons why traditional courts or courts of traditional leaders should be retained in a modern democratic country like South Africa. Firstly, it is argued that customary law, as the law of the majority of African people and the traditional courts that administer justice according to this law, are part of the cultural heritage of African people. This argument has been made particularly by traditional leaders themselves as well as by some academics. Secondly, traditional courts are a useful and desirable mechanism for the speedy resolution of disputes given their nature as an easily accessible, inexpensive (virtually free), simple system of justice. Thirdly, it is argued that although there are shortcomings in the system, they are not beyond repair but may be made to adapt to changing needs¹ and to the requirements of the Bill of Rights.

2. Advantages and disadvantages of traditional courts

2.1 Advantages:

1. See Yvonne Mokgoro, "The role and place of lay participation, customary and community courts in a restructured future judiciary", in *Reshaping the structures of justice for a democratic South Africa*, Papers of conference organized by the national Association of Democratic Lawyers, Pretoria, Oct.1993, p.76.

- 2.1.1 Accessibility: Traditional courts exist in almost every area of jurisdiction of a traditional leader (chief or headman) which means that virtually every village has a court within reach of most inhabitants. People do not have to travel long distances to magistrates courts at district headquarters. The courts are also accessible in terms of social distance. Since the presiding chief and his councillors who constitute the court are not very different in terms of social status, wealth or education, disputants do not feel as intimidated by the chief's court as they would in a western-type court.
- 2.1.2 Cost: Besides the fact that they are easily accessible, traditional courts are cheap in terms of transport costs and the courts levy only minimal fees which may be payable in kind. Further, since legal practitioners are not permitted in these courts, justice is affordable.
- 2.1.3 Familiarity with the law: Traditional courts apply customary law. Customary law consists of rules and customs of a particular group or community. Ordinary people understand it and relate to it much more than the largely imported common law or the statutory law applied in the regular courts. Although African society has been changing over the decades, African people still identify with their customary law rather than other laws which baffle the learned and the ordinary people alike. The absence of lawyers in these courts has ensured that principles of customary law and practice remain structurally and conceptually simple, which in turn encourages popular participation in the exposition of the law.
- 2.1.4 Simplicity and informality: The procedure in traditional courts is simple, flexible and expeditious. Procedural informality of African traditional courts has been held out as a major advantage over the western-style courts which sometimes get bogged down in technicalities. The procedure allows for the parties to present their cases and have their witnesses give their versions of events. After each party or witness has made a statement, the chief or headman and his councillors can question them. Even members of the public (adult males) are allowed to question the parties and the witnesses and to express

opinions.² This informality makes these courts user-friendly and public participation makes the process popular in the sense of regarding it as their own and not something imposed from above.

2.1.5 Language: The fact that the language of the court is invariably the local language of the disputants, with no risk of distortion through interpreting, makes these courts attractive to their users and gives greater satisfaction to the participants in the process as compared to regular courts where the language used is not understood by the majority.

2.2 *Disadvantages*

2.2.1 Exclusion of legal practitioners: Legal representation is prohibited in most countries where there are traditional or customary courts or non-traditional community courts.³ It is sometimes argued that the exclusion of lawyers from traditional courts is unjustified in that litigants should have the choice, if they so wish, to engage legal practitioners to represent them in these courts. In South Africa, rule 5 of the rules of courts of chiefs and headmen⁴, prohibits legal representation in these courts. It has been argued⁵ that this is contrary to section 35 of the Constitution which provides:

- (3) Every accused person has a right to a fair trial, which includes the right -
- (f) to choose and be represented by a legal practitioner, and to be informed of this right promptly.

The appropriateness of this exclusion is further discussed later in this paper.

2 Bekker, J.C, *Seymour's Customary Law in Southern Africa*, Juta, 1989, p.29

3 These include Botswana, Lesotho, Swaziland, Zimbabwe and Uganda.

4 Government Gazette No. R2082 of 29 Dec. 1967.

5 This was one of the applicants' argument in seeking an order declaring section 7 of the Transkei Regional Authority Act unconstitutional in *Bangindawo and others v Head of Nyanda Regional Authority and Another*, 1998 (3) BCLR 314 (Tk).

2.2.2 No presumption of innocence: It has been stated that the inquisitorial procedure whereby the chief and his councillors question a party to proceedings in traditional courts, amounts to a presumption of guilt against a person accused of an offence before a traditional court and that such accused had to convince the court of his or her innocence. Thus it is said that the right to silence, enshrined in section 35 (3) (h) of the Constitution, is unknown in customary law and that a person unable to clearly articulate his or her position may prejudice his or her case.

2.2.3 Composition of the traditional court: There are two possible constitutionally controversial issues relating to the composition of the court: firstly, whether they are not discriminatory against women contrary to section 9 of the Constitution and secondly whether chiefs and headmen are appropriately qualified to preside over courts in terms of section 174 of the Constitution.

(a) Sexism in composition of the court: Women are neither allowed to preside over nor to participate in the proceedings of traditional courts except as litigants assisted by men.⁶ Chiefs and headmen preside by virtue of their position and women do not succeed to chieftainship although they may hold a position in an acting capacity. Dispute resolution like other aspects of traditional African society is dominated by patriarchy. This seems to offend against the democratic values of equality and non-discrimination enshrined in the Constitution. The topic of discrimination against women in customary law is a widely debated one. Reference to it in this context is brief. There appears to be no reason for not appointing women chiefs in their own right and thereafter as presiding adjudicators in traditional courts. This however, is opposed by traditional leaders⁷ on the ground that it

6 However, it is noted that in some traditional courts today women are included as members of the court. This was pointed out to me by Ms. B.Oomen of the Vollenhoven Institute, University of Leiden who is currently (1998/99) doing socio-legal research in the Northern Province.

7 The equality clause was opposed by the traditional leaders during the certification hearing of the 1996 constitution. See submissions to the Constitutional Court on the certification of the Constitution of the Republic of South Africa, 1996 by the Congress of Traditional Leaders of South Africa. See also the

would be going against African culture which is constitutionally protected by sections 30 and 31. Section 30 states: “everyone has the right to use the language and to participate in the cultural life of their choice, but no one may exercise these rights in a manner inconsistent with any provision of the Bill of Rights.” Section 31(1) states that “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community-

(a) to enjoy their culture...”.

However, sub-section 2 of the same section qualifies the right in that it “ may not be exercised in a manner inconsistent with any provision of the Bill of Rights.” It is clear that the provisos to sections 30 and 31 make the right to culture subject to the equality clause which suggests that the exclusion of women from membership of traditional courts is unconstitutional.

(b) Lack of training in law- The argument regarding suitability is that traditional leaders are not necessarily proficient in the law whether customary or, with respect to their criminal jurisdiction, common law or statutory law. If this is true, it is prejudicial to litigants and to the credibility of the whole justice system.

The other argument is that the lack of legal qualifications makes the presiding chiefs and headmen unsuitable for a judicial role as envisaged by section 174 (1) of the Constitution which states that “Any appropriately qualified woman or man who is a fit and proper person, may be appointed a judicial officer.” It is arguable that traditional leaders are *prima facie* proficient in the customary law which they administer in their courts and are therefore “appropriately qualified to adjudicate in matters of customary law.”⁸ However, the same cannot be said of their knowledge of the common law or statutory law. There is thus merit in the argument that they are not qualified to adjudicate in matters relating to

submission of Professor NJJ Olivier and the Traditional Authorities Research Group.

8 This argument is forcefully made by A.M. Mayekiso of the Umtata Magistrate’s Court in his support of not abolishing the Regional Authority courts in the former Transkei. (Ministry of Justice documents.)

common law and statutory criminal law and that they should not have jurisdiction over such matters.

