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The omission of the opt-out clause

The revised (and improved?) Traditional Courts Bill 2017

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The Traditional Courts Bill B1B-2017 omits the opt-out clause and the notion that engagement with traditional courts is on a voluntary and consensual basis – a long-standing sticky point with traditional leaders. Under the Bill, individuals are bound to attend a traditional court when summoned and cannot opt-out of the system, which conflicts starkly with the notion of customary law as a voluntary and consensual system of law. This article argues that compelling individuals to attend a traditional court may be unconstitutional for unjustifiably infringing the rights to culture, a fair trial and equality.

'[T]he Constitution of the RSA and its Bill of Rights would certainly allow people to opt out [of the traditional court system] if they so want as it is their right to choose.'[2]

'It should be compulsory for any person summoned to appear before the court to do so. Failure to do so should result in the members of the South African Police Service fetching him or her and the clerk or messenger of the court accompanying the person concerned to the court.'

The Traditional Courts Bill B1B-2017 ('the Bill')[4] represents a significant change in the state's approach to traditional courts.[5] It omits various provisions included in previous versions of

the Bill that required participation in traditional courts to be voluntary and in particular the opt-out clause; a clause that allowed individuals the option not to attend a traditional court when summoned. The article considers the constitutionality of the omission of the clause. It provides a brief overview of the context and impetus for the Traditional Courts Bill and explains the notion of an opt-out clause. It then addresses the question of constitutionality by examining whether compelling individuals to attend a traditional court unjustifiably infringes the rights to culture, a fair trial and equality.

Context and impetus for the Traditional Courts Bill

Historically, a chief's power was defined by his ability to attract followers and secure their allegiance through good leadership – contrary to the oft propagated notion that chiefs were unbridled dictators who ruled heedless of people's needs.[6] The abundance of land in the pre-colonial era meant that people could easily move away from unjust chiefs, which incentivised good leadership.[7] Furthermore, chiefs played a role in the resolution of disputes,[8] but power was diffused as dispute resolution occurred at different levels, described as 'layered or nested within one another.'[9] Family and village councils were the primary fora for dispute resolution and difficult and important issues were escalated 'upwards' to chiefs' courts.[10] However, there was no rigid hierarchical structure and the dispute resolution fora differed among communities. For example, some communities had no traditional leadership (and thus no chief's court) while in others the headman (and his court) was the highest form of traditional authority.[11] In addition, participation in traditional courts – like affiliation to a chief – was voluntary and individuals opted into the courts and moved between them as suited them best.[12] Oppressive and unfair courts would quickly lose support as individuals preferred those perceived as just[13] and thus the fluidity of movement between fora was a means to hold courts accountable.

Colonialism and apartheid upended the voluntary nature of customary law. The state uprooted and settled indigenous communities and appointed chiefs who implemented the state's agenda of segregation and control of the population.[14] Chiefs who resisted were replaced, and the resultant upward accountability of chiefs to the state meant a loss of accountability and legitimacy in communities.[15] As chiefs clamoured to secure their interests against the ever encroaching state, they articulated distorted versions of customary law that benefited men at the expense of women and children.[16] Courts, comprised of men,[17] further meted out brutal punishments to maintain control over people[18] and the system of chieftaincy became a caricature of its original form.

Despite the controversial role of chiefs during the apartheid era,[19] the Constitution recognises traditional authorities and the approximately 1 500 traditional courts recognised under the previous regime.[20] The 'tribes', 'tribal authorities' and 'chiefs' previously convened and recognised by the apartheid state continue today as traditional communities, traditional councils and traditional leaders respectively, with the same territorial boundaries.[21] The result is a perpetuation of the apartheid structures though a community may dispute the legitimacy of the leader and/or the actual territorial boundaries.[22] Nonetheless, traditional courts remain predominantly responsible for the administration of justice in rural areas today.[23]

The Black Administration Act – the central tool in the apartheid state's segregation policy – currently regulates traditional courts but its provisions are largely outdated and ignored.[24] Court procedures are regulated by customary law and, consonant with the variation in

customary law, differs at the various levels and across communities.[25] Generally, proceedings are informal and occur in the open at a time when community members are free to attend.[26] The complainant presents his case and witnesses followed by the respondent and his witnesses. The matter is then debated by community members who may question parties and witnesses.[27] After the discussions, the authoritative figure summarises proceedings and pronounces on the matter.[28]

