Controversies surrounding the Traditional Courts Bill

Tribal levies: Double taxation for the rural poor

The Traditional Courts Bill and African justice systems

The Traditional Courts Bill: A silent coup?

Regulating traditional courts

Interview with Deputy Minister of Cooperative Governance and Traditional Affairs, Yunus Carrim
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Celebrating number portability: Youths swap cell phones as a Pedi healer watches during the celebration of healer Ntate Ragetse 30 years of traditional healing at his place in Tafelkop, Limpopo. Pic: Muntu Vilakazi. Circa August 2007. © Sunday Times
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Interview with Deputy Minister of Cooperative Governance and Traditional Affairs,
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Mazibuko K Jara
Any discussion about crime and criminal justice in South Africa is incomplete without reference to the place of customary justice and the chiefs who administer it, particularly in rural areas. Yet, precisely because this issue almost exclusively affects rural dwellers whose voices are seldom heard, it fails to attract much attention. This edition of SACQ considers the flawed processes that led to the Traditional Courts Bill (TCB), and its controversial take on how customary justice should be dispensed.

Any post-1994 ambivalence within government about the role of chiefs in rural governance, crime prevention, and the administration of justice now seems to have been firmly resolved in favour of the chiefs. As Sindiso Mnisi describes in this volume, an array of inter-related statutes, passed since 2003, provide a framework for chiefs to impose their authority over just about every aspect of life in the former homelands, home to around 17 million South Africans. Aninka Claassens describes the resultant resurgence and re-imposition of ‘tribal levies’ across the country, a practice rooted as much in colonial and apartheid policies of indirect rule as in custom, and one that was fiercely resisted by those subjected to it under apartheid. Nomboniso Gasa describes the re-inscription of artificial apartheid-era ‘tribal boundaries’ (and so, identities) as a basis for carving up jurisdiction in these areas.

Two pieces of legislation are central to the schema of resurgent traditional authority. One, the Communal Land Rights Act, which centralised the authority to administer and allocate land within chiefly structures, has already been declared unconstitutional in its entirety by the Constitutional Court, largely because the procedures followed by Parliament allowed it to circumvent effective public participation. The other is the Traditional Courts Bill.

Traditional courts are a feature of life in rural South Africa. Many function effectively. Many others do not. They hear disputes ranging from the cow that ate the neighbour’s cabbages to the most serious criminal offences (even if they and government officially disclaim any jurisdiction in these matters), and everything in between. As Phathekile Holomisa points out in this volume, these courts are not centralised. Instead, they are layered, drawing legitimacy from complex systems of social recognition and nested authority. As such, the TCB does not formalise existing systems; it creates new ones. We need to ask, as Nomboniso Gasa does in this volume, why this is necessary, and whose interests are served. The debate is one that should engage those concerned with crime and justice in South Africa.

Just a few of the issues that arise from the contributions to this volume: Is it appropriate to deny legal representation in a court that may impose financial penalties (including fines and compensation payments), order that a party to the dispute perform ‘service without remuneration’, and deprive a person of any benefits that accrue in terms of customary law and custom’ (which would include access to land), all with the ultimate effect of an order made in the magistrates’ court? And are these forms of sanction appropriate to such a forum in the first place? Is it acceptable, in a constitutional democracy, to enforce recourse only to traditional courts, to the exclusion of the formal criminal justice system? If traditional courts draw their authority to act from the consensual recognition of their subjects (as many do), why would one need to force a choice of forum through law? And, as Sindiso Mnisi asks in her second contribution to this volume, how should these courts be regulated to best align them with constitutional values?
These are not easy questions and there are no easy answers. However, they cannot be avoided by those concerned with crime and justice. More importantly, they need to be debated by those whom the Bill will directly affect, something that has not happened to date. This volume is a contribution to that debate.

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The Traditional Courts Bill

Controversy around process, substance and implications

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This article introduces the Traditional Courts Bill (B15-2008). The Bill has caused controversy, and drawn criticism from rural communities and civil society. Key to the concerns raised was the flawed consultative process that the Department of Justice and Constitutional Development followed in bringing the Bill before parliament. In addition, substantive concerns raised about the Bill relate to the implications its provisions will likely have for rural citizens. The article discusses a number of major concerns that have been raised against the Bill and concludes with a brief assessment of the Bill in light of the Constitutional Court’s decision in Tongoane and Others v National Minister for Agriculture and Land Affairs and Others.

In December 2009, the king of the amaThembu in the Eastern Cape, Buyelekhaya Dalindyebo, was sentenced to 15 years’ imprisonment for crimes committed against his subjects in the former Transkei in 1995. The conviction gained prominence in the media in January 2010 when, in response to Dalindyebo’s case, the amaThembu tribe served official notice on the government that it was seceding from South Africa and, as it claimed, taking its due 60% of South Africa’s territory with it. Of greater interest with regard to the Traditional Courts Bill (B15-2008)(TCB), though, is the criminal case that was heard in the Mthatha High Court, where Dalindyebo was found guilty of arson, kidnapping, defeating the ends of justice, assault with intent to do grievous bodily harm and culpable homicide.

Dalindyebo was charged with these and other crimes that he had allegedly committed against his subjects when they failed to make amends for offences that they had apparently committed, and for which punishment had been imposed by the king. Among the alleged offences committed by his subjects were three notable cases. The first accused was found guilty by the king of permitting his goats to wander onto the king’s land. He was fined R1 200. When he failed to pay his fine in full, the king instructed that his family’s belongings be removed and set their four rondavels, livestock and kraal alight. The offender’s wife and children were taken and held captive at the king’s home until the following afternoon as leverage against the outstanding fine. The accused was ordered to leave the king’s area of jurisdiction.

The second accused was allegedly guilty of murder and thus fined six cows. This accused argued that he did not pay his fine because he had already been charged with the same offence in the magistrate’s court and the matter was still under that court’s consideration. Yet his home and belongings suffered the same fate as those of the first accused. He also claimed that he was forcibly...
delivered to the king by members of the community, at the king’s behest, and detained.

The third group of accused were three young men accused of rape, housebreaking and theft. These young men were arrested, stripped naked and beaten with sjamboks by the king who, when he got tired, was relieved by the persons who had assisted him in capturing the boys. One other boy was said to have only participated remotely in the alleged crimes. He was captured by community members who, before delivering him to the king, beat him in the same way they had seen the king beating the other three. This beating resulted in the boy’s death. The king subsequently fined the deceased boy’s father 15 cows for the boy’s alleged offences.

In his criminal defence, Dalindyebo argued that he was enforcing law and order. Thus, presumably, he was simply exercising his authority as king. This authority is confirmed by section 28(1) of the Traditional Leadership and Governance Framework Act (41 of 2003)(TLGFA) and embraced by the definition of traditional leader in sections 1 and 4 of the TCB. The territorial basis of that jurisdiction and authority is also confirmed by the TLGFA in section 28(3) and adopted by the TCB. In terms of the TCB, even those individuals and sub-groups who resisted the imposition of (illegitimate) traditional authorities by the apartheid government are now subjected to them.

Plainly put, if the TCB had been in operation at the time it would have lent statutory authority to some of Dalindyebo’s actions. In terms of the TCB, anyone within the traditional leader’s jurisdiction may be ordered to come before him (as presiding officer), where s/he may be fined and stripped of customary entitlements. As it was, Dalindyebo claimed that the fine against the first accused was a fine of one beast for disobeying the court. As will be seen in the detail set out below, the TCB outlaws banishment as a sanction in only criminal, and not civil, cases. It also permits the denial of customary entitlements as a punishment. Though the TCB does not specifically say this, customary entitlements would ordinarily be understood to include land rights and membership of the community. Thus, a number of the crimes committed by Dalindyebo against his people, if not necessarily made lawful by the TCB, would at least have been more difficult to prosecute.

In the case against Dalindyebo, Judge Sytze Alkema was able to find, in terms of section 26(3) of the Constitution, that ‘[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.’ Yet, if the TCB had existed, Dalindyebo’s decision as presiding officer of a traditional court would have had the same status as a judgment in the magistrate’s court. This would have required his people – who would have had limited grounds of appeal, according to the TCB, and minimal financial resources available to them – to challenge his decisions in the higher courts. This example leaves one wondering what kind of justice ordinary people, who come before such traditional leaders under the TCB, could truly have.

Customary courts form an important part of the informal justice system of South Africa. They can provide dispute resolution and justice, both accessibly and economically, to nearly 17 million South Africans. Yet they represent many difficulties, from inadequate resources right through to dysfunctionality, corruption and abuse. Dalindyebo’s ‘customary justice’ exemplifies the worst kinds of abuses possible in customary courts. It is by no means typical. In fact, the variability between the practices and successes of customary courts – not only between provinces but sometimes within the same area – is one of their most notable traits. Hence the importance of government in either aiding or hindering their improvement.

The Traditional Courts Bill was intended to resolve the problems with the courts and bring them in line with the Constitution, as well as facilitate their cooperation with the state courts. It would replace the remaining sections of the notorious Black Administration Act (38 of 1927) (BAA) – namely, sections 12 and 20 – with legislation that would reflect the new era of democracy and primacy of rights such as equality and dignity. It was also meant to give respect to
the lived realities of the many poor, rural South Africans who observe customary law,\(^8\) as well as give expression to the customary law that is lived by them on the ground,\(^9\) as tempered only by the Constitution. It does not accomplish these things.

This article introduces readers to the Traditional Courts Bill: how it came into being and what it says and means (both literally and in practice). It focuses on five major points of controversy around the TCB: (i) inadequate consultation with the rural public, especially women, in the drafting process, (ii) the recognition and constitution of customary courts, (iii) the courts’ subject-matter jurisdiction, the exclusion of legal representation and the courts’ powers of sanction, (iv) the courts’ territorial jurisdiction and individuals’ inability to choose their forum, and (v) terms specifically affecting the rights and security of women.

The article concludes with a summary of concerns raised by the Constitutional Court in the recent decision of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*,\(^10\) which declared the Communal Land Rights Act (11 of 2004)(CLARA) ‘unconstitutional in its entirety’.\(^11\) It highlights that the concerns the Court raised should have a bearing on how the Traditional Courts Bill is assessed for constitutionality.

**CONSULTATION AND DRAFTING PROCESS**

The Department of Justice and Constitutional Development’s consultation process in drafting the TCB is controversial because no ordinary members of the public were included in this process. However, traditional leaders at national and provincial level were consulted, with the National House of Traditional Leaders playing the prime role of consultant in the drafting of the Policy Framework and Bill. It is therefore no wonder that when the Bill was introduced in parliament in May 2008 there was an outcry from ordinary rural people and civil society organisations about the fact that the rural public had not been consulted. There were also substantive objections to the Bill. Despite this, after the Bill had lapsed with the change of government in May 2009, the same (unchanged) Bill was re-introduced to parliament in July 2009. The stakeholder task group that had been established by the previous parliamentary Portfolio Committee on Justice and Constitutional Development to investigate the possibility of holding provincial consultations had also ceased to exist, and the new committee made no further mention of this.

Public consultations have yet to be held in rural areas. Because the TCB deals with customary law, it has to be passed by means of the procedure set out in section 76 of the Constitution. As discussed by the Constitutional Court in *Tongoane*, this necessitates provincial involvement and public participation in law making. The committee has, since September 2009, expressly acknowledged that there are constitutionality issues with the Bill. It has delayed further consultations, rather proposing that it might possibly hold these jointly with the Select Committee of the National Council of Provinces. There has to date been no indication from the Portfolio Committee on Justice and Constitutional Development of plans to hold such provincial consultations, or of a timeline for these consultations. In the interim, the application of the relevant provisions of the BAA was extended till 30 December 2012. The motivation for extension of the BAA, as contained in a notice to the Speaker of Parliament by the Chief Whip of the ANC, is to provide ‘for…obtaining greater public input and consensus on contentious issues and allowing traditional courts to continue functioning legally’.

Women and children make up most rural constituencies, and often find themselves in a vulnerable position in relation to male-dominated traditional institutions. As discussed below, women face particular problems in customary courts and are therefore the people most adversely affected by the Bill’s failings. Failure to consult them is one of the problems with the Bill.

The Traditional Courts Bill is not the first attempt to address the problems customary courts both face, and raise. The South African Law Reform Commission (SALRC) made an earlier attempt that was rejected by the Department of Justice and Constitutional Development. The department
instead developed a completely different (and often contrary) model of regulation for the courts. Yet it was never clear why the SALRC Bill had been abandoned and the flawed TCB put in its place, especially given the comparative extent of consultation by the SALRC. Instead of building on the SALRC’s work, the department undertook to hold its own consultations, and draft what appears to be almost entirely a new Bill that is particularly weak in the protection of women’s right to involvement in customary courts.

RECOGNITION AND CONSTITUTION OF COURTS

The TCB defines a traditional court, in s 1, as ‘a court established as part of the traditional justice system which (a) functions in terms of customary law and custom; and (b) is presided over by a king, queen, senior traditional leader … and which includes a forum of community elders who meet to resolve any dispute which has arisen.’ The Bill goes on to give no role to the ‘community of elders’ but only speaks of the senior traditional leader as constituting the court in his role as presiding officer. It also assigns no explicit role to the potentially more gender-diverse traditional TLGFA.

The only possible role it gives to headmen and headwomen, in s 4(4) is that of having power delegated to them by the senior traditional leader. This point is important, because it means that the TCB does not recognise headmen’s courts. The Bill only recognises the chiefs’ courts at the level of the ‘traditional community’, and a ‘traditional community’ is questionably deemed by section 28(3) of the TLGFA to be any previously recognised or invented ‘tribe’. The Bill thus fails to recognise the full range of traditional courts that currently operate – family, clan, ward, village councils and meetings. Traditional leaders themselves say that this failure to (specifically) recognise lower level courts is inconsistent with customary law.

It is important that the TCB makes no provision for the involvement of ordinary members of the community, who would ordinarily participate in the hearing and resolution of traditional court cases. Given that senior traditional leaders are predominantly male, this means that women are unlikely to be able to participate in dispute resolution and, hence, unable to contribute to the development of living customary law.

SUBJECT-MATTER JURISDICTION, LEGAL REPRESENTATION AND SANCTIONS

The Bill grants civil and criminal jurisdiction to traditional courts. The civil matters excluded from the jurisdiction of the courts are constitutional matters, divorce and separation, custody and guardianship of children, wills and property of a value that is yet to be specified, or falling into yet unspecified categories. An annexure of crimes that the courts may try is included with the Bill. These are theft (including that of stock of a value to be limited by the Minister), malicious injury to property (also of an as yet uncapped amount), regular assault, and crimen injuria (of a value that is yet to be limited). By implication, therefore, severe crimes such as murder, rape and assault with grievous bodily harm are excluded from these courts’ jurisdiction.

Section 9(3)(a) of the TCB bars people appearing before traditional courts from being represented by lawyers. This arguably puts it in conflict with the Constitution’s protection of the right to representation of criminally accused persons. However, the counter argument that introducing lawyers to traditional courts would change their nature and render them expensive for users is worth noting. The decision to exclude lawyers from traditional courts is alarming because of the powers of sanction given to the presiding officer by the Bill, as well as the fact that people do not have the option of opting out of a court, as discussed in the next section.

