DISCOURSE AND DEBATE*

DEMOCRACY IN ACTION: THE DEMISE OF THE TRADITIONAL COURTS BILL AND ITS IMPLICATIONS

Key words: Traditional Courts Bill, customary law, women, constitutional democracy, apartheid

I  INTRODUCTION

In February 2014, following years of resistance, the Traditional Courts Bill (TCB), was allowed to lapse in Parliament. This followed intense opposition by citizens in rural areas, the South African Human Rights Commission (SAHRC), the Department of Women, Children and People with Disabilities (DWCPD) and other institutions in the public consultations held by Parliament on the Bill. Despite significant structural and procedural obstacles to participation in these consultations, including the fact that the state assisted only traditional leaders to attend public hearings, many people in rural areas gave eloquent inputs on the Bill. Even though the official word is that the Bill simply lapsed, this is a direct consequence of this national resistance. It is a victory for the thousands of people who opposed the Bill, for the millions of people who will not be forced to live under the separate legal system that the Bill had proposed, and for South Africa’s democratic structures which demonstrated responsiveness to public outcry.

The TCB was widely criticised as an unconstitutional piece of legislation that perpetuated colonial and apartheid distortions of customary law, and undermined the rights and increased the vulnerability of people who live under customary law. Criticism of the TCB included the fact that it adopted Bantustan boundaries to define the jurisdiction of traditional courts; that it centralised power in senior traditional leaders at the expense of all other forums for dispute management under customary law; and that it failed to protect the rights of women and other marginalised groups in traditional courts. This criticism, among others, did not imply a rejection of custom or

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tradition. Indeed, the majority of inputs demonstrated how the TCB would destabilise the ways that people currently practice customary law and participate in localised dispute management structures.

On the 20th anniversary of the reunification of South Africa, the defeat of the Bantustans, and the triumph of democracy, people in rural areas have again defeated the spatial and structural organisations of power that earlier deprived them of their rights and made them tribal subjects rather than citizens. In public consultation forums around the country, people who live in the former homelands rejected a Bill that would have taken away their full citizenship rights and insisted on the equality that the Constitution of the Republic of South African, 1996 promises all South Africans.

This note reflects on the process followed by Parliament in trying to pass the TCB and the challenges that the Bill posed to the principle of equal citizenship in post-apartheid South Africa. First we discuss the provisions that attracted the most opposition, and examine how different people communicated the effects that the Bill would have had on their lives. Next we reflect on the development of the Bill from its introduction in 2008, to its withdrawal and later reintroduction in 2011, and the public hearings and submissions that accompanied these processes. Finally, we interrogate the context surrounding the lapsing of the TCB, the significance of this development, and remaining vulnerabilities and areas of concern in terms of current and proposed legislation related to customary law.

II THE PROMISE OF DEMOCRACY: EQUAL CITIZENSHIP RIGHTS FOR ALL

The TCB was introduced to Parliament to replace ss 12 and 20 of the Black Administration Act 38 of 1927 (BAA), colonial-era provisions that still empower chiefs and headmen to determine civil disputes and try certain offences in traditional courts. From its introduction in 2008, the TCB attracted widespread opposition across the country for perpetuating, and in some cases intensifying, many of the problems that it was intended to address.5

The TCB draws on definitions set out in the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA). This Act adopted the same boundaries that defined tribal authorities under the apartheid Bantu Authorities Act and applied them to traditional councils today. Section 28 of the TLGFA provides for chiefs appointed and ‘tribes’ created before 1994 to be recognised as senior traditional leaders and traditional councils respectively, provided that they comply with the new composition requirements. Section 4(1)(a) of the Act provides for traditional councils to administer the affairs of traditional communities ‘in accordance with custom and tradition’. By using pre-existing boundaries to define areas where customary law is practised and by perpetuating structures inherited from the pre-democratic era, the TLGFA reaffirms many aspects of the homeland systems.

