Law and Traditional Justice System in South Africa: A Hybrid of Historical and Constitutional Discourse

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Introduction

The institution of traditional leadership has played and still plays a critical role in the administration of justice. During the pre-colonial era, the institution of traditional leadership was a political, administrative and judicial centre of justice. It is for this reason that the primary objective of this article is to discuss a legal history of the traditional courts and the administration of justice in South Africa. This article contends that the respect and status accorded to traditional courts during the pre-colonial era were greatly eroded by colonial and apartheid regimes in South Africa.

The intention was to obliterate and deny traditional leaders their proper role of administration of justice within their communities. With the advent of the constitutional democracy in South Africa, the institution of traditional courts is required to redefine itself within the framework of a democratic dispensation. This article also demonstrates how the traditional courts should be transformed and aligned with the new constitutional imperatives. It is within this context that the new role of traditional courts is articulated to define their roles in a democratic South Africa.

Pre-Colonial Epoch

Origin and Nature of Traditional Courts

The most important institutions which were responsible for the administration of justice during the pre-colonial South Africa were traditional courts. According to Bekker, traditional courts in South Africa and the rest of Africa were basically traditional institutions.[i] It is of great importance to mention that pre-colonial traditional courts were deeply rooted and embedded in the inner system of indigenous (African) culture and customs of the traditional societies. In this regard, Ntloedibe stated that the powers, duties, actions and obligations of traditional leaders were tied into the inner chambers of custom and culture that became synonymous with the principle of *ubuntu/botho*.[ii]

At the centre of the whole concept of *ubuntu/botho* was the belief that no person was an island. The Tswana aphorism which captured this philosophy was that *motho ke motho ka batho ba bangwe*.[iii] The status of traditional courts in pre-colonial societies must be viewed in the light of the specific social organization of African societies.

The traditional courts were generally communal in character. It was within this framework that African law functioned. As Rakate correctly pointed out:[iv]

> Ideologically, indigenous African law is of the communal or socialist type, in contrast with the general law [Western law] which is more of an individualistic or capitalistic nature. The ethos or social imperative of the traditional African community is social solidarity. Likewise the principle of social solidarity forms the underlying principle of indigenous African law. The maintenance [of law and order] and restoration of social solidarity does in fact pervade the whole fabric of that law. The principle of social solidarity expresses itself in the form of kinship communalism.

Furthermore, it is critically important to emphasize that a Traditional Court did not have a specialized law where there was a sharp cleavage between law and what an ordinary person regarded as fair and just. In a Traditional Court, a person was tried by his village men and women and as a result there was no gap between him or her and the court. It was also difficult to draw a clear distinction between law, on the one hand, and public morality on the other. The traditional leader was the executive, legislature and judicial head of the traditional community.[v]

Traditional leaders served in these courts as supreme judges and acted with the advice of their Executive Council.[vi] Jobodwane pointed out that in traditional South African societies, the idea of separation of powers was an alien concept.

This means that the separation of the entire judiciary from the traditional executive and parliament[vii] was completely unknown to traditional leaders and their subjects.[viii]

It is important to note that lack of separation of powers did not mean that traditional leaders were not impartial because they were part of the executive arm of government. This was so because the judicial process was mainly aimed at mediation and reconciliation rather than categorically finding for or against a litigant. It must be emphasised that this procedure worked well in predominantly traditional societies with subsistence economies.

According to Bekker, as far as it could be ascertained, no serious irregularities or harmful practices have occurred in pre-colonial societies.[ix] It should be noted that Bekker did not suggest that Traditional Courts had no irregularities at all. What Bekker meant is that the irregularities which were there could not do a lot of harm to justice. Bekker further analysed this matter and stated that:[x]

> It is argued that at the level of traditional leaders, the judicial process administering largely simple customary law rules in simple disputes, a formal separation of powers between the executive and the judiciary is not crucial.

This kind of procedure outlined by Bekker was simple and flexible. Moreover those present in court saw themselves as part and parcel of the adjudication process. All men were sensible of the necessity of justice to maintain peace and order for the general maintenance of society. Justice emanated from law itself. Law was a powerful tool used to discipline, correct and shape human personality. Tradition, culture and custom were building units of individual character. The individual was but part of the entire group. Therefore, if an individual committed an offence the whole group was involved and every member was liable, not as an individual but as part of the group or clan that committed the wrong.[xi] Hartland established that pre-colonial societies were organised in clans and members of these clans regarded themselves as brothers and sisters.

Their duty to one another was of mutual trust, support and defence.[xii] It was under this traditional arrangement that, a traditional leader through his court played a conciliatory and mediatory role. The traditional leader was a unifying force of the traditional community.

He was the personification of unity and a mediator between his people. In addition, the traditional leader was assisted by his councillors and the elders of the community. Traditional councillors played an important judicial and political role in traditional life. Traditional leaders were expected to be impartial at all times. Such an action would be a serious violation of custom. Schapera correctly noted that:[xiii]

> The Chief himself was not above the law. Should he commit an offence against one of his subject, the victim can complain to the men at *kgotla* or to one of the Chief's near relatives, who will then report the matter to the
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> Chief. The latter is expected to make amends for the wrong he has done. Should he not do so, it is said that he may be tried before his own court, his senior paternal uncle acting as judge.

Court Proceedings and Evidence

Rules of Procedure

Van der Merwe noted that it was reasonable to assume as a matter of principle that the procedural systems of the traditional court structures were honest attempts to discover and protect the truth. The existence of different methods of discovering and protecting the truth can be explained in the light of history because the main principles of court procedure and evidence were not the products of scientific observation but rather embodied and represented a system of values shaped by the course of the political, sociological and cultural history of people.[xiv]

The courts of traditional leaders had jurisdiction over criminal and civil cases. As Holomisa stated, court proceedings were held openly both verbally and figuratively. Normally court proceedings were conducted under a tree or near a cattle kraal. The processes and procedures were all inclusive. All present in the court were given the opportunity to participate in both the examination and cross-examination of all the parties to a case. The proceedings were conducted informally and in a relaxed atmosphere.[xv]

The pre-colonial Traditional Courts operated on an inquisitorial and reconciliatory basis. The inquisitorial procedures were primarily aimed at effecting compromises and reconciliation. Hammond-Tooke succinctly stated that:[xvi]

