

## **Traditional Court Bill: A Constitutional Test**

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### ***Introduction***

Are traditional courts relevant in the modern social economic and political climate? Are traditional courts conservative and unable to deliver justice in the modern social economic and political climate? Are traditional courts seen as prototypes of the kind of dispute resolution mechanism that are desirable in the modern society? Are there reasons why traditional courts or courts of traditional leaders should be retained in a modern democratic country like South Africa?

### ***Background***

This controversial Bill was introduced to parliament in March 2008. It is common cause that the Government's policy among others is to improve access to justice to more South Africans, in particular those who are historically disadvantaged. It was held that this could be possible if proper recognition to the traditional justice system could be enhanced in a manner consistent with values entrenched in customary law and the Constitution.<sup>1</sup> It is held that these courts have jurisdiction to hear matters on the level of magistrate's court. They are designed to deal with customary issues in terms of customary law. An authorized African headman or his deputy may decide on cases using indigenous law and custom, for example, disputes over ownership of cattle or lobolo, brought before him by an African against another African within his area of jurisdiction.<sup>2</sup> A person with a claim has the right to choose whether to bring a claim in the chief's court or in the magistrate's court. It was further said that anyone who is not satisfied with the decision in a chief's court can take their matter to the ordinary courts.

### **Should the traditional courts be courts of law?**

While it is true that many people fear to undo progress made in the status of this controversial new draft law (traditional court bill) in which public engagement started in 1994, and the Bill was brought back to Parliament in February 16, 2012. It must also be acknowledged that Traditional Court Bill makes an uneasy comeback.

There is no doubt that there is a dire need for easy, inexpensive mechanism for rural communities to resolve disputes in keeping with their customs. It is also within constitutional mandate to improve access to justice and speedy dispute resolution. The Bill was tabled in Parliament in 2008 but withdrawn after robust criticism from unions, rural communities, among others. The question is whether the amendments, if any, will pass the constitutional test.<sup>3</sup>

There were several issues raised in respect of the Bill, among others was whether these courts should be recognised as courts of law or only as arbitration tribunals. It is unfortunate that the researcher of this paper deems it appropriate to hold a view that these courts should be recognised as Alternative Dispute Resolution Forum. There are views that appearances before these courts are per summons and as such, appearances are compulsory, that is appearances are not voluntary as in the case of mediation.

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<sup>1</sup> The Traditional Court Bill (B15-2008): A Summary of Concerns, *Law, Race and Gender Research Unit, Faculty of Law, University of Cape Town*, [www.lrg.uct.ac.za](http://www.lrg.uct.ac.za) December 2011

<sup>2</sup> The Courts of South Africa, [http://www.westerncape.gov.za/eng/pubs/public\\_info/c/32303](http://www.westerncape.gov.za/eng/pubs/public_info/c/32303) 2/29/2012

<sup>3</sup> The Legal Resource Centre-2012 01 22 "Extraordinary" powers for chiefs, <http://www.lrc.org.za/lrc-in-the-news/1733-2012-01-22-extraordinary-powers-for-chiefs> 2/29/2012

The fact is, a person with a claim has the right to choose whether to bring a claim in the chief's court or in the magistrate's court, and if so, it *per se* renders appearance not to be compulsory. It must also be noted that the presiding officers, chiefs or headmen are not legally trained or qualified, if some are trained or qualified not all and it is not a requirement to have them trained or qualified. For example, in case of Small Claims Courts, Commissioners are from legal background and they are admitted to practise law and in addition they must have taken prescribed oath to serve in the justice system to the best of their ability, as a result finality and enforceability of judgements of these courts are important and respected. The Small Claims Courts are meant to lessen the workload on the magistrate's courts.<sup>4</sup> It is difficult to perceive traditional courts as courts of law in the modern social and economic climate, in particular, in the era of constitutional supremacy.

There are several reasons that may persuade researchers to believe that these courts should be retained. It could be argued that:

- customary law, as the law of majority of African people and the traditional courts that administer justice according to this law, are part of heritage of African people.
- traditional courts are a useful and desirable mechanism for the speedy resolution of dispute given their nature as an easily accessible, inexpensive, simple system of justice
- it is argued that although there are shortcomings in the system, they are not beyond repair but may be made to adopt to changing needs and to the requirements of the Bill of Rights<sup>5</sup>

It is true that traditional courts exist in almost every area of jurisdiction of a traditional leader, that is chief or headman. One may venture to say that every village has a court within reach of most inhabitants of the area in question. Litigants do not have to travel long distance to magistrate's courts at the district headquarters. The courts are accessible in terms of social distance.

Having considered the likely advantages of the Traditional Courts Bill, the question remains whether the Bill could prevail against constitutional scrutiny. Some criticism labelled against the Bill is that it lacks prescribed process of appeals. While the contention may be true, attention may be drawn to Small Claims Court that also lacks prescribed substantive appeal process save procedural appeal process. The Small Claims Courts still finds its place in the South African's court structure. What is important is enforceability of judgements of these courts, and not less important is that the Traditional Courts are to be respected and to lessen the workload on the magistrate's courts.<sup>6</sup>

