

Public participation in the Traditional Courts Bill legislative process [working title]¹

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1. INTRODUCTION

The Traditional Courts Bill (TCB) was introduced in 2008, and again in 2012, to provide post-apartheid recognition and regulation for traditional forums of dispute resolution. Under apartheid these forums were governed by the Black Administration Act 38 of 1927 (BAA). This statute provided government officials with the power to group people into ‘tribes’ and appoint chiefs as leaders in a separate system of governance for the black majority. Those parts of the BAA dealing with so-called ‘tribal courts’ have not yet been repealed. The TCB would thus serve to replace this illegitimate regulatory framework while at the same time incorporating constitutional values such as equality and accountability, and facilitating access to justice for the rural poor.² To this end, the Bill sought to provide ‘traditional courts’, presided over by senior traditional leaders, with the jurisdiction to adjudicate certain civil and criminal matters and impose sanctions on people within specific geographical areas.

Despite its admirable stated objectives, the TCB met with fierce opposition from ordinary people, civil society and academia while it was before Parliament. Opponents bemoaned *inter alia* the Bill’s continuation of separate governance for black people, lack of protections for women, enforcement of unaccountable and undemocratic powers for chiefs, and failure to use living customary law as a regulatory starting point for supposedly customary courts. The TCB was criticised for instead perpetuating, and in some cases intensifying, colonial and apartheid distortions of customary law. Some argued that the bill failed to reflect people’s experiences of customary law meaningfully or to respond to the needs and vulnerabilities that arise from the diverse contexts in which customary law is practiced around the country. Many also criticised the procedures used to draft the TCB and pointed to deficiencies in the consultation process once the Bill entered Parliament. This was closely linked to arguments that the bill’s content was disconnected from living customary law. Living customary law has been framed by the Constitutional Court as customary law which is responsive to change and reflects the ways that people practice custom.³ Many of the critiques of the TCB consultation

¹ Kindly note that this paper is still in draft form and should not be cited or used for any purposes without the authors’ permission. Where relevant, references are given in full in the footnotes to ease the future insertion of cross-references. However, some references remain incomplete or use inconsistent referencing styles.

² See, for example, the Preamble to Traditional Courts Bill [B 1–2012].

³ Living customary law is contrasted to ‘official’ customary law found in textbooks and statutes. See for example *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) at paras 87, 110–111 and 154–155.

process rest on the idea that uneven consultation demonstrates whose interests the state privileges in the development of legislation. Only those voices that are heard are able to influence the direction, principles and content of legislation. This piece examines the process of public participation surrounding the TCB – exploring the Constitutional requirements for consultation and the extent to which the TCB process met them.

Firstly we examine the spirit in which consultation is captured in the Constitution and some of the motivations for this inclusion in the context of South Africa's political history. This examination focuses on the political significance of public participation in the legislative process and highlights relationships of power that necessitate the opening of spaces for different voices to be heard.

Next we reflect on the South African Law Reform Commission's (SALRC) studies of customary law and how the SALRC developed and conducted consultation on 'traditional courts and the judicial function of traditional leaders'.⁴ This forms a basis for considering how consultation around customary law has been imagined in the past and which steps have been taken to encourage diversity in contributions and engagement from different sectors of society. The SALRC's relatively inclusive process is used as a benchmark for examining the thoroughness of the TCB process and the steps that were and could have been taken to consult on custom, while also acknowledging that the Commission's process itself was neither all-encompassing nor faultless.

Thirdly, we describe briefly the development of the TCB from its introduction in the National Assembly in 2008, through its withdrawal from Parliament in 2011 and its reintroduction in the National Council of Provinces (NCOP) in 2012. This paper follows the TCB until it lapsed in Parliament in 2014.

Lastly we analyse the Constitution's inclusion of public participation focusing on its significance in the legislative process. This section draws on the Constitution and on Court decisions to examine the jurisprudential principles that necessitate consultation and underpin the imagining of transformative democracy. This analysis draws on first-hand accounts of the process to evaluate how the different experiences and observations of people compare to the principles of participation and inclusivity put forward in South Africa's legal framework.

Submissions to Parliament repeatedly juxtaposed conditions in the former homelands, where the TCB would have effect, with expectations of conditions today.⁵ This thread in the submissions highlights the value that many place on living in a democratic dispensation with a Constitution and Bill of Rights that they can draw on to demand rights, freedoms and protections previously denied to black South Africans. The dominant sentiment across sectors was that customary law and

⁴ South African Law Reform Commission. 'Report on Traditional Courts and the judicial function of traditional leaders'. Project 90. 2003.

⁵ Thipe, T. 'Voices in the Legislative Process: A report on the public submissions on the Traditional Courts Bill (2008 and 2012)'. *Issues in Law and Society*. 2013.

constitutional rights need to work together to shape experiences of justice in traditional courts, rather than being framed as oppositional. Many people living under customary law shared challenges that they currently experience in traditional courts and described the many levels at which the TCB would have worsened these challenges and taken away existing forums for more democratic and responsive processes of justice.

This piece seeks to illustrate how privileging the voices of traditional leaders at the expense of other people who live in rural areas resulted in a bill that did not reflect or protect the needs or interests of the majority. By exploring the legal, political and social motivations behind consultation, this piece identifies the many levels at which the failure to facilitate effective public participation regarding the TCB was damaging to the people who would have been most affected by it, and more broadly to the fibre of democracy. The consultation with traditional leaders to the exclusion of ordinary community members in the development of the TCB resulted in legislation that grossly skewed relationships in favour of traditional leaders at the expense of the people that they are supposed to serve. When the TCB was reintroduced to Parliament in 2012 without changes from its 2008 form, submissions again reflected that people who would be affected by the TCB were not adequately informed or consulted before it was presented to Parliament. The continuing failure to meaningfully consult with people over the lifespan of the TCB points to Parliament's deep inadequacies in its engagement with the public, and, related to this, to the development of legislation that is more damaging than constructive to the people it is designed to serve.

2. SPIRIT OF THE CONSTITUTION

The South African Constitution⁶ was born in a moment of political opportunity, uncertainty and hope as the country sought to break from the violence, oppression and inequality of colonial and apartheid rule through the reimagining of the national political order. In the spirit of breaking from a past of exclusion and suppression, the Constitution requires that Parliament ensure public participation in the legislative process. The Constitutional Court has further required that such participation be 'meaningful'.⁷

Central to the state's assertion of power under colonialism and apartheid was the epistemic violence that denied and devalued vernacular knowledge to inflict inauthentic and inorganic systems, structures, values and identities on African people. Such violence is evident in official representations of customary law, through which custom was manipulated to support colonial supremacy that allowed the state greater control over African people.⁸ Because of the pervasiveness of colonial framing of custom, even institutions that oppose these past political regimes are epistemologically affected by them through reliance on 'official' accounts of custom.

⁶ Constitution of the Republic of South Africa Act 108 of 1996.

⁷ *Doctors for Life International* at paras 129, 131, 145, 171 and 235.

⁸ Mamdani, Mahmood. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Chapter II: Decentralized Despotism. Princeton, NJ: Princeton UP, 1996.

Rather than rely on this damaging misrepresentation of custom, the constitutional requirement for consultation forces legislators to use knowledge produced by the people who practice and are served by customary law. The exclusion and silencing of different, affected groups in the development of legislation robs it of the rootedness and nuance that comes from broad contribution.

The requirement for consultation encourages an understanding of how different systems, structures and relationships exist on the ground and how change would impact the ways that people experience these institutions. Consultation therefore allows for changes in knowledge architecture, fundamentally altering past genealogies of power to reflect vernacular values and knowledge, and in so doing prioritising the needs of people living under custom rather than those of external and elite actors. Consultation forms the first step in addressing the historic distortions that simultaneously erased and recreated custom by silencing people who lived according to customary law in its defining and legislating, and imposing a different legal framework on them.

Central to the recognition of people's knowledge through consultation is the space that these processes open for the restoration and protection of people's dignity through the validation of practices on the ground and the acknowledgement of people's ownership of and expertise in vernacular governance. Solange Rosa quotes Sandra Liebenberg explaining the significance of public participation in relation to human dignity:

A major factor contributing to a sense of powerlessness and lack of autonomy is the absence of the opportunity to voice our concerns in relation to decisions which have a major impact on our lives. Meaningful participation in decisions that affect our lives affirms the close relationship between freedom and human dignity ... It not only gives people a sense of control over their lives, but it affirms their equal worth as members of a political society ... Participation in public and private processes of decision-making is not only an affirmation of individual dignity and freedom, but gives substance to a participatory and deliberative concept of democracy. This is the best reading of the value of accountable, responsive and open democracy in the Constitution.⁹

Engaging with people on their experience of custom unlocks the potential to develop and support expressions of custom that affirm dignity in the use of justice systems and that allow for substantive alignment with the Constitution. Aninka Claassens explains:

For law to be legitimate in the long term it needs to be brought into line with the realities of most people's everyday lives, or to some extent resonate with values espoused by the relevant population,

⁹ Solange Rosa. 'Transformative Constitutionalism in a Democratic Developmental State'.

rather than imposing categories and procedures that are irrelevant and inaccessible to all but a tiny elite.¹⁰

Law that does not reflect the realities of the people it serves cannot be expected to protect their interests and adequately provide justice. The failure to listen to historically marginalised people, especially those from vulnerable population groups, in the legislative process largely results in the perpetuation of power inequalities that limit the realisation of rights. Failures in consultation also result in static legislation that is deaf to the dynamism of vernacular systems, structures and institutions which evolve in relation to changes in the communities in which they exist. In contrast, listening to diverse views and experiences on the ground promotes sensitivity to context and positionality allowing greater insight into vernacular realities and promoting values of accountability, responsiveness and openness that are central to the spirit of Constitution.¹¹ Justice Ngcobo explained:

The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it acts as a counterweight to secret lobbying and influence-peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.¹²

Public participation is both practical and symbolic in the conceptualisation of South Africa's democracy. An examination of the material impacts of public participation demonstrates that the Constitution's emphasis on consultation is not a rhetorical device or only relevant to representation, but serves as a tool for substantively influencing policy to give it life and legitimacy in the eyes of the people it serves.

