

## **BACKGROUND INFORMATION ON THE TRADITIONAL COURTS BILL**

1. Following the lapsing of the Traditional Courts Bill, 2012 in the National Council of Provinces at the end of the fourth administration, and the concerns that were raised regarding this Bill, it is becoming increasingly urgent to promote legislation that will transform traditional courts, as they exist at present.
2. The need to promote the required legislation has been accepted by virtually all stakeholders in the discussions to date.
3. On 30 November and 3 December 2015, the Department held **consultative meetings** with representatives of the National House of Traditional Leaders and civil society, respectively. A National Dialogue, where all the stakeholders referred to above were present, was convened on 4 December 2015. The purpose of these meetings was to solicit views on the principles which have been identified for policy development and for the basis of draft legislation. The identified issues, in essence, are the concerns that were raised in respect of the Traditional Courts Bill as introduced in the National Assembly in 2008 and subsequently in the National Council of Provinces in 2012 (“the previous Bills”).
4. A Reference Group, established by the National Dialogue on the Bill in December 2015 and chaired by the Deputy Ministers of Justice and Constitutional Development and Traditional Affairs, met on numerous occasions during 2016. The Reference Group consisted of representatives of civil society, traditional leaders and Government. The mandate of this Reference Group was to discuss outstanding matters relating to the Bill, assist in the development of a Bill and to pave the way for the introduction of the Bill into Parliament.

### **Important aspects of the Bill include:**

#### **Participation by and representation of women and vulnerable groups**

5. The previous Bills were criticised severely for not having meaningful provisions on the participation of women in traditional courts. It was pointed out that in some traditional communities and traditional courts, women are barred from participating in the proceedings of traditional courts, either as litigants or as members of the court.
6. Specific provisions are required in the proposed legislation in terms of which women are unequivocally free to participate as members of the court and also as litigants, with no limitations whatsoever. Many participants in the discussions argued strongly that women should be able to represent themselves as litigants in the court, and not be required to be represented by a male relative. It was also argued that traditional courts must be convened in places that do not restrict access by women.
7. The Bill, dealing with the constitution of traditional courts, provides that traditional courts must be constituted of women and men, pursuant to the goal of promoting the right of equality as contemplated in section 9 of the Constitution. It requires these courts, in their deliberations, to “promote and protect the representation and participation of women, as parties and members

thereof”.

8. It also requires the Justice Minister to put measures in place in order to promote and protect the representation and participation of women and to report thereon to Parliament every year.
9. The Commission for Gender Equality must, in its report to Parliament each year, report on measures it has taken or put in place in order to achieve the promotion and protection of women as parties and members in traditional courts, in addition to making recommendations on legislative and other measures in this regard.
10. Traditional courts must, during their proceedings, ensure that the rights in the Bill of Rights are observed and respected, with particular reference to women who are to be “afforded full and equal participation in the proceedings as men are.”
11. The thrust of all these provisions is therefore to encourage and promote full equality, requiring measures to be put in place to achieve the set goals in this regard. The Bill also sets out some examples of conduct which is specifically prohibited because it infringes on the dignity, equality and freedom of vulnerable persons.

**The right to opt out the system of traditional justice:**

12. The previous Bills did not allow parties to **opt out** of the traditional justice system. The current view is that, because the traditional justice system is, and always has been, voluntary in nature, parties should have the right to opt out of and into the system and to focus on the accepted view that the traditional justice system is there to be used by any person who subscribes to the system and who wishes to use it, rather than approaching the other courts, a constitutional right which cannot be taken away from any person.
13. The agreed position, however, seems to be that a party should only be able to “opt out” of the system before the commencement of any proceedings in a traditional court and not during the proceedings. The Bill therefore provides that a traditional court may only hear and determine a dispute “if the party against whom the proceedings are instituted agrees freely and voluntarily to the resolution of the dispute by the court in question”.
14. Failure to heed a summons of a traditional must also be dealt with. The Bill provides for the scenario where a party who, after being summoned to appear in a traditional court, willfully fails to so appear, in clear contempt of the court. The clerk of the court must make a determination to this effect and then refer the matter to a justice of the peace.

**Sanctions and enforcement thereof:**

15. The sanctions proposed in the previous Bills elicited severe criticism. The outcomes of stakeholder engagement seem to suggest that, because the traditional justice system is essentially about promoting restorative justice and social cohesion, traditional courts should not have the power to impose retributive sanctions.
16. Concerns were also raised that the sanctions proposed in the previous Bill could give rise to

abuse, for instance the deprivation of customary law benefits and having to do community service for the benefit of traditional leaders.

17. In terms of the Bill an order may be expressed in monetary terms or otherwise, including livestock, for the payment of damages suffered, on condition that the order for damages may not exceed the value of the damage in question or the capped amount determined by the Minister by notice in the *Gazette* from time to time, whichever is the lesser.
18. Other orders include an order prohibiting the conduct complained of, an order that an unconditional apology be made and an order requiring a party to keep the peace. All the orders suggested in the Bill are of a restorative justice nature. The Bill permits an order of community service, on condition that it is not for the benefit of a traditional leader.

#### **Distinction between civil and criminal matters:**

19. While the previous Bills conferred both criminal and civil jurisdiction on traditional courts, cogent arguments have been made to the effect that customary law does not make a distinction between criminal and civil matters, and that there are no offences that are customary law specific.
20. Furthermore, strong objections were raised regarding the power of traditional courts to adjudicate in criminal matters, which would be in conflict with the Constitution because the Constitution, in section 179, provides for a single prosecuting authority “which has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings”.
21. The emerging view would seem to be that traditional courts should deal with certain minor disputes/infractions, whether they are civil or criminal in nature, without categorising them as such. Traditional courts would go about their responsibilities in such a manner as to achieve conciliation between the parties and should have the power to grant compensatory type awards as discussed below. Criminal convictions are not envisaged at all.
22. The Bill therefore refers simply to “dispute”, which is defined in clause 1 to mean “a dispute between parties of any nature, including a dispute arising out of customary law, which a traditional court is competent to deal with in terms of this Act”.

