

# Third time a charm?

## The Traditional Courts Bill 2017

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*This article discusses the latest version of the Traditional Courts Bill introduced by Parliament in 2017. It examines several fundamental objections to previous versions of the Bill to explain the progress that has thus far been made. In a much-welcomed improvement, the 2017 Bill provides a mechanism for individuals to opt out of the traditional justice system. Nonetheless, the recognition of the old apartheid homeland boundaries is perpetuated, as only courts convened by a traditional leader, whose power and jurisdiction are based on the old tribal boundaries, are recognised. A notable change is that there are no longer appeals to the magistrates' courts. Parties may appeal a decision to a higher customary court or apply for a review of a decision to the high court. This calls into question the accessibility and affordability of appeals, and essentially locks people into the traditional justice system after the commencement of proceedings. The bar on legal representation continues under the 2017 Bill, which remains objectionable given that traditional courts may still deal with criminal matters. However, the powers of traditional courts in granting sanctions have been significantly circumscribed and regulated. Thus, while the 2017 Bill represents a significant development of previous versions of the Bill, there is still room for improvement.*

Traditional courts are at present still governed by the remaining provisions of the notorious Black Administration Act, which was promulgated in 1927.<sup>1</sup> Unsurprisingly, the provisions are largely regarded as outdated and ignored.<sup>2</sup> In 2008 the legislature introduced the Traditional Courts Bill,<sup>3</sup> which was withdrawn in 2011 due to criticism and public outcry. This criticism was based on the lack of public consultation in the drafting of the Bill, the gender composition of the courts and women's participation in the resolution of

disputes, centralisation of power in traditional leaders and their courts at the expense of lower courts within the customary system, and the professionalisation of courts.<sup>4</sup> The Bill (hereafter 'the 2008/2012 Bill') was, however, re-introduced unchanged in 2012.<sup>5</sup> The determined and fierce opposition to the Bill by, among others, civil society and citizens in rural areas, led to the National Council of Provinces,<sup>6</sup> including ANC-controlled provinces, rejecting the 2012 Bill.<sup>7</sup>

In 2017 the legislature introduced a revised version of the Traditional Courts Bill<sup>8</sup> ('the 2017 Bill') borne out of the public engagement with

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the 2008/2012 Bill and aimed at addressing criticisms that marred previous versions of the Bill. This article examines some of the fundamental criticisms levelled at the 2008/2012 Bill, and looks at whether they are sufficiently addressed by the 2017 Bill. This article focuses on the way that the 2017 Bill entrenches tribal boundaries; the locking in of rural people into the traditional justice system; the lack of legal representation; and the wide discretionary powers of chiefs in imposing sanctions.

The article argues that while certain important, and very welcome, changes have been made to the 2017 Bill, there is still room for improvement before the Bill comes into force.

## Entrenchment of tribal boundaries

Perhaps one of the most significant objections to previous iterations of the Bill was that it entrenched the old apartheid homeland boundaries. During apartheid, the state created tribes and appointed chiefs and tribal authorities, who were accountable to the state, to rule over the newly created tribes.<sup>9</sup> These tribes were confined within artificially fixed boundaries in the homelands, and chiefs and tribal authorities were given territorial jurisdiction over the areas in which they were appointed.<sup>10</sup> This forced territorial jurisdiction distorted the true nature of customary law, which is defined by an individual's voluntary affiliation to a chief.<sup>11</sup>

Mnisi Weeks and others criticised the 2008/2012 Bill for continuing the artifice of territorial jurisdiction under the new framework.<sup>12</sup> Mnisi Weeks argued that the Bill, as read with section 28 of the Traditional Leadership and Governance Framework Act<sup>13</sup> ('the TLGFA'), recognised tribes created during apartheid as traditional communities and conferred territorial jurisdiction over these communities on traditional courts.<sup>14</sup> This perpetuated the artificial tribal authority boundaries created during apartheid, as it bound individuals to attend

the court of the traditional leader in whose jurisdiction they resided, regardless of whether they affiliated with the leader or disputed his legitimacy.<sup>15</sup> This entrenched, and effectively locked people into, the boundaries of the old tribal authorities.

