SUBMISSION TO THE NATIONAL COUNCIL OF PROVINCES ON THE TRADITIONAL COURTS BILL [B 1-2012]

By

National Research Foundation Chair in Customary Law

Chuma Himonga

(Professor of Law, Faculty of Law University of Cape Town)

1. Introduction

I welcome the opportunity to make this submission[1] to the National Council of Provinces (NCOP) regarding the Traditional Courts Bill.

As in many other African countries, traditional courts in South Africa play a significant role in dispute resolution, especially among rural communities.

However, the transformation of these institutions is necessary, in order to make them part of the democratic systems of governance in post-colonial states. The colonial states (and in the case of South Africa, the apartheid political and legal systems) transformed African traditional authorities and judicial institutions into their intermediary, administrative institutions.[2] These institutions were never designed to be responsive to the communities they purported to be a part of. If anything, they distorted living customary law (i.e. the customary practices communities observe and recognise as norms or rules regulating the lives of their members) within which people negotiated their power and access to resources and defined norms of accountability by those in positions of authority to their communities.[3]

With regard to the transformation of traditional institutions, a study on traditional authorities in Africa has identified a number of principles that are worthy of note. They 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

University of Cape Town, Faculty of Law, Private Bag X3, Rondebosch, 7700, Cape Town, South Africa
Office 4.39, Kramer Law Building, Middle Campus, Cape Town, South Africa
Phone: +27 21 650 2189, **Fax:** +27 21 650 3431, **E-mail:** nkanyiso.sibanda@uct.ac.za
www.customarylawchair.uct.ac.za

development of mechanisms that reflect the democratic practice of checks and balances, applicable to both the state and the chiefs.[4]

In recognition of the importance of traditional institutions, the South African Law Reform Commission set out to investigate traditional courts and the judicial functions of traditional leaders in 1999, with a view to reforming the institutions concerned in the context of the values of the new constitutional order. In 2003, the Commission finalised its work on this project and presented a report and a draft Bill (the Commission's Bill) to the Minister of Justice and Constitutional Development. However, this Bill was not brought before Parliament. Instead the Department of Justice commenced another legislative process leading to a new Bill (the *current* Bill).

This submission is a response to the call by the Department of Justice and Constitutional Development under General Notice of 901 of 2011, which announces the intention of the Select Committee on Security and Constitutional Development, on request of the Minister of Justice and Constitutional Development, to introduce the *current* Bill in Parliament in 2012.

2. Submissions

At the outset, I would like to commend the African National Congress (ANC) for the fact that as early as 1988, it recognized, in its *Constitutional Guidelines* for a Democratic South Africa, the need to transform the institution of hereditary rulers and chiefs and to bring it in line with the democratic principles embodied in the Constitution.[5] This is a worthwhile stance by the ANC, one which parliamentarians must not lose sight of in searching for a model of traditional courts in a democratic South Africa.

I also recognise that the *current* Bill and the debates around it represent tensions enmeshed in codifying and reforming customary law in the post-apartheid legal pluralistic state. These tensions exist 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.[6] Needless to say a careful balancing of the interests represented by these tensions is critical to the crafting of legislation for the regulation of traditional courts.

Equally important to the search for a workable legal framework for traditional courts is the need to recognise the problem associated with legislating upon a living, flexible and evolving system of customary law and thereby codifying or ossifying this system of law, contrary to its nature. Living customary law has been recognised by the Constitutional Court.[7] It follows that the ossification living

customary law through legislation is contrary to the spirit of the Constitution and the new constitutional dispensation.

In my view, the problem under consideration calls for a complete paradigm shift in the methods of reforming customary law. What is required are methods that recognise that legislation may not be used to reform customary law in a way that codifies it (i.e. in the same way as legislation is used to reform western law). Instead, it should be used to facilitate the development or evolvement of living customary law, taking into account the relevant constitutional imperatives.

My submissions in the following paragraphs advocate for legislation that addresses the tensions and problem mentioned above.

2.1. Restoration of the South African Law Commission Bill

I submit that the South African Law Commission's Bill should be used as a basis for legislation to reform and regulate traditional courts. I further submit that this Bill be introduced in Parliament instead of the current Bill, or that the latter be redrafted and framed on the model of the former.

In support of the reinstatement of the Commission's Bill, it is worth recalling that this Bill was the result of an 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 view of the legislative process, there is no apparent reason why this Bill should not have been brought before Parliament.

Furthermore, the Commission's Bill achieves what the current Bill fails to do in several important areas. In this respect, the Commission's Bill provides that a reasonable proportion of women should be councillors (as representatives of the community) and, additionally, it proposes three alternative positions on the gender equality obligations relating to the composition of the traditional courts. In contrast, the current Bill does not specifically address the gender composition of traditional courts. Section 9 of the Bill merely 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 composition of the court.