> … Important here is the Lobedu custom of Lu Khumela [to beg pardon of one another] by which reconciliation is reached by an emissary who intervenes between two parties usually accompanied by the slaughtering of a goat [Nguni hlamba ritual]. This granting of pardon stops court procedures and … it is estimate[d] that about 80 percent of disputes are solved in this way without ever coming to court …

The inquisitorial procedure of African Traditional Court system played a much more active role during and sometimes even before the trial. The trial was not viewed as a contest between two opposing parties. The accused was examined because he or she was considered a valuable source of information. The accused was not only the object of enquiry but a full procedural subject.[xvii] It is in this context that the procedure of the Traditional Court was best described by Kriege as follows:[xviii]

> The bare legal principle is only one factor in the situation. More often than not it must give way to what is far more important than legal principle that is to the friendly re-adjustment of the disputing parties. The great aim is not to adjudicate upon conflicting rights according to strict law but to use the principles of justice wisely in order to effect reconciliation and to re-establish good relations. Legal procedure is thus not absolute, it was subservient to the human situation and man was not made for law but law was made for man. [Underlining Supplied]

According to Kriege, justice was always realised in a Traditional Court. Kriege is therefore correct to state that:[xix]

> If a reconciliation ensures, the court not only rejoices but watches from afar, vicariously participating in the return of the prodigal son, the wrongdoer with the beer brewed and brought to become reconciled with his father, the aggrieved party.

It was in this spirit of reconciliation that Traditional Courts and adjudicators perceived their role in the dispensation of justice. It is quite evident that African jurisprudence in pre-colonial societies was deeply rooted in the philosophy of collective responsibility.

Rules of Evidence

The bulk of evidence was obtained through witnesses who had knowledge of the relevant facts or circumstances. Such evidence was produced by way of oral statements. Truthfulness was guaranteed through the vehicle of cross-examination and not by taking of oath. Penetrating questions from the judge (traditional leader) and his councillors served to elicit a full and faithful account of all the relevant facts surrounding a case.[xx]

Rules about hearsay evidence were not strictly endorsed. However, Holomisa cautioned that the system should not be understood to mean that there was chaos and disorder in those courts. There was in fact decorum and high respect for authority of court and the traditional leader.[xxi] According to Van der Merwe, the Shona[xxii] justified the admission of hearsay[xxiii] on the basis of saying that:[xxiv]

> If one can get to the tendrils of the pumpkin plant, then one can sooner or later get to the pumpkin.

After evidence has been led and gathered from the witnesses and parties involved, a verdict was reached. This was done normally at the conclusion of all the deliberations. It was then that a traditional leader who acted as a presiding officer pronounced the judgement. Reasons for judgement were clearly articulated to the parties concerned. The traditional leader's decision was to be approved by his councillors.

According to Holomisa, the main objectives of the traditional administration of justice were centred around the following key principles, namely:[xxv]

- Rehabilitation of the offender;
- Compensation of the aggrieved party;
- Promotion of peace within the community; and
- Promotion of reconciliation and inquisitorial procedure.[xxvi]

Colonial Paradigms and Dimensional Changes

When the settlers from the outside (Europe) assumed political dominance over an indigenous population in South Africa, decisions had to be made in respect of the system of social control and the administration of justice.

The white settlement in South Africa triggered a considerable number of questions with regard to customary law and its institutions, especially the traditional authority courts structures.

This gamut of questions include *inter alia:* Was there to be a complete annihilation of the indigenous law? Was the indigenous system of governance and Traditional Courts to be supported or not? Was part of the indigenous system to be rejected or accepted?[xxvii] The aim of the white settlers was to disintegrate at least overtly African institutions and customs as much as possible. The standard procedure was to recognize traditional institutions except insofar as it ran counter to what the British considered general principles of right and wrong.

Bennett explained that when Britain occupied the Cape, black customary law was dismissed as barbarous and pre-legal custom.[xxviii] However, it should be borne in mind that the British government retained Roman Dutch law as the law of the Colony of the Cape of Good Hope to the exclusion of African customary law and its institutions. The British non-recognition policy of African customary law impacted negatively on the institution of traditional leadership at the Cape Colony.

During the early years of British occupation, the British settlers undermined the political authorities of the Khoisan in the western Cape and the Xhosa in the eastern Cape.[xxix]The advent of colonialism completely changed the traditional system of administration of justice. As stated above, during the pre-colonial era, each colony had its own court structure. The British policy differed from one province to another. For example, the British in Cape Colony did not recognize customary law as a system of law, let alone Traditional Courts.

The traditional leaders were replaced by white Magistrates. These Magistrates were not permitted to apply customary law.

In other words, a non-recognition policy was applied. The British government claimed that the reason for non-recognition policy was part of the government to civilize the black population. However, it was evident that the policy was part of a government programme to undermine indigenous political and judicial authority. Therefore it is important to emphasize that the early British administration in the Cape was resolutely opposed to recognising customary law.

In the territory of Transkei which was annexed in 1984 appeals of civil matters between blacks were heard in the Native Territories Appeal Court and later to the Cape Supreme Court.[xxx] The white Magistrates enjoyed appellate jurisdiction to hear appeals in civil disputes between blacks in the Transkei. In Transvaal traditional leaders, Sub-Native Commissioners and the full Native Commissioners for blacks were appointed by the colonial government to adjudicate all civil matters between backs in so far as it did not conflict with the principles of natural justice.

Natal was the first colony in South Africa to recognise and enforce customary law. As a result, the Traditional Courts were also accorded the recognition they deserve accordingly. The traditional leaders were permitted to apply and enforce customary law in their courts. The reason for that compromise was that the colonial government was of the view that it would be in a good stead to control the large number of displaced persons through the institution of traditional leaders.

The policy of indirect rule was recommended to provide a situation regarding displaced black persons in Natal. Therefore, blacks in the colony of Natal were placed under traditional authorities.[xxxi] Furthermore, in Natal legislation was promulgated to provide *inter alia* that Traditional Courts, Magistrates Courts and a Special Court called the Black High Court enjoyed jurisdiction to adjudicate matters in which parties were blacks.