The 2017 Bill does little to change this situation. It provides that a traditional court must be convened by a traditional leader (or his designate)<sup>16</sup> and defines a traditional leader as one who, in terms of the customary law of the community, holds a traditional leadership position in accordance with an Act of Parliament. Under the TLGFA, recognition of traditional leaders is linked to traditional communities, traditional councils and tribal boundaries.<sup>17</sup> The effect is that the only legally recognised courts are those convened by a traditional leader, whose power and jurisdiction are based on the old tribal boundaries.<sup>18</sup>

In a welcome development, however, the 2017 Bill no longer creates a strict territorial jurisdiction for courts. Individuals may institute proceedings in any traditional court and are not bound to attend court in the jurisdiction in which they reside.<sup>19</sup> Many people may nonetheless choose to use their local court due to familiarity, societal pressure and the pragmatic savings in time and costs, but being allowed to have a choice of court remains an important reflection of the voluntary and consensual nature of customary dispute resolution forums.

## Opt-out

The 2012 Bill locked rural people into the traditional justice system with no option to refuse to attend a traditional court when summoned. Most controversially, clause 20(c) of the 2008/2012 Bill provided that any person who,

[h]aving 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.

Locking individuals into the traditional justice system in this way flagrantly contravened its voluntary nature. Mnisi Weeks argued that attendance at customary courts was always elective and this voluntary nature of the courts defined the authority of the court, conferred legitimacy on the leader and was a means to hold the leader accountable.<sup>20</sup> Individuals would not frequent unjust customary courts, resulting in a loss of their credibility.<sup>21</sup> This served as a real incentive for customary courts to rule fairly.<sup>22</sup> Mnisi Weeks further argued that the lack of an opt-out mechanism infringed on individuals' right to choose their culture and associate with the traditional authorities of their choice.<sup>23</sup>

Clause 20(c) has been deleted in the 2017 Bill, which instead affirms the voluntary participation in a traditional court<sup>24</sup> and the consensual nature of customary law.<sup>25</sup> Furthermore, it provides that a traditional court may only hear a matter 'if the party against whom the proceedings are instituted agrees freely and voluntarily to the resolution of the dispute'.<sup>26</sup> A person who elects not to have the matter resolved by the traditional court must inform the clerk of the court of his decision,<sup>27</sup> but need not furnish reasons for the decision. Traditional courts may, however, provide 'counselling' even after a party has elected to opt out of proceedings.<sup>28</sup> What constitutes counselling is not explained in the Bill, and it is problematic that it permits the court's involvement in the dispute when a party may have opted out. The court's power should rather be limited to referring the matter elsewhere.<sup>29</sup>

Once individuals consent to their matter being heard in a traditional court, they cannot withdraw from the proceedings, unless they

have 'compelling grounds' to do so and have informed the traditional court.<sup>30</sup> The 2017 Bill does not define compelling grounds and also does not set out who evaluates the reasons for the withdrawal, or how this should be done. It is unlikely to expect that a person's fear of an unjust outcome would be considered sufficient justification for withdrawal from the proceedings, and it therefore appears that consenting to proceedings in a traditional court may bar a person from pursuing the matter in a common law court.<sup>31</sup> The right to opt out and the consequences of failing to do so must be carefully explained to individuals so that they can make a meaningful choice.<sup>32</sup>

The Department of Justice and Constitutional Development (hereafter 'the Department of Justice') explained that the intention of these provisions is to prevent parties from forum shopping.<sup>33</sup> However, this raises one of the most basic objections to legislation on traditional courts: that it changes the nature of traditional dispute resolution forums.<sup>34</sup> These forums are not courts like the high courts and magistrates' courts, and forcing them into court-like moulds destroys not only their essence but also that which makes them such effective dispute resolution mechanisms. The legitimacy, credibility and effectiveness of traditional courts stem from voluntary participation, and locking individuals in at any stage in the proceedings undermines the voluntary and consensual nature of these courts. Allowing individuals to withdraw from proceedings may well result in forum shopping, but it also means that claimants who legitimately fear an unjust outcome can expeditiously move their matter to the magistrates' court for resolution. This is particularly important, given that there are no appeals to the common law courts – a point we shall return to below.