3 **Should traditional courts continue to exist?**

Given the above advantages and disadvantages of typical traditional courts, the question is whether in a modern democratic South Africa, these courts should continue to exist or should be abolished. There are several reasons why traditional courts should continue to exist. These include their constitutional position; the strong lobby of traditional leaders and the continued usefulness in practice of traditional courts.

3.1 *The Constitution recognises and protects them*

3.1.1 In the *Certification* case⁹, the Constitutional Court confirmed that section 166 (e) which refers to "any other court established or recognised by an Act of Parliament" accords recognition to traditional courts via the Black Administration Act No. 38 of 1927. The Court further held that section 16(1) of Schedule 6 of the Constitution is more direct in its recognition of traditional courts when it states that: "every court, including courts of traditional leaders ... continues to function."

3.1.2 Thus it may be said that the framers of the Constitution intended the continued existence of traditional courts. This, however, does not mean that they have to remain unchanged in the same form as provided for under the Black Administration Act of 1927. Section 2 of schedule 6 says that all law that was in force when the new constitution took effect continues in force, subject to any amendment or repeal. Thus, traditional courts may be safely reorganised under this section by amending or repealing and replacing, the Black Administration Act and statutes of the former homelands that regulate traditional courts.

9 *Ex Parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa*, 1996(4) SA 744 (cc), p835

3.1.3 As administration of justice is neither within the concurrent functional areas of national and provincial legislative competence nor exclusive areas of competence of the provincial legislatures, it must be that the national legislature has the residual competence to amend or repeal and or pass new laws regulating traditional courts.

3.2 *Strong lobby of traditional leaders*

3.2.1 Traditional leaders in general support the continuation and even strengthening of traditional courts presided over by chiefs or headmen and their councils. They have lobbied for the improvement of their status and role in the new South African order at various fora, including parliament, conferences, public addresses and in the media.

3.2.2 For example, in a number of statements, the Congress of Traditional Leaders of South Africa (CONTRALESA), has expressed its position on the matter saying traditional courts must not only be recognised but must be specifically entrenched in the Constitution. Thus, in its objection to the certification of the 1996 constitution, CONTRALESA stated:

The chapter dealing with courts does not make provision for customary courts that have been in existence from time immemorial. We are of the view that these courts like other courts of the land should be recognized in the constitution.¹⁰

3.2.3 In its submission to the Constituent Assembly Ad hoc Committee on Traditional Leaders, CONTRALESA (KwaZulu/Natal branch) urged that chiefs should be accorded civil and criminal jurisdiction in respect of civil claims arising out of indigenous law and custom and in respect of certain criminal offences determined by the Minister.¹¹ This position was

10 In this connection the Constitutional court dismissed the objection on grounds as in 3.1.1 above

11 In effect CONTRALESA was suggesting that the system of chiefs' courts as they operate today be maintained.

also reaffirmed by the then President of CONTRALESA, Chief Patekile Holomisa.¹²

- 3.2.4 The former Northern Transvaal leaders make a case for the retention of traditional courts as follows:

Traditional courts are closer to the people and enjoy respect in their areas of jurisdiction as a result they should continue to exist. Their existence will to an extent assist in the reduction of workload faced by our magistrates' courts."¹³

The leaders also stress the value of traditional courts in performing a mediation function and in promoting reconciliation of parties.

- 3.2.5 In a strongly worded statement styled "Manifesto of Constitutional Proposals and Political Commitments for all traditional leaders of South Africa" a delegation of Amakhosi of KwaZulu/Natal called for constitutional recognition of "tribal courts and the system of jurisdiction, enforcement and/or sanctions of traditional and indigenous law".¹⁴

- 3.2.6 At a meeting of a committee of traditional leaders nominated by a conference of traditional leaders from Eastern Cape, North West, Free State, KwaZulu-Natal and Mpumalanga in September 1996, it was resolved "to make representation to the Ministry of Justice to recognise customary courts as courts of law."¹⁵ This was because of the view that since the traditional courts were not integrated in the national judicial system, they were not sufficiently protected. They called for greater recognition because they argued, this was "a judicial service which remains accessible and available to tribal communities for free".¹⁶

12 Statement made at Workshop for Traditional Leaders, Durban 26 - 28 July, 1996.

13 Submission to the Constitutional Assembly Ad Hoc Committee on Traditional Authorities and Customary Law and Practice 11 May, 1995.

14 Constitutional Assembly: Public Hearings on Traditional Authorities, May 1995.

15 Press statement issued following the meeting of the Traditional Leaders Working Committee. Phokeng 6th September, 1996

16 Ibid

- 3.2.7 At another meeting of traditional leaders of the former Northern Transvaal organised by the Commission on Constitutional Affairs to solicit views on traditional authorities, the leaders expressed their view that traditional courts should continue to exist as before because “formal courts are in most cases inaccessible, expensive and incomprehensible.” They further stated that chiefs’ powers in respect of the courts should not be limited.¹⁷
- 3.2.8 The National Development and Restoration of Traditional Customs Forum (NADERTRAC), another organisation associated with traditional leaders, has called for the continuance of traditional courts. Its main arguments are that (i) traditional courts provide justice to poor communities whose members can not afford attorneys’ fees (ii) no legal representation is necessary as the procedure is so uncomplicated that anyone can prosecute and defend a case (iii) that the language and procedures of the ordinary courts are not understandable by illiterate people. NADERTRAC recommends that, in order to strengthen the courts, workshops to provide legal training for chiefs and headmen be organised and that decisions of traditional courts be recognised and regarded as valid by the High Courts.¹⁸
- 3.2.9 There is also support from Inkatha Freedom Party and the KwaZulu-Natal government¹⁹. It is possible that if an attempt was made to abolish chiefs’ courts, traditional leaders would withdraw their full cooperation in local government which would probably cause disruption. In a discussion document, the KwaZulu- Natal government states: “The uncertainty on the status of traditional jurisdiction is likely to undermine the administration of justice and create havoc and confusion in place of the present order and social

17 Memorandum from Northern Transvaal Commission on Constitutional Affairs to Commission on Traditional Authorities. 11/05/95

18 Department of Justice memorandum 8/8/1/7 (DDM) of 8/11/96

19 See policy statements on the internet site <http://www.polity.org.za>

stability.”²⁰ It is such withholding of cooperation by the traditional leaders in Zimbabwe which led the state to capitulate to demands of chiefs to return their adjudicatory powers which were abolished in 1981 and were reestablished in 1990.²¹

3.3 *Traditional courts still serve a useful purpose*

3.3.1 As discussed above, traditional courts are generally seen as speedy, informal, not intimidating, cheap or free, and accessible. They are likely to remain that way. This is appreciated by the communities who would rather go to these courts they are familiar with than go to magistrates courts. This can be shown for instance by the low level of appeals from chiefs’ courts to magistrates’ courts.

3.3.2 Traditional courts substantially reduce the potential workload of magistrates courts. If the cases heard in traditional courts were to be heard by magistrates’ courts, the latter would probably grind to a halt.²²

3.4 *Little opposition to traditional courts (?)*

3.4.1 There seems little opposition to the existence of traditional courts generally in the literature, except for the Regional Authority Courts in the former Transkei which are discussed later in the paper. One group that has clearly voiced its opposition to the continued existence of traditional courts is the Rural Women's Movement which has categorically stated that traditional leaders should not have judicial powers. Rather, it argues, traditional leaders courts should be regarded as arbitration forums. The Movement

20 Ibid.

21 Ncube, W., “Dealing with inequities in customary law: action, reaction and social change in Zimbabwe” (1991) 5 *International Journal of Law and Family* p.64.

