

Traditional Courts in South Africa

A stumbling block on the road towards a modern constitutional state?

The controversial Traditional Courts Bill (TBC), which was taken off the parliamentary schedule in 2008 on the grounds that it was unconstitutional, has reappeared unchanged on the political agenda. Critics claim that the reappearance of the Bill is not a coincidence but a strategic move by President Jacob Zuma and his allies to secure political support, particularly amongst traditional leaders, for his re-election as presidential candidate at the ANC's elective conference in December 2012.

The political influence of traditional leaders is not to be underestimated in a country where currently around 40 per cent of the population fall under their rule.¹ Despite having lost much of their influence during the years of colonization and apartheid, traditional leaders of the region have maintained parts of their authoritarian power in the democratic South African state. The 1996 Constitution, praised as one of the most modern constitutions in the world, acknowledges the status and role of traditional leadership and recognises the establishment of traditional courts as well as the application of customary law.²

A heated debate has been sparked by, *inter alia*, the authoritarian character of traditional leadership and gender inequality as to whether traditional courts should keep their powers in the democratic South African state. In 2008, the Traditional Courts Bill

was introduced to Parliament with the aim of aligning these courts with the Constitution as well as with regular justice institutions.³ However, for many stakeholders the provisions of the Bill did not go far enough with regards to the contradictions of traditional courts with constitutional principles, and therefore the Bill was rejected in its entirety.⁴ In December 2011, a new draft of the Bill was handed in which does not contain any substantial changes compared to the 2008 version.⁵ As a consequence, the controversy about traditional courts continues. While some argue that that they constitute the best suited way to promote justice in communities which traditionally have been ruled according to customary law, others claim that the values promoted by these courts and their procedures inherently conflict with democracy and the South African Constitution.

Characteristics of Traditional Courts

Even though courts and customs vary from region to region and at times even from clan to clan, traditional systems of justice administration display certain common characteristics which distinguish them from regular courts. The final judgment, for in-

¹ Kessel, I. van & Oomen, B. (1997). 'One Chief, one vote': The Revival of Traditional Authorities in Post-Apartheid South Africa. *African Affairs*, 96, 561-585; p561.

² Republic of South Africa. (1996). *Constitution of the Republic of South Africa*; Ch12(1).

³ Republic of South Africa. Committee on Security and Constitutional Development. (2008/2011). *Traditional Courts Bill*; Preamble.

⁴ Clappaert, S. (2012, May 28). South Africa's 'Traditional Courts Bill' Impairs Rights of 12 Million Rural Women [Online exclusive]. *Inter Press Service*. Retrieved 25.06.2012 from <http://www.ipsnews.net/2012/05/south-africas-traditional-courts-bill-impairs-rights-of-12-million-rural-women/>

⁵ Swart, H. (2012, Feb 17). Traditional Courts Bill out of Step [Online exclusive]. *Mail & Guardian*. Retrieved 25.05.2012 from <http://mg.co.za/article/2012-02-17-traditional-courts-bill-out-of-step/>

Konrad-Adenauer-Stiftung e.V.
South Africa

TOBIAS REINAUER

June 2012

<http://www.kas.de/suedafrika/>

stance, rests exclusively with the head of the community – be it that of a clan, a tribe, or a whole nation – who also holds executive and legislative power. Further, it is often stated that African courts primarily aim at maintaining peace within the community by means of reconciliation as opposed to retribution in regular courts.⁶ Court settings are moreover often held in an informal manner in which participants assess cases with less focus on due procedure as in regular courts.⁷ Normally, every adult member of the community who wishes to make a contribution to a hearing is entitled to take part in the cross-examination of the accused and witnesses.⁸ However, in many communities this is not the case since women often still have minor rights in court proceedings as compared to men.

