

# Submission in respect of the third cycle of the Universal Periodic Review of South Africa: Traditional Courts Bill

Submitted by the Coalition for Rural Democracy

Legal Resources Centre  
Alliance for Rural Democracy  
Land and Accountability Research Centre

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## 1. Introduction/ Contributing Organisations

The **Legal Resources Centre** (LRC) is an independent non-profit public interest law clinic which uses the law as an instrument of justice. It works for the development of a fully democratic South African society based on the principle of substantive equality, by providing free legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic or historical circumstances.

The LRC represented and continues to represent citizens and communities in litigation about customary law and its status in the broader South African legal context. We appeared on behalf of clients in the Constitutional Court in the matters of *Bhe*, *Richtersveld* and *Shilubana*. Our clients include the communities that successfully challenged the constitutionality of the Communal Land Rights Act of 2004. The LRC also represents a number of communities in court litigation and administrative representations concerning the impact of the Traditional Leadership and Governance Framework Act of 2003 – including the communities of Daggakraal, Pilane and Xalanga.

In general, the LRC's opposition to discriminatory laws such as the Traditional Courts Bill is not opposition to the institution of traditional leadership itself, or to customary law. There is widespread acceptance of the valuable role played by customary law and the need for indigenous legal processes to be recognised and supported. In particular, our concern relates to the distortion of customary law and inappropriate codification and recording thereof. The statutory regulation of customary law should not prevent it from developing in consonance with the Bill of Rights as envisaged in section 39(3) of the Constitution.

The LRC is also concerned about the manner in which new laws, including the Traditional Leadership and Governance Framework Act of 2003, bolster unilateral chiefly power and undermine indigenous accountability mechanisms. The laws are criticised for entrenching the colonial and apartheid distortions and divisions that were central to the creation of the Bantustan political system and used to justify the denial of equal citizenship to all South Africans.

The **Land and Accountability Research Centre (LARC)** – formerly the Rural Women's Action Research Programme at the Centre for Law and Society (CLS) – is based in the University of Cape Town's Faculty of Law. LARC forms part of a collaborative network, constituted as the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of rights

in the former homeland areas of South Africa. An explicit concern of LARC is power relations, and the impact of national laws and policy in framing the balance of patriarchal and autocratic power within which rural women and men struggle for change at the local level. LARC undertakes regular consultation meetings and empirical research with rural partners, focusing on documenting actual practice, both past and current. We hold interdisciplinary seminars and workshops involving historians and anthropologists so that we can update debates and evidence concerning 'the customary' by reference to developments in these fields, rather than by relying on the outdated ethnographic 'handbooks' of the apartheid era.

LARC has developed a strong focus on issues of customary law, in particular with regard to empirical research to ascertain the nature and content of 'living customary law'. Its researchers have published widely in peer-reviewed journals on issues pertaining to the interface between 'official' and 'living' customary law as distinguished by the Constitutional Court.

Recently, LARC has developed a particular focus on research into the challenging interface of customary law with other sources of law under the Constitution. We have provided research support to parties and amici involved in cases concerning customary law before the High Court and the Constitutional Court, such as *Tongoane*, *Shilubana*, *Mayelane v Ngwenyama* and *Pilane*. The Constitutional Court has referred to my own scholarly work in its judgment in *Gumede*.

The **Alliance for Rural Democracy (ARD)** is a dynamic and flexible grouping of civil society organisations which have joined together to contest policy and legislation that undermines the rights of rural citizens living in the former Bantustans and which threatens to dispossess them of rights in land. Such laws, policies and practices distort customary law, undermine security of tenure and rights in land while entrenching the powers of traditional authorities. The ARD has challenged these undemocratic practices and discriminatory laws through campaigns on the ground and through test cases brought before the courts:

- The ARD has mobilised for the review of the Traditional Leadership and Governance Framework Act which prevents rural people from addressing the complex legacies of the apartheid Bantustans. The ARD is also mobilising to highlight the implications of the new Traditional and Khoi-San Leadership Bill, which seeks to replace the Framework Act.
- The Alliance together successfully contested the implementation of the Communal Land Rights Act (CLRA) which was struck down by the Constitutional Court.
- The ARD campaigned tirelessly against the Traditional Courts Bill (TCB) and succeeded in amplifying the voices of rural women who have been at the forefront of opposition to the TCB. The ARD argued that the Bill would create a separate legal system for the 18 million people living in the former Bantustans and make them subjects of traditional leaders with second class rights in the South African democracy.
- The ARD has consistently argued that democratic South Africa has failed to meet key constitutional obligations to ensure security of land tenure for residents of the former Bantustans, and are currently mobilising to expose key failures of legislation passed since 1994.
- The ARD is also playing an active role to expose elite mining deals that fail to benefit rural citizens. It has contested the illicit leasing of land in the former homelands for mining and

other projects without the informed consent of the rights holders as required by the Interim Protection of Informal Land Rights Act.

**Together, the LRC, LARC and ARD wish to draw attention to recommendation 124.95 from the government of Norway to South Africa.**

- **Recommendation 124.95: Ensure that the proposed new Traditional Courts Bill, if adopted, does not violate South Africa's international obligations or its own Constitution in the area of women's rights and gender equality (Norway)**

On 26 September 2012, the South African Human Rights Commission, a constitutionally mandated body, released a statement expressing its disappointment at the government's "rejection of international advice on the Traditional Courts Bill". The SAHRC reported that the South African government did not accept the recommendation, stating that "the matter was still under national consultation". The SAHRC proceeded to refer to the numerous complaints it had received on the process around the Traditional Courts Bill.

Aside from the content of the Traditional Courts Bill, it is remarkable that the South African government would not accept a comment calling on it to ensure compliance with the Constitution and its international obligations, citing as excuse the fact that the matter is still under national consultation. The outcome of such consultation cannot be that a piece of legislation is adopted that conflicts with either the Constitution or binding international obligations.

In these submissions, we provide some background to the debates surrounding the Traditional Courts Bill in an attempt to give context to South Africa's actions; we outline further developments since 2012; and we provide recommendations as to South Africa's further conduct in this regard.

### **1. The statutory regulation of customary law under the Constitution**

One of the most radical but lesser known innovations of the South African Constitution was the recognition of customary law as an independent system of law equal to the common law. Some recognition of customary law has been a feature of most African legal systems for decades; in fact selective recognition of customary law rules, often officially distorted for convenience, was a feature of colonial projects of indirect rule. The South African Constitution rejects that approach. It rejects a notion of customary law as a peculiar set of rules applicable only within the boundaries of traditional communities. Instead, it recognises that it is a system of law with its own operational rules and insists that it be understood within its own context. Wherever it is applicable, it must be applied subject to the Constitution.

With that recognition, the Constitution took a significant step in eradicating racial discrimination, which was at the root of the historical rejection of customary law as a lesser form of law. At the same time, the approach would ensure that any discriminatory and harmful aspects of customary law, notably against women and children, be developed. Thus, customary law would be subject to the same constitutional scrutiny as the other sources of South African law rather than being hidden from view within the boundaries of traditional communities.

Regrettably, the progressive approach to customary law of the Constitution and the Constitutional Court has not resonated with the legislature. Apparently under some political pressure to appease an increasingly significant constituency of traditional leaders, the statutory regulation of customary law has remained a top-down affair with the recognition, status and powers of traditional leaders being virtually the exclusive focus.<sup>1</sup> In a recent submission to the South African Human Rights Commission, the Department of Cooperative Governance and Traditional Affairs explained that the role of its Department of Traditional Affairs is to “empower and support traditional leaders”.<sup>2</sup>

Communities and civil society have consistently argued that an approach that focuses on empowering traditional leaders – many of whom carry little legitimacy with their communities for reasons that will be explained later – is seriously detrimental to the rights of members of traditional communities.<sup>3</sup> This prejudice is disproportionately felt by vulnerable groups, in particular women.