22 Koyana, D.S. “The indigenous constitutional system and the role of the customary courts today.” Paper presented at the Constitutional Assembly Public hearing on Traditional Authorities, Cape Town, May 1995.

accuses these courts of using judicial powers "without following the rules that courts of general law apply and without being accountable." It further accused traditional courts of favouritism and bias against women.²³ The South African National Civics Organisation, (SANCO) is opposed to the role of traditional leaders in general. It argues that the institution is undemocratic, sexist and conservative and that there is widespread corruption and abuse of office by traditional leaders.²⁴

3.4.2 It appears that, although traditional leaders have been given opportunities to present their views on this matter, no empirical research has been conducted to find out the views of ordinary people about the functioning of chiefs' courts. The assurance of traditional leaders that their people are satisfied with their administration of justice is not enough. More research is warranted on this issue.

4 **Should traditional courts be courts of law?**

4.1 This is a contentious issue. It may be submitted that traditional courts should be regarded as courts of law²⁵ and given the status and respect of courts of law. The main arguments in support of this are:

(a) that they serve a judicial purpose: they resolve legal disputes. Appeals from them go to magistrates' courts and from there to the High Court. The fact that a case is heard *de*

23 Rural Women's Movement: "Submission to the Ad Hoc Committee on Traditional Leaders", Constitutional Assembly, May 1995.

24 Houston, G. *et al*, *Constitutional Development and Issues of Traditional Leadership In Rural Local Government in South Africa: Seminar Report on "Aspects of the Debate on the Draft of the New South African Constitution*, dated 22 April 1996, p.66, referred to in Khunou, S.F., "Critical Assessment of the role and the effectiveness of traditional leaders in traditional local government", paper delivered at the Conference of the Southern African Society of Legal Historians, Roodevallei Country Lodge, 13-15 January 1999.

25 "Court of law" here means a court recognized as part of the hierarchy of courts in the judicial system as opposed to an informal dispute resolution tribunal. The label has no bearing on whether the court is a court of record or not.

novo on appeal to a magistrate's court does not detract from the judicial nature of the original proceedings. The rehearing is for technical reasons: because no adequate record of proceedings is kept due to lack of resources and the fact that members of chiefs' courts are not legally trained. Cases that are not appealed against, are finally disposed of and are enforceable.²⁶ According to *Tsautsi v Nene*,²⁷ once such a case is decided and the losing party does not appeal, then the case becomes *res judicata* and cannot be subsequently brought by the same parties or those acting on their behalf before the same or another court.

(b) that the Constitutional court has ruled that such courts are recognized by section 166 (e) of the Constitution. Section 166 is under the sub-heading: "Judicial system" and states:

"The courts are:

(e) any other courts established or recognised in terms of an Act of Parliament".

The Court pointed out that traditional courts are recognised in terms of the Black Administration Act No.38 of 1927. The question is whether the Constitutional Court would have said this if the traditional courts were not courts of law.

(c) that there is a precedent for regarding traditional courts as courts of law. The Zimbabwe Local Courts Act states: "A local court constituted in terms of sub-section 1, shall be a court of law..."²⁸

4.2 *Arguments against:*

26 Decisions of traditional courts are enforceable by the chief's messenger according to customary law. Where the messenger fails to enforce judgment, however, assistance may be sought from a magistrate's court which may enforce a civil judgment or punish the convicted person.

27 1952 NAC (S) 73. See also Bekker (supra) p.16.

28 Customary Law and Local Courts Act, Chapter 7:05 (Acts 2/1990, 22/1992, 22/1995), section 10 (2).

(a) No separation of powers:

It has been argued that the combining of executive and judicial functions on the part of traditional leaders is contrary to the principle of separation of powers as required by Constitutional Principle VI²⁹ and as provided for in section 165³⁰ of the Constitution and that it contravenes the requirement for independence and impartiality of judicial officers.³¹ However, Madlanga, J., in *Bangindawo* says that independence of the judiciary and impartiality as conceived in ‘western’ jurisprudence were not the same as under customary law. He warns of “the danger in a wholesale transplant of a concept suited to one legal system onto another legal system.” The learned judge concludes: “there seems, in my view, to be no reason whatsoever for the imposition of the Western conception of the notions of judicial impartiality and independence in the African customary law setting...The believers in and adherents of African customary law believe in the impartiality of the chief or king when he exercises his judicial functions. The imposition of anything contrary to this outlook would strike at the very heart of the African customary legal system, especially the judicial facet thereof.”³²

With due respect, it is submitted that the learned judge misses the point here. The question is not whether the people believe in the independence of the chiefs and headmen from the executive but whether such independence in fact exists. The traditional system is no longer what it used to be before the advent of colonialism and the modern state. Traditional leaders are, and have been for some time now, functionaries of the state. They are part of

29 Constitutional Principle VI states: “There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances, to ensure accountability, responsiveness and openness.”

30 Section 165 (2) reads: “The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”

31 This was one of the arguments of the applicants in *Bangindawo and Others v Head of Nyanda Regional Authority and Another* 1998 (3) BCLR 314 (Tk)

32 Ibid. p.326

the administrative apparatus of the state. They implement government policy and enforce the law. It cannot therefore be convincingly argued that in performing their judicial functions, they are independent from the executive and free from the influence of officialdom, especially in criminal cases, in the same way as judges. Indeed in some cases they are the complainant, prosecutor and judge. From this perspective it may further be argued that there is always a risk of partiality in favour of the state in cases where the state is a party. This is of course not to say that other judicial officers are immune from partiality but the risk is minimised by the assimilation of the values of impartiality and independence by the judiciary and protection of the same under the Constitution. Traditional leaders do not enjoy the security of tenure accorded to judicial officers³³. They may be deprived of their right to hold courts by the Minister who confers the jurisdiction in the first place and who is a member of the executive.

Thus, there seems to be merit in the criticism that courts of chiefs and headmen do not satisfy the constitutional requirement of separation of powers. It is arguable that for this reason and because of the apparent risk of partiality, the Regional Authority Courts of the former Transkei should be deprived of their fairly broad jurisdiction over criminal matters if they are to survive. Such wide criminal jurisdiction should be left to magistrates' courts. At the same time, it is arguable that at the level of traditional courts, the judicial process administering largely simple customary law rules in simple disputes, a formal separation of powers between the executive and the judiciary is not crucial. Separation of powers in the chief's functions would be desirable but is not practical at this juncture.

(b) No legal qualifications: This is a similar argument as that made earlier, that traditional leaders are not legally qualified and that therefore they should not preside over courts of law.

(c) Not courts of record:

Traditional courts are not courts of record. A record of proceedings is normally necessary in case of review or appeal so that the higher court can satisfy itself that the lower court made the correct decision and that proper procedures were followed; in short that justice was done. This is partly why cases from traditional leaders' courts are heard *de novo* when they go on appeal. Since it is suggested that para-legal clerks be appointed to traditional courts, they should be able to record proceedings including summaries of evidence and reasons for judgment, which would eliminate this objection.

4.3 *If traditional courts are not courts of law*

Alternatively, if it is decided not to recognise traditional courts as courts of law, they could be regarded as courts *sui generis* which need not be subject to the principle of separation of powers and which do not give legal practitioners audience but which otherwise respect the principle of impartiality in the sense of objectivity and absence of bias and observe some elementary principles of natural justice.

4.4 *Opting out*

4.4.1 Whether these courts are recognised as courts of law or not, consideration might be given to accused persons (if criminal jurisdiction is retained) being able to opt out and to demand transfer of the case to a magistrates court. This of course may not please the traditional leaders, but it would remove the objection relating to the nature of procedures in traditional courts for those who feel strongly about it.