Responses to the TCB in the 2008 and 2012 public submissions to Parliament reflect the ways in which the failure to listen to experiences of customary law significantly compromised the bill's content, making it out of touch with the realities of the

¹⁰ Aninka Claassens. 'Entrenching distortion and closing down spaces for change: Contestations over land and custom in South Africa'. Roskilde University. 2012: 36.

¹¹ See the founding values of the Constitution at s 1(d).

¹² *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) – hereafter 'DFL' – at para [115]; *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC) – hereafter 'Matatiele' – at para [59]. See also *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) – hereafter 'Merafong' – at paras [26] and [44].

people it was intended to serve. As is discussed later in this piece, these inputs show how, by relying on state-sponsored histories constructed under colonialism and apartheid and amplifying the voices of traditional leaders at the expense of the majority of people who live under customary law, the TCB's consultation process undermined the institutions and values that govern customary law and the rights of people who live under custom.

3. SOUTH AFRICAN LAW REFORM COMMISSION

The Commission believes that the most effective way of securing the legitimacy of its recommendations is to ensure the widest possible consultation with the people likely to be affected by new laws, and to this end the Commission views the polling of opinions across the country as an important component of its working methods.¹³

Between 1999 and 2003 the South African Law Reform Commission (SALRC) undertook Project 90 to identify the reforms necessary to support and enhance customary courts and to ensure that they function in line with the Constitution. In 2003, following discussions, submissions and workshops around the country, the Commission submitted a report and a draft bill to the Minister of Justice with recommendations on governance and administration under customary law and the relationship between customary and civil courts.

This examination focuses on the SALRC's consultation process: in particular, the forums used to solicit public participation, efforts to hear different perspectives, and how these different voices influenced both the SALRC's public participation procedure and its ultimate recommendations.

The Commission's Project Committee brought together experts on customary law from different disciplinary backgrounds.¹⁴ The Project Committee worked with a variety of institutions and organisations to host consultation workshops with stakeholders, including traditional leaders, academic and other experts on customary law and, significantly, different groups governed by customary law. Reflecting on these workshops, the Commission noted:

[A]lthough the purpose was essentially information-collection on the part of the Commission, the workshops would also afford communities (through their representatives) the opportunity to address the issue of customary law... the workshops were intended to enable people at grassroots level to feel that they 'own' the process from its early stages.¹⁵

¹³ South African Law Reform Commission: Project 90, Customary Law of Succession. Report. 2004: 7.

¹⁴ These experts included Professor Maithufi, Professor Bennett, Judge Mokgoro, Ms Baqwa, Professor Dlamini, Professor Himonga, Professor Mqoke, Ms Mbatha, Mr Mawila, Professor Rugege and Ms Mashao.

¹⁵ South African Law Reform Commission. 'Customary Law of Succession Report'. Project 90. 2004: 7.

By emphasising the significance of people feeling that they 'own' legislation, the Commission underlined the value of recognising knowledge and organic expertise and the space this sharing of knowledge creates to translate realities on the ground into legislation that is meaningful to people's lives.

On 9 September 1999, the Centre for Indigenous Law at the University of South Africa, the Congress of Traditional Leaders of South Africa (CONTRALESA), and the SALRC organised an academic workshop, 'Customary Courts', in Pretoria with experts from around the country. This was preceded by workshops held in June and July 1999 in the Eastern Cape, Free State, Kwazulu-Natal, Mpumalanga, North West and Limpopo. The Commission reported:

[T]hese workshops were well attended with most stakeholders represented. In particular, traditional leaders of all ranks (chiefs, headmen and sub-headmen), magistrates, prosecutors, representatives of the regional offices of the Department of Justice, academics and ordinary people under the leadership of traditional leaders... In some provinces, representatives of provincial houses of traditional leaders, women's groups and local council members also attended.¹⁶

In addition to the provincial workshops, the Project Committee held meetings between November 2002 and October 2003 and conducted household surveys 'in about twelve sections in the townships' to diversify inputs on customary practices in these townships.¹⁷ This recognition of diversity in expressions of customary law by the SALRC and its efforts to be sensitive to difference in methodologies suggests a move against essentialising custom and towards engaging with complexity.

The SALRC briefed the Joint Monitoring Committee on Improvement of Quality of Life and Status of Women four times between 2001 and 2003 on the progress in consultation.¹⁸ In the initial stages of the consultation process, the Centre for Applied Legal Studies (CALs) at the University of the Witwatersrand and the SALRC hosted an 'expert meeting' to discuss the Commission's recommendations and to ensure that the necessary measures were taken to make the reform of customary law inclusive. One of the primary criticisms of the Commission's workshops came from women's organisations, which argued that the SALRC's first discussion document failed to address the problems that rural women face in customary courts. In response to these criticisms, the Commission for Gender Equality, CALs and the National Land Committee jointly convened a series of consultations with women's groups to understand their views on traditional courts. Workshops with women were held in September 1999, in KwaZulu-Natal, Limpopo, Eastern Cape and the North West, often with local NGOs in attendance. The workshops focused on

¹⁶ Report on traditional courts and the judicial function of traditional leaders. *South African Law Reform Commission*. Project 90. 2003: 1.

¹⁷ *Ibid.*

¹⁸ On 29 August 2001, 18 October 2002, 4 April 2003 and 18 November 2003. Report on traditional courts and the judicial function of traditional leaders. *South African Law Reform Commission*. Project 90. 2003.

rural women and field workers active in rural development who could provide a perspective different to that advanced by traditional leaders. These meetings were the basis for a joint submission by the three organisations. The Commission's 2003 final report refers to women's concerns raised in the joint submission and how it attempted to address them.¹⁹

Public inputs on the drafting of the TCB revealed that in contrast to the Commission's deliberations, only traditional leaders were consulted by the government department responsible for drafting the bill.²⁰ Because of this exclusion of the majority of people who live under customary law, it can be understood that no attempt was made by government to consult with rural women as a specific interest group. This shows that the TCB drafting consultation process failed both to consider reservations raised during the Law Commission's consultation and to learn from the Commission's responses to these criticisms. This omission also raises questions about the meaningfulness of this consultation process when a group that makes up the majority in South Africa's rural areas²¹ was not engaged in a way that promoted access and free participation.

The SALRC's consultation process was in stark contrast to the TCB process, in which traditional leaders were the primary group consulted in the drafting of the bill.²² In their 2008 submission to the Portfolio Committee on Justice and Constitutional Development, the National Assembly committee responsible for the TCB, Professors Thandabantu Nhlapo²³ and Tom Bennett²⁴ from the University of Cape Town, raised concerns about the TCB process, linked specifically to the SALRC's prior process. Nhlapo and Bennett argued:

As people who worked directly on producing the original draft bill on Traditional Courts that was attached to the Report of the Law Commission, we are aware that the present Bill bears little resemblance to that original draft. The problem with this is that no parliamentary hearing process could match the Law Commission consultation process that was undertaken in 1999 for depth of debate or width of geographical coverage. On principle, it seems wrong to ignore almost totally the results of such national buy-in in favour of a

¹⁹ *Ibid.*

²⁰ Law Race and Gender Research Unit, submission to the National Council of Provinces. 2012; Women's Legal Centre, submission to the National Council of Provinces. 2012; South African Human Rights Commission, submission to the National Council of Provinces. 2012.

²¹ 'Gender Statistics in South Africa, 2011'. Statistics South Africa. 2011.

www.statssa.go.za/publications/Report-03-10-052011.pdf.

²² See Memorandum on the Objects of the Traditional Courts Bill, 2008' in Traditional Courts Bill [B 15–2008] at para 3 and 'Memorandum on the Objects of the Traditional Courts Bill, 2012' in Traditional Courts Bill [B 1–2012] at para 4.

²³ Professor Nhlapo was the Project Leader of the Customary Law project and the chairperson of the Project Committee during the development of the original draft bill. He also led the national consultation process both with traditional leaders and later with women's groups.

²⁴ Professor Bennett was a member of the Project Committee and author of the Discussion Paper and the final Report.

totally new product, moreover one which is passed through Parliament at a pace which does not offer an opportunity for ordinary people to contribute... We submit that Parliament should see its way clear to extending the deadline for submissions, and to seek a way to solicit a wide range of views on the Bill, especially those of the rural people whose lives are lived under customary law. The current process appears to be rushed, and the consultation perfunctory, and if this perception persists any final Act that results will be robbed of much of its legitimacy.²⁵

Nhlapo and Bennett contrast the complexity and multiplicity of options for the organisation of traditional courts to suit different environments developed by the SALRC with the reductionism and lack of nuance reflected in the TCB. Nhlapo and Bennett draw attention to the TCB's lack of sensitivity to context and diversity and, like many other submissions, link the TCB's crude representations of customary law to the poor consultation process surrounding its development.

One of the significant differences between the SALRC's recommendations and the TCB was that the Commission's recommendations allowed for 'opting out' of traditional courts in favour of magistrates' courts, whereas the TCB forced people within prescribed 'tribal' boundaries to use traditional courts exclusively.²⁶ The SALRC noted that because of the 'controversy surrounding the issue of the independence and impartiality of customary courts' it was 'safer to leave the door open for objecting to the jurisdiction of the customary court and opting out in favour of magistrates' or other courts, particularly in criminal proceedings'.²⁷ Denying the right to opt out of traditional courts was one of the primary criticisms of the TCB, which illustrated its significant departure from the SALRC's recommendations. The TCB ignored what public submissions described as a common practice of using different courts for different types of protection in different situations. Many women's organisations objected to the provision against opting out, arguing that it was common practice for women to use magistrates' courts in matters such as child maintenance and domestic violence, which state legislation covers comprehensively.

While the Commission's draft bill may not have been perfect, its recommendations were significantly more nuanced and responsive to difference and diversity than the TCB. These outcomes are reflective of the Commission's more inclusive consultation, which was broader in representation and more rigorous in factoring feedback from affected people into the development of the draft bill. Significantly, this process engaged with positionality, recognising the role that identity, localised history, and social, geographic and political locations play in influencing personal interests and experiences of customary law.

²⁵ Thandabantu Nhlapo and Professor Tom Bennett. Submission to Parliament on the TCB. 2008.