The TCB built on the TLGFA by entrenching the power of traditional leaders within Bantustan boundaries and making it a criminal offence for people not to appear before traditional courts when summoned. In doing this, the Bill ignored living customary law, the cornerstone of which is how people practise this law in their daily lives. Because of these fundamental flaws, the TCB gave historical distortions of custom new legitimacy and entrenched a separate legal system for black people living in the former Bantustans. The Bill denied people the right to appeal to state courts and empowered traditional leaders to deny people land or sentence them to forced labour, among other punishments.

Rather than affirming traditional justice systems, the Bill fundamentally altered customary law by centralising power in the hands of senior traditional leaders and adding powers that they did not traditionally hold under custom. This centralisation of power ignores and disempowers the complex layers of social organisation that exist below senior traditional leaders where dispute resolution is most often handled before it is escalated to the senior traditional leader. It effectively empowers senior traditional leaders to interpret custom, enforce it, and make the final decision in case of an appeal.

The TCB denied people within its jurisdiction the right to legal representation. This has a particularly detrimental effect on women as, in many traditional courts, they are not allowed to speak or represent themselves, but have to rely on male relatives to represent them.\(^6\) This places women at a serious disadvantage, particularly in cases arising from disputes with their male relatives. As a result, women were at the fore of opposition to the TCB, arguing that legislation cannot undermine the rights to equality that the Constitution guarantees.

The objections to the TCB’s adoption of colonial and apartheid structures, hierarchies and spatial dynamics highlighted the fact that, for people living under customary law, the repeal of apartheid legislation is not significant in itself. Rather, this repeal is made significant through the intentional rupturing of colonial and apartheid knowledge, structures and practices. By relying on apartheid ideas of the relationships between land, ethnicity, boundaries and customary governance, the TCB adopted skewed paradigms that were originally designed to serve the political interests of the apartheid state. It was therefore unable to move beyond the symbolism of the repeal of apartheid laws to achieve material outcomes. Indeed, the TCB illustrates just how important it is for post-apartheid laws to free people from the oppressions of the past and to support the realisation of human dignity.

Throughout the provincial and national hearings and in the submissions to Parliament on the TCB, people consistently located customary law in the context of South Africa’s constitutional democracy and the expectation that customary law should comply with the letter and spirit of the Constitution. People argued that customary law and traditional courts need to respect and

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protect individual and group rights, particularly in line with the protections guaranteed to all citizens. Jennifer Williams from the Women’s Legal Centre noted:

All the provisions in the Constitution recognising customary laws, the exercise of the rights to culture and powers of traditional leadership recognise these only to the extent that they are not inconsistent with other rights in the Constitution. No other right is limited in this manner throughout the Constitution. The limitation of these rights by definition was deliberate and is indicative of an attempt to eliminate competing interests between the right to culture and other rights in the Constitution … The Constitution posited the achievement of equality, freedom and dignity as paramount to the pursuit of an equalitarian society.\(^7\)

In forums throughout the country, people juxtaposed experiences of life in the Bantustans with hopes about the freedoms, protections and rights promised by the end of apartheid. This framing of rights highlights the value that many people place on living in a democratic dispensation, characterised by a Constitution and Bill of Rights that they can draw on to demand rights, freedoms and protections previously denied to Africans. The dominant sentiment across sectors was that customary law and constitutional rights need to inform each other and work together in shaping experiences of justice in traditional courts, rather than being framed as oppositional.

III  THE TCB AND THE LEGISLATIVE PROCESS

The TCB was published in the Government Gazette on 27 March 2008 and was introduced to the National Assembly. The Justice Portfolio Committee issued a call for submissions relating for the TCB on 21 April with a deadline of submissions on 6 May 2008. During this 16-day period there were three public holidays and two weekends, leaving nine working days for people to prepare submissions for the hearings.\(^8\) Over this period, fewer than 20 submissions were received, a number which indicates the inadequate advertising and information provided on the Bill. Several submissions called for an extension of the period provided for submissions to allow for greater participation, a recommendation which was ignored. Public hearings on the TCB were held on 13, 14 and 20 May 2008. Despite the limited time provided for the public to prepare submissions on the Bill, the majority of these expressed opposition to the TCB and raised many of the same challenges to the Bill that would later be echoed around the country in public hearings.

