

**REPORT ON THE PROVINCIAL TRADITIONAL
COURTS BILL HEARINGS:
EXPLORING RURAL PEOPLE'S DEMOCRATIC
PARTICIPATION AND FREEDOM OF EXPRESSION**

Nolundi Luwaya

An occasional paper of the

Rural Women's Action Research Programme

at the Centre for Law and Society, University of Cape Town

The Rural Women's Action Research Programme (RWAR) supports struggles for change by rural women and men in South Africa. Through research, providing support for litigation and active networks with and between rural communities, we focus on providing evidence of current practice and underlying values in customary law to challenge the perpetuation of the distorted versions of custom inherited from apartheid.

ISSUES IN LAW AND SOCIETY

ISSUE 02

NOVEMBER 2013

© Nolundi Luwaya 2013

ISBN 978 0 7992 2502 0

Published by:

Centre for Law and Society

The information contained in this publication may be freely distributed and reproduced, provided that the source is acknowledged, and it is used for non-commercial purposes.

Enquiries to:

Centre for Law and Society

Faculty of Law

University of Cape Town

Private Bag X3

Rondebosch

7701

Tel: +27 21 650 5906

Fax: +27 21 650 3095

**REPORT ON THE PROVINCIAL TRADITIONAL COURTS BILL
HEARINGS:
Exploring rural people's democratic participation and
freedom of expression**

Nolundi Luwaya
*Researcher, Rural Women's Action Programme
Centre for Law and Society, University of Cape Town*

Introduction

The public hearings on the Traditional Courts Bill (B 1–2012), held during April and May 2012, were mandated by the National Council of Provinces (NCOP).ⁱ This was after the Department of Justice and Constitutional Development (DOJCD) admitted to flaws in the consultation process that it had followed during the drafting of the Bill. The Bill was written in consultation with the National House of Traditional Leaders only; no rural people were included in the process.

The NCOP directed that the provinces hold public hearings and return with a mandate. When considering the climate within which the hearings took place, a key factor to be borne in mind is the impact of the traditional laws that have been enacted since 2003. The public hearings took place seven years after the Traditional Leadership and Governance Framework Act (TLGFA) came into effect. This law, coupled with the provincial laws enacted in 2005, has had a real impact in expanding chiefly power and eliciting arrogant behaviour from some chiefs. It is this reality and people's experience that contributed to community members being so concerned about the Bill and, therefore, prepared to

challenge it. Perhaps if the TCB had come before these laws resuscitated chiefly power, people would not have seen it as a threat to their citizenship rights. The material collected from these hearings provides a rich collection of rural voices and lived realities as expressed by rural men and women.

Once people were at the hearing venues, very little was going to stop them from speaking out. They were determined to hold the government to account and posed difficult questions to provincial officials. Community members wanted to know why they were to be treated differently to people living in urban areas, why they were being taken backwards and why they had not been consulted on the Bill. A deep sense of betrayal emerged as people expressed surprise at the fact that the Bill flew in the face of all that they had fought for. Those in attendance made it very clear that this was their opportunity to speak and the government's time to listen. They exercised ownership over the provincial hearing process in the following ways: The hearings were conducted in the vernacular languages of the various provinces, broadening the scope of who could participate. Rural citizens showed commitment and courage both in attending the hearings and in speaking out against the Bill in the presence of their traditional leaders. This they did in spite of the real risks associated with exposing themselves by contradicting positions held by chiefs who hold legislative powers that determine the terms of their livelihoods.

The majority of people who spoke were rural community members, as opposed to non-governmental organisations (NGOs). The speakers were the men and women who live in the communities that will be affected by the Bill. Ordinary South Africans – not academics or political parties – shaped the

mandates that emerged from the provinces. The oral inputs presented across the country were not scripted or learned. They were the actual stories and experiences of people who live under traditional leadership. The fact that there was a mix of voices both for and against the TCB indicates that some anti-customary law and traditional leadership campaign did not dominate the hearings. Even those who spoke out in opposition made it clear that they were opposed to those aspects of the Bill that would interfere with their citizenship rights and render them second-class citizens. Although the provincial hearing process was flawed, the content that emerged from it has an authenticity and credibility that lawmakers ignore at their own peril.

Through the provincial negotiating mandates which were first tabled in May 2012, and subsequently revised in October 2013 South Africans have sent a strong and clear message to Parliament that they will not be overlooked or side-lined. It would be prudent for those in traditional leadership and government positions to take into consideration the experiential knowledge presented by rural community members. Proper engagement with this knowledge and these lived realities is an important part of finding solutions to the problems and difficulties faced by a significant portion of South Africans. It is also a crucial step towards developing a nuanced and carefully considered type of customary law legislation. Such legislation must be developed in consultation with those communities that choose to live under customary law. It should reflect an understanding of the actual power relations on the ground and protect the most vulnerable from the worst abuses of power. The most accurate manner in which to determine the actual power relations, those who are most vulnerable to these relations and the worst abuses happening as a result is through consultation and engagement

with rural citizens. Their knowledge must be part of what guides and informs the laws that will govern them.

The fact that initially four provinces voted against the Bill and this number rose to five, points to the strength of the voices of ordinary people when they come out in their numbers to speak. These negotiating mandates should be claimed by rural people as small victories. They are the result of people's commitment to protecting their rights and citizenship. The Select Committee on Security and Constitutional Development is yet to deliberate on the mandates that emerged from the provinces in May last year and October this year. This is unfair to the rural people who attended the hearings against all odds to voice their views. The hope is that the subsequent actions of government around the Traditional Courts Bill will indicate that the negotiating mandates have been assigned the authority that they deserve, given that they reflect the views of South African citizens.