²⁶ Sindiso Mnisi Weeks. 'Beyond the Traditional Courts Bill: Regulating customary courts in line with living customary law and the Constitution'. *South African Crime Quarterly*. 2011: 36.

²⁷ *Ibid.*

4. DEVELOPMENT OF THE TCB IN PARLIAMENT

Much of the criticism surrounding the TCB started at the point of its introduction to the public. An explanatory summary of the bill was published in the Government Gazette on 27 March 2008, after which it was introduced in the National Assembly.²⁸ The Portfolio Committee on Justice and Constitutional Development called for written submissions on 21 April with 6 May as the deadline. There were three public holidays and two weekends in this 16-day period. Fewer than 20 submissions were received – most of them opposed to the TCB and several calling vainly for an extension of the comment period.

Many submissions said that only traditional leaders were actively engaged during the bill's development. This criticism was at the heart of much of the opposition to the bill, both substantively in terms of the ways it sought to bolster traditional leaders' power and would have increased the vulnerability of people living under its jurisdiction, and procedurally in terms of the right to democratic participation.²⁹ This position was supported by the Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women in Parliament, which noted that '[t]he Bill has been drafted in consultation with traditional leaders but opinions and feelings of rural communities ha[ve] not been captured anywhere'.³⁰

Hearings on 13, 14 and 20 May 2008 started with the Department of Justice and Constitutional Development (DOJ) giving an overview of the bill, saying it was necessary to fill the legal gap that would be left by the constitutionally-mandated repeal of the BAA.³¹ This Act authorised chiefs to hear and adjudicate certain claims and disputes in 'tribal' courts according to customary law.³² Only organisations representing traditional leaders supported the bill in its entirety. COSATU, the South African Council of Churches, the Commission for Gender Equality, civil society organisations including those representing rural women and various rural communities opposed the TCB. A dominant criticism at the hearings, and in most submissions, was of the poor consultation. It was argued that this was reflected in the bill's content, which is out of touch with realities and needs in current practices of customary law.

The Portfolio Committee accepted in May that it would miss the June 2008 deadline for repeal of the BAA's tribal court provisions³³ and resolved on 17 June 2008 to

²⁸ Department of Justice and Constitutional Development, 'Publication of Explanatory Summary of the Traditional Courts Bill, 2008' in GN 392 GG 30902 of 27 March 2008.

²⁹ Law Race and Gender Research Unit. Submission to Parliament. 2008.

³⁰ Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women. Parliament of South Africa. Submission on the TCB. 2008

³¹ 'Traditional Courts Bill B15-2008: Public Hearings'. <http://www.pmg.org.za/report/20080514-traditional-courts-bill-b15-2008-public-hearings>. *Parliamentary Monitoring Group*.

³² At ss 12 and 20 of Act 38 of 1927.

³³ In terms of s 1(3) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005, which at that time stated that ss 12 and 20 of the BAA would be repealed either on 30 June 2008 or when a new national law regulating customary courts was implemented – whichever was first in time.

keep the BAA in force until the end of 2009. The provisions were extended again every year³⁴ until Parliament voted in 2012 to keep them indefinitely.³⁵

The TCB was withdrawn from the National Assembly in June 2011. On 13 December 2011, as the holiday season began, the DOJ unexpectedly announced in a Government Gazette notice that the TCB would be reintroduced in the NCOP in January³⁶ and set a deadline of 15 February 2012 for comments.

The DOJ briefed the NCOP's Select Committee on Security and Constitutional Development (Select Committee) on the bill on 7 March 2012 and went on to brief individual provincial legislatures ahead of public hearings which were held in all nine provinces in the month leading up to 18 May.

Several written submissions from areas where the bill would have the most direct effect said the only information about it had come from civil society groups.³⁷ The submissions also detailed the significant personal expense that many undertook to attend hearings in centres far from where they lived. Many said traditional leaders, but not ordinary residents, were transported to the hearings at state expense. This exacerbated the sting of later insinuations by a Member of Parliament that people were brought to national hearings in September 2012 as rural puppets of civil society groups.³⁸

The North West, Gauteng, Eastern Cape and Western Cape delegations rejected the bill in the negotiating mandates submitted to the Select Committee after their provincial hearings.³⁹ KwaZulu-Natal, Limpopo, the Free State and the Northern Cape proposed a series of contradictory amendments. Mpumalanga asked for a three month extension to prepare its mandate. Some of these provinces said later in statements to the committee that they would have voted against the bill if they had known this was an option.

³⁴ See various amendments to Act 28 of 2005.

³⁵ Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act 20 of 2012. According to this Act, only the implementation of a national law to regulate customary courts (such as the TCB) can trigger the repeal of the relevant provisions in the BAA.

³⁶ Department of Justice and Constitutional Development, 'Publication of Explanatory Summary of the Traditional Courts Bill, 2012 in Terms of Rule 186 of the Rules of the National Council of Provinces' in GN 901 GG 34850 of 13 December 2011.

³⁷ Thuto Thipe. 'Voices in the legislative process: A report on the public submissions on the Traditional Courts Bill (2008 and 2012)'. *Issues in Law and Society*. 2013.

³⁸ See an audio recording of the hearing on 18 September 2012 titled 'SC Security: Public Hearings on the Traditional Courts Bill' by Parliamentary Monitoring Group, available at <http://www.pmg.org.za/node/34022> [accessed 6 June 2014]. This was noted with concern by another Member of Parliament at the next hearing day on 19 September 2012 – see audio recording by Parliamentary Monitoring Group 'SC Security: Public Hearings on Traditional Courts Bill', available at <http://www.pmg.org.za/node/34061> [accessed 6 June 2014].

³⁹ Meeting of the Select Committee on Security and Constitutional Development on 30 May 2012, see: 'Traditional Courts Bill [B1-2012]: briefings by UCT and deliberations on process' by PMG, available at <http://www.pmg.org.za/report/20120530-traditional-courts-bill-briefings-uct-and-deliberations-process> [accessed 19 August 2014].

The schedule below details the hearings held in different provinces during April and May 2012.

PROVINCE	DATE	VENUE
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
Free State	14 May	Tshiya Education Resources Centre, QwaQwa
	16 May	Elksa Church, Oppermansgronde
	17 May	Refentse Primary School, Thaba Nchu
Gauteng	9 May	Rhatabiseng Community Hall, Bronkhorstspuit
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, L.A. Complex
Limpopo	16 May	Porche-Villa Hotel and Conference Centre, Thulamela Local Municipality, Vhembe District
	16 May	Tzaneen Country Lodge, Mopani District
	18 May	Fetakgomo Civic Hall, Sekhukhune District
	18 May	Bolivia Lodge, Polokwane
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
North West	16 May	Ratshidi Hall, Mafikeng
	16 May	Potchefstroom Banquet Hall
	18 May	Tlhabane Hall, Rustenburg
	18 May	Batlhaping Tribal Hall, Taung
Northern Cape	17 May	Gasegonyane Town Hall, Gasegonyane Local Municipality, John Taolo Gaetsewe District
Western Cape	24 April	The Chamber, 6 th Floor, Provincial Legislature Building, 7 Wale Street, Cape Town
	25 April	The Chamber, 6 th Floor, Provincial Legislature Building, 7 Wale Street, Cape Town

The Select Committee resolved at this point to hold another round of hearings rather than debate the provincial mandates on the bill. A 31 May 2012 letter to the Chair of the NCOP by the Legal Resources Centre pointed out that this was a procedural anomaly and urged that the Committee consider the negotiating mandates

submitted by the provinces as it was supposed to do.⁴⁰ This did not happen. Instead, a new call for written submissions was made by the Committee⁴¹ and national public hearings were held from 18 to 21 September 2012 in Cape Town.⁴² At least 24 oral submissions were made to the Select Committee during this period, mostly by people based in rural areas. Of this number, approximately 20 spoke in opposition to the TCB. Unusually, the DOJ was also permitted to make a 'submission' on the bill, rather than merely brief the Select Committee at the onset of the hearings.⁴³ This 'submission' included responses to arguments raised in other submissions and proposals for a regulatory framework that departed substantially from the content of the bill under consideration in the hearings – the same bill that the Department itself originally tabled in Parliament.⁴⁴ It seems that the Department's 'submission' was a dubious attempt to introduce a new government policy position via a public submissions process in the hope that its position would eventually trump the views of the public.

When the committee met on 24 October 2012 to table its report on the hearings, the DOJ presented a document that summarised only two submissions – those of the South African Human Rights Commission and the Department of Women, Children and People with Disabilities.⁴⁵ One member of the Committee argued that any account of the public hearings that did not represent the overwhelming opposition to the TCB would not be accurate and could not qualify as a summary of the process.⁴⁶ The Committee Chairperson said that the majority of submissions had been excluded because they were 'irrelevant'. This position disregarded important experiential and contextual contributions by members of the public who could not

⁴⁰ Correspondence by Legal Resources Centre to the Honourable Chair of the National Council of Provinces (31 May 2012), available at http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/LRC_Letter_NCOP_31May2012.pdf [accessed 9 June 2014].

⁴¹ Centre for Law and Society 'Select Committee calls for more submissions and hearings on TCB' (27 August 2012), available at <http://www.cls.uct.ac.za/news/archives/?id=53&t=int> [accessed 9 July 2014].

⁴² Centre for Law and Society 'TCB public hearings postponed by one week' (4 September 2012), available at <http://www.lrg.uct.ac.za/news/archives/?id=56&t=int> [accessed 9 July 2014]. See also Parliamentary Monitoring Group 'Traditional Courts Bill (B1–2012)', Bill Tracker available at <http://bills.pmg.org.za/bill/161/> [accessed 9 July 2014].

⁴³ In contrast, PMG 'Overview of Fourth Parliament' noted at 9 that some parliamentary committees have been adamant that government departments not express opinions on bills after they have entered the parliamentary process.

⁴⁴ Department of Justice and Constitutional Development 'A submission of the Department of Justice and Constitutional Development to the Select Committee on Security and Constitutional Development on the Traditional Courts Bill' (12 September 2012), available via Parliamentary Monitoring Group at <http://db3sqepoi5n3s.cloudfront.net/files/docs/120912scsecuritydevelopment.pdf> [accessed 9 July 2014].