On 21 May, when the Portfolio Committee met to deliberate on the submissions, it decided that it would not be possible for the TCB to be passed by the end of June 2008. The BAA was therefore extended to allow time for the new Parliament to develop the TCB and take the Bill to its conclusion.\(^9\)

\(^{7}\) J Williams ‘Women’s Legal Centre Submission to Parliament on TCB’ (2012).
The BAA was extended at a meeting on 17 June 2008 to remain in force until 30 December 2009.

In April 2011, the African National Congress (ANC)’s Study Group on Justice recommended to the Department of Justice that it withdraw the TCB from the National Assembly and potentially re-introduce it in the National Council of Provinces (NCOP). Because the TCB would affect the provinces, its reintroduction in the NCOP would meet the requirements of s 76 of the Constitution, which mandates a longer consultation process involving the provincial legislatures. The Portfolio Committee formally withdrew the TCB on 2 June 2011. On 13 December 2011, the Department of Justice issued a general notice in the Government Gazette stating that the Select Committee would introduce the TCB in Parliament in January 2012. The notice was published during the December vacation period and took many people by surprise at a time when work slows down and many are on holiday. The Bill was introduced in the NCOP on 26 January 2012 and interested parties were invited to submit comments on the Bill by 15 February 2012. Despite significant opposition from a range of stakeholders in 2008, no changes had been made to the Bill when it was reintroduced.

Similarly to 2008, the overwhelming majority of submissions in 2012 expressed opposition to the Bill, many arguing for its complete withdrawal.\textsuperscript{10} The Select Committee decided not to debate the provincial mandates on the Bill, many of which had rejected it. Instead it opted for another round of public hearings. Public hearings on the Bill took place between 18 April and 18 May 2012 in all nine provinces. Writing on her observations of several hearings, Nolundi Luwaya noted:

\begin{quote}
[O]bstacles [to participation] included arbitrary decisions by chairpersons about what constituted ‘relevant comments’ … hostile atmospheres[s] and processes that frequently privileged elite voices and militated against open discussion and information gathering … 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.\textsuperscript{11}
\end{quote}

\textsuperscript{10} Thipe (note 3 above).
\textsuperscript{11} Luwaya (note 2 above) 38.
She continues:

[At some hearings] the venue for the hearing … 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.\textsuperscript{12}

Many people went to great lengths to attend these hearings and many did so at great personal cost and risk, when their traditional leaders were present at the hearings.\textsuperscript{13} Challenges to participation included venue changes on the day of the hearing in several locations, as well as instructions in some cases that no inputs could be given after traditional leaders had spoken.\textsuperscript{14} Despite significant obstacles to public participation at the hearings, the resounding message from across the country was opposition to the TCB.

Following the outcome of these hearings, the Committee held national hearings on the Bill on 15 August 2012. Interested parties were invited to send written submissions to the Committee by 4 September 2012. These hearings were held from 18 to 21 September in Cape Town. Over 20 oral submissions were made to the Select Committee during this four-day period. The majority of these submissions came from people based in rural areas where the Bill would have effect. The overwhelming majority of these submissions expressed opposition to the TCB, with many, including the DWCPD, calling for its withdrawal and others proposing far-reaching amendments.