Certain of the sanctions are controversial because of the nature of the far-reaching powers given to traditional leaders acting as presiding officers. For example, according to clause 10(2)(g), the traditional court may issue:
an order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court.

According to this provision, even a person who is not a party to the dispute before the court can be ordered to provide ‘free labour’. In light of the fact that most people in the rural areas are women and children, who already bear the brunt of manual labour, this work is likely to fall on their shoulders. Moreover, the persons most likely to benefit from the ‘free labour’ are the traditional leaders who claim that it is customary for their ‘subjects’ to provide labour in the ‘fields of the realm’ and royal kraal.18

The TCB significantly limits the bases upon which rural people can apply for appeal and review of traditional court judgments and procedures.19 Startlingly, the powerful sanction in section 10(2)(g) as well as ‘any other order that the traditional court may deem appropriate’20 are not appealable, if imposed.21

Section 10(2)(i) authorises traditional courts to deprive defendants of entitlements that accrue in terms of customary law and custom. Customary access to land is one such entitlement; community membership is another. Even though section 10(1) limits the traditional court’s right to impose banishment as punishment in criminal matters, there is no such limitation in respect of civil disputes.

When it comes to ensuring enforcement of these sanctions, the Bill requires investigation of the reasons for failure to comply and permits that:

If it is found that the failure is due to fault on the part of the person, the traditional court may deal with the matter in accordance with customary law and custom and may impose further sanctions for such non-compliance.22

This provision brings Dalindyebo’s cases against the first and second accused to mind as he most severely abused this very power. Unfortunately, given that the TCB only speaks of ‘any other order that the traditional court may deem appropriate’ as needing to be ‘consistent with the provisions of this Act’,23 further abuse is not ruled out.

TERRITORIAL JURISDICTION AND CHOICE OF FORUM (THE ABILITY TO OPT OUT)

As previously mentioned, section 28(3) of the TLGFA deems ‘tribes’ invented and recognised under the Black Authorities Act 68 of 1951 to be ‘traditional communities’ and recognises them as the basic unit of administration in rural areas. The TCB entrenches these former apartheid homeland boundaries established by the Black Authorities Act and perpetuated by the TLGFA. That is, the jurisdiction of traditional courts is determined by these territorial boundaries. Consequently, people will not have the opportunity to choose whether they want to fall under a particular traditional leader's authority and the laws he is able to make and enforce in terms of the Bill. This authority and law will be imposed on rural communities, even those who are contesting existing apartheid boundaries and imposed cultural affiliations.

Section 20(c) of the TCB specifically outlaws such choice. It prescribes that anyone who

having received a notice to attend court proceedings, without sufficient cause fails to attend at the time and place specified in the notice, or fails to remain in attendance until the conclusion of the proceedings in question or until excused from further attendance by the presiding officer, is guilty of an offence and liable on conviction to a fine.

Currently, under the BAA, opting out is possible; the TCB therefore changes current law and practice by outlawing opting out. The Bill also hereby violates the consensual character of customary law, as well as the constitutional democratic principle that would at least allow people to choose their leaders.
MATTERS AFFECTING WOMEN

There are still many places where women are not allowed to appear before, or address customary courts directly – instead they must be represented by male relatives. This puts women at a disadvantage if they are without adult male relatives, or if their relatives are the ones with whom they have the dispute. This is so especially when the matter before the court concerns a marital or family dispute, or the status of the women’s rights vis-à-vis those of male relatives. Widows are at an additional disadvantage because women in mourning face particular restrictions in relation to entering court spaces. A well-known problem is that of the eviction of widows, arising out of disputes following the deaths of their husbands.

The Bill does not address this problem. Rather, it enables the continuation of gender-discriminatory practices in this regard. Section 9(3)(b) reads:

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 custom.

The qualification at the end undercuts the supposed equitability of the former part of the provision. This section is therefore an example of formal equality that actually masks substantive inequality, because it is unheard of for wives to represent their husbands in customary courts. In terms of most ‘customary law and custom’ women must be represented by male relatives.

The TCB says, in clause 9(2), that the presiding officer must ensure that the rights contained in the Bill of Rights are observed and respected, and in particular ‘that women are afforded full and equal participation in the proceedings, as men are’. This section must be read in light of the fact, explained above, that the Bill does not make any provision for the role of councillors in traditional courts. Therefore, the provision is limited to women as litigants and does not encourage increased women’s representation in the constitution of traditional courts.

Moreover, the TCB does not provide specific protections for women to address the particular problems that they often face. It puts the onus on the senior traditional leader to ensure the participation of women. This means that rural women may have to challenge the actions of the senior traditional leader to invoke their rights – a daunting task, given power relations in rural areas. This would also be difficult because of the Bill’s limitations on review, which is allowed only on the basis that a traditional court acted outside the scope of the Act, lacked jurisdiction, proceeded with gross irregularity and was biased or acted with malice.

A number of women’s groups argued to the SALRC that the composition of traditional courts and their patriarchal character tend to favour male interests and render women particularly vulnerable. In consideration of this, the 1999 submission by the Commission on Gender Equality, Centre for Applied Legal Studies and National Land Committee to the SALRC recommended excluding all matters relating to the status of women from the jurisdiction of traditional courts, for these reasons. They specifically recommended that matters relating to the following be excluded:

- violence against women and children (including rape, attempted rape, indecent assault, domestic violence and child abuse)
- guardianship and maintenance (including determination of paternity); and
- marriage (both civil and customary)

The TCB specifically excludes divorce and separation, custody and guardianship of children, wills and property of not-yet-specified value and falling into categories that are yet to be specified. It does not expressly exclude domestic violence and other forms of violence against women and children.

CONCLUSION

In its 2003 report, the SALRC found that customary courts are very important and serve as
a valuable resource in poor, rural communities where people would otherwise have no access to justice. This is a finding borne out by our research.26 The SALRC raised the concern, however, that these courts did not always operate optimally and needed to be made more functional and accountable. They also needed to be assisted to give better effect to the rights and justice visions articulated in the Constitution.

The general sentiments expressed at the National Workshop on the Traditional Courts Bill held in Johannesburg in November 2009, involving a multitude of civil society organisations and community representatives, captures well the problems with the TCB and legislation of its kind:

People were generally horrified at the thought that some of their chiefs – some of whom they said squandered community resources and fined people excessively for their own benefit – would be given the powers of sanction that the Bill permits. They told of the limitations that they incur to their constitutional rights at present, which they felt would only be furthered by the Traditional Courts Bill. They were of the view that traditional leaders’ powers should be reduced, not increased, as they perceived the legislation presently sought to do. Generally speaking, therefore, the perceived augmentation of autocratic chiefly powers by the Bill was thought to breed incompetence and maintain corrupt chiefs’ attitudes of impunity because they did not then need to be accountable to their communities in any way. … People had earlier raised the fact that most chiefs act independently without consulting with their communities. …

Some questioned the motives for the promulgation of the Bill on the grounds that they questioned the very need for this Bill. One asked, would this Bill fix what appeared to be social problems on the ground? Most were more than skeptical that it would, feeling that it would only exacerbate them.27

These issues of equal participation by all community members, limited powers for traditional leaders and accountability of officials of traditional institutions, as well as the primary ‘social problems on the ground’ of patriarchy and other power imbalances between traditional leaders and ordinary people, are not addressed by the TCB. As this article argues, the TCB has severe flaws that will entrench corrupt, abusive and unaccountable traditional leaders – and the Dalindyebo saga provides a tragic illustration of the potential consequences.

Moreover, while the Bill presumes to conform to the Constitution, if passed as it stands currently, it would have to be found to offend constitutional entitlements articulated by the Constitutional Court in Tongoane.

- It builds upon the foundations of the Black Authorities Act of 1951 and repeats its errors (in a manner akin to that rejected by the Constitutional Court vis-à-vis CLARA). Rather than reject these territorial and jurisdictional boundaries, it reaffirms them.
- The department evidently failed to involve extensive public consultation in the formulation of the Bill.
- Respect for public participation in the development of customary law locally and by ordinary people is a constitutional imperative that the Bill does not observe.

With regard to the last principle, the Constitutional Court has declared previously:

As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated.28 (emphasis added)

This does not just mean that the participation of community members in the development of customary law (and thus in the customary courts) would likely be protected under the Constitution. It also means that developments to include
women's participation in the courts would be protected. This would be so, regardless of whether they occurred under living law or explicitly under the Constitution.

The *Tongoane* decision was based on procedural concerns about insufficient consultation on CLARA, following the use of incorrect legislative procedures in Parliament. However, this article has shown that, while there are procedural problems with the TCB, there are more substantive problems with the Bill that should preclude Parliament from passing it.

The model of regulation that the TCB adopts is irredeemably flawed. New legislation is necessary to replace it. Ideally, such legislation would rely on an entirely different framework for the regulation of customary courts. This replacement legislation should focus on encouraging the democratic potential, progressive developments and general strengths of living customary law, while holding it and traditional authorities to firm account in terms of the Constitution where customary law is weak, or the leaders corrupt.

To comment on this article visit [http://www.issafrica.org/sacq.php](http://www.issafrica.org/sacq.php)

**NOTES**

2. An estimated 16,5 million South Africans live in the former homelands, according to analysis by Debbie Budlender, as cited in Claassens & Cousins (eds.), *Land, Power & Custom*, 4, fn 2.
3. Evidence of these deficiencies can be found in submissions made to the Portfolio Committee on Justice and Constitutional Development on the Traditional Courts Bill (B15-2008) in May 2008 and to the Portfolio Committee on Rural Development and Land Reform on the Black Authorities Act Repeal Bill (B9-2010) in July 2010.
4. Ibid.
5. See the headnote and Preamble of the TCB.
7. See Preamble, and sections 2 and 3 of the TCB.
8. See headnote, Preamble, and sections 2 and 3 of the TCB. Customary law is protected by sections 30, 31, 39(2), 211(3) of the Constitution, and customary institutions recognised in section 211(1) and (2).
9. *Alexkor Ltd and Another v the Richtersveld Community and Others* 2004 (5) SA 460 (CC), Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others 2005 (1) SA 580 (CC), Gamele v President of the Republic of South Africa and Others 2009 (3) BCLR 243 (CC) and *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) all acknowledge the ‘customary law’ referred to in the Constitution as that which is lived and developed through practice by the people who observe it.
10. 2010 (6) SA 214 (CC).
11. Ibid at paras 110, 116.
12. The SALRC elected to use the reference ‘customary courts’ as most popular among the respondents and most commonly associated with customary law (which is what the courts would administer), and as most widely used in the rest of the continent.
15. Section 5(2) of TCB.
16. Schedule 1 of TCB.
17. Section 35(3)(f).
18. See chiefs’ affidavits in the *Tongoane* case.
19. Sections 13 and 14 of TCB.
20. Section 10(2)(l) of the TCB.
21. Section 13(1) of the TCB.
22. Section 11(2)(c) of the TCB.
23. Section 10(2)(l) of the TCB.
24. Section 14(1)(a)-(d) of the TCB.
25. Section 3.4 of the CALS etc. 1999 Report.
27. Substantive Report on National Community Workshop on Traditional Courts Bill, 11-12 November 2009 at 3, 6 and 5.
People in the former homelands waged a successful battle against the imposition of 'tribal levies' during the anti-apartheid struggle. Recently, however, there has been a resurgence of traditional authorities demanding annual levies. Those who refuse to pay cannot access government grants and identity books. This article argues that recent laws bolstering the powers of traditional leaders have contributed to this resurgence. It argues that the laws undermine the citizenship rights of the poorest South Africans as well as their ability to hold traditional leaders to account. It suggests that the laws have been ambiguously worded in an attempt to disguise the fact that they are inconsistent with the Constitution. It rebuts the argument that annual tribal levies are consistent with and justified by customary law, by describing their colonial and apartheid genesis.

RESURGENCE OF TRIBAL LEVIES

A series of rural consultation meetings about the Traditional Courts Bill (TCB) was held between 2008 and 2010 in former homeland provinces. In these meetings the resurgence of traditional leaders extorting tribal levies was raised as a serious problem, with very severe consequences for poor people, in particular women who are struggling to eke out an existence for themselves and their children. In meeting after meeting the point was made that people who are not 'up to date' with their annual tribal levies and other ad hoc levies or taxes are refused letters from the tribal authority or traditional council, confirming that they are known and bona fide community members. These letters are important in rural areas where people do not have the types of formal physical or postal addresses required on many government forms. Without these official ‘confirmation of address’ letters they cannot apply for child support grants, pensions, identity documents or even open bank accounts. People complained further that they do not receive report-backs about how the money collected through levies is spent. They expressed concern that the levies do not benefit the local communities from which they are collected.

Speakers referred to tribal levies as a system of double taxation, targeting the 'poorest of the poor'.

Similar problems surfaced in all the former homeland areas. This article focuses mainly, however, on Limpopo province, where fieldwork was undertaken in September 2010. During that research we were informed of the serious consequences facing people who do not, or cannot, pay their levies. In a village near Elim we were told of an unemployed woman who had been invited to apply for a job with the South African Police Services. The application required that she provide her address or submit a form stamped by the local tribal authority vouching that she was a
community member. However, the tribal authority refused to stamp the form because there was no record that her family had paid annual levies in recent years. She was unable to raise the 'back-pay' of R140 demanded by the tribal office and so, despite meeting the requirements for the job, she was unable even to apply.2

Barbara Oomen, in her book Chiefs in South Africa describes similar incidents to those raised in the consultation meetings. In one incident, community members proposing development initiatives at village council meetings 'were not questioned about the developmental or organisational aspects of the projects … but merely whether they were known to the chief and had paid the R100 tribal levy raised for the coronation and the building of the chief’s villa'.3

AMBIGUITIES IN POLICY AND LAW

The extortion of tribal levies and taxes was a flashpoint for anti-Bantustan and anti-chief mobilisation in the former Lebowa and Gazankulu Bantustans during the 1980s.4 There was strong resistance to recurrent demands that poor rural people ‘pop out’ innumerable levies, and vociferous complaints that the funds collected were not properly accounted for. The scale of protest, which included recurrent attacks on the tribal police responsible for levy collection in some areas,5 combined with United Democratic Front (UDF) calls for an end to the ‘double taxation’ of homeland dwellers, led to traditional leaders muting their demands for levies during the early 1990s. Many rural dwellers stopped paying levies from that time, assuming that they were no longer lawful after the transition to democracy.

