THE CHALLENGES OF FORMALISATION, REGULATION, AND REFORM OF TRADITIONAL COURTS IN SOUTH AFRICA

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ABSTRACT

The system of traditional courts in South Africa was regulated by the Black Administration Act of 1927 throughout the apartheid period. This Act was substantially repealed in 2005, leaving only the few provisions that regulate the traditional courts, pending the enactment of legislation by Parliament. The regulation and functioning of these courts through a new law is necessary in light of the post-apartheid Constitution of the Republic of South Africa and its Bill of Rights. The repeal of the 1927 Act led to two legislative processes, one by the South African Law Reform Commission and the other by the Department of Justice, both aimed at addressing the lacuna that had arisen. This paper addresses some of the concerns relating to the process and substance in these legislative developments.

I INTRODUCTION

The active involvement of traditional leaders in judicial matters, the usage of traditional judicial forums, and constitutional imperatives in South Africa have led to efforts to reconfigure and regulate the traditional court system. The South African Parliament is due to consider a Traditional Courts Bill[1] (the Justice Bill) in 2009. This Bill will officially recognize the authority and jurisdictional limits of traditional courts under the new constitutional dispensation. It will vest power in the Minister of Justice to establish these courts and impose restrictions on their exercise of judgment. The Justice Bill

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1 B15-2008.

follows the repeal of the Black Administration Act[2] in 2005. This Act previously regulated the customary courts and the Bill is an effort to fill the lacuna it has left.

The Justice Bill represents a microcosm of the tensions enmeshed in codifying and reforming customary law in the post-apartheid era. The tensions between respect for democratic principles and the rights of women and other vulnerable groups, on one hand, and the restoration of the dignity of a people and their traditional institutions, on the other hand, come to life in this Bill. Needless to say, the debates surrounding the Bill indicate the many challenges of crafting a new legal system against the backdrop of a democracy with a constitutionally entrenched legal pluralism. At another level, the Bill indicates the continuing pragmatic accommodation strategy of the South African government in respect of traditional laws and institutions. This is reflected in the legislative process to date–which includes the recognition of the institution and the functions of traditional leaders, through the Traditional Leadership and Governance Framework Act of 2003.

Against this backdrop, this article provides insight into, and an analysis of, the major issues and debates relating to the institutions of traditional leaders' role and functions in the administration of justice that have contributed to the slow birth of a regulatory framework for the traditional justice system. The paper addresses issues concerning both the legislative process and the content of the draft law. In discussing the process, the paper also charts the development of the Justice Bill in relation to the prior reform effort of the South African Law Reform Commission (the Commission) in respect of traditional courts.

The paper is divided into four sections. Following this introduction is a discussion of the theoretical and historical perspectives of the reform of traditional courts. The next section analyses the debates and issues relating to the process and content that have contributed to the slow birth of the legislation for the regulation of traditional courts. The last section is the conclusion.

II THEORETICAL AND HISTORICAL PERSPECTIVES OF THE TRADITIONAL COURTS REFORM

As early as 1988 in its Constitutional Guidelines for a Democratic South Africa, the African National Congress recognised the need to transform the institution of hereditary rulers and chiefs and to bring it in line with the

2 Act 38 of 1927.

democratic principles embodied in the Constitution.[3] It has also been argued that:

> [C]hieftaincy can be part of the democratic renewal in Africa but only if chieftaincy and the post-colonial state ... are both transformed. The colonial and post-colonial despotisms transformed African chieftaincy into their intermediary, administrative institution. Now this administrative chieftaincy should be turned into civil chieftaincy which would be more just, responsive and responsible just as the new type of central government would be.[4]

Van Trotha's principles to effect such a transformation include: state recognition of the *de facto* legal pluralism and the institutionalisation of the chiefs' independent legal system; local autonomy with local problems being solved locally; agency and competence of chiefs, with chiefs being active agents in promoting the well-being of the community, and also being able to deal competently with the modern economic, administrative and political challenges and tasks; civil chieftaincy which is constitutionally integrated, free from central government control but subject to local control; and the development of mechanisms that reflect the democratic practice of checks and balances, applicable to both the state and the chiefs.[5]

The developments in South Africa since 1994 indicate a similar philosophy of developing a civil chieftaincy, based on democratic norms and principles. The recognition by a democratic state, that chiefs are at the centre of local political, social and economic life, particularly in rural areas, has led to a relationship of dependence between the state and traditional institutions, with the state 'encapsulating' chiefs through its legislation and resources, and at the same time, the state also borrowing some legitimacy from the chiefs.[6]

However, in the context of South Africa, there is no consensus on precisely how the institutions of traditional leaders should be dealt with. Contested issues include amongst others, different notions of and views on democracy, legal pluralism and dual legal systems, and also, centralised and decentralised laws. It has been argued that the state has adopted a 'pragmatic encroachment of democracy approach' in its handling of the institution of traditional leaders. This approach includes policies that indicate that the state is

3 See generally TW Bennett & C Murray 'Traditional leaders' in S Woolman & others (eds) *Constitutional law of South Africa* 2nd edition, vol 2 (Cape Town: Juta & Company Ltd, 2006) chapter 26, i-26-67.

4 DI Ray & EABVR van Nieuwaal 'The new relevance of traditional authorities in Africa' (1996) 37 & 38 *Journal of Legal Pluralism & Unofficial Law* 8 (citing Van Trotha).

5 As above 9 & 10.

6 As above 8.

doing more than just tolerating traditional leaders, and the creation of laws and policies which '... seem to indicate that government is seriously considering an integration of traditional leadership within the South African system of governance.'[7] Furthermore, Sithole and Mbele's research largely indicates two different approaches by academics and commentators. Proponents of democratic pragmatism adopt the view that '... traditional leaders should be useful for as long as the extension of democratic local governance is not sufficient towards the rural areas.' Organic democracy proponents on the other hand see '... traditional leadership as occupying its own space in governance–one that attends simultaneously to the social, the cultural as well as the everyday survival issues of the communities.'[8] The everyday survival issues also relate to the judicial functions of traditional leaders and this gives rise to additional debates, particularly on the various notions of legal pluralism and dual legal systems.