The Committee’s chairperson indicated that the Committee would deliberate on the TCB following the public hearings. However, this did not happen when the Committee tabled a report on the hearings. Despite the wealth of inputs on the TCB that were communicated at the hearings, when the Committee met on 24 October the Department of Justice presented a report that only summarised two submissions, that of the SAHRC and the DWCPD.\textsuperscript{15} This document also included recommendations from the Department of Justice. When members of the Select Committee objected to the omission of the other 20 submissions from the summary, the department justified this move by arguing that only those two submissions spoke to clauses in the Bill. A member of the Committee noted that an account of the hearings that failed to reflect the tremendous opposition to the Bill would fail accurately to reflect the hearings and could not qualify as a summary report of the process. Other members noted that the accounts of abuse of power by traditional leaders that were detailed in many submissions were deeply significant because the Bill proposed to expand traditional leaders’ powers. The omission of the inputs by people who would have lived under the TCB effectively silenced their voices around their experiences of customary law and traditional courts

\begin{itemize}
\item \textsuperscript{12} Ibid 17.
\item \textsuperscript{13} Ibid.
\item \textsuperscript{14} Ibid 15, 10.
\item \textsuperscript{15} Alliance for Rural Democracy “Traditional Courts Bill: Committee Chairperson Compromises Parliament’s Integrity. Civil Society Calls for his Status to be Reviewed” <http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/Media_Release_24102012.pdf>.
\end{itemize}
and rendered their knowledge and experience invisible. The Committee chairperson communicated that the department drafted this document upon his instruction.\footnote{Ibid.}

In a press statement in response to the Department of Justice’s report, the Alliance for Rural Democracy argued:

The Chairperson’s actions and attitudes toward the public hearings on the Bill are deeply insulting to the many rural people who travelled from afar to come to Parliament and put forward their views on the Bill. They proclaim that the public needn’t have bothered to make submissions as their views don’t even qualify to be part of the official record, let alone to be debated and considered by the Committee and provincial legislatures.\footnote{Ibid.}

In its final meeting of the year on the TCB, held on 28 November 2012, the Committee adopted a new report, which was rewritten to incorporate all of the submissions that were presented at the national hearings.\footnote{Parliamentary Monitoring Group ‘Report of the Select Committee on Security and Constitutional Development on the Traditional Courts Bill Public Hearings held in Parliament 18 to 21 September 2012’ (28 November 2012) <http://www.pmg.org.za/files/doc/2012/comreports/121129cssecurityreport3.htm>.


The Committee directed that this report be circulated to the provinces.

There was little movement on the TCB between November 2012 and October 2013.\footnote{Ibid.} When the Committee met in October 2013, it emerged that the majority of provinces opposed the TCB: Eastern Cape, North West, Limpopo, Gauteng and Western Cape. Only the Free State and Northern Cape supported the Bill, and did so with major proposed amendments. KwaZulu-Natal and Mpumalanga were undecided about the Bill. The rejection of the TCB by the majority of provinces strongly communicated the scale of opposition to the Bill by people throughout the country.

At this point, the Select Committee departed from parliamentary procedure that requires that negotiating mandates be debated once they have been submitted to the Committee. Following this procedure would have forced the Committee to reject the Bill. Instead, the Committee claimed that the negotiating mandates were unclear and sent the Bill back to the provinces to be considered for the third time. The legal opinion issued by Parliament’s Constitutional and Legal Service Office stated that some members of the Select Committee recommended that the Bill be withdrawn.\footnote{Ibid.}

One of the outcomes of the Committee’s decision to send the TCB back to the provinces was an additional round of hearings in the North West, one of the provinces with the strongest and most vocal opposition to the Bill in the previous round of hearings. The previous negotiating mandate of the North West had unequivocally rejected the TCB, reflecting that 95 per cent of the
people who participated in the hearings had rejected the Bill. On 21 October 2013, the Portfolio Committee on Local Government and Traditional Affairs of the North West legislature held four hearings on the TCB across the province. Based on these hearings, the North West changed its mandate to support the TCB. In a letter to the secretary of the Select Committee, representatives of the Bafokeng Land Buyers Association, a North West-based community organisation, cast doubt on the openness of these hearings based on their experiences. This letter details intimidation of people speaking out against the Bill by the chairperson and people wearing ANC t-shirts. It also argues that only a few people were able to give inputs on the Bill because limited time was given to the floor before the chairperson summarised the hearing as reflecting support of the Bill.