Seemingly recognising that experience, the 2003 White Paper on Traditional Leadership provides:

The authority to impose statutory taxes and levies lies with municipalities. Duplication of this responsibility and the double taxation of people must be avoided. Traditional leadership structures should no longer impose statutory taxes and levies on communities.6

The Traditional Leadership and Governance Framework Act (Framework Act), enacted in 2003 pursuant to the White Paper, was more ambiguous. It does not address directly whether or not traditional councils or chiefs have the authority to impose levies. It does however state in section 4(2) that:

Applicable provincial legislation must regulate the performance of functions by traditional councils by at least requiring a traditional council to-(a) keep proper records, (b) have its financial statements audited, (c) disclose the receipt of gifts,

and in s(3)(b):

meet at least once a year with its traditional community to give account of the activities and finances of the traditional council and levies received by the traditional council. (emphasis added)

This provision seems to be the basis on which Khosi Phumulani Kutama, the chairperson of the National House of Traditional Leaders, stated in a 2007 affidavit in the Tongoane7 case that the Framework Act recognises the ‘established practice of collecting traditional levies’. He added that ‘[m]ost provincial [traditional leadership] laws have retained this long established practice’. Elsewhere in his affidavit he states that historically traditional leaders could levy traditional taxes, and cites the Constitution’s recognition of the ‘institution, status and role of traditional leadership according to customary law’.8

On first reading, his statement seems to contradict the White Paper, as do the provincial laws to which he refers.9 However, on a closer reading, the Limpopo10 ‘Traditional Leadership and Institutions Act differentiates between statutory taxes and ‘monies which in accordance with the customary laws of the traditional community concerned are payable to the traditional council’.11 Section 25 of the Limpopo Act provides that a ‘traditional council may, with the approval of the Premier, levy traditional council rates’ and that ‘any taxpayer who fails to pay the levy may be dealt with in accordance with the customary laws of the traditional community concerned.’
as they demand, the government will bolster their ability to push the limits of the open-ended ‘customary law arena’ in relation to governance and taxation powers.

If one reconsiders the White Paper’s statement about levies in the light of subsequent events, the inherent ambiguities in its wording become more apparent:

The authority to impose statutory taxes and levies lies with municipalities. Duplication of this responsibility and the double taxation of people must be avoided. Traditional leadership structures should no longer impose statutory taxes and levies on communities.

The word that now jumps out is ‘statutory’. The door is left open for non-statutory, ‘customary’ or ‘voluntary’ levies. While double taxation is to be ‘avoided’, there is no direct prohibition of non-statutory, customary or ‘voluntary’ tribal levies. The Framework Act and the provincial laws are similarly deeply ambiguous. Nowhere does the Framework Act provide traditional councils with the authority to collect tribal levies and taxes, yet it refers to the need for provincial legislation to regulate the way in which traditional councils account for tribal levies.

LAW, THE BALANCE OF POWER AND THE POWER OF DEFINITION

The pivotal question is this: what is the content of unwritten customary law with regard to tribal taxes and levies? And how, and by whom, are disputes about its content resolved? It is difficult for ordinary people to challenge chiefly versions of customary law in tribal courts overseen by traditional leaders, or in formal courts which are precedent-driven and rely on past judgements that upheld colonial and apartheid versions of customary law, in which hut taxes and tribal levies were a motive force. And, as Bennett has remarked,

[I]n spite of the failings of the official version of customary law, mere availability of information has had the effect of creating a de facto presumption in its favour. Litigants are entitled

Limpopo is the only province in South Africa that has this kind of wording in its new traditional leadership law. The KwaZulu-Natal, Mpumalanga and Free State provincial laws are silent on tribal levies. Northern Cape, North West, and the Eastern Cape provincial laws ban them. They provide that ‘[a] traditional council may not impose any levy on any member of the traditional community or on any section of the traditional community.’ Revealingly, however, these three provinces also provide that ‘[a] traditional council may request members of a traditional community or section of a traditional community, to make a voluntary contribution.’

The seeming contradictions between the White Paper, the national and provincial laws and Kutama’s statement need to be contextualised by other sections of the White Paper, which recommend that ‘[t]ribal councils as they existed before colonialism, and which were based on custom, should be established and renamed “traditional councils”’. They ‘will exercise the powers and perform the functions conferred upon them in terms of customary law, customs and statutory law’ and will ‘continue to generally administer the affairs of the community in accordance with custom and tradition.’ The White Paper also provides that traditional councils ‘should play a role similar to that previously played by tribal authorities prior to 1994.’

Yet, prior to 1994 tribal authorities played an equivalent role to local government in the former homelands (although their legitimacy was often highly contested). The White Paper adds that traditional councils ‘will, however, not discharge the functions currently assigned to municipalities.’ The contradictory statements in the White Paper illustrate both the department’s dilemma and, in my view, its attempted ‘solution’. The dilemma is how to accommodate traditional leaders’ demand that their pre-1994 governance role be restored, and yet retain the system of elected local government required by the Constitution. The ‘solution’ appears to be that, instead of giving traditional leaders direct statutory powers of taxation and local government
to object, but in practice this right seldom amounts to much, because in the heat of litigation, time and money militate against undertaking a possibly inconclusive search for the living law.\textsuperscript{14}

The danger of ossified rule-based versions of customary law trumping the citizenship rights envisaged by the Constitution is exacerbated when statute laws such as the Limpopo Act explicitly authorise traditional councils to impose ‘customary’ levies and duties, and to punish offenders in tribal courts.

Moreover, section 21 of the Framework Act provides that disputes concerning ‘customary law or customs’ must, in the first instance, be resolved ‘internally and in accordance with customs’ by community members and traditional leaders. If a dispute cannot be resolved internally it must be referred to the relevant House of Traditional Leaders (HTL). If the HTL is unable to resolve the dispute, it must be referred to the premier of the province, who must resolve it after having consulted the parties and the provincial house of traditional leaders. Thus a person complaining about chiefly distortions of customary law would have to take the issue up in forums dominated by traditional leaders and their organisations. The manifold problems facing litigants who seek to challenge abuse of power by traditional leaders or distortions emanating from them ‘internally’ i.e., in traditional courts, would become insurmountable were the Traditional Courts Bill to be enacted in its current form [see Mnisi Weeks in this edition].

The nub of the issue is that all of the legislation, provincial and national, appears to be deliberately ambiguous, making it very difficult for ordinary people to work out what the law says and how to challenge the resurgence of tribal levies. The in-built ambiguity also complicates possible legal challenges to both the practice and the laws themselves, requiring careful research and evidence to head off some of the rebuttals and loopholes that appear to have been built into the policy and legislation.

**TRIBAL LEVIES AND CUSTOMARY LAW**

According to the Constitution, the power to legislate and impose taxes vests in national, provincial and local government, and is subject to stringent legislative and procedural requirements, none of which has been met by the Limpopo Act.\textsuperscript{15} Legal experts have advised that traditional councils cannot levy taxes, as they are not a sphere of government expressly mandated to do so by the Constitution.

Kutama’s position, however, appears to be that tribal levies and taxes are authorised by the Constitution’s recognition of customary law. He makes the case that traditional leaders have inherent customary law powers to tax their ‘subjects’. In this vein it could conceivably be argued that the express provisions in the Constitution authorising national, provincial and local government to introduce taxes do not mean that other bodies are prohibited from doing so where alternative legal authority exists.

It is thus important to look at the origins of current levies and taxes and the extent to which they derive from ‘custom’ as opposed to prior colonial and apartheid laws. The ‘customary law’ justification also raises a series of questions concerning the extent to which current levies and taxes are consistent with the reciprocal nature of past customary practices. It raises the problem of transposing practices developed in one context (where traditional leaders were not supported financially by government and fulfilled a range of hands-on day-to-day functions) to another (where traditional leaders are paid salaries, and may be lawyers or Members of Parliament living in distant cities). Moreover, the Framework Act reinforces and cements the controversial Bantu Authority boundaries derived from apartheid.\textsuperscript{16} This makes it impossible for rural people to hold traditional leaders to account by withdrawing their allegiance.\textsuperscript{17} It also centralises power to senior traditional leaders and away from co-existing multilayered traditional institutions such as headmen and village councils. Key questions that arise concern the impact of laws such as the Bantu Authorities Act and the Framework Act on...
indigenous accountability mechanisms, and whether tribal taxes and levies can be said to remain ‘customary’ once laws are introduced that undermine age-old indigenous accountability mechanisms that mediate power.

Another fundamental question is whether tribal levies are in fact ‘taxes’, as opposed to ‘voluntary contributions’, in which case the limitations on taxation power imposed by the Constitution would not apply. This is relatively straightforward however, as once sanctions for non-payment are imposed (as all the consultation meetings report) it becomes clear that tribal levies are neither voluntary contributions nor donations, but instead constitute a form of taxation. Closely related to this question is that concerning the manner in which the ‘voluntary contributions’ mentioned in the Eastern Cape, North West and Northern Cape provincial laws are approved by those to whom they apply, and whether there are adequate checks and balances to ensure that such approval is freely given. There is a long-standing practice of groups of African people agreeing to finance specific development projects by clubbing together to raise funds. Historically this was the primary mechanism that black people used to purchase land. Indeed, white farmers in arguing for the 1913 Land Act to be more stringently applied complained to the Beaumont Commission that black people had an unfair advantage in the land market because they routinely clubbed together to outbid individual white buyers.18

Colonial and union laws governing ‘native’ taxation included provision for a tribe or community to apply for permission to levy a ‘special rate’ to finance specific projects such as buying land, building a school or sinking a well. Such ‘voluntary’ special rates had to be approved at a community meeting and were only possible in relation to specific projects.19 Once approved at community level, the special rate was referred to the Minister of Native Affairs for approval and was then published in the government gazette along with the restricted time period for collecting the rate, the name of the tribe and the purpose of the special rate. A study of special rate notices by Kathryn Blair20 shows, however, that over time there was a noticeable shift away from ‘special rates’ being collected for specific projects towards special rates being used to finance on-going tribal administration over multi-year timeframes.

Blair shows that initially special rates were not legally defined to constitute taxation in the same way as taxes imposed by government, but that the 1925 Native Taxation and Development Act was subsequently amended to enable punishment of special rate defaulters as tax evaders. In other words, what began as voluntary contributions for specific agreed purposes became, in practice, a tax to finance the running costs of Bantu Authorities. The various homeland governments subsequently introduced legislation that built on this history, but in many cases removed the formal protections and requirements that had existed in law, if not in practice. For example, the Lebowa Tribal Taxation Act of 1975 removed the requirement for community approval of a proposed rate. The only explicit requirements for the enactment of a tribal rate were the approval of the Lebowa Minister of Finance and publication of the rate in the Lebowa Gazette. Neither a special purpose nor the approval of the majority of the tribe was mentioned in the Act. After 1977 Lebowa gazette notices stated merely that the money collected would be used ‘for the general administration of the tribe’, instead of the more specific purposes published in earlier gazettes, such as ‘the purchase of ploughing units’ or ‘the building of Bakenberg High School and Secondary School.’21

During a recent research trip to Limpopo, people near Elim described the historical origins of current annual levies. Both men and women said that annual levies started with the ‘call-in cards’ that migrant labourers had to get stamped by the chiefs every year when they renewed the annual contracts that locked them into the migrant labour system. They said that migrants were dependent on the chief’s signature for the renewal of their annual contracts and that signature was dependent on the migrant paying an annual tax that started at R1.50 but increased rapidly over the years. Over time, people explained, the ‘call-in card’ levy was extended to all families, whether they included a migrant...
labourer or not. Various people said that by the 1980s the annual tax had increased to R160 per family per year and was collected by tribal police going door-to-door, demanding payment.

However, during the anti-Bantustan rebellions of the late 1980s residents began to attack the tax collectors and drove them out of their villages. The system fell into abeyance and only re-emerged recently. Many people said they got away with refusing to pay the annual levy until recently, but are now forced to pay, because without stamped ‘proof-of-address’ letters they cannot obtain ID documents for their children, apply for pensions and social grants, or even obtain driver’s licenses.

CONCLUSION

The history and contested nature of tribal levies provides clear evidence of the distorting impact of past discriminatory laws and practices. In addition, recent laws such as the Framework Act and the provincial laws enacted pursuant to it are fundamentally at odds with the consensual character of customary law – and appear to have sparked the re-emergence of levies. People are forced to pay levies, not on the basis that they have agreed to them, but because otherwise they are deprived of access to their entitlements as South African citizens. They are put between a rock and hard place not by customary law, but because of the state’s choice to enact laws that reinforce Bantustan boundaries and apartheid precedents. Despite the state’s attempts to cloak the new laws in ambiguity, the levy provisions in the Limpopo Traditional Leadership and Institutions Act are manifestly vulnerable to constitutional attack.

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NOTES

1. The Law, Race and Gender Unit, together with the LRC and other NGO and CBO partners held community consultation workshops on the TCB in Madikwe (North West), Nelspruit, East London and the Eastern Cape. During 2008 the LRC had convened community consultation workshops in Qunu in the Eastern Cape, and in Pietermaritzburg with the Rural Women’s Movement. The provincial consultation meetings culminated in a large national workshop of 100 rural delegates from around the country in Johannesburg in November 2009. Since then further meetings have been held in North West, Eastern Cape and KwaZulu-Natal.


5. Interview with Shirhami Shirinda December 2010.


8. Kutama’s affidavit in the CD ROM of Court papers (paras 40.3, 17.3, 40.2, 23.2) that is included in A Claassens & B Cousins (eds) Land, Power and Custom; Controversies Generated by South Africa’s Communal Land Rights Act, Cape Town, UCT Press, 2008.

9. Most of these laws were enacted in 2005 and 2006 pursuant to the national Traditional Leadership and Governance Act 41 of 2003, which created a framework for mandatory laws to be introduced by the provinces.

10. Kutama’s province.


16. Section 28 deems pre-existing tribal authorities established and delineated in terms of the Bantu Authorities Act to be the traditional councils of the future, provided that they meet new composition requirements.


19. S 15 of the Native Taxation and Development Act, 1925.


Balancing law and tradition

The TCB and its relation to African systems of justice administration

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The African system of justice administration, as epitomised by traditional courts, is inclusive, democratic, open and welcoming to those who seek justice. In contrast to western value-inspired courts, which are intimidating, alienating, complicated, retributive, incarcerating and expensive, traditional courts seek to foster harmony, reconciliation, compensation to the aggrieved, easy and inexpensive access to justice, and the rehabilitation of the offender. It fosters a spirit of communalism, where the individual exists for the benefit of the greater community. Justice is fostered within the family, the clan, the neighbourhood, the village, the tribe and the nation. Traditional leadership is central to the organisation and governance of the community, from the lowest level to the highest. The Traditional Courts Bill, currently before the South African Parliament, needs to be redrafted to ensure that the African system of justice administration encapsulates all the values and features underpinning it. The jurisdiction of these courts will have to be extended to cover the whole of South Africa and be applicable to all citizens; in the same way as tenets of Roman Dutch law and English law are applied without discrimination.

The South African Constitution states that the courts of the land are the Constitutional Court, the Supreme Court of Appeal, the High Courts, the magistrate’s courts, as well as any other court established or recognised in terms of an Act of Parliament. Customary courts or courts of traditional leaders are not mentioned save in Section 16 (1) of schedule 6. This section states that courts of traditional leaders continue to exist and to function subject to the amendment or repeal of relevant legislation and consistency with the Constitution.

The Congress of Traditional Leaders of South Africa (Contralesa) opposed the certification of the final Constitution on the grounds that it failed to protect the institution of traditional leadership (ubukhosi). In response the Constitutional Court stated that courts of traditional leaders did not have to be specifically mentioned in the chapter dealing with courts since they could be accommodated under the paragraph dealing with ‘other courts’. Yet, as traditional leaders we regard the omission as an insult to real and authentic African value systems.

