The Traditional Courts Bill that seeks to regulate traditional courts and customary law to replace an outdated piece of legislation contained in the Black Administration Act of 1927, was met with strong opposition from participants at an HSRC seminar attended by lawyers, academics, members of civil society, and human rights groups.

Ina van der Linde reports

Reconciling the irreconcilable: the TRADITIONAL COURTS Bill

Participants described this piece of legislation as unconstitutional and flawed. Most agreed that the passing of the bill should be either delayed or withdrawn and that the whole process should start from scratch.

The bill was initially submitted to parliament by the Department of Justice and Constitutional Development in 2008 to align it with the Constitution and human rights. It was subsequently withdrawn following an outcry from ordinary rural people and civil society organisations because of perceived shortcomings. In December 2011 the same bill was reintroduced, but with the same content that caused its withdrawal in the first place. The bill has now been submitted to the National Council of Provinces for discussions.

The main concern of speaker Dr Sindiso Mnisi Weeks, a senior lecturer in African customary law at the University of Cape Town, was that the 17 to 21 million South Africans living under traditional law were not consulted. The bill therefore contains largely the opinions of the National House of Traditional Leaders, and gives traditional leaders unprecedented powers.

She said all concerned parties agree that traditional courts have their place in the rural areas. These courts are conveniently close to communities and are more accessible and cheaper than the national justice system. If regulated properly and becoming democratic institutions elected by the communities they serve, they can become valuable assets in solving local disputes and issues of a social nature.

At the moment, however, the concerns are the following:

- Power is centralised in the hands of traditional leaders, who are largely men. They are the presiding officers of the court; they constitute the court, decide whether one is guilty, determine punitive action and even determine what customary law is mostly not written down. This means that there is no separation of power between applying customary law and adjudicating disputes, which is a fundamental principle of a constitutional democracy.
- Decisions of the traditional courts are final and carry the same weight as that of a magistrate's court.
- The bill makes no provision for women to serve as members of the court and women are therefore most likely to be marginalised.
- When found guilty, parties cannot appeal. The courts have extensive administrative powers to decide over land administration, natural resources, health education, safety and security, and the issuing of marriage, death and birth certificates. A party found guilty may appeal sanctions, but some sanctions are excluded, for example forced labour, or any other order that the traditional court may deem fit cannot be appealed.
- Sittings of the courts are often held in 'sacred' places where women are forbidden to enter; in many instances women are not allowed to speak in courts anyway. In both these examples men are appointed to speak on the women's behalf.
- Communities cannot opt out of a traditional court, or choose to use the state's court system and the accused may also not appoint a legal representative.

The issue here, said Dr Weeks, is about voices and power: 'This bill... does not appreciate the true value of customary dispute resolutions, namely to encourage debate, to build consensus and be inclusive in a sense.

'The overarching consequence is that it encourages corruption and creates a separate and inferior legal regime for formal homelands areas and for people living in those areas and entrench past distortions such as authoritarian rule, regarding traditional leaders as all powerful and ruling over subjects and entrenches patriarchy.'

Ms Jennifer Johnny of the South African Law Reform Commission proposed a solution. She suggested introducing specialist courts dealing with customary law in the mainstream courts, similar to specialist courts dealing with child maintenance and domestic violence.

After weeks of countrywide public hearings most of the provinces either rejected the bill or asked for massive changes. The bill was referred back to the Department of Justice and Constitutional Development.

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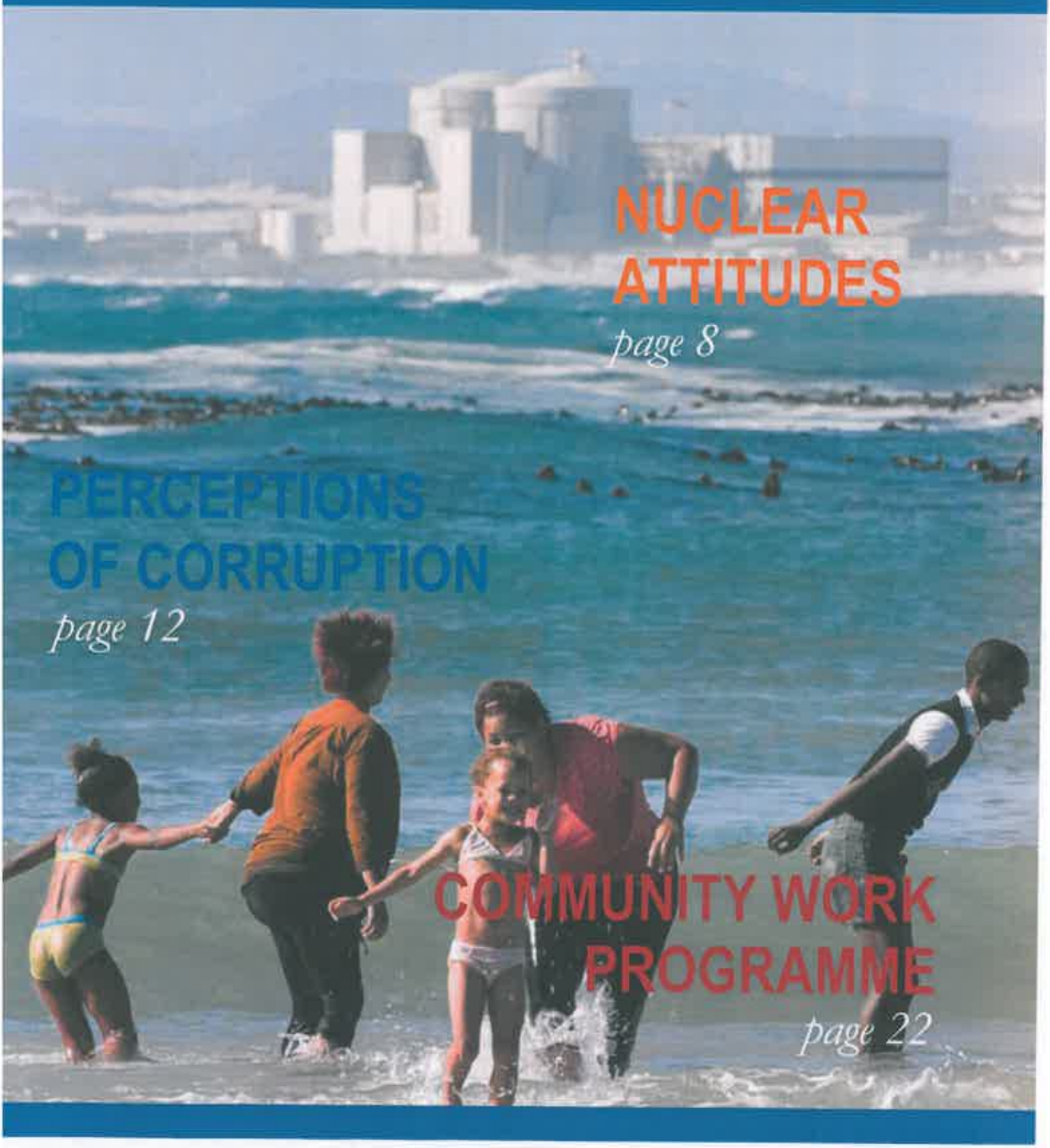

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