

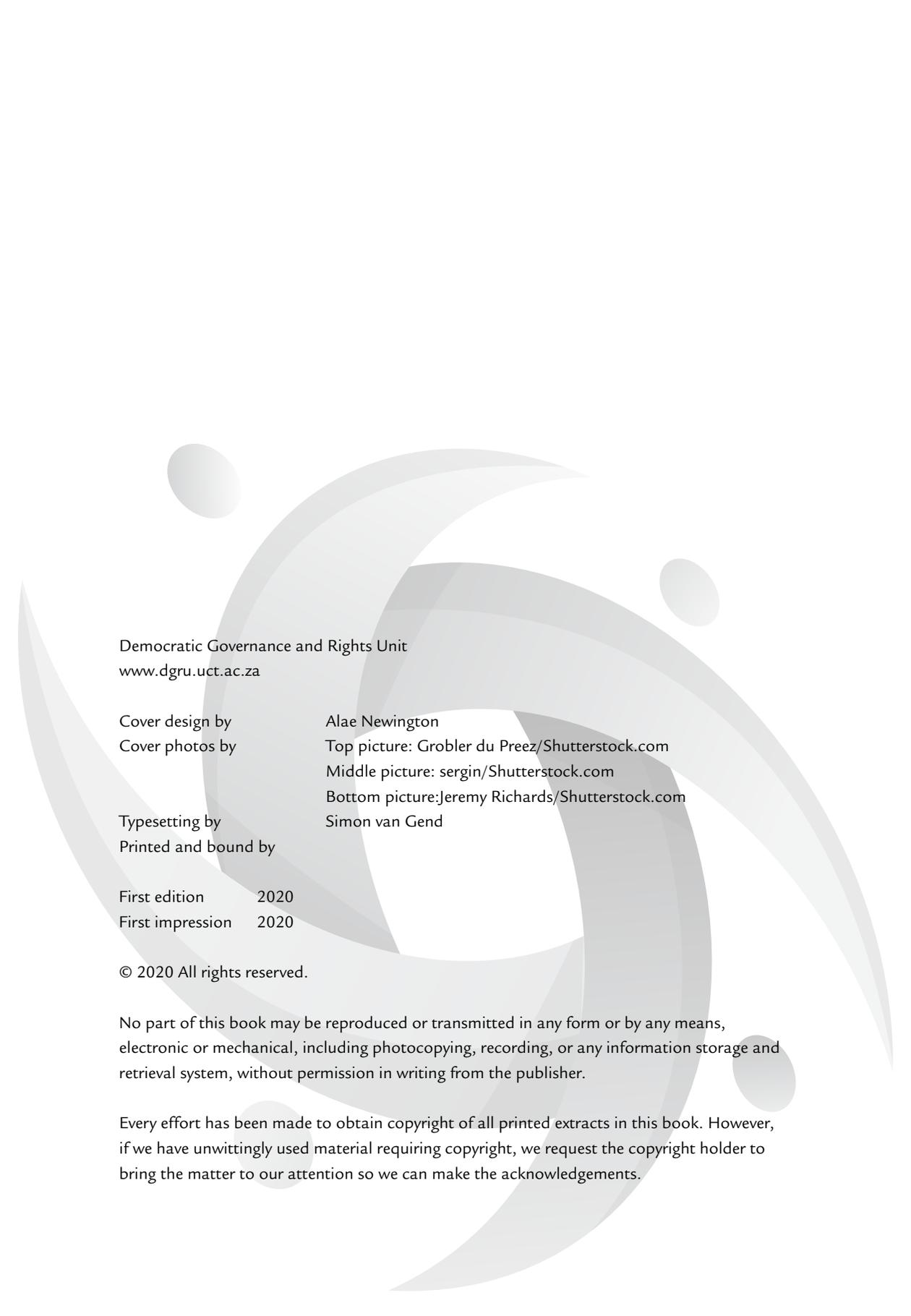
ASSESSING THE FUNCTIONING OF URBAN TRADITIONAL COURTS IN SOUTH AFRICA



WORKING PAPER SERIES

Assessing the Functioning of Urban Traditional Courts in South Africa





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Background and aim of the research