The Traditional Courts Bill, currently before Parliament, ostensibly seeks to give the recognition that is due to ubukhosi and its role in the dispensation of criminal and civil justice. Its passage into law has been stalled by opposition emanating from women’s rights activists and political ideologues, who maintain, respectively, that it promotes women’s oppression and the perpetuation of an undemocratic system. Others

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oppose it on the basis that the Bill centralises power in traditional leaders, whereas the African justice systems are based on layered authority. I agree fully with the latter criticism, as much as I reject the notion that *ubukhosi* and its ways are inherently sexist and undemocratic. The Bill does indeed tend to concentrate at the level of the court of the senior traditional leader, disregarding the various other levels above and below it. *Ubukhosi*, as the custodian of African cultures, customs and traditions, is dynamic, and in this sense, in its operations, it has over time evolved to the extent that women enjoy the right to participate fully in matters of governance, and are eligible to be elected or appointed to leadership positions, excepting, of course, hereditary positions. Succession to hereditary positions is governed strictly by the dictates of a particular clan's directives – deviation from such directives detracts from the legitimacy of the holder of the position.

For this Bill to pass the test of indigenous African constitutional muster, and thereby gain legitimacy in the eyes of traditional Africans, it must meet the requirements outlined hereunder.

Notwithstanding the constitutional disdain and the opposition to *ubukhosi* mentioned above, we are of the firm view that our courts are not just courts of law but are, most importantly, courts of justice. Courts where the search for truth, reconciliation, compensation and rehabilitation are the main goals. This is in contrast to the procedural justice, retribution, incarceration, and revenge that are the hallmarks of the inherited European system of justice administration.

In traditional African communities the head of the family is the person who settles disputes among members of the family and dispenses justice according to the degree of the transgression. The primary aim is at all times the maintenance of good relations and harmony in the family.

At a level higher than the household, disputes involving more than one family are handled by clan leaders or elders. Here again the purpose is to keep peace among members of the same clan. In instances where antagonists are from different clans or neighbourhoods, the arbitrator is the sub-headman. This is the first formal level of the African judicial system. His court or council consists of himself as head, and prominent heads of the local homesteads.

His court, like those of a rank higher than his, usually sits in the open, normally and literally under a tree. Every adult member of the community is free to participate in the proceedings by way of examining and cross-examining the litigants and their witnesses. The case is literally heard by the peers of the parties locked in dispute. Whilst in all courts of traditional leaders there is a difference between criminal and civil cases, the procedure followed to establish the truth is the same.

The proceedings are conducted in an informal manner and a relaxed atmosphere. In the course of the examination and cross-examination of the witness the members of the court sometimes lead their own evidence to rebut the assertions of the witness. Generally, everybody knows everybody, so in a case of stock theft, for example, if a chicken, goat, or a beast has been slaughtered in a homestead the neighbourhood quickly becomes aware of it. In the same way, if the accused is found to have chicken feathers or a fresh animal skin when he is known not to have fowls or beasts he is required to explain himself if the charge is theft.

The proceedings are fair to the extent that towards their conclusion, especially when evidence appears to be heavily weighed against the accused, he would even be asked to suggest the kind of sanction or punishment he believes would be appropriate. He is, after all, a member of that same court himself.

The headman, the senior traditional leader (*nkosi, kgosi, hos*, *khosi*) and the king each have their own court. The king's court consists of all the senior traditional leaders of his land, some of his senior uncles and brothers, as well as prominent members of the realm, who are renowned for their
leadership skills and knowledge of the history and customs of the people.

At the other level the court of inkosi is similarly constituted, with all the headmen being members of the council. The court of the headman is constituted likewise, with the sub-headmen being part of the council. As stated before, the examination and cross-examination of the witnesses is not confined only to the head of the court and his counsellors, but is open to the general community membership in attendance. Even a traveller would be allowed to impart his wisdom to the gathering.

The open and democratic manner in which cases are heard in the courts of traditional leaders instills a sense of confidence in the litigants. It is on rare occasions that appeals are lodged against judgments and sanctions. Cultural norms and customs add legitimacy to both the proceedings and the court officials themselves.

Traditionally and historically women play a very small, if any, part in court proceedings. In matters involving family disputes and laws of succession and inheritance, though, they are consulted as expert witnesses who are endowed with special skills and insights.

Nowadays this practice of excluding women from court proceedings is being reversed. Many regents who act for minor heirs to the throne are women, and mothers to the heirs. Some of the counsellors are themselves women. This trend results in the trials being conducted with compassion and understanding for the plight of both the aggrieved and the offender.

It would be wise for government, in its endeavour to modernise and democratise the institution of traditional leadership, to leave these courts as they are and to let them evolve on their own and adapt to the changing conditions. The procedures followed do not lend themselves readily to the involvement of legal representatives; the people concerned are generally conversant with the rules and anyone is free to point out for rectification conduct that is improper. Lawyers should, if they want to participate in proceedings, do so like any other members of the public.

These days, however, these courts do not deal only with cultural and custom-related cases; they also handle criminal and civil cases that are based on so-called common and statutory laws, the Constitution and Bill of Rights. It is necessary and imperative, therefore, that the judicial officers undergo some kind of paralegal training to empower them with the requisite skills and knowledge. The courts should all be made to be courts of record. This means that the tribal authority buildings must be upgraded, modernised and equipped with the necessary personnel, as well as office and court equipment.

The courts of traditional leaders should also be established in urban areas to cater for the justice administration needs of African communities who still value the African system of justice. There are many traditional leaders who are resident in those areas and some of them are indeed consulted and called upon to settle various kinds of dispute in accordance with indigenous laws and customs.

The Bill’s shortcomings notwithstanding, government should be commended for seeking to entrench African cultural values and mores, which promote the humane treatment of human beings by other human beings – ubuntu.

Having been exposed to both the received western system of justice administration and the African courts, I maintain that the latter are superior to the former. Under the former system justice is for sale. Litigants are required to hire lawyers to represent their interests, and the more expensive the lawyer the greater the chances of victory – and the reverse is equally true. In these courts the litigants are at the mercy of the wisdom or whims of one person – the magistrate or judge – or, where applicable, the one or two assessors. The rest of the community has no say in the search for the truth. As stated earlier, the proceedings are rigid and alienating, the environment austere and the atmosphere intimidating to ordinary participants.
There is the tiresome accusation that African culture discriminates against and oppresses women. This accusation tends to be stated as fact, without investigation, by people who are supposed to be wise as they are educated. Some of these critics take their own personal run-ins with their traditional leaders back home and proceed to label the entire institution as being as bad as those local leaders. When people break western law they are brought to justice. Yet when they pervert indigenous African law, the conclusion is that the law is so bad it warrants the abolition of the entire system from which it emanates. These critics do not bother to study African courts to understand how they interpret indigenous law in a manner that protects the interests of the poor, the weak and the vulnerable.

The traditional councils, through which these soon-to-be recognised traditional courts will of necessity operate, have, under this government, been transformed, democratised and made gender-sensitive. Women have to constitute no less than one third of the entire membership of the council. The aged, the young and the disabled are represented. The critics will not be bothered to acquaint themselves with these developments. They are content with rehashing colonial drivel, which presumes that African culture is inferior to western culture.

As we seek to modernise and move with the times of the globalising world, let us ask ourselves whether we are becoming better or worse human beings; whether we are becoming a more caring, sharing and morally upright world; or whether we are becoming more selfish, greedy, immoral and inhumane.

One of the most important forums for decision-making is the people’s assembly (imbizo). Each one of the authorities has power to convene imbizo within his area of jurisdiction. This is the highest policy-making forum (in effect parliament) of the people, where all adult male members of the community have the right to attend and participate in the deliberations. It is not a forum where inkosi merely addresses the people, expecting them to do his bidding.

At the end of the deliberations he, together with his councillors, considers the input given by the speakers. The deliberations are thereafter summarised either by himself or through his councillors, and pronounces the resolutions arrived at in accordance with the views of the majority, consensus-seeking being the overriding goal at all times. Each authority in his respective area of jurisdiction strives for unity and is required at all times to desist from showing loyalty to one school of thought to the exclusion of others. In other words, whilst he is deeply involved in politics he has to be above partisan or party politics.

Whilst imbizo is the supreme policy-making body, the Chief in Council acts as the cabinet responsible for the implementation of policy. Another forum, whose functions are pivotal to stability, peace and respect for law and order, is the court (Inkundla, Kgotla). This is the forum where cases are heard and decided and disputes entertained and resolved. Decisions and resolutions are taken in accordance with customs, traditions and precedents. The primary aim of the exercise is not one of retribution, revenge and/or punishment, but more of rehabilitation, reconciliation and compensation.

Family or clan heads are required to seek resolution of disputes where members of the same family or clan are involved, before a matter is brought to the court of first instance. The lowest court is presided over by the sub-headman while the highest judicial

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Description of traditional systems

At the very top of the hierarchy is the king, variously called Ikumkani, Isilo, Ingwenyama, Morena emoholo, KgosiKulu, etc., who is the head of the nation comprised of the tribes whose individual head is Inkosi. The king has his own Council, which is made up of all Amakhosi of his area, some of the senior members of the Royal House (uncles and brothers of the king) as well as any other prominent personalities of the nation.
officer is the king. Each of these courts is characterised by openness, with cases usually heard democratically in the open under a tree, with the peers of the parties allowed to examine and cross-examine all the parties and their witnesses.

It is usually easy to establish the truth, because the society being an open one, everybody knows everybody. At the end of the proceedings the procedure followed in the *imbizo* is used in that *inkosi* and councillors confer amongst themselves and return to declare the verdict and punishment where it is necessary. The verdict is generally accepted by all the parties, with reasons for judgment having been given. Also, in the event that the 'accused' is found guilty, the right of appeal to the party who feels aggrieved by the judgment and/or punishment lies with the immediate court of a higher jurisdiction. Through his headmen and/or councillors the traditional leader administers the affairs of the people. He determines, in council, the times for ploughing, planting and harvest, the grazing lands that must be used and those that must be saved for future use, and the times for the holding of cultural events and initiation ceremonies.

His home is home to the poor, the weak, the mentally handicapped, travel-weary strangers and, in times of war, the refuge for victims of such strife. By reason of these responsibilities the people regard it as their duty to provide the maintenance of the traditional leader by tending his livestock and cultivating his fields. In times of need and starvation, the people expect the Great Place to provide for them as a matter of course.

**Land**

The traditional leader is the custodian of the land. He holds it in trust for the people as a whole. He cannot do as he pleases with it. He is required to deal with it sparingly and equitably. Every breadwinner or family head is entitled to a piece of land as a residential site for his family, as well as an arable allotment to produce food for the family. He is entitled to graze his livestock in the communal grazing lands. Whenever a young man gets married he approaches the local sub-headman and points out the piece of land he is interested in.

The sub-headman calls a meeting of all the homestead heads of the area to get their views on the young man’s application. Once approved, the application is forwarded to the headman who passes it on to the head of the tribe for confirmation. If a single unmarried woman bears children, she becomes entitled to an allotment of her own when it becomes apparent that she is unlikely to get married, for the same reasons that a young newly married man does. The land belongs to the community as whole and no one can alienate his allotment. If the holder abandons his allotment, it reverts to the community and is dealt with within the said procedure. Land is too valuable for a price to be put on it. Sale of land is taboo. One other important function of the traditional leader is that of being the commander of the army. Only he can declare war against, or make peace with other tribes.

**Separation of powers**

From the above it is evident that separation of powers, as is practised in the United States of America, is an alien concept. *Inkosi* is the legislator, administrator and adjudicator. What is crucial though, is that he always acts on the advice and with the assistance of his councillors. Furthermore, power devolves from the highest authority, the king, down to the head of the family. The people’s assembly, *imbizo*, has power to nullify acts performed by the executive when it sits. Custom and tradition do not permit abuse of power and the traditional leader who is inclined towards authoritarianism exposes himself to rebellion and even assassination, which results in him being replaced by the next person in line to the throne.

**Patriarchy**

The society depicted above is naturally one of patriarchy, headed by males. A few tribes, such as you find in parts of Venda and Lebowa, are required by custom to at all times have a woman as traditional leader. The intricacies of procreation of the heir, who will bear the family clan name, is a matter best known by those tribes. Women have however, throughout history played crucial roles in the governance of the tribes. Upon the death of
inkosi, the Queen Mothers have been known to exert a tremendous amount of influence over those who act as regents for the minor heirs. In some cases they have themselves acted as regents for their sons. Queens Manthatsi and Nonesi are but two of many who are famous for having led armies of their tribes against colonial invaders and/or other hostile tribes.

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NOTES

Freedom from all forms of bondage, subjugation and prejudice formed the cornerstone of liberation from apartheid. The understanding of freedom as fundamental to our existence as individuals and communities in a democratic state has led us to explore our understandings of different forms of colonial and apartheid domination.

These were more than formal processes; they were at the heart of defining what it means to be human. Of course the experience of apartheid took different forms and impacted differently on various sectors of society. But on the whole, it sought to manipulate and even destroy our common humanity as South Africans.

It is against the background of total subjugation of individuals and communities in cultural, political, spiritual and economic spheres, knowledge systems, and educational processes, that the current debate on restoring the dignity of African cultural practices, belief systems and customary law must be located.

How do these coexist with the South African Constitution, which recognises and respects African customs, beliefs as well as various forms of leadership on the one hand, and is committed to building a secular society that accords equal rights and dignity to all its citizens on the other? What would be the best form of affirming African customary law while recognising that no community, including Africans, and cultural and religious groupings such as Muslims, Jews and Christians, exist in isolation? And given the legal supremacy of the Constitution, what happens when it conflicts with cultural practices, and religious and other identities? What is needed is to find a balance that builds harmony and contributes to the peaceful coexistence of all South Africans. Central to this balancing is the need to act without compromising the supremacy of the Constitution as the highest law of the land.

African people’s ways of existence, including cultural practices and belief systems, were denigrated and almost annihilated under apartheid. The restoration of those marginalised cultural practices forms part of South Africa’s nation-building project and needs to be alive to

The Traditional Courts Bill

A silent coup?

NOMBONISO GASANBONISO GASANBONISO GASA

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This article calls into question the representation of traditional governance and customary law that underpins the Traditional Courts Bill (B15-2008)(TCB). It argues that the Bill presents a flawed view of traditional custom and practice by, amongst other things, failing to recognise the changing nature of custom and cultural practice. In so doing the Bill provides a legal basis upon which prejudice and discriminatory practices may be entrenched. The article argues that African cultures have always valued individual rights and choices, and affirmed these as integral to each individual being part of a community. This is in no way represented in the Bill. The author argues that the TCB has not only disregarded five years of work of the SALRC, funded by tax-payers, but also proposes a system that contradicts the Constitution.

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the contradictions that have always existed within these cultures and communities.

For example, understanding and probing the meaning of power, and the epistemological assumptions that underpinned the colonial project, is central to unifying as well as restoring the dignity of all South African people. In this context, African customary law needs to be viewed as an intrinsic but complex part of a democratic state based on diverse cultural experiences and identities.

Culture needs to be understood as a fluid pattern of social relations, construction of identities and communal existence. At the core of African customary practices and cultural philosophies is the belief that *umntu ngumntu ngabantu* – a person is a person because of others. The co-dependency between individual existence and collective or communal existence cannot be overemphasised. But here is the critical component which is often obliterated: *umntu ngumntu ngabantu* also affirms the importance of the individual, because without that individual who is indeed affirmed and enriched by interaction with other people, the adage simply cannot exist.