There have been many problems with this approach of empowering leaders. It has ensured that traditional leaders remain accountable to government, who pays their salaries, rather than to the communities they purport to serve.<sup>4</sup> Contrary to actual customary systems of governance, it centralises power in the hands of a single leader and, at least with the Traditional Courts Bill, attempted to imbue traditional leaders with concurrent legislative, judicial and executive powers. Perhaps most significantly, it turns customary law into the law of the chief rather than the law of the people – with significant impacts for women.

The upshot is the entrenchment of crude forms of discrimination against the people of the former homelands: some pay forms of taxes to their chiefs for basic citizenship rights like proof of identity and of residency, which other South Africans do not.<sup>5</sup> Others are often refused the right to lay charges at the police for crimes committed against them – crimes that may include rape. Almost all these communities are routinely denied the right to access the formal courts qua communities as they are considered to have no standing outside the representation of their (often imposed) traditional leader.<sup>6</sup> This is made worse by the fact that the former homelands continue to be the poorest and most deprived areas of South Africa by some margin, with women also in this regard disproportionately impacted.

The Constitutional Court has repeatedly confirmed its understanding of customary law as a living, evolving system. In fact, it has distinguished between the history and the practice of customary law:

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<sup>1</sup> See Claassens, A and Budlender, G ‘Transformative Constitutionalism and Customary Law’ in *Constitutional Court Review* Volume VI; Juta 2016 p 75; Wicomb W ‘The Exceptionalism and Identity of Customary Law under the Constitution’ *Constitutional Court Review* Volume VI; Juta 2016 p 127.

<sup>2</sup> SAHRC offices, Johannesburg, 14 September 2016.

<sup>3</sup> See [www.customcontested.co.za](http://www.customcontested.co.za).

<sup>4</sup> See De Souza M ‘Justice and legitimacy hindered by uncertainty: The legal status of traditional councils in North West Province’ *SA Crime Quarterly* No 49 September 2014.

<sup>5</sup> A group of community members in Limpopo has approached the High Court for an order that this practice of taxing poor rural communities is unconstitutional given that taxation powers reside with the elected government spheres only. The Premier and the Member of the Executive Council of the Limpopo Province have opposed this application. It is pending.

<sup>6</sup> Claassens and Matlala *Platinum, poverty and princes in post-apartheid South Africa* in Gilbert M. Khadiagala et al (eds), *New South African review 4: a fragile democracy - twenty years on*, Johannesburg: Wits University Press, 2014.

there is the law that the elders remember and there is the law as the community (and not its leader) practices it today. Both help the Court in understanding the content of the law.

Most interesting was the evidence that emerged in the last decade of how women in traditional communities used the new language of the Constitution, notably concepts such as ‘equality’ and ‘women’s rights’ to develop often deeply patriarchal systems in line with the new South African rights landscape. A survey in three former homeland areas in South Africa by the Community Agency for Social Enquiry released in 2011, indicated that unmarried women were gaining increasing access to land despite no relevant legislation being in place.<sup>7</sup> These women were negotiating better deals for themselves through the empowerment of the discourse of women’s rights and the Constitution. As a result, new rules and new rights emerged. The same happened in the case of Ms Shilubana, whose community had decided to develop their customary law to allow a woman to become their Chief – a development later confirmed by the Constitutional Court.

The problem is that legislation that entrenches top-down power fails to provide the necessary room and recognition for law to be developed by the community practicing it, despite the Constitution’s recognition of a living form of customary law.

## **2. The Traditional Courts Bill**

The Traditional Courts Bill (TCB) was first introduced in the South African Parliament in April 2008. It followed the introduction of two other pieces of legislation that seemed relatively benign at first, but which turned out to have devastating impacts on communities living under the jurisdiction of traditional leaders.

Accordingly, when the TCB arrived in Parliament in 2008, communities were far more aware of the dangers of seemingly “toothless” regulatory legislation. The Bill, which effectively enabled traditional leaders to make, administer and dispense with the law within their communities, caused such an uproar that it was quickly withdrawn.