Framework of traditional courts

Traditional courts can be found in various areas and are not limited to rural villages as in the past. Nowadays traditional courts may be found in urban areas as well. These courts were formerly known as chief's courts. Traditional courts are designed to deal with customary issues in terms of customary law. The chief and his headmen decide cases brought before them by parties within the area of jurisdiction using indigenous law and custom. A person with a claim has the right to choose whether to bring the claim to the traditional court or in a magistrates' court. However, there are certain cases that are best brought before the traditional court because they solely concern traditions and customs. An example of such cases would be a case dealing with a divorce or separation arising out of a customary marriage or or a case dealing with inheritance where there are children born outside of a customary marriage or stokvel disputes. A person who is not satisfied with the decision in a traditional court may take their matter to the magistrates' court for adjudication.

The judicial functions of traditional leaders and traditional court are still regulated by the old colonial legislation, namely the Repeal of the Black Administration Act and Amendment of Certain Laws Act¹. This legislation is outdated and not appropriate and as a result traditional courts currently have no statutory basis for their structure, functions and powers. The Traditional Courts Bill has been tabled before parliament and it aims to reaffirm the

Traditional courts currently have no statutory basis for their structure, functions and powers.

1 28 of 2005

The Bill ostensibly concentrates legislative, executive and judicial power in one person – the traditional leader

values of customary law and customs in the resolution of disputes, based on restorative justice and reconciliation and to align them with the constitution. The Bill seeks to regulate the structure and functioning of traditional courts. However, the Bill in its various forms since 2008 has been met with strong public opposition, delaying its implementation. Opposition has generally focused on the fact that the Bill will legalise and entrench current discrimination against women and in effect create a separate legal system for the 17 million people living in the former Bantustans, enabling chiefs to order forced labour within those boundaries, and making it a criminal offence for people to opt out of traditional courts.² In addition the Bill ostensibly concentrates legislative, executive and judicial power in one person – the traditional leader.³ In 2019 the Justice and Correctional Services Portfolio Committee in the National Assembly adopted the latest version of the Bill but it has yet to be passed by the NCOP. Given its history, it is unlikely it will be adopted without opposition.

Aims of the project

This project formed part of a bigger project on judicial corruption and administration within our judicial governance work in South Africa. The aim of the broader project is to get a better understanding of the state of corruption in the lower courts, including traditional courts.

We did this through several strands of empirical research namely: (i) analysis of the systems of regulating conduct and the data on conduct complaints received by the Magistrates Commission; (ii) analysis of magistrates' own perceptions of corruption and other issues; and (iii) analysis of public opinion regarding magistrates. We also

2 <https://www.customcontested.co.za/traditional-courts-bill-dead/>;

3 <https://www.dailymaverick.co.za/article/2019-04-09-the-traditional-courts-bill-will-enable-concentration-of-power-in-one-individual-a-traditional-leader/>

include an exploratory analysis of the functioning of an urban traditional court.

Given that traditional (chief's) courts have jurisdiction to hear certain matters at the level of magistrate's courts, we thought it would be useful to include some research in the broader project on how people experience the traditional courts and what their perceptions are of levels of corruption at these courts. This part of the research project was designed to be exploratory given uncertainty as to the extent of access to traditional courts we would get.

We decided to focus on traditional courts in urban areas as they would probably be the courts at which people were most likely to exercise their options to bring a case to either the traditional court or the magistrate's court. They would also be easier for us to access directly ourselves. We have a good working relationship with the Chief Magistrate of Cape Town whom we know is of the Royal Bapedi family and thus has links to traditional courts. We approached him and he set up a meeting for us with two Chiefs of two different urban traditional courts, based in Daveyton and Mamelodi in Gauteng.

Whilst the intention was to include a survey of traditional court users to ascertain their perceptions of the courts and their views on corruption we did not manage to do so for a number of reasons. The first being that court is held once a week and the people who attend are only those whose cases are being heard that day. Thus, the setting is intimate and the daily numbers are low. Trying to survey people in that environment would have been awkward and most likely have affected how they responded. It would also have provided too low a number of respondents as we did not have the resources to attend court regularly over an extended period of time.