There are many different perspectives on legal pluralism and dual legal systems. Merry, for example, agrees with the definition of legal pluralism as '... a situation in which two or more legal systems coexist in the same social field' and also agrees with other views that acknowledge that '... every functioning sub-group in a society has its own legal system which is necessarily different in some respects from those of other subgroups.'[9] According to Wilson, Moore views customary law as '... the product of historical competition between local African power holders and central colonial rulers, all trying to maintain and expand their domains of control and regulations.'[10] Wilson highlights the Weberian maxim that '... law is a semi-autonomous discourse created by bureaucratic officials for the purposes of legal domination. Law's norms are positivised ones, often far removed from, though not wholly unrelated to, the lived norms of existential experience.'[11]

Yet another form of dualism pertains to the behaviour of functionaries and, the power relations that exist within competing legal regimes. For instance, concerns have been raised that the Traditional Courts Bill may have far-ranging impact, including in relation to women's access to equal justice under the law within a customary law system that is regarded as patriarchal. The challenge of maintaining an overall balance of power between state laws

7 P Sithole & T Mbele *Fifteen year review on traditional leadership a research report* (Human Sciences Research Council Research Report submitted to the Presidency, South Africa, 2008) 43.

8 As above 16.

9 SE Engle 'Legal pluralism' (1988) 22 (5) *Law & Society Review* 870.

10 RA Wilson 'Reconciliation and revenge in post-apartheid South Africa—Rethinking legal pluralism and human rights' (2000) 41 (1) *Current Anthropology* 77.

11 As above.

and competing customary legal regimes may also have implications for the roles that will be demanded of chiefs. As Ray & van Nieuwaal argue, '[a] key feature of syncretism is constant change, which forces the chief to use two different languages belonging to the radically different worlds in which he has been received since colonial oppression. This situation also creates a certain duality in the chief's behaviour.'[12]

The tensions between centralized and decentralized law; and common and customary law that come to a head in the proposed Traditional Courts Bill find their roots in the very nature of the country's colonial history. In the 1800s, early British colonizers faced the pragmatic challenges of imposing foreign law upon territories with pre-existing legal systems. Their strategic recognition of pre-colonial political leaders, including headmen, as chiefs, and the simultaneous efforts to undermine chieftaincies, and to keep all such leaders, under the wing of the state, served to reinforce the supremacy of the colonial authority–and also to set the stage for apartheid's racial stratification.[13] Under this system, the practice of creating chiefs, and also in many instances hiring and firing them, meant that chiefs became civil servants for all intents and purposes. As Van Kessel and Van Oomen argue: 'State recognition [was] more vital for the chieftaincy than popular support.'[14]

Bank and Southall assert that between 1910 and 1948, traditional authorities at the level of chiefs were largely denied administrative functions and powers by the South African state. They were allowed the right to administer communal land tenure and to arbitrate civil customary cases.[15] The 1927 Native Administration Act is the official marker of the start of a dual legal system in South Africa. This is the law that created a new system of courts to hear civil disputes between Africans, concurrently with native commissioner's courts (which was the court of appeal from the traditional leaders' courts). The State appointed the traditional leaders who would have judicial powers and the jurisdiction to apply customary law.[16] These roles were further reinforced after 1948 under the apartheid government, where traditional leaders were given control over rural local government through various legislative and policy measures–for the maintenance of apartheid. For the majority of the population, chiefs were discredited, as they were viewed as collaborators of the apartheid regime, and this led to strong opposition to the institution of

12 As above note 4, 24.

13 See TW Bennett *Sourcebook of African customary law* (Cape Town: Juta & Co., Ltd., 1991) 61-62.

14 I van Kessel & V van Oomen 'One chief, one vote: The revival of traditional authorities in post-apartheid South Africa' (1997) 96 *African Affairs* 561, 563.

15 DI Ray & EABVR van Nieuwaal, above note 4, 21.

16 *South African Law Commission Report on Conflicts of Law* Project 90 (1999).

tional leaders. The legitimacy and authority of chiefs was contested dur-
ɔoth the colonial and the apartheid era and this contestation continued
re and after 1994. With the winds of change blowing in the late 1980s,
ɛ chiefs began placing themselves strategically as an independent political
: and as representatives of the people–in an attempt to take advantage of
ınticipated changes.[17]

The emergence of the Congress of Traditional leaders of South Africa
NTRALESA) in 1987 was one such attempt at gaining political legitimacy
power.[18] The participation of chiefs in the negotiations process that led to
lemise of apartheid did yield some benefits for chiefs. Sections 181 and 182
ıe Interim Constitution of 1993 recognised the powers and functions of
itional authorities and, furthermore, they were also given *ex officio* mem-
hip of the elected local government within whose jurisdiction they fell.
pter 12 of the Final Constitution of 1996 recognises the institution, status
role of traditional leadership and states that 'the courts must apply cus-
ary law when that law is applicable. Thus South Africa today is governed
tradition of weak legal pluralism: a legal framework that recognizes a vari-
ɔf legal systems but centralizes ultimate authority over their application in
State.[19] Though the country's 1996 Constitution formally mandates the ap-
ıtion of customary law 'when applicable,' that law and the authority of
itional leaders remain subordinate to the State's regulation.[20]

As South Africa simultaneously fortifies its equal protection laws and
; tribute to its cultural diversity, it must balance seemingly opposing forces,
naintaining the centralized authority of the (race-neutral) state and, for-
izing the self-governance powers of indigenous cultural groups. The
lenge of recognition of such institutions, without granting them the exer-
of power, has exacerbated the tensions in all relevant law reform efforts
:e 1994 in relation to the institutions of traditional leaders. One example of
was manifest during the consultation process surrounding the enactment
he Traditional Leadership and Governance Framework Act of 2003 (which
ıe seminal legislation that outlines the roles and functions of the institution
raditional leadership). The absence of the word 'power' in the draft and

See generally L Ntsebeza *Democracy compromised: Chiefs and the politics of land in South Africa* (Cape Town: Human Science Research Council Press, 2006). Also B Oomen *Chiefs in South Africa: Law, power and culture in the post-apartheid era* (Peitermaritzburg: University of KZN Press, 2005).

As above.

TW Bennett 'Conflict of laws' in JC Bekker J & others (eds) *Index to legal pluralism* (Ohio: LexisNexis, 2002) 21.

0 Section 211 (3) of the Constitution of the Republic of South Africa, 1996.

final legislation, led to many heated exchanges in Parliament.[21] Against this backdrop, the proposed Traditional Courts Bill further illustrates tensions enmeshed in codifying customary law in the post-apartheid era.