At the end of 2011, just before the holiday season, the Bill was reintroduced into a different House of Parliament, but with identical content. What made the Bill so offensive?

For one, it provided that anyone who refused to appear at the chief’s court when summoned, was guilty of a criminal offence. Given that thousands of South Africans find themselves within the boundaries of jurisdiction of traditional leaders that they do not recognise – but who assert their authority over them anyway – this provision has obvious problems. This is because the jurisdictional boundaries recognised for traditional authorities under the Traditional Leadership and Governance Framework Act in 2003 were actually derived from previous declarations made by the colonial and apartheid governments. These declarations were often official manipulations of the customary law reality in order to further the government’s project of creating separate homelands for ethnic groups.

The Bill further allowed for forced labour to be meted out as a sanction and, worse still, for “customary entitlements” – which would include rights in land – to be taken away by the presiding

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<sup>7</sup> Debbie Budlender, Sibongile Mgweba, Keteletsu Motsepe and Leilanie Williams *Women, Land and Customary Law* (2011).

officer. Given that the Bill envisioned very limited opportunities to appeal, this would give abusive traditional leaders carte blanche to deal with dissenting voices as they wished.

These fears were far from hypothetical: in some communities where traditional courts operate, these are used to mete out interdicts to stop people from meeting without first obtaining the consent of an imposed leader or paying excessive fines for “crimes” such as “disrespecting the chief”. It thus came as no surprise that the few rural communities who came to know of the Bill rejected it outright. In addition, some constitutional lawyers and activists bemoaned the fact that the Bill made no attempt to reflect the law as actually practised on the ground. This would require the chief’s actions to be bolstered by strong accountability mechanisms that are customary and bottom-up (rather than exclusively top-down, as set out in the Bill). Traditional leaders, on the other hand, made no secret of their reasons for supporting the Bill: without this law, they argued, they had no power over their communities and thus could not perform their ‘functions’.

But perhaps the loudest resistance came from women’s groups. In particular, they voiced their deep concern with the Bill’s lukewarm response to the very real discrimination experienced by women in many existing traditional courts. From across the country, women from traditional communities attended Parliament to tell Members of Parliament (MPs) that they are not allowed to enter the traditional court even when they are the ones on trial. Instead, they had to be represented by a male relative, who would speak on their behalf. One brave woman from KwaZulu-Natal raised her hand to show the MPs where a male member of her traditional council, to which she had also been elected as a member, had harassed her and eventually bit off her finger in anger over her rejection of his advances. The Rural Women’s Movement<sup>8</sup> described how women in mourning dress were not allowed near the courts. Often, they said, this resulted in women being evicted from their houses. In addition, as courts are most often presided over by male councillors, this meant that the court favoured men, regarded it inappropriate for women to get involved in family disputes and found those who did so to be unruly. Women from Limpopo related the trauma caused by rumours of witchcraft and the frustrations of not being allowed to defend themselves.

It was difficult to understand how these stories could emanate from a constitutional democracy that prides itself on its founding principles of equality and freedom. More worrying was the TCB’s response to these realities: it proclaimed on the one hand that women must be afforded “full and equal participation” in the proceedings (s9(2)(i)), but on the other, that a “party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom” (s (3)(b)), thereby ensuring that women in particularly patriarchal communities will continue to be represented by men.

### **3. Parliamentary process**

It quickly became clear that the Bill was introduced in 2011 with every intention of getting it passed in Parliament at all costs. Stopping the Bill would thus not merely be a matter of ensuring the rejection of the Bill at public hearings in Parliament – it would require an attack on multiple fronts. The problem was that the women and men most deeply affected by the Bill lived in the provinces furthest away from Parliament in inaccessible areas where communication (other than text

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<sup>8</sup> See [www.customcontested.co.za](http://www.customcontested.co.za).

messaging) was near impossible. In addition, the Bill did not offer the direct threat of clear-cut abuses around which communities and organisations across a spectrum could easily unite; rather the real problem with the Bill was its position within the existing legislative framework and the implications of many of the provisions read together with existing legislation. In the same way, the formalistic “protections” for women that the Bill did provide, meant nothing in the context of deeply entrenched patriarchy.

