



SUBMISSION ON THE TRADITIONAL COURTS BILL

Chuma Himonga (Professor of Law, Faculty of Law, University of Cape Town)

And

Rashida Manjoo (Research Associate, Faculty of Law, University of Cape Town)

We welcome the opportunity to make this submission to the Portfolio Committee on Justice and Constitutional Development (hereinafter the Portfolio Committee) regarding the Traditional Courts Bill, 15 of 2008 (“the Bill”).

As in many other African countries, traditional courts in South Africa play a significant role in dispute resolution, especially among rural communities. In recognition of the importance of these institutions, the South African Law Reform Commission set out to investigate traditional courts and the judicial functions of traditional leaders in 1999, with a view to reforming the institutions concerned in the context of the values of the new Constitutional order. Against this background, the call for submissions on the Traditional Courts Bill, by the Portfolio Committee on Justice and Constitutional Development, nine years after the commencement of the project, is a commendable development.

However, we note with concern that the Bill emanating from the above mentioned legislative process differs in many substantive respects from the Bill that is currently before the Portfolio Committee. Due to the short timeframe leading to the Portfolio Committee hearings, this submission will limit itself to issues of process. We are of the view that there has been no consultation on the current Bill, and we urge the Committee to facilitate public participation, particularly in communities that will be directly affected by the Traditional Courts Act. Not only is participation of this nature an important principle of democracy, it is also a



fundamental right of the communities whose lives will be affected by the proposed law. Carolyn Evans and Simon Evans argue that “[I]n established democratic States, legislatures perform several distinct functions. They are representative bodies providing a mechanism by which citizens participate in public affairs and government; they are forums in which governments can be held accountable for their conduct; and they are (more or less) deliberative law-making bodies. In discharging each of these functions they can affect the enjoyment of human rights.”¹

Furthermore, the right to public participation was tested and upheld by the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC). The Court made it clear that Parliament had failed to fulfil its constitutional obligation by its failure to facilitate public participation in the law-making process. The consequence led to the striking down of two pieces of legislation. The role of the South African Parliament as a ‘deliberative law-making body’ came under scrutiny in this case due to the applicant’s allegation of an omission in the legislative process. The Court asserted that the right to political participation is a fundamental human right based on provisions in both international and regional human rights instruments.

Adopting an historical and a social context approach, the Court held that certain statutes require mandatory public consultations, depending on the nature of the bill, the importance accorded to it by state and non-state actors, requests received for such consultations, and also if promises had been made in response to such requests. Public consultations in such circumstances would be an indicator of respect for the views of affected people. Adequate consultation is even more crucial in contexts where the affected groups have been previously discriminated against, marginalized, silenced, received no recognition, and who have an

¹ Carolyn Evans and Simon Evans, *Evaluating the Human Rights Performance of Legislatures*, 6 HUMAN RIGHTS LAW REVIEW **, 547 (2006) (as cited in Czapanskiy and Manjoo --forthcoming Duke Journal of



interest in laws that will directly impact them.² The Court, in recognizing the significance of public participation structures and methods of the past, asserted: “They were also seen as crucial in laying the foundation for the future participatory democracy that [the people] were fighting for and that we are operating under. This emphasis on democratic participation that was born in the struggle against injustices is strongly reflected in our new democratic Constitution and the entrenchment of public participation in Parliament and the legislatures.”³ The Court recognized two aspects of the duty to facilitate public involvement, the duty to provide meaningful opportunities for participation in the law-making process and the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.⁴ Hence, the Court asserted that “[O]ur constitutional framework requires the achievement of a balanced relationship between representative and participatory elements in our democracy.”⁵ Furthermore, the notion of restoration of dignity and the according of respect to citizens by government served to strengthen the views contained in the majority decision that a special duty existed as regards public participation. The duty has many components including: providing information, providing access to Parliament, providing an opportunity to submit representations and submissions, providing a forum for public hearings for oral submissions, summoning people to Parliament, etc.

In light of the above, we note with deep concern that Parliament is once again failing in its duty to facilitate public participation, as envisaged by the judgment discussed above. Our concern is based on our experience during a trip to Limpopo last week, where we met with a considerably large group of people in rural communities. They were completely unaware of

International and Comparative Law 2008)

² *Doctors for Life* at para 167/8

³ *Doctors for Life* at para 112

⁴ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* at para 129 (as cited in Czapanskiy and Manjoo).

⁵ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* at para 121 (as cited in Czapanskiy and Manjoo).



Department of Private Law

Wilfred & Jules Kramer Law School Building • Stanley Road • Middle Campus
Postal address: Private BagX3 • Rondebosch • 7701 • Cape Town • Republic of South Africa

the call for submissions and the Parliamentary hearings scheduled by the Portfolio Committee on the Traditional Courts Bill, as they had not seen the public notice and had not been informed by the relevant state department. They were also apparently unaware of the new version of the Bill before the Committee. We can only assume that there are other rural communities that are similarly situated and who are being denied their right to participate in the law-making process.

We therefore urge the portfolio Committee to undertake the necessary steps to facilitate public participation country-wide before the current Bill is made law.

Thank for your consideration of our submission.

Yours sincerely

Professor Chuma Himonga

Advocate Rashida Manjoo