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The Traditional Courts Bill (B15-2008): A Summary of Concerns

The Traditional Courts Bill (B15-2008) is draft legislation that was introduced to parliament in March 2008. The Department of Justice and Constitutional Development said that the Bill was to give more South Africans improved “access to justice” by giving proper recognition to the traditional justice system in a manner consistent with values in customary law and the Constitution. The Bill met with much resistance because it was inconsistent with both customary law and the Constitution.

In April 2011, the ANC Study Group on Justice recommended that the Department of Justice withdraw the Bill and potentially reintroduce it to the National Council of Provinces (NCOP). The Portfolio Committee on Justice and Constitutional Development subsequently adopted the same resolution. We see the NCOP’s continuation with the Traditional Courts Bill as problematic for the following reasons.

1. When it was introduced to parliament in 2008, the Traditional Courts Bill met with much opposition. COSATU, the Chapter 9 institutions, civil society and ordinary rural people objected to it on the basis that no members of the public had been consulted in its drafting, and it had unconstitutional content. Only traditional leaders had been consulted in the drafting process. Since the initial Portfolio Committee hearings, the Constitutional Court has handed down the decision in *Tongoane and Others v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC). In this decision, the Constitutional Court reiterated the central importance of the participation of ordinary South Africans in the making of laws that affect them. If the Bill were passed, it would have to be challenged legally and there is a good chance that the Traditional Courts Bill would be found unconstitutional on the grounds that it was drafted without consulting the rural public.
2. Apart from the concern that rural people were not consulted in the drafting of the Bill, there are numerous substantive grounds upon which the Traditional Courts Bill is arguably constitutionally flawed. These substantive issues themselves reflect the problem of who was and was not consulted in the Bill’s drafting.
 - a. The Bill does not guarantee women participation in traditional courts – neither as members of the body of people who make decisions in the courts, nor as litigants. Rural women are most often marginalised from traditional courts. They are commonly refused self-representation and even attendance of some traditional courts. This leads to their further exploitation and economic vulnerability. For example, widows are not permitted to enter the “sacred spaces” that are traditional courts whilst in mourning and are often required to be represented by the male family members who seek to dispossess them of their inheritance. They are therefore unable to defend themselves in the traditional courts and are consequently evicted from their homes. The Traditional Courts Bill does not

require that this customary law practice change but instead permits that women may continue being represented by men, “in accordance with customary law”.

- b. In terms of the Bill, people attending customary courts are denied legal representation. And, given that they are *forced* to attend the traditional court given jurisdiction over them, this provision undermines their constitutional right to legal representation (especially in criminal cases). In other words, rural people are denied the ability to choose whether they want to have their case decided according to civil law or customary law, and respectively whether they want to have legal representation or not. This also undermines rural people’s right of freedom of association. Under this right they should choose whether or not they wish to live under the customary system of law and traditional authority, or not.
- c. In the Traditional Courts Bill, traditional courts are bodies that constitute single authorities: traditional leaders. This legislation effectively gives traditional leaders power to make customary law and adjudicate disputes, in addition to the executive powers such as land administration and development that they are being given. And, by so doing, it contradicts the separation of powers required by the Constitution. The legislation also contradicts customary law practice where traditional courts are structures in which the general community can participate and assist in dispute resolution.
- d. Only chiefs’ courts are given recognition by the Traditional Courts Bill. Yet, it is well known that the traditional courts that do the bulk of the work are headmen’s courts. It is therefore an immense oversight to only recognise and regulate the chiefs’ courts if what the Department seeks to accomplish with this legislation is to bring the traditional justice system in line with the Constitution.
- e. The Traditional Courts Bill allows the traditional leader to impose excessive sanctions in civil law cases. For instance, the traditional leader may require forced labour for the benefit of the community. Yet, the person ordered to perform the labour may not appeal this sanction even if they have reasonable grounds for objecting to it. Moreover, the traditional leader may deprive a person of customary benefits. These might include land rights or community membership. This presents an unjustified threat to rural people’s security of tenure.

LRG has twice petitioned the Minister of Justice not to reintroduce the Traditional Courts Bill to the NCOP, arguing that the documents and information gathered in the initial hearings held by the Portfolio Committee could guide the Department on what process is necessary for the drafting of a more constitutional replacement for the Bill. Drafting legislation in full consultation with rural people would enable the Department to arrive at legislation that is more suitable to meet the justice needs of rural people. The Portfolio Committee’s recommendation that the Minister withdraw the Bill from the National Assembly presents the Department with the opportunity for just this.

Despite our urgings, we have been advised that the Traditional Courts Bill will be reintroduced in the NCOP and consultations around it are likely to be held in the rural provinces during the first quarter of 2012. We therefore encourage rural people to prepare to participate in these consultations and make their voices heard. In 2009, LRG partnered with the Legal Resources Centre and other NGOs and CBOs to host a workshop on the Bill. The purpose of this 2012 workshop is to refresh our understanding of the Bill and its implications, strategise about how we can effectively mobilise around the provincial consultations and start preparing submissions on our local concerns with the Bill. We hope that, after the national workshop, provincial meetings can be organised by the participants to prepare for and mobilise around the hearings, and to help organisations and CBOs prepare their submissions.