The South African Constitution provides that where legislation will potentially impact on certain issues, including customary law, a comprehensive process in both national Houses of Parliament must be followed before it can be passed. In that case both houses, as well as the internal committees responsible for debating the Bill, have independent mandates to facilitate public participation on the content of the legislation. The nine provincial legislatures are also required to engage in public participation processes, and then convey their votes through provincial delegations sitting in the national House.

The pressure from NGOs, CBOs and communities during public consultation had a remarkable effect on the process. The Select Committee of the National Council of Provinces tasked with considering the Bill, held round after round of public hearings, apparently unable to choose between rejecting the Bill and risking the political consequences of pushing it through and facing the wrath of rural communities. In February 2014, after sitting with the Bill for two years, the Select Committee held a meeting to consider the views of the various provinces on the Bill. The LRC prepared and circulated a document reflecting the widely opposing views of the provinces expressed before the meeting, indicating that the Committee could never pass the Bill and pass constitutional muster.

The meeting all but descended into chaos with various members expressing disbelief at the fact that the Bill was still in Parliament. Two members quoted directly from the document we provided to support their case. Most remarkable was the fact that the objecting members represented all the political parties – including the ruling party. It was the first time since 1994 that this had happened.

After an abrupt end to proceedings, a quiet announcement followed some days later: due to an apparent ‘oversight’ the Bill had not been correctly reintroduced and had thus lapsed on the basis of a technicality. While this outcome denied rural communities the opportunity of a public celebration, it could do little to erase what was an exceptional victory for democracy.

In an address to the University of the Western Cape soon thereafter, former Constitutional Court judge Albie Sachs cited the victory over the Traditional Courts Bill as one of the most significant post-constitutional indications that the South African democracy is indeed alive and well.

#### **4. Most recent developments**

Earlier this year, the Congress of Traditional Leaders of SA (Contralesa)<sup>9</sup> instituted legal action against Parliament, the Ministers of Justice and Traditional Affairs and the National Prosecuting Authority. The action centred around what Contralesa alleged was Parliament’s ‘failure to pass laws that recognise the judicial status of traditional leaders’. As such, they asserted that Parliament should be directed to pass a law such as the Traditional Courts Bill within three years. Contralesa seeks an order for traditional leaders to be protected from civil and criminal liability when

performing duties under customary law. In addition, they have asked that the prosecution of King Buyelekhaya Dalindyebo – jailed for crimes such as kidnapping, culpable homicide and arson against his so-called ‘subjects’ – be set aside.

In arguing in favour of the Traditional Courts Bill, Contralesa, in its papers, says:

*In terms of the TCB, even those individuals and sub-groups who resisted the imposition of (illegitimate) traditional authorities by the apartheid governed are now subjected to them. Plainly put, if the TCB had been in operation at the time it would have lent statutory authority to some of King Dalindyebo’s actions. In terms of the TCB, anyone within the traditional leader’s jurisdiction may be ordered to come before him (as presiding officer), where s/he may be fined and stripped of customary entitlement. As it was, King Dalindyebo claimed that the fine against the first accused was a fine of one beast for disobeying the court.*

*As will be seen in the detail set out below, the TCB outlaws banishment as a sanction in only criminal, and not civil, cases. It also permits the denial of customary entitlement as a punishment. Though the TCB does not specifically say this, customary entitlements would ordinarily be understood to include land rights and membership of the community.*

Contralesa’s intention with the Traditional Courts Bill was thus made clear.