This analysis consists of three components:

- a. Process
- b. Content
- c. The process after the hearings

The section on process looks at the flawed nature of the hearings. It documents the difficulties that people encountered and how these impacted upon the hearings as a whole. The content section is comprised of translated quotations from statements people made at the hearings. It seeks to show the divergence of voices but also the grounds upon which people objected to the Bill. This section is split into the different themes that emerged. The information analysed here is drawn from notes and reports

compiled by those who attended the hearings as monitors and observers. In some instances, monitors recorded the proceedings and these audio recordings were also used. The section on the process after the hearings looks at the processes that followed after the hearings and the Bill's current status in the legislative process. The report concludes with an explanation of the importance of the legislative process and its significance for the lives of South Africans. From this analysis can be gleaned the extent to which rural people could claim their right to democratic participation and freedom of expression at the hearings.

a. Process

Issues are identified that highlight the obstacles and difficulties that ordinary rural South Africans overcame in order to speak out against the Traditional Courts Bill at the provincial hearings. Detailing the flaws in the process draws our attention to how dedicated rural citizens are to our democracy and to participating in it.

i. How the hearings were conducted

Inadequate format for presentations on the Bill

The format that was followed at the hearings tended to be the same across the provinces. Generally the hearings would begin with welcoming and introductory comments by members from the provincial legislature in attendance. Where chiefs were present, they would be introduced individually and by name. A member of the provincial legislature would explain the purpose of the meeting as a public hearing, the aim of which was to hear the views of those in attendance. The proceedings would then move

to a presentation of the Bill. This would begin with a summary of the Bill's legislative background and then move into the content of certain provisions. It is worth mentioning that in some provinces the public hearings were preceded by public education on the Traditional Courts Bill. The apparent aim of these sessions was to familiarise people with the Bill, thus enabling them to make submissions at the hearings. There is, however, no evidence that these sessions were well attended by people or that they were particularly useful. The one report received from KwaZulu-Natal indicated that these sessions amounted to a reading out of the Bill in a vernacular language without any in-depth explanation or discussion.

At all the hearings the presentation of the Bill's substantive content consisted of a guided explanation of the Bill given by either a 'legal advisor'¹ or a member of the legislature. The speaker would explain those sections of the Bill that they identified as important. This explanation in most cases amounted to the reading out and/or translation of the Bill itself or a translated summary document. It would be the presenter's prerogative to determine the focus of the explanation. This meant that the amount of focus and detail on the contentious and heavily criticised provisions was insufficient. Where these provisions were dealt with they received only a cursory mention but no unpacking. The records show that the presentation and explanation of the Bill was not satisfactory at any of the hearings. A defence offered by presenters at many of the hearings was that the hearings were about obtaining people's views and not about explicating the Bill.

¹ These 'legal advisors' were seemingly attached to the provincial legislatures.

A monitor at the Mdantsane hearing in the Eastern Cape (EC) described the presentation approach as follows:

The approach taken by the legal advisor in presenting the Bill was essentially one that assumes that all present at the meeting know of the Bill and/or have read its contents as he did not take time to introduce even the objectives clause or preamble of the Bill but referred the public straight to page five of the Bill as his starting point.

This inadequate explanation of the Bill put rural people at a disadvantage as they were required to be specific and pertinent on a Bill they knew little about.

The public education sessions that preceded some hearings were used as a justification for the inadequate explanation of the Bill. It cannot be shown that the public education sessions were of any assistance in equipping people with information.

While these explanations varied somewhat in length the resultant effect was generally the same. The Bill would be portrayed in a glowing light, with many of its shortcomings being glossed over. Public perceptions of the Bill were accordingly influenced. A monitor at the hearings in Mthatha, Eastern Cape, observed that:

It is important to note that the positive light in which the legislature's legal advisor interpreted the contents of the Bill helped in creating the apparent positive light the Bill was viewed in throughout the hearing.

Procedural hindrances to people making submissions

The manner in which the hearings were conducted gave rise to some procedural concerns. In some cases these were so obvious that the people in attendance voiced their objection to them in the actual hearing. In Bushbuckridge, Mpumalanga, the chairperson was twice told by members of the public to allow people to make their submissions and not to dictate to them. At the Cape Town hearing, a representative from the South African Human Rights Commission (SAHRC) stated that an irregularity would be noted as the chairperson showed a prejudice towards some people who wanted to make a submission. In this case the chairperson blocked inputs by declaring them irrelevant to the Bill. At hearings in Limpopo and the Eastern Cape the chairperson tried to limit the input of some people on the basis that they had already handed in written submissions and that their inputs could be gathered from those documents. This was done without prior notification that written submissions would preclude oral submissions.

Observers remarked on the bias shown by the chairperson and the panel of provincial government officials in conducting the hearings. At certain hearings they did not provide a neutral space for people to voice their opinions. At the Port Shepstone, KwaZulu-Natal, hearing the chairperson allowed members of the provincial committee, who were also traditional leaders, the opportunity to refute the submissions made. Further evidence emerged in Ulundi, KwaZulu-Natal, that pointed to the biased manner in which some hearings were conducted. Here the chairperson imposed a three-minute rule aimed at keeping inputs and submissions short, but this rule was not uniformly enforced. When the chief present at this hearing spoke, he was not held to

the rule. At this same hearing the chairperson closed the opportunity for questions after one round on the basis that questions were repetitive and none of the views expressed differed from what had already been heard. It was only after an objection was raised that people were given a second opportunity to speak. Neutrality was also an issue at the hearing held in Rustenburg, North West. A monitor at this hearing noted that ‘...the chairperson kept on interjecting and responding to inputs whenever they felt that traditional leaders or the current government were attacked.’ In Nkomazi, Mpumalanga, the chairperson stated that anyone who was unhappy with the laws of South Africa should leave the country.

In some provinces there was an issue with the language in which the meeting was conducted. Oppermansgronde in the Free State is an example of this. There the common language is Afrikaans but the portions of the hearings that dealt with the substantive aspects of the Bill were conducted in English, with inadequate translation. A similar problem hindered participation in the hearing in Bronkhorstspuit, Gauteng.

