

Submission by the Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women to the Portfolio Committee on Justice and Constitutional Development on the Traditional Courts Bill, [B15- 2008]

17 September 2008

Introduction

The Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women (henceforth the JMC) has an exclusive and purposive focus on women – their rights, empowerment, development and inclusion at all spheres of decision-making. It is required to “monitor and evaluate progress with regard to the improvement in the quality of life and status of women in South Africa.”

The JMC recognises that the Traditional Courts Bill, (B15-2008), is aimed at promoting social cohesion, speedier and more cost-effective access to justice and to preserve traditions that promote nation-building. Although the JMC comprehends the aims and objectives of the Traditional Courts Bill, it also recognises that there are serious shortcomings and gendered implications that serve to impede the delivery of fair justice to women in particular.

The JMC acknowledges the important role that culture plays in the lives of the citizens of this country, particularly those in rural communities. Traditional culture plays an important part in the lives of more than 22 million South Africans who live within traditional authority boundaries and the JMC accepts that culture shapes and drives these communities and should therefore be respected and valued. It should however be noted that patriarchy is an established feature of traditional/ customary law within the South African context, and that to some extent, culture and cultural expectations across different social groupings has tended to create impediments to the promotion of women’s rights. However, culture does not remain static as time passes and value and belief systems adapt and transform. Cultural systems likewise are fluid and shift to accommodate changes in collective thinking. Within this context it is therefore important that a Bill that proposes to create a legislative framework based on historical traditional systems and values, needs to take into account the gendered implications of certain traditional values and practices, and in particular, needs to be very carefully scrutinised in terms of its potential impact on women.

The Constitution in the Bill of Rights enshrines the right to gender equality, and as the supreme law in the country it takes precedence over all other legislation. The Traditional Courts Bill in its current form does not make mention of gender equality per se but rather refers to the more general principles of human dignity and human rights. It does indicate that as part of its guiding principles, that it is committed to non-racialism and non-sexism, as well as to the access to justice for all persons. There is however no further details as to the implementation of specific measures to achieve and maintain these principles. Before the Bill is passed it must therefore achieve a balance between the respect for customary law and the upholding of constitutional rights as set out in the Bill of Rights.

In light of its functions and responsibilities, the JMC herewith raises its concerns in relation to the Bill, particularly those pertaining to its potential impact on women and the manner in which it serves to entrench uneven social relations between men and women. The JMC has reviewed the Bill and has highlighted various areas of concern relating to the impact the Bill will have on women and to this end is making a submission to the Portfolio Committee on Justice and Constitutional Development.

Gender Concerns

Clause 4 of the Bill makes provision for the designation and training of a senior traditional leader as a presiding officer of the traditional court for the area of jurisdiction. This means that the role of presiding officer is restricted to "a traditional leader of a specific community who exercises authority over a number of headmen or headwomen in accordance with customary law, or within whose area of jurisdiction a number of headmen or women exercise authority¹". The Bill indicates that in the absence of a senior traditional leader or designated king or queen, a headman or headwoman may be appointed in the position of presiding officer. Although this clause does make provision for the appointment of women, it is known that the majority of traditional leaders are men, thus creating a disjuncture between the proviso and the equitable appointment of women to these positions of power.

Clause 9 of the Bill states that the presiding officer must ensure that women are afforded full and equal participation in proceedings, but does not indicate how this will be achieved. Given that the system is rooted in patriarchal traditions, the Bill would need to include provisions to indicate how the representation of women in decision-making capacities in traditional courts will be ensured. In addition the Bill would need to specify the critical importance of treating women involved in any kind of litigation in an equal manner to men and that gender not be used in any way to discriminate against women in assessing the merits of cases brought before traditional courts.

In addition the Bill gives no indication of any legislated monitoring tools to ensure women's equal participation. It further provides that "a party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom²". The last part of the clause however still implies that there are restrictions in that parties are bound by customary law and custom as to who may represent them. This poses a particular challenge for women who have traditionally not been allowed to participate in the proceedings of these courts.

The JMC also notes that in 2003, the South African Law Commission produced a report and draft Bill after consultations with rural communities and in particular with rural women, on what shape customary courts should take in post-apartheid South Africa. The Commission recommended that the representation of women in these courts/councils be guaranteed by law - this recommendation has not been included in the Bill.

¹ As defined in the Traditional Leadership and Governance Framework Act, Act 41 of 2003

² Clause 9 (3)(b)

The JMC also has concerns around the position of rural women having to appear in these courts – particularly whether they will indeed receive fair and equal treatment. As stated by a Member of Parliament during the hearings held by the Portfolio Committee on Justice: *"In our culture women don't go to these courts, and when one does go she sits in isolation with her head down to show respect. So how can women go to these courts, particularly if they were not involved in the drafting of this Bill?"*³. How will these biases be prevented?

The court will also be designated to hear cases on domestic violence raising the question as to whether presiding officers and other court staff will have a complete and working understanding of domestic violence legislation so as to adequately address these issues in keeping with the Constitution, and have the necessary sensitivity and requisite gender sensitivity training for dealing with matters of this nature.

Save for 2(b) of the guiding principles which refers to the systemic discrimination and inequalities on the basis of gender, age and race, which exist as a result of past colonialism and apartheid, no other mention is made of gender or gender equality. The Bill in its current form is not gender-sensitive and particularly does not make enough provision for women.

