# Policy Framework on the Traditional Justice System under the Constitution

the doj & cd
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

CONTENTS

CONTENTS

CONTENTS

# INTRODUCTION

01

## 1.1 *The importance of the institution of the traditional court system in maintaining peace and harmony in traditional communities*

1.1.1 Traditional leadership plays a critical and vital role in traditional communities in relation to the administration of justice. It is part of the cultural heritage of the African people and is recognised by the Constitution.

1.1.2 Customary law has existed since time immemorial and is recognised in the South African legal system. A large number of people who live in traditional communities subscribes to the principles of customary law and embraces the traditional court system that applies this form of law. An estimated 14 million people form part of traditional communities in all provinces in South Africa except the Western Cape.

1.1.3 The institution of traditional leadership plays a crucial role in promoting social cohesion, peace and harmony in communities. In this sphere of the administration of justice, traditional leaders resolve disputes through traditional courts *(Makgotla/ Inkundla)*. The importance of traditional courts derives from the fact that they are closest to the communities and use the language and methods that the community understands better than the procedures applied by formal courts. A traditional leader and his/he councillors sit in commune ("*lekgotla*"), hear the evidence of complainants and "accused" persons, and resolve disputes according to the cultural practices and customs applicable to the community in question. In contrast to the formal court system, traditional courts do not adhere to any prescribed or written set of rules. They are guided by the culture and tradition of the community in which they operate. In this way, justice is dispensed easily and quickly.

1.1.4 In the post 1994 democratic dispensation the following categories of leadership positions and institutions are recognised:

***Traditional Leadership positions***

The following table illustrates the provincial spread of the three levels of traditional leadership in the country:

| | EC | NW | LMP | MPU | KZN | FS | WC | NC | GP | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|
| Kings/Queens | 6 | 0 | 1 | 2 | 1 | 2 | 0 | 0 | 0 | 12 |
| Senior traditional leaders | 220 | 54 | 183 | 63 | 306 | 13 | 0 | 9 | 2 | 850 |
| Headmen/ Headwomen | 935 | 100 | 527 | To be recognised | To be recognised | 78 | 0 | 25 | To be recognised | 1665 |

***Houses of Traditional Leaders***

The National House of Traditional Leaders was established in terms of the National House of Traditional Leaders Act of 1997 and it operates at national level, the following table indicates the status quo as regards the Provincial and Local Houses in the provinces.

| Province | Local Houses | Provincial Houses |
|---|---|---|
| Eastern Cape | 5 Local Houses to be established | Established |
| Free State | 1 Local House (1 TC to perform functions of Local House) | Established |
| Gauteng | 2 TCs to perform functions of Local Houses | To be established |
| KwaZulu-Natal | 11 Local Houses established | Established |
| Limpopo | 5 Local Houses established | Established |
| Mpumalanga | 3 Local Houses established | Established |
| North West | 3 Local Houses established | Established |
| Northern Cape | 1 Local House | To be established |
| Total | 31 | 8 |

***Traditional Councils***

For each traditional community under the authority of a traditional leader, a traditional council has been constituted and recognised.

## *1.2 Vision and purpose of the policy framework*

1.2.1 The vision of this policy framework is to affirm the importance of the institution of traditional leadership in the administration of justice, namely to enhance access to justice and to contribute to the improvement of life for all.

1.2.2 The primary purpose of this policy document is to harmonise the traditional justice system with the Constitution.

1.2.3 The Black Administration Act[1], being the remnant of the building blocks of racial segregation, was repealed in November 2005.[2] This gave rise to the need for substitute national legislation to regulate the role and functions of traditional leaders in the administration of justice. Some of the provisions of the Black Administration Act were left operative until 30 June 2008. The policy framework contained in this document is intended to form the basis for the envisaged substitute legislation providing for the role and functions of traditional leaders in the administration of justice.

1.2.4 The policy document is the culmination of a literature research, a comparative study of other jurisdictions, as well as consultations with traditional leaders, those government departments responsible for traditional affairs, and other stakeholders in the field of customary law. The Minister and some officials undertook study visits to observe the indigenous systems in India and Botswana. Other information was derived from an international conference on traditional institutions, which was held in Durban in May 2007, and from a subsequent Conference of Magistrates, which was held in Midrand in September 2007. At these conferences, national and international speakers shared their experiences of traditional institutions and the role these institutions play in the administration of justice.

1.2.5 The 1994 democratic elections ushered in a new democratic order. This new order formed the basis for the review of the legislation and practices that existed prior to 1994. This policy document focuses on the role and functions of traditional leaders under the new democratic dispensation, in the administration of justice. The following extract from the foreword to the White Paper on Traditional Leadership and Governance is relevant:

"The institution of traditional leadership occupies an important place in African life and, historically, in the body politic of South Africa. It embodies the preservation of culture, traditions, customs and values of the African people, while also representing the early forms of societal organisation and governance. However, when South Africa adopted the Interim Constitution and, subsequently, the 1996 Constitution, our people declared the Republic of South Africa to be a sovereign, democratic State founded on a number of universal values, including the supremacy of the Constitution. This marked the ushering in of a new era.

Following the 1994 elections, the new government embarked on a course to transform the South African state. This included the transformation of institutions of governance in accordance with the new democratic order and constitutional principles such as equality and non-discrimination. One of these was the institution of traditional leadership. Like our forebearers on the African continent, we were thereby presented with the singular challenge of defining the place and role of the institution of traditional leadership in the new system of governance. The new Constitution has laid the basis for this and enjoined the new government to develop legislation that would conclusively address this matter."

1.2.6 The objectives of this policy paper are therefore to-

(a) affirm the importance of traditional leadership in the administration of justice and to establish an indigenous justice model that is suitable to the new constitutional order;

(b) establish a basis for the enactment of legislation regulating the role and functions of traditional

1 Act 38 of 1927.

2 Repeal of the Black Administration Act and Amendment of Certain Laws Act (Act 28 of 2005).

leaders in the administration of justice, consistent with the new constitutional dispensation;

(c) enhance the efficiency of and increase access to traditional courts; and

(d) determine the criminal and civil jurisdiction of traditional courts and develop procedures governing traditional courts.

1.2.7 The deficiencies in the traditional court system must be adapted to meet the new constitutional requirements.

## *1.3 Structure of the policy framework*

1.3.1 In the next chapter (Chapter 2), the historical role of traditional leadership is given. This chapter seeks to illustrate and provide the background of the role that traditional leadership has played in the administration of justice before the commencement of the Constitution. It reflects briefly on the colonial era, the apartheid era, including the period under the homeland and self-governing states, and the period immediately prior to the new constitutional dispensation.

Chapter 3 focuses on a comparative study of the indigenous justice systems in selected African and other western countries, as well as the general features thereof that resemble the South African indigenous system. Chapter 4 considers the developments brought about by the new constitutional order, while Chapter 5 provides an overview of the challenges facing traditional leadership under the new constitutional dispensation. The last chapter (Chapter 6) focuses on policy options that are suited for the South African traditional justice system and provides a framework for the legislation that is intended to give effect to the policy framework.

1.3.2 Chapter 7 contains a conclusion which gives a brief outline of the consultation process that was undertaken in developing this policy framework.

# AN HISTORICAL

ROLE OF THE INSTITUTION OF TRADITIONAL LEADERSHIP IN THE ADMINISTRATION OF JUSTICE

02

**Policy Framework on the Traditional Justice System under the Constitution**

## 2.1 The institution of traditional leadership during the colonial era

2.1.1 The role of traditional institutions in the administration of justice can be traced back since time immemorial. Bennet[3] explains that the institution of traditional leadership has its origin from ancient times when communities sharing the same beliefs and kingship were allocated land for occupation and grazing. The leader stood at the head of the traditional government and below the leader there were two tiers of authority: the wardhead and the family head. The leader played a leadership role in all facets of community life, from rural development to leading the soldiers during wars and resolving disputes in the community. Traditional government differed from the modern democracy concepts. It did not recognise the principle of separation of powers and its functions integrated aspects relating to judicial, administrative and legislative competencies.[4] The role of the institution is important in understanding the challenges faced by this institution under the current democratic order. The recognition of courts of traditional leaders, it was generally argued, was justifiable, since they subjected those under this system to the laws and processes to which they were accustomed.

2.1.2 The advent of colonialism brought about a complete change in the administration of justice by traditional leaders. The colonial and apartheid governments intervened in the structures dispensing justice by developing a system of separate courts for African people. The recognition of "Courts of Chiefs" during the colonial era was seen as an essential part of the colonial administration under the policy of indirect rule.[5] The policy of indirect rule, apart from being a practical administrative necessity for the success of the colonial experiment, was also said to be based on the notion that there was a cultural gap between the colonisers and the African community that required African affairs to be administered separately from those institutions and structures reserved for the White section of the population.[6]

2.1.3 According to Olivier, by the end of the British Colonial period in Africa (between 1957 and 1967), legal dualism was in place. This was a dual court system that combined the imported (western) law and the customary law.[7]

2.1.4 Although Africans still used these courts during this period, concerns were raised about their operation. These courts, like other aspects of traditional African society, were dominated by patriarchy. Sexism in the composition of the court was an issue. In some communities women were not allowed to preside over or participate in the proceedings of "Courts of Chiefs", except as litigants, and then only if they were assisted by men.[8] The "Courts of Chiefs" were still regarded as a useful and desirable mechanism for the speedy resolution of disputes, given their nature as an easily accessible, inexpensive (virtually free) and simple system of justice.

## 2.2 The institution of traditional leadership under the apartheid era

2.2.1 After the union of the four colonies in 1910, "Courts of Chiefs" were used to promote tribalism. They never enjoyed statutory recognition before 1927. The British policy of indirect rule was used to control and manipulate their powers.