It is also noteworthy that while the current 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 meaning of 'full and equal participation in the proceedings' is obscure. This is so because the Bill does not explicitly provide for the right of women to participate fully in decision-making, as well as in other aspects of the proceedings. Clearly, the possible exclusion of women from acting as traditional court officials and from full participation in all aspects of litigation 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.[8]

Thus from a gender equality perspective, the current Bill's principle (in section 3(1)(a)) of the need '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…'[9] is an empty promise.

2.2 Recognition of Informal Dispute Resolution Mechanisms

Under this paragraph, I submit that any legislation for the regulation of traditional courts should recognise informal dispute resolution mechanisms: family councils, clans and headmen. These mechanisms are important arenas for the generation of norms of living customary law, especially in the areas of marriage, succession and inheritance and land tenure. Thus any exclusion of these informal mechanisms from the traditional justice system fails to recognise an important source of living customary law embedded in local community life.

Furthermore, failure to recognise the 'living' justice structures in the legal framework for traditional courts would be difficult to comprehend in light of the fact that recent research has found that these structures do possess positive attributes with regard to accountability, negotiation of power relations at local levels and definition of authentic versions of customary norms.[10] The positive attributes of the 'living' traditional justice system clearly commend their inclusion in the recognised traditional justice system.

Related to the recognition of informal local community-based mechanisms of dispute resolution is the issue of the definition of customary law. The concept of customary law is controversial.[11] Any legislation that purports to deal with customary law must, therefore, define it. For this reason, the Commission was careful to include a definition of customary law that encompasses the customary law practised by the people.[12] Similarly, other major legislation dealing with customary law under the new constitutional era, such as the Recognition of Customary Marriages Act, [13] and the Reform the Customary

Law of Succession and Related Matters Act[14] include a definition of customary law that attempts to link this system of law to its source, i.e. the people who live under it. Thus, the Acts concerned define 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.'[15] In contrast, the current Bill is silent on the definition of customary law.

Taking into account the foregoing observations, I submit that, as it stands, the current Bill undermines 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 alterum partem rule* and *nemo index in propria causa* rule[16] (and for that matter in a non-official language![17]) serves to underscore this point. The current Bill must, therefore, not be passed into law as it stands.

2.3. Implications of Procedural Links Between the Formal and Informal Traditional Justice System for Gender Justice

Along with the recognition of informal dispute mechanism discussed in the preceding paragraph is the need for procedural links between these mechanisms and the traditional court that is to be established. It must be stated at the outset that the proposed link is premised on the assumption that the traditional court will be capacitated, through appropriate training of its presiding officers and other personnel, to apply the constitutional principles and values, especially the core principles of dignity, equality and non-discrimination.

The proposed links between the formal and informal traditional justice system are that: (a) any legislation regulating traditional courts should contain a procedural provision 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; and (b) The Bill should require a traditional court to take cognisance of the findings in the above enquiry in its decisions, as it deems just, taking into account the need to protect the rights and interests of vulnerable groups in the community in accordance with the principles, for example of equality, non-discrimination and equity.

The motivation for the procedural links under discussion is that there is a possibility, as is evident in studies from other African countries, that the absence of a procedural link between the formal and informal traditional justice systems may prejudice vulnerable members of the community, including women, in two respects. Firstly, not all customary practices applied by informal dispute resolution

mechanisms are equitable or consistent with the human rights principles of equality and non-discrimination. Secondly, 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 general disadvantage of women.[18]

In sum, the proposed procedural links are aimed at guarding against gender and other injustices emanating from the informal justice systems creeping into, and being reinforced, in the formal justice system through appeals from traditional courts where the formal and informal process of dispute resolution intersect.

2.4. The Appeal System

One of the notable shortcomings of the appeal provisions of the current Bill is that it undermines the right of rural communities to have their disputes resolved according to their cultural rights as enshrined in the Constitution. [19] The Commission's Bill attempts to solve this problem by providing for a delayed encounter with common law courts on appeal. In this respect, it provides for an appeal system in which cases move from lower traditional courts to higher traditional courts. [20] Unfortunately, the current Bill makes no mention of an internal appeals process within the traditional justice system. Instead, appeals from the traditional courts go straight to magistrates courts (in this context, the common law, western courts).[21]

This argument is bolstered by studies of magistrates' courts and superior courts elsewhere on the continent. These studies have found that when the courts concerned hear appeals from customary courts (i.e. traditional courts), they apply notions of customary law whose content is influenced by their black-letter law training, as well as by the law derived from western law that they apply in exercise of their primary jurisdiction. As a result they apply norms of 'customary law' that are strange to the litigants before them.[22]