5 **Structure of traditional courts**

- 5.1 Traditional courts or chiefs' and headmen's courts are established in rural areas where they are presided over by chiefs or headmen under the Black Administration Act, No 38 of 1927 and various statutes in the former TBVC states. Since 1986, appeals from these courts go to magistrates' courts and further appeals may be taken to the High Courts and Supreme Court of Appeal. In presiding over traditional courts, chiefs and headmen are assisted by their councillors.
- 5.2 Traditional courts should continue to be recognised where they are already established, i.e. rural areas within the areas of jurisdiction of chiefs and headmen.
- 5.3 In urban or peri-urban areas where there are no chiefs or headmen, community courts could be established on the Ugandan model, where a committee is popularly elected by all the residents of a particular village or urban locality and charged with keeping the peace, supplementing police, and resolving disputes.³⁴ These community courts should apply the general sense of justice and common sense, while respecting human rights. Decisions should be by consensus or by majority vote. Community courts should be formally established so that the present so-called people's courts which sometimes degenerate into 'kangaroo' courts operating without any regard to natural justice, can be rendered superfluous.
- 5.4 Traditional courts should continue to be presided over by chiefs and headmen as part of their role under section 211 of the Constitution. However, as far as councillors to sit with the chief or headman are concerned, an element of popular justice could be introduced whereby the councillors are elected by the people of the village or ward to sit with the

34 The Resistance Committees (Judicial Powers) Statute, No.1 of 1988. The RC courts which were created on an informal basis in 1986 after Museveni and the National Resistance Movement came to power were formalised in 1988 by statutory provision providing for their establishment all over the country, are very popular with the general population. The only people who have misgivings about them are the lawyers who are not allowed audience in these courts. They raise objections similar to those in South Africa especially with respect to absence of separation of powers. See: Oloka -Onyango and Barya: "Popular Justice and Resistance Committee Courts in Uganda" mimeo, Kampala, 1994.

chief or headman in his or her adjudication of disputes. Decisions could be taken collectively, treating the councillors as full members of the court. This would be contrary to custom but would demonstrate the claim by the leaders themselves that customary law and institutions are adaptable to changing circumstances.

- 5.5 Alternatively, the presiding chief or headman should appoint his advisors from a panel elected by the community. Chiefs and headmen, however, should be required to include female councillors (councillors are traditionally male) in compliance with the non-discrimination requirements in the Bill of Rights. The idea of democratically elected chiefs' councillors is supported by some elements in the traditional leadership, for example, CONTRALESA (KwaZulu-Natal)³⁵ and there is no reason why the rest should not be persuaded to support it.
- 5.6 The traditional element of popular participation whereby every adult was allowed to question litigants and give his opinion on the case should be maintained and encouraged as this boosts the legitimacy of the court. However, to comply with S.9 of the Constitution, consideration should be given to the full participation of women members of the community.
- 5.7 As suggested earlier, trained para-legals should be appointed by the Ministry of Justice to assist traditional courts as clerks of court. This would help the courts to assess and avoid decisions that might be in violation of the Constitution or the law or that are beyond the jurisdiction of the court. They could also advise where a particular procedure being followed is contrary to rules of natural justice. It should not be necessary to employ fully legally qualified persons for these courts as this would be costly and could undermine the simplicity, the informality and flexibility of these courts. The para-legals should be trained

35 In its written submission to the Constituent Assembly hearings on traditional leadership, CONTRALESA (KwaZulu-Natal) stated: "Each tribe must have its own tribal authority under the leadership of a chief being assisted by a determinate number of democratically elected councillors. The chief [should] be accorded civil and criminal jurisdiction...".

in customary law and basic elements of procedure and evidence while ensuring that they do not derail the whole idea of traditional courts.

5.8 Chiefs Courts as Arbitration Tribunals:

5.8.1 An alternative to the current chiefs' and headmen's courts could be the Lesotho model where chiefs' courts are not courts of law as such but arbitration tribunals. In Lesotho, the right of a chief to hold a formal court was taken away by the British colonial regime in 1938 after about three decades of complaints by commoners' organisations which accused the chiefs of miscarriage of justice through abuse of power, favouritism and bribery.³⁶ New customary law courts were established which were presided over by lay persons styled presidents.³⁷ These were and are still appointed from the ranks of court clerks, messengers or police officers. Today, these presidents are given some training in customary law and basic principles of procedure and evidence. They, however, need not be qualified in law. The courts have jurisdiction in civil matters arising out of customary law and criminal jurisdiction over minor offences. They still apply customary procedure and keep their courts as simple and flexible as possible.

5.8.2 The withdrawal of judicial powers from the chiefs did not remove them completely from the area of resolution of disputes. They could still hold 'courts' over cases voluntarily brought to them by the parties. Thus, chiefs' courts became arbitration tribunals of a kind. Chiefs are not separately remunerated for this service but often get gifts from the successful parties. Since these arbitration tribunals are at village level many members of the community still use them in simple disputes and they therefore still serve a useful

36 For a history of this change over, see: S.Rugege, "The Struggle over the restructuring of the Basotho or chiefs' courts in Lesotho, 1903-1950", Vol.3 No.2 (1987) *Lesotho Law Journal*, pp. 159-191.

37 Native Courts proclamation, No.62 of 1938, now renamed Central and Local Courts Proclamation, 1938.

purpose.³⁸ However, the people have a choice to go to the local court instead of the chief especially in more complex cases. A similar system could be adopted in South Africa but would naturally be strongly opposed by the traditional leaders who would have more than prestige to lose. If chiefs' courts became arbitration tribunals, their place as customary courts could be taken over by elected customary courts or community courts. However, this arrangement would meet with strong opposition from the traditional leaders and may not be a practical proposition.

5.9 *Regional Authority Courts in former Transkei*

5.9.1 The Regional Authority Courts in former Transkei are a special category of courts. These courts, set up by Regional Authority Courts Act No.13 of 1982 of the former Transkei, have concurrent jurisdiction with magistrates' courts in civil and criminal cases, therefore have power to send a convicted person to jail. Yet legal representation, as in other traditional leaders' courts, is not permitted.

5.9.2 Although the High Court has declared the exclusion of legal representation from Regional Authority courts unconstitutional (*Bangindawo* case) these courts remain anomalous since the reintegration of former Transkei into South Africa. These courts should be abolished for the following reasons:

(i) since the Regional Authority courts have concurrent jurisdiction with magistrates' courts, they are superfluous.

(ii) they are not any more accessible than magistrates' courts since there is one Regional Authority court per region.

38 See Rugege, S., "The future of traditional hereditary chieftaincy in Southern Africa: The case of Lesotho", in Santho and Sejanamane (eds) *Southern Africa after Apartheid: Prospects for the Inner Periphery*, SAPES Books, Harare, 1991.

(iii) they have to apply common law, in which they are not competent, in fairly serious criminal cases. The accused is better off in a magistrate's court where rules of procedure and evidence, such as the rule against hearsay evidence, are applicable. Even if legal practitioners are permitted to appear in these courts in accordance with the decision in *Bangindawo*, the accused is liable to be prejudiced by the little understanding of the common law and of the technical language of the lawyers on the part of the presiding officer. Where an accused cannot afford a lawyer, the presiding officer is not able to assist him or her in presenting a defence.

(iv) since the former homelands have been re-absorbed into South Africa, there is need for uniformity in the administration of justice. One part of South Africa cannot have a set of courts which no other part of South Africa has. The fact that they are only applicable to "Transkei citizens" makes them even more unacceptable. The court's ruling in *Bangindawo* that reference to Transkei citizens should be taken to imply South African citizens living in the former Transkei, is not of great assistance in this respect.

(iv) Section 171 of the Constitution requires that "All courts function in terms of national legislation and their rules and procedures must be provided for in terms of national legislation." The Transkei Regional Authority Act is not national legislation.

(v) A number of magistrates, having observed the operation of the regional authority courts, support moves for their abolition.³⁹

5.9.3 The Regional Authority courts could be abolished by repeal of the relevant aspects of the Transkei Regional Authority Act 1982. Since traditional leadership falls under the concurrent legislative competence of the national parliament and the provincial legislatures, there should be no problem with this. At the same time the administration of

39 See documents from Regional Representative, Ministry of Justice, Transkei to The Director General, Department of Justice, Sept., 1995.

justice falls under the national government and it should feel free to pass legislation that has the effect of rationalising and streamlining the administration of justice with regard to traditional courts.