Hostile atmosphere towards the public

The presence of chiefs at some hearings had a clear impact on the atmosphere of the hearings. There was a fair amount of hearings in various provinces at which people were warned to take note of how they spoke in the presence of chiefs and how they referred to the chiefs. This was particularly pertinent in the Eastern Cape and Mpumalanga. In KwaZulu-Natal it was characterised by shows of great deference. Proceedings would be put on hold in order for chiefs who had arrived late to be introduced. Members of the provincial legislature would often express gratitude to chiefs for

taking the time to attend these hearings. At hearings in Matatiele and Mthatha the chairperson allowed the chiefs to make the closing statements. The chairperson in Mthatha went so far as to say that to speak after the chief had spoken would be disrespectful, thus the hearing must end. This can be contrasted with Potchefstroom hearing in North West where no chiefs were noted as being present. The chairperson attempted to close the meeting on the basis that there were no voices in favour of the Bill. The people present, however, insisted on continuing with the hearing. In Bushbuckridge, Mpumalanga, the seating arrangements separated the chiefs and members of the public. An observer at this hearing noted that this created an intimidating environment.

Members of civil society organisations (CSOs) – both NGOs and community-based organisations (CBOs) – reported being subjected to unwelcome instances of pressure to limit their attendance and involvement in the hearings. Pressure came in the form of statements that suggested that people who attended hearings were a ‘nuisance’. In a notable incident in KwaZulu-Natal, a member of the committee of the provincial legislature responsible for traditional affairs, who is also a chief, directed his displeasure at one woman in particular. The chief lashed out at this woman, who is a representative of a rural women’s organisation, accusing her of seeking status by claiming to speak on behalf of all rural women. A representative from the SAHRC observed this incident.

ii. Who was able to speak freely and who was not

Most hearings were closed before everyone who had indicated a desire to speak had done so. Generally, however, apart from the

exceptions noted, many people claimed the space to speak out, either against or for the Bill. The exceptions to this involved members of the public who found restrictions placed on their participation that did not apply to traditional leaders or members of provincial governments. Rural citizens were frequently instructed to keep their input 'relevant' to the Bill – an arbitrary judgment used to prevent certain questions from being addressed.

This difficulty was aggravated by the fact that many rural people had not had an opportunity to engage with the Bill prior to the hearings. In the Free State people requested a workshop on the Bill, with an elderly woman saying 'we still don't understand what this thing is for'. In many other provinces, including those that had public education sessions, people attending the hearings often complained that they had not been given adequate time to engage with and understand the Bill. In addition, people wanted to make general submissions to speak about how the Bill would exacerbate their situations. Such inputs were ruled to be irrelevant. An example of this was observed at the hearing in Bronkhorstspuit, Gauteng, where a monitor recorded the following:

[O]ld men spoke of land dispossession and were really pleading and lamenting, but after listening for a few minutes the chairperson advised him that this is not the forum saying: 'We feel for you, *baba*, but we cannot do anything about this – we are discussing the TCB.

Restricting people's input in this manner indicates that certain knowledge is placed above the experiential knowledge that rural people were speaking from. By dismissing as irrelevant the lived

experiences and personal stories of those who would be most affected by the Bill, officials were creating a hierarchy of knowledge and clearly placing the knowledge of rural citizens at the lowest level. The connections that community members made between their current experiences and the Bill show an understanding of the connection between the law and their experience. It also shows that people recognise a threat to their citizenship rights.

Gender division marked the proceedings

The rural voices tended to be predominantly male, with women forming a small portion. At some hearings women's voices were completely silenced. At the hearing in QwaQwa, Free State, no women spoke. A monitor noted:

There were no questions at all raised by the women in attendance, which was concerning as the Bill also affects women in these designated communities. It was unclear whether the lack of interaction was due to a lack of understanding of the Bill or simply an unwillingness to interact on the women's part.

In Port Shepstone, KwaZulu-Natal, male community members and traditional leaders dominated the proceedings among the more than 200 people in attendance. Of the 15 female community members present, only one spoke. These women later explained that their silence was due to the fact that their chief was present at the hearing. Such incidents emphasise the importance of consulting women as separate stakeholders in safe spaces where there is less risk of them facing consequences for speaking up. This example can be contrasted with a hearing in the same

province in Stanger where women formed the majority of speakers. They emerged as the dominant voices, asking questions and providing testimonies. However, here there were significantly fewer people in attendance. Second, only a small number of traditional leaders were present. Third, the women who actively participated included municipal councillors and a deputy mayor – therefore women who are empowered to some extent. The differences between these two meetings speak to exactly what is meant by rural power relations. Those female participants that were active held positions that offer them protection and possible access to assistance, should there be consequences for having spoken out. Contrast this with a widow living in the heart of rural KwaZulu-Natal who is in a far more vulnerable position, should her traditional leader decide to make things difficult for her as ‘punishment’ for raising her concerns at the hearings.

iii. Participation of traditional leaders: When and where did they speak?

The participation of traditional leaders in the hearings varied not only from province to province but also from hearing to hearing. In Hluhluwe, KwaZulu-Natal, reports indicate that mainly traditional leaders attended the hearing. They engaged minimally with the Bill and spent most of the time discussing issues of funds and salaries. In many other instances, notwithstanding large numbers of chiefs in attendance, they made few comments. Their participation frequently took the form of closing remarks and rebuttals to what people had said, as was the case in Mthatha, Eastern Cape. A chief closed this hearing saying that he supported the Bill and whatever he supports, all his people support – therefore, any person who did not support the Bill would be excluded from his chieftaincy. Chiefs also made closing remarks at

hearings in Ulundi, KwaZulu-Natal, and Bushbuckridge, Mpumalanga. Allowing this created the impression that traditional leaders were 'under attack' and had to defend themselves from the 'accusations' being levelled against them. These dismissals of citizens' submissions should not have been allowed.

There were hearings where chiefs, for unknown reasons, did not participate. At some hearings the provincial government made a point of stating that the Bill had been taken to the national and provincial houses of traditional leaders and that the chiefs had already been given an opportunity to engage with the Bill. At hearings in Vhembe and Sekhukhune, Limpopo, members of the provincial legislature made mention of a meeting held before the public hearings that only chiefs had attended. It was noted that those chiefs who had attended this pre-hearing meeting did not speak at the Vhembe hearing.