In response, the Department of Justice and Constitutional Development that opposed the application, set out the government’s efforts to pass this Bill over the last years. Deputy Minister John Jeffery says:

*Of course, our country has come a long way since 1952, and in a constitutional democracy such as ours, it is unthinkable that judicial immunity be conferred upon the King in relation to acts of criminal conduct in which he played judge, jury, prosecutor, and enforcer in relation to sentences imposed by him. [...]*

*The policy framework on the “Traditional Justice System under the Constitution” was finalised early in 2008. The 2008 Traditional Courts Bill that was introduced into Parliament was based on this policy framework. [...] There was considerable interest in the Bill and comments were made by numerous individuals and organisations.*

*During the public hearings, concerns were raised, among others, that there had not been sufficient consultation on the Bill. Although the then Portfolio Committee was of the view that there had been consultation on the Bill, it was concerned about the level or quality of consultation with the roleplayers, and the public. Therefore, the Portfolio Committee decided that there should be further consultation on the Bill.*

*The same Bill that was introduced in the National Assembly in 2008 was introduced in the National Council of Provinces (“NCOP”) in 2012, with a view to amending the Bill during the parliamentary process in order to address the concerns raised previously [...] All the provincial legislatures held public hearings on the Bill. The same concerns and criticisms that were raised on the Bill when it was introduced in the National Assembly in 2008 were raised during the NCOP process.*



*When the Bill was first introduced in Parliament in 2008, it met with much opposition which was continued after its re-introduction in the NCOP in 2012. It was claimed that traditional leaders had been privileged in the drafting process, while the people most affected had been excluded. It was also claimed that 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.*

*Further criticism related to claims that the Bill exacerbated existing challenges to access to justice in that it, for example, denied the right to legal representation, and did not meaningfully promote the right of access to these courts by women, as parties or as members thereof. It was further contended that the Bill created new inequalities including denying people the right to appeal to state courts and empowering traditional leaders to deprive people of customary law benefits or to sentence them to community services which was perceived in some quarters as forced labour, among other punishments. Further contentions were that the Bill did not allow a person to “opt out of the traditional justice system”; that it perpetuated the boundaries of the discredited “Bantustan” system; and that it did not recognise the constitutional imperative that only the National Prosecuting Authority had the authority to institute and conduct prosecutions in criminal matters.*

*In the negotiations on the Bill, four provinces were in favour of the Bill, four were against and one province neither supported nor rejected the Bill. The Bill lapsed at the end of the fourth administration [...]*

*Due to the Bill having lapsed and the concerns that were raised regarding this Bill it has become increasingly necessary and urgent to promote legislation that will transform the traditional courts justice system and to align them with the Constitution.*

*On 30 November and 3 December 2015, the Department held consultative meetings with representatives of the National House of Traditional Leaders and civil society, respectively, using the draft concept paper as the basis for deliberations. A National Dialogue was convened on 4 December 2015. Representatives of the Department of Traditional Affairs also attended some of these engagements. All key and relevant stakeholders, including representatives of the National House of Traditional Leaders, Contralesa and civil society, attended. The purpose of these meetings was to solicit views on the principles which have been identified for policy development, and which were regarded as a basis for a new Bill on the transformation of traditional courts. The identified issues, in essence, were the concerns that were raised in respect of the Traditional Courts Bill as introduced in the National Assembly in 2008 and subsequently in the NCOP in 2012.*

*At the meeting of 4 December 2015, the stakeholders agreed that a reference group comprising of officials, representatives of traditional leaders and civil society should be established to take the process forward by finalising the issues in respect of which there is still not a convergence of opinion, and consolidating all issues with the view to preparing a draft Bill.*

**We would like to highlight the following:**

- If the view was to introduce an identical Bill in parliament in 2012 “with the view of amending it during the parliamentary process” to address all the concerns, this intention

was entirely flouted. No meaningful amendments whatsoever were proposed or entertained by the relevant Parliamentary Committee.