This article argues that African cultures have always valued individual rights and choices, and affirmed these as integral to each individual being part of a community. There is no individual/community dichotomy. Recognition of the individual is not a foreign concept, but deeply embedded in cosmological questions. For example, many African belief systems hold: ‘if you spit in the face of the daughter of the Y clan that defiles not only the individual but his or her ancestors and those from whom she has come’. Whilst the individual is connected to a larger community, s/he is respected in her own right and for no other reason but simply that s/he is human, deserving dignity and fair treatment and respect.

Individual rights and responsibilities are the cornerstone of community existence. In various idioms we find expressions rich in affirming the individual without erasing other human beings or the community. In isiXhosa, it is said *akukho nkwal’ephandel ’enyeye, ephandel ’enyeye yenethole* – ‘no pheasant scratches for another, the one that does so, does first for its offspring’. In short, the primary responsibility of any members of a community is to address their responsibilities and the needs of their offspring and those dependent on them in order to be productive members of the community.

**LOCATING THE TCB**

It must be considered whether the TCB may entrench distorted meanings of community and notions of belonging. Factors to take into account are the different expressions and rituals that recognise the individual and the protection of individual dignity, as well as the responsibility and place of community and customary systems of governance.

Despite a commitment to move away from apartheid-era (pre-liberation) readings and interpretations of ‘traditional leadership’, customary law and practices, and cultural identities, the TCB, like so many other legislative attempts to address this complex area, falls into the same traps of colonial and apartheid sensibilities, boundary formation and definitions. Many debates, literature and policy processes that claim to restore the dignity of African cultural and customary systems and leadership fall into essentialist representation, treating these dynamic processes as static.

African cultures, like any others, are complex and dialectical, and contradictory in how they have unfolded, grown and continue to live in multiple relationships, internally and externally.

Regrettably, the continued romanticisation of African cultural practices and identities as immemorial and unchanging leads to their being seen as exotic. This interpretation is of course based mainly on scholarship with vested interests relating to power and privilege, as well as a need to present static notions of African systems as humane and without any contradictions or inequalities.
Recognition of these inequalities and contradictions does not detract from the most valuable and positive aspects of what have been continually evolving African cultural processes and understandings. In any cultural milieu, there is that which is empowering and restrictive, enabling and disabling. As society develops we have to interrogate what is emancipatory and what hinders self-realisation in these cultural worlds. In his foreword to Nkosi Phathekile Holomisa's book, According to Tradition: A cultural perspective on current affairs, Sonwabile Mancotywa writes, 'Over and above everything else our traditional leaders continue to be custodians of our rich and diverse cultural heritage. Indeed if it were not for their wisdom and intrepid spirit to rise above colonial structures, as a nation we would be faced with identity crises, without any trace of our source of origin or an anchor to our African roots...'.

Mancotywa's words point to one of the critical dangers that African cultural systems encounter, a narrative based on a distortion of historical legacies. In reality, 'traditional leaders' are not custodians of culture in the African cultural milieu. People of different ranks and stature are custodians and repositories of knowledge, customs and practices. It is these people – the bearers of knowledge and wisdom of their people – upon whom Africans have entrusted these responsibilities and roles since pre-colonial times. Izanusi, in a Zulu cultural context, are appealed to as people whose responsibility is not born of inherited titles but through training, learning and investing time to protect and enhance the knowledge systems and diffuse these.

In times of crises or where complex issues have to be interpreted, izanusi are often called, either to work as individuals or as part of a team of people of the same rank and knowledge, to guide conversations and to look deeper into those complex issues.

Among the Yoruba in West Africa there is a saying, 'when a griot dies, a whole library is lost'. This is in recognition of other spaces where knowledge and wisdom is found. The griot's role in the historical record of his or her people is as undisputed as that of elders in our families from whom we learn of our heritage, lineage and identity.

But the griots and izanusi have never pretended to be bearers of knowledge that is unchanging. They survived and remained relevant because they learnt as they taught. In the African cultural milieu, a custodian does not necessarily have to know everything and have the last word all the time.

Mancotywa's foreword is in line with the TCB in its concentration and centralisation of power, knowledge and 'wisdom' in 'traditional leaders' in a single individual, the presiding officer. This displaces the role of family elders, who are critical in dispute resolution, in assisting young people to know their lineage and helping them to be rooted and anchored in their identity. 1 There is a marked and fundamental difference between the TCB and the Bill put forward by the South African Law Reform Commission (SALRC). The SALRC version of the Bill recognises the multi-centred layers of the customary court system. Thus, it proposes a flexible system which accommodates these different levels of operation.

Recognition of a single court within the ambit of customary law in a 'traditional community' and the promotion of centralised power are in fact inimical to the heritage that the TCB claims to affirm. Ordinarily, when a matter comes to this level of court in a customary system, there are a range of steps that have already occurred (see also Sindiso Mnisi's concluding article in this edition of SACQ). These findings are placed before the court as a narrative of the process, to ensure that no significant role player will feel excluded or undermined and to enable the court to determine the seriousness of the matter it confronts. At every stage of the hearing, such narrative is provided, supporting the court. Where necessary, those who are affected will come forward to attest to this as in 'sihleli siyinkundla yekhaya satetha savana ukuba masidibane nosapho lwamathile siyisombulule le ngxaki njengabamelwane, kwacaca ukuba umhlaba uyenyuvela, sagqitha ke njenge sitethe' (we sat as a family and decided to sit with
the other family and agreed to resolved this matter as neighbours, it became clear that this is an uphill battle and thus concluded to go beyond that, according to practice....) Each stage verifies the participatory nature of the system and commitment to seek resolution as neighbours.

Gradually, a body of work, evidence, and thorny issues emerge, and often even the ‘customary court’ cannot make an instant pronouncement but will go outside the immediate royal family and seek advice from izanusi – the ‘wise ones’ – based on their knowledge, skill and investment in their community.

Entrusting power and decision-making to one individual in the manner suggested in the TCB (section 4(i) and (ii)) violates the intention of such processes.²

Further, the SALRC Bill proposed that the ‘customary courts’ should comprise representatives of the community. It also proposed the inclusion of women as participants and representatives of community interests. These different stakeholders, whilst bound to operate within the ‘customary law’ system, would provide community participation and a bridge between the community and the customary courts.

The SALRC Bill also proposed that the participation of councillors be looked at and that government should develop policy in this regard. It is easy to understand why the SALRC did not make a clear recommendation on this as it is one of the hotly contested issues by ‘traditional leaders’, some of whom have been on record objecting to local government in ‘traditional communities’ and the role of councillors. Whilst the context of this is understood, it is not acceptable that the SALRC Bill and later the TCB have considered the voices of ‘traditional leaders’ as the most important in this debate.

There is no doubt that the procedures of community participation would have been highly contested both in terms of functioning as well as composition. Some customary practices to which the SALRC Bill referred prohibit women from direct participation in decision-making and even direct representation as complainants, defendants and advisors on complex issues. Whatever considerations informed the Department of Justice and Constitutional Development’s approach, and the decision to drop the SARLC Bill and introduce the TCB, the primary and hegemonic voice of ‘traditional’ leaders is clear. It actively advances proposals, provisions and parameters that undermine some of the constitutional principles it sets as guidelines, and which it purports to respect and promote. It is also interesting to note that throughout the TCB all the proposals that were made by ‘traditional leaders’ are endorsed, and complex issues that were raised by communities and other stakeholders in the SALRC are ignored.

One such issue involves the notion of opting out. For example, section 20 (c) asserts that any person who:

having received a notice to attend court proceedings, without sufficient cause fails to attend at the time and place specified in the notice, or fails to remain in attendance until conclusion of the proceedings in question or until excused from further attendance by the presiding officer, is guilty of an offence or liable on conviction to a fine.³

The assertion of authority on grounds of jurisdictional boundaries is problematic, ahistorical, and contrary to customary systems and a long history of self-determination. This provision not only undermines the constitutional rights of citizens who live in areas demarcated as ‘traditional communities’, but it also seeks to impose a single identity and an interpretation of customary law that is inconsistent with the inherited and living law.

Some of the provisions in the TCB will suffocate the dynamism of those communities defined as ‘traditional communities’, and will impose cultural hegemony at the expense of peaceful coexistence. This may amount to cultural chauvinism.
In some communities there are people of mixed religions and spiritual beliefs. For example, it is sometimes ruled that burials will not take place on a Sunday. This denies the right of those who cannot bury on Saturdays to practice their religion and belief systems freely. Should they be found to have disobeyed an order of the court, or disturbed communal harmony, some may elect not to present themselves to the ‘traditional court’ and thus opt out. In their eyes and world view, the ‘customary court’ may not or should not pronounce on their spirituality. By not giving them an opportunity to opt out, their constitutional right of worship is violated.

This example is made deliberately because it is perhaps the least contested. There are many less visible examples that may present complex issues and lead to conflict. This may be particularly so in communities of mixed ‘cultural identity’ where some clans may choose not to be subjected to the dominant customary law. These clans may have lived together for several generations but yet may have practices, including ‘customary practices’, that are not common between them. Refusing such people, and individual members of a community, space to opt out undermines their constitutional right and choices.

The refusal to give people an option to ‘opt out’ is an expression of the anxiety of ‘traditional leaders’ to avoid any potential undermining of their authority. It is revealing that ‘traditional leaders’ fear that their ‘own’ communities may not recognise their power. This points to the need for a debate on representation, legitimacy and confidence of communities in these institutions.

It is the notion of fixed, unchanging, African cultural homogeneity based on static boundaries and cultural identity that underpins all the laws and policies that are applicable in African customary law and systems in South Africa today. Ironically, the geographic boundaries for these laws are derived from the very laws that should be scrapped, such as the Black Authorities Act 68 of 1951 and the Black Administration Act 38 of 1927. They are ossified in a manner that is permanently scarring South Africa according to apartheid and colonial logic. This destroys any notion of a living customary law.

Alongside these apartheid geographic boundaries come a range of practices and authoritative systems that undermine the constitution and entrench inequality. For example, African ‘customary’ practices are said to be egalitarian and are largely so. Yet there are also fundamental contradictions and inequalities that often determine the status of a person within a pecking order and can be highly prejudicial. For those who come from small clans that have no status in the system, for those who do not have cattle or the means to assert their authority, for women and children, this system can be oppressive. It is therefore important that any process that seeks to affirm ‘customary practices’ also develops mechanisms to prevent abuse and prejudices that are visited upon South Africans, wherever they are.

The TCB has not only disregarded five years of work of the SALRC, funded by tax-payers, it also proposes a system that contradicts the Constitution.

**GENDER AND THE TCB**

Scholars who have written on gender have identified the obliteration of women as active agents of change with specific roles, identity and power in favour of the nation, which, more often than not, is based on a patriarchal framework and epistemology. This is a glaring point of departure in the TCB’s presentation of ‘traditional governance’. Even the schedule of cases that may be put forward in these courts unmask the logic and rationale that the TCB tries to hide through its continuous reference to constitutional principles.

There is a glaring absence of crimes committed against women, including those that are already identified in the national legislation. For example, conjugal rape, incest, statutory rape (including that which takes place during the forced marriages of girls who are legal minors,
ukuthwala), domestic violence and spousal abuse do not appear in the schedule. Thus these cannot be heard in the customary courts and yet they cannot go elsewhere because they fall within the ‘traditional community’.

There is a double edged sword on gender in ‘traditional courts’. It is doubtful whether inclusion of these crimes in the jurisdiction of such courts would be desirable for women, girls and some men who may experience gender-based violence and discrimination, including on grounds of sexuality and sexual identity. Experience of what has been generally referred to as ‘tribal courts’ has shown indifference, inadequacy and downright hostility to people who speak of these crimes. On the other hand, exclusion of these crimes in the schedule of cases within the scope of the TCB creates another problem.

If people who live in the areas designated as ‘traditional communities’ cannot opt out and take the choice of using the magistrate’s court, the family court or the equality court as their courts of first instance, these people are left without any access to justice.

Given this problem, it is apparent why the SALRC’s version of the Bill proposed to exclude all matters pertaining to gender violence, discrimination, dissolution of marriage and sexual offences. However, given the strong opposition by some leading voices, especially among ‘traditional leaders’, it is clear that this is going to be an area of major contestation. Excluding these issues must be met by recognition of citizens’ inalienable right to opt out of the system.

The reality is that these courts are not sympathetic to the victims of these crimes, given the patriarchal framework in which they are located. That is not to say conventional courts do not present their own inadequacies. But they have the potential to offer women better access to justice because they are subject to the constitution and laws of the country.

THE TCB AND ABUSE OF POWER

There are very few South Africans, if any, who can argue that customary law bears no relevance today. Similarly, it is hard to imagine serious thinking South Africans disputing the relevance and importance of the institution of ‘traditional’ leadership, however constituted.

The TCB touches on an issue that is important not only to those for whom it is applicable, but brings up a central challenge to South Africa’s emergence as a constitutional democracy. However, in its current form the TCB undermines the goal of restoring dignity to ‘traditional leaders’ and others who have been harmed, and reduces the meaning of freedom for rural Africans to the status of the subaltern.

To those who are familiar with the history of the institution of traditional leadership during colonial conquest and the apartheid era, this creates unfortunate continuities, including the possibility of the abuse of power. These communities are a significant part of the South African population; they include 17 to 18 million South Africans, according to some statistics. The TCB in its current form effectively disenfranchises these communities. While they can go through the formal processes of voting, what that means, particularly in relation to local government, clearly needs further probing. The Bill as it presently stands erodes local governance in a significant manner. Some of the tensions between local government and traditional institutions in South Africa are directly related to issues of land, identity, power and authority.

Consider this example: Mngqanga is a village in the surrounds of Lady Frere, which is Rhodna, under abaThembu base Rhode ‘traditional leadership’ in the Eastern Cape. During the height of the rule of KD Matanzima, the people of Mngqanga decided to protest and defy the rule of the Transkei government, which was synonymous with being subjected to serf-like status. People had to work the fields of the Paramount Chief, pay lobolo for his many wives and undertake activities as part of the women of the Transkei National Independence Party (TNIP).
Tired of the defiance and protestations of the people of Mngqanga, a scorched earth policy was applied in this rural community. Villagers woke up to find their homesteads and plains on fire. In the kraals, the trapped sheep and goats bleated and the cattle bellowed. Some houses caught fire and people lost not only their livestock, but also their homes and belongings. Word is said to have come from the abaThembu Royal palace in Qamata, zitshiswe ngamandla akomkhulu, (the destruction by fire was caused by the special powers of the royal house). The people of Mngqanga continue to live with the scars of this memory.

These people, and many others, we are now told, have trust in and a bond with their 'traditional leaders' that is born of common heritage. They watch and listen as others speak of the institution as their anchor and proud heritage.

Whilst the rest of South Africa went through the process of the Truth and Reconciliation Commission (TRC), not a word was said about the brutalities that were visited on these people and others all over South Africa. That silence remains even more problematic in the context of the powers given to 'traditional leaders' through the TLGFA and the proposed TCB. The recent hearings in parliament, where the TCB was discussed with people who came from rural communities all over South Africa, exposed some of the abuses that are taking place today, in the name of culture.

CONCLUSION

This article has asked whether we need the TCB in the form that it has taken. Does having this layer of courts actually make justice more accessible to poor people? Does restoring the dignity of customary law and affirmation of African cultural systems mean that South Africa must introduce 'traditional courts' with such sweeping powers? Is it in fact customary law and cultural heritage that is being affirmed?