Where traditional leaders did participate it often tended to be headmen who spoke. Their inputs centred on recognition of the role of headmen and their courts, as well as the payment of headmen. The headmen were concerned that their courts, which do the bulk of the work, are not recognised in the Bill. Their concern is that this lack of recognition implies that their courts and the work they have been doing falls outside of the law. They were also concerned with the safety of chiefs and headmen, and requested police presence and protection for them. Occasionally there were complaints about the fact that they had not been informed about the hearings timeously. Some chiefs complained that they heard about the Bill at the same time as their subjects. In Limpopo some traditional leaders objected about not having been

invited to a meeting held before the public hearing. These leaders felt that they were being side-lined. As one said:

Certain leaders were not invited to the meeting last week. We are being undermined and marginalised. Only senior traditional leaders are listened to.

iv. Notification and selection of venues

In certain provinces there were serious problems with the manner in which the hearings were advertised. In some cases, those who would be most affected by the Bill did not know about the hearings. In Mpumalanga, monitors discovered that many people did not know about the public hearings. At the hearing in Badplaas, Mpumalanga, there was a change of venue that was not publicised. Members of the surrounding communities travelled to the venue announced by the Mpumalanga legislature. After waiting for more than an hour it came to light that the venue had been changed to the Mpfuluzi Hall in Mayflower some 40 km away. This venue change meant that those who could not travel the 40 km at such short notice could not participate in the hearing, despite intending to make their voices heard. At this same hearing, a representative from the local house of traditional leaders complained that chiefs had not been informed of this hearing. He stressed that people should realise that chiefs did not know about the hearing because they would have attended in great numbers. In KwaZulu-Natal there was a venue change for the Port Shepstone hearing. Some community members heard about the change en route and were able to alter their travel plans. This venue change was doubly disadvantageous because the new venue was located in the city centre, while the old venue

had been more accessible to would-be participants in the rural areas.

In the Eastern Cape it was announced during a hearing in another part of the province that there would be a fifth hearing in Matatiele. An advertisement for this hearing was seen in the newspaper only a day before the additional hearing. Complaints about the advertising of the hearings and the choice of venues surfaced repeatedly across this and other provinces. People from the Herschel district in the Eastern Cape were one of the communities to express their unhappiness with the notification and selection of the venues for hearings:

There were no notices made to the wider community of Herschel about the hearings. It is also of great concern that the Herschel hearing was held in Queenstown, more than 200 km from the Herschel district. This is seen as a deliberate attempt by government to exclude the people of Herschel of their constitutional right to participate in the TCB process. If there were any discussion that took place about the TCB, traditional leaders kept [it] to themselves. The Concerned Residents of Herschel heard about the hearing from an unofficial source and convened own workshop to consider the implications of the TCB. If government ignores this concern, it will practically have deprived the wider community of Herschel from participating in the TCB process. In a nutshell, the current Bill falls into the same trap as its 2008 predecessor. No consultation or too little consultation has taken place with the ordinary people on the ground. It is our contention that this Bill requires an open discussion with the ordinary people on the ground.

In the Northern Cape there was much dissatisfaction with both the alerts about and the location of the venue. The hearing in this province was advertised at short notice. One member of the community described how they had found out about the hearing:

I was walking in town today and saw posters saying there is a public hearing. The advert was put up yesterday. Today I'm told that I have 10 minutes to read through it and vote on the Bill. This Bill says I can work for free for a chief. How can such a decision be done in 10 minutes?

Even chiefs were not informed timeously. One chief reported only hearing of the Bill the previous day. The venue for the hearing was also a problem as it was located some distance from those who would be most affected by the Bill.

In some provinces transport to the hearings was provided through the traditional authorities. This did not benefit everybody as some leaders made transport available selectively. At the Badplaas, Mpumalanga, hearing a member of the community saw mini-buses from her area organised by their traditional leader. She and those with her had heard nothing about this transport but she was not surprised as they would not have been selected. At the hearings in Vhembe, Limpopo, a monitor observed that chiefs were given a form to fill in so that they could receive reimbursement for the cost of their travel to the hearing. An old man in the Eastern Cape was quoted in a monitor's report as stating:

He did not know about the Bill or the hearings as the King in his village only informed his own people and brought

only those people along to the hearing. The speaker came to the hearing out of his own accord to hear for himself what the Bill is about.

People also pointed out that hosting some hearings in urban areas made them inaccessible to the people who would have to live under the Bill. In defending their choice of venues, members of the Eastern Cape provincial legislature stated that they had chosen venues that were central and accessible to the surrounding villages:

The reason we brought people here is that it is a central location and there is easy access to get here. I am sure we can all agree it is a lot easier than going to other places. We have to understand that we have to meet on common ground. Once again I say that there are seven million of us and time frames dictate that we cannot have the hearings one by one.

b. Content

This portion of the report examines the verbal contributions from people who attended the hearings. The notes and reports of monitors reveal certain themes, offering insight into what rural community members are faced with and how they deal with challenges.

i. Corruption and abuse of power

The manner in which traditional leaders exercise their powers is the cause of great dissatisfaction. The impact upon people's lives was revealed as predominantly negative. Rural people reported

being subjected to severe hardship at the hands of traditional leaders in cases where leaders abuse their powers. People living under traditional authorities have strong misgivings about chiefs and the interests that they prioritise. Some of the following quotes from the reports highlight these feelings of discontent:

I am very sad when we are being tied up the way we are by this law. We come from oppression. Chiefs were part of oppression. (Queenstown, Eastern Cape)

Chiefs do not handle cases properly. (Queenstown, Eastern Cape)

This Bill is going to impose chiefs that we banned from our communities a long time ago. We don't want chiefs in our communities because they are brutal and corrupt. (Mdantsane, Eastern Cape)

In our community the chief is already known to side with certain people politically. If you are therefore known to be a supporter of a different political party you can't have a fair trial. Worst of all is that we don't even have an option not to subject ourselves to this court. (Mdantsane, Eastern Cape)

We hear that people will now be fined. Where will all these monies go because our chiefs are corrupt as it is? (Mdantsane, Eastern Cape)

Our own king is not responsive to our needs. We are currently oppressed as it is, so how much more under the Bill? It was better when there were *inkosana* and not the

king. There is not even service delivery in my village.
(Mdantsane, Eastern Cape)

The speaker highlighted the abuse of power by their king in their village and indicated that he had no faith in kings...the speaker stated that kings are biased and that the community will never be treated equally by the king.
(Mdantsane, Eastern Cape)