In 1895 the Natal Black High Court was abolished and replaced by the Supreme Court. In 1898, a new Natal Black High Court was re-instituted to hear civil matters between blacks. These courts had the power to hear civil matters between the blacks provided that the decisions of the court were not inconsistent to the principles of natural justice or equality.[xxxii]

In Transvaal a policy similar to that of Natal was adopted. The State President was made the Paramount Chief of the black people in Transvaal.[xxxiii] A Court of Appeal under the helmet of the Superintendent of Natives was established and dealt with all the appeals from the decisions of both the Traditional Courts and Commissioner' Courts. Therefore it is significant to note that under these political circumstances, the same policy was applied in the Orange Free State.

Law and Politics of the Union Government

Synopsis of the Black Administration Act 38 Of 1927

In 1910 the Union of South Africa was formed when the previously independent provinces of Natal, Orange Free State, Cape Province and Transvaal were amalgamated.[xxxiv] The principal concern of the union government was to impose uniformity. The individual history and the special circumstances of each of the provinces had produced curiously diverse court structures and degrees of recognition of customary law.[xxxv] The desire for uniformity was coupled with the need to promote tribalism and traditional authority. The union government believed that the return of traditional institutions could deflect the challenge posed by a growing urbanized African proleterate.[xxxvi]

According to Olivier, the Black Administration Act[xxxvii] was enacted to establish a national system to provide for among many other things, the recognition and application of customary law and the creation of a separate court structure.[xxxviii]

The Black Administration Act empowered the State President to appoint a traditional leader[xxxix] while section 2 (8) enables the Minister to appoint an acting traditional leader, headman and acting headman.[xl] The Traditional Courts were retained under the 1927 dispensation. It was explained by Bennett that:[xli]

> Although in many respects the Chiefs' Courts function imperfectly, their retention is widely supported both by blacks and by experts in black customary law. These courts represent at once an indigenous cultural institution and an important instrument of reconciliation. For these reasons a rural black will often prefer to have his case heard by the Chief's Court.

The Bold and Ugly Face of the Black Administration Act

It is significant to mention that the application of the Black Administration Act throughout South Africa did a mortal blow to the entire institution of traditional leadership. This piece of legislation undermined and interfered with the traditional authorities and Traditional Courts. Hence, Baletseng and Van der Walt remarked:[xlii]

> During its application the 1927 Act changed the institution of traditional authorities [traditional courts] to a point where the institution had become the symbolic institution amongst the indigenous communities. It has eroded the institution to an extent that today there is a reigning confusion as to what the traditional authorities [traditional courts] are.
>
> If one looks at the provision of the Act, one is left with no option but to question the authenticity of the institution. Only in a few settlements does one get a feeling of what is happening but in most villages and settlements there is a lot of uncertainty.

The Black Administration Act[xliii] had generally reduced Traditional Courts to a very different institution. There is no shred of doubt that the Black Administration Act had a profound negative effect on the judicial authority and functions of traditional leaders. For example, the Act recognized the judicial authority of traditional leaders subject to the authority of the Minister acting on behalf of the Governor-General (later the State President). What transpired was that most of the customary functions of the traditional leaders were vested in the office of the Governor-General.

The traditional leaders were authorized to hear civil disputes arising out of the black laws and customs between black residents within their jurisdiction.[xliv] It was unheard of a situation where a white person was tried by a Traditional Court in South Africa. Where a case involved black and white parties even in the area of a traditional leader such a matter had to be referred to a Magistrate. In addition, the traditional leaders were not allowed to settle disputes pertaining to nullity of divorce or separation in respect of customary marriage.

This is an example of how the government undermined the expertise of traditional leaders regarding matters of the dissolution of marriage. This legislative arrangement undermined the indigenous legal acumen and knowledge of the traditional leaders and placed them on the periphery of judicial adjudication. The Act simply implied that traditional leaders were not capable of settling divorce matters. This statute drastically and dramatically altered the original meaning of the institution of traditional leaders and caused it to evolve in a manner that did not remain faithful to its indigenous concept and communities.[xlv] The Act was an attempt by the union government to create tribes and traditional authorities as if they were new institutions and failed to build on what was already in existence.

General Effects of Colonialism and Repugnancy Clause

The first problem the European colonial powers had was to deal with the physical control of the territories of the traditional authorities' areas. This had to be won at the expense of the traditional leaders. According to Ndima, at the time of colonization the pre-colonial people of South Africa lived in an order regulated by customary law subject to the repugnancy *proviso*.[xlvi]

The colonial government adopted the pre-colonial Traditional Courts and used traditional leaders not only to administer justice, but also for local administration. The Traditional Courts were of course, recognized in order to administer justice according to African customary law. These courts co-existed with colonial-type courts, which administered common law and were given limited jurisdiction to apply African customary law usually on condition that such law was not repugnant to the principles of public justice or natural justice. The recognition policy pertaining to the traditional courts was among other things based on the presumption that since blacks knew African law better than the Europeans (white Magistrates), the settlements of disputes was left to the Traditional Courts.[xlvii]

As a consequence, jurisdiction was only confined to disputes between blacks only and effect could be given African customary law in so far as it was not repugnant to public or natural justice. The English type Courts continued to have concurrent jurisdiction with the indigenous courts. In addition as Bekker once again noted, traditional authorities and traditional leaders continued to be used not only for the administration of justice but also as agencies for local government.[xlviii] However, as Dlamini noted the Traditional Courts existed in the pre-colonial South Africa, although after the advent of colonialism, they ceased to be indigenously developed.

They no longer developed in response to the African needs but to those of the new political overlords. The process of de-culturization that ensued resulted in those in contact with the colonial administration being dissatisfied with their own traditional system and the values of African justice. This paved the way for the imposition of Western notion of justice and values.[xlix] Generally, colonial rule was authoritarian to the core. There were no representative institutions. The administration not only implemented policy: they made it as well. Even the policy of "indirect rule" which emphasised the powers and use of traditional leaders and the creation of special "native" (black) courts to administer unwritten customary law was conceived for the benefit of the white administrators and not necessarily for the benefit of the traditional communities.

Colonialism founded as it was on racism and naked exploitation not only denied and inhibited fundamental rights of the African people but it was essentially against the promotion of African law and development of Traditional Courts.[l] In the terrain of law, the repugnancy *proviso* was a hallmark of colonial rule in South Africa. This provision was the main limitation on recognition of customary law. Although the repugnancy provision was phrased differently in various colonies of South Africa, the repugnancy clause was everywhere intended to serve the same function namely, to prevent enforcement of customary laws or practices if they offended the western moral standards.