⁴⁵ 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

⁴⁶ 'Traditional Courts Bill: Department responses to public hearings' on 24 October 2012 by PMG <http://www.pmg.org.za/report/20121024-presentation-department-justice-and-constitutional-development-dojcd> [accessed 19 August 2014].

reasonably be expected to make reference to provisions in the bill as legal experts would.

The Chairperson of the Select Committee said that the DOJ drafted the summary on his instruction. The dual role played by the DOJ as both a stakeholder with its own responses and 'submission' and as gatekeeper of submissions deemed 'relevant' was problematic. It is questionable whether the Department should have occupied either of these roles after the responsibility for drafting the TCB had been transferred from the Department to Parliament by the official tabling of the bill in the NCOP.⁴⁷ Apparently realising its mistake, the Committee adopted a new report in its final TCB meeting of the year on 27 November 2012 – rewritten to incorporate all of the submissions made at the national hearings.

There was no further communication from the Committee on the status of the bill for almost a year after the report was adopted and no indication of what lay ahead for people living in the former homelands who would be most directly affected by it. Then suddenly the Select Committee announced a meeting for 15 October 2013 on the dormant TCB. The Committee resolved again at that meeting not to hold debates on mandates submitted by the provinces in favour of yet more public consultation in the provinces – purportedly to allow provinces more time to resolve 'ambiguities' regarding the proposals in their negotiating mandates.⁴⁸ Some civil society organisations speculated that members of the Committee were being swayed by political concerns that a majority of provinces might reject the bill.⁴⁹ It emerged later that the Committee had considered advice received from a parliamentary legal office in August 2013, which assessed *inter alia* whether the bill should have been withdrawn as some committee members had suggested or whether there should have been further consultation as the Minister of Justice and Constitutional Development⁵⁰ had suggested.

⁴⁷ PMG 'Overview of Fourth Parliament' mentions similar concerns at 23 about Parliament's reliance on government departments for drafting and advice.

⁴⁸ Parliamentary Monitoring Group 'Traditional Courts Bill: referral to the provinces for further deliberations' (Meeting Report, 15 October 2013); available at <http://www.pmg.org.za/report/20131015-traditional-courts-bill-referral-provinces-for-further-deliberations-criminal-law-forensic-procedures-amendment> [accessed 9 July 2014].

⁴⁹ See Centre for Law and Society 'Victory for rural people as most provinces oppose TCB, yet Parliament wants more "consultation"' (Media Release, 15 October 2013), available at <http://www.customcontested.co.za/victory-rural-people-provinces-oppose-tcb-yet-parliament-wants-consultation/> [accessed 9 July 2014]; and Alliance for Rural Democracy 'NCOP again ignores rural voices on Traditional Courts Bill: A case of "we'll consult until we change your minds"?' (Media Release, 21 November 2013), available at <http://www.customcontested.co.za/ncop-ignores-rural-voices-traditional-courts-bill-case-well-consult-change-minds/> [accessed 20 June 2014].

⁵⁰ Alliance for Rural Democracy and Tshintsha Amakhaya 'NCOP succumbs to pressure from the Executive not to withdraw the TCB' (Media Release, 22 October 2013); available at <http://www.customcontested.co.za/ncop-succumbs-pressure-executive-withdraw-tcb/> [accessed 3 July 2014].

By October 2013 the Minister's suggestions had prevailed and further rounds of hearings were held by the Free State and North West provincial legislatures.⁵¹ The Free State retained its negotiating mandate in favour of the bill, while North West converted its negotiating mandate from rejection to support for the TCB.⁵²

By February 2014, when the Select Committee was scheduled to finally consider provincial negotiating mandates on the bill, four provinces opposed it, four provinces supported the bill with amendments and one province abstained from voting.⁵³ It became clear at a meeting on 12 February that no province would accept the bill without extensive changes and that suggested amendments were contradictory.⁵⁴ One week later a parliamentary law advisor confirmed that wide-ranging amendments would be necessary to correct defects in the bill.⁵⁵

With only a short period before the rising of Parliament ahead of national elections, and an apparent impasse on the way forward, the TCB was removed from the parliamentary schedule on the technical pretext that it had not been properly revived since the previous year, as required in terms of procedure.⁵⁶ The Alliance for Rural Democracy contended that this was to prevent the humiliation of rejection after so many years in the legislature. In any event, the bill was set to lapse by the end of March 2014, the end of the parliamentary term.

⁵¹ See Alliance for Rural Democracy 'NCOP again ignores rural voices on Traditional Courts Bill: A case of "we'll consult until we change your minds"?' (Media Release, 21 November 2013), available at <http://www.customcontested.co.za/ncop-ignores-rural-voices-traditional-courts-bill-case-well-consult-change-minds/> [accessed 20 June 2014]; and Alliance for Rural Democracy 'Third round of hearings on the TCB fails to change minds' (Media Release, 22 November 2013), available at <http://www.customcontested.co.za/third-round-hearings-tcb-fails-change-minds/> [accessed 9 July 2014]. On 8 November 2013, the Chairperson of the North West Provincial Legislature Portfolio Committee on Local Government and Traditional Affairs invited the Bafokeng Land Buyers' Association to four simultaneous public hearings to be held in different districts on 21 November 2013.

⁵² Note that both provinces supported the bill provided that certain amendments would be taken into consideration. See details of negotiating mandates in 'The Traditional Courts Bill: Summary of the process to date 5 February 2014' prepared by Select Committee Secretary, available at <http://db3sqepoi5n3s.cloudfront.net/files/140204summary.pdf> [accessed 9 July 2014].

⁵³ Parliamentary Monitoring Group 'Traditional Courts Bill: Update on replies from provincial legislatures' (Meeting Report, 4 February 2014), available at <http://www.pmg.org.za/report/20140204-independent-police-investigative-directorate-head-request-minister-police-for-approval-nomination-mr-r-mcbride> [accessed 9 July 2014].

⁵⁴ Parliamentary Monitoring Group 'Traditional Courts Bill [B1-2012]: Consideration of negotiating mandates' (Meeting Report, 12 February), available at <http://www.pmg.org.za/report/20140212-traditional-courts-bill-b1-2012-consideration-negotiating-mandates> [accessed 9 July 2014]; Centre for Law and Society 'NCOP in disarray about TCB' (12 February 2014), available at <http://www.customcontested.co.za/ncop-disarray-tcb/> [accessed 9 July 2014].

⁵⁵ Parliamentary Monitoring Group 'Traditional Courts Bill: Legal responses to provinces' proposals' (Meeting Report, 19 February 2014), available at <http://www.pmg.org.za/report/20140219-traditional-courts-bill-legal-response-provinces-proposals> [accessed 9 July 2014]. See also Centre for Law and Society 'TCB on life support' (19 February 2014), available at <http://www.customcontested.co.za/tcb-life-support/> [accessed 9 July 2014].

⁵⁶ Alliance for Rural Democracy 'Traditional Courts Bill is dead!' (Media Release, 21 February 2014), available at <http://www.customcontested.co.za/traditional-courts-bill-dead/> [accessed 9 July 2014].

Civil society organisations publicly claimed the defeat of the TCB as a victory, but it is yet to be seen whether the bill will be revived in the same or different form in the new post-election Parliament.⁵⁷

The existence of anomalies in the law-making process coupled with particularly fierce opposition to the TCB by members of the public and civil society make the TCB's passage through Parliament an interesting case study for the effectiveness and application of the Constitution's parliamentary public participation requirements. The following sections take a closer look at the Constitutional Court's jurisprudence on public participation in the legislative process in light of the TCB's development thus far.

5. LEGAL REQUIREMENTS FOR CONSULTATION

5.1 Constitutional framework for public participation

The Constitutional provisions for public participation in law-making are incorporated into Parliament's rules, which provide that the public may participate in parliamentary processes by attending meetings, submitting written comments or petitions, or giving oral testimony before Parliament.⁵⁸ For the NCOP the specific powers and requirements which allow the public to participate are located at ss 69, 70(1)(b) and 72 of the Constitution. Section 72(1)(a) explicitly imposes a duty on the NCOP in respect of public participation:

The National Council of Provinces must... facilitate public involvement in the legislative and other processes of the Council and its committees...

Corresponding provisions are located at ss 56, 57(1)(b) and 59 of the Constitution for the National Assembly and ss 115, 116(1)(b) and 118 for the various provincial legislatures.⁵⁹ These provisions allow the legislative bodies to ask for evidence or information, to accept input from stakeholders, and to make procedural rules consistent with principles of transparent and participatory democracy to fulfil their broad mandate to 'facilitate public involvement' and make law-making processes open to the public.

Several initiatives by Parliament attempt to give effect to this mandate by making the parliamentary process more inclusive, accessible and user-friendly. These include multimedia resources such as an animated video titled 'How can I participate in

⁵⁷ As at the time of writing, end August 2014. See PMG 'Overview of Fourth Parliament' at 19; and Thuto Thipe and Mbongiseni Buthelezi. 'Democracy in action: The demise of the Traditional Courts Bill and implications'.

⁵⁸ *DFL* at para [144]; *Matatiele* at para [62]. See Rule 6 of the Joint Rules of Parliament, Rule 5 of the Rules of the National Council of Provinces and, to a lesser extent, Rules 203F and 203M of the Rules of the National Assembly; all available at <http://www.pmg.org.za/rules-parliament-guide-procedure> [accessed 13 May 2013].

⁵⁹ *DFL* at para [136].

Parliament?’ posted to YouTube,⁶⁰ a monthly magazine called ‘InSession’ which provides updates on parliamentary events and achievements,⁶¹ educational publications and fact sheets available through Parliament’s website,⁶² as well as profiles on social media websites Twitter and Facebook.⁶³ A parliamentary task team has been working on an official framework for public participation in Parliament since 2011.⁶⁴ However, other formal participatory mechanisms have already been introduced – for example, mobile Parliamentary Democracy Offices in some remote areas⁶⁵ and the NCOP’s ‘Taking Parliament to the People’ initiative.⁶⁶ Whether these initiatives have been effective is a separate matter.