Whilst we did not manage to conclude perception surveys of users of traditional courts, we did manage to convene a focus group of traditional court leaders and observe a day of hearings at one court to obtain a better sense of how these courts function.



Traditional courts: Initial meeting with the chiefs

During the month of November 2019, we met with two chiefs at the offices of the Magistrates Commission in Pretoria. The two chiefs were: chief Mampuru and chief Mahlangu. Chief Mampuru is the leader of the Bapedi nation and his traditional court is situated in Daveyton, Gauteng. Chief Mahlangu is the leader of the Ndebele nation and his traditional court is situated in Mamelodi, Gauteng. Both chiefs were accompanied by their respective headmen. The purpose of the meeting was to ascertain first-hand information from the chiefs on how traditional courts are conducted in general.

From this meeting we ascertained the following in respect of traditional courts:

- Traditional courts have been in townships since the 1980s.
- The days on which traditional courts operate differ from one place to another. For these two tribes, In rural areas their traditional courts operate once during the week and in urban areas they operate on weekends. Both chief Mampuru and chief Mahlangu's courts operate on Sunday.
- Both chiefs have headmen who assist them and preside over cases with the chiefs. The chief's headmen are all on equal footing as there are no different ranks among them. Chief Mampuru has a total of 16 headmen and chief Mahlangu has a total of 4 headmen. In discussion, chief Mampuru noted that they were aware of significant corruption within the South African Police Services (SAPS) and that in courts a lot of corruption and bribery occurs. However, when 16 headmen and a chief preside over a case, they felt that it is impossible to

bribe all of them. Therefore, in the chiefs' opinion, the more people that preside over cases the lesser the risk of corruption.

- The issue of corruption was discussed in the meeting held with the chiefs and their headmen. It appeared from this discussion that in their opinion, corruption at traditional courts is not prevalent because during a case each chief sits with approximately four headmen, in the case of chief Mahlangu and 16 headmen in the case of chief Mampuru, which means that more than one person would have to be bribed. There are also no breaks between each case being heard and a conclusion on a case is reached on the same day. Therefore, according to the two groups, the chances of the process and outcome being influenced improperly are regarded as very slim. Whilst we did not observe any corruption during our attendance at the Mamelodi traditional court in February 2020, we did not interview court users, so we cannot state this with absolute certainty. This assertion also ignores the fact that bribery and corruption can take place *before* the hearing. In her book *Access to Justice and Human Security: Cultural Contradictions in Rural South Africa* (Routledge, 2018) Sindiso Mnisi Weeks indicates that bribery, often with alcohol or other gifts can take place prior to the actual sitting of the traditional court.
- Traditional courts have jurisdiction to hear all cases except for murder, rape, wills and estates cases and robbery. Traditional courts are mainly approached to deal with divorce cases and when presiding over such cases the court strives to reconcile parties. Traditional courts also deal with cases relating to stokvel disputes.
- Although we were advised that traditional courts do, on paper, not have jurisdiction to deal with cases relating to murder, rape, wills and estates cases and theft, we however became aware of the fact that the traditional courts do, in practice, deal with cases relating to theft. Chief Mampuru and chief Mahlangu pointed out that the cases that their courts deal with relating to theft are usually 'petty' cases, such as when a person's television

Traditional courts have jurisdiction to hear all cases except for murder, rape, wills and estates cases and robbery.

has been stolen and such a person reports the case to the traditional court. Both chiefs substantiated that the traditional courts deal with such cases although they do not have jurisdiction because the traditional courts are much more effective in such cases than when a person would approach a magistrates court. The results are more expedient at the traditional court than they would be at the magistrates court. The approach of the traditional court follows restorative justice principles, in that the aim would be to get the item – the television for example – returned to the person, rather than merely a punitive punishment against the perpetrator.

- Further, Chief Mampuru’s court seeks assistance from SAPS if a party in a case fails to attend at the traditional court when a summons was served on them. The police endeavour to locate the party and accompany such party to the court on a day set down by the court.

Subsequent to this meeting with the two chiefs, we made arrangements with chief Mahlangu to attend at his court as observers. We further acquired the assistance of a Pedi speaking student from the University of Pretoria, Tebogo Moswane, to assist with translation should the need arise.