The repugnancy clause affected the manner in which the traditional leaders applied and enforced customary law in their courts.[li] The colonial Traditional Courts of South Africa were the beacons of colonial government. As Bennett correctly pointed out that they were intended not only to settle disputes but also to proclaim the reach of government and the values of western civilisation.

The colonial government claimed that by recognising the Traditional Courts, they had paid due regard to indigenous culture.[lii] As a consequence, the early period of colonisation was characterised by the restriction of traditional rule, which meant among many other things depriving traditional leaders of their judicial powers. But once the colonies had been subdued, the advantages of retaining and utilising traditional leaders became evident. Traditional leaders were made the agents of the Colonial State (Principal). As the agents of the colonial government, they were obliged to carry out colonial policy including the policies which impacted negatively on the running of Traditional Courts systems.[liii]

One of the axioms of structural-functionalism was that traditional institutions (court structures) functioned to sustain social harmony. In consequences traditional leaders were assumed to be entirely beneficial adjuncts to colonial rule. Immediate control of the traditional leaders was vested in the Native Affairs Department of the colonial administration. Parallel to the Traditional Courts, the Department of Native Affairs ran its own Commissioners' Courts.

These courts were mainly staffed by white officials who performed both judicial and administrative functions. The Commissioners' courts were forum(s) that bridged the Traditional Leaders' Courts and the Western-styled Magistrates' Courts. As a consequence, the Commissioners' Courts catered for the litigants who were caught up in what Bennett called cultural transition.[liv] Both the Magistrates' Courts and the Supreme Courts constituted a third level of the judicial system of the colonial administration. These courts administered justice for the entire colonial population. They were staffed by the professional lawyers who possessed erudition of law.

The high fees of these courts precluded African civil litigation and there was no attempt whatsoever to adjust procedures to cater for African requirements. Consequently, all civil cases as well as many petty criminal ones were confined to the Traditional Leaders' Courts and Commissioners' Courts.[lv]The main problem which was implicit in the judicial role of traditional leaders became apparent when the locals lost confidence in them. The reason being, the traditional leaders often acted as the agents of more or less unpopular government policies. This obviously meant that the courts they ran stood every chance of being tainted by the dislike felt for the policy.

Orthodox of the Apartheid Regime

Bureaucracy and Policing Agents

In 1948, the National Party (NP) won the elections and ascended to political power. The party's victory was marked by the formal introduction of *apartheid*.[lvi] The main goal of NP was racial, cultural and political purity. One of the first tasks of the NP government when it took over was to interfere with traditional government. The government first achieved its objective of tribal divisions through the promulgation of the Bantu Authorities Act.[lvii]

The Bantu Authorities Act was supposed to modify and give the definition to traditional authorities and traditional governance. The Act established three tiers of administrative hierarchies in rural black South Africa. According to TARG Report, traditional leaders were *ex-officio* members of these three tiers of tribal authorities. This arrangement brought traditional leaders into the centre of apartheid government system. As a result of their direct involvement and participation in the governance activities of apartheid government, their legitimacy was greatly eroded.[lviii] The apartheid government used traditional leaders through these authorities to exercise administrative and judicial control over the people in the rural areas.

The Act granted traditional authorities greater judicial authority with regard to the general administration of the affairs of their traditional communities.

The decisions or judgments of the Traditional Courts regarding the exercise of their powers in the tribal authorities were always deemed valid irrespective of the irregularities which might occur. According to Letsoalo, that is why the term "Chief" becomes a synonym for puppet. Traditional leaders were responsible to the *apartheid* government and no longer accountable to their subjects.[lix]The traditional leaders were placed at the centre of bureaucratic system through the creation of traditional authorities at all levels. They were vested with the administrative, developmental, judicial and legislative powers. In fact they became the public servants of the government while at the same time they were expected to dispense justice or administer justice in their areas of jurisdiction.

Those who were against the apartheid government directives were simply removed from the office and replaced with those who were willing to adhere to the new institutions.[lx]The traditional leaders' responsibility for the administration of justice encouraged new trends of policing tough measures for the maintenance of law and order. Lodge noted that traditional leaders were incited:[lxi]

> Be your own policy in your own interest, find out those men who respect authority and tribal institutions (courts) and band them together as the Chief's and headmen's *impis* which will turn out when called to help keep your tribes and locations clean and well behaved. Use moderate violence…just like a good Chief could do.

The Black Authorities Act made traditional leaders both police officers and agents of the government. This arrangement fragmented the legitimacy of traditional leaders who were supposed to administer justice. Hence, most rural people viewed the institution of traditional leadership and their court systems with suspicion. Members of the traditional communities lost trust and confidence in the institutions of traditional authorities including their courts.

Another Repugnancy Clause: Better or Bad?

As already highlighted above, regarding the recognition and application of customary law, a provision was made by the Black Administration Act for the limited recognition of customary law by a court structure especially established for dealing with disputes between blacks. In 1988, the parliament of South Africa enacted the Law of Evidence Amendment Act[lxii] which also gave impetus to the recognition and application of customary law.

This Act empowered all the courts to apply customary law subject to the repugnancy provision. Section 1 (1) of the Law of Evidence Amendment Act was identical to section 11 (1) of the Black Administration Act[lxiii] with the important extension that all South African Courts were since 1988 empowered to apply customary irrespective of whether one or both parties were black. The above section provides inter alia as follows:

> … Any court may take judicial notice of the law of foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: provided that indigenous law shall not be opposed to the principles of public policy or natural justice: provided further that it shall not be lawful for any court to declare that custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles.

The above section further "rubberstamped" (agreed to) the judicial powers of the traditional leaders to apply customary law. However, Traditional Courts were not given a *carte blanche* power to apply customary law. These courts were permitted to apply customary law subject to certain conditions, namely: provided that customary law was not repugnant to the principle of public policy or natural justice. Still the Act did not improve the judicial status of the Traditional Courts in respect of the application of customary law. The repugnancy clause contained in section 1 (1) of the Law of Evidence Amendment Act still limited the application of customary law and allowed its application provided such customary law was consistent with the principles of public policy and natural justice.