There is a significant body of literature more broadly examining the Constitutional Court’s framing of meaningful engagement, the role of consultation in transformative democracy, the necessity of consultation in the provision of services by the state, and the ways that the Court has upheld the Constitution’s commitment to public participation in the development of South Africa’s democracy.⁶⁷ This piece focuses on the role of public participation in the legislative process with an in-depth examination of the Court’s interpretations of the Constitutional requirements for consultation in the development of legislation. Focusing on the law-making process allows for a richer and more relevant analysis and evaluation of the TCB’s legislative journey.

5.2 Interpreting the constitutional provisions: *Doctors for Life* sets the standard

In the *Doctors for Life* case, the Constitutional Court discussed at length the legislature’s duty to facilitate public involvement in its law-making processes, including those of parliamentary committees.⁶⁸ This case arose because the NCOP and provincial legislatures had, for the most part, failed to call for written submissions from the public and to hold public hearings before passing certain

⁶⁰ Parliament of the Republic of South Africa ‘How Can I Participate in Parliament?’ (7 December 2012), available to watch at <http://www.youtube.com/watch?v=FvLtVmAsAiY&index=2&list=PLt0wwMdzvHOqM8T72WZwzGkafPtMiD7T> [accessed 10 June 2014]. The video is available in four official languages.

⁶¹ Parliament of the Republic of South Africa ‘InSession’ magazine, archive and current issues available at http://www.parliament.gov.za/live/content.php?Item_ID=3026 [accessed 10 June 2014].

⁶² Parliament of the Republic of South Africa ‘Education Publications’ (various) available at http://www.parliament.gov.za/live/content.php?Category_ID=173 [accessed 10 June 2014].

⁶³ Parliament’s Facebook profile is accessible at <https://www.facebook.com/ParliamentofRSA>, while the Twitter account for Parliament can be found at <https://twitter.com/ParliamentofRSA>.

⁶⁴ PMG ‘Overview of Fourth Parliament’ at 24.

⁶⁵ See information on ‘Parliamentary Democracy Offices’ at http://www.parliament.gov.za/live/content.php?Category_ID=170 [accessed 10 June 2014], as well as PMG ‘Overview of Fourth Parliament’ at 24.

⁶⁶ See information on ‘National Council of Provinces’ at http://www.parliament.gov.za/live/content.php?Category_ID=27 [accessed 10 June 2014], as well as PMG ‘Overview of Fourth Parliament’ at 24.

⁶⁷ Sandra Liebenberg, ‘Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of “meaningful engagement”’. (2012) 1 *AHRLJ* 1-29; Gustav Muller, ‘Conceptualising “meaningful engagement” as a deliberative democratic partnership’.

⁶⁸ *DFL* at para [1].

bills.⁶⁹ The NCOP and provincial legislatures contended that the duty to facilitate public involvement merely required giving the public a chance to make submissions ‘at some point in the national legislative process’.⁷⁰ In this case, such an opportunity had been given in the National Assembly,⁷¹ but was lacking at later stages of the legislative process.⁷² The Court had to determine whether the NCOP and provincial legislatures had failed to honour their constitutional obligation to facilitate public participation.

The Court said that three considerations were necessary for a contextual understanding of the national and provincial legislatures’ constitutional obligation:⁷³ 1) the NCOP’s role in the law-making process, 2) the right to political participation, and 3) the nature of South Africa’s constitutional democracy.⁷⁴ The first of these refers to the role played by the NCOP in protecting provincial interests in the national sphere and in involving provincial legislatures in national law-making debates.⁷⁵ It is for this reason that the provincial legislatures’ duty to facilitate public involvement was also relevant to the litigation – it is these legislatures that provide the NCOP delegates with their voting mandates.⁷⁶

The Court’s second consideration was that public involvement in law-making forms part of the right to political participation, as recognised in international human rights law⁷⁷ and in South Africa’s Constitution.⁷⁸ The Court noted that in most international and regional human rights instruments ‘the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected’.⁷⁹ Some interpretations of the general right recognise not only citizens’ ability to vote, but also to directly contribute to law-making and decision-making processes, particularly where they will be affected by those laws

⁶⁹ *DFL* at paras [2] and [4].

⁷⁰ Emphasis added. *DFL* at para [7].

⁷¹ *DFL* at para [5].

⁷² *DFL* at paras [169], [183] and [191].

⁷³ At para [118] of *DFL*, the Constitutional Court described the concept ‘public involvement’ as ‘the active participation of the public in the decision-making processes’ and noted that it was used interchangeably with the term ‘public participation’.

⁷⁴ *DFL* at para [78].

⁷⁵ Section 42(4) of the Constitution. See also *DFL* at paras [79], [81], [86], [151] and [179]; *Matatiele* at paras [39] and [41]. At para [151] of *DFL*, the Court noted that each legislative body needs to find its mandate afresh and facilitate its own public participation. In other words, public participation conducted at the National Assembly level does not, on its own, sufficiently fulfil the duty of the National Council of Provinces to involve the public in law-making.

⁷⁶ *DFL* at paras [86] – [88]. In *Matatiele* at para [47] it was noted that provincial legislatures have a duty to facilitate public participation when they are involved in national legislative processes at the NCOP via their delegations as well as when they are drafting provincial laws.

⁷⁷ See art 21 of the Universal Declaration of Human Rights and art 25 of the International Covenant on Civil and Political Rights.

⁷⁸ *DFL* at paras [106] – [107]. The right is given effect to in s 19 of the Constitution, supported by s 16, and also in the participatory parliamentary process set out in the Constitution.

⁷⁹ *DFL* at para [90]; *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010) – hereafter ‘*Poverty Alleviation Network*’ – at para [34].

and decisions.⁸⁰ Such interpretations also impose a *duty* on the state to facilitate public involvement in these processes.⁸¹ Thus, the South African Constitution incorporates political rights related to an electoral process at s 19,⁸² but then also introduces state obligations to facilitate ongoing public participation in law-making.⁸³

The Court's third consideration was the participatory nature of South Africa's constitutional democracy. It said that because the founding values of accountability, responsiveness and openness are included in the Constitution, our democracy is not only about *representation* of the people by members of Parliament but also about *participation* by the people themselves in Parliament, and that these two elements of democracy had to balance with one another.⁸⁴ This is in keeping with the preamble of the Constitution, which indicates the need for a 'democratic and open society in which government is based on the will of the people'.⁸⁵ For this reason, it has been said by a Speaker of Parliament that public involvement is about continuous engagement with the public that results in 'concrete action' – not just about soliciting views on a particular law for a particular period.⁸⁶

This feature of our democracy finds its origins in the concept of *people's power* – a concept used during the struggle against apartheid to encapsulate the need to provide South Africa's majority with the voice that they were denied in national law-making and political processes – which saw the rise of community-based groups in opposition to the apartheid system.⁸⁷ Many of these same groups were denied a democratic voice by Parliament's shortcomings in respect of public participation during the Traditional Courts Bill legislative process.⁸⁸

It is in this context that many people objected to the TCB's consultation process. In 2008, Charlotte Mokgosi from the Makgobistad Community Committee in the North West province explained that 'the new bill came as a real surprise to us, as the

⁸⁰ DFL at paras [94], [98], [103] – [104]. See also art 25(a) of the International Covenant on Civil and Political Rights, which recognises a right to 'take part in the conduct of public affairs, *directly* or through freely chosen representatives' (emphasis added).

⁸¹ DFL at para [105].

⁸² See also s 1(d) of the Constitution, which states that '[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government' is a founding value of South Africa.

⁸³ DFL at para [108].

⁸⁴ DFL at paras [111] and [122]. This contextual consideration was confirmed and applied in *Matatiele* at paras [39] – [40] and [56] – [65]; *Merafong* at para [26] and *Poverty Alleviation Network* at para [33].

⁸⁵ DFL at paras [110] – [111]. See also PMG 'Overview of Fourth Parliament' at 26.

⁸⁶ PMG 'Overview of Fourth Parliament' at 25.

⁸⁷ DFL at para [112].

⁸⁸ In DFL at para [174], the Court notes the special need for consultation in respect of issues that affect groups that were previously discriminated against, so as to prevent their repeat marginalisation. Persons living in the former homelands of South Africa, for whom the Traditional Courts Bill will be most applicable would certainly also fall within this category – see a submission on the Bill by the Law, Race and Gender Research Unit; available at http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/lrg_feb2012_ncopsubmission.pdf [accessed 14 May 2013].

Makgobistad community we've never heard about it before'.⁸⁹ This was a common theme in the submissions.

A strong view in the 2012 provincial and national hearings was that the poor advertisement of and limited accessibility to the hearings were deliberate attempts to exclude those who would be affected by the bill and to silence opposition.

Simangele Zungu from KwaZulu-Natal said:

The advert about the Public Hearings in Parliament was on the newspapers a week ago and within a week as rural communities we are expected to have organised ourselves and developed submissions and select members of our communities to represent us at National Parliament in Cape Town[?] How fair is this? All we could see through all of this is that the government is just conducting these hearings for the sake of conducting it and not expecting to listen to our voice as rural communities who will be impacted negatively by this Bill. I must say that we are very disappointed about our government's attitude to issues of critical concern to poor rural women and girls.⁹⁰

This view sees exclusion from public participation as politically motivated and locates it within a broader trend of legislation on customary law that is focused on the interests of traditional leaders rather than the majority of people who live under traditional leadership.⁹¹

The Concerned Residents of Herschel, representing residents from six 'Tribal Authority' areas in the Eastern Cape, explained:

There were no known formal discussions on the Bill in Herschel. 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 kilometres 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

⁸⁹ 'Submission on Traditional Courts Bill' by Charlotte Mokgosi, Makgobistad Community Committee, Makgobistad, North West (13 May 2008); available at http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/comm_submission_makgobistad_2008.pdf [accessed 11 June 2014].

⁹⁰ 'Submission on the Traditional Courts Bill of 2012' by Simangele Zungu, KwaZulu-Natal (2012); on file with the authors.

⁹¹ Aninka Claassens. 'What's wrong with the Traditional Courts Bill'. Mail and Guardian, 2 June 2008. <http://mg.co.za/article/2008-06-02-whats-wrong-with-the-traditional-courts-bill>; Pearlie Joubert. 'Back to the dark day'. Mail and Guardian, 16 May 2008. <http://mg.co.za/article/2008-05-16-back-to-the-dark-day>; Business Day Editorial. 'Two steps back'. Business Day, 06 August 2012. <http://www.bdlive.co.za/articles/2008/05/27/two-stepsback;jsessionid=272B7657E28AB80499D38299A6A0A72Dpresent1.bdfm>; Sindiso Mnisi. 'Terror in the name of tradition'. Mail and Guardian, 26 February 2010. <http://mg.co.za/article/2010-02-25-terror-in-the-name-of-tradition>.