Despite these critiques, recent submissions on the 2017 Bill have seen traditional leaders lobby

for an abandonment of the opt-out clause, on the basis that it undermines their power and the functioning of traditional courts.<sup>35</sup> The National House of Traditional Leaders advocated for a return to the previous position, where all individuals resident within a traditional leader's jurisdictional area are bound to submit to his court.<sup>36</sup> This would be an unfortunate regression and should not be allowed. In reality, existing power dynamics between powerful traditional leaders and vulnerable parties, like women, are likely to make it difficult for parties to opt out after they have been summoned to court, even if the law allows them to do so.<sup>37</sup> The unbalanced power structures within traditional dispute resolution forums may intimidate individuals from opting out,<sup>38</sup> which means that, rather than doing away with this right, we should inform and support individuals to exercise their option to opt out.

## Review and appeals

Unlike the 2008/2012 Bill, the 2017 version no longer allows appeals to the magistrates' courts. Instead, it provides that a high court may review an order of the traditional court and allows for appeals only to be made to another customary institution, in accordance with customary law and custom.<sup>39</sup> The high court may examine whether there was misconduct, bias or procedural irregularity in the way the traditional court arrived at its decision, but cannot pronounce on the merits of the case. Notably, the high court cannot review a decision because a party was refused a request to opt out, or was not informed of this right.

Disputes about the substance and merits of a decision must be dealt with in terms of the internal customary law appeal mechanisms, for example with an appeal to a higher customary court. The rationale for removing magistrates' courts' jurisdiction to hear appeals from traditional courts was based on the fact that the process was reminiscent of the apartheid

era,<sup>40</sup> where appeals were used as a means of controlling the decision-making of chiefs and undermining their powers. We should certainly not be emulating an era where white judicial officers substituted the decisions of chiefs with their own understandings and pronouncements of the law. Himonga and Manjoo note that, due to their training, magistrates' and superior courts tend to apply customary law rigidly, which emphasises black letter law. Also, they often apply 'norms' of customary law that are not authentic and therefore alien to litigants who live under customary law.<sup>41</sup> Bennett and Nhlapo argue that keeping the appeal within the customary law justice system for as long as possible gives effect to individuals' constitutional right to have their matter decided in a system that is familiar, non-alienating, inexpensive and accessible.<sup>42</sup>

Although Himonga and Manjoo are in favour of an appeal travelling through the customary law internal appeal mechanism before reaching the common law courts, they do not support the 2017 Bill provision that individuals should not have a right to appeal to the common law courts. Instead, they favour the model contained in the first bill proposed by the South African Law Commission ('the Commission Bill').<sup>43</sup> The Commission Bill proposed that a decision of a customary court could be appealed to a higher level customary court or, when there is no higher level or the customary court is at the higher level, to a magistrates' court.<sup>44</sup> This model aims to keep the appeal within the customary justice system as long as possible, but never to altogether preclude an appeal to the common law courts.

Unlike the model proposed above, the 2017 Bill, which will exclude appeals to the common law courts, is untenable. For example, what would happen in a case where procedure has been correctly followed but the substantive outcome is problematic? Claassens shows

how customary courts undermine women's realisation of their rights due to the patriarchal nature of the law.<sup>45</sup> For example, one woman explained that upon the death of her husband she was expected to become the wife of her husband's brother in accordance with custom. It was argued by the police and in the headman's court that this was indeed a customary practice and that the woman therefore had no case.<sup>46</sup> Even where women sit as members of the court or represent themselves, male-dominant outcomes may prevail.<sup>47</sup> Under the proposed Bill, a case like this would have to be examined on the merits of the decision, and there is no reason to believe that an appeal to a higher customary court would yield a better outcome. Furthermore, there is rich variation in the set-up of traditional courts across South Africa and not every community has a higher customary court to hear appeals. The 2017 Bill does not explain what happens in such a situation, but it appears that litigants would be left without an appeal mechanism – which is problematic.