III FACTORS CONTRIBUTING TO THE SLOW BIRTH OF A REGULATORY FRAMEWORK FOR TRADITIONAL COURTS

As stated above, traditional courts were legislatively recognised in 1927. Under the apartheid government, there was a preliminary attempt in 1986 to deal with the reorganisation of traditional courts. But they were retained as part of the justice system. The Hoexter Commission Report argued that:

> Although in many respects the chief 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.[22]

The advent of a constitutional democracy in 1994 and the need to align the traditional court system with the Constitution, necessitated changes to the regulatory framework of traditional courts. In 2005, the Black Administration Act was repealed, except for provisions regulating the functioning of the chiefs' and headmen's courts. The provisions regulating the operation of these courts have been extended several times due to the relevant legislation not being passed. The latest date to which they have been extended is 30 December 2009.[23] The question that may be asked is why, in the light of these apparently desperate attempts to preserve the traditional court system beyond the Black Administration Act, has Parliament not been able to enact a new law regulating these courts? In this section we discuss some of the major issues and debates relating to both the process involved in the drafting of the new law and the content of the proposed law. However, because the development of the draft law is still an on-going process, the analysis of the issues is generally limited to the stage of the report of the Portfolio Committee on Justice and Constitutional Development (Committee) of 24 March 2009. This date is also

21 Rashida Manjoo (personal experience as the CGE Parliamentary Commissioner).

22 Hoexter Commission *Commission of inquiry into the structure and functioning of South African courts* Fifth and final report (1983) Part 1, para 3.4.3.8.

23 See Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005; Black Administration Act and Amendment of Certain Laws 8 of 2006; Black Administration Act and Amendment of Certain Laws Act 13 of 2007; Black Administration Act and Amendment of Certain Laws Act 7 of 2008.

convenient from another point of view, as it is the stage at which the mandate of the Committee came to an end, pending national elections which were held on 22 April 2009. A new Committee with the mandate to consider law reform in this area was constituted under the new government which is now in power.

A Process of drafting the new law

The two critical elements relating to the issue of process i.e. the duplication of the process of drafting the law and public participation in the legislative process will be examined in the section below.

1 *Duplication of the traditional courts reform process: The Commission and the Justice Bills (1996-2009)*

Post-apartheid developments with regard to traditional courts include two processes–one by the South African Law Reform Commission (Commission) and the other by the Department of Justice (DOJ).

An investigation into customary courts and the judicial powers of traditional leaders was decided on by the Commission in 1996. Discussion Paper 82 of the Commission aimed to '... generate focused comment and debate on the principles which should underpin the recognition, establishment, status, role, and jurisdiction and functioning of the courts of traditional leaders.'[24] The recommendations in this paper included, amongst others: the continued recognition of traditional courts in rural areas; the establishment of community courts in urban or peri-urban areas; chiefs and headmen should continue to preside in such courts; full participation of women as presiding adjudicators must be allowed; para-legals should be appointed to assist the courts; the jurisdiction of the court should not be based on race; and formal rules of procedure and evidence should not be imposed on such courts. The Commission undertook research, had numerous workshops in all the provinces of the country, and consulted various experts,[25] in an effort to find a solution for the modernisation of the courts, and to ensure their compliance with the principle of democracy and other constitutional values.

In 2003, the Commission finalised its work on this project and presented a report and a draft Bill to the Minister of Justice and Constitutional Development. The recommendations include, amongst others, the following matters: the courts should be established by the Minister; they should have both civil and criminal jurisdictions, subject to limitations; a reasonable proportion of women should form part of the councillors (as representatives of the community); the courts should keep a record of proceedings (in the form of a summary) of each case heard; a Registrar for Customary Courts should be appointed for each Province; and alternative models of appeal, envisaging appeals from traditional courts to lower or higher levels of customary courts before the matter reaches either the magistrates' courts or High Court.

The Commission's report was accompanied with a draft Bill. It is necessary to underscore the point that by the very nature of the investigation through the Commission, this Bill was the result of extensive and relatively wide process of public consultation and participation. The participation included the most closely affected members of society, such as traditional leaders, women's groups and rural communities. Therefore, from the point of the legislative process, there is no apparent reason why this Bill should not have been brought before Parliament. This observation is further amplified by the fact that a somewhat similar legislative process was followed in the reform of a major aspect of customary law i.e. the law of marriage. The culmination of that process led to the passing of the Recognition of Customary Marriages Act in 1998. It should be added that there have been no challenges in the courts resulting in the invalidation of this Act, on the basis of the process followed prior to its enactment.

As already intimated, the Commission's Bill was not tabled in Parliament by the Minister of Justice, and no explanation is publicly available on the reasons for the lack of further developments in this regard. Instead, the Department of Justice commenced another legislative process leading to a new Bill, which has, obviously, contributed to the delay in the enactment of the necessary legislation. Moreover, it is likely that due to the contentions the Justice Bill has generated, the process of consultation and debate will be prolonged, before the Bill is brought to Parliament.

The DOJ process began in 2006 with the convening of a task team by the Minister of Justice within her department, with the goal of developing a policy framework on the role of traditional leadership in the administration of justice. This task team considered the Commission report, conducted more research and also identified recommendations in the Commission report that were inconsistent with government policy. In 2007 a conference was held for magistrates, judges and traditional leaders on "The integrity and efficiency of the lower courts and judicial accountability."

One topic of discussion was the issue of indigenous justice systems, and

24 South African Law Reform Commission *The harmonisation of the common law and indigenous law: traditional courts and the judicial function of traditional leaders* (Discussion Paper 82 Project 90, 1999) xii.

25 South African Law Reform Commission *Customary law–report on traditional courts and the judicial function of traditional leaders* (Project 90 2003) 1-3.

many complaints were raised here about the delays in the passage of a law to formalise traditional and community courts. It was argued that legislation needed to be fast-tracked to '... enhance access to justice and to alleviate the mainstream courts of their heavy case loads.'[26] The task team subsequently developed a draft policy document and held consultations with the National and Provincial Houses of Traditional Leaders in seven Provinces. The final version of the policy framework sets out the primary purpose of the document as 'the harmonisation of traditional justice systems with the Constitution.' It also refers to the need to address the lacuna that has arisen in the law, due to the 2005 repeal of the Black Administration Act, which requires the passing of substitute national legislation to regulate the role and functions of traditional leaders in the administration of justice.[27] The policy document also identifies a role for the DOJ in providing capacity and resources for the functioning of such courts, including the provision of training and administrative support. The policy document served as the basis for the Justice Bill.

This Bill was introduced in Parliament in March 2008 and a call for submissions was made. Public hearings by the Committee were held for four days in May 2008.[28] The majority of submissions were critical of both the substance and the process followed in developing the Bill. The Committee thus established a sub-committee to assist it with the processing of the Bill with regard to further consultation and the determination of the areas of agreement and disagreement in the Bill.[29] The Committee agreed on the need for consultation and on the terms pertaining to this consultation, an aspect that will be discussed later.