As it stands, Traditional Courts are respected since their founders or custodians are persons of high integrity and command high respect in the communities. If their judgements would be subjected to appeal or review, it may sound contrary to what their status entails. In practice, *la Kgoshi ga le fetolwe* meaning that, one is not supposed to engage in arguments with *Kgoshi*, it therefore negates the issue of appeal or review. The enforcement of sanction is to some extent different. In a criminal matter brought before a chief or headman, for instance, the tortfeasor may be fined a goat. The goat may be slaughtered at *Kgorong* and be cooked for the participants (counsellors) who adjudicated the case. The tortfeasor may also be invited to feast-with *Kgoshi* / headman and other participants(counsellors) as long as women are excluded, which in itself violate equality clause entrenched in the Constitution.<sup>7</sup>

<sup>4</sup> No appeal may be filed against the judgment or order of the Small Claims Courts. The Court proceedings may, however, be referred to the High Court for review on three grounds,

- absence of jurisdiction by the court
- interest in the cause, bias, malice, or corruption on the part of the commissioner
- gross irregularities with regard to the proceedings, see also Small Claims Courts Act 61 of 1984

<sup>5</sup> *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*. ISBN: 0-621-29273-7 May 1999. See also Mokgoro y, "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*, Paper of conference organized by the national Association of Democratic Lawyers, Pretoria, Oct. 1993

<sup>6</sup> *South African Law Commission, Discussion Paper, Project 90* [http://www.saflii.org/za/other/zalc/report/2003/1/2003\\_1-CHAPTER-2.html](http://www.saflii.org/za/other/zalc/report/2003/1/2003_1-CHAPTER-2.html) 2/29/2012

<sup>7</sup> *South African Constitution, Act 108 of 1996, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2011*

Koyana and Bekker submitted as follows:<sup>8</sup>

The participation of women should not be peremptory. Our research shows that more and more women participate in traditional work. The numbers have grown gradually over the years and will continue to grow in an orderly manner. We think that a more substantial role for women should be left to the traditional leaders themselves. If women are imposed upon the system, it will create undesirable distortions and possibly confrontation and conflict.

The Constitution does not appear to appreciate progressive participation, for instance, Prof Koyana states that the numbers of women have grown gradually over the years and will continue to grow in an orderly manner, and states further that a more substantial role for women should be left to the traditional leaders themselves. The Equality Clause as entrenched in the Constitution does not permit room for compromise and progressive realization.

Section 9 of the Constitution<sup>9</sup> read with the judgement of the Constitutional Court judge, O'Regan in Pillay<sup>10</sup>'s case held that section 9 was adopted in recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair. It builds and entrenches inequality among different groups in the society. The drafters realized that it was necessary both to proscribe such forms of discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purpose of section 8 and in particular section (2), (3) and (4).

Langa DP remarked as follows, in *Pretoria City Council v Walker*<sup>11</sup>

The inclusion of both direct and indirect discrimination, within the ambit of the prohibition imposed by section 8(2) of the Constitution, evinces a concern for the consequences rather than the form of conduct. It recognizes that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of section 8(2) of the Constitution.<sup>12</sup>

### Alternative Dispute Resolution

The Alternative Dispute Resolution is understood in the present context to include dispute resolution process in which interveners are precluded from making binding determinations for the parties, it is sometimes called facilitation, mediation, conciliation, case appraisal and neutral evaluation. The nature of the Alternative Dispute Resolution would differ from other Arbitration Tribunals in the sense that they will be specialized forum. They will deal with matter relating to culture of specific people in areas of their jurisdictions. In this sense traditional courts processes can be differentiated from systems in which interveners can make authoritative and enforceable ruling, as is the case of arbitration, adjudication and binding determination.<sup>13</sup>

The Alternative Dispute Resolution is based on normative assumptions, that Alternative Dispute Resolution can contribute to Access to Justice imperatives by providing the following societal benefits:

- unclogging of the court list
- expedition of civil litigation
- greater effectiveness of dispute resolution systems in terms of efficient use of resources
- greater flexibility of outcomes
- potential cost savings for courts and litigants, and
- enhancement to the qualitative aspects of dispute resolution outcomes.

<sup>8</sup> Submission dated 11 June 1999

<sup>9</sup> South African Constitution Act 108 of 1996

<sup>10</sup> *Kwazulu-Natal MEC for Education v Pillay* 2008 1 SA 474 (CC)

<sup>11</sup> 1998 ZACC 1, 1988 (2) SA 363 (CC)

<sup>12</sup> Sachs J expressed same views, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 ZACC 15, 1999 (1) SA 6 (CC)

<sup>13</sup> Laurence Boule, Access to Justice Conference 'Towards delivering accessible quality justice for all' 8-10 July 2011, Sandton, a paper on Alternative Dispute Resolution

It must be understood that the 'chief's court' should remain the centrepiece of the customary system, however, recognition should be made of dispute resolution mechanisms. The drawbacks of the Traditional Court Bill are as follows:

- The Bill does not guarantee woman participation in traditional courts, rural women are most marginalised from traditional court.
- There is no legal representation allowed in traditional courts.
- The traditional courts may impose sanction contrary to the Constitution, for example, traditional leader may require forced labour for benefit of the community.
- The doctrine of separation of power in accordance with the Constitution is not properly observed. Traditional courts are bodies that constitute single authority.<sup>14</sup>

### ***Conclusion***

The Bill as it stands may not pass the constitutional challenge, in that it fails to guarantee the provision in its proceedings of fairness, independence and impartiality. The rights of the accused person in terms of Article 34 and 35 of the Bill of Rights are not guaranteed, these include the right of the accused person to choose and to consult with a legal practitioner. The Bill is inconsistent with both customary law and the Constitution.

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<sup>14</sup> Law, Race and Gender Research Unit, University of Cape Town, The traditional Courts Bill: A Summary of Concerns, December 2011