5.9.4 The alternative would be to retain the Transkei Regional Courts as appeal courts in customary law matters, similar to the now defunct Appeal Court of Commissioners' Courts, and to establish similar courts all over South Africa. Appeals from these courts could then go to the relevant High Court. This reorganisation would be within the parameters of sub-item 16 (6) (a) of Schedule 6 to the Constitution which calls for the rationalisation of all courts "with a view to establishing a judicial system suited to the new Constitution." Customary law appeal courts exist in Lesotho, Botswana, Zimbabwe, Swaziland and Malawi. Whereas in the case of Zimbabwe there is only one level of customary law appeal courts, the community courts, in Lesotho cases go from the local courts to the central courts, to the Judicial Commissioner and finally to the High Court⁴⁰. Swaziland has the Swazi Court of Appeal, the Higher Swazi Court of Appeal and the Judicial Commissioner. While criminal appeals from the Higher Swazi Court of Appeal have to go to the Judicial Commissioner first and if necessary on a further appeal to the High Court, a civil appeal from the same court goes straight to the High Court.⁴¹

6 Jurisdiction

6.1 *General:*

6.1.1 Traditional leaders' courts currently have both civil and criminal jurisdiction; under the Black Administration Act and the statutes of the former TBVC states and self-governing territories. Questions that arise over jurisdiction have to do with jurisdiction in respect of

40 Central and Local Courts Proclamation No 62 of 1938, sections 27 and 28.

41 Swazi Courts Act No 80 of 1950 section 33.

persons; the law applicable; monetary ceiling and the related question of remedies in civil cases and sanctions in criminal cases; and, importantly, whether traditional courts should continue to exercise criminal jurisdiction.

6.2 *Jurisdiction in respect of persons:*

- 6.2.1 It is possible to argue that making chiefs' and headmen's courts only accessible to Blacks is discrimination on racial grounds. This may be so. But is the discrimination unfair? It is evidently not. Bennett is correct when he points out that non-Africans should not be able to claim discrimination on the basis of exclusion from traditional courts as they have effective alternative forums and are therefore not disadvantaged⁴² by the apparent discrimination, nor should Africans be able to argue that they are subjected to an inferior forum or judicial process as they still have a chance to appeal if not satisfied with the decision of a traditional court. Prospective plaintiffs are not compelled to pursue a case in a chief's court since magistrates' courts and small claims courts are also available. A defendant in a criminal case should be able to ask for transfer of his case to a magistrates court if he feels he will be prejudiced by being tried in a traditional court.
- 6.2.2 However, subjection to the jurisdiction of a traditional court should no longer be based on race or colour but on such factors as residence, proximity, nature of transaction or subject matter and the law applicable. If the nature of the case falls under customary law and other facts favour jurisdiction, then the matter should go to a traditional court, whoever the parties. There is no reason why a white trader at the local village store who impregnates a village girl should not be subject to the customary law action of seduction at the instance of her guardian at the chief's or headman's court. Such a court should have the power to make him pay the number of beasts accepted as compensation in accordance with the local custom.

42 Bennett, *Human Rights and African Customary Law*, p.77

6.3 *The law to be administered:*

- 6.3.1 In civil cases, traditional courts apply customary law.⁴³ Chiefs' and headmen's courts have no jurisdiction to hear cases arising out of common law. This should continue to be the case since judicial officers not trained in the common law would cause a travesty of justice if they attempted to apply it.⁴⁴ As far as customary law is concerned, every adult member of the ethnic group is supposed to know it, and since the chiefs are supposed to be the custodians of the law of their community they are presumed to know the customary law. Even the parties are expected to know the law, the only question being the application of the law to the facts. In some instances traditional courts decide according to common sense which should not be objectionable.
- 6.3.2 As the law stands customary law is applicable subject to the so-called repugnancy clause which requires that customary law should not be contrary to natural justice or public policy. This requirement should be replaced by one subject to the constitution and to consistency with the values underlying the Bill of Rights⁴⁵
- 6.3.3 Chiefs' courts exercise criminal jurisdiction over offences known to customary law, and

43 Section 12(1) of Black Administration Act, 1927

44 One can respectfully disagree with Justice Madlanga's reasoning in *Bangindawo* when he says it is alright for lay traditional leaders and their advisors to decide criminal cases based on common law since it could not be argued that judicial officers who are trained in customary law should not be allowed to decide matters based on customary law. It is possible to argue that the two situations are not comparable since legal training prepares the lawyer to handle even those legal subjects which he or she has not studied at law school. Lawyers, and therefore judges, are given the skills of discovering the law which lay persons do not have. Thus whereas it may be relatively easy for the judge to understand an assessor's exposition of the law, it would not be at all easy for a chief or headman to understand an explanation of certain common law concepts. [See *Bangidawo*, supra, p.333]

45 Section 39(2) states that "when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

some common law and statutory offences.⁴⁶ The problem, however, is that the chiefs and other member of their courts have no knowledge of the common law nor can they be taken to be clear about statutory offences. This is another reason militating against the continuation of criminal jurisdiction for chiefs' courts. If they are not allowed to hear civil cases arising out of common law, it is not clear why they have jurisdiction over common law offences. The justification in the past was that administering justice in criminal matters was seen by the state as part of a chief's function of maintaining law and order in the rural areas. In a constitutional state, it may no longer be sufficient justification.

6.4 *Jurisdiction in respect of causes of action*

6.4.1 Chiefs' courts are limited in their civil jurisdiction to causes of action arising out of customary law. The jurisdiction is unlimited in terms of monetary value but these courts are not allowed to hear cases relating to nullity, divorce or separation arising out of a civil marriage, even if it is between black people. This seems to be a reasonable limitation and such cases should be taken to a family court given the patriarchal nature of traditional societies and institution and the alleged bias of traditional courts against women.⁴⁷

6.4.2 According to the Black Areas Land Regulations⁴⁸, land disputes did not go to the traditional court as civil claims but rather to the chief in his administrative capacity and from there they could go on appeal to the commissioner with a further right of appeal to the chief commissioner.⁴⁹ The Land Regulations (Amendment) Proclamation R23 of 1993

46 Section 20 of Black Administration Act

47 As claimed by The Rural Women's Movement in the "Submission to the Ad Hoc Committee on Traditional Leaders", Constitutional Assembly, May 1995.

48 Proclamation R188 of 1969.

49 Sections 67 and 68. Bekker, Seymour's Customary Law, supra p.16.

substitutes “Land Officer”⁵⁰ for the commissioner and “Director-General” for chief commissioner and hence retains the administrative character of settlement of land disputes. There seems to be no good reason for this. It was probably aimed at making control of land by the state an administrative matter involving discretion as to who should hold land. This is supported by the fact that real rights in land were not recognised as far as black people were concerned. They only had a right of access for use. Access to land could be withdrawn by the chief. However, even these rights of use are of crucial importance to the people and should be cognisable and protected by the courts. Disputes over occupation of state land still need to be dealt with initially by administrative officials but the same need not apply to other land. It is therefore recommended that disputes over customary land rights should be handled like any other disputes before a chief or headman in his adjudicative rather than administrative capacity and appeals should go to other courts in the normal way.⁵¹

- 6.4.3 There is reason to question the unlimited monetary jurisdiction of traditional courts. The main claim of these courts is simplicity uncluttered by technical legal know-how and they should not be able to handle cases involving thousands of rands. In the past, transactions arising out of customary law did not involve a lot of money. However, today, such cases could arise, for instance in matters of inheritance, damage to property, or customary contracts. In some other African countries, there is a monetary ceiling imposed in civil cases in traditional courts. For instance in Zimbabwe, primary courts (the lowest level of traditional courts) have no civil jurisdiction where the value of the claim exceeds Z\$1 500 (about 500 rand before the 1998 devaluation) and community courts (higher traditional courts) have no civil jurisdiction where the value of the claim exceeds Z\$3 000 (about 1

50 “Land Officer” is defined as “any officer of a provincial administration designated in writing by the Director-General concerned as a land officer..”