It suffices to mention that both the Black Administration Act and section 1 (1) of the Law of Evidence Amendment Act limited the judicial powers of the Traditional leaders' Courts. Furthermore, since Traditional Courts fell within the ambit of "any courts" it means that the said section conferred them with discretion to take judicial notice of law of foreign state. This statutory dimension introduced a foreign mode of adjudication in the judicial regime of traditional customary. However, it was not clear at the time of research that Traditional Courts had ever taken judicial notice of law of foreign state.

Be that as it may, it is important to note that the 1988 legislative dispensation did not strengthen the judicial powers of the traditional leaders save to say that it empowered the traditional courts and other courts in South Africa to apply customary law.

New Constitutional Dispensation

Current Debate and Politics

The legitimacy of the traditional leaders in general and Traditional Courts in particular is currently under the spotlight in South Africa.

Since the dawn of democracy, a debate around the legitimate status of traditional leaders and their role within the framework of constitutional democracy gained momentum. The legitimacy, efficiency and honesty of these leaders and their courts obviously differed from individual to individual and from era to era. Many traditional leaders have a reputation of being stooges of the apartheid regime and many are said to be inefficient and corrupt.

As Bennett noted, even the better traditional leaders are considered politically conservative and lacking in the financial and management skills essential for administering their domains.[lxiv]These views and assertions are not unique to the new South Africa, they are widespread in Africa. As a result, after independence many African countries attempted to sideline traditional authorities and the traditional leaders' courts but these institutions continued to thrive. Although this has never been the case in South Africa, it is beyond doubt that the critics of traditional systems continue to question the relevance and constitutional nature of traditional leadership and court system.

However, the institution still enjoys considerable public support. There is no doubt about it. Thus the role of traditional leaders in the administration of justice is more in touch with community sentiment than the ordinary courts. According to Bennett, for ordinary people in the rural areas traditional leaders are a "legal and constitutional horizon" a personification of the moral and political order, protection against injustice, unseemly behavior, evil and calamity.[lxv] Currently the traditional leaders are expected to perform judicial functions in their communities and often quite contradictory roles of state bureaucrats. As a result, there are serious discrepancies between the demands of government, what traditional leaders "indigenously" do and the attitudes of local communities.

As far as contemporary practice has deviated from traditional norms, one might expect an adjustment in traditional courts to reflect the change. It is consistently argued that some traditional leaders spoke fondly of a time in the past when a criminal would not be treated with kid gloves. This perception, disturbingly, is quite pervasive among traditional leaders and members of the traditional communities. This perception obviously stands in stark contrast to the ethos of the Constitution[lxvi] and Bill of Rights[lxvii] and particularly the presumption of innocence until proven guilty.[lxviii]In exploring some of these debatable issues and in particular the role of traditional leaders in the administration of justice and crime prevention, it is submitted that the Traditional Courts should be repositioned squarely within the framework of the constitutional democracy.

The key question should not be whether traditional leaders should perform such functions, but how they can participate in the delivery of local justice. Whatever the reasons, it is common knowledge that traditional leadership has remained at the periphery of transformation in South Africa. This applies equally to their Traditional Courts. Even the South African Constitution fails to sufficiently outline the leader's constitutional status, powers and duties. As a consequence of this constitutional arrangement, many traditional leaders have a feeling of impotence and marginalization in the current democratic government. The general view among them is that their role and powers are being reduced in many respects including the administration of justice.

Constitutional Challenges

Corporal Punishment in Traditional Courts

As stated earlier that, under the Black Administration Act traditional leaders are not permitted to impose any of the following punishments: death, mutilation, grievous bodily harm and imprisonment.

However, the Black Administration Act allowed the Traditional Courts to apply corporal punishment to unmarried males below the age of 30 years,. With one exception these statutory limitations are in line with section 12(1) of the Constitution. This section provides *inter alia* that everyone has the right to freedom and security of the person, which includes the right not to be tortured in any way and not to be treated or punished in a cruel, inhumane or degrading way.

This exception relates to the whippings that may be inflicted on juniors. This form of punishment (corporal punishment) has already been considered by the constitutional court to be contrary to human rights norms in the case of S v Williams.[lxix] Therefore, it is argued that the traditional system of adjudication in respect of corporal punishment falls short of new standards set by the Constitution.

Legal Representation

The principle of legal representation cut across the customary notion of due process, which had no institution of professional representation. All adult males were expected to know the law and the judicial procedures of court. As Bennett noted, only women needed assistance to present their case. However, this customary requirement cannot pass the "gender test" of the Constitution.[lxx] Under the new constitutional dispensation women can no longer be regarded as minors or perennial children. Therefore, they should be allowed to represent themselves in the Traditional Courts.

Be that as it may, the rules regulating procedure in Traditional Courts bar the presence of advocates or attorneys. There are two reasons for this procedure: to preserve an atmosphere of informality and to ensure that wealthy litigants do not gain an undue advantage.[lxxi] The policy of excluding lawyers from the Traditional Courts appears understandable and reasonable where civil claims and minor criminal offences are concerned.

The reason being, it can be assumed that Africans are familiar with their own informal system of court. However, it is submitted that in serious criminal matters involving drastic penalties where an accused person may face sanctions as extreme as banishment, loss of land rights or whipping, the exclusion of professional representation can not be defended.

The total ban on legal representation may have to be modified and adjusted to take account of these cases and more importantly to be compatible with the standards of the Constitution.

Traditional Justice and Race

Race is critical to establishing jurisdiction because in terms of the Black Administration Act only blacks have access to Traditional Courts.[lxxii] Restricting the use of institutions peculiar to a culture to members of that cultural group is common. But in the context of the overall ethos and values of the *Constitution* it does involve discrimination. Bennett argues that the main purpose for allowing only Africans to litigate in Traditional Courts is to provide them with a forum in keeping with their cultural expectations.

If this is the case, an African may argue that if he or she was forced to submit to the jurisdiction of a Traditional Court, this would entail being subjected to a lower standard of justice and would therefore be unfair discrimination on the ground of culture or ethnic origin. Different arguments would not be helpful under the current constitutional circumstances. All what is needed is the type of arrangement that would serve all South Africans irrespective of race or colour. It is imperative to modify the Traditional Courts in such a way that they can be proudly referred to as the "South African Courts" for the people of South Africa.

Transformative Approach: Is it a Must?