Kings abuse municipal powers... we want people who have been elected by the people... (Mdantsane, Eastern Cape)

He stated that the kings are the worst kind of oppressors and proposed that government first investigate kings and then see if they are fit for office. (Mdantsane, Eastern Cape)

Chiefs are corrupt – they won't be able to handle even more power without corruption. (Potchefstroom, North West)

He said if this law is passed into law, chiefs will harass people [and not] follow proper procedures, like giving notice to the people they want in their courts.
(Bushbuckridge, Mpumalanga)

The hearings revealed bias in chiefs' treatment of traditional court cases and that corruption is a very real problem. Many rural people expressed distrust in traditional leaders and a belief that they are unable to serve the interests of their people. This distrust means that people want options when accessing justice.

ii. Development and power abuses

Traditional leaders' abuse of power was closely linked with issues of rural development. People recounted how chiefs' power abuses were related to a lack of or delays in development that communities had in some cases worked hard to initiate. Monitors observed that the dominant experience when it came to development was negative. Community members identified traditional leaders as a hindrance to development and felt that an increase in power would only compound this.

There are high tensions between my community and the chief because our chief has stalled development projects... How will we then subject ourselves to someone who does not even listen to us? (Mdantsane, Eastern Cape)

He stated that there are no schools and other developments in his village because of conflicts with the king. If kings are given further powers there is no hope for us. (Mdantsane, Eastern Cape)

You can look at the area where I live. There are potholes but there is a chief. We are all God's children. Why are we treated as second-class citizens? If we have this court we will never have development. We never voted for chiefs, we want municipalities. (Kuruman, Northern Cape)

It was stated by more than one person that in their opinion the Traditional Courts Bill brings no development to Thaba Nchu but takes the village backwards. (Thaba Nchu, Free State)

It is evident that community members desire better access to justice and improvement in the quality of rural life. Differences arise between those who feel chiefs play no role in improving the current situation and those who argue that allocating further powers to traditional leaders will address this very problem. A monitor in the Eastern Cape observed that ‘a large number of people see the TCB as bringing development by giving powers to chiefs’.

iii. Access to justice

Difficulties in accessing justice are a troubling reality for people in the rural areas. At the hearings some of those who welcomed the Bill argued that it would enhance the availability of judicial services, especially for women. Traditional courts were credited with being easier to get to, practically, as they are located outside of cities and towns. It was also pointed out that these courts’ proceedings are characterised by social ease, as they are familiar to rural people and fit their ways and customs. These courts can offer assistance in cases where magistrates’ courts are unable to do so. People also acknowledged that magistrates’ courts, apart from being difficult to get to for various reasons, were often congested. Regulating traditional courts, if done in the correct manner, was recognised as a positive development.

I welcome the Bill because we will now have our disputes resolved in our communities. We often have to spend a lot of money on transport to travel to courts to have our disputes resolved. Now we will have them resolved in our communities without travelling. I also welcome the Bill because we now don’t have to spend money on lawyers.
(Mdantsane, Eastern Cape)

He argued that the TCB will give the local communities an opportunity to resolve their own disputes without going to the police. (Mdantsane, Eastern Cape)

The speaker supports the Bill because in any event disputes were settled by that village. All that is needed is agreement amongst all parties as used to happen. (Mthatha, Eastern Cape)

The speaker stated that crime is rampant in her village. In addition disputes are settled in Bhishe which is a long way from her village and she finds that system to be ineffective. (Mdantsane, Eastern Cape)

The speaker supports the Bill as they often get turned away from the magistrates' courts and referred to their traditional leaders anyway [for] dispute resolution. The TCB stands for poor people without money and no means to secure lawyers. (Thaba Nchu, Free State)

If you see the magistrates' courts those courts are full even for petty cases. The traditional courts will reduce congestion in the magistrates' courts. (Queenstown, Eastern Cape)

In contrast, there are those who feel that the Bill in its current form will not advance access to justice. It disallows opting out of traditional courts, while not recognising other dispute resolution forums that operate at different levels in rural communities. These options allow people to take disputes to the forum that is most accessible to them. People expressed concern over the

narrowing of options through the exclusion of existing alternative forums. Many voices insisted on as wide an avenue to justice as possible. Among these voices were those of headmen, although it could be said that their motive was less about increasing access to justice and more about maintaining their own position.

Why can't you be given a choice on what steps to take regarding traditional issues? (Thaba Nchu, Free State)

We call for the option to opt out! (Queenstown, Eastern Cape)

I would like to know; if I am visiting a village and commit a crime will the chief have authority to punish me, even if I don't know the rules? (Kuruman, Northern Cape)

Since there are already different councils to hear disputes in our community what is going to happen when those are dissolved in order to have traditional courts[?] (Mthatha, Eastern Cape)

The speaker stated that in his village they have their own procedure of dealing with cases which is not recognised by the Bill. (Potchefstroom, North West)

[T]he Bill is treating people in rural areas as second class because people in urban areas only go to magistrates for all disputes. (Bushbuckridge, Mpumalanga)

What will be the role of *indunas* in the proposed Traditional Courts Bill? (Vhembe, Limpopo)

It will not be fair to be subjected to the rule of chiefs that we don't even recognise. Some of us don't even recognise traditional laws and now we will be subjected to traditional laws that we don't recognise simply because we stay within the jurisdiction where there is such rule. (Mdantsane, Eastern Cape)

Many of the speakers sought reassurance that the forums in which they currently deal with their disputes would also find recognition under the Bill. The absence of such recognition is a clear indication of the exclusion of rural people in the drafting process. It also shows that the Bill's emphasis on the apex court, namely the chiefs' court, is inconsistent with the practice of people on the ground.

iv. Living nature of customary law and customary dispute resolution processes

Submissions made by community members revealed more about the living nature of customary law and customary dispute resolution mechanisms as understood and experienced by the people who use it. Monitors recorded acknowledgement of the fluidity of customary law at some hearings. For example, at the Cape Town hearings customary law was defined as flexible. The fact that customary law is not codified was also raised. The descriptions of customary dispute resolution in submissions confirmed the existence of a multi-layered structure. People living under customary law explained the dispute resolution systems that they are familiar with. They highlighted a progressive process that involves the community at every stage.