Patriarchal overtones remain in the courts, which tend to be dominated by men.[29] Generally men participate in proceedings[30] and women do not speak and must be represented by a male relative when presenting a case.[31] Furthermore, women's interests are often dismissed and considered subordinate to men.[32] Thus, it is not unusual for a woman's claim for divorce to be dismissed or for her to be evicted from the home upon divorce with no right to matrimonial property.[33] There is, however, no single monolithic experience of traditional courts today and experiences are nuanced and varied. For example, Oomen notes that while in some courts women are only witnesses, in others they may represent themselves.[34] Thus, some may experience traditional courts as oppressive and unfair,[35] while others support the institution of chieftaincy and traditional courts.[36]

The Bill is meant to repeal the last remaining provisions of the Black Administration Act and ensure the proper functioning of the traditional court system.[37] There are several iterations of the Bill, which has a complex legislative history and has been opposed on several grounds, such as a lack of public consultation, concentration of power in the chief and breach of the doctrine of separation of powers.[38] As previously stated, this article explores specifically whether the omission of the opt-out clause renders the Bill unconstitutional.

Opt-in/opt-out of the courts?

The Traditional Courts Bill B1-2017 ('the old Bill') contained an opt-out clause that allowed individuals to refuse to participate in proceedings. It provided:

> 4(2) (*a*) A traditional court may, subject to subsection (3), only hear and determine a dispute contemplated in Schedule 2 - [...]
>
> (iii) if the party against whom the proceedings are instituted agrees freely and voluntarily to the resolution of the dispute by the traditional court in question [...]
>
> (3) (*a*) Any person who has been summoned to appear before a traditional court who, for any reason, elects not to have his or her dispute heard and determined by that traditional court or to appear before that traditional court must, within 14 days or such longer period as may be necessary, duly assisted or accompanied by any person of his or her choice in whom he or she has confidence, should he or she so wish, inform the clerk of his or her decision accordingly.

Thus, individuals could opt out of proceedings without any reason therefor by merely informing the clerk of the court.[39] More generally, various clauses in the old Bill affirmed the voluntary and consensual nature of traditional courts.[40] It – at least theoretically – allowed individuals to avoid traditional courts without directly confronting powerful traditional leaders.

Unfortunately, the opt-out clause and general references to voluntary participation have been deleted in the Bill, which assumes the compliance of an individual summoned by a traditional leader to court. Individuals are not required to consent to participate in proceedings – to opt-in to the court so to speak – and cannot opt-out of initiated proceedings

and elect to use different traditional fora or the common law courts. If an individual does not appear when summoned, the clerk must refer the matter to a justice of a peace who is empowered to negotiate with the party to comply with the summons or request the transfer of the matter to a magistrate's court with jurisdiction.[41] Fortunately, the Bill does not go so far as to criminalise the failure to appear when summoned nor allow for an order to be granted in a person's absence.

In addition, the right of appeal has been reinstated. Parties aggrieved by a decision of a traditional court may now, after exhausting all customary procedures of appeal, refer the matter to a magistrate court.[42] This is in addition to the right of review to the high court,[43] and ensures that individuals may appeal decisions of traditional courts to the common law courts.[44] The right of appeal is noteworthy as it may be used to justify the omission of the opt-out clause as is discussed later on.

Constitutional analysis

This section examines whether compelling individuals to attend a traditional court unjustifiably infringes the right to culture, a fair trial and equality. It adopts an abridged section 36 analysis[45] to examine whether there is an infringement of a right and justifiable reason therefor.

The right to culture

Perhaps one of the biggest objections to the omission of the opt-out clause is that it infringes an individual's right to choose their culture and associate with the traditional authorities of their choice.[46] Individuals are bound to submit to the jurisdiction of the traditional leader when summoned regardless of whether they wish to engage with the traditional court or have an affiliation to the particular traditional leader. This undermines the rights to culture, self-identification and freedom of association.[47]

Furthermore, as mentioned previously, the Bill perpetuates the previous apartheid-era structures and boundaries, which is ideologically problematic. Moreover, this is likely to be perceived as hurtful and abhorrent to those who were previously governed by them[48] and is once again a segregation of the population along disputed boundary lines. Most, alarmingly, it exacerbates issues surrounding the recognition and legitimacy of existing traditional leaders and territorial boundaries by compelling individuals to submit to court proceedings under, in some cases, a disputed traditional leader.