With regard to content, the Committee found four broad areas of agreement and five of disagreement by stake holders. As summarised by the Committee, the areas of agreement are: (a) that the Constitution recognises the traditional justice system in terms of section 211(3) of the Constitution, and that the country's justice systems is composed of both the common law

26 Department of Justice and Constitutional Development *Report on the consultation process with the national and provincial houses of traditional leaders on the policy on traditional courts* (unpublished, undated) 3.

27 Department of Justice and Constitutional Development *Report on the policy framework on the traditional justice system under the Constitution* (unpublished, undated) 7.

28 13, 14, 20 and 21 May 2009. See Report of the Portfolio Committee on Justice and Constitutional Development on *The Traditional Courts Bill* [B15-2008] (National Assembly Section 76(1), dated 24 March 2009) (hereafter referred to as the Committee Report). This was a report of the out-going Portfolio Committee to the new Portfolio Committee constituted by the new Parliament after the elections of 22 April 2009.

29 The sub-committee consisted of five representatives each of the traditional leaders, civil society, Members of Parliament and one representative each from the Commission for Gender Equality and the South African Human Rights Commission. See Committee Report 2.

and customary law justice systems; (b) that the customary law justice system has progressive aspects, including its emphasis on restorative justice and reconciliation; (c) the need to align the customary law justice system with constitutional principles; and (d) the imperative for the state to support customary law institutions to ensure their effectiveness.[30] The areas of disagreement are: (a) whether or not the Bill should include a provision allowing people to opt out of the traditional justice system; (b) the constitutionality of the prohibition of legal representation and of the vesting of both executive and judicial powers in one functionary (the traditional leader); (c) the recognition by the Bill of all unofficial structures operational at the community level; (d) the structure of the appeal system from traditional courts; and (e) the effective protection and guarantee of gender equality in relation to the composition of the courts and benefits to be derived from their operation.[31] As a result of these and other areas of disagreement, which are apparent from the submissions, the discussion on the Bill was deferred pending further public participation after the 2009 elections.

However, the outgoing Committee agreed on the terms that the consultation process would follow.[32] These include: who will conduct the provincial public hearings;[33] who will be present at the hearings;[34] the extent of the geographical areas to be covered (i.e. all nine provinces); the location of the hearings (i.e. in the provincial legislatures and in at least one rural area per province); and the need for, and form of, the education process required to raise public awareness before the hearings.[35] In addition, the Committee indicated the time frame within which public consultation would take place after the national elections (i.e. within eight weeks of the new Committee being constituted but not later than the end of August, and also that the Bill would be finalised before December 2009).

The nature of government operations does not, however, guarantee that

30 The Committee Report 4-5.

31 The resolution of these disagreements would, as much as possible, take a consensual approach (see Committee Report 1, 5).

32 See Committee Report 3-4.

33 That is, jointly by the NCOP and National Assembly Justice Parliamentary Committees. The joint Monitoring Committee on Improvement of Quality of Life and the Status of Women would be invited to participate, along with representatives of the traditional leaders, civil society and relevant Chapter 9 institutions and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (see Committee Report 3-4).

34 That is, representatives of the traditional leaders, civil society and the relevant chapter 9 institutions and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

35 This would include workshops in the provinces.

these terms and time frames will be observed by the new Committee. And the out-going Committee was alive to this uncertainty when it stated:[36]

> The Portfolio Committee recognizes that we cannot prescribe to the new Justice Committee that will be constituted after 22 April 2009 elections. Nor is it our intention to be prescriptive. This report is offered as a record of the progress on the Traditional Courts Bill by the end of our term. It is also meant to contribute to avoiding duplication by the new Committee and easing its processing of the Bill.

Clearly, the pangs for the birth of the regulatory framework for traditional courts is not about to end. Firstly, should the new Committee decide to abandon the process suggested by the old Committee a new process will have to be initiated, resulting in further delays in the enactment of the legislation. Secondly, even if the new Committee adopts the consultation terms of the old Committee, the selection of participants in the process may become a source of contention. The questions may include: how will the representatives of traditional leaders be selected? Will representation again be dominated by the National House of Traditional Leaders, to the exclusion of village-level structure leaders? How will the participating rural communities in each province be selected, especially as regards who selects them and the criteria for inclusion and exclusion?

2 *Public participation*

The question of public consultation and participation dominated the issue of process. Civil society groups[37] joined some of the state bodies set up to support constitutional democracy, such as the Commission for Gender Equality and the South African Human Rights Commission, to protest the lack of adequate consultation in relation to the Justice Bill. The Committee acknowledged that there had been insufficient consultation.[38]

Thus, while the DOJ process was essentially targeted at traditional leaders (and not the affected communities), the Commission process was more

36 Committee Report 5.

37 This includes the Kwazulu-Natal Rural Women's Movement (this orgnisation has a membership of more than 40 000 members made up of 510 rural women's Community Based Organisations, and the age of the members ranges from 16 to 84 years (see Submission of the Movement, 6 May 2008, 2); the Kalkfontein B and C Community in Mpumalanga (see submission by Segopotso on behalf of this community 7); the Bafokeng community in Rustenburg; the Congress of South African Trade Unions, the Legal Resources Centre and the Women's Legal Centre.

consultative, including a broader range of people. This fact has also been attested to by one of the biggest women's rural grouping in the country, the Kwazulu-Natal Rural Women's Movement, which acknowledges having participated in the Commission process.[39]

Public participation in law-making processes is both a critical element of democracy and a fundamental right of the communities whose lives will be affected by the proposed law. Carolyn Evans and Simon Evans argue that:

> [I]n established democratic States, legislatures perform several distinct functions. They are representative bodies providing a mechanism by which citizens participate in public affairs and government; they are forums in which governments can be held accountable for their conduct; and they are (more or less) deliberative law-making bodies. In discharging each of these functions they can affect the enjoyment of human rights.[40]

Furthermore, the Constitution enshrines the right to public participation in law-making processes by requiring the National Assembly to facilitate public involvement in the legislative and other processes of the Assembly and its committees. The role of Parliament as a 'deliberative law-making body' has also come under scrutiny in several cases since the advent of the new constitutional democracy.[41] The Court found that Parliament had failed to fulfil its constitutional obligation by its failure to facilitate public participation in the law making-process. In consequence it struck down the two pieces of legislation in question.