#### **Legal representation**

23. The previous Bills prohibited legal representation in traditional courts. Strong objections were raised against this prohibition, especially since those Bills conferred the power on traditional courts to deal with criminal matters and also because they did not allow parties to opt out of the traditional justice system.
24. Reflecting on the outcomes of the stakeholder engagement, the general view would seem to be that, because the traditional justice system is essentially consensual and voluntary in nature, legal representation is undesirable. The traditional justice system is geared towards achieving conciliation between the parties in a non-adversarial manner, unlike other courts.

25. It was argued therefore that there is no need for legal representation in these courts and that a party in a traditional court should be able to be represented by any person of his or her choice, including a family member, whether male or female, a friend or a councillor. The discussions pointed sharply to the fact these courts operate in a manner which is entirely different to that applicable in other courts and that the introduction of legal practitioners will take away the benefits of a speedy, cheap and accessible system.
26. There is general agreement that legal representation is not suited for the traditional justice system. The Bill therefore provides that no party to any proceedings before a court “may be represented by a legal practitioner acting in that capacity”.

**Boundaries/jurisdiction:**

27. Concerns were raised that the previous Bills entrenched the former “Bantustan” boundaries. The emerging view appears to be that traditional courts should not be confined to any specific boundaries and that a person may approach any such court to resolve his or her dispute. While the previous Bills made provision for areas of jurisdiction of traditional courts, the view is held that the Bill should avoid making reference to the concept of “jurisdiction”, as it is known for purposes of courts as contemplated in Chapter 8 of the Constitution. The Bill therefore avoids references to “jurisdiction”. A person may “institute proceedings in respect of a dispute in any traditional court”.

**Nature of traditional courts:**

28. Participants in the consultation process were unanimous in their view that traditional courts are “courts of law under customary law’ (subject to the Constitution), which distinguishes them from the courts contemplated in Chapter 8 of the Constitution. This particular aspect still remains a point in respect of which there are and will remain, differing views but which can be taken further during the Parliamentary debates.
29. The previous Bills conferred on traditional leaders the power to preside over traditional courts. The discussions in the Reference Group made it clear that these courts practise what is referred to as “participatory justice”, which does not accord with the notion of a traditional leader being in sole control of the court.
30. The Bill therefore no longer deals with the concept of “presiding officers” but does recognise that they are and must continue to be, convened either by a traditional leader or by a person designated by him or her in accordance with customary law and custom.

**Appeals:**

31. The previous Bills made provision for appeals from traditional courts to magistrates’ courts. Concerns were raised that the conventional courts and the traditional justice system have different value systems and that the concept of appeal is a misnomer in the traditional justice environment.

32. According to commentators, if a person is aggrieved by a decision of a traditional justice structure, he or she escalates the matter to the next level in the traditional justice system. Therefore, the notion of “appeal” as it is known in our courts of law, is not known in customary law.
33. In the recent stakeholder engagements with the Department, commentators clearly favoured an approach where this escalation of matters remains contained in the traditional justice system, and that the terminology used in the proposed legislation possibly be adapted to make it clear that what is meant in this regard, namely an escalation of a matter from one level to another in the traditional justice system without referring specifically to “appeals”.
34. A proposal was made that a person who is aggrieved by a decision of a traditional court could escalate the matter to a structure within the customary law environment, possibly to a structure constituted by the National or Provincial Houses of Traditional Leaders.
35. The Bill provides that an aggrieved party may, on grounds other than the grounds for procedural review, escalate his or her matter to a customary law institution or structure in accordance with customary law and custom. Appeals may, however, not be lodged on the grounds of procedural deficiencies. Procedural short-comings may only be dealt with by way of review, as discussed below.

#### **Administrative/logistical support for traditional courts:**

36. In its report, the South African Law Reform Commission (SALRC) on “Traditional Courts and the Judicial Functions of Traditional Leaders” recommended the establishment of an Office of Registrar of Traditional Courts. This proposal, while it has financial implications, is still relevant and seems to be supported by most participants in the discussions referred to above.
37. In order to curb further financial implications for the State, the Bill does not provide for the establishment of such an Office but rather proposes that the Minister must, after consultation with the Cabinet member responsible for traditional affairs, subject to the laws governing the public service, designate or appoint persons as Provincial Traditional Court Registrar in respect of each province. While this is a departure from the recommendations of the SALRC, it will ensure that provinces use existing capacity and keep State expenses as low as possible.

#### **Transfer of disputes:**

38. The Bill provides for the transfer of disputes from traditional courts to the magistrate’s court having jurisdiction and *vice versa*.

#### **Other features in the Bill:**

39. The Minister must, in consultation with the Minister of Traditional Affairs, compile a **code of conduct** for members of the traditional court. The code of conduct will be the prevailing standard of conduct for members of a traditional court to which such members must adhere. The code will be applicable to all persons who have a role in terms of customary law for the effective functioning of traditional courts, including persons who facilitate sessions of court on behalf of

traditional leaders, clerks of traditional courts and interpreters.

40. The Minister is required to make **regulations** in respect of certain matters. Regulations must, among others, be made regarding the training of traditional leaders and persons designated by traditional leaders to convene traditional courts and the involvement and training of paralegals and interns in the functioning of traditional courts.
41. An important aspect of the Bill is that it repeals all existing former homeland legislation regulating traditional courts and provides for a single statutory framework in this regard.

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