51 It may to be noted that in Zimbabwe, the legislature refused to give back powers of allocation and administration of land to chiefs when adjudicative powers were returned to chiefs for fear of abuse of the powers over land rights. Jurisdiction of customary courts over land is excluded by section 16 (1) (g) of the Customary law and Local Courts Act, Cap. 7:05, Laws of Zimbabwe (Nos 2/90, 22/92, 22/95).

000 rand)⁵². Botswana also imposes value limitations on civil jurisdiction of traditional courts. South Africa should also consider imposing monetary ceilings of jurisdiction in civil matters. Such ceiling could be made the same as those imposed on small claims courts.⁵³

- 6.4.4 Since traditional courts award damages in customary delicts, this is another reason to impose a monetary ceiling on jurisdiction. Although, the amount is usually fixed by custom, with traditional society getting more and more integrated into the modern (capitalist) economy, the amount awarded by these courts is bound to keep going up and therefore needs to be limited so that the more complex cases or cases involving a lot of money can be more accurately assessed. It is also noted that already in some cases chiefs' courts exceed their jurisdiction by hearing common law cases and awarding damages and costs arbitrarily.⁵⁴
- 6.4.5 Chiefs' courts are permitted to award compensation and restitution. The purpose of customary proceedings is to bring about reconciliation of the parties and restore harmony in the community, rather than retribution or the award of deterrent damages as at common law. Where no actual damage or injury is suffered then an apology suffices. These remedies should be retained as appropriate and should be encouraged even in other courts.
- 6.4.6 The question may be asked whether traditional courts should have jurisdiction over matters relating to the status of children and women. Zimbabwe has excluded from the jurisdiction of customary law courts matters where women are likely to be prejudiced by the patriarchal attitudes of the male dominated traditional courts, that is, claims to maintenance, custody or guardianship of minor children, dissolution of marriage and

52 Customary Law and Local Courts Act (supra), Section 16 (1) (b).

53 Under the Small Claims Courts Act No. 61 of 1984

54 See Dlamini, C., "The role of chiefs in the administration of justice", LLD Thesis, University of Pretoria, 1988, pp. 58-59. Koyana, supra, also notes that chiefs' courts frequently exceed their jurisdiction

interpretation, validity and effect of wills⁵⁵. In view of the provisions of the Constitution relating to gender equality in section 9 and the “best interests of the child” principle in Section 28 (2) as well as legislation on maintenance, South Africa may want to follow Zimbabwe and exclude determination of these matters from the jurisdiction of traditional courts. It is conceded that many claims in traditional courts touch on issues relating to the status of women and children and that therefore traditional leaders will resist attempts to deprive them of jurisdiction over matters such as custody and guardianship. However, it is submitted that the issues of the rights of women and the welfare of children are such important aspects of the new constitutional dispensation that they justify an open debate as to who should have jurisdiction in these matters.

6.5 *Criminal Jurisdiction*

6.5.1 Chiefs’ and headmen’s courts have criminal jurisdiction over statutory offences, offences under the common law or customary law offences except those specified under the third Schedule of the Black Administration Act. The excluded offences are mainly the more serious offences such as treason, sedition, murder, culpable homicide, rape, arson, robbery. However, the list includes less serious offences but whose elements may be difficult to prove such as indecent assault, receiving stolen property knowing it to have been stolen and breaking and entering any premises with intent to commit a crime. The common offence of stock-theft was excluded largely because complainants were often white farmers who were not subject to the jurisdiction of chiefs’ courts. Nevertheless, there is no reason why it should not have been included with respect to black litigants. The jurisdiction of courts in former homelands is basically the same as under the Black Administration Act except in some instances with respect to punishment.

6.5.2 It is not uncommon that chiefs and headmen exceed their jurisdiction in terms of which

55 Ibid section 16(1) (c) (d) (e) (f)

offences that can be tried by their courts. For instance, in one case from Qumbu District noted by Koyana, the offence was recorded as “Beating a girl and sleeping with her by force”.⁵⁶ The accused pleaded guilty and was sentenced to a fine of a beast and 10 lashes with a whip. This was clearly a case of rape which the chief’s court was not permitted to try and the sentence was too lenient. Other cases are not clear because of the scantiness of the record. In one case the accused is found guilty of: “Proposing love to a school girl by force”, for which he is sentenced to 5 lashes⁵⁷. Is this another case of rape, attempted rape, indecent assault? A chiefs’ or headmen’s court is not permitted to try any of the above possible offences. It may be observed, however, that customary law does not make a clear distinction between crime and delict and this may pose a problem for the court whether it has jurisdiction or not. It is clear that these courts need to be monitored and that traditional leaders should be reminded every now and then what the scope of their jurisdiction is. The list of scheduled offences which are outside the jurisdiction of traditional courts, should also be reviewed and reassessed with a view to ensuring that these courts only preside over offences that are appropriate to their nature and resources.

6.6 *Should traditional courts continue to exercise criminal jurisdiction?*

6.6.1 The issue whether chiefs’ courts should continue to exercise criminal jurisdiction has come to the fore because of the rights of the accused under section 35 of the constitution such as the right to be presumed innocent and the related right to remain silent as well as the right to choose and be represented by a legal practitioner. It has been suggested that customary procedure is based on an inquisitorial system which leaves no room for the right to silence. When this is coupled with the prohibition of legal representation in chiefs’ courts, the suggestion is made that an accused person is not afforded a fair trial in such a court and that therefore criminal jurisdiction should be taken away.

56 Case No.58, in Koyana, D.S, *The Judicial Process in the Customary Courts*, p.133, 1983

57 Ibid. p.174.

- 6.6.2 From a comparative perspective, Zimbabwe denies criminal jurisdiction to local courts (as traditional leaders' courts are called in Zimbabwe)⁵⁸. In Uganda's Resistance Committee Courts there is no criminal jurisdiction except over by-laws passed by the Resistance Council itself and legal representation is not allowed except in case of a prosecution for breach of bye-laws⁵⁹. In Botswana⁶⁰ and Swaziland⁶¹, however, chiefs' courts have considerable criminal jurisdiction. At the same time, legal practitioners are not permitted. Namibia restricts jurisdiction of traditional authority courts to "disputes over any customary matters between members of that traditional community"⁶², which thus limits these courts to largely civil matters, although it could include certain offences known to customary law.
- 6.6.3 It seems reasonable, if magistrates' courts are not to be overwhelmed, that at least some minor offences continue to be within the jurisdiction of the traditional leaders' courts while the more serious are excluded from such courts and left to be administered by magistrates' courts or higher. There should therefore be further sifting. Koyana's argument that the jurisdiction of chiefs' courts be increased to be at par with magistrates' courts goes too far⁶³. It is argued below that legal practitioners should continue to be barred from

58 Customary Law and Local Courts Act, *supra*

59 Resistance Committee (Judicial Powers) Statute, No 1 of 1988

60 Chapter 04:05 Laws of Botswana (Customary Courts) sections 11&17. The lower customary court may sentence an accused to a term of imprisonment not exceeding 6 months, while the higher customary court may impose imprisonment up to one year. The President may, however, issue an order increasing the jurisdiction of a customary court in criminal matters giving it power to sentence a person to imprisonment up to 4 years or 4000 pula. This is a dangerous power.

61 Swazi Courts Act No 80 of 1950. Section 12. A Swazi court is not restricted except that "the fine or other punishment shall in no case be excessive but shall always be commensurate with the nature and circumstances of the offence and the circumstances of the offender."

62 Traditional Authorities Act, No 17 of 1995. Section 10(3)

63 Koyana states: "time has come for the jurisdiction of the customary courts to be increased so as to equal that of magistrates' courts of South Africa." 'The indigenous constitutional system and the role of the customary courts today.' Paper presented at the Constitutional Assembly Public Hearing on Traditional Authorities, Cape Town, May 1995.

traditional leaders' courts, hence the need to limit the criminal jurisdiction of these courts.