On 12 February 2014, the parliamentary Select Committee met to discuss the provinces’ negotiating mandates. Based on some provinces’ revisions to their mandates, the divide on the Bill emerged as four provinces in support of the TCB, four opposed it, and one abstaining. The Northern Cape, Free State, North West and Mpumalanga supported the Bill. The Eastern Cape, Limpopo, Gauteng and the Western Cape opposed the Bill. KwaZulu-Natal abstained. All provinces that voted in favour of the Bill proposed significant amendments, many of which would have required rewriting of entire sections. Many of the proposed amendments contradicted each other, which created uncertainty about how these would be reconciled. Because of the extensive number of amendments proposed, and the complexity of understanding how different provinces’ amendments related to each other, the Committee decided that the Parliamentary Legal Advisor be tasked with drafting a clause-by-clause analysis setting out and comparing the positions of the provinces and commenting on their compliance with the Constitution.

At the Select Committee’s meeting on 19 February, the Parliamentary Legal Advisor agreed with many of the provinces’ concerns about the Bill’s validity. In the clause-by-clause engagement with the mandates, the Legal Advisor identified a number of the TCB’s provisions as unconstitutional. Speaking to the TCB’s precarious position in relation to the Constitution, Northern Cape representative, John Gunda, argued that even though the Northern Cape legislature voted in support of the TCB, this was a hollow support. The amendments that the province proposed in the mandate necessitated such extensive changes that they effectively required portions of the Bill to be rewritten. This meeting was adjourned on the basis that the Bill would be referred back to the provincial legislatures for yet further mandates. However,

23 Ibid.
24 Wicomb (note 21 above).
following this meeting, the TCB was removed from the parliamentary schedule. The explanation given for this removal was that the Committee realised that the Bill had lapsed in terms of NCOP Rule 238.

IV LOOKING FORWARD: THE TRADITIONAL AFFAIRS BILL AND THE TLGFA

The Traditional Affairs Bill, which continues along the lines of the TCB, was published for public comment on 20 September 2013. Like the TCB, this Bill relies on the TLGFA’s boundaries for jurisdiction, reinforcing many of the same colonial and apartheid spatial dynamics that were rejected in the TCB process.

Unlike the TCB, the Traditional Affairs Bill is not as explicit in the powers that the state gives traditional leaders over the people who live in their jurisdiction. The current version of that Bill provides that traditional leaders and councils can be allocated roles by government departments through ‘legislative or other measures’. A previous version of the Bill in 2011 provided that these roles could be given by means of administrative delegation, which would have circumvented the important consultative processes that are required when Parliament makes laws, and made it very difficult to discover what powers have been delegated to whom. Again, this state intervention in customary law would have allowed for the perpetuation of colonial distortions of customary law by making traditional leaders dependent on the state for power and legitimacy, rather than on the people that they govern. This goes against the common phrase found in many South African languages that ‘a chief is a chief through the people’.

V CONCLUSION

The TCB, TLGFA and Traditional Affairs Bill demonstrate the persistence of deeply internalised colonial and apartheid notions of how African societies were organised and ruled. We know through the work of various scholars that colonial officials turned every kind of African polity into a tribe in order to make it legible for purposes of indirect rule. The post-apartheid state has introduced and is continuing to introduce legislation that relies on colonial and apartheid understandings of customary law that force rural citizens back towards recognition as tribes. The resistance to the TCB illustrates that people in rural areas are pushing back against these developments, and claiming the rights to which they are entitled as citizens.

Allowing the TCB to lapse rather than withdrawing it from Parliament politically allows for protection against the admission of the outright defeat of the Bill. The material effects are, however, effectively the same. The pressure

that people around the country were able to apply on provincial legislatures to reject the TCB attests to the level of investment in the democratic dispensation and the right to equal citizenship that it guarantees all South Africans. The level of engagement around the TCB sends a message that customary law cannot be used as a vehicle to deprive people of their rights. It needs to be respected and promoted in the context of constitutional democracy.

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