TCB process. If there were any discussion[s] that took place about the TCB, Traditional Leaders kept to themselves. The Concerned Residents of Herschel heard about the hearing from an unofficial source... 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.⁹²

The Concerned Residents of Herschel illustrate that even when the TCB was reintroduced in 2012, after widespread protest about the poor consultation in 2008, the government continued to shape consultation in ways that excluded people who would be affected by the bill.

5.3 Content of Parliament's duty

With the three considerations enumerated above in mind, the Constitutional Court in *Doctor's for Life* examined the content of parliament's duty to facilitate public involvement in the Constitution. In the Court's judgment, the phrase 'facilitate public involvement' is interpreted to mean that Parliament must '[take] steps to ensure that the public participate in the legislative process'.⁹³ However, the Constitution does not specify what steps Parliament should take, instead giving it the discretion to develop its own mechanisms.⁹⁴ The Constitutional Court's duty is then to assess whether the degree of participation decided upon by the legislative body in each case has been sufficient to comply with ss 59, 72 and 118 of the Constitution.⁹⁵

The Constitutional Court held that the standard to be used in making this determination is *reasonableness* judged on the following factors: the nature, importance and potential impact of the legislation; temporal and budgetary constraints on Parliament; Parliament's own assessment of appropriate public involvement in a certain context; and whether Parliament has adopted any rules or policies to facilitate public participation.⁹⁶ In this way, the pragmatic difficulty

⁹² 'Submission on the Traditional Courts Bill (TCB)' by Concerned Residents of Herschel, Eastern Cape (2012); available at http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/herschel_apr2012_provsubmission.pdf [accessed 11 June 2014].

⁹³ *DFL* at paras [119] – [120]; reiterated in *Poverty Alleviation Network* at para [35]. This denotation accords with both a broader interpretation of the right to public participation and the explicitly participatory nature of constitutional democracy in South Africa (*DFL* at para [121]).

⁹⁴ *DFL* at paras [123] and [145]; *Matatiele* at para [67]; *Merafong* at para [27]; *Poverty Alleviation Network* at para [35]; *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others* 2011 (11) BCLR 1158 (CC) – hereafter '*Moutse*' – at para [49]. See also ss 57(1), 70(1) and 116(1) of the Constitution.

⁹⁵ *DFL* at paras [124] – [125] and [199] – [200].

⁹⁶ *DFL* at para [128] and [146]; confirmed in *Matatiele* at paras [67] – [68]; *Merafong* at para [27] and *Poverty Alleviation Network* at para [36]. As discussed earlier, Parliament has indeed adopted general rules and introduced initiatives for the involvement of the public in its processes. Note though that the Constitutional Court warns at para [52] of *Matatiele* that this is not exhaustive of the duty to facilitate public involvement.

associated with Parliament's mandate is acknowledged and respect is given to its original law-making power.⁹⁷

Judicial deference to Parliament's legislative powers in the context of public participation was discussed by the *Doctors for Life* majority judgment, per Justice Ngcobo:

... the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable.⁹⁸

The Court went on to say that the judiciary must establish whether Parliament fulfilled its duty based on whether 'the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process'.⁹⁹ This formulation of the reasonableness enquiry has two further components: whether *meaningful* opportunities had been provided and whether measures were put in place so that people could actually *use* the opportunities that Parliament created.¹⁰⁰

Interestingly, the Court considered whether the NCOP can forego calling separate public hearings by piggybacking on public hearings held by the provincial legislatures. It was decided that this *was* possible if provincial interests emerging from local hearings were actually taken account of in the NCOP.¹⁰¹ In the case of the TCB, the NCOP could not claim to be piggybacking on provincial hearings because it failed to consider the provincial negotiating mandates when they were submitted in May 2012. This arguably forced the NCOP to have its own national public hearings in September before proceeding with debates on the bill.

⁹⁷ At paras [139] – [140] of *DFL*, Justice Ngcobo for the majority confirms an observation made in *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006 (1) SA 474 (SCA) that the public participation provision in the Constitution merely 'sets a base standard' and that Parliament has the prerogative to decide for itself how best to facilitate public involvement. In *Poverty Alleviation Network* at para [35], the Constitutional Court noted further: 'Striking a balance between the need to respect parliamentary autonomy on the one hand, and the right of the public to participate in the legislative process on the other, is crucial.'

⁹⁸ *DFL* at para [146].

⁹⁹ *DFL* at para [129]. At para [171] the Court adds that '[i]nterested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions'. This suggests that parliamentarians should enter the legislative process with clear minds, capable of persuasion based on input from the public.

¹⁰⁰ *DFL* at para [129]; re-iterated in *Matatiele* at para [54] and *Moutse* at para [49].

¹⁰¹ *DFL* at paras [159] – [164]. In the *DFL* case this was interpreted to require that all provincial legislatures actually held public hearings and that the NCOP had access to records of those hearings.

In *Doctors for Life*, the two statutes under consideration were declared unconstitutional and Parliament was given the opportunity to re-enact them with proper public participation.¹⁰²

5.4 Building on *Doctors for Life*

A trio of cases (*Matatiele*, *Merafong* and *Moutse*) concerning the duty of provincial legislatures to facilitate public involvement followed on the *Doctors for Life* case. All three cases dealt *inter alia* with the steps taken by provincial legislatures to foster public participation in the process of legislative amendments to the Constitution and other laws which were to alter the boundaries of some provinces.

5.4.1 *Matatiele confirms the reasonableness standard*

In *Matatiele Municipality and Others v President of the Republic of South Africa and Others*,¹⁰³ a majority of the Constitutional Court confirmed and applied the principles set out in *Doctors for Life* to the conduct of the KwaZulu-Natal and Eastern Cape provincial legislatures in dealing with legislation to alter the boundary between those two provinces. In addition, the Court noted that where legislation is likely to have more of an effect on a 'discrete' group of people, they could more reasonably expect to be heard by legislative bodies.¹⁰⁴

The Eastern Cape legislature had conducted public hearings in several areas and had accepted written submissions,¹⁰⁵ while the KwaZulu-Natal legislature invited no submissions in any form from the public despite having regarded public hearings as necessary due to the potential impact of the legislation.¹⁰⁶ Accordingly, it was held that only the Eastern Cape had acted reasonably in trying to fulfil its duty to facilitate public involvement.¹⁰⁷ Those parts of the legislation that required specific approval by KwaZulu-Natal were declared unconstitutional and invalid, pending Parliament's adoption of a new law to change the boundary.¹⁰⁸

Parliament's renewed attempt to alter the boundary between these two provinces was subsequently also challenged in the Constitutional Court.¹⁰⁹ In the 2010 *Poverty Alleviation Network* case, it was argued in the alternative that the National

¹⁰² *DFL* at paras [198] – [214]. A similar declaration and remedy was deemed appropriate in *Matatiele* – see paras [88] – [99], [109] and [114] of that judgment.

¹⁰³ 2007 (1) BCLR 47 (CC). Interestingly, judgment for *Matatiele* was delivered on the day following the *Doctors for Life* judgment – although Justice Yacoob notes at para [124] of *Matatiele* that the two judgments were 'considered by the Court side by side'.

¹⁰⁴ *Matatiele* at para [68].

¹⁰⁵ *Matatiele* at paras [70] – [72].

¹⁰⁶ *Matatiele* at paras [74] – [83]. In assessing the reasonableness of KwaZulu-Natal's conduct at paras [80] – [81], the Court pointed out that fundamental rights to citizenship and freedom of movement were at stake for those affected by the proposed boundary change.

¹⁰⁷ *Matatiele* at para [73].

¹⁰⁸ *Matatiele* at para [114]; *Poverty Alleviation Network* at para [15].

¹⁰⁹ In the case of *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* 2010 (6) BCLR 520 (CC).

Assembly, the NCOP and the KwaZulu-Natal Provincial Legislature had failed to facilitate public participation on the new boundary laws.¹¹⁰ Applicants complained *inter alia* that they had not been given a ‘meaningful opportunity to be heard’ separately and exclusively as a ‘discrete’ group in oral submission form.¹¹¹

Unlike in *Matatiele*, the KwaZulu-Natal Legislature, as well as the National Assembly and the NCOP, did provide some opportunities for the public to submit views on the new boundaries.¹¹² The relevant Portfolio Committees in the National Assembly deemed oral submissions unnecessary, but accepted and discussed written submissions.¹¹³ The KwaZulu-Natal Legislature held four public hearings and specifically invited the applicants to attend.¹¹⁴

The Court held that while ‘discrete’ groups could reasonably expect to be heard during law-making processes, as per *Matatiele*, this did not mean that they had to be the only group consulted ‘to the exclusion of all others’.¹¹⁵ In relation to the TCB this meant that even if, for example, traditional leaders were considered to be a ‘discrete’ group likely to be more affected by its application, they could by no means be consulted to the exclusion of others. That is precisely what occurred during the drafting stages of the TCB.

Although the National Assembly did not have oral hearings, its Portfolio Committee considered full written submissions made by the Poverty Alleviation Network applicants and others.¹¹⁶ Applicants’ complaints in this regard were therefore also dismissed by the Court.

5.4.2 Merafong considers meaningful participation

*Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*¹¹⁷ was decided in the Constitutional Court two years after *Doctors for Life* and *Matatiele*. This case extended the enquiry to ask whether, notwithstanding the reasonable opportunity to be heard, participation by the public had been *meaningful*.¹¹⁸ The Gauteng legislature had, like the Eastern Cape in *Matatiele*, conducted a public hearing and accepted written submissions from several different stakeholders.¹¹⁹ However, after having absorbed these views into its negotiating mandate before the NCOP, Gauteng adopted a final mandate which was in direct

¹¹⁰ *Poverty Alleviation Network* at para [4].

