

Beyond the Traditional Courts Bill

Regulating customary courts in line with living customary law and the Constitution

SINDISO MNISI WEEKS*

sindiso.mnisi@uct.ac.za

This article discusses flaws in the Traditional Courts Bill in light of research that shows customary courts to operate in accordance with a model that is very different from that adopted by the Bill. Customary courts are not professional institutions but community-based discussion forums, thus participation in them is inclusive of the broad community membership, and their accountability is partly dependent on people's ability to choose to use them, or other forums, when their own courts are unjust. The article therefore develops a framework for regulating customary courts that gives recognition to their essential elements as understood through prior study of diverse courts. The framework advanced is also one that gives greater expression to rights (to democracy, gender equality and freedom of association, or choice) articulated in the Constitution.

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;¹ secondly, in 20th century contestations brought to the civil courts to challenge traditional authority misconduct as well as state misinterpretations, distortions and impositions;² and, thirdly, recent research and consultations conducted by the

* Senior Researcher, Law, Race and Gender Research Unit and Senior Lecturer in African Customary Law, Faculty of Law, University of Cape Town.

South African Law Reform Commission (SALRC) from 1998 to 2003.³ 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.⁴ 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.⁵ Community members are therefore able to participate freely in their functioning, although women were traditionally excluded from participating in customary courts.⁶ 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 court²³ 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.²⁴

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.²⁵ Historical evidence shows that clan and village level structures simply do not refer matters 'upwards' to courts dominated by unaccountable traditional leaders.²⁶

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 culture²⁷ and to freely (dis)associate with their traditional authorities.²⁸ 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.²⁹

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).³⁰ 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.³¹

Customary courts are generally not independent and impartial;³² 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.³³ 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)³⁴ court. Similarly, rural people should also be able to institute proceedings in state courts and avoid customary courts entirely.³⁵ 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 representation³⁶ 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,³⁷ custody, guardianship, maintenance, determination of paternity, and succession³⁸ (validity, effect or interpretation of wills).³⁹ Given that discussion of differences within the community is a significant aspect of customary dispute resolution for many rural people (including women),⁴⁰ 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

1. J Comaroff and S Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context*, Chicago and London, University of Chicago, 1981; P Cook, *Social Organisation and Ceremonial Institutions of the Bomvana*, Cape Town and Johannesburg, Juta & Co. Ltd, 1931; Major E Dutton, *The Basuto of Basutoland*, London, Jonathan Cape, 1923; W Hammond-Tooke, *Command or Consensus: The Development of Transkeian Local Government*, Cape Town, David Philip, 1975; H Kuper, *An African aristocracy: rank among the Swazi of Bechuanaland*, London, New York, International African Institute, Oxford University Press, 1947; H Mönnig, *The Pedi*, Pretoria, Van Schaik, 1967; D Reader, *Zulu tribe in transition: the Makhanya of Southern Natal*, Manchester, Manchester University Press, 1966; I Schapera, *Tribal innovators: Tswana chiefs and social change, 1795-1940*, London School of Economics Monographs on Social Anthropology no 43, London, Athlone Press, 1970; M Wilson, S Kaplan, T Maki et al, *Keiskammahoek rural survey vol 3: social structure*, Pietermaritzburg: Shuter and Shooter, 1952.
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 Tsoke* 1927 AD 74, *Mathura v Du Toit* 1926 TPD 126, *Rathibe v Reid* 1927 AD 74, *Mandhlakayise Ngcobo v Chief Native*

- 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 Makgotho* 1928 TPD 487, *Morake v Dubedube* 1928 TPD 625, *Rex v Kumalo and Others* 1952 (1) SA 381 (A), *Rex v Ntwana* 1961 (3) SA 123 (E), *State v Mngadi* [1971] 2 All SA 394 (N).
3. South African Law Reform Commission Discussion Paper 82 (Project 90), May 1999, South African Law Reform Commission Report on Traditional Courts and the Judicial Function of Traditional Leaders (Project 90), January 2003 and Draft Submission for Comment: Traditional Courts and the Judicial Function of Chiefs – CALS, CGE and NLC, November 1999.
 4. See, for example, 'The Traditional Courts Bill of 2008: documents to broaden the discussion to rural areas'. A publication of the Legal Resources Centre and the Law, Race and Gender Unit, Faculty of Law, University of Cape Town, November 2009 at section 4(3); A Claassens and S Ngubane, Women, land and power: the impact of the Communal Land Rights Act, 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, 154-183; A Claassens and S Mnisi, Rural women redefining land rights in the context of living customary law, *South African Journal on Human Rights* 25 (2009), 491; S Mnisi, The interface between living customary law(s) of succession and South African state law, Unpublished DPhil thesis, University of Oxford, 2010.
 5. Mönnig, *The Pedi*, 309; Dutton, *The Basuto of Basutoland*, 59-60.
 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 Bomvana*, 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 Ntwana* 1961 (3) SA 123 (E) also notes the council and headmen's role in the traditional dispute resolution process; *State v Mngadi* [1971] 2 All SA 394 (N) similarly notes the headmen's involvement in the processes of dispute resolution.
 10. Mönnig, *The Pedi*, 308; Wilson et al, *Keiskammahoek rural survey vol 3*, Schapera, *Tribal Innovators*, 92.
 11. Kuper, *An African aristocracy*, 65.
 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'.
 14. M Chanock, *The making of South African legal culture, 1902-1936: fear, favour and prejudice*, Cambridge, Cambridge University Press, 2001, 262, 267; A Claassens, Women, customary law and discrimination: the impact of the Communal Land Rights Act, *Acta Juridica* 42 (2005), 50; M Mamdani, *Citizen and subject: contemporary Africa and the legacy of late colonialism*, Princeton, Princeton University Press, 1996, 81; T Nhlapo, The African customary law of marriage and the rights conundrum, in M Mamdani (ed), *Beyond rights-talk and culture-talk: comparative essays on the politics of rights and culture*. Cape Town, David Philip Publishers, 2000, 136-48 at 161-3; R Roberts, *Litigants and households: African disputes and colonial courts in the French Soudan, 1895-1912*, Portsmouth, NH, Heinemann, 2005, 18-20.
 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'.
 16. Wilson et al, *Keiskammahoek rural survey vol 3*.
 17. Kuper, *An African aristocracy*, 65.
 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 'in 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 them 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 induna 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'.
 24. Claasens and Ngubane, *Women, land and power*, 173-5; Claasens and Mnisi, *Rural women redefining land rights in the context of living customary law*; E Curren and E Bonthuys, *Customary law and domestic violence in rural South African communities*, *South African Journal on Human Rights* 21 (2005), 607, 633; T Higgins, J Fenrich and Z Tanzer, *Gender equality and customary marriage: bargaining in the shadow of post-apartheid legal pluralism* 30(6) (2007), 1653, 1700-01; B Oomen, *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era*, James Currey Ltd, 2005, 140.
 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 Mawane 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. Mönning, *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'.
 29. See PMG report, <http://www.pmg.org.za/report/20090901-department-justice-constitutional-development-traditional-courts-bill> (accessed November 2010).
 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').
 33. See observations made, in this regard, by K Von Benda-Beckmann, *Forum shopping and shopping forums: Dispute processing in a Minangkabau village in West Sumatra*, *Journal of Legal Pluralism* 19 (1981), 117-160, 137-38.
 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.
40. Wilson et al, *Keiskammahoek rural survey vol 3*.
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.