Mnisi Weeks notes that permitting direct appeals to the magistrates' court allows individuals to avoid challenging the chief directly where they believe his judgment is unfair.<sup>48</sup> People are thus allowed to clearly convey their dissatisfaction with the decision of a traditional leader, but without having to directly confront him. This is exceptionally important in rural areas where the unequal power relations between men and women, and between those with means and influence and those without, may stop people from lodging appeals.<sup>49</sup> People should have the choice of where to lodge an appeal. Those who have faith in customary law institutions and want to benefit from their accessibility, affordability and efficiency will do so, while those who do not trust that these institutions will yield a satisfactory outcome will have another avenue to realise their rights.

It is also unclear why the 2017 Bill shifts review powers from the magistrates' court to the high court. There are 15 high courts in South Africa, all situated in the major towns, whereas there are almost 2 000 magistrates' courts scattered across the country in closer proximity to rural areas. To make access to justice easier for people in these areas, magistrates' courts should retain the power to hear reviews and appeals from traditional courts.<sup>50</sup>

## Legal representation

The 2008/2012 Bill precluded parties from having legal representation in court on the basis that it would increase the costs of using the courts, complicate procedure in courts, hamper their efficiency and change the nature of court proceedings.<sup>51</sup> The exclusion of legal representation in criminal matters was a contentious issue and Mnisi Weeks argued that it conflicted with the constitutional right of criminally accused persons to legal representation.<sup>52</sup> She argued that the exclusion could only be permissible if attendance at a customary court was voluntary, and individuals chose to waive the right to legal representation.<sup>53</sup>

The 2017 Bill still precludes legal representation.<sup>54</sup> The Department of Justice justified the exclusion on the basis that traditional courts no longer have criminal jurisdiction.<sup>55</sup> The various references to criminal jurisdiction have been removed and where the matter is being investigated by the South African Police Service (SAPS), traditional courts have no jurisdiction to hear the matter.<sup>56</sup> In contradiction to this, however, schedule 2 provides a list of crimes that 'traditional courts are competent to deal with', including theft, malicious damage to property, assault where no grievous bodily harm is inflicted, breaking and entering any premises, receiving stolen property or *crimen injuria*. The Department of Justice explained that traditional courts would deal with disputes

around such matters where formal charges had not been instituted.<sup>57</sup> It thus appears that traditional courts have criminal jurisdiction even though the proceedings may not result in a criminal conviction. Parties should be entitled to legal representation, since (despite technically not being an accused, given that there are no criminal charges) there is a risk of self-incrimination. In order to avoid prejudice to parties, the criminal jurisdiction of traditional courts must therefore explicitly be excluded and schedule 2 of the proposed Bill deleted.<sup>58</sup> Alternatively, parties must be allowed legal representation in such matters.

The exclusion of legal representation in civil matters is more nuanced than mere questions of jurisdiction. Bennett argues that there is no constitutional right to representation in civil disputes, where parties are more likely to be familiar with the procedure for pleading the case than in criminal matters, and therefore suffer no prejudice from the exclusion of legal representation.<sup>59</sup> Indeed, the court in *Chris v Commissioner Small Claims Court Butterworth*<sup>60</sup> upheld the constitutionality of the exclusion of legal representation in the small claims court.

However, we should be cautious in likening traditional courts to the small claims court and, in doing so, assume that there is no prejudice to parties in these cases. Small claims courts are presided over by legal practitioners who act as independent and impartial adjudicators. Traditional courts, on the other hand, tend not to be impartial, as the convenor often knows the parties and confidential information about the parties is regarded as advantageous in reaching a fully informed decision.<sup>61</sup> A real risk therefore exists that influential parties may abuse their influence and the system to resolve a dispute in their favour. Traditional courts' ability to impose fines compounds this risk, and may severely prejudice the poor and most vulnerable in a community.

The exclusion of legal representation and the simplicity and flexibility this provides must thus be carefully balanced against potential prejudice to parties. Creating an expeditious dispute resolution system is critically important, and the exclusion of legal representation in civil disputes may be justifiable, provided parties can opt out of proceedings and appeal the decision to a common law court. These mechanisms would protect against coercion and provide a degree of oversight that would hopefully combat any prejudice to parties.