6.6.4 Alternatively, criminal jurisdiction could be taken away from these courts and made exclusive to magistrates courts or higher which would leave traditional courts as customary courts administering civil matters as in Zimbabwe. This decision would be unpopular with traditional leaders as it would be seen as undermining their authority and prestige. However, it would resolve some of the objections and criticisms directed against traditional courts.

6.7 *Punishment*

6.7.1 Under the Black Administration Act, a chief's or headman's court is empowered to sentence an offender to a fine not exceeding R50 or two head of large stock or ten head of small stock. The limitation to R50 is obviously out-dated and is not equivalent to two head of large stock. In the former homelands, the amount is generally higher; for instance in former Transkei the limit is R400 or four head of large stock valued at R100 per head; in former Bophuthatswana the amount is R200 or two head of large stock while the more recent legislation in former KwaZulu - the KwaZulu Amakhosi and Iziphakanyiswa Act of 1990 - stipulates a maximum fine of R1000 or one head of large stock. If traditional courts are going to be allowed to keep criminal jurisdiction the maximum limit for fines could be raised from R50 to at least R500. Payment of fines in the form of livestock is convenient for the rural poor but should be re-evaluated regularly.

6.7.2 The appropriation of fines should be regulated by legislation. The position in the case of former Ciskei where "appropriation of fines shall be in accordance with tribal law and custom"⁶⁴ should not be allowed as it could lead to the appropriation of fines for personal benefit. Fines should go into the general revenue fund either of the province or at

64 Section 40 of the Ciskei Authorities Act 37/1984

national level, but could be utilised for the direct benefit of the community from which such fines have been levied.

6.7.3 Another form of punishment which in the past a chiefs' court could inflict is corporal punishment which however, could only be inflicted on unmarried males under the apparent age of 30. The Constitutional Court, however, has ruled in *S v Williams* that corporal punishment is unconstitutional for being in contravention of S 12 (1) (e) - "not to be treated or punished in a cruel, inhuman or degrading way"⁶⁵. Following the decision, the Abolition of Corporal Punishment Act, 1997⁶⁶ (Act 33 of 1997) was passed. The traditional courts therefore need to be alerted that a sentence of corporal punishment is contrary to the law.

6.7.4 More importantly, traditional courts are prohibited from imposing any punishment involving death, mutilation, grievous bodily harm or imprisonment. This is an important limitation, particularly regarding imprisonment. Courts where lawyers are not allowed to represent accused persons, should not have the power to deprive the subject of his liberty despite the fact that in some other African countries imprisonment is one of the punishments traditional courts are permitted to impose. Thus, in Swaziland⁶⁷ and Botswana⁶⁸ imprisonment may be imposed by traditional courts. Under Kamuzu Banda, Malawi traditional courts could even pass death sentences. However, section 110(3) of the new Malawi Constitution (1995) traditional courts jurisdiction is "limited exclusively to civil cases at customary law and such minor common law and statutory civil cases as prescribed by an Act of Parliament."

65 1995 (7) BCLR 861(cc)

66 Act 33 of 1997. The Act came into operation on 5 September 1997.

67 Swazi Courts Act (supra) section 12

68 Chapter 04:05, section 17

6.7.5 The question may be raised as to the constitutionality of imposition of compulsory labour by traditional courts as was permitted by legislation in former Bophuthatswana and KwaNdebele. It may be argued that this is contrary to section 13 of the Constitution which states that “No one may be subjected to slavery, servitude or forced labour.” Is compulsory labour imposed by the court “forced labour”? According to the *Convention concerning Forced or Compulsory Labour* of the International Labour Organisation, forced or compulsory labour does not include

“any work or service exacted from any person as a consequence of a conviction in a court of law provided that such work is carried out under the supervision and control of a public authority and that the said person is not hired to or placed under the disposal of private individuals, companies or association.”⁶⁹

Thus, if traditional courts can be regarded as courts of law, which we argue they are, imposition of compulsory labour for public purposes should not be unconstitutional. The provision of the former KwaNdebele Act is clear. It states that a chief or headman may impose a penalty of compulsory community service. The former Bophuthatswana provision is not as clear but states that the compulsory service is to be performed at a place designated by the court and under the control of the tribal authority or its delegate. The assumption here should be that the convicted person would not be subjected to compulsory labour for the personal advantage of the chief or headman.

7. Procedure in Traditional Courts

7.1 General Procedure

7.1.1 According to the Black Administration Act and the statutes relevant to traditional courts in former homelands, the procedure to be followed in resolving disputes is customary procedure. Most commentators on customary procedure agree that it is simple, informal

69 ILO, Convention No.29, 1930, article 2 (c).

and flexible and puts the parties at ease⁷⁰. This in turn makes them willing participants in seeking a resolution of the problem at issue. As indicated earlier, the procedure takes an inquisitorial form where the presiding adjudicator and his advisors do a lot of the questioning of the parties and the witnesses. In the absence of lawyers, the court does the examination and cross-examination. Even people that are not members of the court but who are present in court may participate in the proceedings by posing questions to the parties. This community participation adds to the acceptability of the customary legal process.

7.1.2 It is suggested that in this simple setting where everybody is comfortable to speak, the inquisitorial procedure is not harmful to the parties; not even to an accused person in minor criminal cases. The suggestion that this amounts to a presumption of guilt on the part of the court is misconceived. The questioning is aimed at seeking simple truth and is not as rigorous and intimidating as cross-examination by legal practitioners in regular courts. It is therefore recommended that formal rules of procedure and evidence should not be imposed on traditional courts as the customary procedure is generally compatible with rules of natural justice.

7.2 *Regulations*

7.2.1 Regulations have been made to supplement the customary procedure of traditional courts.⁷¹ They provide for such matters as keeping of records of the particulars of cases, registration of judgement, execution, appeals, fees etc. These rules are useful although it is said that many courts do not follow them either because they find them inconvenient or

70 For instance, Dlamini, C. Supra. p224; Koyana D.S., "The indigenous constitutional system and the role of the customary courts today." Presented at the Public Hearing on Traditional Authorities and Customary Law and Practice. Constitutional Assembly, 12-13 May, 1995. See also T.O.Elias, *The nature of African Customary Law*, Manchester Press, 1956.

71 Rules of Courts of Chiefs and Headmen in Civil Matters GN R2082 of 1967.

because of ignorance.⁷²

7.3 *Supervision*

7.3.1 There should be greater supervision to ensure that these minimum rules are followed. Procedures need to be more closely monitored to ensure compliance with minimum standards of natural justice. Such close monitoring of traditional courts would be in recognition of the special dispensation given to the traditional leaders, while remaining aware of the need to be vigilant with respect to possible abuse of power by chiefs to the detriment of the people. To this end a traditional courts secretariat should be set up in the Ministry of Justice with a commissioner and assistant commissioners to monitor these courts and ensure that they deliver justice to the community. Supervision could be carried out by the nearest magistrates' court. However, this may not be a good idea as magistrates may want to impose the same procedures and rules of evidence as they apply in their own courts which would detrimentally change the nature and character of the traditional courts. A customary courts' commissioner exists in Botswana,⁷³ and a judicial commissioner in Swaziland.