Traditional ways of conflict resolution

A major strength of African traditional courts which is often pointed to is their strong communitarian character. Pathekile Holomisa, traditional leader and chair of the parliamentary joint constitutional review committee as well as advocate at the South African High Court, concludes that traditional courts are “courts where the search for truth, reconciliation, compensation, and retribution are the main goals” and that “this is in contrast to the procedural justice, retribution, incarceration, and revenge that are the hallmarks of the inherited European system of justice administration.”⁹ Every adult member of the community is allowed to participate in the cross-examination of witnesses and since individuals of rural neighbourhoods, villages, or districts usually know each other, the truth-finding process is facilitated significantly.¹⁰ Proponents of traditional courts argue that their participatory character in addition to the fact that chiefs generally uphold values which have traditionally sustained the communities con-

tribute to a wide acknowledgment of the courts’ powers by the people. Among the mostly rural subjects of traditional leadership, the customs performed and the norms promoted afford the courts a degree of legitimacy which regular courts often lack¹¹.

It is often reproached that traditional courts or traditional leadership in general centralise power in a single authoritative figure, which conflicts with the principles of representation and division of powers of modern democracies. Those leaders who singularly hold the power to judge according to their interpretation of the facts of a case are said to be at risk of failing to remain accountable to the needs of the community. Proponents of Traditional Courts do not dispute the fact that chiefs do hold a substantial amount of power that surpasses the capacities of any single official in regular courts, but claim that they are however by no means entitled to act freely as they wish. When judging cases, it is custom for traditional leaders to always take into account the advice of a number of personal councillors.¹² Besides, supporters of the TCB argue that the proposed Bill equips parties to a traditional court with the right to appeal or to request a review of a judgment in an extensive number of instances.¹³ If this is the case, a magistrate court can assess the matter and, where necessary, nullify judgments of traditional courts.¹⁴ In cases of severe deviations from what is expected of a traditional leader, the 2003 Traditional Leadership and Governance Framework Amendment Act also provides for their removal from office.¹⁵

Another advantage of traditional courts is their high degree of accessibility. As stated before, African courts are commonly held in an informal and relaxed manner. Contrarily, procedures in regular courts in general are very formal and strictly adhered to.¹⁶ As such they can be alienating and create a rigid and intimidating atmosphere for those

⁶ Holomisa, P. (2011). Balancing Law and Tradition – The TCB and its Relation to African systems of Justice Administration. *Crime Quarterly*, 35, 17-22; p18.

⁷ Ibid

⁸ Ibid

⁹ Ibid *supra* note 3; p18.

¹⁰ Ibid

¹¹ Ibid *supra* note 3; p19.

¹² Ibid *supra* note 3; p21.

¹³ Ibid *supra* note 6; Ch12.

¹⁴ Ibid

¹⁵ Republic of South Africa. (2003). *Traditional Leadership and Governance Framework Amendment Act*; Ch10 & 12.

¹⁶ Ibid *supra* note 3; p19.

Konrad-Adenauer-Stiftung e.V.

South Africa

TOBIAS REINAUER

June 2012

<http://www.kas.de/suedafrika/>

who are not used to them.¹⁷ Also, the costs involved in traditional court settings are considerably lower than in regular courts. This is due to a variety of reasons: Firstly, trials are usually held outside and thus do not need any particular premises; secondly, courts are typically situated in immediate proximity to where the breach of law occurred; and thirdly, there are less court officials involved as in regular courts. Holomisa further argues that in African systems, justice is not "for sale" since there are no legal representatives involved.¹⁸ In regular courts, he argues, those who can afford better lawyers also usually have greater chances of winning cases.¹⁹ A last point which contributes to better accessibility of traditional courts is that they are held in local languages. Contrarily, the language used in proceedings of regular South African courts can present a barrier for some. While traditional courts can be held in any of the eleven constitutionally recognised languages, officials in regular courts are only allowed to speak in English or Afrikaans.²⁰ Despite the fact that plaintiff, defendant, and witnesses who are unable to speak one of these languages are assigned a translator, this might contribute to an alienating atmosphere unsuited to court proceedings.