## Sanctions

One of the most pressing reasons for legislation on customary courts is to regulate what many consider to be the unbridled powers of traditional leaders. King Dalindybo, the king of the abaThembu in the Eastern Cape, provides a brutal example of the kind of abuse of power the Bill aims to curb. Dalindybo made headlines when the Supreme Court of Appeal found him guilty of arson, kidnapping, defeating the ends of justice and assault.<sup>62</sup> Most disappointing was the fact that he argued in his defence that he was acting in the best interests of his people and upholding customary law.<sup>63</sup>

The 2008/2012 Bill did very little to regulate the powers of traditional leaders acting as presiding officers. The wide powers contained in the Bill allowed, among others, traditional courts to order a person who is not party to a dispute to perform labour without remuneration for the benefit of the community;<sup>64</sup> the deprivation of customary entitlements;<sup>65</sup> an order of banishment in civil matters;<sup>66</sup> and any other order that the traditional court may deem appropriate.<sup>67</sup>

These proposed sanctions were problematic, as individuals could be exploited for labour or stripped of their land and membership in a community.<sup>68</sup> The broad provisions failed to provide any parameters for the exercise of power. In contrast, the sanctions that may be

imposed by a traditional leader in terms of the 2017 Bill have been significantly circumscribed. Community service orders can no longer be imposed on individuals not party to the proceedings, nor for the benefit of the traditional leader.<sup>69</sup> A traditional leader is also precluded from making any order benefitting himself, a family member or official at the traditional court.<sup>70</sup> Furthermore, the 2017 Bill does not empower courts to order corporal punishment or banishment, and the broad provision empowering the court to make any order it deems appropriate has been deleted.

This regulation of traditional courts' powers is a much-welcomed change aimed at preventing the blatant abuse of power exemplified by King Dalindyebo. The exercise of the courts' powers will have to be closely monitored, as much depends on the implementation of the provisions. For example, the court is still empowered to order labour without remuneration,<sup>71</sup> and where a party is ordered to repair property they damaged, it is completely unobjectionable. However, if parties, especially vulnerable women, find themselves exploited to work without pay, it would be problematic.<sup>72</sup>

## Conclusion

Millions of people living in rural areas in South Africa use traditional courts as a first port of call for justice. Unfortunately, there is currently no real regulation of these courts, which has left them open to abuse and has meant that they function sub-optimally. The 2008/2012 Bill drew a myriad of criticism, which the 2017 Bill seeks to address. Unfortunately, the 2017 Bill continues to define traditional courts with reference to traditional leaders whose authority is determined by the old apartheid boundaries. This perpetuation of the tribal boundaries is only slightly ameliorated by the fact that individuals can institute proceedings in any traditional court. Individuals are also no longer compelled to attend a traditional

court and may refuse if summoned to do so. These amendments reflect the voluntary and consensual nature of customary law and are critical to ensuring the legitimacy and credibility of traditional dispute resolution forums. However, the changes in the proposed law should not be overstated. The 2017 Bill provides that once parties consent to proceedings in a traditional court, they cannot withdraw without compelling reasons to do so. This, coupled with the fact that the proposed law prevents appeals to the common law system, effectively locks claimants into the traditional justice system after the commencement of proceedings. Given some of the unjust experiences of people who take their disputes to these courts, especially women, this is not desirable. While it prevents an exploitation of the system, it also restricts the ability to navigate forums for the best realisation of rights, and precludes individuals from taking the dispute elsewhere when there is fear of an unjust outcome. Moreover, the distinctive nature of customary law as voluntary and consensual is lost, which may undermine the legitimacy of these forums.

The 2017 Bill still precludes legal representation in traditional courts, based on the argument that traditional courts no longer have criminal jurisdiction. However, schedule 2 of the 2017 Bill provides that traditional courts may deal with certain criminal matters listed therein. This introduces ambiguity into the Bill, which is best clarified by the explicit exclusion of criminal jurisdiction and the deletion of schedule 2.

Barring legal representation in civil disputes may be key to simplicity and flexibility in proceedings, but in circumstances where there may be unequal power relations and no impartial convenor, this may be exploited by powerful parties to achieve a favourable outcome. Nonetheless, the exclusion may be justified if individuals have a right to opt out of proceedings and to appeal decisions to a common law

court. These rights may function as a safeguard against coercion and a check on the decisions of the traditional court. Finally, in one of the most significant changes, the 2017 Bill regulates the sanctions that may be granted by a traditional court, and purports to protect the vulnerable from exploitative orders.