- On 24 October 2012, barely a month after the South African delegation rejected Norway's recommendation, the chair of the Select Committee of the NCOP dealing with the Bill, attempted to eliminate from the parliamentary process the statements from all rural communities participating in the September public hearings. He called their submissions "irrelevant". This attitude towards the people that will be affected by the Bill is regrettably also reflected in the Deputy Minister's reference to "all stakeholders" consulted: traditional leader structures and 'civil society' (It should be noted that the members of civil society participating in this process specifically hold no mandate). As representatives of civil society ourselves, we know that we cannot speak for the affected rural peoples.
- In November 2012, in his annual address to the National House of Traditional Leaders, President Jacob Zuma acknowledged that the Traditional Courts Bill is flawed. In particular, he acknowledged the criticism that the Bill 'entrenches the balkanisation of traditional communities in accordance with the boundaries of [...] the defunct Bantustans'. These entrenched tribal boundaries in turn keep illegitimate leaders in power over artificially-created communities. The Traditional Courts Bill gives these traditional leaders even more power and denies communities proper access to justice. All these concerns, he said, were being addressed "as part of the on-going parliamentary process". That the President's concessions were made in a speech to traditional leaders is equally significant. Traditional leaders have, for the most part, been vocal supporters of the Bill and it has been common cause that they were the only constituency consulted in its drafting – despite the Department of Justice's recent fallacious intimations that the Bill reflects earlier public consultations by the South African Law Commission. As opposition to the Bill grew from ordinary members of rural communities, they sometimes voiced their opposition by asking publicly of their leaders: if you are a chief for and by the people, why would you need this Bill to entrench your power over us? Regrettably, President Zuma attempted to soften the blow of his speech by deviating from the written text. While acknowledging the flaws of the Bill pointed out in the public hearings, he launched an attack on anyone who criticised 'African culture' – citing examples straight from the Traditional Courts Bill debate. "Let us not be influenced by other cultures and try to think that we are the wrong ones" he implored of his audience. Most offensive, it seems are 'lawyers' who "change facts". "They tell you they are dealing with cold facts. They will never tell you that these cold facts have warm bodies". If President Zuma was at the public hearings, he would have noticed the many 'warm bodies' testifying to the abuses of some unaccountable traditional leaders. Given the consistent disdain with which parliament has treated community members, the President's outrageous attempt to undermine the legitimacy of such evidence, is unfortunately not unexpected. Such double speak and disregard for the ordinary members of rural communities has been a theme of the Traditional Courts Bill legislative process throughout – both from Parliament and the Department of Justice, and now from the leader of the land. President Zuma's promise, therefore, that the concerns with the Bill are being dealt with by Parliament, rings hollow. That process has proved itself to be so deeply flawed that there is no hope that it can produce a version of the current Bill that could withstand constitutional scrutiny. It is deeply ironic that President Zuma painted the detractors of the Bill as "Africans who become too clever; [who are] most eloquent in criticising their cultural

background". In fact, opposition of the Bill is largely based on the fact that it does not reflect living customary law – and its participatory and accountable essence. In doing so, it fails to incorporate elements of accountability and democracy that could ensure the protection of rights for those who are most vulnerable in traditional communities – including women and children. Instead, just as it entrenches the distorted apartheid conceptions of jurisdictions, boundaries and ethnicities, it entrenches distorted apartheid versions of traditional courts. The President is therefore correct when he asserts that “disputes we are talking about [...] were caused by the colonialists”. It is colonial boundaries and versions of traditional courts that are reflected in the Traditional Courts Bill, as rural communities point out. What he does not say is that these colonial distortions favour chiefs currently in power – and they are thus the ones favouring the entrenchment of these distortions.

## **5. Recommendations**

1. The first step to ensuring constitutional compliance of the Traditional Courts Bill is to seek to establish the living customary law as it is practised on the ground. Any process must start there.
  2. If the Bill purports to address “abuses” occurring in existing traditional courts – notably related to discrimination against women – then these abuses must be understood. The entirely formal and ineffective provision made in the rejected Bill illustrates a shallow understanding of the issues.
  3. Both previous steps require a process of broad consultation with people who live and experience customary law and traditional leadership on a daily basis. These are the people best placed to comment on how traditional dispute resolution forums should be regulated.
  4. Scrap the Traditional Leadership and Governance Framework Act that entrenches the illegitimate boundaries that lock rural communities into cultures and identities that they often do not prescribe to. Ensure that traditional institutions are required to be accountable and transparent to traditional community members, rather than relying on jurisdictions and authority derived from apartheid.
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