2.2.2 As a result of the enactment of the Black Administration Act, "Chiefs" became state functionaries, exercising authority and constituting courts, no longer under the mandate of the people, but in terms of the mandate of the government of the day. Under the colonial system of indirect rule and under subsequent apartheid governments, the "Courts of Chiefs" were subject to considerable government manipulation through the use of wide discretionary powers in terms of which the status, role and functions of "Chiefs" and the "Courts of Chiefs" were used to the advantage or convenience

3 T Bennet and C Murray, "Traditional Leaders" in S Woolman (et al) Constitutional Law of South Africa, 2nd Edition (2006) Juta Law, p 26 - 25

4 T Bennet and C Murray, above, p 26 - 27

5 See K Mann and R Roberts, *Law in Colonial Africa* (1991), p 18-23, and RB Mqeke, *Customary Law and the New Millenium* (2003) (Lovedale Press, Alice), p 29.

6 See ZN Jobodwana, *Courts of Chiefs and Human Rights: Comparative African Perspectives* (2000) 15, South African Public Law 26, p 34.

7 NJJ Olivier, *Indigenous Law* (Volume 32)(2000), p197-198, par 192.

8 B Oomen, *Chiefs in South Africa: Law, Culture, and Power in the Post Apartheid Era*, p209

of the state.[9] During this period the long tradition of checks and balances in terms of which the traditional leader ruled on the advice of his councillors and subject to the wishes of his subjects was eroded and replaced with a system whereby "Chiefs" were placed under the supervision of the Lietenant-General and later the State President who held the office of the Paramount Chief in the colonial and apartheid eras.[10] In order to maintain control, a system was created in terms of which Commissioners' courts (which were presided over by Whites) served as the appeal courts against the decisions of the "Chiefs".

2.2.3 The end result of the incorporation of courts of traditional leaders into the national judicial system was a dual legal system with formal Western-style courts dispensing justice according to the "law of the land", while the less formal "Courts of Chiefs" and Commissioners' courts dispensed justice according to customary law.[11], The notion of "duality" placed "Courts of Chiefs" in an inferior position to the formal courts and seems to presuppose equality. However, the general attitude shared by many people was that "Courts of Chiefs" were inferior.

2.2.4 The Commissioners' courts were abolished in 1986 by the Special Courts for Blacks Abolition Act, 1986 (Act 34 of 1986), and the "Courts of Chiefs and Headman" were retained. This followed on the recommendation of the Hoexter Commission in 1983.

2.2.5 The establishment of the homelands and self-governing states brought about changes to the traditional court system. The homelands and self-governing states were assigned the power to regulate their own traditional court systems. This resulted in different homelands and independent states adopting different systems of "Courts of Chiefs", influenced by the traditions and culture applicable in their areas.

2.2.6 In the former Transkei and Zululand, the "Courts of Chiefs" exercised similar powers and had a similar jurisdiction to the magistrates' courts. Appeals in the former Transkei from traditional leaders went to the regional authorities on which the kings and queens had representation.

2.2.7 In the former Bophuthatswana, by virtue of the Bophuthatswana Traditional Courts Act, 1979 (Act 29 of 1979), the authority to deal with criminal and civil matters was conferred on structures (tribal authorities) and not on individual traditional leaders. Appeals from these traditional structures went to a special court in each magisterial district, consisting of a magistrate and two additional members (experts from tribes in the district).

2.2.8 In the former Ciskei, "Chiefs" and headmen had automatic jurisdiction to deal with criminal and civil matters arising from customary law and custom by virtue of their appointment as traditional leaders.

2.2.9 Despite the enactment of provincial legislation, the KwaNdebele Traditional Hearings of Civil and Criminal Cases Act, 1984, still applies in those parts of Mpumalanga that formed part of the former KwaNdebele.

2.2.10 In the former Gazankulu, Lebowa and Qwaqwa, the dispensation provided for in the Black Administration Act applied. In terms of this Act, the Minister conferred criminal and civil jurisdiction on "Chiefs" and headmen.

2.2.11 In the former Venda, sections 24(1) and 25(1) of the Venda Traditional Leaders Administration Proclamation, 1991 (Proclamation 29 of 1991), provided for the conferment of civil and criminal jurisdiction upon "Chiefs" and headmen by the former Chairman of the Council for National Unity.

2.2.12 Traditional courts have continued to exist and function largely under the old dispensation provided for in the Black Administration Act and other Provincial legislation. The Constitution allows for the continued existence and functioning of these courts, subject to the Constitution and the repeal or amendment of the legislation by a competent authority. The Black Administration Act was amended in certain respects to remove elements that were in conflict with certain constitutional values, such as corporal punishment. Corporal punishment was found to be contrary to the right to human dignity in the Bill of Rights. The right to impose imprisonment by regional authorities in the former Transkei was found to be procedurally unfair.

9 Bennet and Murray, above p 188.
10 Bennet and Murray, above P 26 - 27
11 Bennet and Murray, above p 69

COMPARATIVE STUDIES

03

# Policy Framework on the Traditional Justice System under the Constitution

## 3.1 *Indigenous justice system in selected countries*

3.1.1 Dispute resolution outside of court is not a new phenomenon. Societies worldwide, including indigenous/traditional communities in South Africa, have long been using non-judicial, indigenous methods to resolve conflicts. The indigenous systems of Botswana, Malawi, India, South Australia and Canada were examined in order to establish a traditional court system suited to the South African situation.

3.1.2 A comparative analysis of the traditional justice systems of Botswana, Malawi and India are set out briefly below as models from which South Africa could possibly draw lessons.

### *(a) Botswana*

3.1.3 Botswana has a dual court system. Customary courts function parallel to the formal court system. These are established by the Minister of Local Government in terms of the Customary Courts Act, 1974. The courts are structured at three levels: the Customary Court Commissioner, the Customary Court of Appeal and the customary courts.

3.1.4 At the lowest level of this traditional dispute resolution structure is the family, consisting of a man, his wife and his children. Parties usually attempt to settle their disputes, especially in family matters, at the level of the family. When this fails, they may be brought before a household group, which is usually made up of one or more families living in the same collection of huts. Another level is that of the family group, which is composed of one or more closely related households living together in the same part of the village. Where one or more family groups are organised and live together in a well-organised local administrative unit, this is called a ward. The wards come under the leadership and authority of a headman, whose position is often hereditary. In large tribes like the Bangwaketse and the Bamangwato, the headmen are graded (from A to G in respect of the former, and from A to K in respect of the latter). In other tribes, such as the Bakwena, Batawana and Bamalete, there are both headmen and subchiefs. In the case of the Bakwena, these subchiefs are graded from A to C. Each of these traditional authorities has judicial powers, which enables them to settle disputes. The unrecognised headmens' courts are often referred to as the Headmen's Courts of Arbitration, probably influenced by section 3 of the Customary Courts Act.[12]

3.1.5 The customary courts, headed by presidents and appointed by the Minister of Local Government, operate in the main urban centres in the country (Gaborone, Francistown, Lobatse, Selebi-Pikwe, Jwaneng, Ghanzi and Kasane). These courts handle minor offences involving land, marital matters and property disputes. Foreigners may be tried in customary courts. Legal representation is not allowed in the customary courts and there are no specific rules of evidence. Tribal judges, appointed by the tribal leader or elected by the community, determine sentences, which may be appealed against in the civil court system. The quality of decisions reached in the customary courts varies considerably. In some cases tribal judges may mete out sentences such as public lashings.

3.1.6 There are also formal courts established by the Minister of Local Government in accordance with the Customary Courts Act. The Act specifies the courts' jurisdiction in respect of causes of action, as well as their geographical limits. The Act also prescribes the constitution of the court, the order of precedence among its members and the powers and duties of any persons who may be appointed to act as assessors.[13]

### *(b) Malawi*

3.1.7 Malawi, which has recently undertaken a similar process of reviewing its court structures and has sought to harmonise the laws applicable to the administration of justice, has an interesting customary law system. The country established customary justice forums, reported to be in the region of 24 000, at the village level. These customary justice forums, which operate under 217 court centres that are presided over by magistrates, are said to handle between 80 and 90% of all disputes. The most

12 Charles Formbad, Customary Courts and Traditional Justice in Botswana: Present challenges and Future Perspectives, *Stellenbosch Law Review*, 2004, Volume 1, p 17.

13 Formbad, p 176 -177.

common disputes brought before the customary justice centres are family disputes, land disputes and property matters.[14]

3.1.8 The customary justice forums deal with disputes at village level and refer disputes to the relevant court centres if they are unable to resolve them.[15]

### (c) India

3.1.9 Despite the fact that the judicial system in India is well organised, with a high level of integrity, the courts are confronted with four main problems: the number of courts and judges in all grades are alarmingly inadequate, there has been an increase in the flow of cases in recent years due to multifarious acts enacted by the central and state governments, the costs involved in prosecuting or defending a case in a court of law are high due to heavy court fees, lawyers' fees and incidental charges, and delays are experienced in the disposal of cases, resulting in huge backlogs in all the courts.

3.1.10 The poor find it difficult to prosecute or defend a case due to the high costs involved. Eminent judges of the Supreme Court and high courts have emphasised the need for free legal aid to the poor. The other alternative methods, among others, being used are, the *Lok Adalat* (people's courts), where justice is dispensed summarily without too much emphasis on legal technicalities.

3.1.11 The *Lok Adalat* system initially started in Gujarat in March 1982 and has now been extended throughout the country. The evolution of this system was part of a strategy to relieve heavy burdens in the courts with pending cases.[16] These courts were established to deal with pending cases and to provide some form of relief for litigants.

3.1.12 The Parliament of India enacted the Legal Services Authorities Act, 1987, and one of the aims of this Act was to organise *Lok Adalat* in order to ensure that the operation of the legal system promotes justice on the basis of equal opportunity. The Act gives statutory recognition to the resolution of disputes by means of compromise and settlement through *Lok Adalat*. The concept originates from the system of *Panchayats*, which has its roots in the history and culture of India.

3.1.13 Litigants derive many benefits from *Lok Adalat*. There is no court fee and even if the case is already filed in the regular court, the fee paid is refunded if the dispute is settled at the "no court fee" stage. There is no strict application of procedural laws and the Evidence Act while assessing the merits of the dispute. The parties to the dispute, although they may be represented by their advocates, can interact with the *Lok Adalats* judge directly and explain their position in the dispute and advance arguments, which is not possible in the formal courts. Disputes can be brought directly before *Lok Adalat* instead of going to a formal court and then to *Lok Adalat*. The decision of *Lok Adalat* is binding on the parties to the dispute and its order is capable of execution through the applicable legal process.