7.4 *Records*

7.4.1 One question that may be raised is whether the written record required by the rules is sufficient or whether traditional courts can be made courts of record which record all the proceedings including all the evidence. At the moment all that the rules require is a record showing the parties, the claim or charge, the defence, the judgement and the date of the judgement. The record has to be signed by the chief or signed on his behalf and filed with

72 See Koyana, *The Judicial Process in Customary Courts*, University of Transkei, 1983.

73 Customary Courts Act, *supra*, section 4. The functions of the Commissioner are stated as including: (a) advising the Minister in respect of the constitution, jurisdiction and membership of customary courts, (b) ... the guidance and supervision of customary courts, (c) such other powers and duties as may from time to time be assigned to him by the Minister.

the clerk of the magistrate's court. Copies of the record are given to the parties and one kept by the chief's court. If there is no literate person to enter the particular, the chief may supply these particulars personally or by messenger to the clerk of the magistrate's court who then enters them⁷⁴. The purpose of this record is to show that a particular case was in fact heard by the court for purposes of processing an appeal or assistance in execution of judgement by the magistrate's court.

7.4.2 Should these courts be made courts of record? Such a requirement may be unrealistic given the level of education in most traditional courts. Already, the records they keep are sometimes incomplete or are unintelligible.⁷⁵ Although record keeping should be improved by appointing para-legal clerks to these courts, transcription of all the evidence, even in the relevant African language of the court would put an undue strain on these courts. It would also require electronic recording equipment. In any case since cases which go on appeal to magistrate's courts are heard de novo, a complete record may not be useful but rather be a burden on magistrates having to go through a record that is not adequately prepared⁷⁶.

7.4.3 On the other hand some other countries have these courts as courts of record. For instance, in Botswana the law requires traditional courts to have the evidence recorded in the language of the court and for the President of the court and the clerk of the court to sign the record at the end of the case or of each day's hearing.⁷⁷

7.4.4 Although a full record may be cumbersome and not practical at this juncture, it is recommended that the proposed para-legal clerks of court should make summaries of

74 Sections 6&7 of GNR 2082/67.

75 Dlamini supra p208

76 *ibid.*

77 Customary courts (Procedure) Rules, S.I 74 of 1971, Rule 14.

evidence and reasons for judgement which can subsequently be used on appeal or review.

7.5 *Legal Representation*

7.5.1 As indicated earlier, legal representation in chiefs and headmen's courts is prohibited by the rules prescribed for these courts. In *Bangindawo*⁷⁸, the prohibition against legal representation was ruled unconstitutional with respect to the regional authority courts which still operate in the former Transkei. The decision, however, may be taken to apply only to such courts and not to courts of chiefs and headmen. This view can be deduced from the remarks of the judge in connection with the powers of the regional authority courts. The judge acknowledges that regional authority courts are more akin to African customary courts than western type courts. He then goes on to say: "However, that cannot be taken too far. Regional Authority courts, in terms of section 3 of the Regional Authority Act, exercise concurrent jurisdiction with magistrates courts. This means that these courts have the power to adjudicate on complex statutory and common law matters. In criminal matters they may impose substantially robust prison terms in respect of statutory offences.." Having noted that the substantive law justiciable in such courts is not purely customary law, he found the justification for excluding legal representation offered by the respondents insufficient. This leaves the question whether prohibition of legal representation in ordinary chiefs' courts cannot be justified.

7.5.2 There are a number of reasons why legal practitioners should be excluded from traditional courts. Firstly, litigants in these courts are normally the very poor who cannot afford lawyers' fees which means that in civil cases, a poor litigant confronting or confronted by a wealthy opponent is likely to be prejudiced.⁷⁹ Secondly, the issues that come before these courts are usually simple cases which do not need complicated legal arguments by counsel.

78 Ibid.

79 In this connection see also Bennett, T.W., *Human Rights and African Customary Law*, Juta, 1995, pp78-9.

Participants in the process, as indicated above, are generally knowledgeable in customary law. Thirdly, lawyers have a tendency to use legal jargon to impress the presiding adjudicator and are more likely to confuse a court of lay persons adjudicating on a case. Fourthly, in addition to the confusing rhetoric, lawyers tend to dwell on technicalities of law and procedure which cause delays and in traditional courts would undermine the very essence of such courts, that is expeditiousness in disposing of cases, flexibility and simplicity. Fifthly, legal representation would introduce a problem relating to language. One of the advantages of traditional courts, as indicated above is that the language of the court is the local language of the community in the area of jurisdiction. However, the lawyer may not speak or understand such language and may have to address the court in a language that members of the court do not understand. This would then necessitate the introduction of interpreters with the possible risk of distortion, not to mention additional cost.

7.5.3 In light of the above arguments and the fact of the exclusion of legal practitioners in other countries with similar courts, it is arguable that exclusion of lawyers from traditional courts at the level of chiefs' and headmen's courts, is a limitation on the right to counsel which is "justifiable in an open and democratic society based on human dignity, equality and freedom" in terms of section 36 (1) since it is in the end to the advantage of both parties to a dispute at that level. Section 36 (1) spells out the requirements for the permissible limitation of a right. It reads:

36 (1) The rights under the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

These requirements are discussed below.

(i) Law of general application: It is submitted that a rule excluding the right of legal representation in courts of chiefs and headmen is a law of general application in terms of section 36 in that it applies to all litigants in those courts without discrimination.

(ii) Nature of the right: It is arguable that although the right to counsel is an important right in certain circumstances such as when an accused may be deprived of his or her liberty, the right is of limited utility in the type of simple cases handled by chiefs' courts where the learned articulation of interests is not crucial.

(iii) Purpose of the limitation: The purpose of the limitation is to ensure substantive equality before the law, simplicity of proceedings and hence assisting the lay court to arrive at just decisions.

(iv) Nature and extent of the limitation: It may be noted that although the prohibition is total, it is only so at the lowest level of the administration of justice and that on appeal to the magistrate's court, in case a party is dissatisfied with the decision of the chief's court, legal representation is permissible.

(v) Relation between the limitation and its purpose: It is arguable that traditional courts have in general worked well without the participation of legal practitioners and therefore it can be said that the limitation has achieved its purpose of keeping those courts simple and informal while delivering substantive justice.

(vi) Less restrictive means: There appears to be no less restrictive means of achieving the purpose of the limitation since the system of justice in South Africa is currently unable to provide legal representation at all levels. Legal Aid is under considerable strain already without having to add thousands of potential litigants to its list. Another financial consideration in this connection is that introducing legal representation would also mean hiring of prosecutors in the simple criminal matters handled by chiefs' courts.

7.5.4 In conclusion, taking all the factors into consideration, the balancing of the right of the individual to legal representation against the interests of an unrepresented party and the

general interests of simplicity, informality at the lowest level of the administration of justice would seem to tilt in favour of exclusion of legal representation in a way that is justifiable under section 36 (1).

8. **Conclusion**

8.1 This paper has attempted to deal with the complicated question of the future of the judicial function of traditional leaders in a constitutional democracy. It examines the perceived advantages and disadvantages of traditional leaders' courts and concludes that the advantages outweigh the disadvantages and that the system of these courts can be improved to conform with the values underlying the Constitution. On the whole the courts continue to serve a useful purpose. Further it is acknowledged that the institution of traditional courts is protected by the Constitution.

8.2 The structure, jurisdiction and procedure of these courts are examined with a view to identifying those areas in need of reform. As far as structure is concerned it is argued that traditional leaders' courts should be courts of law with the power to enforce their own judgments. A radical recommendation is that whereas the courts should continue to be presided over by traditional leaders, an element of popular justice should be infused into these courts by having the councillors, who sit with the leaders, elected by the people of the area of jurisdiction of the court. The controversial issue of criminal jurisdiction in traditional leaders' courts is discussed, with the conclusion that only very minor criminal offences should be handled by these courts and that there should be no question of increasing their jurisdiction in this regard. At the same time, it is recommended that legal practitioners should be kept out of these courts as they might cause more problems than they solve. Another departure proposed, is that these courts should be courts of record. For this purpose, para-legals should be trained and appointed to compile reasonable records including summaries of evidence and judgments. Another important recommendation in our view is that a secretariat for traditional courts should be set up in the Ministry of Justice, manned by a commissioner and assistant commissioners, to

monitor the operation of traditional courts, to ensure their compliance with the rules and constitutional values.