According to Czapanskiy and Manjoo, a number of pertinent elements have emerged from this jurisprudence. Firstly, the right to political participation is a fundamental human right based on provisions in both international and regional human rights instruments.[42] Secondly, certain statutes require mandatory public consultations. The relevant factors to be taken into account are: the nature of the Bill; the importance accorded to it by state and non-state actors; requests received for such consultations whether promises had been

39 See Rural Women Movement's submission, above note 37, 2-3.

40 C Evans & S Evans, (2006) 'Evaluating the human rights performance of legislatures, 6 *Human Rights Law Review*, 547 (as cited by K Czapanskiy and R Manjoo. 'The right of public participation in the law-making process and the role of legislature in the promotion of this right' *Duke Journal of Comparative & International Law*, (2008) 19 (1) 1-40, 3.

41 See, for example, *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC); *Minister of Health & Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (1) BCLR 1 (CC). For a detailed discussion of this subject see Czapanskiy and Manjoo, as above note 40.

42 Czapanskiy & Manjoo, above note 40, 6.

made in response to such requests.[43] They furthermore state that 'public consultations in such circumstances would be an indicator of respect for the views of affected people [especially] in contexts where the affected groups have been previously discriminated against, marginalised, silenced, received no recognition and have an interest in laws that will directly impact them.'[44] The third element is the notion of restoration of dignity and the according of respect to citizens by the government. This notion served to strengthen the views contained in the majority decision that a special duty existed as regards public participation. The duty has many components including: providing information, providing access to Parliament, providing an opportunity to submit representation and submissions, providing a forum for public hearings for oral submission, and summoning people to Parliament.

In *Doctors for Life International v Speaker of the National Assembly and Others*, the Constitutional Court recognised two aspects of the duty to facilitate public involvement. It stated that '[t]he duty to provide meaningful opportunities for participation in the law-making process ... [and] the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.'[45] Hence, the Court asserted that '[o]ur constitutional framework requires the achievement of balanced relationship between representative and participatory elements in our democracy.'[46]

Against the backdrop of the constitutional right to participation and the relevant jurisprudence, the concern of interested groups about the lack of consultation in the development of the Justice Bill seems legitimate. The Justice Bill seems to fall foul of the constitutional mandate on public participation. The colonial and apartheid marginalisation of customary law and its institutions; the lack of full recognition of this system of law, as well as the past discrimination of the black population under the Black Administration Act are among the relevant factors. Moreover, the most affected people by the Bill, namely, rural communities and women have been among the objectors to the Bill on account of inadequate consultation.[47]

The issue of inclusion and exclusion of rural communities in the consultation process deserves special mention. Because of the diversity in the 'living' customary law systems, representing different ethnic groups, the ethnic groups that are excluded from the consultation will have been deprived of

43 As above, 9.
44 As above.
45 Above note 41, para 129.
46 As above, para 122.
47 See, for example, the Bafokeng and the Women's Legal Centre submissions.

their right to define the traditional courts system that will regulate their lives. The exclusion also means an imposition on the excluded communities not only of the state or official customary law structures, but of the customary laws of other ethnic groups that are accorded the privilege of inclusion. However, we do well to remember that the Constitutional Court has, by recognising the concept of "living" customary law,[48] implicitly recognised that this system of law is defined by the people who practice it. No customary law group (ethnic group) can, therefore, define and give their customary law to other communities with different systems of 'living' customary law, let alone without consultation.

In our view, the Justice Bill, if challenged on account of the lack of consultation, would not pass constitutional muster. Thus once the government chose to abandon the Commission process and its Bill (for whatever reason), the Committee's decision to call for further consultation on the Justice Bill was the only appropriate action. However, this decision will inevitably lead to further delays in the enactment of the Bill. Equally, the controversies concerning the content of the Bill offer little hope that the Bill would be passed quickly if it were to be brought back to Parliament in its current form. A discussion of some of the issues in the next section highlights the nature of disagreements with the substance of the Bill that will require to be attended to before the Bill can pass into law.

B. Content of the Justice Bill

The Justice Bill differs in many ways from the Commission Bill. In this section we discuss some of the controversial provisions of the Justice Bill. We will make reference to the Commission Bill where necessary, as well as to the various submissions to the pre-elections Committee.[49]

1 *Gender Equality*

Among the core and founding values of the South African Constitution are the principles of equality and non-sexism, which are also entrenched in the Bill of Rights.[50] Critics of the Justice Bill are concerned about gender equality in

48 See *Exparte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744, 1996 (10) BCLR 1253 para 197; *Mabena v Letsoala* 1998 (2) SA 1068 (T); *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 (CC) (2005 (1) BCLR 10) para 111.
49 For ease of reference, we will simply refer to the submission by its author, with or without a page number as some of them are not paginated.
50 See the Constitution of the Republic of South Africa ss 1, 9 respectively.

the constitution of the traditional courts and the insensitivity of the Bill to this issue.[51] In comparison to the Commission Bill, which went so far as to propose three alternative positions on the gender equality obligations relating to the composition of the traditional courts,[52] the Justice Bill does not specifically address the gender composition of traditional courts. Section 9 of the Bill requires the presiding officer to ensure that 'women are afforded full and equal participation in the proceedings.' But it does not impose an obligation specifically and formally to include women in the 'forum of community elders' charged with dispute-resolution responsibility under Section 1 of the Bill. Likewise, while the Bill affirms the definition of traditional councils as defined in the Framework Act (and accordingly, its requirement that 30% of the council be women and 40% elected), it is not clear, as presently drafted, whether the Bill implies that council members will comprise part of the traditional court body.

Furthermore, the entitlement of women to 'full and equal participation in the proceedings'[53] referred to above does not guarantee their right to participate fully in all aspects of the proceedings. Consequently, this kind of provision may enable women to appear as witnesses but not as active participants in the decision-making process of the court.[54] Clearly, the possible exclusion of women from acting as traditional court officials and from full participation in all aspects of litigation also has the potential of denying their right to define and develop the norms of customary law that govern their lives on equal terms with their male counterparts. Litigation processes are important arenas for the definition of norms that regulate customary law communities.[55]

Thus from a gender equality perspective, the Bill's principle of the need, in the application of the anticipated Act, 'to align the traditional justice system with the Constitution in order for the said system to embrace the values enshrined in the Constitution including ... the achievement of equality and the advancement of human rights ... '[56] is, apparently, an empty promise.

51 See especially the submission by T Nthlapo.

52 See s 4 of the Commission Bill. It is claimed that this section was one of the two strongly debated in the Commission's consultation process, and that this section was the product of 'emerging consensus' among the interested parties (see Nhlapo's submission).