The 2017 Bill makes welcome changes to the 2008/2012 Bill. With some clarifications and improvements, the Bill will hopefully find support from all stakeholders, paving the way for long-awaited legislation that regulates the traditional justice system in South Africa.



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## Notes

- 1 Black Administration Act 1928 (Act 38 of 1927), sections 12, 20.
- 2 For example, traditional courts often exceed their jurisdiction and the limit of fines they may impose. See South African Law Commission, The harmonisation of the common law and indigenous law: traditional courts and the judicial function of traditional leaders, Project 90, Discussion Paper 82, 1999, 27–28, 30.
- 3 Traditional Courts Bill, B15-2008.
- 4 See some of the submissions on the Bill: South African Human Rights Commission (SAHRC), Traditional Courts Bill [B1-2012]: submission to the National Council of Provinces, 15 February 2012, <https://www.sahrc.org.za/home/21/files/SAHRC%20Submission%20Traditional%20Courts%20Bill%20NCOP%2015%202012.pdf> (accessed 21 May 2018); Legal Resources Centre (LRC), Submission to the Portfolio Committee on Justice and Constitutional Development re Traditional Courts Bill 15 of 2008, 6 May 2008, [http://lrc.org.za/lrcarchive/images/pdf\\_downloads/Law\\_Policy\\_Reform/2012\\_02\\_16\\_LRC\\_Submissions\\_on\\_Traditional\\_Courts\\_Bill\\_2008.pdf](http://lrc.org.za/lrcarchive/images/pdf_downloads/Law_Policy_Reform/2012_02_16_LRC_Submissions_on_Traditional_Courts_Bill_2008.pdf) (accessed 21 May 2018); Law, Race and Gender Research Unit, Submission on the Traditional Courts Bill (B1-2012), 15 February 2012. Submissions on the 2008 Bill can be found at Parliamentary Monitoring Group (PMG), Traditional Courts Bill (B15-2008), <https://pmg.org.za/bill/409/> (accessed 11 June 2018), while those for the 2012 Bill can be found at PMG, Traditional Courts Bill (B1-2012), [www.pmg.org.za/bill/159/](http://www.pmg.org.za/bill/159/) (accessed 11 June 2018). Also see T Thihe, Defining boundaries: gender and property rights in South Africa's Traditional Courts Bill, *Laws*, 2, 2013, 483; N Gasa, The Traditional Courts Bill: a silent coup?, *South African Crime Quarterly*, 35, 2011, 23; S Mnisi Weeks, Beyond the Traditional Courts Bill: regulating customary courts in line with living customary law and the constitution, *South African Crime Quarterly*, 35, 2011, 31; A Claassens, Who told them we want this Bill? The Traditional Courts Bill and rural women, *Agenda*, 2009, 9; T Thihe, M de Souza and N Luwaya, 'The advert was put up yesterday': public participation in the Traditional Courts Bill legislative process, *New York Law School Law Review*, 60, 2015–2016, 519.
- 5 Traditional Courts Bill, B1-2012. The 2008/2012 Bill was the state's second attempt at legislation in this area. In 2003, the South African Law Commission proposed a draft bill annexed to its Report on Traditional Courts and the Judicial Function of Traditional Leaders (Project 90: Customary Law) 2003, hereafter referred to as the 'Commission Bill'. For a discussion of the Commission Bill see C Himonga and R Manjoo, The challenges of formalisation, regulation, and reform of traditional courts in South Africa, *Malawi Law Journal*, 3, 2009, 157. There is no explanation of why this Bill, which entailed extensive public consultation, was not tabled before Parliament.
- 6 The National Council of Provinces and the National Assembly are the two houses of Parliament responsible for passing legislation. A bill that affects the provinces, such as the Traditional Courts Bill, must be approved by both the National Assembly and the National Council of Provinces. See Constitution of the Republic of South Africa, 1996, sections 42, 76.
- 7 T Thihe, Voices in the legislative process: a report on the public submissions on the Traditional Courts Bill (2008 and 2012), *Issues in Law and Society*, 2013, 3. Due to space constraints the article does not canvass the extensive critiques or process that led to the withdrawal of the 2012 Bill.
- 8 Traditional Courts Bill, B1-2017.
- 9 TW Bennett, *Customary law in South Africa*, Cape Town: Juta and Co, 2004, 106–111.
- 10 *Ibid.*, 106–111.
- 11 C Himonga and T Nhlapo, *African customary law in South Africa: post-apartheid and living law perspectives*, Cape Town: Oxford University Press, 2014, 229–230.
- 12 S Mnisi Weeks, The Traditional Courts Bill: controversy around process, substance and implications, *South African Crime Quarterly*, 35, 2011, 2, 7; Himonga and Manjoo, The challenges of formalisation, regulation, and reform of traditional courts in South Africa, 175; LRC, Submission to the Portfolio Committee on Justice and Constitutional Development re Traditional Courts Bill 15 of 2008, 3–5.
- 13 Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003).
- 14 Mnisi Weeks, The Traditional Courts Bill, 7.
- 15 *Ibid.*
- 16 Traditional Courts Bill, B1-2017, clause 4(1)(b).
- 17 Land and Accountability Research Centre (LARC), Submission on Traditional Courts Bill, 2017, 15 March 2017, 7, [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180314Land\\_and\\_Accountability.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180314Land_and_Accountability.pdf) (accessed 21 May 2018); LRC, Submissions to the Portfolio Committee on Justice Correctional Services re Traditional Courts Bill, B1 of 2017, 15 March 2017, 9–14, 19–20, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180314LRC.pdf> (accessed 21 May 2018).
- 18 LARC, Submission on Traditional Courts Bill, 2017, 7.
- 19 Traditional Courts Bill, B1-2017, clause 4(1)(a).
- 20 Mnisi Weeks, Beyond the Traditional Courts Bill, 33.