3.1.14 No appeal lies against an order of *Lok Adalat*, whereas in the formal courts there is always an opportunity to appeal to a higher forum against the decision of the trial court, which causes delays in the settlement of disputes.

### (d) Ghana

3.1.15 The institution of chieftaincy is guaranteed by Article 270 of the Constitution of the Republic of Ghana, 1992. The Chieftaincy Act of 1970 (Act 370) regulates chieftaincy in Ghana and sets up the traditional councils, as well as regional and national Houses of Chiefs. The National House of Chiefs, the Regional Houses of Chiefs, and the traditional councils each have judicial committees with the authority to decide and resolve disputes affecting chieftaincy.[17]

3.1.16 Despite the recognition of chieftaincy, traditional courts ceased to exist after independence. The institution of chieftaincy does not have any legislative, administrative

14 W Scharf , *Non-State Justice Systems in Southern Africa: How should Governments Respond?*, p 42.

15 Scharf, p 43.

16 M Galanter and JK Krishnan (2003) *Bread for the Poor: Access to Justice Via Lok Adalats in India,* Paper presented at the DFID workshop on Non-State Justice Systems, London, March 6-7 2004.

17 Article 273 and 274 of the Constitution of the Republic of Ghana.

or judicial functions. Nevertheless, chiefs still exert considerable authority, respect and influence at the local level, and fulfil quasi-judicial roles. Chiefs and their traditional councils have extended their jurisdiction beyond strictly chieftaincy-related matters to family and property matters, including divorce, child custody and land disputes. They determine cases called *efisem* by the Akans (literally, private matters) or civil (as opposed to criminal) cases. The essentials of the traditional justice system are well articulated in the case law in Ghana, and customary law is also enforced in the district and other courts, depending on the nature of the dispute.

3.1.17 The Chief Justice of the Republic of Ghana, Justice George Kingsley Acquah[18] reminded his audience that "chiefs are custodians of land, and they indeed settle quite a large a number of land disputes. Chiefs therefore remain 'tribunal of preference' for most citizens, especially in the rural areas. They also settle a number of domestic and customary law disputes in their locality. The informality of these tribunals makes them user-friendly and public participation makes the process popular in the sense of people regarding the process as their own, and not something imposed from above."

3.1.18 Traditional leaders have informally retained the judicial power that they continue to exercise despite the abolition of traditional courts in the first years of independence. Dr Seth Twum has proposed that since traditional leaders still wield considerable authority over their subjects and access to the regular courts is difficult and expensive, the traditional court system, as established under the Native Jurisdiction Ordinance (1883), should be reintroduced.[19]

3.1.19 Although the Constitution does not recognise any traditional court, traditional leaders and traditional councils have nevertheless extended their jurisdiction beyond strictly chieftaincy-related matters to family and property disputes, including divorce, child custody and land. The Ministry of Justice and the Attorney-General's Department are guiding a process on the reintroduction of the traditional court system established under the Native Jurisdiction Ordinance (1883). Training in ADR and other paralegal issues has been intensified and the necessary legal framework will be established to back such an important process. Recognising such important de facto jurisdiction, individual institutions such as the World Bank have supported the provision of training to traditional chiefs in basic law and ADR mechanisms. This has assisted in the overhaul of these institutions in Ghana.

### *(e) Australia*

3.1.20 In an article in the *Information Bulletin* published by the Government of South Australia, John Tomaino wrote that aboriginal courts in South Australia, which were first established as pilots in 1999, developed as a result of a lack of trust in the formal justice system. The aboriginal people felt that they, as litigants, had limited input into the judicial process in general, and sentencing in particular. They also saw the courts as culturally alienating, isolating, and unwelcoming to the community and family groups. He mentions some of the features introduced to allay the fears of the aboriginal people. All parties, including the magistrates, are seated at the same level and are in close proximity to each other in order to facilitate direct communication. The magistrate sits with a member of the aboriginal community who has a sound knowledge of the culture and can advise the courts on certain issues. Extensive use is made of pre-sentencing information, including bail enquiry reports, to shape sentencing decisions. Government and non-government agencies attend and offer support to the clients, opening up opportunities for rehabilitation. Magistrates who preside over the courts develop a rapport with the aboriginal communities, which, in turn, builds knowledge of local issues that results in better quality sentencing decisions.[20]

3.1.21 While the functioning of the aboriginal courts, to some extent, resembles a version of what the South African community courts could or should be, their points of

18 Addressing a conference on traditional justice in Ghana on 5 December 2005.

19 Report of the 7th National Governance Workshop, *Traditional Authority and Good Governance in Accra*.

20 Above, p 4-5.

similarity with the traditional courts are in respect of their accommodation of culture, participation by all who attend the proceedings and their restorative justice approach.

*(f) Canada*

3.1.22 Similar to South Australia, there has been a strong emergence of an aboriginal justice system in Canada. The Canadian system is based more on restorative justice than on the harmonisation of culture with the formal court system. In a recent publication, *Reclaiming Aboriginal Justice, Identity and Community*[21], the author initiates the debate in the Canadian legal environment on whether, traditionally, aboriginal justice was always healing, restorative and rarely retributive. The author gives a detailed explanation of the concept of restorative justice as part of aboriginal justice and he remarks as follows:

"Restorative justice provides a mode to decolonialise justice for these aboriginal people. They want to move away from abstract, rationalistic, and universalistic theories of justice in the Eurocentric justice tradition toward defining justice in terms of their awareness of their knowledge, tradition and values. This form of justice is about relearning 'how we should suppose to be' and 'relearning our traditional responsibilities' … It is conceived of as healing because social disorder and crime are seen as illnesses to the spiritual, emotional, physical and mental wellbeing of individuals and the community that must be treated through traditional means. Part of this process involves reconciling the accused with his or her conscience through counselling by elders or other community members. It involves reconciling with the individual or family who has been wronged through offender acceptance of responsibility and restitution. It empowers individuals and assists in reclaiming community ownership of justice and other community members."

3.1.23 In order to realise the ideals of restorative justice, Canada has established a Community Council Project as a diversion programme, with the objectives of reversing the uneven imposition of serious sanctions onto those already socially disadvantaged, avoiding the harsh and criminogenic impact of prison, providing a range of alternatives for decision-makers to choose from, providing satisfying justice for victims and communities, of dealing with the social, economic and personal factors associated with crime in preference to the often punitive-orientated alternatives.[22]

3.1.24 The experiences of South Australia and Canada are relevant to traditional courts and emphasise the restorative justice elements that should characterise these forms of justice.

## *3.2 Features that suit the envisaged South African model of traditional courts*

It is clear from the analysis above that there are also models of conflict resolution in traditional societies in Africa, Asia, Australia and Canada. However, the question immediately arises whether these models are in all respects suited for our traditional courts? These models, although there are similarities, can and should not be extended to our traditional courts for the following reasons:

- The Botswana model creates overlaps between the formal court system and the parallel traditional court system.
- The Malawi model allows for magistrates and not traditional leaders to preside in customary justice forums.
- The Indian model allows for parties to the disputes to be represented by their advocates and is purely based on alternative dispute resolution.
- In Ghana the institution of chieftaincy does not have any legislative, administrative or judicial functions.
- In Australia and Canada magistrates and not traditional leaders preside in traditional courts.

21 Written by Craig Proulx, Purich Publishing (2003).

22 Above, p 81-82.

# THE IMPACT

## OF THE CONSTITUTION ON TRADITIONAL LEADERSHIP

04

**Policy Framework on the Traditional Justice System under the Constitution**

## 4.1 *The recognition of traditional courts under the new democratic dispensation*

4.1.1 The Constitution recognises the institution, status and role of traditional leadership according to customary law, but subject to the Constitution. It recognises that a traditional authority observing a system of customary law may function, subject to any applicable legislation and customs.

4.1.2 During the certification proceedings, a contention that the final Constitution failed to establish traditional or customary courts (as required by the Constitutional Principle XIII) was dismissed. Under the final Constitution the customary courts qualify as 'any court established or recognised in terms of an act of Parliament'. However, because traditional rulers also exercise legislative, and especially, executive powers, it has been argued that, as judges, they are neither independent nor impartial, as required by FCs 156(2). In Bangindawo and others v Head of Nyanda Regional Authority and others 1998(3) SA 262 (Tk), the applicants used this argument to object to the Transkeian Regional Courts. The High Court dismissed the objection on the grounds that the usual common-law tests for independence and impartiality were not applicable. It held that, in Africa, although no clear distinction is drawn between the executive, judicial and legislative functions of government, no reasonable African would perceive bias on the part of traditional leaders merely because they exercise executive powers.

4.1.3 In Mhlekwa v Head of the Tembuland Reginal Authority; Feni v Head of Western Tembuland Regional Authority 2001 (1) SA 574 (Tk); 2000 (9) BCLR 979 (Tk), the court disagreed with the ruling on Regional Authority Courts. The court maintained that some of the functions involved controversial public issues and might therefore lead to the perception of an unduly close relationship with the executive. In paragraphs 616 – 7 and 1017 – 18 the court held that traditional leaders do not enjoy the security of tenure guaranteed to other judicial officers by section 177 of the final Constitution. The Mhlekwa case did not overrule the Bangindawo case, which was concerned only with jurisdiction over civil matters. According to Bennet[23], this result is correct because in civil cases, the question of compatibility with the Constitution must be weighed against consideration of access to justice. To annul the judicial powers of traditional rulers would be to deprive the rural population of local courts in which they usually litigate, their disputes. The Mhlekwa case confirmed the South African Law Reform Commission's opinion on traditional courts and the judicial function of traditional leaders in its discussion paper[24] with regard to the criminal jurisdiction of traditional courts. The Commission favoured the preservation of traditional courts. The Commission argued that the perception of impartiality and independence were less important than the fact of freedom from executive interference. This is a problem that is especially acute in criminal cases, where presiding officers could scarcely be considered impartial when, at one and the same time, they are "complainant", "prosecutor" and "judge"[25].