The right to a fair trial

The Traditional Courts Bill has previously been critiqued on several grounds, such as the exclusion of legal representation; lack of regulation of improperly obtained evidence, ambiguous jurisdiction and concentration of power in traditional leaders.[49] The challenges, discussed below, explain why it is imperative that individuals can opt-out of traditional courts when fearing an infringement of their rights.

The Bill excludes legal representation; a constitutional right in criminal matters.[50] While the Bill appears to exclude criminal jurisdiction – jurisdiction is excluded where the matter is investigated by the South African Police Service[51] – schedule two nonetheless allows courts to deal with a range of criminal matters including, among others, theft, malicious damage to property, assault where no grievous bodily harm is inflicted, breaking and entering, receiving stolen property or *crimen injuria*. The explanation of the contradiction being that traditional courts would deal with disputes where formal charges have not been instituted, thus not infringing on the accused's constitutional right to legal representation.[52] It nonetheless creates ambiguity regarding the jurisdiction of traditional courts and suggests that traditional courts may deal with criminal matters. The ambiguity is compounded by

the lack of clear delineation between civil and criminal law matters in customary law. A traditional court hearing a family dispute may engage in a wide scope of questioning resulting in an individual incriminating themselves in a criminal offence.[53] Individuals must thus consent to proceedings and waive their right to legal representation to avoid the provisions being declared an infringement of an accused's fair trial rights.

The Bill further provides that traditional courts function in accordance with customary law subject to the Constitution; and customary law determines the rules of evidence and procedure.[54] Given the variation in customary law and the norms of courts,[55] it is impossible to test from the outset whether individual rights are adequately protected in traditional courts. For example, the Bill does not regulate evidence obtained through human rights violations which risks the admission of improperly obtained evidence in violation of individual's fair trial rights.[56]

The right to equality

The locking in of individuals to the traditional court may also infringe the equality rights of individuals. For example, several years ago, King Dalindyebo (King of the abaThembu people) made headlines when he was accused of, among others, kidnapping, arson and assault of community members – going far beyond the scope of his jurisdiction and powers.[57] The case exemplified the violent and authoritative rule to which individuals in rural areas could be subject in stark contrast to their urban counterparts.

More often, however, the power imbalance is more subtle than the violent tyranny found in the *Dalindyebo* case. Foremost, the patriarchal nature of these courts cannot be overlooked. As mentioned previously, women must have their cases represented by a man but what happens when a woman's grievance is against the family member meant to represent her? And how does she pursue a claim of domestic violence in a court dominated by the male family members of the perpetrator.[58] The gender composition of the courts too often marginalises the interests of women with a chilling effect on how women use these courts.

Moreover, disputes today often revolve around the legitimacy of a chief's position and exercises of power.[59] For example, individuals often dispute a chief's control and allotment of land.[60] These individuals cannot be expected to challenge the chief's actions in his own court and confining individuals to these courts is unfair. In all likelihood, it will stifle challenges to abuses of power effectively silencing communities.[61]

In light of the above, it is arguable that individuals residing in rural areas – generally the poorest and most vulnerable in society – are effectively subjected to a different justice system than South Africans in urban areas. The difference per se is not objectionable, but the imposition on people of a justice system notorious for its imbalance of power and patriarchal overtones is. It results in the bifurcation of the legal system and citizenship in South Africa,[62] as individuals in rural areas may be confined to violent, authoritative and biased courts as discussed above. This differential treatment confers upon them lesser rights than their urban counterparts and conflicts starkly with the Constitutional vision of unified democracy and equal rights. Such a position is likely to be found unconstitutional unless individuals can exclude themselves from the traditional justice system when they so wish.

Justification for the infringement of rights

There is scant justification offered for the omission of the opt-out clause and essentially the locking in of individuals into the traditional justice system. The popular argument is that attendance at traditional courts must be

compulsory to ensure that traditional authority is not undermined and equal treatment between traditional and common law courts.[63] Compelling attendance also guards against forum shopping and individuals flitting between the traditional and common law courts depending on which provides a better outcome.[64] Furthermore, allowing individuals to opt-out of traditional courts may destabilise community relations as certain conflicts may go unresolved. Finally, the omission of the opt-out clause may be argued to be justifiable when the Bill is considered in its entirety, as the right of appeal and review, combined with the lack of criminal sanctions for non-attendance, means that individuals can still move between fora. These arguments, as compelling as they sound, however, are unpersuasive when closely analysed as set out below.