Traditional court observations: Mamelodi Traditional Court

On 23 February 2020 we attended the traditional court in Mamelodi, Gauteng (Section H, 2445 Jwaga Street, Mamelodi, Gauteng). The purpose of the attendance at the traditional court was to observe the functioning of the court in its entirety. To be precise the observation looked at the composition of the presiding officers, the type of cases brought before the traditional court, the conduct of the court proceedings (taking into account factors such as fairness, the application of the *audi alterum partem* principle, the presumption of innocence until proven guilty, and application of customary law, findings in cases brought before the court, and upholding of the values entrenched in the constitution.

Observations

■ Traditional court premises

The traditional court proceedings are convened at the homestead of Chief Mahlangu in an old house that the family no longer resides in. The house is also used to keep old furniture. The room used to convene the traditional court only has one small window and has no proper working electricity. In collaboration with the government, Chief Mahlangu intends to have the old structure currently used as a courtroom turned into a museum. A proper office next to the new house in the homestead will be built and this is where all cases will be convened.

At the traditional court the dress code is dependent on the gender of the person appearing before the traditional court.

■ **Dress Code**

As in any other court, there is a particular dress code that must be adhered to when attending the traditional court. At the various courts, such as the high court and labour court, it is well known that when appearing before the court one must be properly dressed. A proper dress code comprises a white shirt or blouse closed at the neck, dark pants or skirt and black or dark closed shoes.

At the traditional court the dress code is dependent on the gender of the person appearing before the traditional court. Men must wear long trousers and have jackets on. Women must either wear a skirt or a long dress, cover their shoulders and must cover their heads with a head scarf. This dress code is strictly adhered to by those who appear before the traditional court when we were in attendance.

■ **Opening of a case – process**

One of the Chief's headman / advisor plays the role of the clerk in an ordinary court as he is responsible for opening cases formally. This person also occupies the role of a chairperson during the hearing of a case. A person who seeks to open a case with the traditional court must consult with the headman who plays the role of a chairperson during the hearing of a case. This headman will request the personal details of the person who is opening the case and those of the respondent. The headman will also request that the complainant provides a summary of the case, which he will note down in an exam pad. The headman then writes out a notice in an exam pad to the respondent. The notice gives the details of the parties, a very short description of the case and a date of the hearing of the case. The notice is then stamped, inserted in an envelope and handed to the complainant to serve on the respondent.

■ **How the Traditional Court is convened**

There are five people presiding over each case heard by the court, namely the chief and his four headmen. As mentioned in the previous paragraph, one of the four

headmen is also a chairperson of the court proceedings and convenes the court proceedings.

As in any other ordinary court the parties attending court wait outside the room used for court proceedings. The chairperson calls the parties to each case inside the room used for court proceedings, with their witnesses. The chairperson then requests that the complainant provides their personal details, i.e. full name and identity number. The complainant is then requested to state his/her case. Should the witness of the complainant have input in addition to what the complainant already stated, the witness is given an opportunity to speak. The chairperson then requests that the respondent provides their personal details. The respondent is then requested to state its case. Should the witness of the respondent have input in addition to what the respondent has already stated, the witness is given an opportunity to speak.

The three advisors and the chairperson then assess the case and immediately provide their views and findings. Each of the advisors has an opportunity to speak and give their views based on their own observations. Each advisor tries to find a solution to the issue at hand between the parties. In the meanwhile, the chief listens to what the advisors are saying. Once the advisors have had an opportunity to state their views and suggested solutions to the dispute between the parties, they hand over to the chief to speak. The chief has the last say. However, this does not preclude the advisors from giving their input after the chief has spoken. These discussions are undertaken with both the complainant and the respondent inside the room used for court proceedings. The parties may raise questions during the discussions by the advisors and the chief.

The chief and the advisors will then reach consensus on the manner in which the parties are to proceed in trying to resolve their dispute. Once consensus is reached the parties to the case are then told what it is that they must do in order to resolve their dispute. The

Once the advisors have had an opportunity to state their views and suggested solutions to the dispute between the parties, they hand over to the chief to speak.

parties have the option of either accepting the suggested solution from the chief and his advisors or rejecting it. However, in many cases the parties accept the solution and way forward provided by the chief and his advisors.