4.1.4 According to a survey by Barbara Oomen[26] in the Sekhukhune area, members of the community in that area prefer customary courts compared to the mainstream courts or magistrates' courts.[27] Sixty-five percent of the respondents in the jurisdiction of "Courts of Chiefs" are in favour of having their disputes adjudicated in the traditional courts. It shows that people in the rural areas are comfortable with the way in which cases are dealt with because they are dealt with and finalised speedily. The other issue that makes the majority of people favour the traditional courts is the language used, which is well known in the traditional community concerned.

4.1.5 Some of the common disputes that are dealt with by the traditional courts are theft, common assault, malicious damage to property, land issues, domestic violence, witchcraft, marriage matters and crimen injuria (insults), while the most common civil disputes involve damage to crops by stray animals, impregnating another man's

23 T Bennet and Murray, above p 127

24 82 of 1999: Project 90: Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the judicial functions of traditional leaders.

25 Para 42 of the SALR paper above

26 Oomen, above p 205.

27 Oomen, above p 205.

wife, impregnating a young girl or woman, and disputes over lobola payments.

4.1.6 In the Sekhukhune area, one of the magistrates indicated that it is the most boring place to work because people solve their cases at home.[28] He mentioned that he only has one session a week when he deals with assault and theft and, like his colleagues, he refers cases deemed to be customary law issues, land disputes, family fights and insults to the "Court of Chiefs". A survey undertaken in Sekhukhune illustrates the following:[29]

| Subject | Kgosi | Magistrate |
|---|---|---|
| Marriage matters | 53 | 57 |
| Family matters | 71 | 22 |
| Petty theft | 67 | 19 |
| Maintenance cases | 19 | 77 |
| Land issues | 62 | 35 |
| Assault/bodily harm | 49 | 38 |
| Theft other than petty theft | 9 | 90 |
| Witchcraft | 68 | 35 |

## *4.2 The impact of the Constitution on the institution of traditional leadership*

4.2.1 With the advent of the new constitutional order it was realised that it would only be possible to transform the legislation existing on 27 April 1994 over a period of time. Because a comprehensive rationalisation process would be necessary in respect of existing legislation, both the Interim Constitution and the final Constitution (in preparation of this rationalisation process) contained the following important transitional provisions:

(a) Laws existing at the commencement of these Constitutions would continue to apply in the geographical areas in which they applied before the Interim Constitution and the final Constitution took effect until they are amended or repealed by a competent authority.[30]

(b) Where necessary, the administration of existing laws would be assigned to the appropriate authorities at the appropriate levels of government, as envisaged by both constitutions.[31] (The reason for this particular mechanism emanates from the fact that both the Interim Constitution and the final Constitution provided for legislative authority to be vested at different levels of government. The legislative competences of the national and provincial levels of government are clearly determined.[32] Such a concept was not well defined in the pre-1994 constitutional dispensation. Moreover, the former homelands also had their own legislation, which continued to apply after 27 April 1994 and had to be administered at the appropriate level of government, and not necessarily in the area where it had applied before.)

(c) Every court, including courts of traditional leaders, existing when the new Constitution took effect, would continue to function and to exercise jurisdiction in terms of the legislation applicable to them, subject to any amendment or repeal of that legislation.

28 Oomen, above p 207.

29 Oomen, p 206.

30 Section 229 of the Interim Constitution and item 2 of Schedule 6 to the final Constitution.

31 Section 235(8) of the Interim Constitution and item 14 of Schedule 6 to the final Constitution.

32 Schedule 6 to the Interim Constitution and Schedules 4 and 5 to the final Constitution.

# CHALLENGES

SOUGHT TO BE ADDRESSED BY THE POLICY FRAMEWORK

05

**Policy Framework on the Traditional Justice System under the Constitution**

## 5.1 Introduction

Despite its continued existence under the democratic era the traditional court dispensation continues to experience constitutional and operational challenges. Allegations of abuse of the conferred judicial authority by some traditional leaders, patriarchal stereotypes and the prevalent exclusion of women in the traditional court structures and bias against women litigants or parties to the proceedings continue to gloom the picture over these courts. Challenges arising from the conflicts of the system with some of the constitutional values overlap with the formal judicial system, fragmentation and inconsistencies and lack of enforceability of traditional courts' decisions are highlighted in the succeeding paragraphs. The following case studies illustrate this:

## 5.2 Embracing the new constitutional values

5.2.1 The commencement of the new constitutional dispensation, among others, abolished the principle of parliamentary sovereignty/supremacy. This watershed event also heralded a dispensation that recognised South Africa as a sovereign, democratic state founded on, among others, the following values:

- Human dignity, the achievement of equality and the advancement of human rights and freedom.
- Non-racialism and non-sexism.
- Supremacy of the Constitution and the rule of law.

5.2.2 Against this backdrop, the Constitution is the supreme law of the Republic and any law or conduct that is inconsistent with it is invalid.[33]

5.2.3 The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all the people in the country and affirms the democratic values of human dignity, equality and freedom, providing that the state must respect, protect, promote and fulfil the rights contained in the Bill of Rights.[34]

5.2.4 The greatest challenge facing the institution of traditional leadership is the alignment of some of the practices of traditional leadership emanating from cultures and customs with the values underpinning the Constitution, such as equality and the eradication of unfair discrimination based on, in particular race, gender and age. For instance, the provision in the Black Administration Act, that requires traditional leaders to hear civil disputes between blacks[35] and criminal cases where the accused is black, amounts to racial discrimination. The role and functions of traditional leadership in the administration of justice should be seen against this background.

5.2.5 A further important issue on the jurisdiction of traditional courts is corporal punishment. Traditional courts still regularly administer this sanction in forms varying from few lashings to ferocious beatings.

## 5.3 Exercise of judicial functions by traditional leaders

5.3.1 The Constitution requires judicial officers appointed in any court to be appropriately qualified women or men who are fit and proper persons. The appointment, promotion, transfer, dismissal of, or disciplinary steps against judicial officers must take place without favour or prejudice. Before judicial officers perform their functions, they must take an oath or affirm, in a manner prescribed by the Constitution, that they will uphold and protect the Constitution.

5.3.2 Although traditional leaders were assigned judicial functions under the Black Administration Act, they do not necessarily fall under the definition of judicial officer envisaged by the Constitution. Judicial officers are judges and magistrates appointed in terms of the Constitution and the Magistrates' Act.[36] Traditional leaders are not appointed to any judicial position, but ascend to the throne. Therefore, the requirements relating to the qualifications, being fit and proper persons, and the

33 Section 2 of the Constitution.
34 Section 7 of the Constitution.
35 Section 35 of the Black Administration Act defines "black" as a member of an aboriginal race or tribe of Africa.
36 Act 90 of 1993.

promotion and dismissal of judicial officers do not necessarily apply to traditional leaders.

## 5.4 Fragmentation of the traditional justice system

5.4.1 The 1993 Constitution provided for the assignment of the administration of a law to a province if that law, among others, fell within the functional area that was specified in Schedule 6 to the 1993 Constitution. "Traditional authorities" and "indigenous law and customary law" were among these functional areas. A number of laws pertaining to the administration of justice was assigned to the respective provinces.

5.4.2 In order to have a single set of laws applying nationally (as opposed to former RSA laws and former homeland laws dealing with the same subject matter applying in different areas of the country), soon after 1994 most national departments promoted legislation to rationalise the laws for which they were responsible (ie former homeland legislation and former RSA legislation). This rationalisation of legislation invariably repealed the legislation of the former homelands, which still applied in those areas, and the corresponding RSA legislation was made applicable throughout the country. However, not surprisingly, this did not happen in the case of legislation dealing with the role and functions of traditional leaders in the administration of justice. This was due to the complexity and sensitivity of the issues in question, as well as the fact that the whole issue of aligning the institution of traditional leadership with the new constitutional dispensation would require a policy review process that would culminate in new legislation.

5.4.3 In order to ensure that the different laws that existed on 27 April 1994 were dealt with at the appropriate level of government, as contemplated by the Interim Constitution, the administration of numerous laws was either assigned upwards (to the national level of government) or downwards (to the provincial level of government). In this process, the administration of all the laws regulating the role and functions of traditional leaders in the administration of justice, which were, at the time, still administered at provincial level, was temporarily assigned to the national level of government under the responsibility of the Minister of Justice. Shortly after that, the administration of a number of these statutes was reassigned to the various provinces. A number of statutes also remained under the administration of the Minister for Justice and Constitutional Development.

5.4.4 Many of the above-mentioned statutes regulating the role and functions of traditional leaders in the administration of justice, which are now administered by the various provinces, have their origin in the dispensation created by sections 12 and 20 of the Black Administration Act and other legislation passed during the homeland era. There are, however, deviations from the Black Administration Act. In certain provinces judicial authority vests in senior traditional leaders, while in others it vests in the headmen and, in others in traditional councils.

5.4.5 For instance, in North West (in the former Bophuthatswana), the authority to deal with criminal and civil matters is conferred on structures (tribal authorities) and not on individual traditional leaders.[37] Appeals from traditional structures go to a special court in each magisterial district, consisting of a magistrate and two additional members (experts from the communities in the district). In the former Ciskei, chiefs and headmen have automatic jurisdiction to deal with criminal and civil matters arising from customary law and custom by virtue of their appointment as traditional leaders. Appeals from traditional leaders go to regional authorities, on which kings and queens have representation.

## 5.5 Institutional challenges

5.5.1 Despite considerable support for a traditional form of justice, there are people who are less positive about traditional courts, saying that they have not lived up to their expectations, especially in the new dispensation. Allegations of abuse of the conferred judicial authority by some traditional leaders, patriarchal stereotypes, the prevalent exclusion of women in the traditional

37 Bophuthatswana Courts Chiefs Act, Act 2908, 1979.

court structures and bias against women litigants or parties to the proceedings continue to cast gloom over the picture of these courts. In a case where a woman married another woman(man) in order to bear children for the husband, she was reprimanded that, as a married woman, she should not talk while standing.