Unequal treatment of Women in Traditional Courts

Traditional systems of justice administration have often been criticised for their lack of a fair trial according to the standards of regular courts since neither plaintiff nor defendant is allowed to be represented by legal practitioners. Both drafts of the TCB codify a custom according to which "no party to any proceedings before a traditional court may be represented by a legal representative."²¹ If implemented, this would stand in direct contrast to the Constitution, accord-

ing to which "every accused person has a right to a fair trial, which includes the right (...) to choose, and be represented by, a legal practitioner."²² Not being able to have a legal representative's assistance in court is problematic since it puts the applicant or the accused at risk of suffering from unequal chances to decide a case for him/herself. Especially in rural areas individuals of the poorer strata of society might well not have sufficient access to and knowledge of sources of customary law and thus might have to face unfair disadvantages in court towards the better informed.

A further point of criticism lies in the fact that women suffer a high risk of unequal treatment in the proceedings of traditional courts. This violates the principle of equality and non-sexism as stated in the first chapter of the Constitution.²³ Although, if put into effect, the TCB under section 9(3)(b) would allow men to represent women as well as women to represent men, this seeming equality would be undermined by the very same section which further reads that this should be done "in accordance with customary law and custom."²⁴ Inequality is consequently failed to be blocked as in many instances it is still considered customary to prevent women from participating in traditional courts. For instance, in several areas widows during their mourning phase as well as menstruating women are not allowed to attend court proceedings.²⁵ Further obstacles for the enforcement of women's rights are limitations in review for judgments of traditional leaders. Even though the TCB under section 9(2) theoretically grants full and equal participation for both genders and so abolishes the previously existing requirement for women to be represented by a male member of her family, often times this would not necessarily lead to women having equal rights.²⁶ The problem is that the proposed Bill only provides possibilities for review in cases where tradi-

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid

²⁰ Vos, Pierre de. (2008, April 30). All Languages Equal but English (and Afrikaans?) more equal? Message posted to Constitutionally Speaking blog: <http://constitutionallyspeaking.co.za/all-languages-equal-but-english-and-afrikaans-more-equal/>

²¹ Ibid *supra* note 6; Ch9(3)(a).

²² Ibid *supra* note 2; Ch2(35)(3)(f).

²³ Ibid *supra* note 2; Ch1(1)(b).

²⁴ Ibid *supra* note 6; 9(3)(f).

²⁵ Ibid *supra* note 7.

²⁶ Weeks, S. M. (2011). The Traditional Courts Bill – Controversy around Process, Substance, and Implications. *Crime Quarterly*, 35, 3-10; p8.

Konrad-Adenauer-Stiftung e.V.
South Africa

TOBIAS REINAUER

June 2012

<http://www.kas.de/suedafrika/>

tional courts lacked jurisdiction, were biased, acted with malice, or acted with "gross irregularities" regarding the proceedings.²⁷ It thus leaves it largely up to the senior traditional leader to enforce women's rights and their participation in court. In case a traditional leader failed to appropriately adapt customs to the provisions of the TCB, it would therefore be up to women themselves to claim their rights. Considering the esteem traditional leaders enjoy and the still predominantly subordinate position of women in rural communities, this can present a difficult task. Also, the limited knowledge people often have of sources of law poses a problem for the enforcement of women's rights and thus render possibilities of review and appeal practically ineffective.

Another aspect that puts women at disadvantage is their exclusion from hereditary positions of leadership.²⁸ Some argue that the distribution of power according to bloodlines, besides being sexist, also conflicts with democracy in general as leaders ought to be chosen by their subjects and not by heritage.²⁹ On top of this, the system of hereditary power in South Africa suffers from a set of particular problems which have evolved over the course of history.

