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The Traditional Courts Bill

1. Introduction

Traditional leadership is one of the oldest institutions in Africa. During the pre-colonial periods, traditional governance and traditional leadership played a vital role in local communities. Traditional authorities were viewed as heads of their people and leaders of their communities. Many customary structures and practices survived even the apartheid era, and 'the institution, status and role' of traditional leadership were subsequently recognised by the Constitution.[1] Hence, almost since the dawn of democracy in 1994, traditional leaders have been campaigning for a traditional law system that would accommodate people living in traditional communities, and would preserve African culture and the institution of traditional leadership. In particular, traditional leaders have been pushing for a Traditional Courts Bill that would allow traditional law to have the same stature as common law, and give traditional courts equal recognition. This was always bound to be a difficult balance to achieve, especially as some aspects of traditional law and practice are not easily compatible with the Constitution.

2. Historical background

During the pre-colonial era the institution of traditional leadership enjoyed much power and prestige as it was a political and administrative centre of governance for traditional communities, and it was the form of government with the highest authority.[2]

During colonisation, the British experimented with two systems. The first used colonial bureaucracy to weaken the institution of chieftaincy; the chief's powers were controlled through the system of direct, magisterial rule. This system was adopted in the Eastern Cape. The second system used local indigenous rulers (chiefs) to control and administer the local population. This was known as the 'Shepstone' system, in which chiefs became vassals of the colonial bureaucracy, dependent on the colonial government. This was favoured in colonial Natal.

The apartheid government based its policies on racial discrimination. As a result, it created Bantustans and separated them based on the language and culture of ethnic groups. The Bantustans' governments passed various pieces of legislation to control traditional leadership.[3] In general, the authority of the institution of traditional leadership was reduced, and it applied only to people who lived in traditional communities.

3. Traditional Leadership in a Democratic Society

One of the key issues relating to the institution of traditional leadership is that it works on principles that can be seen as incompatible with democratic ideas and values. For example, traditional leadership is entirely dependent on the patrilineal line. There are no elections, and chiefs hold office for life. One of their key duties is to resolve disputes, however their operations are unregulated, unrecorded, and unmonitored. As will be seen, the Traditional Courts Bill seeks to rectify some of these issues and to adhere to democratic principles by promoting children's rights, promoting equality, upholding freedom of sexual orientation, and prohibiting corporal punishment and gender discrimination.[4]

4. The Different Versions of the Bill

The Traditional Courts Bill (originally B15 of 2008, then B1 of 2012) was introduced to replace sections 12 and 20 of the Black Administration Act of 1927, and various colonial-era provisions that

authorised chiefs and headmen to regulate civil disputes and to try some crimes in traditional courts.[5]

Under the 2008 and 2012 Bills, millions of rural people would remain under the jurisdiction of a traditional court based on where they lived.[6] They would adhere to the Bantustan boundaries that were established under the Black Authorities of 1951,[7] and there would be no 'op-out', meaning that people would be denied the right to choose to be prosecuted in a magistrate's court as opposed to a traditional court.

Consequently, civil society organisations rejected the 2008 and 2012 versions of the Bill. They asserted that these Bills were unconstitutional and would infringe especially on women's rights.[8] Moreover, Shirhami Shirinda, a member of a royal family in Limpopo, criticised the Bill, arguing that it contained a repetition of the colonial precedent of the Black Administration Act of 1927, "which turned chiefs into judges."[9] Thus, the Bill would legitimise patriarchal customs such as *ukuthwala* (abduction and forced marriage) and – given the views of traditional leaders on homosexuality – it was unlikely that the courts would recognised gay rights.

A further version of the Bill was introduced in 2017. This version recognised that

> *"there is a need to address certain abuses prevailing in some traditional courts as they currently exist; protect the public interest; and enhance accountability in the resolution of disputes in accordance with evolving customs and practices in the new constitutional dispensation." [And] "that customary law is premised on the principle and spirit of **voluntary affiliation**, and that its application is accessible to those who **choose to** live in accordance with the values of evolving customary law and abide by the practices and customs thereof."*[10]

Therefore, this Bill created legal mechanisms separate from, but parallel to, the common and statutory law that applies to people living in urban areas. It enabled a person summoned by a traditional court to opt-out from proceedings in that court and to choose to pursue their matters in a magistrate's court.[11] However, traditional leaders rejected the proposed op-out clause.

In March 2018 the Portfolio Committee on Justice and Correctional Services hosted various organisations, including traditional leaders and the Congress of Traditional Leaders of South Africa (Contralesa), for a public hearing on the latest amendments to the Bill. But while this latest version seems to enjoy more support from traditional leadership, it has been roundly criticised by civil society, which argues that it is worse than the versions that came before it.

