

**COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA)**  
**ON THE TRADITIONAL COURTS BILL (B1-2012) -**

The following comments flow from a broad review of the Traditional Courts Bill (B1-2012). Although we are not making a detailed and exhaustive submission on the Bill, our comments will highlight some areas where the constitutionality of the Bill might be challenged.

The aim of the Traditional Courts Bill is "To affirm the recognition of the traditional justice system and its values, based on restorative justice and reconciliation; to provide for the structure and functioning of traditional courts in line with constitutional imperatives and values; to enhance customary law; and to provide for matters connected therewith."

In this regard the provisions of the Bill of Rights, that affords equal protection to all South Africans, will be infringed.

Hereunder are briefly some of the major concerns arising from the Bill:

1. Women comprise approximately 60% of traditional communities. It is a concern that their dignity will not be protected, unless the fundamental right to equality is protected.

The protection and recognition of women's rights will be undermined by the proposed legislation, as customary law is highly rooted in the patriarchal system. Traditional courts were comprised almost exclusively of older men. In many places women were not allowed to attend traditional courts, as they could not enter sacred places. In other cases women were not permitted to represent themselves or had to be represented by a male family member, who might be the very same person infringing on their rights or threatening their security.

In the past, women were considered perpetual minors and were not empowered to participate in decision making processes. The gains that have been made during the past years towards empowerment of women and gender equality are being reversed. It is essential that women

are included and allowed to participate in the development of customary law, so that their own needs, and that of their children, are taken into account.

Should this Bill be enacted, many women in rural areas, where development is happening at a very slow pace, will find themselves having to struggle against the twin threats of both poverty and oppression from their male counterparts.

2. In terms of Sections 5 and 6, traditional courts will have to power to deal with cases of a civil and criminal nature. There are however no checks and balances on the powers granted to traditional chiefs, nor can any separation of powers be seen. The Bill fosters power without accountability and directly defies the separation of powers explicit in the Constitution. Unilateral power is given to traditional chiefs who, in the execution of their duties, will act as legislators, administrators and judicial officers of customary law. This creates a potential for rural despots to reign supreme.
3. Section 9(3)(a) denies a party to the proceedings before a traditional court the right of legal representation. Lawyers are not allowed to participate in proceedings, even in respect of criminal cases, thereby infringing on a person's right to legal representation. It is the duty of a legal representative to ensure that his/her client is not prejudiced. Preventing a party the right to legal representation will deny many persons, particularly the uneducated, the marginalized and the indigent, the constitutional right to a fair trial.
4. An order of the traditional court is final (see Section 12) and the Bill makes no provision for an internal appeal system.
5. Although Section 18 makes provision for the recording of the nature of dispute or charge, a summary of the facts and the decision of the court, no provision is made for the keeping of mechanical record of the entire proceeding. This will make appeal and review proceedings before the magistrate's court difficult.

6. Section 19 provides for the transfer of cases from the traditional court to the magistrate's court or small claims court at the discretion of the presiding officer. The parties however do not have the right to choose to have their matters heard in a mainstream court, i.e. a magistrate's court, as there is no clause to opt out of this system. They are bound and have no option but to be regulated in terms of the proposed Act, as it will apply to all in the former homeland areas.
7. Sections 4(5) and 21(1)(b) deal with the training of traditional leaders. If the Bill is enacted, careful consideration should be given to the training model, as experience has shown that teaching by way of a manual, delivering a lecture and evaluation by way of question and answer is not always appropriate. Material should be created that, as far as possible, resembles real life situations.
8. The Bill seeks to dignify customary law and place it on a proper footing. However, in practice it has the effect of recreating aspects of the system of apartheid, as it uses the same approach as the Tribal Authorities legislation of the 1950's. It inadvertently leads to imposing apartheid boundaries on communities, yet again reversing the gains that have been made since 1994..

Although our legal system intends to go through the mediation route in settling disputes between parties, this cannot be done at the expense of women who are already suffering oppression from the same people who are to adjudicate over their matters.

People in rural areas always appreciate settling disputes without straining relations, but a different vehicle must be used to address this gap and not traditional courts presided over by traditional leaders.