5.5.2 Although the institution of traditional leadership and traditional courts formed one of the institutions used by the apartheid government to maintain a separate system for blacks, they were not funded adequately by the government. They relied on tribal levies and fines imposed by the tribal courts, as they were called, to sustain themselves. On the other hand, the Commissioners' courts were funded by the state and the white commissioners who supervised the traditional leaders received additional remuneration in the form of an inconvenience allowance. The fact that the system continues to function despite the lack of adequate official funding is testimony to the way in which the communities embraced the system. It was only after the recognition of traditional leadership by the new constitutional order that government provided resources for it, mainly from the provincial governments that fulfil an administrative role. Of importance are the accounting responsibilities that came with the funding. This is an aspect that was absent during the apartheid era. There were no requirements to establish a proper accounting system for the receipt and use of tribal levies, and the salaries of "Chiefs", headmen and tribal police were prioritised above community interests. No form of remuneration is given for participation in the proceedings of the traditional courts. It is perceived to be a community service.

5.5.3 No training programmes were introduced to prepare traditional leadership for the new constitutional order. The values and systems brought about by the democratic order were foreign to the cultural way of doing things. The handling of public funds in the form of tribal levies was taken away from traditional leaders and funding was provided by organs of state. Governance aspects were coordinated through the newly established Houses of Traditional Leaders. The institution was not provided with skilled personnel to provide support during the transition to democratic rule. Some of the persons who volunteered their services in the traditional courts could not be absorbed into the public service due to a lack of the required qualifications.

5.5.4 Corporal punishment, which was the most common type of sentence meted out by the traditional courts, was abandoned for being inconsistent with the right to human dignity in the Bill of Rights, and the use of tribal police as peace officers was also done away with as it overlapped with the functions of the police, who are statutorily empowered to effect arrests. The weakening of the enforcement mechanisms without the introduction of alternative mechanisms that were in line with the Constitution, reduced the effectiveness of the traditional courts.

5.5.5 The Constitution introduced institutions such as the South African Human Rights Commission, the Commission on Gender Equality and the Public Protector with constitutional mandates to investigate any violation of rights in the Constitution. These institutions, to some extent, provided services relating to conflict resolution and mediation of conflicts arising from the Bill of Rights and competed with traditional courts in some respects.

5.5.6 There is, moreover, an overlap in jurisdiction between traditional courts and magistrates' courts in respect of certain matters, for instance petty theft and crimen injuria, and this leads to forum-shopping. This has further weakened the role of the traditional courts as custodians of good morals and culture.

5.5.7 The following case studies illustrate some of the challenges and anomalies which still exist in the traditional justice system:

(i) A dispute arose in August 1997 in a village called Mononono among the Bakgatla-ba-Kgalefa tribal authority which falls under Kgosi Pilane's jurisdiction. A woman lost her husband and she objected to the observance of the Bakgatla mourning custom which requires her to sprinkle a herb called 'mogaga' on her pathway each time she left her yard. She refused to do so because of her religious beliefs which do not recognise this custom. She was brought before the authority and sentenced to confinement to her yard for a period of 12 months. The widow in Mononono

village was aware that as she was living among the Bakgatla-ba-Kgalefa, she was expected to subscribe to the culture of Bakgatla. However, the Constitution of South Africa makes provision for individuals to exercise their own rights. This problem is complex because it involves two different belief systems. The widow found herself in a dilemma because of her husband's culture and her own religious beliefs. To add to the complexity of the matter, the Bakgatla tribal authority sentenced her to confinement to her yard for 12 months without taking cognisance of her religious beliefs.[38]

(ii) A case study was done by Barbara Oomen in the area of Sekhukhune.[39] It examined a dispute decided at Sekhukhune at Mamone kgoro between two families, the Magakalas and the Monagedis. In this case, the husband from the Magakalas threatened to kill his wife. The wife's family took a letter to the senior traditional leader's kraal, where it was agreed that the two families would follow the procedure in bringing the case to the senior traditional leader's kraal. The discussion suggested that the man should respect his wife; he should not assault his wife and they should live in peace. In the end Mr Magakala accepted his wrongdoings. In imposing a sanction, there was disagreement among the councillors. Some were in favour of corporal punishment, while some were in favour of a fine.[40]

(iii) A third case study, also by Barbara Oomen, examined the case of Jerry Lethamaga. Mr Lethamaga was a supporter of Mr Mohlahla, who had fought with the chief's mother over the throne for the past number of years. As his headman, he started allocating sites in Mokwete, where there was also a headman appointed by the chief. In May 1999, Mr Lethamaga was dragged to the kgoro, beaten up and tied to the thorn tree for the red ants to punish him further. He was also fined R3 500 and the people to whom he had allocated the sites were required to leave the village. Mr Lethamaga opened a case against the Momone.[41]

5.5.8 From the above case studies, it is evident that the policy framework should seek to address specific challenges in the traditional courts, such as the types of cases opened, the sanctions imposed, the use of alternative dispute resolution methods and restorative justice, gender equality, and corporal punishment.

38 An unreported case of Elizabeth Tumane and the Human Rights Commission vs Bakgatla-ba-kgalefa and kgosi Nylala Pilane. Case No. 618 of 1998 heard in the Bophuthatswana Provincial Division of the High Court of South Africa

39 Oomen, p 209 – 210.

40 Oomen, p 4.

41 Oomen, p 4.

# POLICY CONSIDERATIONS

06

## 6.1 Cultural values enhancing social cohesion, peace and harmony

6.1.1 The role of the institution of traditional leadership in the administration of justice is not confined purely to dispute resolution. This role is traditionally twofold in nature, namely

(i) a proactive role to promote social cohesion, co-existence, peace and harmony; and

(ii) a reactive role to resolve disputes that have arisen.

6.1.2 Cultural values, deriving from customary law and custom are unique to traditional communities. Inherent in these values are customary practices that seek to and do in fact promote social cohesion, co-existence, peace and harmony, sometimes known as ubuntu, by inculcating a deep respect for law and order/orderliness, on the one hand, and authority, on the other. The institution of traditional leadership has always been the custodian of these values and must continue to do so. It plays a crucial role in promoting them, transforming them and developing them, where necessary. The institution of traditional leadership is destined to play a crucial role in the transformation or development of these values and practices.

6.1.3 There are instances of real or perceived contradictions between some of these values and practices and the values enshrined in the Constitution. These contradictions are indicative of the need to further develop customary law to be consistent with constitutional values. The Constitution enjoins all courts, including traditional courts, tribunals or forums, when interpreting any legislation and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.

6.1.4 The following are areas in respect of which the institution of traditional leadership or traditional leaders can fulfill a proactive role in promoting social cohesion, co-existence, peace and harmony in their areas of jurisdiction:

(i) General practices and cultural events that are known to build and enhance solidarity, such as mass gatherings to pray for peace or rain or conduct cleansing ceremonies after a tragedy has befallen a community or observance of particular days and heritage sites to commemorate historic events (e.g. Shaka's Day).

(ii) Promotion of family values, responsible parenting and moral regeneration, in conjunction with the relevant social sector governance structures.

(iii) Crime prevention, in conjunction with the SAPS and other law enforcement structures, for instance Community Police Forums and Community Safety Forums.

6.1.5 The institution of traditional leadership could further play a role in the implementation of policies and programmes which have a bearing on the administration of justice. For example in programmes such as the Victims Charter, the institution of traditional leadership may be capacitated to empower traditional communities through awareness campaigns to exercise their rights and privileges contained in the Charter.

## 6.2 The traditional justice system suited for the South African constitutional dispensation

6.2.1 The traditional justice system should promote and preserve the African values of justice, which are based on reconciliation and restorative justice. The Constitution protects cultural rights and the institution of traditional leadership. Traditional leaders, in particular, are the custodians of this culture and tradition. The allocation of a role and functions to the institution of traditional leadership must be done in a manner that preserves the values on which the institution of traditional leadership is founded.

6.2.2 Traditional courts differ from formal courts in that they are readily accessible, they serve to restore and bind the relationship between traditional people, and are highly visible, with a transparent decision-making process in which there is community participation. Formal courts, on the other hand, follow complex legal rules and focus on retribution.

6.2.3 The essence of the traditional justice system lies in the participation of communities in resolving their disputes. This differs from the formal judicial system where disputes are deferred to the courts to be adjudicated by judicial officers who pass arbitrary judgments. The traditional

methods of dispute resolution were not litigious in the courts as they are understood in the Western concept of justice. Communities met in the *makgotla* to resolve their disputes, and the chief, as Sachs puts it, invariably acted as spokesman for his councillors, who, in turn, sought to uphold and reinforce the established norms of the tribe. Sachs notes further as follows:

"In this context, the good chief was reckoned not by the terror he could inspire or magnamity he could display, but by his skill in articulating the sense of justice (just-ness) of a relatively homogeneous community, which involved his applying universally accepted rules and precedents to particular disputes in a manifestly appropriate way".[42]

6.2.4 The Constitution enshrines the "right of everyone to have any dispute that can be resolved by the application of the law in a fair and public hearing in a court or, where appropriate, another independent and impartial forum". In terms of the Constitution, any form of court, tribunal or forum may be established to resolve particular disputes, provided that such a court, tribunal or forum meets the constitutionally entrenched requirements of independence and impartiality.

6.2.5 Traditional leadership has been administering justice in traditional communities for centuries. Before the colonial presence, civil and criminal disputes were resolved by applying indigenous law in the communal context of *inkundla* or *lekgotla*, presided over by a traditional leader. Although decisions were made through democratic deliberations, the system fell short of true, holistic democracy as understood in modern thought, largely due to the fact that women in certain cultural practices were not allowed to attend and debate within the *lekgotla*.[43]

6.2.6 National legislation should affirm the traditional institutions or forums sitting as traditional courts at which traditional leaders exercise their role and functions relating to the administration of justice. The envisaged legislation should provide for the procedures to be followed by the traditional courts.