■ **Types of cases heard by the Traditional Court**

On the day of observation five cases were heard by the traditional court. We observed a range of disputes brought before the traditional court. One of these disputes related to a disagreement between neighbours, one related to a disagreement regarding a family home, one related to cultural traditions around mourning and two related to reckless lending / financial matters.

The first complaint was laid by an old lady (Ms X) against her neighbour (the respondent). A dispute arose when the respondent's children hung their wet laundry on Ms X's fence. When Ms. X addressed her concerns with her respondent's children, the children started swearing at her. Ms X reported the case at the police station and applied for an interdict and a protection order at the magistrates court. An interdict and a protection order were granted by the magistrates court but when these were served by Ms X and the police on the respondent, the respondent refused to acknowledge receipt by providing her signature.

After deliberation, the headman noted that the court is not there to separate people but it is there to reconcile people. The dispute between the two parties can be resolved. After various comments the chief suggested that the respondent apologise to the complainant for her children's conduct. The respondent apologised to the complainant. However, the complainant was concerned that the respondent was not sincere when apologising. The chief and his headmen concluded the case by confirming that all issues between the parties have been addressed before the traditional court, the respondent had apologised but the complainant had not yet accepted the apology as she was still very hurt. The complainant will do some introspection and

After deliberation, the headman noted that the court is not there to separate people but it is there to reconcile people. The dispute between the two parties can be resolved.

once she is ready to accept the apology will inform the respondent as such.

The second case related to family disagreements. The siblings in this case were disagreeing about who should receive rent money in respect of flats that are situated in their family home. The complainant was an older brother to his siblings, the respondents. The complainant's main issue was that he had built a flat on the land belonging to their father and was no longer residing in that flat. The flat was being rented out and the money was being received by one of his siblings who was residing in the family home. The complainant was unemployed and therefore wanted the rent money for the flat which he built to be received by him until he is employed. His siblings were refusing this request because the flat was built on land belonging to their father.

Subsequent to various discussions, the chief and the headmen resolved that the rent money must go to the legal owner of the property – their father who was present during the hearing. Although the father was no longer residing in the property it was still his house and his land. Should any of the parties wish to get a portion of money from the rental amount they must make such a request from their father who is the rightful owner of the property. Neither of the parties were satisfied with the outcome. However, because the property did not belong to either of the parties and their father agreed with the decision made by the chief, the parties had no other alternative but to accept the ruling made by the chief.

All the aspects of the third case related only to custom. The third case related to a mother-in-law (the complainant) who had various concerns about her daughter in law (the respondent). The crux of the complaint was that the daughter-in-law has not been behaving in a dignified manner ever since her husband passed away and that she refuses to mourn her husband in a proper traditional manner.

The complainant was further directed to inform the respondent of the traditions followed in the family as this will prevent future disagreements relating to traditions.

After lengthy deliberation it became apparent that the family of the respondent's late husband was in the first place not aware of the correct traditional manner in which the respondent should mourn her late husband. As a result, the respondent was not properly informed by her late husband's family of the manner in which she must traditionally mourn. The blame was on the complainant. The chief and headman resolved that the complainant must apologise to her daughter-in-law for placing blame on her whereas the complainant and her family were at fault by not giving the correct direction to their daughter-in-law regarding mourning. The complainant was further directed to inform the respondent of the traditions followed in the family as this will prevent future disagreements relating to traditions.

The fourth case related to an unpaid debt. The complainant had loaned money in the total amount of R1 000.00 to the respondent. The respondent was unemployed, and her husband had recently passed away. Two years passed since the complainant had loaned the respondent the money. Yet, the respondent had not made a single payment toward the loaned amount.

After deliberations it was determined that the respondent could not pay the full R1 000.00 back to the complainant. The respondent offered to pay five equal instalments towards the debt, in the sum of R200.00 per month. The headmen attempted to negotiate monthly payment of at least R250.00 per month. However, the complainant would not have been able to afford this amount. It was then agreed between the parties that the respondent would pay R200.00 per month. It must be noted that the monies would be paid by the respondent to the traditional court where after the complainant would receive the monies from the traditional court. It appeared that there is no bank account into which the monies could be deposited as it was enquired from the respondent whether she would be able to travel to the

traditional court to make the payment. It must also be noted that no interest was charged on the debt.