- 21 Ibid., 33–34.
- 22 Ibid.
- 23 Ibid., 33.
- 24 Traditional Courts Bill, B1-2017, clauses 2(b)(ii); 2(c)(ii); 2(c)(iii), 2(f).
- 25 Ibid., clause 2(c)(i).
- 26 Ibid., clause 4(2)(a)(iii).
- 27 Ibid., clause 4(3)(a).
- 28 Ibid., clause 4(3)(d)(i).
- 29 LARC, Submission on Traditional Courts Bill, 2017, 9. The Royal Bafokeng Nation also recommends the deletion of this clause: see Royal Bafokeng Nation, Comments on the Traditional Courts Bill, 2017, 14 March 2017, [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180314Royal\\_Bafokeng.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180314Royal_Bafokeng.pdf) (accessed 21 May 2018).
- 30 Traditional Courts Bill, B1-2017, clause 4(3)(e).
- 31 A traditional court may order that the matter be referred to the National Prosecuting Authority for the institution of criminal proceedings: see Traditional Courts Bill, B1-2017, clause 8(1)(j).
- 32 This is supported by the LRC, Submissions to the Portfolio Committee on Justice Correctional Services re Traditional Courts Bill, B1 of 2017, 24.
- 33 PMG, Traditional Courts Bill: Department of Justice and Constitutional Development media briefing, <https://pmg.org.za/page/Traditional%20Courts%20Media%20Briefing?via=homepage-feature-card> (accessed 31 March 2018).
- 34 Mnisi Weeks, Beyond the Traditional Courts Bill, 31.
- 35 PMG, The Traditional Courts Bill: public hearings day 3, Congress of Traditional Leaders of South Africa, 20 March 2018, <https://pmg.org.za/committee-meeting/26029/> (accessed 21 May 2018); PMG, Inputs by the National House of Traditional Leaders to the Traditional Courts Bill, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180314NHTL.pdf> (accessed 21 May 2018); Royal Bafokeng Nation, Comments on the Traditional Courts Bill, 2017.
- 36 PMG, Inputs by the National House of Traditional Leaders to the Traditional Courts Bill.
- 37 LARC, Submission on Traditional Courts Bill, 2017, 9.
- 38 Ibid., 9.
- 39 Traditional Courts Bill, B1-2017, clauses 11, 12.
- 40 PMG, Traditional Courts Bill: Department of Justice and Constitutional Development media briefing.
- 41 Himonga and Manjoo, The challenges of formalisation, regulation, and reform of traditional courts in South Africa, 178.
- 42 TW Bennett and RT Nhlapo, Submission in respect of the Traditional Courts Bill, LARC, 6 May 2008, [http://www.larc.uct.ac.za/sites/default/files/image\\_tool/images/347/Submissions/legal\\_submission\\_nhlapo\\_bennett\\_2008.pdf](http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/legal_submission_nhlapo_bennett_2008.pdf) (accessed 21 May 2018).
- 43 For a discussion of this Bill see South African Law Reform Commission, Customary law report on traditional courts and the judicial function of traditional leaders; Himonga and Manjoo, The challenges of formalisation, regulation, and reform of traditional courts in South Africa, 164–165.