6.2.7 The policies proposed in this policy framework seek to affirm these traditional methods of administering justice inherent in the values of the indigenous/traditional communities. This system is not a substitute for the formal judicial system. It complements and supports the judicial system. Therefore one should guard against interpreting the principles of the traditional justice system in the context of due process as applied or understood in the retributive justice system. For example, an accused person, as defined in the Criminal Procedure Act, 1977, has a different meaning to an accused person in the context of the traditional justice system. In this context an accused person in the criminal justice system is entitled to legal representation, while an accused person in the traditional justice system is not.

6.2.8 These policies are intended to increase access to justice for social groups that are not adequately or fairly served by the formal judicial system – thus reducing the cost and time taken to resolve minor disputes. The greater the reflection of community values in the laws and dispute resolution processes, the greater the respect the process will get from members of the traditional community.

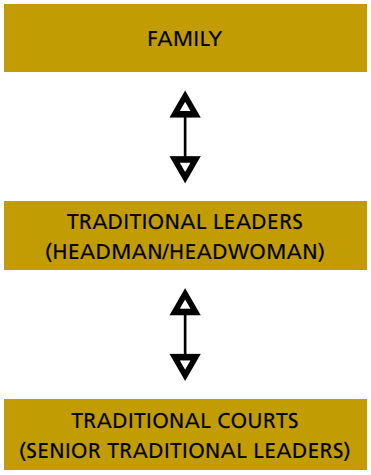
## *6.3 The procedures followed in the traditional justice system*

6.3.1 The traditional justice system, commences at the family or local level. The elders in a family would attempt to resolve the dispute. If they are unable to do so, they then escalate it to the local level (headman or headwoman). Dispute resolution at the family or local level is regulated by customary law. Taking a matter to the traditional court is usually seen as a last resort, and is only done after the initial attempts to resolve the dispute have failed.

42 A Sachs, Justice in South Africa, Berkeley, Los Angeles: University of California Press, 1973 p 96

43 Justice Moseneke at the Magistrates' Conference of 15-16 September 2007.

6.3.2 The structure is generally as follows:




6.3.3 Generally a matter will only be taken to the traditional court as a last resort and only after other processes have failed. The complaint starts at the family level and if it is not resolved at that level it is referred to the level of headman/headwoman for resolution. If the matter is not resolved by the headman/headwoman the matter is referred to the senior traditional leader who convenes a traditional court. Complaints and disputes are heard at the traditional authority offices, either in the chief's office or in the traditional authorities' boardroom. These complaints are heard informally and generally involve discussions between all the affected parties with the inclusion of the traditional leader and other members of the traditional council. They adopt dispute resolution mechanisms and seek to reach an agreement between all the parties. If no agreement is reached, it becomes a formal hearing before a traditional court.

6.3.4 The court sitting is open to members of the community, who are permitted to comment and asked questions to either party. At the end of the trial the traditional leader pronounces the decision of the traditional court. In areas where senior traditional leaders fall under a king or a queen, there is a further right of appeal against a decision of such a court to the king or queen.

6.3.5 Dispute resolution at a family and headman/headwoman level is regulated entirely by customary law. The envisaged legalisation will therefore only regulate dispute resolution once the dispute has been referred to a traditional court.

## *6.4 Affirming the principles of restorative justice within the traditional justice system*

6.4.1 Throughout history, traditional leaders have had dispute resolution mechanisms in place, which have been successful in resolving disputes in rural communities. The primary aim of the traditional courts is to achieve reconciliation between the parties.

6.4.2 While it is true that a traditional court, when adjudicating a dispute, hands down a "verdict" (i.e. finds someone guilty or innocent), it is also true that the ultimate objective of the proceedings is dispute resolution and the restoration of a healthy relationship between the parties. Elements of restorative justice, which appear to be an innovation in the formal justice system, have existed since time immemorial in the traditional justice system.

## *6.5 Provision of reasonable resources for the exercise of the role and functions of the traditional leaders in the administration of justice*

6.5.1 Unlike formal courts where magistrates and judges are appointed to deal specifically with judicial functions, the institution of traditional leadership has a range of other functions emanating from culture and custom, which are assigned to it by legislation. Unlike judicial officers, traditional leaders are not appointed to their positions by virtue of their competence or capability, but ascend to the throne through succession. They are not appointed, but are "born leaders".

6.5.2 Traditional leaders perform their role and functions closest to the community. The Traditional Leadership and Governance Framework Act enjoins government to provide the resources necessary for traditional leaders to perform their functions. It expressly provides that every organ of state must strive to ensure that the allocation of any role or function to the institution of traditional leadership is accompanied by the necessary resources, and must ensure that a proper accounting system is put in place. It is necessary to provide an environment that will facilitate and promote an integrated approach in the exercise of the role and functions that cut across all the spheres of government. Within this context, the

Department of Justice and Constitutional Development is expected to provide the capacity and resources that may be required specifically for the exercise of the role and functions of traditional leaders in the administration of justice, such as resources necessary to provide training and administrative support to the traditional courts.

## 6.6 The report of the South African Law Reform Commission on traditional courts and judicial functions of traditional leaders

6.6.1 In 1999, the South African Law Reform Commission conducted an investigation to consolidate the different laws and provisions governing traditional courts in order to bring them in line with the principles of democracy and other values underlying the Constitution. The investigation led to the publication of a discussion paper entitled *Traditional courts and the judicial functions of traditional leaders*. Extensive consultation at national, provincial and local level followed the publication of this discussion paper. This culminated in the publication of a final report and a draft bill.

6.6.2 The recommendations of the report can be summarised as follows:

(i) The Department should enact legislation, establishing customary courts with civil and criminal jurisdiction, as prescribed in the Act, and a monetary ceiling should be prescribed in respect of their civil jurisdiction.

(ii) The legislation should provide for the representation/participation of women in customary courts.

(iii) Legal representation should not be permissible in proceedings before customary courts.

(iv) Customary courts should be empowered to impose fines and suspended sentences.

(v) Defendants in proceedings before customary courts should have the right to opt out and take their matters to the mainstream courts.

(vi) Appeals against the decisions of customary courts should lie with the customary court of appeal established to hear appeals of the courts of first instance.

(vii) Judgments of courts of traditional leaders should be enforceable in the magistrates' courts.

(viii) A registrar of customary courts should be established in each province to provide administrative support to the customary courts in the province.

6.6.3 While the report contains recommendations that seek to reform and strengthen the traditional court dispensation, some of its recommendations, in particular those that relate to the imposition of suspended prison sentences, appeals and keeping records of court proceedings, are based on Western courts and may be found to be inconsistent with the African values of justice.

## 6.7 Policy proposals

### 6.7.1 Designation of traditional leaders to preside in traditional courts

6.7.1.1 The Minister should designate kings, queens and senior traditional leaders as presiding officers of traditional courts established within their areas of jurisdiction, defined in terms of legislation.

6.7.1.2 National legislation should provide for the designation to be in writing. The attendance of prescribed training programmes should be one of the requirements for a traditional leader to be designated to exercise his or her role and functions in the administration of justice. Similarly, legislation should provide for the withdrawal of the designation in cases of abuse of the given authority.

6.7.1.3 A headman/headwoman or a member of the royal family may also be designated as a presiding officer to perform functions of a senior traditional leader where the latter is unavailable.

### 6.7.2 Accountability of traditional leaders in exercising their role and functions in the administration of justice

6.7.2.1 There are no mechanisms to ensure that traditional leaders exercise their role and functions in the administration of justice within the ambits of the law. The lack of a mechanism to ensure that traditional

leaders exercise their role and functions in the administration of justice in accordance with the requirements of the Constitution and the law, presents serious challenges. Just as national legislation requires judges and magistrates to take an oath of office before a senior judicial officer, so should national legislation require traditional leaders who have been designated as presiding officers to take an oath of office before a magistrate of the magistrate's court in the area of jurisdiction of the traditional court.

6.7.2.2 National legislation may provide for the development of a code of conduct for traditional leaders designated to exercise their role and functions in the administration of justice, and should prescribe measures to be taken against any breach of such ethical conduct by any traditional leader. Such measures may include recommendations to undergo a particular training programme or temporary or even permanent withdrawal of the designation if the breach is serious enough to warrant withdrawal.

### *6.7.3 Attendance of a prescribed training programme by traditional leaders*

6.7.3.1 Traditional leaders should undergo a prescribed training programme on, among others, human rights, diversity and social context for eligibility to be designated as presiding officers in traditional courts. The training should also be extended to any headman, headwoman or any other member of the royal family who has been designated as a presiding officer.

6.7.3.2 Legislation should provide for such training programmes (in consultation with Justice College) as may be necessary for the efficient functioning of traditional courts. The training programme should include human rights education, diversity and social context training.

### *6.7.4 Traditional courts to have jurisdiction in respect of civil disputes arising from customary law and certain criminal offences*

6.7.4.1 In the past, traditional courts were perceived to be competent to handle only disputes arising from customary practices. Customary law is an unwritten body of law and differs from area to area and among the different traditional communities. Customary law is a body of practices, rules, institutions and values that are applied by a traditional community.

6.7.4.2 The distinction between disputes that emanate from customary law and those based on the common law is often not very clear. According to Sachs, the boundaries between custom and the common law have become soft and permeable. He states that although these terms are used separately in the Constitution, they can be seen as having been employed in a descriptive and fluid, rather than in a normative and categorical manner. He further observes as follows:

"Both need to be infused with the values of the Constitution. In the days of segregation they were kept apart, both conceptually and institutionally. Today there is no reason not to recognise and welcome the fact that each has osmostically and irreversibly seeped into and reinforced the other. Furthermore, both have been profoundly and irrevocably affected by legislation; if ever pure fonts of common law and customary law existed, they do not exist anymore today."[44]

6.7.4.3 The extension of criminal and civil jurisdiction to traditional courts may raise constitutional challenges. There is a fine distinction between crimes that arise from customary law and practices and those that arise from common law. Following research in this regard, there are no known customary law crimes separate from those that emanate from common law. This is so because customary law is unwritten and differs from one community to another. Although in civil law there are certain disputes which are based purely on customary law, it is necessary to determine the extent to which traditional courts may be given jurisdiction to hear civil disputes and common law crimes. The extension of criminal and civil jurisdiction should be consistent with the requirements of the Constitution.