General Concerns

The Bill has been drafted in consultation with traditional leaders but opinions and feelings of rural communities has not been captured anywhere. The Memorandum on the Objects of the Traditional Courts Bill indicates that the Department of Justice and Constitutional Development has consulted with the National House of Traditional Leaders, as well as with the South African Local Government Association, as well as with the provincial arms of these organisations. No community/civil consultation is indicated. What is particularly disconcerting is that the process to date has not included adequate consultation with women, particularly rural women whose lives will be impacted upon by the Bill. Considering that the Bill will have a direct effect on millions of South Africans in rural communities, community participation in the process is vital. Gender sensitive consultation, which includes focus group sessions with women only, should have constituted a critical part of this process.

If the Bill is promulgated in its current form, more than 22 million South Africans who live in rural areas outside municipal boundaries, will find themselves bound by the authority of traditional leaders, who have been appointed by the Minister of Justice, without any consultation with other community leaders. In addition, members of these communities will not have the choice of opting out of the traditional courts process or seeking alternative legal representation. This limitation may prove to be particularly problematic for women who might feel that they will not be treated fairly by these courts and who would prefer taking their case to a civil court. There may also be varied understandings and interpretations of customary law, which does not create uniformity throughout the process.

³ Mail & Guardian, 17 May 2008

Clause 12 of the Bill indicates that the order of a traditional court is final (save for a party wishing to appeal the order or take the case forward for procedural review). Taking into consideration that Clause 10 outlines specific orders that the traditional court may hand down, the finality of Clause 12 can be regarded as an infringement on the rights of persons in communities governed by traditional/customary law. This relates specifically to Clause 10(b) which indicates that both monetary terms and possessions (in particular livestock), may be used in the settlement of fines, damages or compensation. Considering that many rural communities are indigent and also depend on livestock and the like for their livelihood, such a final order impacts not only on the parties concerned, but also on their families. Clause 10(i) further states that the court can make an order depriving the concerned parties of benefits that they would normally accrue in terms of customary law – this order also has implications for families of the parties involved in that any loss of benefits also results in a loss for women and children in a family. This also has gendered implications for female-headed households. Furthermore, 10(l), indicates that the traditional court may also, within the provisions of the Bill, make any other order that it deems appropriate, thus giving the court, and in effect its presiding officer, liberty to decide on rulings against parties and does not enforce consistency.

Section 174 (1) of the Constitution states that any "appropriately qualified woman or man who is a fit and proper person may be appointed a judicial officer". However, whether this is applicable to the presiding officers in traditional courts who have no training in the legal arena is not clear. Mention is made of the provision of training for designated leaders – there is no indication in the Bill of what kind of training will be provided, and if the training provided will be sufficient to equip the leaders with the necessary skills and sensitivities needed for some of the cases brought before them.

There is seemingly also no uniformity in the staffing structure of the courts as Clause 17 states that the Minister *may*, depending on the resources available at the local magistrate's court, assign officers to assist the traditional court.

The Traditional Courts Bill also has the potential to divide communities as it reiterates ethnic differences through the enforcement of historically colonial and apartheid boundaries, which are used as jurisdiction boundaries. It also impacts on power relations in rural areas as there is no recognition of other dispute-resolution mechanisms like village councils, clan meetings, development forums and civics organisations.

Recommendations

It is critical that the Traditional Courts Bill must achieve a balance between the respect for customary law and the upholding of constitutional rights as set out in the Bill of Rights.

It is therefore recommended that all processes related to the promulgation of the Bill be halted completely until there has been proper consultation with women, particularly those from rural areas, as to whether they support the Bill or not.

Recommendations related to the Clauses mentioned above include the following:

Clause 4: "Designation and training of traditional leaders"

- It is recommended that specific provisions to ensure that an equitable amount of women are appointed, or that equal opportunities exist for women to be appointed as presiding officers, be included.
- Specifications of what kind of training presiding officers will undergo must be provided – this must include gender sensitivity training.

Clause 9: "Procedure of traditional court"

- Provisions specifically indicating that women will receive equal and just treatment must be included.
- It is further recommended that a provision be included to allow parties, and women in particular to, in certain cases, choose to pursue civil proceedings rather than customary. This should apply in particular to cases where domestic violence and assault have occurred.

Clause 10: "Sanctions and orders that may be given by a traditional court"

- It should be mentioned that orders that are given should not impact negatively on the families or livelihoods of the families of the parties involved.
- To ensure consistency and fairness, the Bill should spell out the punitive measures which can be made use of and not give courts liberty to use measures that "they deem fit".

Clause 12: "Order of traditional court final"

- It is recommended that provisions allowing parties to challenge the order of the court be included, particularly in cases where either party or parties perceive a particular order to be an infringement on their basic human rights.

Clause 17: "Assignment of officers to assist traditional courts"

- The Bill must make provision for and ensure that all courts are staffed adequately and consistently to ensure speedy and fair delivery of justice.

In the event of the Bill being supported, the following changes would need to be made:

1. Specific provisions for the inclusion and appointment of women to these courts be included;
2. The forms of training that the presiding officer and other members will receive be specified, to ensure that the training adequately equips presiding officers with the skills needed to preside over their courts objectively and knowledgeably, particularly in relation to women.
3. Some form of legal oversight body to monitor the operations of these courts is required.

In addition it is recommended that:

4. Joint sittings between the JMC and the Portfolio Committee on Justice be facilitated to consider the Bill;

5. More opportunities be created for women and women's organisations to give input into this proposed legislation which will directly affect them;
6. The JMC be represented on the Task Team established to look at the legislation.