Flexibility of customary law

Question: How do you perceive the traditional justice system that is out there at the moment? Answer: By nature it is a very fluid and flexible system. (Cape Town, Western Cape)

Customary law is in its nature not codified, the appointment of traditional leaders as presiding officers goes against this. (Potchefstroom, North West)

Customs differ from place to place and between various tribes. How will the legislature ensure that these are not lost as a result of the implementation of the Bill? (Potchefstroom, North West)

Varied forms of customary dispute resolution

The issue first goes to the board, then to the headman, then to the chiefs. If they cannot do anything then it goes to the great chief. (Cape Town, Western Cape)

Before the court enters into a dispute, there are other things that must first be done. For instance you must go to the family of the accused person with whom you have a dispute. You need to involve the family of the accused person in the process. (QwaQwa, Free State)

The Bill does not address the issue of having a council when the chiefs preside over matters. According to true customary law a chief does not solely preside over a matter,

but does so with the assistance and guidance of council members. (Potchefstroom, North West)

In the past the appeals went to the king. There was no appeal to the magistrate, because the chief is under the king. (Queenstown, Eastern Cape)

Headman's courts are the court[s] of first instance. (Rustenburg, North West)

What will be the role of *indunas* in the proposed Traditional Courts Bill? Traditionally *inkosi* and tribal courts would have a council that advised on matters. (Mayflower, Mpumalanga)

However he said that dispute resolution in the traditional context happens in three stages: first at the *nkosana*, second at the *nkosi*, and third at *ngonyameni*. His view is that the appearance at *ngonyameni* was the last level and therefore there is no need for appeal to the magistrate. (KwaMhlanga, Mpumalanga)

I know that if we cannot resolve matters we go to the paramount. (Fetakgomo, Limpopo)

The inputs at the hearings indicate that headmen and their courts play a vital role. Speakers indicated that other dispute resolution forums, like the family and the broader community, also offer accessible and familiar avenues for dealing with disputes.

v. *Land, traditional leaders and corruption*

People expressed concern about the Bill's implications for issues pertaining to land. One of the main concerns was privately owned land. Some were worried that corruption affecting land would continue, and that those who own land would be under threat. People wanted clarity on the problems and the solutions that the Bill might present. However, this clarity was not forthcoming as provincial officials were quick to dismiss these concerns. Whereas community members exhibited a real understanding of the interconnected nature of these issues, officials seemed to regard them as separate.

Oppression is also over land. Land is sold by the chiefs even to outsiders. That is oppression. As Herschel people, we are worried because chiefs are oppressive. Let there be an investigation into these land sales as we do not know where this money goes. (Queenstown, Eastern Cape)

What about land administration[?] [W]here is that addressed? (Queenstown, Eastern Cape)

Which villages and which communities is this Bill going to affect? Will it affect people who got land in restitution programmes? (Kuruman, Northern Cape)

I fought for land and I have land. What does the Bill say about land? IPILRA [Interim Protection of Informal Land Rights Act of 1996] says what must happen to informal land occupants. How does the Bill affect my IPILRA rights? Will I now have to go back to the chief to get land? (Queenstown, Eastern Cape)

The speaker wants their land back before the Bill is in force, because after the enforcement the chiefs will be established and the speaker is afraid that the land cannot be given back. (Potchefstroom, North West)

This speaker was afraid of losing his land when the Bill comes into force. (Potchefstroom, North West)

This speaker is afraid that there will be confusion about his land, because he paid for it and wants to keep it. (Potchefstroom, North West)

Where will the chief's jurisdiction be? The chiefs are the ones demarcating land in the rural areas. (Nkomazi, Mpumalanga)

Land distribution by chiefs is a problem. How will this be regulated? (Matatiele, Eastern Cape)

He said that the chief does not have land, land belongs to God and that they all reside on the land in terms of PTOs [Permission to Occupy certificates], including the chief. (Bushbuckridge, Mpumalanga)

At the hearing in Nkomazi, Mpumalanga, the chairperson of the hearing, a member of the provincial legislature, denied rural people's assertions that chiefs were demarcating land. This is unsettling as the monitoring reports indicate that many people are concerned that handing extensive powers to chiefs will expand their hold on land. This will, in turn, render people's struggles to obtain and keep land even more difficult.

vi. Contestations over chieftainship

Members of rural communities are concerned about the legitimacy of chiefs. A woman told a Mpumalanga hearing that there are four chiefs in her village, none of whom are recognised. Who would then be the presiding officer, she asked. In Vhembe, Limpopo, a community member asked that the Commission on Traditional Leadership Disputes and Claims (Nhlapo Commission) provide clarity as to who the rightful chiefs were. Rural people were concerned that implementing the Bill before having clarified disputes over chieftainship amounts to doing things back to front. They were also concerned that conflicts would arise as chiefs would tussle with each other for power, and the people would reject leaders that they did not recognise as legitimate. These concerns came across strongly as people expressed unhappiness at having chiefs they do not recognise imposed upon them. In some cases they also expressed uncertainty as to who the legitimate chiefs would be.

Some kings are not legitimate but the premier could appoint such as presiding officers, this will result in conflicts across communities around the country. (Thaba Nchu, Free State)

What about the Nhlapo Commission? Who are the chiefs? (Queenstown, Eastern Cape)

The speaker does not support the Bill in its current format. He argued that the question of kingship first has to be settled by addressing the question of who is a king... First go to the root of the problem and establish proper tribal authorities. (Mdantsane, Eastern Cape)

How will issues of land disputes be resolved between chiefs[?] [B]ecause currently there are disputes about which chiefs should have authority in our community [...]
(Mdantsane, Eastern Cape)

The speaker was concerned that in his area they do not have a chief and their concern was that if the Bill were to be passed, they would then have to have one in his community.
(Potchefstroom, North West)

Many people currently not under chiefs' rule were concerned about having chiefs imposed upon them. They recognised that the Bill would compound current power struggles, as it would add the tantalising prospect of chiefs being backed by state law. The inadequate and unclear answers given in response did not go far in allaying fears.

vii. Social order, crime and corruption

At many of the hearings people complained about rampant crime and poverty in their communities. Rural people described situations of hardship and lamented what they viewed as a decline in social order. As a result of the dire situations in which many rural communities find themselves, some voices identified the Bill as a solution to these problems. Analysing the monitoring reports, it seems those who supported the Bill and the legal empowerment of traditional leaders seek the preservation of 'cultural ways'. They identify the 'Western way of living' as a main cause of social decline and a return to 'African values' as the antidote. In their view, returning chiefs to positions of power is a solution for ill discipline and disrespect.