53 S 9(2(a) (i).

54 Legal Resources Centre (LRC) submission 18.

55 See G Woodman (1988) 'How state courts create customary law in Ghana and Nigeria' in BW Morse & GR Woodman (eds) *Indigenous law and the state* (Dordrecht: Foris Publications, 1988) 181-219.; CN Himonga *Family and succession laws in Zambia: Developments since independence* (Munster: Lit Verlag, 1995) 13-33.

56 See S 3(1) (a) (ii) of the Bill.

2 *Procedural link between the informal and formal traditional justice system: gender perspective*

The absence in the Bill of a procedural link between traditional courts and informal dispute resolution mechanisms is, in our view, a matter of concern, especially from a gender justice perspective. This view is furthermore held in the light of the suggestion by some traditional communities for a provision in the Bill that all matters be required to be dealt with by informal tribunals before they go to a traditional court. The communities holding this position see this approach as a way of involving clans in the initial assessment and mediation of cases before they can be referred to the Traditional Court.'[57] We submit that the absence of a procedural link between the formal and informal traditional systems in these and other circumstances may prejudice vulnerable women in two respects. Firstly, not all customary practices generated and applied by, for example, the semi-autonomous social field of the family are equitable and consistent with the constitutional principle of non-discrimination.[58] Secondly, it would appear that there are instances in which the outcome of disputes in state courts is influenced by outcomes of dispute processing at the informal level to the disadvantage generally of women.

Himonga's study on the administration of customary law deceased estates in Zambia may be used to illustrate this point. The study revealed that in some cases, family forums excluded widows from decision-making about administration of their husbands' estates in accordance with customary law. The matters upon which the family forums had pronounced themselves found their way into state courts for various reasons, including the need to obtain a formal order of appointment of an administrator to enable the family to administer those parts of the estate connected with official institutions. In contrast to family forums, in most cases the courts hearing these matters took into account considerations that were favourable to widows and their children. However, because of the interposition of factors such as ignorance of the law and legal procedures and the fear of alienation on the part of women, when the matters concerned came before state courts the women presented their cases in ways that reinforced the family decisions. The result was that the

57 See submission by the Bafokeng community 16.

58 See the Department of Justice and Constitutional Development Status Quo Report on Traditional Leaders 19 (as cited by the LRC submission 17), which states that informal dispute resolution mechanisms such as sub-headmen, headmen, chiefs and clan leaders impose restrictions on the participation of women and youth in the traditional court. The Kwazulu-Natal Rural Women's Movement also referred to instances in which widows in mourning dress were not allowed to participate in meetings.

courts reached exactly the same decisions as the family in circumstances where they would probably have reached different decisions that were favourable to the widows concerned.[59]

One way of guarding against this gender injustice emanating from informal justice systems creeping into, and being reinforced in, the formal sphere would be a provision in the Bill requiring the traditional courts to make a preliminary enquiry into the types of settlement or handling of the dispute in the informal justice system prior to it coming to the traditional court. The Bill should further require traditional courts to take cognisance of the findings in the above enquiry in its decision, as it deems just, taking into account the need to protect the rights and interests of vulnerable groups in the community. In the context of the constitutional framework,[60] what is 'deemed just' would, presumably, include the eradication of unconstitutional customary practices applied by the informal justice forum concerned that are detriment to the vulnerable party to the dispute. This approach would also be in line with the guiding principles of the Bill aimed at the alignment of the 'traditional justices system with the Constitution in order for the said system to embrace the values enshrined in the Constitution ... [and] to ensure the "'achievement of equality and human rights and freedom."'[61]

Thus while the recognition of informal customary traditional justice structures is a legitimate, constitutionally guaranteed expectation as shown in the next section, it is necessary to ensure that this expectation does not exclude the protection of the interests and rights of women and other vulnerable members of the customary law communities from justice delivery systems. As already stated, one way of ensuring this is making provision in the Bill for an appropriate link between informal justice systems and traditional courts. The latter, being a state institution is, theoretically, more readily held accountable in its administration of justice to the Constitution and its values than the private informal forms that exist in the traditional sector. The proposed training of traditional court officials[62] will, presumably, enhance these courts' accountability in this regard.

59 See CN Himonga 'Protection of widows and administration of customary estates in Zambian courts' in D Ludwar-Ene & M Reh (Eds) *Gross-plan sur les femmes en Afrique Africanische frauen im blick Focus on women in Africa* Bayreuth Africa Studies Series 26 (Bayereuth: Eckhard Bretinger, 1993) 189-195, esp. 179-181.

60 See, for example, 39(2) of the Constitution which requires every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when developing the common law or *customary law* (emphasis supplied).

61 See section 3(2) (a) (b) of the Justice Bill.

62 Section 4(5), read with section 21(1) (b), requires the training of traditional leaders designated as presiding officers of traditional courts. Presumably, this training will include some aspects of the Bill of Rights, including those of non-discrimination and dignity.

3 *Living and official customary dimension of the institutional structure of traditional courts*

The institutional arrangement of the courts constitutes a significant point of contention relating to the constitution of traditional courts. This point boils down to the living and official customary law dimensions of the structure of these courts. As already pointed out, the Constitution has recognised the concept of living customary law. Yet the Bill completely ignores the structures that represent 'living' customary law in its constitution of traditional courts. The LRC, in particular, has essentially argued, and in our view correctly, that when read together with section 28 of the Traditional Leadership and Governance Framework Act,[63] s 4(1) of the Bill entrenches the colonial/apartheid state-constituted structures.[64] Thus official customary law is recognised at the expense of, and to the exclusion of, 'living' structures of the communities. In this regard, the LRC stated:

> The Bill fails to recognize the social reality of the salient customary law structures that continue to exist outside of approved and imposed colonial and apartheid structures and fails to recognise that customary dispute resolution commonly occurs at the level of village councils or headmen's courts, (i.e. at levels "lower" than the traditional council level at which the Bill will allow for the recognition of traditional courts or headmen's courts. ... The Bill entrenches and reinforces the power of state-sanctioned traditional councils and silences the other voices currently engaged in the definition and adjudication of customary law.[65]

The failure to recognise the 'living' justice structures is difficult to comprehend in the light of the fact that recent research has found these structures to possess positive attributes in relation to issues of accountability, negotiation of power relations at local levels and definition of authentic versions of

63 Act 41of 2003. This section states: 'Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been recognised as such. ... ' Section 4(1) of the Bill states: 'The Minister may ... designate a senior traditional leader recognized as such by the Premier, as is contemplated in the Traditional Leadership and Governance Framework Act, as presiding officer of a traditional court for the area of jurisdiction in respect of which such senior traditional leader has jurisdiction.'