- 44 Commission Bill, clause 27.
- 45 Claassens, Who told them we want this Bill?, 9. Also see Thipe, Defining boundaries, 497–499 for a discussion of women’s unsuccessful experiences in court.
- 46 Claassens, Who told them we want this Bill?, 11, 12.
- 47 Ibid., 12.
- 48 Mnisi Weeks, Beyond the Traditional Courts Bill, 39.
- 49 Ibid; also see Claassens, Who told them we want this Bill?, 9.
- 50 Concerns about the costs and accessibility of the high court were also raised by LARC, Submission on Traditional Courts Bill, 2017, 11; PMG, The Traditional Courts Bill: Commission for Gender Equality submission; CGE submissions to Parliament, 20 March 2018, <https://pmg.org.za/committee-meeting/26031/> (accessed 21 May 2018); PMG, Traditional Courts Bill: public hearings day 1, submission by I Madondo Deputy Judge President, KwaZulu-Natal Division, Memorandum of Traditional Courts Bill, <https://pmg.org.za/committee-meeting/25972/> (accessed 21 May 2018).
- 51 Mnisi Weeks, The Traditional Courts Bill, 2, 6; South African Law Commission, The harmonisation of the common law and indigenous law, 36–37.
- 52 Mnisi Weeks, Beyond the Traditional Courts Bill, 34.
- 53 Ibid., 35.
- 54 Traditional Courts Bill, B1-2017, clause 7(4)(b).
- 55 PMG, Traditional Courts Bill: Department of Justice and Constitutional Development media briefing.
- 56 Traditional Courts Bill, B1-2017, clause 4(2)(b)(i).
- 57 PMG, Traditional Courts Bill: Department of Justice and Constitutional Development media briefing.
- 58 This was also the submission of the CGE on the Traditional Courts Bill and selected submissions by the CGE that seek to strengthen gender equality.
- 59 Bennett, *Customary law in South Africa*, 176.
- 60 *Chris v Commissioner Small Claims Court Butterworth* (774/2005) [2007] ZAECHC 114 (26 July 2007).
- 61 Bennett, *Customary law in South Africa*, 170. The convenor may even be related to a party.
- 62 *Dalindyebo v S* (090/2015) [2015] ZASCA 144 (1 October 2015).
- 63 Ibid., para 77.
- 64 Traditional Courts Bill, B15-2018., clause 10(2)(g).
- 65 Ibid., clause 10(2)(i).
- 66 While the court could not impose banishment in criminal matters (Traditional Courts Bill, B15-2008, clause 10), it was not excluded in civil matters.
- 67 Traditional Courts Bill, B15-2008, clause 10(2)(l).
- 68 LRC, Submission to the Portfolio Committee on Justice and Constitutional Development re Traditional Courts Bill 15 of 2008, 9–10; SAHRC, Traditional Courts Bill [B1-2012]: submission to the National Council of Provinces, 21–27.
- 69 Traditional Courts Bill, B1-2017, clauses 8(1)(a)(iv), 8(1)(c).
- 70 Ibid., clause 8.
- 71 Ibid., clause 8(1)(b)(c).
- 72 This is supported by LARC, which suggests that both parties are required to consent before any order to perform services in lieu of compensation is made. See LARC, Submission on Traditional Courts Bill, 2017, 5.