Chiefs must be given more powers so as to be able to ensure that those men who impregnate young women can be forced to pay damages and also to pay *lobola*. (Queenstown, Eastern Cape)

[T]his Bill is restoring power to our chiefs because the law goes with the Constitution. Royalty is royalty. There is no king without his people. We cannot abandon our traditional laws. Our traditional laws must not be removed but made better. What we are doing must be done properly. Kings must be developed. (Fetakgomo, Limpopo)

We must take from what the chiefs did in the past in order to ensure well-being in rural areas. The TCB will bring back discipline and social order. There is no order because the rule of chiefs has been undermined. (Queenstown, Eastern Cape)

I am glad that the government is giving kings power to help the community. The speaker criticised the foreign influences of people from towns and cities... (Mdantsane, Eastern Cape)

In many of the reports it is evident that people are concerned about the use of the money generated by proposed fines. In Nkomazi, Mpumalanga, the community expressed doubt when they were told that the money would go into a provincial bank account. Given the high incidence of poverty and the scarcity of job opportunities, rural people repeatedly called for the funds to be ploughed back into the community. The dire need for rural social development, coupled with misgivings about chiefs, made this a topic people felt strongly about. This is particularly telling

in light of the claim by defenders of traditional leadership that the role of a traditional leader is to provide for the community. All monies and contributions received by the traditional leader should be for the benefit of the community.

What about money generated from *umdliwo* [fines]; where will this money go as there are currently high levels of poverty? She argued that the Bill does not make provision for poverty-stricken people and that the revenue generated through *umdliwo* should go towards alleviating poverty. (Mdantsane, Eastern Cape)

People shouted, laughed and started clapping hands when Nthlalela said when the tribal authority charges a person, the 'money (as fined by the traditional court) has to be sent to the provincial government. It wouldn't belong to the chief anymore and you have to get a receipt.' 'Aaa, so you [provincial government] can eat our money!' an old man shouted to which Nthlalela explained 'there'll be auditors and the money will be kept separate in an account called traditional courts. The audience good-naturedly laughed at this. (Nkomazi, Mpumalanga)

viii. Concerns raised by women

Women's ability to participate in the public hearings was of particular importance as they constitute the majority of the rural population. Not all the hearings were conducive to women expressing their opinions and women had to overcome challenges in this regard. Nevertheless, the voices of rural women did come through. Some of the key issues that women raised were the practice of blocking them from representing themselves in

traditional courts, the difficulty in accessing justice and the lack of protection for women. Most rural women felt that the Bill would constitute a step backwards for women and would detract from the hard-won gains that had been made.

This Bill takes us back as rural women. It's clear that we must be in corners... for us nothing will change. The tradition of discrimination will continue. (Kuruman, Northern Cape)

The speaker was concerned that women are not protected from experiencing unfair bias from the chief. (KwaDukuza, KwaZulu-Natal)

This TCB must go back. Fundamental principles [were] not considered[.] [T]here was no consultation, not with us. There must be a majority decision. Gender equality and the protection of existing rights seem to be ignored in the TCB. There has never been a case of women representing themselves in these courts. Let us not be fooled. Women are represented by men – what does the Constitution say? Practically, no woman can go to a traditional court. Let us talk the truth. (Queenstown, Eastern Cape)

Deaf people go through hardships that people who can hear will never understand and the level of discrimination is sickening and I am tired of it. If you are deaf and someone rapes you and you go with that rapist to the headman[,] because you cannot hear[,] whatever you say is not taken seriously and that causes constant victimisation, oppression and discrimination. This also applies to people with other disabilities and we need to stop making laws

that do not take this into consideration. *Ndingumntu nam, umthetho uthini ngam* [I am also a human being, so what does the law say about me?] (Mthatha, Eastern Cape)

I reject this Bill because it means woman will not have their cases fairly heard. Currently in my community such courts sit next to a kraal and women are not allowed to sit anywhere near the kraal. How will our cases be heard because we can't be present to represent ourselves? (Mdantsane, Eastern Cape)

At the hearing in Stanger, KwaZulu-Natal, a young widow stood up and told her story. She spoke about how she had turned to the traditional court for help when her brother-in-law tried to evict her, only to be told that the court did not deal with women. In a video clip from the hearing in Matatiele, Eastern Cape, another woman broke down in tears as she expressed some of the difficulties faced by widows. In Port Shepstone, KwaZulu-Natal, one lone brave woman stood up at a hearing dominated by men and asked that women also be heard. In Hluhluwe, KwaZulu-Natal, male traditional leaders dominated the hearing, yet rural women still stood up and told their stories and expressed their concerns. The courage of these women stands out when one considers that they are particularly vulnerable given the power relations that exist in many rural communities.

c. The process after the hearings

Upon the completion of the public participation leg of the legislative process on the Traditional Courts Bill, each provincial legislature held meetings to formulate their negotiating mandates. This mandate is the preliminary position that each

province adopts on the Bill. After presenting this preliminary position to the Select Committee on Security and Constitutional Development, the provinces should formulate their final mandates to indicate whether they support or reject the Bill. The presentation of negotiating mandates to the committee took place on May 30, 2012. At this meeting it emerged that four provinces opposed the Bill. They were: Eastern Cape, the North West, Gauteng and Western Cape. Limpopo, Free State, Northern Cape and KwaZulu-Natal voted in favour of the Bill, but suggested far reaching and conflicting amendments. Mpumalanga requested an extension, as it had deadlocked and so was unable to formulate a negotiating mandate.