64 See LRC Submission generally 10-15.

65 LRC submission, 10-11, 12. For this reason, some communities in former homelands have also added their voices in protesting against the imposition by the Bill of traditional court structures that are different from their versions of customary law. See submission by one of the leaders of the Kalkfontein B and C community on his own behalf and that of his community 5.

customary norms.[66] Moreover, the DOJ itself seems to agree with this assessment.[67] The positive attributes of the 'living' traditional justice system clearly commend their inclusion in the recognised traditional justice system if the Bill is to honour its promise of restoring the dignity of customary law and its users in the post apartheid justice system.[68]

Equally important to this critique is the absence in the Justice Bill of the definition of customary law, as though this were an uncontroversial concept.[69] This omission contrasts with the provisions made by other major legislation dealing with customary law under the new constitutional era, such as the Recognition of Customary Marriages Act.[70] This Act defines customary law as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.'[71] The Commission Bill was also careful to attempt a definition of customary law that encompasses the customary law practiced by the people.[72]

Thus, as it stands, the Bill not only undermines 'the dynamics that mediate power and contribute to accountability in rural areas,'[73] but also the process of the definition of an authentic version of customary law and values by the people who use this system of law. The explicit and unreflective imposition by the Bill of common law notions of administration of justice, such as *audi alteram partem rule and nemo judex in propria causa* rule[74] (and for that matter in a non-official language![75]) serves to underscore this point.

66 See B Oomen *Chiefs in Africa* (New York, Oxford: James Currey, UKZN Press and Palgrave, 2005) as cited by the LRC submission 7.

67 The DOJ's Constitutional Development's 1999 Executive Summary of the Status Quo Report on Traditional Leaders and Institutions is quoted as follows: 'It was generally held that these structures [headmen's courts] make an essential contribution towards the effective functioning of a traditional community. ... [They] also ensure that a chief does not rule in an autocratic manner but acts on the advice of relatives and councilors' (quoted by LRC submission 12).

68 See section 3(1) (a) (i) of the Bill.

69 For a discussion of the contestation on the meaning of customary law see, for example, C Himonga & R Manjoo 'What's in a name? The identity and reform of customary law in South Africa's constitutional dispensation' in M O Hinz (ed) *The shades of new leaves governance in traditional authority: A Southern African perspective* (Berlin: Lit Verlag, 2006) 329-350.

70 Act 120 of 1998.

71 Section 1 of the Act. See also cases cited in note 48, above.

72 See section 1 of the Traditional Courts Bill 2003. See also the proposed Reform of Customary Law of Succession and Regulation of Related Matters Bill (B10-2008) section 1, which defines customary law in the same manner as Act 120 of 1998, above note 71,

73 LRC submission 5.

74 See section 9(2) (b) of the Bill.

75 Latin is not included in s 6 of the Constitution that defines South African official languages; neither is it one of those languages that must be promoted by the South African Language Board (see section 6 (5) (b)) of the Constitution.

4 *The appeal system*

The Appeal provisions in the Justice Bill have been criticised for, among other things, undermining the right of rural communities to have their disputes resolved according to the system that is familiar to them[76] and, it may be added, according to their cultural rights enshrined in the Constitution. [77] While the Commission Bill provides for a delayed encounter with common law courts on appeal,[78] the Justice Bill makes no mention of an internal appeals process within the traditional justice system (i.e. from lower traditional courts to higher traditional courts). Instead, appeals from the traditional courts go straight to magistrates courts (in this context, the common law, western courts).[79] It has been argued that the Commission Bill's provisions were motivated by a 'desire to preserve the integrity of customary law and traditional modes of adjudication by allowing cases to travel upward in a hierarchy insulated, at least in its early stages, from the influence of common law and western modes of adjudication [and the normative systems they apply].'[80] This argument is bolstered by the fact that magistrate courts and superior courts elsewhere on the continent have been found to interpret customary law rigidly on appeal, due to the influence of their black letter training and the law they apply. As a result they apply norms of 'customary law' that are strange to the litigants whose customary law is in question.[81]

Furthermore, Nhlapo has maintained that the combination of the concept of Registrar of Customary Courts[82] and the Commission Bill's system of appeal was intended:

> [T]o preserve the constitutional rights of a rural person to have his or her matter decided in a system that is familiar, non-alienating, inexpensive and accessible. For this to happen, the case needs to stay within the customary law system for a significant period before being transferred outside of that system. The immediate jump from the customary law world to the magistrate's court whenever a party is aggrieved by the decision of a customary court does not do justice to this right.[83]

76 See submission by Nhlapo.

77 See sections 30 and 31 of the Constitution.

78 These provisions are contained in section 27 of the Bill.

79 See section 13 of the Bill.

80 Submission by Nhlapo 2.

81 See Himonga, 1995, above note 56; C Himonga 'Property disputes in law and practice: Dissolution of marriage in Zambia in A Armstrong & W Ncube (eds) *Women and law in Southern Africa* (Harare: Zimbabwe Publishing House) 56-84.

82 Section 24 and 25 of the Commission Bill.

83 Nhlapo's submission 2.

It is noteworthy that the simplicity and other positive procedural attributes employed by traditional courts, has been affirmed by the High Court in *Bangindawo & Others v Head of the Nyanda Regional Authority & Another*.[84] In this case, the Court applauded the facts that litigants in traditional courts appear before people who are known to them, that 'their own language is spoken during the conduct of the proceedings and [that] there is, therefore, no danger of a miscarriage of justice occasioned by inaccurate interpretation something that happens with disturbing frequency in other courts.'[85] Accordingly, the Court concluded that 'the environment [in traditional courts] is more conducive to the important perception that justice should be seen to be done.'[86]

The Court, furthermore, addressed the argument of the applicant against the truncated form of procedure of the traditional courts. It dismissed the comparisons made between these courts and common law courts as unhelpful. Madlanga J stated:

> In my view, such an approach does not assist at all. It amounts to no more than comparing apples and potatoes. The elaborate procedure that applicants emphasise can be criticised for providing fertile ground for the raising of technical points which are not infrequently upheld by the courts. On the other hand the less elaborate procedure of the regional authority courts has the advantage of leaving less room for such technicalities and of having the real substance of disputes dealt with and laid to rest.[87]

In light of the above, arguments in favour of the Commission's appeal model, as opposed to that of the Justice Bill, seems to be vindicated. Further, the Commission Bill's appeal provisions apparently represent consensus reached among interested parties on this issue. The issue of the appeals structure is said to be one of the two areas, along with that of gender equality, which generated the strongest debates during the Commission's public consultations. [88]

84 1998 (3) SA 262 (Tk) 279-80.
85 As above, 279.
86 As above.
87 As above 279-280.
88 See Nhlapo's submission 2.