The argument for parity of treatment between customary and common law courts is unconvincing. While individuals cannot opt-out of the common law court system, the argument overlooks that, historically, traditional courts were never courts like the magistrate's or high court.[65] These institutions were imbibed with authority by individuals who voluntarily attended them.[66] Their legitimacy and credibility were based on the voluntary patronage by individuals; from the bottom up.[67] Compulsory attendance means that there is no accountability downwards to communities who are forced to attend a court regardless of its legitimacy.

Compelling attendance merely to emulate the common law courts is further undesirable as it renders traditional courts a derivative of common law courts. This flies in the face of the South African Constitutional Court's repeated call to understand customary law in light of its own values and principles rather than through a common law prism.[68] Imposing authority from the top down would obliterate the voluntary nature of traditional courts and ultimately subvert the values and principles upon which traditional courts are based.

The call for parity of treatment is further undermined by its selective application. As mentioned previously, the Bill provides that traditional courts function in accordance with customary law. There is no argument that parity of treatment requires the common law be applied as it is in common law courts. On the converse, it is expected that traditional courts function in accordance with customary law to give effect to the right to culture and the constitutional recognition of customary law.[69] This perverse double standard invokes equality with the common law courts to compel individuals into the traditional justice system but then precludes the legal safeguards of the common law courts based on giving effect to customary law. It strips traditional courts of their voluntary nature – their greatest safeguard – to purportedly place them in par with the common law courts but then provides none of the checks and balances of the common law.

The argument in respect of guarding against forum shopping is equally as flimsy. Forum shopping is inevitable and occurs to some degree in all dispute resolutions.[70] For example, individuals are constantly choosing between whether to settle a dispute, go to mediation – which is becoming increasingly popular – or enforce their rights in a court. Even within the common law court system, there are a range of courts, such as the small claims court, magistrates' court or high court in which individuals may pursue their claims. Individuals, including those in rural areas, are self-interested and inevitably choose the outcome that yields the best outcome. Many individuals in fact prefer traditional courts due to their familiarity, simplicity, accessibility and restorative nature.[71] But where bias, a tyrannical traditional leader or the patriarchal nature of the courts (all

discussed above) are feared, the opt-out clause allows individuals to excuse themselves from proceedings and seek justice elsewhere.

The argument that an opt-out clause may destabilise community relations is based on the social context in which traditional courts operate and the large degree of co-dependence among community members.[72] The risk is that where individuals do not appear when summoned by traditional leaders, disputes, which could be resolved quickly in the informal setting, may go unaddressed. The costs and distance of the courts along with the nature of some disputes means that the common law courts are often an unviable alternative. For example, in one case study two women involved in verbal altercation with abusive language near a school were summoned to a traditional court.[73] Both women were ordered to pay a R200 fine and apologise at the school for their bad behaviour.[74] The resolution of such a dispute – ill-suited to the common law courts – is essential for cohesion in community relations.

As persuasive as the argument sounds, it paints half a picture. In reality, individuals in rural areas tend to lead interwoven lives and depend on each other to celebrate marriages, bury family members, for transport, food or the like. This means that disputes are generally between people who know each other[75] and the two women in the altercation most likely knew each other and would have continued to have interactions with each other. The dispute may or may not have been resolved within these interactions but it is fallacy to depict the chief's court as the sole fora for dispute resolution. Even if these women did not attend the chief's court, they could have resolved the dispute in a different traditional forum, through family or community help or in their interactions between themselves. The dynamism of customary law means that there is a multiplicity of places and interactions where the negotiation of rights occurs.

Finally, the argument that the Bill, when considered in its entirety, does not lock individuals into the traditional justice system bears consideration. Failing to appear at a traditional court is no longer criminalised and an order may not be granted against individuals in absentia. Individuals may be encouraged to comply with the summons, or the matter may be transferred to a magistrate court. This in conjunction with the right of appeal and review may be argued to mean that individuals may navigate the fora in their best interests despite no explicit right to opt-out.