Legitimacy of Traditional Courts

When in 1951 the National Government introduced the Black Authorities Act (BAA) to restructure local administration, new territorial boundaries were established with the aim of creating ethnically homogenous, largely self-ruled territories for the various African peoples.³⁰ The more compliant a chief of such an area was towards the wishes of the Apartheid Government, the more support he received.³¹ This led the institution of traditional leadership to become entirely reliant on the Department of Native Affairs such that chiefs ultimately were no longer accountable to their subjects.³² They had literally become "civil servants, to be

hired, fired, paid and, if necessary, created by government."³³

A further disadvantage of traditional leadership is, as previously stated, that the different chiefdoms are still divided according to boundaries which have been established back in 1951 by the BAA.³⁴ Under this act more than four million people have been forcibly removed by the Apartheid regime in order to create ethnic homogeneity within these territories.³⁵ Many consequently have not had a choice which system of traditional leadership to fall under and therefore have become subjects to authoritarian leaders who they possibly do not perceive as theirs and who do not promote the traditional customs of their homeland. This is also often an issue for migrating people. The system of traditional leadership presupposes that populations are static such that leaders promote customary law in areas in which people have traditionally lived according to these laws. However, South Africa's current population is highly mobile. To give an example, a 2006 report by Statistics South Africa indicated that between 1996 and 2001 the black population constituted the greatest population stream, with nearly 4 million people migrating from a district, province, or country to another.³⁶ This poses vast problems in terms of the legitimacy of the promotion of customary law.

Traditional Courts need to be aligned to democratic principles

There remains much controversy about the preservation and future of traditional courts in South Africa. Even though to give a complete list of the advantages and disadvantages of traditional courts would go beyond the scope of this article, some of the key issues have been illustrated. On one hand, it has been argued that aspects of tradi-

²⁷ Ibid *supra* note 6; Ch14(1)(a-d).

²⁸ Ibid *supra* note 3; p18.

²⁹ Ibid *supra* note 1; p572.

³⁰ Ibid *supra* note 1; p564.

³¹ Ibid

³² Ibid

³³ Ibid

³⁴ South African Press Association. (2012, May 24). DA opposes Traditional Court Bill [Online exclusive]. *Mail & Guardian*. Retrieved 25.06.2012 from <http://mg.co.za/article/2012-05-24-da-opposes-traditional-courts-bill/>

³⁵ Ibid

³⁶ Kok, P. & Garenne, M. (2006). Migration and Urbanisation in South Africa. *Statistics South Africa*; p.7.

Konrad-Adenauer-Stiftung e.V.

South Africa

TOBIAS REINAUER

June 2012

<http://www.kas.de/suedafrika/>

tional courts, such as the lack of a fair trial, the unequal treatment of women, the hereditary distribution of power, or the imposition of boundaries created in 1951 inherently clash with democratic principles, the South African Constitution, and even the purpose of customary law itself. On the other hand, there exist a number of valid arguments as to why traditional courts are particularly well suited for people that have for a long time lived under customary law, such as the court's communitarian character and easy accessibility.

What can be said with certainty is that leadership of traditional authorities still plays an integral part in South Africa. The fact that about 17 million South Africans still live under the rule of traditional authorities accentuates its great relevance for big parts of the population which has been acknowledged in the Constitution.³⁷ However, it is also commonly accepted that traditional courts need to undergo some change in order to make them compatible with the principles of a modern democracy.³⁸ The reappearance of the Traditional Courts Bill without any significant changes in Parliament just a few months after it has been declared unconstitutional does not help to enter into a meaningful discussion about the role and future of Traditional Courts in South Africa. On the contrary it raises legitimate questions about the political agenda of the TCB lobbyists. An informed discussion amongst all the various stakeholders in South Africa is needed on how Traditional Courts can become better aligned to the democratic principles of a modern constitutional state.

³⁷ Ibid *supra* note 1.

³⁸ Holomisa, P. (2011). Balancing Law and Tradition – The TCB and its Relation to African systems of Justice Administration. *Crime Quarterly*, 35, 17-22. / Weeks, S. M. (2011). The Traditional Courts Bill – Controversy around Process, Substance, and Implications. *Crime Quarterly*, 35, 3-10.