5 *Jurisdiction of the courts*

The Bill is silent on whether the courts have jurisdiction over succession, domestic violence and maintenance matters, amongst others. In relation to succession issues, in the case of *Bhe v Magistrate Khayelitsha*,[89] the Constitutional Court abolished the customary law of intestate succession and replaced it with the Intestate Succession Act[90] (pending the enactment of a law regulating this area of customary law). Parliament has not as yet come up with any legislation on this subject although there is a Bill under consideration.[91] This means that the legal position is still governed by *Bhe*, according to which traditional courts have no jurisdiction any more to deal with intestate succession and inheritance.

Interestingly, however, some traditional communities have argued in their submissions to the Committee that 'traditional courts must have, as part of their jurisdiction, the competence to deal with and adjudicate on matters arising from customary [succession] law.'[92] In their opinion, intestate succession 'is still one of the competencies of the traditional courts.'[93] Implicitly, this submission not only shows that despite *Bhe*, customary intestate succession law is still alive in some, if not all, rural communities, and that it is still applied by traditional courts at different levels. More importantly for our present purposes, if the views of the community that made this submission represent those of other rural communities, then the issue of the jurisdiction of traditional courts with regard to the law they should apply will raise tremendous and prolonged debate in the anticipated post-election hearings on the Bill. Needless to say, this particular issue re-opens the old and contentious debates about the application and validity of intestate customary succession law that have formally already been settled by the Constitutional Court. It is also noteworthy that the application of customary intestate succession law and its replacement by the common law are issues about which traditional leaders have registered strong opposition in the past.[94]

89 2005 (1) SA 580 (CC) (2005 (1) BCLR 10.
90 Act 81 of 1987.
91 Above note 72.
92 Submission by the Bafokeng traditional community 5. Interestingly, this submission was prepared by a firm of attorneys that had been instructed by the Royal Bafokeng Nation (Bafokeng) to review and comment on the Bill, and it was forwarded to the Portfolio Committee by these Attorneys. This might be an indication of how important customary law communities view the subject of the Justice Bill.
93 As above.
94 On the opposition of traditional leaders to the reform of the law of intestate succession that sought to replace this system of law by the common law (i.e. the Intestate Succession Act) prior to

As noted above, an equally contentious issue regarding the jurisdiction of the courts is the fact that the Bill does not expressly exclude domestic violence and maintenance from the jurisdiction of the courts. It has been argued that these issues should be excluded on account of, amongst others, the incapacity of the traditional courts to deal with them in view of the fact that these matters are regulated by legislation.[95] The reasons articulated for the exclusion of these matters, and also the reality on the ground, may lead to the generation of emotive arguments among traditional leaders at different levels, about the imposition of common law on their ways of dealing with the issues in question.

6 *Legal representation*

The issue of legal representation has also raised many heated debates. The Justice Bill explicitly prohibits parties from employing legal representation in traditional court proceedings.[96] This provision is typical of most African statutes regulating traditional courts.[97] It is attributed to the informality of traditional courts and the need to preserve this feature to retain their accessibility to the rural people they are mostly intended to serve. The constitutionality of this prohibition has already arisen in two cases in South Africa since the advent of the Constitution.[98]

In both cases, the High Court found the prohibition of legal representation in criminal matters before traditional courts to be unconstitutional.[99] It is submitted that this legal position should be maintained in view of the seriousness of the sanctions the traditional courts have power to impose under the Bill. These include the forfeiture of a benefit in terms of customary law.[100] This sanction may negatively impact a person's rights at a substantive level, for example, his or her access to resources including land and family networks. A different view has, however, been taken in relation to representation in civil cases in favour of the prohibition. Bennett has, for example, argued in favour of the prohibition on two grounds. Firstly, there is no constitutional right to representation in civil cases. And, secondly, the parties in customary law civil

Bhe, see Himonga and Manjoo, above note 69, 333.

95 See especially Women's Legal Centre submission 21-25,

96 Se s 9(3).

97 See M Chanock *The making of South African legal culture 1902-1936. Fear, favour and prejudice*, (Cambridge: CUP, 2000) 296-8 as cited by TW Bennett 'Traditional courts and fundamental rights' in Hinz, above note 69, 157-166, at 161.

98 See *Bangindawo above note 84 and Mhlekwa v Head of the Western Tembuland Regional Authority* 2001 (1) SA 574 (Tk).

99 See *Bangindawo* as above 277.

100 See section 10(2) (i).

litigation can fairly be presumed to know the customary law and procedures in traditional courts.[101] In our view, this is a correct position generally, particularly in view of the need to balance the interests of justice in relation to access to courts and, also in circumstances where the majority of people have no ready access to other courts in the legal system. However, the legislature would have to reconsider the power of the traditional court to make orders having a serious impact, such as the forfeiture of benefits in civil matters and in relation to damages arising from criminal proceedings.[102]

IV CONCLUSION

This paper has shown that there are deep-seated, largely legitimate, issues that have bedevilled the passage by Parliament of a legal framework for the regulation of traditional courts. Some of the issues have serious implications for the constitutionality of the Bill. This justifies the need, even delay, in the enactment of legislation, in order for the government to rectify them before they rush to Parliament with the current Bill. These issues relate to both substantive matters and the process followed in the drafting of the proposed law. With regard to process, the paper submits that delays in the passage of legislation could have been averted if the DOJ had adopted and furthered the Commission process instead of initiating another legislative process of its own. Further, it has been shown that prominent stakeholders, such as women's groups and rural communities generally view the Commission's consultative process favourably. Hence, the paper has also intimated that the gestation period of the traditional courts regulatory framework could be reduced, should the government revert to the Commission Bill, and use that as a starting point for public participation at the parliamentary level.

The paper has also demonstrated that the content of the Justice Bill would equally have created great obstacles to the passage of the Bill in its present form. Therefore, unless these are solved and agreed upon speedily, which is unlikely, we will not see a legal regulatory framework for traditional courts for years to come. The debates that have already taken place around issues of substance in relation to both the Commission Bill and the Justice Bill, and the experience gained thus far, could, however, add value to the legislative process for the passage of relevant and acceptable legislation. But, any attempts by the government to 'fast-track' the Bill through Parliament and to ignore these issues is almost guaranteed of a constitutional challenge.

101 Above note 98, 162.

102 See section 10(2) (i).