The negotiating mandates were not considered at the May 30 meeting. Instead, proposals were tabled for national public hearings to be held and the provincial public hearing process to be re-opened. Provincial representatives rejected the proposal of re-opening the provincial hearings. Had this occurred, it would potentially have caused confusion as to which mandate enjoys precedence if the later mandates were in conflict with the existing ones. There is also the difficulty of ensuring that different people attend the hearings the second time around to ensure that a wide cross-section of views is obtained. Instead, the committee elected to have national hearings in Parliament in September 2012. The submissions at those hearings reiterated the views that rural people had expressed at the provincial hearings.

Currently the negotiating mandates formulated and presented in May 2012 have still not been dealt with. The committee's summary of the national hearings was distributed to provincial delegations at the committee's final meeting on the Bill in November 2012. On the 15 October 2013 the committee met to

discuss new negotiating mandates arising from what appears to have been a process of subsequent interaction with the provincial legislatures. At this meeting it emerged that both KwaZulu-Natal and Limpopo had withdrawn their support for the bill. KwaZulu-Natal reported that its mandate was now 'undecided' and Limpopo now opposed the bill. The number of provinces opposing the bill is now five, with only two in favour of the bill. Despite this clear message of rejection from the provinces, the committee resolved to send the negotiating mandates back to the provinces for yet more 'consultation'. The delegate from the Eastern Cape insisted that this was fruitless waste of time, as the Eastern Cape would remain firm in its rejection of the Bill. If the Bill were to be pushed through Parliament under these circumstances it would be vulnerable to a constitutional challenge both in relation to its content and in relation to the flawed legislative process so far.

Conclusion

Living in democratic South Africa means exercising the hard-won right to voice your position and demand accountability from public representatives about laws that will affect your life. The importance of this right may dwindle if your life is comfortable and relatively easy. If that is not the case, then this right is of even greater importance. The life of the majority of people living in the rural areas is by no means comfortable or easy. This makes democratic participation in law-making processes by rural people, especially women, imperative. What the public hearings on the TCB confirmed is that as important as democratic participation and freedom of expression are, these are not easy rights to claim. Attending a public hearing on a piece of draft legislation that may have massive implications for your claim to

equality before the law and access to resources is a task fraught with difficulties. The practical difficulties of getting to the actual hearings on the TCB were combined with the difficulties of understanding the substance of the legislation, in order to engage with it meaningfully.

Further obstacles included arbitrary decisions by chairpersons about what constituted 'relevant comments' and dealing with a hostile atmosphere and processes that frequently privileged elite voices and militated against open discussion and information gathering. Viewed through this lens, taking a stand is a meaningful and empowering act. The hearings were an instance in which rural people have shown they are willing and able to overcome the obstacles to make their voices heard. Some people had to travel great distances and were confronted with the reality of unreliable and costly public transport. Many people were kept in the dark about the implications of the Bill and their inputs were subjected to restrictions. But they still managed to tell their stories and express their dissatisfaction with the Bill and its repercussions, as they understood them.

The provincial public hearings presented a snapshot of the state of democracy in rural South Africa. That snapshot shows that South Africans living in rural areas are committed to preserving the democracy that was envisaged during the struggle against apartheid. Rural citizens used their lived experiences and knowledge to make sense of the political and the legal. This often produced insightful analysis and a realistic understanding of how laws like the TCB fit with other customary law legislation and the bigger political picture. This experiential knowledge has much to contribute to the development of policy and legislation and it is a great pity that officials dismissed it on some occasions. The

lengths to which rural community members went to share this knowledge and these experiences highlight their commitment to protecting the citizenship rights that the new democratic dispensation guarantees them. People spoke about the Constitution and how this was not the democracy that they had fought for. They emphasised that this battle for liberation was one that they had already fought and won. Their referencing of the Constitution contradicts assertions by some leaders that the Constitution is a foreign, ‘Western’ document that South Africans cannot relate to their lives. In fact, people in their oral submissions showed how deeply they relate to the Constitution.

ⁱ Dates and locations of the public hearings per province:

<u>PROVINCE:</u>	<u>DATE:</u>	<u>VENUE:</u>
Eastern Cape	23 April	Queenstown Town Hall
	24 April	Lusikisiki Town Hall
	24 April	Mthatha Town Hall
	26 April	Mdantsane Indoor Sports Centre
	17 May	Maluti Civic Hall, Matatiele
KwaZulu-Natal	8 May	Port Shepstone Civic Centre
	9 May	KwaDukuza Town Hall, Stanger
	11 May	oSizweni Town Hall, Newcastle
	16 May	Inkosi Gumede Hall, Mkhanyakude
	17 May	uLundi Chamber, LA Complex
North West	16 May	Ratshidi Hall, Mafikeng
	16 May	Potchefstroom Banquet Hall

	18 May	Tlhabane Hall, Rustenburg
	18 May	Bathaping Tribal Hall, Taung
Limpopo	16 May	Thulamela, Porche Village Lodge, Vhembe District
	16 May	Tzaneen Country Lodge, Mopani District
	18 May	Fetakgomo Civic Hall, Sekhukhune District
	18 May	Bolivia Lodge, Polokwane
Western Cape	24 April	The Chamber, 6 th Floor, Provincial Legislature Building, 7 Wale Str, Cape Town
	25 April	The Chamber, 6 th Floor, Provincial Legislature Building, 7 Wale Str, Cape Town
Gauteng	9 May	Rhatabiseng Community Hall, Bronkhortspruit
Mpumalanga	18 April	Tonga Multi-Purpose Centre, Nkomazi Municipality
	18 April	Kabokweni Community Hall, Mbombela Municipality
	18 April	Mapulaneng Multi-purpose Centre, Bushbuckridge Municipality
	25 April	KwaMhlanga Community Hall, Themibisile Municipality
	25 April	Mfuluzi Hall, Mayflower, Albert Luthuli Municipality
Free State	14 May	Tshiya Education Resources Centre, Qwaqwa
	16 May	Elksa Church, Oppermansgronde
	17 May	Refentse Primary School, Thaba Nchu
Northern Cape	17 May	Gasegonyane Town Hall, Gasegonyane Local Municipality, John Taolo Gaetsewe District