According to Nyasha Karimakwenda and Ayesha Motala, researchers at the Land and Accountability Centre in the Department of Public Law at UCT, the Bill still unconditionally imposes customary law jurisdiction on rural communities. They argue that rural people should "have the right to choose whether to submit to traditional courts or to insist on their right to use the judicial system introduced by the 1996 Constitution." Furthermore,

> "[a]s it stands the bill will unconditionally impose customary law jurisdiction on rural communities, will lessen the accountability of traditional courts and will remove carefully crafted protections for women and other groups against discrimination. The status, fluidity and consensual nature of customary law, as recognised in numerous Constitutional Court judgments, has been altogether ignored." [12]

5. The Current Position

Traditional leaders and Contralesa do not support the opt out clause, and they have been pushing for its removal. For example, Aaron Martin Messelaar, a Contralesa NEC member, said that he is "personally disappointed in the in and out opt clause," and does not support its inclusion.

When the Portfolio Committee met to deliberate on the Bill, the Chairperson, Dr Mathole Motshekga, noted that the heart of the Bill was that it must have jurisdiction, and "if you are going to have an optional participation, then do you really need this Bill?" If institutions like Contralesa, the National House of Traditional Leaders, and (in his view) the majority of people affected by the Bill's provisions all asserted that having an opt-out clause would undermine the Bill, then "who are these important voices that we are listening to who are saying we must opt out?" he asked.[13]

On the other hand, a delegation of State Legal Advisors briefed the Committee on the amendments that the Committee requested,

including the removal of reference to the voluntariness of Traditional Courts. They notified the Committee that the removal of the opt out clause might render the Bill unconstitutional.[14]
A Parliamentary Legal Advisor, Ms Phumelela Ngema, was also of the opinion that the removal of the opt out clause from the Bill would be unconstitutional. She said that

> "Section 30 of the Constitution provides that everyone has the right to participate in the cultural life of their choice but no one may do so in a manner inconsistent with any provision in the Bill of Rights. Section 31(1) of the Constitution provides that persons belonging to a cultural, religious or linguistic community may not be denied their rights as outlined in those specific provisions. Section 31 (2) provides a built-in limitation to the effect that such rights may not be exercised in a manner inconsistent with any provision in the Bill of Rights."

The Constitution of South Africa allows for legal pluralism which, according to the Parliamentary Legal Advisor, gives people a right to opt out of appearing before a traditional court.

The Chairperson responded that culture and law should not be confused or conflated. He asked whether the point of departure was that customary law was law and, if so, if one went into an area under customary law and violated that law, how could one simply choose to 'opt out' of the jurisdiction of a court which was empowered to enforce that law?[15]

In the end, most members of the Portfolio Committee were of the view that the opt out clause should be removed, as traditional law should have the same status as common law and traditional courts should enjoy proper and equal recognition. Thus, despite the fact that other members were concerned about the constitutionality of the Bill, the majority of the Committee voted to have the opt out clause removed.[16]

6. Conclusion

The debate about the Traditional Courts Bill centres on its constitutionality; it raises difficult issues regarding the (in) compatibility of some customary law principles and processes with the essentially liberal, individual rights-based nature of our Constitution. Institutions like Contralesa and the House of Traditional Leaders argue that traditional law should have the same status as common and statutory law, and that traditional courts should continue to exercise their age-old jurisdiction.[17] Based on these reasons they were at the forefront of campaigns for the deletion of the opt out clause. However, if it is the case – as numerous expert and activists have claimed – that aspects of customary law discriminate unfairly on the basis of sex, sexual orientation, marital status, ethnicity and other grounds – then it is extremely difficult, if not impossible, to see how anyone can be forced to accept its jurisdiction. This would amount to forcing them to waive some of their most fundamental rights and freedoms – and a forced waiver is no waiver at all. Therefore, it seems inescapable that the only way that traditional law can co-exist with our scheme of constitutional rights is if submission to its jurisdiction becomes a matter of voluntariness; and if anyone who wishes to opt out of that jurisdiction is free to do so.

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[1] Constitution of the Republic of South Africa, Chapter 12.
[2] http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812009000400005
[3] http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812009000400005
[4] https://www.dailymaverick.co.za/article/2018-03-19-parliament-opt-out-traditional-courts-bill-supporters-most-hated-clause/
[5] https://www.google.com/search?q=certain&ie=utf-8&oe=utf-8&client=firefox-b
[6] https://www.dailymaverick.co.za/article/2012-09-20-traditional-courts-whose-bill-is-it-anyway/
[7] https://www.dailymaverick.co.za/article/2012-09-20-traditional-courts-whose-bill-is-it-anyway/
[8] https://www.news24.com/SouthAfrica/News/traditional-laws-should-be-compulsory-20180325-2

[9]https://www.dailymaverick.co.za/article/2012-09-20-traditional-courts-whose-bill-is-it-anyway/
[10] http://www.justice.gov.za/legislation/bills/2017-TraditionalCourtsBill.pdf
[11]https://www.dailymaverick.co.za/article/2018-09-13-latest-traditional-courts-bill-draft-flouts-constitutional-rights-even-more-disturbingly/amp/
[12]https://www.dailymaverick.co.za/article/2018-09-13-latest-traditional-courts-bill-draft-flouts-constitutional-rights-even-more-disturbingly/
[13] https://pmg.org.za/committee-meeting/26863/
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