The re-orientation of Traditional Courts is crucial in advancing the transformation of Traditional Courts. From the above discussion, it is quite clear that the Constitution is a transformative document protecting the society. In order to understand the transformative nature of the Constitution in the context of Traditional Leaders' Courts, it is important to embrace its values and standards. These constitutional values serve as the foundation on which its transformative character is built.[lxxiii] On the 08 May 1996, the people of South Africa through their freely elected representatives adopted the 1996 *Constitution* with a pledge that:[lxxiv]

> We the people, of South Africa, recognize the injustice of our past; … We therefore, through our freely elected representatives adopt this Constitution as the Supreme Law of the Republic so as to - heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. Lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law …

The transformation process of the Traditional Courts and the continuing efforts to ensure access for all to justice are intended to fill this undertaking. This commitment should afford the ever-expanding rural masses of the people greater access to justice.[lxxv] The Constitution further enjoins the courts to apply the law impartially and without fear, favour or prejudice.[lxxvi] These important beacons have chartered the way forward for the Traditional Courts. It is for this reason among many others that Traditional Courts should be adjusted and transmogrified to be compatible with the constitutional imperatives.

Therefore, the government and the people of South Africa are emboldened to proceed confidently with the efforts to transform the traditional justice system. This will place it in a position to meet the needs of all the people of South Africa.[lxxvii] One of the efforts of the democratic government is premised on ensuring complete access of justice for all, especially the women, the elderly and the rural people in general.

However it is quite disheartening to find that the founding pledge of a society based on democratic values, social justice and fundamental rights and notions of access to justice seem to be under siege.This is one of the developments which challenge and pursue a call for the transformation of Traditional Courts so that they can assert procurement of justice in traditional communities. The reason for the existing position of the lack of justice and ineffective administration of justice in the traditional leaders authority area is a consequence of several factors.

These factors included *inter alia* historical legacy of colonialism and *apartheid* which literally disempowered and "annihilated" the general expertise of traditional leaders as dispensers of justice; the general assumption that the institution of Traditional Courts is intrinsically regressive and lack of Traditional Courts' infrastructure such as chairs, tables, computers and other equipments which are necessary support mechanisms in the processes relating to administration of justice.[lxxviii]

Conclusion

It is evident from the preceding discussion that the successive governments of both the colonial and apartheid regimes disintegrated the essence of the African traditional justice system through the statutory mechanisms and control of the Traditional Courts.

With a long and well documented history of distortions of African traditional justice system and the disintegration of the institution of the traditional leadership and Traditional Court systems, there is no doubt that a new dynamic culture informed by the pre-colonial systems and the Constitution should be resuscitated to facilitate social justice in rural areas.

The process of transformation of Traditional Courts should be informed by the need to create an open, transparent and accountable Traditional Court system.[lxxix]

It seems the Traditional Courts Bill[lxxx] will not pass the constitutional muster more especially its provisions which deny women active participation in the Traditional Courts. The parliament should therefore re-adjust the Traditional Courts Bill to promote gender equality and allow legal representation in the Traditional Courts. However, it is hoped that the Traditional Courts will be transformed in such a way that it reflects some of its essential values of its pre-colonial era which promotes reconciliation amongst the litigants.

Notes

[i]Bekker JC "The Future of Indigenous Courts of Southern Africa" in Sanders (ed) AJGM Southern Africa in Need of Law Reform (South Africa 1981) 185.

[ii]Ntloedibe EL "The Role of Traditional Leaders as the Custodians of Culture, Tradition and Land" Unpublished Paper presented at a workshop on the "Culture, Religion and Fundamental Rights" 26-27 November 1998. And see also S v Makwenyane and Another 1995 (3) SA 391 (CC), where the constitutional court described *ubuntu*/*botho* as the source of communal tradition. The court also considered it important to recognize African values. One such value was the value of *ubuntu*.

According to Mokgoro J, *ubuntu* translates into humanness, personhood and morality and envelopes the key values of group solidarity, compassion respect, human dignity, reconciliation and collective unity. The court further stated that the need for *ubuntu* expresses the ethos of an instinctive capacity for and enjoyment of love towards fellow men and women, the joy of and the fulfillment involved in recognizing their innate humanity, the reciprocity this generates in interaction within the collective community the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve.

[iii]This Tswana adage means that a person is a person because of other persons and how he relates to them. People in traditional communities related to each other in many ways. That is why people were unlikely to act arbitrary against one another. Being a person in pre-colonial societies was not a matter of possessing a body and being able to walk and talk. But it was all about the good qualities that made up an ideal person. The whole idea of treating each other with respect instilled a sense of justice in the people. Hence, Jobodwane argued that it was beyond a point of dispute that one of the most outstanding characteristics common to all traditional systems of pre-colonial South African societies was the doctrine of *ubuntu*. Jobodwane cited Kamenka eliciting the similarities between the African culture and early Greek and Chinese cultures when he stated that men in pre-modern societies saw man as part of social organism, a structure of community based on common religious traditions, a hierarchy of power and network of mutual obligation that made and shaped man rather than served him. Jobodwane further commented that the same observation is similarly made with reference to African societies: that the individual was not autonomous or possessed of rights above and prior society. The individual's place in African society was fixed by a defined role or status in a greater whole, be it family, clan or traditional community. See in this regard Jobodwane ZM "Customary Courts and Human Rights: Comparative African Perspectives" 2000 SAPR/PL 26-27.

[iv]Rakate PK "The Status of Traditional Courts Under the Final Constitution" Unpublished Paper written for the Constitutional Court of South Africa, Johannesburg 1996.

[v]Dlamini CRM "The Clash between Customary Law and Universal Human Rights" 2002 Speculum Juris 45.

[vi]It is significant to note that the words "Executive Council" is used in this context to denote a tribal council of a traditional community.

[vii]The word "parliament" is used in this context to refer to a traditional community assembly. It may also be used to refer to a *Pitso* or *Imbizo* depending on the language spoken by a particular group.

[viii]Jobodwane ZM "Customary Courts and Human Rights: Comparative African Perspectives" 2000 SAPR/PL 26-27.