¹¹¹ *Poverty Alleviation Network* at paras [17] and [50]. The applicants argued that the *Matatiele* residents’ views were watered down by others’ presence at the public hearings – see para [50].

¹¹² *Poverty Alleviation Network* at para [38].

¹¹³ *Poverty Alleviation Network* at paras [41] – [42].

¹¹⁴ *Poverty Alleviation Network* at paras [43] – [45]. At para [46], the Court notes that the applicants were further invited to present their views directly to the relevant Portfolio Committee in the Provincial Legislature, which they did in both oral and written form.

¹¹⁵ *Poverty Alleviation Network* at para [53].

¹¹⁶ *Poverty Alleviation Network* at paras [57] – [58].

¹¹⁷ 2008 (5) SA 171 (CC).

¹¹⁸ *Merafong* at paras [43] and [45].

¹¹⁹ *Merafong* at paras [31] – [33] and [42].

opposition to both its own negotiating mandate and the views of the public.¹²⁰ The Merafong Demarcation Forum and other applicants in the case argued that this adoption suggested that Gauteng's final vote was a 'done deal' no matter what emerged from the public engagement and that the legislature should have consulted the public prior to changing its vote.¹²¹

The Court dismissed this argument, saying that the Gauteng legislature was clearly intent on considering and incorporating the views of the public and in fact did so.¹²² By its nature, a provincial legislature's *negotiating* mandate could always change during negotiation with other provinces in the NCOP.¹²³ What emerges as a final mandate is the product of public views, political party policies, discussion in the provincial legislature and negotiation at the NCOP.¹²⁴ The Court noted:

... being involved does not mean that one's views must necessarily prevail. ... [but this] is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind.¹²⁵

Thus, while interested persons have a right to be afforded a reasonable opportunity to be heard and to have their views taken into consideration by the legislature, there is no right to have their suggestions adhered to. Furthermore, while it would have been politically sound for the Gauteng legislature to report back to the public once it was clear that its final mandate would depart from public opinion,¹²⁶ there was no legal duty on it to do so – particularly in light of the fact that it was not legally bound by what had emerged from public consultation.¹²⁷

Similar issues arose in the *Poverty Alleviation Network* case in 2010. In that case the National Assembly had accepted only written submissions, while the KwaZulu-Natal Legislature held four public hearings in respect of new boundary laws.¹²⁸ The last of these hearings attracted about 3000 members of the public and opposition to the new boundary laws was apparently universal.¹²⁹ Despite this, KwaZulu-Natal voted in favour of the laws and the public was given the impression that the province was acting on orders from national government.¹³⁰

¹²⁰ *Merafong* at paras [34] – [39].

¹²¹ *Merafong* at paras [43] – [47]. Similarly, the contention was made by applicants in the *Poverty Alleviation Network* case that 'the impugned legislation was a product of a politically dictated, pre-determined decision' – see para [18].

¹²² *Merafong* at paras [49] and [52] – [53].

¹²³ *Merafong* at para [49].

¹²⁴ *Merafong* at paras [49] – [50].

¹²⁵ *Merafong* at paras [50] – [51].

¹²⁶ *Merafong* at paras [54] – [60].

¹²⁷ *Merafong* at paras [54] – [60].

¹²⁸ *Poverty Alleviation Network* at paras [41] – [44].

¹²⁹ *Poverty Alleviation Network* at para [48].

¹³⁰ *Poverty Alleviation Network* at para [49].

This caused applicants in the case to argue that their representations were never actually considered by the relevant legislative bodies and that participation had been a façade for constitutional compliance.¹³¹

The Constitutional Court dismissed the argument and confirmed the assertion in *Merafong* that openness to all views is required to make public participation meaningful, but that Parliament was not bound by those views.¹³²

5.4.3 Implications of Merafong for Traditional Courts Bill process

Unlike in *Doctors for Life* and *Matatiele*, public participation in all provincial legislatures and the NCOP included both written and oral submissions on the version of the TCB tabled in 2012. The issue therefore is whether the public could actually make use of those opportunities and whether, as in *Merafong*, those opportunities were meaningful to the legislative process.

The public's ability to participate in the opportunities provided during the TCB process was hampered by several factors including inadequate notice and a lack of information. These will be considered in more detail later.

The remaining question about the meaningfulness of participation calls to mind the fate of the original negotiating mandates submitted by provinces to the Select Committee in May 2012. Despite obstacles of time and access, members of the public and stakeholders had managed to contribute views on the bill either verbally or in writing to provincial legislatures. It is difficult to assess whether the negotiating mandates purportedly resulting from these views accurately reflected public opinion on the bill throughout each province. Yet, once submitted, these mandates in terms of Parliament's own procedure should have been debated in the Select Committee regardless of their flaws. The fact that they were not debated casts doubt on how meaningful the provincial public participation actually was. At the time, the public were left wondering whether there was any point in submitting views to provincial legislatures when those views were not being conveyed to a drafting forum.

As in *Merafong*, one province changed its mandate during the TCB legislative process. As described earlier, North West initially voted against the bill but changed its mandate after an unusual second round of hearings in the province. Yet, unlike in *Merafong*, the change in North West's opinion did not take place as a result of political discussion and negotiation in the Select Committee to produce a final mandate different to an earlier negotiating mandate. North West reversed the mandate with which it was to enter into negotiation in the first place. In the process North West appeared to disregard the strong dissenting views presented during the first round of provincial hearings in favour of supporting views from the second round of provincial hearings.

¹³¹ *Poverty Alleviation Network* at paras [17] – [18] and [59].

¹³² *Poverty Alleviation Network* at paras [60] – [63].

It is worth noting the Select Committee's reluctance to debate the negotiating mandates when they were first submitted and the unorthodox invitation to repeat public hearing processes in the provinces. The logic behind the Select Committee's decision to invite additional provincial hearings was questioned in a 15 October 2013 meeting by a representative of the Eastern Cape Legislature (as reported in minutes of the meeting):

[The representative] said it would be unfortunate if the Bill had to be taken back to the provinces again... The Eastern Cape had held thorough consultations and public hearings, and the people were saying the Bill was not in the interests of the country... [The representative] held the view that it was a waste of time to refer the Bill back, as he did not see provinces coming to Parliament again with any other mandate.¹³³

Further provincial hearings were permitted nonetheless. In a series of media statements, the Alliance for Rural Democracy questioned whether these procedural manipulations by the Select Committee were politically motivated and underpinned by a rationale of 'we'll consult until we change your minds'.¹³⁴ Only two provinces, the Free State and the North West, opted to have additional hearings. The resulting mandate flip by the North West was sufficient to prevent a 5-province majority voting outright against the bill.

In circumstances such as these where law-makers seem to be motivated in the first instance by political considerations,¹³⁵ and not by genuine expressions of public opinion on a bill, the meaningfulness of particular public participation opportunities, as well as public participation in the law-making process more broadly, is undermined.¹³⁶ It is arguable that if law-makers cannot take account only of public opinion when drafting laws (as per the Court's decision in *Merafong*), then they cannot take account only of political considerations either.

¹³³ Parliamentary Monitoring Group 'Traditional Courts Bill: referral to the provinces for further deliberations' (Meeting Report, 15 October 2013); available at <http://www.pmg.org.za/report/20131015-traditional-courts-bill-referral-provinces-for-further-deliberations-criminal-law-forensic-procedures-amendment> [accessed 6 June 2014].

¹³⁴ Alliance for Rural Democracy 'NCOP again ignores rural voices on Traditional Courts Bill: A case of "we'll consult until we change your minds"?' (Media Release, 21 November 2013); available at <http://www.customcontested.co.za/ncop-ignores-rural-voices-traditional-courts-bill-case-well-consult-change-minds/> [accessed 20 June 2014]. See also Mbongiseni Buthelezi 'The disturbing passage of the Traditional Courts Bill' *The Star* (26 November 2013) and PMG 'Overview of Fourth Parliament' at 9.

¹³⁵ Some parliamentarians have openly admitted that their mandates are obtained from the political parties of which they are elected members, not from the people that they are meant to represent in Parliament – see PMG 'Overview of Fourth Parliament' at 18 and 28. The unfortunate reality that 'the public has no recourse if MPs support narrow party agendas in between election times' is also noted at 18.

¹³⁶ A similar sentiment is expressed in PMG 'Overview of Fourth Parliament' at 26.

5.4.4 Moutse links timing to meaningfulness and leaves report-writing to legislative committees

In the *Moutse Demarcation Forum* case,¹³⁷ applicants argued that despite having provided several opportunities for public comment, the Mpumalanga Provincial Legislature failed to meet its Constitutional duty to facilitate public participation adequately while considering two laws that would change its provincial boundaries.

The Mpumalanga Legislature held four public hearings across three municipalities most directly affected by the boundary change within the month of November 2005.¹³⁸ A committee in the Legislature then considered submissions from the public hearings and compiled a report.¹³⁹ After initially denying the applicants' request for a fifth hearing in another part of Moutse and after protest action by the applicants, the Legislature's committee arranged for an additional hearing to be held in the affected area and incorporated comments from this hearing into a revised version of its report endorsing the laws.¹⁴⁰ This revised report formed the basis for Mpumalanga's vote in favour of the laws in the NCOP.

The Court considered the applicants' argument that people of Moutse should reasonably have been consulted by the Mpumalanga Legislature as a 'discrete group' since they would be directly affected by the proposed laws.¹⁴¹ The Court agreed that there should have been a hearing for all Moutse residents in the first instance because of their geographic proximity to the affected boundary and their historical choice to remain part of Mpumalanga; but the Court also acknowledged that a hearing was eventually granted to them in amends.¹⁴²

Applicants went on to argue that, because of the short notice period and hearing duration, this hearing was inadequate to fulfil the Legislature's public participation duty.¹⁴³ Developing a point already made in *Doctors for Life*, the Court made a connection between meaningful participation and the timing of invites to the public:

Two principles may be deduced.... The first is that the interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken.¹⁴⁴

¹³⁷ *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others* 2011 (11) BCLR 1158 (CC).

¹³⁸ *Moutse* at para [53].

¹³⁹ *Moutse* at para [54].

¹⁴⁰ *Moutse* at paras [54] – [55].

