SUBMISSION IN RESPECT OF THE TRADITIONAL COURTS BILL

1. Introduction

1.1 We, Professor Thandabantu Nhlapo and Professor Tom Bennett, hereby make this submission in respect of the Traditional Courts Bill currently before Parliament.

1.2 We are both professors of law at the University of Cape Town who have spent the greater part of our lives working, researching and writing in the area of customary law. We both also have extensive teaching experience in the subject.

1.3 Of particular relevance to this submission is the fact that we were both intimately involved in the work of the South African Law Commission at the time of the investigation which produced the first draft bill on traditional courts. Professor Nhlapo was the full-time member at the Law Commission at the time, and was Project Leader of Project 90, the Customary Law project. As such, he was the chairperson of the Project Committee during its deliberations on the original draft bill and also led the country-wide consultation process, both with the traditional leaders and with the womens' groups that were canvassed thereafter. Professor Bennett was a member of the Project Committee and author of the Discussion Paper and the final Report.

2. Submission

With the background described above, it is our considered opinion that it would be a serious mistake if the Traditional Courts Bill currently before Parliament were rushed through according to the current timelines. In essence, our submission is that the deadline for public consultation and submissions should be extended. Our reasons are set out below.

2.1 Both the Constitution (Section 59(1)) and the Constitutional Court (the *Doctors for Life* case) have made it clear that Parliament has a duty to facilitate public participation in legislative processes of the Assembly, and that such participation should be "meaningful". It cannot be said that a deadline for submissions which follows immediately upon a spate of public holidays a few days after announcement of the hearing provides the public with a meaningful opportunity to participate. The University of Cape Town has a number of academics who are interested in this area of the law and yet even colleagues here only got to hear of the hearings a few days ago. It is fair to conclude that many rural people, who will be the most directly affected by the legislation, would not have heard at all.

2.2 The unresolved issues surrounding the content of the Bill are many, and they are all not only complex, but weighty. Without advancing the relevant arguments, we list below some of the more intractable issues around the Bill that, in our opinion, remain controversial.

2.2.1 As people who worked directly on producing the original draft bill on Traditional Courts that was attached to the Report of the Law Commission, we are aware that the present Bill bears little resemblance to that original draft. The problem with this is that no parliamentary hearing process could match the Law Commission consultation process that was undertaken in 1999 for depth of debate or width of geographical coverage. On principle, it seems wrong to ignore almost totally the results of such national buy-in in favour of a totally new product, moreover one which is passed through Parliament at a pace which does not offer an opportunity for ordinary people to contribute.

Specifically, and without advancing the relevant arguments, we list the following as some of the areas that remain unresolved, and which call for wider consultation and debate.

2.2.2 Constitution of customary courts. In the original draft bill, the Law Commission recognised the delicacy of this matter by proposing not one, but three alternative modes of constitution these courts (Section 4). The current Bill does not appear to be alive to these sensitivities.

2.2.3 Appeals. The Law Commission also took time to explore various models of appeal system, based on a desire to preserve the integrity of customary law and traditional modes of adjudication by allowing cases to travel upwards in a hierarchy insulated, at least in its early stages, from the influence of common law and western modes of adjudication. The fact that the original draft bill provides three models (Section 27) attests to the thought that went into this concept. The concept is further buttressed by the creation of an administrative system that protects this customary law "universe" by developing the concept of a Registrar of Customary Courts (Section 24 and 25). Together these provisions serve to 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. 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 significantly violates this right.

3. Conclusion

We submit that Parliament should see its way clear to extending the deadline for submissions, and to seek a way to solicit a wide range of views on the Bill, especially those of the rural people whose lives are lived under customary law. The current process appears to be rushed, and the consultation perfunctory, and if this perception persists any final Act that results will be robbed of much of its legitimacy.

Professor TW Bennett

Professor RT Nhlapo

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