This theoretical position, however, is an unlikely reality. Chiefs perform a host of functions – often unsanctioned – such as land allocation, taxation, dispute resolution and the delineation of areas for business and other activities.[76] The concentration of power in chiefs means that individuals are unlikely to ignore a summons and risk antagonising a chief who may tax or ostracise them regardless of any opt-out clause. If anything, the opt-out clause – as well as the right of review and appeal – is unlikely to bring about change in the navigation of traditional courts. Legislation has limited impact and it must be combined with other social initiatives to create awareness of these rights and empower individuals to exercise them.[77] Realistically though, for as long as traditional leaders exercise significant powers in communities, individuals are likely to be coerced to use these fora. But there is no reason for this power to be concretised in legislation. Indeed, an explicit right to opt-out of proceedings grounds the idea that participation is on a voluntary basis and at least in theory allows individuals to escape courts without confronting powerful chiefs.

The right to appeal decisions – which is important and serves as an important check on traditional courts – is no substitute for the right

to opt-out of proceedings and does not address these constitutional infringements. First, appeals to common law courts can only be lodged after all internal appeals have been exhausted. This may be a long and protracted process, which many would not have the appetite to follow. Secondly, given the power surrounding traditional leaders, individuals may not be comfortable in appealing decisions of traditional courts fearful of the repercussions.[78] Here the ability to not submit to the jurisdiction of the court is important as it articulates individuals' objections without requiring them to directly confront powerful traditional leaders and voicing their disapproval of decisions.[79]

Conclusion

Traditional courts are the first port of call for approximately 40% of South Africa's population that live in rural areas.[80] The omission of the opt-out clause represents a significant regression in the development of the Bill. It links the courts to the structures recognised in the Traditional Leadership Act thereby perpetuating the old apartheid boundaries recognised therein. Hence, it props up the credibility of what may be disputed traditional leaders at the expense of individuals' right to culture and to choose their own authorities. The ambiguous nature of the court's jurisdiction and blurring between civil and criminal matters also means that the exclusion of legal representation and associated risks of self-incrimination are only justified if individuals voluntarily waived the right to legal representation; that is had an option whether to participate in proceedings and voluntarily consented to do so with a real understanding of the consequences thereof. As these issues may only arise during the course of proceedings and a civil matter may transform into a criminal matter, it is essential that individuals can opt-out at any stage of proceedings. Without such an option, the exclusion of legal representation and imposition of a different justice system for individuals in rural areas is arguably unconstitutional and risks being struck down in court.

The Bill must be understood in light of the new package of controversial laws that evince a systematic structural approach to shoring up the powers of traditional leaders. For example, the communal land tenure policy proposes that traditional councils are the owners of land[81] while the Traditional and Khoi-San Leadership Act provides for much greater powers of traditional leaders to conclude contracts on behalf of their communities.[82] Similarly, the Bill centralises power in traditional leaders recognised under the Traditional Leadership Act,[83] and ignores the multi-layered nature of traditional dispute resolution. Compelling individuals to attend a traditional leader's court re-enforces traditional leaders' power even when not recognised by a community.

Accordingly, the Bill must be revised to ensure that traditional leaders and courts derive their authority and legitimacy from communities as opposed to the state. The Bill should require individuals to consent to participate in proceedings; an opt-in system.[84] This does away with the geographical jurisdiction of courts, which mimics the racial separation of apartheid. At the very least individuals must be allowed to opt-out of proceedings. This would not detract from the popularity of proper functioning courts but would allow individuals to escape from unjust and oppressive chiefs. This reflects the varied experience of courts and allows traditional courts that are functioning and effective to continue, while providing a means for dissatisfied individuals to seek justice elsewhere.

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Notes

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2 L Xingwana, Department of Women, Children and People with Disabilities 2012 as cited in T Thipe, Voices in the legislative process: A report on the public submissions on the Traditional Courts Bill (2008 and 2012), 2013, 3, https://open.uct.ac.za/bitstream/handle/11427/2462/CLS_IssLS01_2013-08.pdf?sequence=1 (accessed 20 December 2020).

3 A Makinana, Traditional laws should be compulsory, 25 March 2018, www.news24.com/news24/southafrica/news/traditional-laws-should-be-compulsory-20180325-2 (accessed 18 October 2020).

4 A draft bill was first proposed in 2003 by the South African Law Commission in its Report on Traditional Courts and the Judicial Function of Traditional Leaders (Project 90: Customary Law) 2003. In 2008 the legislature introduced a revised Traditional Courts Bill 2008 (B15-2008) which was subsequently withdrawn and re-introduced unchanged as the Traditional Courts Bill 2012 (B1-2012). In 2017 another iteration was introduced as the Traditional Courts Bill 2017 (B1-2017).

5 The term 'traditional court' is used in the Bill and thus adopted in this article and used interchangeably with the term 'traditional dispute resolution fora'. There is dispute surrounding the status and nature of these institutions and questions as to how traditional these fora really are. See Land and Accountability Research Centre (LARC), Submission on Traditional Courts Bill, 2017, 15 March 2017, 5–6, http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180314Land_and_Accountability.pdf (accessed 21 May 2018) and South African Law Commission Discussion Paper 82 on traditional courts and the judicial function of traditional leaders (Project 90) 1999 www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf (accessed 3 September 2020) 11–15; N Ntlama and DD Ndima, The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems, *International Journal of African Renaissance Studies*, 4:1, 2009, 6 and 20–21, https://doi.org/10.1080/18186870903101974. Due to space constraints, the article does not engage in this debate and the adoption of the terminology for the sake of convenience should not be interpreted as an endorsement of a particular ideology.

6 P Delius, Contested terrain: Land rights and chiefly power in historical perspective, in A Claassens and B Cousins (eds), *Land, power & custom: Controversies generated by South Africa's Communal Land Rights Act*, Cape Town: UCT Press, 2008, 211 and 215.

7 Delius, Contested terrain, 215; T Thipe, Defining boundaries: Gender and property rights in South Africa's Traditional Courts Bill, *Laws*, 2, 2013, 483 and 489. Even after colonialism, where chiefs were appointed by the state, people's support for chieftaincy depended on the ability of chiefs to deliver services; B Oomen, *Chiefs!: Law, power, and culture in contemporary South Africa*, Doctoral dissertation, Universiteit Leiden, 2002, 82.

8 C Himonga and T Nhlapo, *African customary law in South Africa: Post-apartheid and living law perspectives*, Cape Town: Oxford University Press, 2014, 230.

9 B Cousins, Characterising 'communal' tenure: nested systems and flexible boundaries, in A Claassens and B Cousins (eds), *Land, power & custom: Controversies generated by South Africa's Communal Land Rights Act*, Cape Town: UCT Press, 2008, 109 and 123. For a description of the nested nature of dispute resolution see P Holomisa, Balancing law and tradition: The TCB and its relation to African systems of justice administration, *South African Crime Quarterly* 35, 2011, 17 and 18, https://doi.org/10.17159/2413-3108/2011/v0i35a867.

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11 TW Bennett, *Customary law in South Africa*, Cape Town: Juta and Co, 2004, 14.

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14 Himonga and Nhlapo, *African customary law in South Africa*, 4–17.

15 Bennett, *Customary law in South Africa*, 107.

16 J Williams and J Klusener, The Traditional Courts Bill: A woman's perspective, *South African Journal on Human Rights*, 29:2, 2013, 276 and 278, https://doi.org/10.1080/19962126.2013.11865075; TV McClendon, Tradition and domestic struggle in the courtroom: Customary law and the control of women in segregation-era Natal, *The International Journal of African Historical Studies*, 28:3, 1995, 527, https://doi.org/10.2307/221173.

17 Williams and Klusener, The Traditional Courts Bill: A woman's perspective, 278.

18 Claassens, *'It is not easy to challenge a chief'*, 32, Claassens narrates an incident in which an entire family was evicted from their home and fined four cattle because their son had fought with a teacher.

19 B Oomen, 'We must now go back to our history': Retraditionalisation in a Northern Province chieftaincy, *African Studies*, 59:1, 2000, 73–74, https://doi.org/10.1080/713650973 and Claassens, *'It is not easy to challenge a chief'*.

20 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) para 199; Constitution of the Republic of South Africa, 1996, sections 211 (1) and 16(1) of schedule 6. The number of courts may be significantly higher if lower levels of courts such as the courts of family councils and community courts are taken into account.

21 Sections 28(1), (3) and (4) of the Traditional Leadership and Governance Framework Act. The whole Act has been repealed by the Traditional and Khoi-San Leadership Act 3 of 2019 which has yet to come into operation.

22 N Luwaya, Report on the provincial Traditional Courts Bill hearings: Exploring rural people's democratic participation and freedom of expression, *Issues in Law and Society*, 2013, 30–31.

23 Bennett, *Customary law in South Africa*, 141.

24 Black Administration Act (38 of 1927) ss 12, 20 and Schedule 3.

25 Bennett, *Customary law in South Africa*, 166.

26 Ibid.

27 Ibid.

28 Ibid, 167; also see Holomisa, Balancing law and tradition, 18 for a discussion on the procedure in courts.

29 B Tshehla, *Traditional justice in practice – a Limpopo case study*, Pretoria, *Institute for Security Studies Monographs*, 2005, 26.

30 Bennett, *Customary law in South Africa*, 166 and Holomisa, Balancing law and tradition, 19.

31 Bennett, *Customary law in South Africa*, 166 and S Mnisi Weeks, *Access to justice and human security: Cultural contradictions in rural South Africa*, United Kingdom, Routledge, 2018, 26

32 CB Soyapi, Regulating traditional justice in South Africa: A comparative analysis of selected aspects of the Traditional Courts Bill, *Potchefstroom Electronic Law Journal,* 17:4, 2014, 1445, http://dx.doi.org/10.4314/pelj.v17i4.07.

33 See footnote number 26 in Soyapi, Regulating traditional justice in South Africa, 1445; A Claassens and S Ngubane, Women, land and power: the impact of the Communal Land Rights Act, in *Land, power & custom: Controversies generated by South Africa's Communal Land Rights Act*, Cape Town: UCT Press, 2008, 154, 156.

34 Tshehla, *Traditional justice in practice*, 21–26.

35 Claassens, *'It is not easy to challenge a chief'*, 83; Williams and Klusener, The Traditional Courts Bill: A woman's perspective, 284.

36 E Curran and E Bonthuys, Customary law and domestic violence in rural South African communities, *South African Journal of Human Rights*, 21:4, 2005, 630-632, https://doi.org/10.1080/19962126.2005.11865150.

37 Thipe, Defining boundaries, 492.

38 Thipe, Voices in the legislative process, 4-9; Thipe, Defining boundaries; Legal Resources Centre (LRC), Submission to the Portfolio Committee on Justice and Constitutional Development re Traditional Courts Bill 15 of 2008, 5–6.

39 'Old' Traditional Courts Bill (B1-2017), Clause 4(3)(a).

40 Ibid., preamble and clauses 2(b)(ii) and (iii); 2(c); 2(f); 3(2)(e) and 4(2)(a)(iii).

41 'New' Traditional Courts Bill (B1B-2017), clauses 4(4)(a) and (b).

42 Ibid., clause 12(1).

43 Ibid., clause 11.

44 The term 'common law courts' is used in the article to refer to those courts that draw their values from Roman law, Roman-Dutch law and English law such as the high courts and magistrate's court.

45 Constitution of the Republic of South Africa, 1996, s 36. The section provides that any limitation of rights must be reasonable and justifiable taking into account the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether there are less restrictive means to achieve purpose.

46 Constitution of the Republic of South Africa, 1996, ss 30 and 31; Mnisi Weeks, Beyond the Traditional Courts Bill, 34.

47 Thipe, Voices in the legislative process, 15.

48 Ibid, 9–11.

49 RD Nanima, A missing link in the Traditional Courts Bill, 2017, *South African Crime Quarterly*, 65, 2018, 23, https://doi.org/10.17159/2413-3108/2018/v0n65a5268; Mnisi Weeks, Beyond the Traditional Courts Bill. Also see the numerous submissions and reports on the various iterations of the Bill cited in this article.

50 Constitution of the Republic of South Africa, 1996, section 35(3)(f). For a discussion on this see Soyapi, Regulating traditional justice in South Africa, 1450–1453.

51 Traditional Courts Bill (B1B-2017), clause 4(2)(b)(i).

52 Parliamentary Monitoring Group (PMG), Traditional Courts Bill: Department of Justice and Constitutional Development media briefing.

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