2.5. Legal Representation

The current Bill explicitly prohibits parties from employing legal representation in traditional court proceedings.[23] This provision is typical of most African statutes regulating traditional courts. 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.[24]

In both cases, the High Court found the prohibition of legal representation in criminal matters before traditional courts to be unconstitutional.[25] It is submitted that this legal position should be maintained if traditional courts are given jurisdiction that seriously affects the rights of citizens, for example, the power the traditional courts have under the *current* Bill to make orders for forfeiture of a benefit in terms of customary law. [26] Such orders may negatively impact people's rights at a substantive level, for example, their access to resources, including land and family networks.[27].

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[28] and, secondly, the parties in customary law civil litigation can fairly be presumed to know the customary law and procedures in traditional courts.[29] In my 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, I submit that this view cannot be sustained where the proposed legislation gives the traditional court power to make orders having a serious impact on people's rights, as already stated.

3. Conclusion

In conclusion, I would like to underscore the point that the current Bill is flawed in many respects, and that it does not go far enough in resolving 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. Furthermore, the Bill does not adequately address the problem of legislating upon a living system of customary law and incorporating a philosophy of flexibility that encourages the evolvement of customary law from the communities themselves. The Bill should, therefore, not be passed into law as it stands. The Commission's Bill makes a serious attempt to address these tensions and problem. It should, therefore, form the basis of a legislative framework for regulating traditional courts.

Notes

[1] For a detailed discussion of some of the issues raised in this submission, see C Himonga and R Manjoo (2009). 'The Challenges of Formalisation, Regulation, and Reform of Traditional Courts in South Africa'. Malawi Law Journal 3(2): 157-181. I acknowledge R Manjoo and sources used in that paper that may not be adequately acknowledged in this submission due to its nature.
[2] DI Ray & EABVR van Nieuwaal 'The New Relevance of Traditional Authorities in Africa' (1996) 37 & 38 *Journal of Legal Pluralism & Unofficial Law* 8 (citing Von Trotha).
[3] See generally, Martin Chanock, *The making of South African legal culture, 1902-1936: fear, favour and prejudice,* chapter 11 "Creating the Discourse: Customary law and Colonial Rule in South Africa" 243-72.
[4] Ray &van Nieuwaal note 2, p 9.
[5] See generally TW Bennett and C Murray 'Traditional leaders' in S Woolman et al (eds) *Constitutional Law of South Africa* (2006) 26-67.
[6] Himonga and Manjoo note 1.
[7] See C Himonga 'The Future of Living Customary law in African Legal System in the Twenty-First Century and beyond, with Special Reference to South Africa' in J Fenrich et al (eds) *The Future of Customary Law* (2011) 31.
[8] 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* (1988) 181-219.
[9] See S 3(1) (a) (ii) of the Bill.
[10] See generally B Oomen (2005) *Chiefs in Africa*.
[11] 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) (2006) *The Shades of New Leaves Governance in Traditional Authority: A Southern African Perspective* 329-350.
[12] See section 1 of the Commission's Bill.
[13] Act 120 of 1998.
[14] Act 11 of 2009.
[15] Section 1 of the respective Acts.
[16] See section 9(2) (b) of the Bill.
[17] 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 s 6 (5) (b) of the Constitution.
[18] See C Himonga (1993) '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, 189-195.
[19] See sections 30 and 31 of the Constitution.
[20] These provisions are contained in s 27 of the Bill.
[21] See s 13 of the Bill.
[22] See, for example, 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* () 56-84.
[23] Se s 9(3).
[24] I.e. *Bangindawo v Head of the Nyanda Regional Authority 1998 (3) SA 262 and Mhlekwa v Head of the Western Tembuland Regional Authority* 2001 (1) SA 574.
[25] See *Bangindawo,* at 277.
[26] See s 10(2) (i).
[27] For example, where the order concerned consists of the banishment, according to customary law, of an individual from the village of his or her family.
[28] TW Bennett 'Traditional Courts and Fundamental Rights' in M O Hinz (ed) (2006) *The shades of New Leaves Governance in Traditional Authority: A Southern African Perspective 157-166.*
[29] Bennett, n28 at 162.

University of Cape Town, Faculty of Law, Private Bag X3, Rondebosch, 7700, Cape Town, South Africa
Office 4.39, Kramer Law Building, Middle Campus, Cape Town, South Africa
Phone: +27 21 650 2189, **Fax:** +27 21 650 3431, **E-mail:** nkanyiso.sibanda@uct.ac.za
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