The TCB in its current form is clearly concerned with affirming the power, status and standing of 'traditional leaders'. This Bill does this with little regard for the consequences of those who will not be able to avoid being trapped in this system.

It is revealing that the TCB makes no provision for members of the community to raise issues and concerns they may have about the behaviour of 'traditional leaders' and the 'traditional courts'. It does not deal with what happens when these communities are subjected to abuse. In this way the TCB fails to restore the dignity of 'customary law and systems'. Instead, in its current form, it presents a silent coup against hard won freedoms for all, including those who were dumped in the 'reserves' as sources of cheap labour.

The author is grateful to Raymond Suttner, for continued discussions on these and several other critical issues in our quest to build an equal, just and fair society based on sound constitutional principles and human dignity.

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NOTES

2. Traditional Courts Bill (B15-2008).
3. TCB Section 20 (c).
Problems exist with some of South Africa’s customary courts. As the first port of call in the pursuit of justice for approximately 17 million South Africans, there is a need to fix them and to ensure that all customary courts operate in line with the Constitution. In the TCB, government has failed to arrive at a suitable framework to regulate customary courts. How do we regulate customary courts in ways that respect both living customary law and the Constitution?

In this article, I summarise what we know about the way customary courts actually function, and how people use them. I then discuss the implications of what we know for the regulatory framework that the Traditional Courts Bill adopts. Finally, I suggest the necessary aspects of a framework for regulating customary courts. I do not purport to present here anything beyond basic guiding principles, which I argue to be essential to facilitating the successful regulation of customary courts in order to bring them in line with the Constitution, while respecting fundamental and progressive elements of how they operate in practice.

There is a wealth of knowledge about customary courts – the way they operate and how they are used – from which we can draw useful principles for regulation. This knowledge is found, firstly, in a survey of 20th century ethnographies; secondly, in 20th century contestations brought to the civil courts to challenge traditional authority misconduct as well as state misinterpretations, distortions and impositions; and, thirdly, recent research and consultations conducted by the...
South African Law Reform Commission (SALRC) from 1998 to 2003. The findings in these sources have also been recently corroborated by studies conducted by researchers at the Law, Race and Gender Research Unit (LRG) at the University of Cape Town. These multiple sources agree on key features of customary courts that the TCB is shown to have disregarded. Indeed, studies of the statutes formerly regulating this area of law and practice (such as the Black Administration Act 38 of 1927 and the Black Authorities Act 68 of 1951) confirm that the TCB borrows a faulty approach, used by the apartheid government and strongly contested by affected communities, to regulating customary courts. (See the introductory article by the same author in this edition of SACQ.)

I propose legislation that is democratic, emphasises traditional institutions’ accountability to the community and is, hence, consistent with both the Constitution and customary practices. The underlying basis for the regulatory framework is the notion that individual choice is the means by which government might protect group identity and culture. Recognition of both customary and state laws and authorities, whilst simultaneously allowing individuals to determine for themselves when they wish to appeal to these laws and authorities, gives necessary weight to the individual’s right to withdraw from the community and its culture. It is argued that for group identities and arrangements to remain a viable choice, customary courts must be supported and improved in ways that make them an attractive option. Yet it recognises that people must concurrently have the necessary information and means to give effect to their choices, whether in favour of or away from the group and its social and institutional arrangements. Put differently, the state must give effect to the individual agency of rural people. Yet, the state does not, by placing the burden of agency on the individual, rid itself of its responsibility to assist in regulating and supporting traditional forums for positive ends. And, by the same token, the state retains the duty to equip individuals with the tools to choose effectively. This duty includes the need to reconceptualise formal laws and institutions so as to make them more accommodating of alternative contexts and realities, and thereby also to make formal laws and institutions a more viable option for rural people who wish to use them. The law should do this in the following ways:

- being minimalist in assigning power to traditional institutions;
- it should be weighted towards assigning responsibility to these institutions (tempered by an emphasis on the limitations of the powers assigned to them during colonialism and apartheid); and
- it should ensure that accountability is due primarily to the community the court serves and only secondarily to government (while government should bear more of the responsibility of financing the courts than the community does).

THE FUNCTIONS AND USE OF CUSTOMARY COURTS

What do we know about the way customary courts function and how people use them?

Firstly, customary courts are non-professional institutions. They are community forums in which mature members of the community participate. Community members are therefore able to participate freely in their functioning, although women were traditionally excluded from participating in customary courts. The notion of a presiding officer who acts as a judge and is the single decision-maker has no real place in these forums, as they are shared consultative spaces in which all present can participate in the hearing, questioning, deliberation and decision-making.

Dutton observes:

Anyone can ask questions and there is no unseemly hurry; ... Then the smaller fry among the men of the lekhotla give their opinion, the more important people next, and finally the headman gives his decision, which is
generally the summing up of the views of the majority. In theory, he can give any decision he likes, but in practice, … the final verdict is really the general opinion of all present.7

The inconsistency between different communities (even within a single cultural group or locality) with regard to the extent of the chief’s participation in the court – ranging from non-participation to active participation – makes the idea of a ‘presiding officer’, taken from western court systems, an untenable notion to adopt and impose on all communities.8 We know that even if a figure akin to a presiding officer exists in some communities, when it comes to formulating and pronouncing decisions, he is generally bound by what the council and/or the community has found in hearing that case.9

Secondly, customary courts do not, and have never, existed only at the chief’s court level. Historically, colonial and apartheid governments have tried to ignore and thus do away with the lower courts (family, clan and headmen’s courts),10 but failed. These courts are embedded in the communities; they are often formed by members of the local communities meeting to, as they might say, ‘resolve problems’.11 They do the bulk of the work of dispute resolution. Most cases do not even reach the chief’s court, which can be located far away from most community members.12

As a result, lower courts are almost impossible to do away with and should not be ignored, but should instead form the core of any model of customary courts recognised by government. Although the Black Administration Act initially ignored these courts, they continued to exist outside of the law. Due to necessity, the Act was amended so as to include specific recognition of certain such courts, albeit inadequately.13

Thirdly, the possibility of electing to use state courts to avoid unjust customary courts has served an important function. This has often been the case, particularly for women, because they were subject to patriarchy that the colonial and apartheid governments had supported and entrenched in traditional communities.14 Attendance at a particular customary court was always elective;15 it just so happened that people tended to prefer their local forum as a first option for conflict resolution.16

Thus the choice to recognise a particular court served the function of defining the customary court’s jurisdiction and authority.17 It reflected recognition of the legitimacy of a leader and served as an important check on the leader’s authority. This also held leaders to account and caused them to lead well; they knew that if they did not rule justly, or make fair decisions, their people would defect.18

This dynamic was partly disrupted by apartheid legislation that forced limiting boundaries on people. Yet, even with the existence of imposed jurisdictional boundaries for customary courts, the alternative system of courts made available to them (that is, the state court system) served as an important alternate accountability mechanism.19

In other words, people would turn to the state courts to defend them against, or simply to avoid,20 their unjust rulers’ actions, laws and judgments.21 In a modest but important way, this meant that customary courts were dependent on their use by citizens and had to remain accountable in order to retain their legitimacy and continue to exist. To deny rural people the ability to choose whether or not to attend customary courts is to undermine a significant aspect of their ability to secure justice and hold their institutions accountable.

**IMPLICATIONS FOR TCB REGULATORY FRAMEWORK**

By acknowledging and empowering a single actor as constituting the traditional court, and having power to make law and decisions in traditional courts,22 the TCB centralises and professionalises customary courts. It achieves this by assigning the senior traditional leader a role equivalent to that of a judge in a civil court, which is referred to in the Bill as ‘presiding officer’ and by excluding other participants from the court. Put differently, by adopting the Black Administration Act’s
invention of the role of the presiding officer as the central constitutive figure in the customary court and imposing it on all communities, the TCB violates the proven nature of customary courts, that is, broad community involvement. In addition, by failing to specifically provide for women in the constitution and operation of customary courts (except as litigants, and even then without the protections they need), the TCB reinforces the problem that women were and are excluded from involvement in the decision-making of customary courts.

The TCB again entrenches the power of the chief and excludes lower courts in a way that is fundamentally inconsistent with customary practices. It thereby effectively does away with what I have shown to be an indispensable segment of the customary justice system – and the last century and a half has proved that this is doomed to failure. Perhaps, more importantly, these lower courts play a key role in mediating power and abuse in centralised official courts, because rural people can opt to deal with their matters through lower level structures instead. Historical evidence shows that clan and village level structures simply do not refer matters ‘upwards’ to courts dominated by unaccountable traditional leaders.

By refusing people the right to opt out, s20(c) of the TCB strips rural people of several rights and benefits, and then refuses them one of their instruments for seeking and securing alternative justice, and for simultaneously holding their traditional justice institutions accountable. It deprives them of their right to freely choose their culture and to freely (dis)associate with their traditional authorities. It also denies them an escape from illegitimate and/or dysfunctional and unjust customary courts (where these are the conditions of their local courts).

National courts exist in terms of section 166 of the Constitution. Section 166(e) provides for the establishment of ‘any other courts established or recognised in terms of an Act of Parliament…’. The Department of Justice and Constitutional Development has argued that customary courts will not be established under s166, but are, instead, given recognition under section 34 of the Bill of Rights as an ‘independent and impartial tribunal or forum’. This sleight of hand will allow the right to legal representation as provided for in section 35(3)(f) of the Constitution, to be excluded from customary courts.

However, section 34 and the forums it provides for are subject to the Bill of Rights and the Constitution, including the right to legal representation in criminal cases. Section 34 establishes the right to have one’s case heard in a court as established in terms of section 166(e). Moreover, in terms of section 34, if it is established that it is appropriate that the matter be heard in an alternative tribunal or forum, the alternative to the court must be independent and impartial in the way in which state courts are required to be.

Customary courts are generally not independent and impartial; in that case, they must exist outside of section 34. Thus, if people are to use customary courts, they must use them as people use professional negotiators and arbitrators: by opting into them. Put differently, if they are to make use of customary courts, people have to choose to abandon the forums required by sections 166(e) and 34. They cannot be forced to use forums other than the state courts or comparable tribunals and forums. The choice to abandon the state courts is the only way in which the denial of the right to legal representation articulated in section 35(3)(f) in the practice of these courts can be constitutionally justified.

COMPONENTS OF A REGULATORY SYSTEM FOR CUSTOMARY COURTS

As socially embedded and non-professional forums of dispute resolution, customary courts are constructed from the ground up. Therefore, a system for their regulation should not only recognise chief-level courts, or even begin from the chief’s court’s level and devolve authority downwards. Rather, it should start at intra-community level and rely on community members to assign authority upwards. These courts are elective structures, the shape of which should not
be imposed by the state. People should be able to choose to support and perpetuate the courts, or to discontinue them.

To start with, lower level courts should be recognised first, before recognising higher-level courts within communities. The former courts should include family/clan courts, ward/village courts and any other (even typically non-customary) courts that communities form to meet their dispute resolution needs at local level. Following on from that, provision should be made for communities to refer cases up to higher-level courts within their communities, if they wish. Provision must similarly be made for people to refer cases to courts outside their communities, if they wish. In other words, if they elect to do so, community members should be able to take their cases from the headmen’s courts (rather than chiefs’ courts) directly to a magistrate’s court.

People should be able to choose which customary court to patronise. Although they might mostly choose their local court, it is possible that they might choose a customary or other informal court outside the geographical jurisdictional boundaries established by apartheid. They should not be confined to using their local chief’s (or headman’s) court. Similarly, rural people should also be able to institute proceedings in state courts and avoid customary courts entirely. This is most important in the case of criminal matters.

As illustrated above, the only way that the denial of the constitutional right to legal representation can be justified in criminal matters is if an accused person chooses to attend a customary court in which they are not permitted to have professional legal representation, and thus voluntarily abandons this right. Finally, discrimination by customary courts against any member of the community (whether on the basis of gender, culture, class, religion, legitimacy, age, sexual orientation, or even on the basis of non-payment of tribal levies and fees) should be excluded by law.

Community participation in cases should be recognised, whether it takes the form of a council or whether through the general participation of the community. The precise balance between the two (the council and the community) could be left for each community to determine, according to its own practice. Particularly, however, women’s involvement in courts must not be confined to their role as litigants; they must also form part of the court. Women must be integral to the composition of the courts, and thus part of the decision-making on what customary law is and how it is to be applied. Support must therefore be given to the progressive development of customary law in those areas where women are increasingly playing a role in the courts.

When a woman is a litigant in a legal matter, she must be given the right to represent herself in a customary court. Matters concerning the rights and interests of women must not be heard in the absence of the litigant. Thus, they must be present or give voluntary, written consent for another to represent them in their absence. Even where women wish to be assisted by family or friends, they must take primary responsibility for their cases, especially their defence.

Those matters affecting women most adversely should largely be excluded from customary courts’ jurisdiction. These include matters pertaining to violence against women and children: rape, attempted rape, indecent/sexual assault, domestic violence and child abuse. Also included are civil matters determining one’s status, namely, marriage/divorce, custody, guardianship, maintenance, determination of paternity, and succession (validity, effect or interpretation of wills). Given that discussion of differences within the community is a significant aspect of customary dispute resolution for many rural people (including women), mediation of matters without the issuance of a final ‘judgment’ should be permitted, particularly at lower levels of social organisation.

Regarding sanctions – all of which should be appealable to the magistrates’ courts – the following restrictions should be established:

- Community Service Orders should be prohibited from being imposed on people not...
party to the proceedings. These kinds of orders should *not* be interpreted to mean service in the chief or headman’s homestead, or for the chief or headman’s benefit.

- Banishment, or denial of land rights or community membership, and deprivation of other customary rights should be outlawed as punishments in both criminal and civil cases.
- Corporal punishment and other forms of humiliating punishment should continue to be prohibited.
- Orders of a monetary value must be restricted to modest sums that are in reasonable proportion with income levels in rural areas.42

Because of the importance of victim compensation in the case of a wrong – even a criminal wrong – two courses should be pursued adjacently. Firstly, compensation orders in criminal matters (under sections 297 and 300 of the Criminal Procedure Act 51 of 1977) should be publicised in the rural areas. Compensation orders should also be made available to rural claimants via both the civil and customary courts. These should be subject to appropriate financial limits.

Secondly, customary courts should have jurisdiction as an alternative forum for civil claims in connection with minor criminal cases within their jurisdiction, where the criminal courts have not granted compensation orders. Again, this capacity should be subject to appropriate jurisdictional monetary limits. This approach acknowledges the void that customary courts often end up filling by hearing ‘criminal matters’ essentially as civil claims. However, recognition should be given to the fact that civil/criminal boundaries are often blurred (or non-existent) in customary courts and thus, as a case progresses, the aim of the hearing might change from restorative to retributive justice (and vice versa). Consequently, the provision should also allow for referral of cases from the customary court to the magistrate’s court, should a restorative matter become retributive.

Ultimately, rights, resources and oversight are essential to ensuring that, where necessary, customary courts are developed into functional and constitutionally just institutions that truly serve the justice needs of their patrons. This does not entail trying to turn customary courts into magistrate’s courts. Rather, it permits them to operate in their contexts as they are inclined to, while subjecting them firmly to the requirements of the Constitution.