6.7.4.4 It is necessary for traditional courts to be conferred with jurisdiction to hear less serious crimes and minor

44 A Sachs, Towards the Liberation and Revolution of Customary Law (published in Law in Africa (1999) by S Nthai)

civil disputes arising from customary law and common law crimes.

6.7.4.5 The jurisdiction of traditional courts should be in respect of offences and disputes that have arisen within the area of jurisdiction of the traditional court concerned.

6.7.4.6 The Minister should, from time to time, by notice in the Gazette, determine the maximum monetary value of disputes or claims to be heard by traditional courts. Serious disputes such as domestic violence and indecent assault should not be heard by traditional courts.

6.7.4.7 Because South Africa does not have a single, unified system of customary law, traditional courts are and will continue to be confronted with instances where they have to decide which of two or more different systems of customary law apply to the facts of the dispute in question. In practice such conflicts are usually resolved by consensus between the parties to a dispute. In the absence of any form of agreement between the parties to a dispute, the applicable law is the law of the area of the traditional community in question, or the law with which the case has its closest connection.

### *6.7.5 Traditional courts to impose sanctions of a restorative (justice) nature*

6.7.5.1 Traditional courts should not impose any form of imprisonment or suspended sentence.

6.7.5.2 Historically, traditional leaders could impose severe sanctions such as banishment and expulsion from the community. However, these sanctions would not be justified under the Constitution.

6.7.5.3 Traditional courts may impose fines and or monetary compensation. In relation to traditional courts, the focus has always been on reconciliation and restorative justice rather than on punishment. A fine is seen as an acceptance of guilt and the fine is often self-imposed. Choudree cites the following example to illustrate the point:

"If a person realises that he is wrong, or it is apparent to him that his fellow lineage members deem him so, he may impose a fine of a sheep, goat or even a beast on himself to indicate his contrition and to wash away his offence. This ukuzidla is sometimes also resorted to in the headman's court, constituting an admission of guilt. It is known as *imali yo ku zithandanzela* (money for begging for mercy) and is an indication to the court of the sincerity of repentance. In case where the guilty party imposes a fine on himself that the members of the *inkundla* regard as inadequate, they regard this as proof that he is not really sorry, and may increase the fine; on the other hand if he fines himself too heavily, they are likely to reduce it."[45]

6.7.5.4 Traditional courts should be empowered to impose innovative community sanctions, particularly sanctions that facilitate restorative justice, in keeping with the traditional role of traditional leadership. Historically, traditional leaders were charged with maintaining peace and harmony in their communities. The legislation regulating equality courts may give useful guidance in this regard, for instance, that an unqualified apology be given or an order that the accused person compensate the complainant for any damages caused, subject to certain limitations.

6.7.5.5 National legislation should empower the Minister to determine the maximum fine that may be imposed by a traditional court. The fine must be in monetary terms. Compensatory fines may be in the form of monies and livestock. Monies paid as fines should be part of state revenue and must be dealt with as prescribed.

### *6.7.6 Service of notices and court processes and enforcement of decisions of traditional courts*

6.7.6.1 After the advent of the new democratic era the system of traditional police which was essential for the enforcement of decisions of traditional courts, collapsed. One of the functions of the traditional police was to serve notices, directing parties and members of the community to attend the courts and overseeing the enforcement of court decisions. In the absence of traditional police, it is necessary to provide capacity for the exercise of this function.

45 RB Choudree, Conflict Resolution Procedure among the indigenous societies of India, Australia and South Africa, LLM Dessertation, University of Durban-Westville, 1996, p 18

### *6.7.7 Exclusion of legal representation in proceedings before traditional courts*

6.7.7.1 The rights to legal representation in the mainstream courts is pursuant to section 35 of the Constitution and this right is non-derogable. However, in the traditional justice system the right to legal representation does not find application as the traditional justice system is distinct from the ordinary courts envisaged by the Constitution (section 35(3)(c)). The purpose of traditional courts is not to convict, so much as to restore harmony and reconciliation. Sachs remarks as follows in this regard:

> "I am not proposing that community courts in the rural areas, headed by traditional leaders and functioning according to the informal procedures of customary law, be given powers to send people to jail. Nor should they be permitted to impose corporal punishment. If anybody is threatened with loss of liberty, there must be due process of law, defence lawyers, charge sheets, a system of appeal and formal procedures. That is what the Constitution requires. But resolving family and neighbours' disputes and dealing with petty assaults and small thefts requires other techniques and processes."[46]

6.7.7.2 Legal representation should not be permissible due to the fact that traditional courts do not deal with technical legal questions that require lawyers to interpret.

### *6.7.8 Decisions of traditional courts to be final and appeal to be allowed only against certain orders*

6.7.8.1 Judgments and decisions of traditional courts are usually based on consent by the defendant/accused person, and these decisions arrived at also translate into decisions of the community as everyone participates in the resolution of the disputes. The concept of appeal is consequently not a feature of the traditional court system. It was introduced by colonialism and apartheid systems through which the western form of government monitored the traditional leadership. Appeals also protract the legal process.

6.7.8.2 In exceptional cases an appeal to the magistrate's court having jurisdiction should be allowed against orders for payment of an excessive fine or compensation.

### *6.7.9 Review of decisions of traditional courts*

6.7.9.1 Decisions of traditional courts should be reviewable by the magistrate's court having jurisdiction and grounds for review should be provided for in legislation. These grounds should include absence of jurisdiction on the part of the court, gross irregularities, interest in the cause and bias.

### *6.7.10 Mechanisms to be established for referral of cases from traditional courts to magistrates' courts and vice versa*

6.7.10.1 It should be possible for matters to be referred from a traditional court to the magistrates' court having jurisdiction if, in the opinion of the traditional court, the matter under consideration is so serious that it warrants referral to a formal court.

6.7.10.2 Similarly, a matter should be able to be referred to a traditional court by a senior or control prosecutor if, in the opinion of the senior or control prosecutor, the matter falls within the jurisdiction of the traditional court.

### *6.7.11 The role of traditional courts in the criminal justice system*

6.7.11.1 Traditional courts should also be utilised as one of the diversion programmes where cases are diverted from the ordinary courts, applying the formal criminal justice system to be dealt with through the use of alternative dispute resolution or restorative justice.

6.7.11.2 The following are some of the advantages of restorative justice discussed by Schmid:[47]

(i) Victim participation and increased satisfaction: The ordinary courts are perceived to be offender focused and the victim is not a central focus as crime is an offence against the state. The restorative

46 Towards the liberation and Revolution of Customary Law, above p 14.

47 Schmid, above p114 - 128

justice initiatives focus on both the victim and the offender.

(ii) Acceptance of responsibility: The interaction between the offender and the victim provides an opportunity for the offender to admit his or her wrongs and accept responsibility for redressing them.

(iii) Reduced recidivism: Studies done show that recidivism is reduced by a restorative justice approach, compared to the conventional criminal justice methods.

(iv) Problem-solving approach to crime: The participation of the police in restorative justice conferences helps the police and other criminal justice agencies to understand the causes of criminal conduct in certain areas and how to approach them in their investigations.

(v) Additional strength: Giving stakeholders in the criminal justice process the opportunity to participate and make decisions in restorative justice conferences is empowering. As Schmid puts it:

"It is a hallmark of restorative justice that decisions about how to deal with the aftermath of crime are reached after the views of the participants have been canvassed and considered. After this consideration and collaboration, a group decision emerges and is implemented. In this way, it is possible for larger groups (offenders, victims and police) to feel "ownership" of the conference outcome.[48]

6.7.11.3 The institution of traditional leadership, through traditional courts, has a significant role to play in respect of incorporating and operationalising the restorative justice programme on dispute resolution.

### *6.7.12 Keeping of certain records*

6.7.12.1 Legislation should provide for the nature and extent of records to be kept in the proceedings of traditional courts. The records kept should be adequate so as to reflect the record of the decision and the reasons for the decision of the traditional court (in order to allow for the exercise of any right, for instance the rights to appeal against certain orders of the court or the right to seek review of the proceedings of the court).

### *6.7.13 Traditional leaders and traditional courts must advance the values and principles of the Bill of Rights*

6.7.13.1 Through human rights education and social context training programmes, traditional leaders should be sensitised about gender equality in the handling of disputes relating to women and other vulnerable members of society, and the observance and respect of rights enshrined in the Bill of Rights.

6.7.13.2 Although there is some commitment in certain traditional communities to eradicate the past prejudices against women and their exclusion from participation in traditional court structures, there are still some instances of gross inequalities and gender insensitivities in the traditional court system.

6.7.13.3 Legislation regulating traditional courts should affirm the right to equality enshrined in the Constitution and should provide for programmes that will ensure the full participation of women, the youth and the disabled in the traditional courts.

### *6.7.14 The need for national legislation to ensure uniformity*

6.7.14.1 The administration of justice is a national competence, implying that there are no functional areas relating to the administration of justice that are devolved by the Constitution to the provincial or local spheres of government. Provinces have legislative competence on matters relating to indigenous and customary law, subject to Chapter 12 of the Constitution, and have no legislative competence on matters relating to the administration of justice as provided for in Chapter 8 of the Constitution.

6.7.14.2 It is necessary to enact national legislation to ensure that uniform standards apply across the country.

48 Schmid, above p125

## 6.8 *Transitional arrangements*

6.8.1 Transitional arrangements are necessary to give effect to the traditional court dispensation proposed in this policy framework and these will be dealt within the envisaged legislation. The following are areas in respect of which transitional arrangements are necessary.