[ix]Bekker JC "Administration of Justice by Traditional Leaders in Post-Apartheid South Africa" 2002 Speculum Juris 245.
[x]Bekker JC "Administration of Justice by Traditional Leaders in Post-Apartheid South Africa" 2002 Speculum Juris 245.
[xi]This African belief or approach is captured by the Tswana adage that says: "I am because we are" which literally means that a person is a person because of other persons.
[xii]Hartland SE Primitive Law (London 1924) 111.
[xiii]Schapera I A Handbook of Tswana Law and Custom (Frank Cass 1938) 84.
[xiv]Van der Merwe SE "Accusatorial and Inquisitorial Procedures and Restricted and Free Systems of Evidence" in Sanders AJGM (ed) Southern Africa in Need of Law Reform (South Africa 1981) 141.
[xv]Holomisa SP "Administration of Justice under Traditional Leadership" Unpublished Paper Delivered at the Conference on Traditional Leadership and Local Government 6-7 October 2007 Durban 2.
[xvi]Hammond-Tooke "World View I: A System of Beliefs" in Hammond-Tooke (ed) The Bantu Speaking People of Southern Africa (1974) 318 and 362.
[xvii]Van der Merwe SE "Accusatorial and Inquisitorial Procedures and Restricted and Free Systems of Evidence" in Sanders AJGM (ed) Southern Africa in Need of Law Reform (South Africa 1981) 142-143.
[xviii]Kriege "Some Aspects of the Lovhedu Judicial Arrangements" Journal of Bantu Studies 1939 199.
[xix]Kriege "Some Aspects of the Lovhedu Judicial Arrangements" Journal of Bantu Studies 1939 144.
[xx]Van Niekerk BJ "Principles of the Indigenous Law of Procedure and Evidence as Exhibited in Tswana Law" in Sanders AJGM (ed) Southern Africa in Need of Law Reform (South Africa 1981) 136.
[xxi]Holomisa SP "Administration of Justice under Traditional Leadership" Unpublished Paper Delivered at the Conference on Traditional Leadership and Local Government 6-7 October 2007 Durban 2.
[xxii]The word "Shona" refers to the African people or ethnic group which is found mainly in Zimbabwe. In Zimbabwe there are two main ethnic groups namely, the Shona and the Ndebele. It is said that the present President of Zimbabwe Robert Mugabe is a Moshona which means a member of the Shona group.
[xxiii]In terms of the South African Law of Evidence which is deeply rooted in English Common Law, generally hearsay evidence is inadmissible. However, there are notable exceptions in which hearsay evidence may be admissible. These exceptions include *inter alia* a situation whereby the disputants consent to the use of hearsay evidence and where one of the parties to the dispute is dead and cannot adduce evidence.
[xxiv]Van der Merwe SE "Accusatorial and Inquisitorial Procedures and Restricted and Free Systems of Evidence" in Sanders AJGM (ed) Southern Africa in Need of Law Reform (South Africa 1981) 147.
[xxv]Holomisa SP "Administration of Justice under Traditional Leadership" Unpublished Paper Delivered at the Conference on Traditional Leadership and Local Government 6-7 October 2007 Durban 3.
[xxvi]The procedure and elicitation of evidence were designed specifically to effect compromise and reconciliation. It was in the spirit of reconciliation that the wheel of justice revolved.
[xxvii]Mittlebeeler EL African Custom and Western Law: The Development of the Rhodesian Criminal law for Africans (London 1976) 9-10.
[xxviii] Bennett TW "The Equality Clause and Customary Law" 1994 SAJHR 122.
[xxix]Bennett TW "The Equality Clause and Customary Law" 1994 SAJHR 122.
[xxx]Rakate PK "The Status of Traditional courts Under the Final Constitution "Paper prepared and written for the constitutional Court of South Africa, Johannesburg 11.
[xxxi]It should be borne in mind that the British authorities put traditional leaders in charge of their tribal administration not because they fully had confidence in their traditional authorities but as a stopgap measure. See in this regard Marè and Hamilton G An Appetite for Power: Buthelezi's Inkatha and South Africa (Johannesburg 1987) 18.
[xxxii]Rakate PK "The Status of Traditional Courts under the Final Constitution"Paper prepared and written for the Constitutional Court of South Africa, Johannesburg 11-12.
[xxxiii]General Report of the South African Law Reform Commission Project 25: "The Repeal of the Black Administration Act 38 of 1927 (March 2004) 12.
[xxxiv]An agreement or contract was written into the so-called South African Act of Edward Vll C 9 of 1909. This agreement marked and endorsed the continuation of the methods and practices of exploitation of black people by whites in the former Boer republics and revealed the white's intention to bar black representation in parliament permanently and to retain the existing system of discrimination. Black leadership responded by sending a multicultural delegation to London to protest against this agreement but they were unsuccessful. In March 1909 traditional leaders and black elites convened a South African Native Convention (SANC) in Bloemfontein to oppose the Draft Act of the Union as proposed by whites in their own Convention. Still, their efforts to oppose the Draft Act became a fruitless exercise.
[xxxv]Bennett TW "The Equality Clause and Customary Law" 1994 SAJHR 62.

[xxxvi]Bennett TW A Source Book of African Customary Law for Southern Africa (Cape Town 1991) 62.
[xxxvii]Act 38 of 1927.
[xxxviii]Olivier NJJ *et al* "Traditional Leadership and Institutions" in Joubert WA (ed) The Law of South Africa: Indigenous law (Durban 2004) 190.
[xxxix]See section 2 of Act 38 of 1927.
[xl]Act 38 of 1927.
[xli]Bennett TW A Source Book of African Customary Law for Southern Africa (Cape Town 1991) 63.
[xlii]Baletseng D and Van der Walt A "The History of Traditional Authorities in North-West" Unpublished Paper Delivered at a Workshop on Culture, Religion and Fundamental Rights 26-27 November 1998.
[xliii]Act 38 of 1927. This Act was repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005. The Act provides inter alia for the repeal of the provisions of the Black Administration Act 38 of 1927 incrementally. The Preamble of the Act states inter alia that since the Constitution of the Republic of South Africa as the supreme law of the Republic is to establish a society based on democratic values, social and economic justice, equality and fundamental rights and to improve the quality of life of all citizens and free the potential of all persons by every means possible, the Black Administration Act is regarded as a law that is repugnant to the values set out in the Constitution particularly section 1 and the Bill of Rights in Chapter 2 thereof, is reminiscent of past divisions and discrimination and ought to be repealed as a matter of the utmost urgency.
[xliv]See generally sections 12 and 20 of the Black Administration Act regarding the civil and criminal jurisdiction of the Traditional Courts.
[xlv]Zibi M "Reforming the Role of Traditional Leadership" Unpublished Paper Presented at a Conference on Traditional Leadership and Local Government 6-7 October 2004 Durban 12.
[xlvi]Ndima DD "The Role of Customary Law in the General Law of South Africa" 2002 Speculum Juris 234.
[xlvii]It is important to note that the traditional leaders had a better know how of customary law than the white Magistrates. Therefore the Traditional leaders were in a better position to administer the African traditional justice system than the white Magistrates.
[xlviii]Bekker CJ "The Future of Indigenous Courts in Southern Africa" in Sanders AJCM (ed) Southern African in Need of Law Reform(South Africa 1981) 186.
[xlix]Dlamini CRM "The Clash between Customary Law and Universal Human Rights" 2002 Speculum Juris 32.
[l]Dlamini CRM "The Clash between Customary Law and Universal Human Rights" 2002 Speculum Juris 33.
[li]Bennett TW *Human Rights and African Customary Law* (Cape Town 1995) 59.
[lii]Benett TW A Source Book of African Customary Law for Southern Africa (Cape Town 1991) 55.
[liii]Benett TW A Source Book of African Customary Law for Southern Africa (Cape Town 1991) 55-56.
[liv]Benett TW A Source Book of African Customary Law for Southern Africa (Cape Town 1991) 57.
[lv]Benett TW A Source Book of African Customary Law for Southern Africa (Cape Town 1991) 57.
[lvi]Goboddo-Madigizela P A Human Being Died that Night: A Story for Forgiveness (Cape Town 2004) 144. The ideology of apartheid was laced with different terminologies such as multinational development, plural democracy and a confederation of independent nations or even good neighbourliness.
[lvii]Act 68 of 1951. Later known as the Black Authorities Act.
[lviii]TARG Report on "Development Management: The Administrative and Legal Position of the Reconstruction and Development Programme Vol III" (Potchefstroom 1996) 7.
[lix]Letsoalo EM "Land Reform in South Africa: A Black Perspective" (Johannesburg 1975) 79.
[lx]The government did not hesitate to act against recalcitrant appointees. For instance, in 1952 a dramatic step was taken when Chief Luthuli was dismissed from his traditional leadership of the Umvoti Mission Reserve in Zululand. The reason for the dismissal of Chief Luthuli was that he refused to give up his membership of the ANC. The extent of government control over traditional leaders could be seen in the disposition of 34 traditional leaders and headmen during the years 1955 and 1958. The Black Authorities Act also made traditional leaders paid employees of the apartheid regime. As a result, those who earned salaries owed allegiance to the regime and no more to their people.
[lxi]Lodge T Black Politics in South Africa since 1945 (Johannesburg 1983) 261.
[lxii]Act 45 of 1988.

[lxiii]Section 11 (1) conferred a discretion to the Commissioners' Court established in terms of section 10 of the Black Administration Act to apply customary law: Not withstanding the provisions of any other law, it shall be in the discretion of the Commissioners' Court in all suits or proceedings between blacks involving questions of customs followed by blacks to decide such questions according to the black law applying to such customs except in so far as it shall have been repealed or modified: provided that such black shall not be opposed to the principles of public policy or natural justice: provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or any similar custom is repugnant to such principles. In cases where the parties belonged to different groups, section 11 (2) provided as follows: In any suit or proceedings between blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of black law other than that which is in operation at the place where the defendant or the respondent resides or carries on business or is employed or if two or more different systems are in operation at that place, not being within a tribal area, the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.

[lxiv]Bennett TW Human Rights and African Customary Law (Cape Town 1995) 69.

[lxv]Bennett TW Human Rights and African Customary Law (Cape Town 1995) 71.

[lxvi]It is significant to note that the 1996 Constitution of the Republic of South Africa was adopted on the 8th of May 1996. Prior to this adoption, there was an interim Constitution herein referred to as the Constitution of the Republic of South Africa, 1993.

[lxvii]See Chapter 2 of the Constitution of the Republic of South Africa, 1996.

[lxviii]See section 35 (3) (h) of the Constitution of the Republic of South Africa, 1996.

[lxix]1994 (4) SA 126 (C). Similarly in S v Petrus (1985) LRC 699, the Botswana Court of Appeal forbade mandatory corporal punishment by installments. In Namibia the Namibian Court in Ex Parte A-G of Namibia: In re Corporal Punishment by Organ of State 1991 (3) SA 76 (NMS) banned corporal punishment generally.

[lxx]See section 9 of the Constitution of the Republic of South Africa, 1996.

[lxxi]Bennett TW Human Rights and African Customary Law (Cape Town 1995) 79.

[lxxii]In terms of section 35 of the Black Administration Act 38 of 1927, black is defined as any person who is a member of any aboriginal race or tribe of Africa.

[lxxiii]Bray E "The Constitutional Concept of Co-operative Government and its Application in Education" 2004 TSAR 705.

[lxxiv]See the preamble of the Constitution of the Republic of South Africa, 1996.

[lxxv]See section 34 of the Constitution of the Republic of South Africa, 1996.

[lxxvi]See section 165 (2) of the Constitution of the Republic of South Africa, 1996.

[lxxvii]See Chapter 8 of the 1996 *Constitution* and in particular section 165 which declares inter alia that the judicial authority of the Republic is vested in the *Constitution* and they must apply law impartially and without fear, favour or prejudice.

[lxxviii]The above factors which impair the system of traditional justice system in South Africa include also the stigmatization of the Traditional Courts and ignorance about the contribution they can make in the general administration of justice.

[lxxix]See also De Lange JH "Seminar in Celebration of the 10th Anniversary of the South African Human Rights Commission, Johannesburg" www.doj.gov.za 7 September 2006.

[lxxx]The Traditional Courts Bill was introduced in the National Council of Provinces (proposed section 76), on request of the Minister of Justice and Constitutional Development. The explanatory summary of Bill published in Government Gazette No. 34850 of 13 December 2011 and the Bill was originally introduced in National Assembly as Traditional Courts Bill (B 15—2008) and withdrawn on 2 June 2011.