The fifth case also related to an unpaid debt. The complainant had loaned the respondent a total amount of R16 000.00. It was agreed between the parties that interest would be charged on the amount on a monthly basis. Repayment would be over a period of ten months. However, the respondent had refused, alternatively neglected to repay the debt.

During the hearing no financial enquiry was conducted in respect of the respondent. Subsequent to various deliberations it was suggested by the headmen that interest on the debt should be dispensed with as it was clearly almost impossible for the respondent to even pay the initial amount. It also came to light during the deliberations that this case was not the only case before the traditional court relating to the respondent owing monies. Details about the other cases against the respondent were openly discussed and this inevitably caused some embarrassment to the respondent. It was agreed between the parties that interest on the debt would be dispensed with. It was further agreed between the parties that the respondent would pay R500.00 per month until the outstanding debt is fully paid. The monthly payments would be made through the traditional court. In this case a handwritten agreement was signed by both parties and kept in the traditional court file.

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Comments and recommendations

The lack of statutory regulation of traditional courts could allow for a range of abuses and malpractices, bringing these important forums into disrepute.

The research was exploratory, and the court observations were conducted in the Mamelodi traditional court only. Thus, our observations and comments can only be applicable to the Mamelodi traditional court. Whilst we can assume that there are similarities in how other urban traditional courts are run, we need to conduct further research to further explore the range of procedures that are used in traditional court dispute resolution.

Lack of statutory regulation

The lack of statutory regulation of traditional courts could allow for a range of abuses and malpractices, bringing these important forums into disrepute. However, during our observations of the traditional court in Mamelodi we found no form of abuses and malpractice of the traditional court. This could be attributed to the integrity possessed by those in control of the structures (the chief and his headmen). However, in the absence of a unified legal framework for traditional courts, this will not inevitably be the case for all courts.

Our discussions with the chiefs revealed also that there was a paucity of information that had been shared with them regarding the current status of the Traditional Courts Bill and any other developments. This is of concern given the recommended role of the chiefs in the current/proposed Bill and the fact that as key stakeholders one would presume that they would be kept apprised of the status of the Bill and provided with copies of its current iteration.

The sooner some sort of satisfactory statutory framework is promulgated, the sooner norms and standards across the board can be applied, balanced with the different traditions and customs practised around South Africa.

Cases heard by the court

Firstly, traditional courts mainly deal with cases relating to tradition and customs. However, as is evident in the last two cases dealt with by the traditional court during our observations, it is not always true that cases before the court solely relate to traditions and customs. The last two cases related to unpaid debts. The manner in which these two cases were dealt with raised a concern because no financial inquiry was conducted in both cases by the chief and the headmen. One would expect that in cases relating to an outstanding debt a similar approach as provided in section 65D(4)(a) of the Magistrates Court Act⁴ would be followed, given that the court operates in a similar manner to a Magistrates Court. This section makes provision as follows:

It is not always true that cases before the court solely relate to traditions and customs.

“(4) In determining the ability of the judgment debtor to pay the judgment debt in instalments or otherwise the court shall take into consideration

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(a) In the case of judgment debtor who is a natural person, the nature of his income, the amounts needed by him for his necessary expenses and those of the persons dependent on him, and for the making of periodical payments which he is obliged to make in terms of an order of court, agreement or otherwise in respect of his other commitments as disclosed in the evidence presented at the hearing of the proceedings”.

4 32 of 1984

Should disagreement arise regarding the hearing at the traditional court there will be no proof of the ruling / order made by the court, other than the notes taken in the hearing.

Secondly, the chairperson of the traditional court tries as much as possible to note every important factor down during the hearing of the case. However, at the conclusion of the hearing there is no formal order / ruling of the traditional court handed to the parties. It must be noted that during the hearing the parties do not take any notes and the hearings are not digitally recorded. Therefore, once the parties leave the traditional court there is nothing tangible to rely on as proof of the decision made by the traditional court. Should disagreement arise regarding the hearing at the traditional court there will be no proof of the ruling / order made by the court, other than the notes taken in the hearing.