(i) Application of different statutes in different provinces:

6.8.1.1 Due to the assignment of laws of former homelands to various provinces in 1994, different statutes have, to date, been applicable in various parts of the Republic. Some of the provinces have repealed the provincial legislation assigned to them, while legislation still applying in certain parts of Mpumalanga and the Eastern Cape, namely the KwaNdebele Traditional Hearings of Civil and Criminal Cases Act, 1984, and the Regional Authorities Courts Act, 1982, were never assigned to Mpumalanga and the Eastern Cape. A single Act of Parliament regulating the role and functions of traditional leaders in the administration of justice is required. This will require the repeal of all the statutes which are administered by the national government and any other provincial statutes which regulate the role of traditional leadership in the administration of justice and which have not been repealed by the respective provincial legislatures. There is a need to coordinate the repeal of these different pieces of legislation to allow for the smooth phasing out of the existing legislative framework and to usher in a single Act of Parliament that will be applicable throughout the Republic. Provinces should also be afforded reasonable time to repeal their statutes in this regard.

(ii) Pending cases

6.8.1.2 When the repeal of the different statutes, providing for the role and functions of traditional leaders in the administration of justice takes effect, it will be necessary to allow traditional courts to finalise part heard matters in terms of the laws which existed when these matters first commenced. Appeals which are pending or which have not been given effect to when the new traditional court dispensation comes into effect should be proceeded with under the legislation which applied before the commencement of the new dispensation.

(iii) Designation of traditional leaders as presiding officers of traditional courts, training and oath of office

6.8.1.3 In order to ensure continuity, traditional leaders whose conferment to hear civil and criminal cases has not been revoked in terms of the provisions of Black Administration Act, 1927, or any other law, should be allowed to continue to hear disputes as presiding officers until they are designated in terms of the new dispensation. These traditional leaders should undergo the prescribed training and take the oath or make an affirmation of office in order to be eligible to continue in office. These traditional leaders should be given reasonable time within which to undergo training and take the oath or make an affirmation. This period should be limited to a prescribed date, affording a reasonable period to comply with the requirements of the new dispensation.

# CONCLUSION

07

## 7.1 The development of legislation on traditional courts

7.1.1 This policy framework seeks to revive and strengthen the traditional justice value system which is vital in attaining the goal of access to justice. The document is the outcome of extensive research and consultation with stakeholders in the administration of justice within and beyond the Republic. It lays the basis for the proposed new legislation which is intended to give effect to the provisions of the Traditional Leadership and Governance Framework Act, which enjoins the Department, as an organ of state, to allocate roles and responsibilities to the institution of traditional leadership in the administration of justice. A Bill on Traditional Courts will be promoted in Parliament to give effect to the policy considerations contained herein.

## 7.2 The consultation process

7.2.1 The national Conference of Magistrates hosted by the Department in September 2007 which was attended by more than 500 delegates, including senior judges, magistrates and Ministers and judicial officers from selected SADC countries, discussed in one of its commissions, the importance of the role of traditional leadership in promoting social cohesion and dealing with dispute resolution. The Conference viewed the policy and legislative initiatives undertaken through this process as invaluable lessons that may assist in building social cohesion and restitution in post conflict countries.

7.2.2 The Conference, which was the beginning of an intense dialogue on the role of traditional courts, was followed by further consultations when the Department met with the National House and Provincial Houses of Traditional Leaders to discuss policy initiatives that should form the basis of the envisaged legislation. Consultative workshops with representatives of the traditional leaders in the various provinces were held as indicated hereunder:

(i) On 7 November 2007 in Mafikeng (at which representatives of the traditional leaders in the North West, Gauteng and the Northern Cape were present);

(ii) on 9 November 2007 in Nelspruit (at which representatives of the traditional leaders in Mpumalanga were present);

(iii) on 15 November 2007 in Polokwane (at which representatives of the traditional leaders in Limpopo were present);

(iv) on 19 November 2009 in East London (at which representatives of the traditional leaders in the Eastern Cape were present);

(v) on 21 November 2007 in Harrismith (at which representatives of the traditional leaders in the Free State were present);

(vi) on 23 November 2007 in Durban (at which representatives of the traditional leaders in KwaZulu-Natal were present); and

(vii) on 12 – 13 December 2007 in Gauteng (at which representatives of the National House of Traditional Leaders and a representative of each Provincial House of Traditional Leaders met with the Department to discuss a consolidated report from the comments made at the provincial workshops, as well as a draft Bill on Traditional Courts).

7.2.3 The National House of Traditional Leaders was represented at each of the consultative workshops by members of the Constitutional Development Committee of the National House of Traditional Leaders. Each consultative workshop was opened formally by the Chairperson of the Provincial House of Traditional Leaders in question. Besides representatives of the traditional leaders in each province, representatives of the judiciary, prosecuting authority, the Chapter 9 Institutions and the South African Association of Local Government (SALGA) were also invited, attended and participated in the proceedings. The components of the provincial departments responsible for traditional affairs also attended and participated in the workshops.

7.2.4 The consultative workshops took the following form:

Welcome and opening by the Chairperson of the Provincial House of Traditional Leaders

- Presentation by the Department on the following:

- The purpose of the consultative workshop.
- the process leading to the finalisation of a policy and legislative framework for the traditional justice dispensation suited to the Constitution, as set out in Chapter 1.
- challenges facing the current traditional justice system, as set out in Chapter 5.
- areas identified for possible policy intervention, as set out in Chapter 6.

Break-away groups (commissions), where the areas identified for policy intervention were discussed in detail.

Detailed report backs/feed back by the individual commissions and further general discussions in plenary.

7.2.5 The purpose of the consultative workshops was –

- to obtain the views and participation of roleplayers, particularly the traditional leaders, in the formulation of policy and the promotion of legislation, emanating from the policy, relating to the role and functions of traditional leaders in the administration of justice;
- to propose solutions to address challenges facing the traditional justice system;
- to affirm the importance of the role and functions of the institution of traditional leadership in the administration of justice; and
- to elicit views on areas requiring policy consideration.

7.2.6 After each consultative workshop participants were requested and encouraged to consult further within the structures supporting the system of traditional leadership in their areas and to submit further considered comments on the issues in question, to the Department.

7.2.7 From the views given at the workshop and submissions received thereafter, there was apparent consensus on numerous areas relating to the traditional court system, among others, the designation of traditional leaders as presiding officials of traditional courts to be based on the attendance of a prescribed training programme, the development of a code of conduct for designated traditional leaders in the exercise of functions relating to the administration of justice, the provision of an appeal system within the hierarchy of the institution of traditional leadership, the exclusion of legal representation in proceedings before traditional courts and the implementation of programmes to promote gender equality. There were, however, a few divergent views between the provinces, for example some provinces felt that appeals must be processed through the magistrates' courts.

7.2.8 All views and submission made during and after the consultative workshops with the institution of traditional leadership have been taken into consideration in policy proposals contained in the policy framework.

T Bennet and C Murray, "Traditional Leaders" in S Woolman (et al) *Constitutional Law of South Africa*, 2nd Edition (2006) Juta Law

Charles Formbad, "Customary Courts and Traditional Justice in Botswana: Present Challenges and Future Perspectives", Stellenbosch Law Review, 2004 (1)

RB Choudree, "Conflict Resolution Procedure among the indigenous societies of India, Australia and South Africa", LLM Dissertation, University of Durban-Westville, 1996, 22

M Galanter and JK Krishnan, "Bread for the Poor: Access to Justice Via Lok Adalats in India", paper presented at the DFID workshop on Non-State Justice Systems, London, March 6-7 2003

ZN Jobodwana, "Courts of Chiefs and Human Rights: Comparative African Perspectives" (2000) 15, South African Public Law,

K Mann and R Roberts, *Law in Colonial Africa* (1991)

Justice Moseneke delivering a paper at the Magistrate Conference of 15-16 September 2007.

RB Mqeke, "Customary Law and the New Millenium" (2003) (Lovedale Press, Alice),

NJJ Olivier, *Indigenous Law* (Volume 32)(2000) Butterworths: Durban

B Oomen, Chiefs in South Africa: *Law, Power and Culture, in the Post-Apartheid Era* ,2005 University of KwaZulu-Natal Press, Pietermaritzburg

W Scharf , "Non-State Justice Systems in Southern Africa: How should Governments Respond?" paper presented at the Centre for the Study of Violence and Reconciliation Coference on the Criminal Justice Conference on 7-8 February 2005

A Sachs, *Justice in South Africa*, Berkeley, Los Angeles: University of California Press 1973, p 96

A Sachs, "Towards the Liberation and Revolution of Customary Law" published in Law in Africa 1999

Craig Proulx, "Reclaiming Aboriginal Justice, Identity and Community" 2003 Purich Publishing

Report of the 7th National Governance Workshop, Traditional Authority and Good Governance in Accra

South African Law Reform Commission Discussion Paper 82 Project 90: Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the judicial functions of traditional leaders 1999

South African Law Reform Commission Report on Traditional courts and judicial functions of traditional leaders 2003

White Paper on Traditional Leadership and Governance July 2003

**STATUTES**

**South Africa Statutes**

Black Administration Act No 38 of 1927

Constitution of the Republic of South Africa, 1996

Magistrates Courts Act No 90 of 1993

Traditional Leadership and Governance Framework Act No 41 of 2003,

**Foreign Statutes**

Botswana

Customary Courts Act of 1974.

**Ghana Statutes**

Constitution of the Republic of Ghana of 1992.

Chieftaincy Act of No 370 of 1970

**India Statutes**

Legal Services Authorities Act No 39 of 1987

**TABLE OF CASES**

Bangindawo and others v Head of Nyanda Regional Authority and others 1998(3)

SA 262 (Tk),

Mhlekwa v Head of the Tembuland Reginal Authority; Feni v Head of Western Tembuland Regional Authority 2001 (1) SA 574 (Tk); 2000 (9) BCLR 979 (Tk),

Elizabeth Tumane and the Human Rights Commission v Bakgatla-ba-Kgafela Tribal Authority and Kgosi Nyalala MJ Pilane case 618/98, in the High Court of South Africa (Bophuthatswana) (unreported)

**Reclaiming**

Aboriginal Justice, Identity and Community

Written by Craig Proulx, Reclaiming

Aboriginal Justice, Identity and Community

Purich Publishing (2003).

Department of Justice and Constitutional Development.
Private Bag X81, Pretoria 0001
Tel: 012 315 1698
Fax: 012 315 1901

# Policy Framework on the Traditional Justice System under the Constitution

the doj & cd
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA