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

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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.[1] 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.[2] Yet they represent many difficulties, from inadequate resources right through to dysfunctionality, corruption and abuse.[3] 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.[4] 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.[5] It would replace the remaining sections of the notorious Black Administration Act (38 of 1927) (BAA)[6] – namely, sections 12 and 20 – with legislation that would reflect the new era of democracy and primacy of rights such as equality and dignity.[7] 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.[12] 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.[13]

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.[14]

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.[15] 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).[16] 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.[17] 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.[24]

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)[25]

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.

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NOTES

1. For discussion on the social basis of land rights in terms of customary law see B Cousins, Characterising "Communal" Tenure: Nested Systems and Flexible Boundaries in A Claassens & B Cousins (eds.), *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act,* Cape Town, UCT Press, 2008, 109-137.
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.
6. See the Black Administration Act and Amendment of Certain Laws Act 28 of 2005 and the Draft Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Bill, 2010 (B37-2010).
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), *Gumede 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.
13. See PMG report, http://www.pmg.org.za/report/20090901-department-justice-constitutional-development-traditional-courts-bill where the department presented a briefing on the TCB to the new Portfolio Committee on Justice and Constitutional Development in September 2009.
14. South African Law Reform Commission Report on Traditional Courts and the Judicial Function of Traditional Leaders (Project 90), January 2003, 9. Also see Presentation by Nkosi Phathekile Holomisa (A! Dilizintaba), MP and Contralesa President at "Workshop on Cultural Heritage: The Role of Traditional Leaders in the Preservation and Promotion of Intangible Heritage", UNESCO Convention on the Safeguarding of Intangible Cultural Heritage, 26-27 July 2007, in Pretoria. Available at contralesa.org/speeches.html (accessed on 15 March 2010).
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.
26. A Claassens & S Ngubane, Women, Land and Power: The Impact of the Communal Land Rights Act, in Claassens & Cousins (eds.), *Land, Power & Custom*, 173-5; A Claassens & S Mnisi, Rural Women Redefining Land Rights in the Context of Living Customary Law, *South African Journal on Human Rights* 25, 2009, 491.
27. Substantive Report on National Community Workshop on Traditional Courts Bill, 11-12 November 2009 at 3, 6 and 5.
28. *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 45.