Lastly, during the hearing of the fifth case the chief displayed some knowledge of the law. On various occasions the chief cautioned against unpaid debt cases being referred to the magistrates' court in that the consequences would be dire to such an extent that movable property could be sold in order to satisfy an outstanding debt. It was commendable that the chief had some knowledge of the law. However, the chief's headmen did not display any similar knowledge of the law. From the chief's comments relating to the law it became apparent that it would be beneficial for traditional courts that the chiefs and headmen have some form of working knowledge of the law. This would enable the court to adequately caution against conduct by the parties that would lead to dire consequences should such cases be referred to the magistrates' court.

Gender

Both traditional courts chiefs and the advisory councils of headmen that we met with were composed entirely of men. Whilst this is understandable given the history and nature of customary law it is incompatible with the transformation imperatives of the Constitution and the status and function of the traditional courts within the broader justice system.

The dress code required by the court is also incompatible with gender equality, in that women are not allowed to wear trousers and must have their heads covered. Given the fact that the Traditional Courts Bill speaks to the need to achieve equality and promote non-sexism, this practice will need to be reconsidered once the Bill is passed.

Training

Based on the observations at the Mamelodi traditional court and the discussions in the focus group it would be beneficial to the justice system to provide formal legal training to the chiefs and their headmen. The main goal of the formal legal training would be to align traditional courts with the values entrenched in the constitution by mentoring and training traditional leaders to give decisions that are in line with the constitution. Traditional courts play a pivotal role in dispute resolution. The focus of the formal legal training would be on mediation in order to enhance the chiefs and the headman's mediation skills. The focus would also have to be on the National Credit Act and the manner in which magistrates deal with outstanding debt related matters (section 65 cases). Writing orders / ruling should also form an essential part of the training. This aspect of the training would not be as extensive as a training on judgment writing.

We would also recommend that the Traditional Courts be provided with some kind of a resource manual which includes information on the Constitution and the relevant laws that the courts deal with, together with explanatory summaries of the legislation.

It is our understanding that the South African Judicial Education Institute (SAJEI) has been offering training to traditional leaders in their adjudicative roles. However, from the observation at the Mamelodi traditional court it does not appear that such training is having the necessary impact on traditional courts. This might be proven otherwise in other traditional court observations.

Traditional courts play a pivotal role in dispute resolution. The focus of the formal legal training would be on mediation in order to enhance the chiefs and the headman's mediation skills.

The principles of restorative justice that were observed both in the focus group discussion and the attendance at the court are to be commended, especially in matters that were not purely customary in nature.

We attempted to get clarity from SAJEI as to what they have presented so far and what they plan for the future. Despite a number of emails, phone calls and WhatsApps, they failed to respond to our questions. We will now submit a PAIA application to get this information. We know that Judge Legodi did do some training but have no further details. Cape Town Chief Magistrate Thulare informed us that when he was Head of Court in Daveyton he trained the East Rand traditional courts and the Pretoria traditional courts when he was Head of Court in Mamelodi. This was during the period 2009 – 2012.

Restorative justice

The principles of restorative justice that were observed both in the focus group discussion and the attendance at the court are to be commended, especially in matters that were not purely customary in nature. Given the adversarial nature of the formal justice system and the long delays in achieving results, the traditional courts have an important role to play especially regarding theft and the like. As was noted in the focus group meeting, complainants would rather get their stolen television back and an apology than just have the perpetrator locked up in jail and have no television.

Corruption

Whilst our observations did not reveal any obvious corruption, the system itself remains vulnerable to potential corruption and other abuses. The lack of a statutory framework leaves the system extremely vulnerable and there are a number of practices that could be open to abuse:

- (i) The court receives and keeps monies due to complainants until the total debt is paid. There is no bank account that this is put into;
- (ii) Court users are required to pay a fee if a summons is to be issued;

- (iii) The lack of a shared written outcome that is provided to all parties; and
- (iv) The lack of legal training could allow for cases to be decided incorrectly

Measuring corruption in the traditional courts system is challenging and we were not able to find a way to do so in this project. In order to measure both overt and more subtle forms of corruption we would need more time and resources to conduct more in-depth ethnographic fieldwork both in urban and rural communities where there are traditional courts.