To achieve this, the state must exercise its own responsibilities towards the courts and the people they serve. I list a few of these institutional responsibilities here.

Firstly, government should provide the courts with the financial support to enable them to operate well.43 Certainly, poor people should not be required to pay (excessive sums) in order to ensure that the courts are operational because of government’s failure to secure this. For example, in places court fees and fines have crept up to prohibitive levels and are even accompanied by unconventional gifts (a form of bribery) on the side,44 which makes it difficult for poor people to access the courts, and creates an obstacle to justice. Rural people should not have to pay for access to these forums of justice. But if proved necessary that they do, these fees should be nominal and consistent, and court finances should be formally accounted for.

The state should have information on how customary courts operate. This will help ensure that customary courts recognise the constitutional rights of individuals and act in accordance with constitutional values. It may require a dedicated department within the Department of Justice and Constitutional Development, with trained officers to evaluate the customary courts and their reports. (Only basic reporting is necessary or even possible at this stage, but it must definitely include accurate financial reporting.) Such a department should conduct site visits as a form of oversight, assessment, modification of practice and training that would allow for course corrections to be made specifically and timeously. The department should also receive, investigate and deal as promptly as possible with complaints pertaining
to violations in specific courts, even where these are anonymous.45

A third and crucial element of government’s responsibility is that sanctions must exist for customary courts that refuse to conform. These should be over and above the sanction presumed above (that people would cease to patronise a dysfunctional and unjust customary court and would report it for investigation). Removal, banning, prosecution, fining and imprisonment of recalcitrant customary court staff and regular participants should also be available sanctions against the institution and its servants.

Where problems with a customary court are systemic and irreparable, the withdrawal of recognition (i.e. official disbandment) should be possible. However, this too should ultimately be guided by the will of the community that the court serves and be supported by the active use of alternatives by the community; otherwise it will be ineffectual. These sanctions must be enforced to prevent disillusionment with government’s preparedness to hold traditional institutions accountable.

A final institutional element to complement the others is that, in the magistrate’s court, dedicated officers should be installed to deal with customary law concerns (original applications and appeals). They should be trained to deal with these matters and develop a real understanding of local systems so that they may give effect to (or, where necessary, develop in line with the Constitution) living customary law. In other words, for the effective integration of customary courts with the state court system, mutual understanding and ongoing communication between the respective institutions is required, as is a willingness to accommodate and learn from one another.

CONCLUSION

In summary, regulation of customary courts should emphasise the responsibilities these courts owe to their patrons. The law should also make traditional institutions directly accountable to the communities they serve, and to the state. Furthermore, regulation should give priority to individual choice as the means by which both group identity and culture can be protected. That means recognising group identity and culture, while allowing the individual to choose it or reject it. Finally, for group identities and customary legal arrangements to remain a viable choice, the state is required to give customary institutions support and facilitate their improvement so that they will be an attractive option for local conflict resolution. This includes ensuring that users of customary courts have the information necessary to realise their choices and rights.

Most importantly, whatever legislation is ultimately promulgated to replace the Traditional Courts Bill must be informed by direct consultations with ordinary rural users of the courts and the needs they articulate, as required by the Constitutional Court’s injunction.46

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NOTES


2. On the nature of the chief’s power and its source: Hermannsburg Mission Society v The Commissioner for Native Affairs and Darius Mogalie 1906 TS 135, Mogale v Engelbrecht and Others 1907 TS 836, Rex v Magano and Madumo 1924 TPD 129, Mathibe v Tsoko 1927 AD 74, Mathura v Du Toit 1926 TPD 126, Rathibe v Reid 1927 AD 74, Mandhlakayise Ngcobo v Chief Native
4. See, for example, ‘The Traditional Courts Bill of 2008:  
7. Dutton,  
259-60.  His fieldwork  
8. Ibid. Also see Mnisi, The interface between living  
9. See note 7. With regard to the Xhosa, Hammond-  
10. Mönnig, The Pedi, 308; Wilson et al, Keiskammahoek  
12. Hammond-Tooke, Command or Consensus, 64.  
13. See the Black Administration Act sections 12 and 20,  
14. M Chanock, The making of South African legal  
15. See  
18. Hammond-Tooke, Command or Consensus, 67, 68.  
19. Reader, Zulu tribe in transition, 259-60.  His fieldwork  
Commissioner for Natal 1936 NPD 94, Moepi v Minister for Bantu Administration and Development 1965 (1) SA 533 (T). On the role of the chief (and headmen) in customary courts, and scope of his power: Makapan v Khope 1923 AD 551, Mokhatle & Others v Union Government (Minister of Native Affairs) 1926 AD 74, Modisane v Makgtoho 1928 TPD 487, Morake v Dubedube 1928 TPD 625, Rex v Kumalo and Others 1952 (1) SA 381 (A), Rex v Ntswana 1961 (3) SA 123 (E), State v Mgadi [1971] 2 All SA 394 (N).  
6. Except in cultural systems where they had their own systems of courts (as in Pedi culture) or, as in the case of the Swazi, where the Queen would hear appeals in the court immediately beneath that of the King who was her son or where, as in the Lovhedu, a woman was the figurehead in the court, as chief. See Mönnig, The Pedi; Kuper, An African aristocracy.  
7. Dutton, The Basuto of Basutoland, 59-60. Even in the case of the more presiding officer-like role of the Tswana judge, according to Comaroff and Roberts, Rules and Processes, 80-83,180, as with legislative pronouncements, the legitimacy and efficacy of the chief’s decisions or rules that are developed in cases depend on (i) their reflection of public opinion, (ii) their being delivered by an authority considered legitimate and (iii) their utility to individuals in the circumstances in which the rule might later be raised. The first criterion introduces the dimension of community participation to the process because, as Comaroff and Roberts observe, the chief must usually consult widely. It is also important to observe that the second of these conditions is often lacking where the apartheid government imposed the existing traditional authorities and institutions. Also see Cook, Social Organisation and ceremonial institutions of the Bovana, 146 and Reader, Zulu tribe in transition, 259-60.  
8. Ibid. Also see Mnisi, The interface between living customary law(s) of succession and South African state law.  
9. See note 7. With regard to the Xhosa, Hammond-Tooke, Command or Consensus, 68, 74 fn 13 notes that decisions are made by the ‘community-in-council’. Indeed, he writes (at 67) that ‘a chief who dared to go against the wishes of his people ran the risk of losing their support, and perhaps his chieftainship’. ... Consensus was all important.’ Also see the following cases for the claims made to them, more than for the findings of the courts: in Morake v Dubedube 1928 TPD 625 at 630 the court describes the chief as ‘sitting in that capacity, advised by his counselors and wrongly rejects the contention that the chief (and his council) does not possess in him the customary law; Rex v Kumalo and Others 1952 (1) SA 381 (A) speaks of the chief and members of his council as deciding upon the proper punishment for a man for contempt of court; Rex v Ntswana 1961 (3) SA 123 (E) also notes the council and headmen’s role in the traditional dispute resolution process; State v Mgadi [1971] 2 All SA 394 (N) similarly notes the headmen’s involvement in the processes of dispute resolution.  
12. Hammond-Tooke, Command or Consensus, 64.  
13. See the Black Administration Act sections 12 and 20, which regulated traditional courts under the respective titles, ‘Settlement of civil disputes by native chiefs’ and ‘Powers of chiefs to try certain offences’. See the amended titles, pursuant to the Native Administration Amendment Act 1929 (9 of 1929) and the Native Administration Amendment Act 1943 (21 of 1943) – respectively, ‘Settlement of civil disputes by Black chiefs, headmen and chiefs’ deputies’ and ‘Powers of chiefs, headmen and chiefs’ deputies to try certain offences’.  
15. See Makapan v Khope, 555 where the court correctly recognises the headman’s court on grounds that it was ‘recognized by members of the tribe as having authority to hear and decide disputes’.  
18. Hammond-Tooke, Command or Consensus, 67, 68.  
19. Reader, Zulu tribe in transition, 259-60. His fieldwork having been done pre-1951, Reader observes that ‘no
aspect of Makhanya life has the South African Administration intervened more decisively than in the judicial sphere’. He says that the legal system there is a complex of European and tribal judicial institutions which have gradually come together over a period of more than 100 years.

20. Hammond-Tooke, Command or Consensus, 78.

21. Roberts, Litigants and Households. Some of the cases cited above, note 2, are examples of these appeals to the state to defend against abuse of power by traditional authorities. These include Hermannsburg Mission Society v The Commissioner for Native Affairs and Darius Mogalie 1906 TS 135 and Rathibe v Reid 1927 AD 74 on whether the chief must consult with the community or act in accordance with the advice of the council, respectively, in his execution of his ‘trusteeship’ role vis-à-vis the land of the tribe; Mandhlakayise Ngcobo v Chief Native Commissioner for Natal 1936 NPD 94, where the court addresses the tribe’s dissatisfaction with its leader, one component of which is the chief’s appointment of a principal isiduna without consulting the tribe; Rex v Magano and Madumo, 1924 TPD 129 on a similar matter of the chief’s need to consult the community; Moepi v Minister for Bantu Administration and Development 1965 (1) SA 533 (T), in which a tribal community, led by the chief’s councilmen, brought a chief before the Bantu Commissioner for his failure to consult the headmen on matters which required their approval; Mathibe v Tsoke 1925 AD 105 at 116 concerning the opportunity for the community to object on whether a new levy should be imposed on them.

22. Sections 1 and 4 of the TCB.

23. See Makapan v Khope, 555 where the court finds that, in terms of section 4 of Law 4 of 1885, ‘a chief appointed by the government [is constituted] to be a court of justice’.


25. Again, see Hammond-Tooke, Command or Consensus, 64, where he observes that, although in theory appeals from lower courts could go to chief’s courts in the Transkei, ‘it seems this was rare in practice.’ He also quotes a regent named Isaac Matiwane as saying that: Subjects of the isiduna were allowed to take their cases on appeal to the chief’s court if they were not satisfied with the isiduna’s verdict. But such cases were very rare. In fact this was not encouraged.

26. Ibid. Mönig, The Pedi, 313 also reflects that few people took cases to the Native Commissioner in terms of the Black Administration Act of their own accord, and only chiefs appointed by the central government actually referred cases to them.

27. Section 30 of the Constitution says ‘everyone has the right to … participate in the cultural life of their choice’. (Emphasis added)

28. Section 18 of the Constitution permits ‘everyone … the right to freedom of association’.


30. See Barkhuizen v Napier 2007 (5) SA 323 (CC) at paras 31-35; Giddey NO v JC Barnard and Partners 2007 (5) SA 525 (CC) at para 15; Engelbrecht v Road Accident Fund and Another 2007 (6) SA 96 (CC) at paras 30 and 40.

31. Ibid.

32. This argument is based on the fact that customary courts do not purport to be independent and impartial in the way that state courts are. In fact, it is sometimes the very fact that they are distinct in this way that attracts the people who choose to use them. (See Mnisi, The interface between living customary law(s) of succession and South African state law, 282-83) However, it is sometimes also the extent of this fact that is responsible for complaints by community members who express the concern that this prevents them from obtaining the objective justice that they would wish. (See Mnisi, The interface between living customary law(s) of succession and South African state law, 222 and ‘The Traditional Courts Bill of 2008: documents to broaden the discussion to rural areas’).


34. With choice, the question arises as to who gets to make it: the plaintiff or defendant. Legislation should possibly provide that, in civil cases, the plaintiff makes the choice by where they initiate proceedings (reserving room and a mechanism for the defendant to object), whilst in criminal cases, the accused should be permitted to make the choice, and move their case after its institution, if necessary.

35. A further justification for people’s being able to choose to use the Magistrate’s Court as against the customary court is that this would do away with the difficulty created by the TCB, for women especially, in requiring them to challenge the chief as presiding officer directly if they feel that his judgment is unfair. People can, instead, just avoid the chief entirely, which subtly says that they think him and his court incompetent/dysfunctional or biased/malicious, but this means does not require direct confrontation between people of unequal power, influence and means.

36. Section 35(3)(f) gives people the right to legal representation where accused of an offence, and sections 7, 8 and 36 all make the Bill of Rights central to our democracy; subject all laws to it and make it only limitable for constitutionally-compelling reasons. Notably, section 35(3)(f) is a non-derogable right even in a state of emergency.

37. I would not interpret this to exclude the possibility of customary courts hearing and deciding matters pertaining to the transactional elements surrounding
marriage, e.g. a woman and her family suing the husband's family for outstanding lobolo.

38. I would not interpret this to exclude the possibility of customary courts hearing and deciding matters relating to the cultural aspects of succession, e.g. a woman's having been 'illegally' (in terms of living customary law) made to wear mourning clothes while her husband's family had not officially taken her through the marriage process by virtue of their owing her and her family lobolo, and the monetary/livestock compensation to the woman and her family that might follow such an infraction.

39. This list reflects a comprehensive list combining section 3.4 of the CALS, CGE and NLC 1999 report and clause 8 (1) of the SALRC draft Bill.


41. According to section 10(2)(i) of the TCB: 'benefits that accrue in terms of customary law and custom' may be taken away from the person as a sanction.

42. According to Statistics South Africa, Income and Expenditure Survey, 2008, 156, in 2005/06, the average annual income of rural households was R30 859 as opposed to R98 011 in urban areas – less than a third of the urban average. Of this, salaried income formed an average of R14 250 in rural households relative to the R66 310 of urban households.

43. Because customary courts are typically non-professional institutions, their financial needs would be different from those of state courts. For instance, government should ideally provide a meal at the end to those who have participated in a day's court proceedings, as this is one of the costs toward which people's fines are often attributed. In some areas, government already provides modest stipends to headmen, councillors and secretaries, as the people who administratively staff the courts – but only at the chief's court level. (This is in terms of section 5 of the Public Office Bearers Act 1998 (Act 20 of 1998) as amended by section 29 of the Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003), and section 26 of the Traditional Leadership and Governance Amendment Act (Act 23 of 2009)). As a consequence, many other servants of these courts are often left out e.g. the 'traditional police' (somewhat comparable to the 'sheriff of the court') who, in some instances, does the bulk of the running around for summoning people to the court and enforcing judgments, as well as sometimes even hearing cases and intervening in physical/violent disputes.

44. Examples of these are given in the Substantive Report on National Community Workshop on Traditional Courts Bill, 11-12 November 2009.

45. While the adoption of such accountability mechanisms as those proposed here might appear entirely improbable, the establishment of the Department of Traditional Affairs makes them a little less so. Its mandate (according to its concept document for the project titled 'Assessment of the State of Governance within the Institution of Traditional Affairs') is partly to 'assist the institution of traditional … leadership to transform themselves to be strategic partners with Government in the development of their communities but also to coordinate the traditional affairs activities of the Department and those of other departments at national, provincial and local government levels. This is meant to ensure that their needs in terms of development, service delivery, governance, access to indigenous knowledge systems, traditional courts and indigenous law, traditional healing and medicine, etc are adequately met.' (point 2.10 at 4; emphasis added). The document envisages that this department will play an oversight role described as including, as the second one of its four focus areas: 'To develop, review, monitor and implement legislation and policies relevant to traditional leadership nationally and to coordinate and monitor the review and implementation of legislation and policies relevant to traditional affairs by national and provincial government departments' (point 2.11 at 4; emphasis added). This is indeed an ambitious project. But, were the Traditional Courts Bill to be replaced by progressive legislation, it at least seems feasible that this legislation could exploit the expressed will of government to provide some degree of oversight, and thus secure the kind of oversight necessary to see the implementation of the replacement legislation.

