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MEDIA STATEMENT BY THE SOUTH AFRICAN LAW COMMISSION ON ITS INVESTIGATION INTO TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF TRADITIONAL LEADERS (PROJECT 90)

The South African Law Commission has completed a report on Traditional Courts and the Judicial Function of Traditional Leaders. The report contains draft legislation which is aimed at establishing customary courts and consolidating the different provisions governing chiefs= courts.

The administration of justice in rural South Africa is predominantly carried out by chiefs= courts, which administer justice largely on the basis of customary law. The operation of these courts is governed by a number of statutes, both of the old South Africa (Black Administration Act 38 of 1927) and of the former homelands and self-governing territories. The continued operation of homeland statutes is sanctioned by item 2 of Schedule 6 of the 1996 Constitution. The President has by proclamation assigned these laws to the relevant provinces.

There is a need to consolidate the different provisions governing these courts and to modernise them so that their operation is in conformity with the principle of democracy and other values underlying the Constitution. Following a request from the Minister of Justice that the matter be expedited, the Commission solicited donor funding and appointed a specialist to develop a position paper along certain guidelines suggested by the Minister. These guidelines included the need for the paper to propose practical solutions, to avoid being overly academic, to draw on legislation in other African countries, and to use existing Departmental materials such as the deliberations and resolutions of the numerous workshops on the subject and Constitutional Assembly documents embodying the submissions and views of the traditional leaders themselves over the years.

To this end, a discussion paper entitled "Traditional Courts and the Judicial Function of Traditional Leaders" was published in May 1999 and circulated for general information and comment. Comments and representations were received by the Commission from traditional leaders, academics, magistrates, women=s groups and other interested persons.

Country-wide workshops were held during the period 9 June to 13 July 1999 in all the provinces that have traditional leaders and traditional structures, namely the Eastern Cape, Free State, KwaZulu-Natal, Mpumalanga, North West and Limpopo (formerly, Northern Province). These workshops were well attended with most stakeholders represented. On 9 September 1999 an academic workshop entitled "Customary Courts" organised jointly by the Centre for Indigenous Law (UNISA) and the Congress of Traditional Leaders of South Africa (CONTRALESA) in cooperation with the Commission, was held in Pretoria. Sixteen presentations were made at the workshop.

A concern was, however, raised with the Commission that women had not been sufficiently represented at these workshops. After discussions on the matter between the Law Commission, the

Commission on Gender Equality, the Centre for Applied Legal Studies and the National Land Committee, it was decided to host more workshops and consultations with women=s groups to solicit their views on the operation of traditional courts. Workshops with women and women=s groups were held between 7 and 20 September 1999, in KwaZulu-Natal, Limpopo, Eastern Cape and North West provinces. The workshops and consultations concentrated on rural women and field workers active in the rural development context who would provide a perspective different to that advanced by traditional leaders.

It is clear that wide consultation with stakeholders took place and many written submissions were made to the South African Law Commission on the discussion paper. The Commission also had the benefit of considering numerous precedents set by other African countries. The task team set up by the project committee on customary law to draft a Bill on customary courts had a wealth of information to guide its deliberations. This report attempts to convey a sense of the discussions and debates that took place in the different *fora* during this process and to express the dilemmas faced by the project committee and the Commission in choosing whatever options have eventually been adopted in the draft Bill.

The Bill recommends that customary courts should be established and that they should have full powers of hearing and determining cases in both criminal and civil matters subject to limitations. The project committee noted that customary courts are inexpensive, simple, informal, accessible and conversant with the community and its laws. It is recommended that Headmen=s tribunals which are currently not recognised as courts should be granted formal recognition.

On the question of the composition of customary courts, the Bill recommends that they should continue to be presided over by traditional leaders. However, to avoid gender discrimination, the Bill provides that in constituting the court effect shall be given to section 9(3) of the Constitution and section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 as to the need for the reasonable representation of both men and women in such institutions.

In civil matters, customary courts should have jurisdiction over cases arising out of customary law. Issues relating to dissolution of marriage (whether customary or civil), custody and guardianship of minors, or maintenance, are excluded from the jurisdiction of these courts. As far as criminal jurisdiction is concerned, customary courts can handle offences which were committed in the area of the court=s jurisdiction except offences listed in the Schedule attached to the Bill. A monetary ceiling on the jurisdiction of customary courts will be fixed by the Minister from time to time.

Legal practitioners are excluded from these courts. However, a person who is a party to a matter before a customary court may be represented by any other person of his or her choice in accordance with customary law.

The Bill also provides for the establishment of the office of a Registrar for Customary Courts. The role

of the Registrar for Customary Courts should be to guide and supervise customary courts, deal with complaints from members of the public about the operation of customary courts, consider the needs of customary courts, arrange for the training of members and clerks of customary courts and where necessary, transfer cases from one customary court to another.

A litigant who is dissatisfied with a decision of a customary court has a right of appeal to a higher customary court and subsequently to a customary court of appeal (if one is established) or to a magistrate's court and then to the High Court.

The report will be made available on the Internet at the following site:

<http://www.law.wits.ac.za/salc/salc.html>

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