46. Tongoane and Others v National Minister for Agriculture and Land Affairs and Others at para 106; also see Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) at para 211.
Mazibuko Jara (MJ): The boundaries to be used for the jurisdiction of the traditional courts envisaged in the Traditional Courts Bill (TCB) are the same as those imposed by the apartheid-era Black Authorities Act of 1951 (BAA); that is because the TCB’s default jurisdictional boundaries of traditional courts are the same as those of the BAA. In your view, do the TCB and other laws, such as the Communal Land Rights Act of 2004 (CLARA) and the Traditional Leadership and Governance Framework Act of 2003 (TLGFA), entrench these BAA tribal boundaries and structures?

Yunus Carrim (YC): I can speak about the TLGFA because I was chair of the Portfolio Committee on Local Government when the Bill was processed. When it comes to the TCB, the Justice and Constitutional Development portfolio committee, which I chaired at the time, had little time to deal with the Bill. It was tabled just before the 2009 national elections. But there was too much conflict over the Bill. We proposed to the incoming committee that they should see to it that public hearings were started again, because many civil society stakeholders claimed that the Department of Justice’s public hearings were biased. It was said that many of the hearings were held in tribal courts, which did not provide a conducive atmosphere for citizens with different views. But it was impossible to complete the TCB process, given the imminent end of our five-year term in parliament. That matter is now on the agenda of the Justice Committee chaired by Llewellyn Landers.

When I chaired the Local Government Committee we did not use the BAA at all as a basis for processing the TLGFA. We looked at what we understood to be happening on the ground. The context of nation-building, and the need to bring traditional leaders into the post-1994 framework were also important considerations. As a portfolio committee, we jettisoned the BAA. We recognised that the traditional leadership institutions will not disappear overnight. We also recognised that the post-1994 situation made traditional leaders feel that there was now a new government that could understand them. Many felt a sense of pride and dignity, which for some included the impulse to restore traditional institutions to what they saw as their rightful place. Some even wanted the restoration almost to return to the pre-colonial era. We had to respond to them. If we had traditional institutions outside of the legislative process, it could have led to problematic and anti-democratic practices in some parts of the country.

One must not look at the TLGFA without looking at the Nhlapo Commission (the Commission on Traditional Leadership Disputes set up by the TLGFA). Many came to the ANC and said, ’we are genuine traditional leaders who were displaced by apartheid because we were not yes-men.’ The ANC had to say that you cannot be a traditional

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** Yunus Carrim was chair of the Parliamentary Portfolio Committee on Justice and Constitutional Development when the TCB was introduced to parliament.
Former homelands map, 1986

Traditional Council map, 2010
leader if the apartheid regime appointed you – if you were one by legitimate custom, so be it; but if imposed we cannot recognise you as one. So, the post-1994 era allowed those who are genuine traditional leaders to remain. The BAA did not allow for that, as it had a particular notion of advancing Bantustans, clan and ethnic divisions, and other elements of apartheid rule. The TLGFA now enables traditional leaders to contribute to social cohesion and the development of rural people. I disagree with the view that parliament relied on the BAA in passing the TLGFA.

I cannot recall the specific discussions on tribal boundaries when the TLGFA was passed. However, government can consider a review of traditional boundaries as we are presently preparing an overhaul of legislation relevant to the roles of traditional leaders.

One has to understand that Act (the TLGFA) in the context of the unfolding political process of change we were in at the time. We did not have a revolution in the Marxist sense but a negotiated transfer of power, a 'democratic breakthrough', as the SACP says. We are an emerging democracy. We cannot overnight dismantle all the structures of the order that we overthrew. What we settled for in 1994 meant that we compromised on certain things. For example, we had to ensure a balance between socio-economic rights and the rights of the market to operate. My understanding is that, whatever our views on traditional leadership, the TLGFA was reasonable in the circumstances. It recognises that democracy must prevail, but a democracy shaped in the context of specific structural, cultural and historical circumstances. The TLGFA is a reasonably balanced piece of legislation, taking into account the conditions of the time. It does not entrench traditional leadership institutions in a way that undermines democracy. This challenge of modernity and tradition persists in many forms across the world – for example, even progressive trade unionists in Britain are taken up by the upcoming royal wedding.

Before the TLGFA, I think that what we did is communicate the ANC’s positions on traditional institutions through the Municipal Structures Act (MSA). That meant that at local level it is the elected councillors that have overall responsibility and decision-making power on development. But councillors must work with traditional leaders. The TLGFA must be located in terms of the MSA.

We also recognised that there are large numbers of rural poor who identify with traditional leaders. And the state alone cannot deliver services. In the same way that we need civil society support, traditional leaders can also play a developmental role. Some of them played this role. Through the TLGFA we gave them a more developmental role in an enabling framework that allows each province to work according to local dynamics to shape their own framework. The TLGFA was not prescriptive legislation. Clearly, what we provided for was a developmental role for traditional leaders, while making it clear that ultimately it is elected public representatives who must take responsibility for service delivery and development. The two need to work together. In the TLGFA we also provided for participation by women in a way that breaks with some discriminatory practices in most of these traditional communities.

The TLGFA was also seen as an interim model until conditions change for a more democratic model. It was not seen as a final answer. Further changes would be on the basis of what is happening on the ground: struggles, contestations and so on. The law reflects the state of those struggles, the conditions on the ground. But of course, the law also has to open space and assist in advancing those struggles.

We were also concerned to enhance the many good and positive aspects of traditional leaders. The ANC itself has a good history with traditional leaders. People like Inkosi Albert Luthuli and Inkosi Zibuse Mlaba in Camperdown are positive examples. It is crude to argue that traditional leaders are inevitably holding back progress. As a deputy minister in this portfolio, I meet often with amakhosi. I am often surprised by the huge potential they have to contribute to development.
Ultimately, it is not just what the law says but also how the law is executed in practice. It is what the MECs and departments understand the law to be. One is aware of the way in which the law can entrench and embed these institutions but these are matters for struggle and local dynamics. As we industrialise and modernise, the chances are that we will be in a better position to accommodate traditional leadership in ways that are more consistent with a progressive democracy. But it is not given that modernisation will do away with traditional systems, views and institutions. Consider, for example, how ethnic and religious differences can emerge in the most modern industrialised societies. What do you say of Muslims born and bred in the UK who turn to Islamic fundamentalism? There are other examples, of course.

Of course we could have done better on the TLGFA. There may be counter-productive features in the TLGFA, including the position of women, the extent of democracy, and urban-rural divisions. But there is now enough space to experiment and improve.

I did not deal with CLARA at all. I was taken aback by CLARA as it surfaced. Some of the civil society people were upset with us as a portfolio committee. They felt that we were accommodating a broad range of views on the TLGFA, but CLARA undermined all of that. I did not know that CLARA was coming out in the way it did. For the TLGFA we allowed for public hearings. We continued to engage with civil society and the traditional leaders till the day we voted on the Bill. We even gave the last version of the Bill to stakeholders for comment, provided they did not raise the same issues on which progress had been made. I did a lot of the negotiating myself. As a result, we struck various balances. The stakeholders and technical experts on all sides were reasonably happy with the way we dealt with the TLGFA. I know certainly that people were not always happy with the final version, but they were reasonably satisfied, even if not altogether happy. When CLARA came up, some of the civil society organisations felt that we were giving them a good TLGFA, yet CLARA was a problematic law. We were like the ‘good guys’, while the committee dealing with CLARA were the ‘bad guys’ – but we were both part of the same ‘plan’, as it were. But even some senior government and ANC representatives did not seem to know exactly what the provisions of CLARA were. The ANC can at times be erratic, haphazard, vague. But there was not the conspiracy some civil society stakeholders claim.

MJ: The TCB does not enable people to opt out of using traditional courts, as was recommended by the Law Commission. Instead it makes it a criminal offence for anyone living within the jurisdiction of a traditional court to fail to appear once summoned by the senior traditional leader as presiding officer. Can you explain whether this is consistent with the Constitution? What will the impact of this be on public respect, trust and confidence in traditional leaders, given that your department sees them as partners in the system of cooperative governance, which includes participation by ordinary people? What is your assessment of the scope of the TLGFA provisions for people to opt out from traditional community status? Can a portion of a ‘traditional community’ have the right to opt out? How?

YC: People have a right to opt out. That’s what our committee felt. If a person does not want to abide by the norms and values of the traditional authority, surely that person has a right to opt out? The legal advice we got was that it would be unconstitutional not to give people from traditional authority areas that right. This is a matter that will have to be addressed by the current Justice Committee as it processes the Bill.

MJ: The concept document for the new Department of Traditional Affairs makes mention of oversight and accountability mechanisms for traditional courts. This seems to suggest that the department would play a role in ensuring the accountability it is seeking. How does the department seek to achieve these goals, and is it involving the Department of Justice in this? Is there a correlating budget that would accompany these tasks? How conducive is the environment for accountability by traditional leaders given the
combined impact of the TCB and the TLGFA to fuse judicial, administrative and governance functions in one structure/person/institution?

YC: Legislation dealing with these issues comes from three different departments: the Department of Cooperative Governance and Traditional Affairs, the Department of Rural Development and Land Reform and the Department of Justice and Constitutional Development. There obviously needs to be synergy between us. This needs to be addressed. We can fine-tune this in the overhaul of legislation I have mentioned. The overall principle should be the need for the separation of powers to ensure accountability – how we do it is something we need to apply our minds to. If the TLGFA collapses different roles, we must look at it and arrive at consensus on what to do. I agree with the issues about accountability of traditional leaders. This is the position of the department.

MJ: Critiques of the TCB, TLGFA and CLARA have argued that these laws fail to recognise the diversity and the multi-layered nature of traditional justice, customary law and customary governance systems. What is your view? Do these laws not concentrate power, responsibilities and role in traditional courts and councils that are both dominated by a senior traditional leader? What about the fact that the TLGFA dissolves community authorities?

YC: The TLGFA was an enabling framework act. The intention was to allow for diversity. It is possible that we did not make adequate provisions to recognise this diversity. If that is the case, there is an opportunity to address it now. Right now, government is overhauling relevant legislation: in particular the TLGFA and the National House of Traditional Leadership Act (NHTLA). We hope this will be tabled in parliament in the second half of this year. The department is finalising a discussion document on this. We can consider submissions on community authorities and other customary structures.

MJ: Can the TLGFA (section 20 in particular) be interpreted to mean that the role of traditional leaders includes governance? Do traditional institutions not constitute a fourth tier of government? What do you make of the Constitutional Court's certification judgment, which specifically rejected the assertion that the roles of traditional leaders included governmental powers?

YC: The Framework Act does not create a fourth tier of government. Traditional leaders are part of our constitutional democracy. What we sought to do was to avoid a situation where traditional leaders would be seen as a fourth tier. The TLGFA provides for a complementary relationship between traditional leaders and elected public representatives. It gives some sort of structure and cohesion to the relationship between traditional leaders and democracy. But it's possible that the way the roles and responsibilities of traditional leaders are applied in practice may, in some cases, serve to create the impression of a fourth tier of government. The Act did not intend this. This is not consistent with the Constitution or values of government or the ANC. If this is the case it needs to be attended to.

MJ: What are the implications of the pending changes to municipal laws regarding the roles of traditional leaders in municipal councils? And the implications for the democratic transformation of local government? Does this not give traditional leaders governmental powers?

YC: What we are talking about are roles, but not an established legislative provision for the same power as public representatives. The views of the current government allow space for a direct developmental role for traditional leaders. But this must be within the framework of democracy. We are not talking about the same powers as public representatives for traditional leaders at this stage, but a greater developmental role. However, an increase in traditional leader powers is a possible outcome, given the review and overhaul of the legislation, and we're not sure what sort of consensus will emerge or what Parliament will decide. The intention is to merge the NHTLA with TLGFA into one overall piece of legislation. Whether they will get more powers is difficult to
say. There is government recognition that traditional leaders can play more of a role – as all actors outside the state can play more of a role.

MJ: The TLGFA was justified by reference to the reform component of tribal authorities through the allocation of a third of seats in new traditional councils to women, and for the election of 40% of its members. The TLGFA stated that such elections would be held by the end of 2004. Yet it is common cause that the elections were botched in KwaZulu-Natal, North West, the Eastern Cape and Mpumalanga, and still have not taken place in Limpopo. Why is it that eight years after the TLGFA was passed in 2003 the election of 40% of the members of traditional councils has not yet taken place in provinces such as Limpopo?

YC: If there were problems, obviously they need to be addressed. Limpopo, I know, posed certain specific problems and the department has been seeking to address them. You must remember that we have to work with the provincial departments on this. Now that we have a separate, dedicated Department of Traditional Affairs within our Ministry, we will be better able to deal with the problems. Some of the problems are understandable, given the complexities of the issues, but others should not have occurred. We have to do more to address them, I agree. The review of the TLGFA and the NHTLA can also address the practical problems in the implementation of the TLGFA.

MJ: What is your message to those rural dwellers concerned about the TLGFA, and the TCB and its impact on rights?

YC: People must take part in the process that will unfold in the next few months. The department will be consulting widely. Parliament will also have public hearings. People are more than welcome to make submissions. We are keen that they do, and we will look at all submissions. We would like to hear more from these organisations. There is an open door to engage with us and, I’m sure, Parliament too.

There is scope for reconciling traditional leaders and a progressive democracy. Given the gigantic challenges around jobs, service delivery, development, HIV/AIDS, the environment and economic growth, and the desperation for progress, I think that we need everybody on board. We need to find a way for traditional leaders to play a role as part and parcel of a progressive democracy. It can be done. Some blindly reject the TLGFA because they do not trust the ANC and government. They do not look fairly at the substance of the TLGFA and the challenges it seeks to address. I think they just don’t trust us. If we were trusted more, people might be more willing to see the TLGFA in a more positive light. We must take our measure of responsibility for the lack of trust in us among sections of civil society. If we look at the TLGFA on its own merits and demerits, there will be faults with it, no doubt. But some of those things can be addressed in the process. On some of them we can never agree. From the vantage point of civil society, what they say makes sense. From the vantage point of traditional leaders, the same applies. From government’s position, we seek to find consensus on the complementary roles of traditional leaders and elected public representatives as part of a progressive democracy. We cannot exclude traditional leaders. They are part of us. We need to draw them in. We do not need to isolate them. They can play a valuable role in our democracy. There is scope.

NOTE

1. Section 20c of the TCB states that any person who – having received a notice to attend court proceedings, without sufficient cause fails to attend at the time and place specified in the notice, or fails to remain in attendance until the conclusion of the proceedings in question or until excused from further attendance by the presiding officer, is guilty of an offence and liable on conviction to a fine.
Source: Law, Race and Gender Research Unit, Faculty of Law, University of Cape Town.
Controversies surrounding the Traditional Courts Bill

Tribal levies: Double taxation for the rural poor

The Traditional Courts Bill and African justice systems

The Traditional Courts Bill: A silent coup?

Regulating traditional courts

Interview with Deputy Minister of Cooperative Governance and Traditional Affairs, Yunus Carrim