¹⁴¹ *Moutse* at paras [56] – [60]. The Court notes the origin of this argument as para [68] of *Matatiele*.

¹⁴² *Moutse* at paras [59] – [60].

¹⁴³ *Moutse* at para [65].

¹⁴⁴ *Moutse* at para [62].

As will be discussed in the next section, inadequate notice periods not only affect how *meaningful* participation will be, they are also an obstacle to people's ability to make use of participation opportunities in the first place. However, in the *Moutse* case the Constitutional Court dismissed the applicants' arguments about a short notice period because they had already been engaging with the bill long before the public hearing was held and had not raised any complaints when the hearing date was first announced.¹⁴⁵ Arguments about the short duration of the hearing itself were also dismissed by the Court, which pointed out that 'the hearing ended when there were no further representations'.¹⁴⁶

In relation to the TCB, although some civil society groups had been engaging with the bill since it was first introduced in 2008, many stakeholders made it known in their submissions that they only became aware of the bill's reintroduction upon being notified of provincial legislature hearings in April and May 2012. Some stakeholders only became aware of the bill through networks with other civil society organisations. Several complained of short notification periods.¹⁴⁷ There were also accounts of inadequate hearing durations¹⁴⁸ – in one case a hearing was abruptly ended and oral submissions closed after a traditional leader spoke in favour of the bill.¹⁴⁹ By the Constitutional Court's own reasoning, there is thus an argument to be made that these circumstances undermined the meaningfulness of public participation processes on the TCB.

The *Moutse* applicants' final attack was on the revised report tabled by the Mpumalanga Legislature's committee. Again the Court dismissed their argument that the committee should have relayed in full public comments made at all of the hearings – stating that it was within the mandate and decision-making role of the committee to reduce the submissions it had received into a summary report.¹⁵⁰ The Court thus concluded that the Mpumalanga Legislature's facilitation of public participation on the boundary laws had been reasonable and dismissed the applicants' challenge to the legislation.¹⁵¹

What does this last finding mean in relation to the Select Committee's initial acceptance of the DOJ's selective summary of submissions received by the NCOP on the TCB? While the *Moutse* decision suggests that the Committee had the authority

¹⁴⁵ *Moutse* at paras [63] – [65].

¹⁴⁶ *Moutse* at paras [66] – [67].

¹⁴⁷ Thuto Thipe. 'Voices in the Legislative Process: A report on the public submissions to Parliament on the Traditional Courts Bill (2008 and 2012)'. *Issues in Law and Society* Occasional paper of Centre for Law and Society, 2013.

¹⁴⁸ Nolundi Luwaya 'Report on the Provincial Traditional Courts Bill hearings: Exploring rural people's democratic participation and freedom of expression' *Issues in Law and Society*, Issue 2, November 2013.

¹⁴⁹ Pearlie Joubert 'King has final word' *City Press* (28 April 2012), available at <http://www.citypress.co.za/politics/king-has-final-word-20120428/> [accessed 1 July 2014].

¹⁵⁰ *Moutse* at paras [73] – [75]. Interestingly, the Court takes into account the separate powers of legislative branches of government by stating further that 'it is undesirable for this Court to prescribe to the Legislature what a report to it should contain'.

¹⁵¹ *Moutse* at paras [82] and [90].

to decide how submissions should be reported, it is precisely because the DOJ – not the Committee – made the decision to summarise two submissions and ignore others that the initial acceptance of the DOJ summary is so procedurally offensive. It is further questionable whether an analysis of only a small fraction of submissions could ever be a ‘summary’ of public participation proceedings. Reservations about the DOJ ‘summary’ were later affirmed and corrected by the Committee, which then tabled its own more comprehensive summary of the submissions.

Despite the Constitutional Court’s findings in *Moutse* and *Merafong*, it can be argued that while the TCB legislative process provided opportunities for public participation, and some people were able to make use of them, certain circumstances undermined the meaningfulness of the opportunities taken. If the bill is revived and becomes enforceable law in future, this issue may have to be explored further in court. A related issue is whether people were able to make use of participation opportunities in the first place. This is considered in the following section.

5.5 Making use of participation opportunities

As stated earlier, part of the reasonableness enquiry set out in *Doctors for Life* requires consideration of whether, having been given opportunities for public participation by a legislative body, people were actually able to make use of those opportunities. The Constitutional Court has highlighted that public participation opportunities cannot be effective without adequate information, prior notice and access to relevant spaces.¹⁵² The ability of ordinary people to participate in public comment opportunities was severely hampered by the failure of the TCB legislative process to take into account the circumstances of the people who would most directly be affected by the bill. The following section examines these shortcomings in closer detail.

5.5.1 No participation without information

In the *Doctors for Life* case, the Constitutional Court noted the link between the right to political participation and the right to freedom of expression or information, stating that in international law these rights ‘[t]aken together... seek to ensure that citizens have the necessary information and the effective opportunity to exercise the right to political participation’.¹⁵³ In South Africa, the right to participate is similarly supported by the rights to freedom of expression and access to information in ss 16 and 32 of the Constitution.

In elaborating on the legislature’s duty to facilitate public involvement, the Court thus stated:

¹⁵² *DFL* at paras [131], [137] and [170] – [171].

¹⁵³ *DFL* at paras [92] and [106]. The Court notes at para [131] that the African Charter on Human and Peoples’ Rights at art 25 requires member states to provide public education on rights such as the right to political participation.

... public involvement may be seen as ‘a continuum that ranges from providing information and building awareness, to partnering in decision-making’.¹⁵⁴

As examples, the Court said Parliament could facilitate participation through road shows, workshops, media broadcasts and publications aimed at educating the public on issues before Parliament.¹⁵⁵ While access to information is crucial to effective participation,¹⁵⁶ an emphasis on public education campaigns has the potential to sidestep the actual participation that should be facilitated. Perhaps the focus should be less on *teaching* the public about the issues before Parliament, and more on the mutual *sharing* of knowledge between Parliament and the public. Parliamentarians should thus be open to imparting *and* receiving information when engaging with their constituencies. As highlighted in *Merafong*, without Parliament’s genuine willingness to hear and consider the views of the public, the right to participation would be meaningless.

This principle of sharing knowledge and acknowledging the value of and engaging with different knowledge was absent from many of the provincial and national TCB hearings. At all of the provincial hearings, the presentation of the bill’s substantive content consisted of a guided explanation of the bill, either by the legal advisor or a member of the legislature. Only sections of the bill that were identified as important were explained, which in most cases amounted to the reading out or translation of the bill’s clauses or of a translated summary document. Because the presenters guided the focus of the explanation, contentious and heavily criticised provisions only received a cursory mention without being unpacked or discussed. The records of observers who attended the hearings show that the presentation and explanation of the bill was not satisfactory at any of the hearings. The public education sessions that preceded some hearings were used as a poor justification for the inadequate explanation of the bill, and at many hearings presenters from the legislatures argued that hearings were about obtaining people’s views and not about taking them through the bill.¹⁵⁷

At some of the hearings people were instructed to speak to a particular provision in the bill, which was difficult for people who were not familiar with it. Such instructions meant that only those who knew with certainty that their input was directly relevant to the bill, or those speaking to a specific provision, could speak freely. These instructions did not seem to apply to traditional leaders, who were able to speak freely regardless of relevance and specificity.

¹⁵⁴ *DFL* at para [129].

¹⁵⁵ *DFL* at para [132]. See also PMG ‘Overview of Fourth Parliament’ at 25.

¹⁵⁶ The Court in *DFL* mentions at para [221] that the dissemination of information about pending legislation is a basic element of public involvement.

¹⁵⁷ Nolundi Luwaya ‘Report on the Provincial Traditional Courts Bill hearings: Exploring rural people’s democratic participation and freedom of expression’ *Issues in Law and Society*, Issue 2, November 2013 at 5.

This difficulty of speaking to specific provisions was aggravated by the fact that many people had not had an opportunity to study the bill prior to the hearings. In the Free State people requested a workshop on the bill, with an elderly lady in Oppermansgronde noting: ‘we still don’t understand what this thing is for’. In many other provinces, including those that had public education, people attending the hearings often complained that they had not been given adequate time to understand the bill. In addition people tried to make general submissions in which they spoke of how the bill would exacerbate their situations, but their inputs were ruled irrelevant.

Surely these circumstances prevent the genuine exchange of knowledge between parliamentarians and people? A lack of detailed prior information about the TCB would have silenced or rendered irrelevant numerous valuable insights during public hearings that could have enriched later legislative debates on the bill.

5.5.2 No participation without adequate notice

The need for prior information is closely linked to the need for adequate notice. In *Doctors for Life*, the Constitutional Court said short notice of a meeting left insufficient time to properly scrutinise laws before discussion.¹⁵⁸ As alleged in the *Moutse* case, this also detracts from the meaningfulness of the consultation and turns public participation into a charade.¹⁵⁹ The Court acknowledged that there may be times when shortcuts need to be taken, but this urgency would have to be shown in assessing the reasonableness of Parliament’s conduct.¹⁶⁰ Expedited public participation would only be permissible it seems in instances of extreme urgency, as noted by the Court:

[W]hen it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. ... The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.¹⁶¹

At least one province was unhappy with the time allocated by the NCOP Select Committee for provincial participation on the TCB.¹⁶² Mpumalanga failed to submit a negotiating mandate after provincial hearings in 2012 and, in a letter to the Chairperson of the NCOP, requested that debates on the TCB be postponed for further consultation on the bill.¹⁶³ This is perhaps indicative of the legislative body’s

¹⁵⁸ *DFL* at para [170] – [171].

¹⁵⁹ *Moutse* at paras [61] – [62].

¹⁶⁰ *DFL* at para [194].

¹⁶¹ *DFL* at para [194].

¹⁶² In another context the Select Committee noted the difficulty it had with planning its own programme due to constant changes in the general parliamentary programme – see PMG ‘Overview of Fourth Parliament’ at 7. Members of Parliament in NCOP committees seem furthermore to have complained generally of short time periods for briefings and debates on legislation – see PMG ‘Overview of Fourth Parliament’ at 18.

¹⁶³ See correspondence by Acting Speaker: Mpumalanga Provincial Legislature dated 29 May 2012, in bundle of provinces’ negotiating mandates available at

own assessment that participation was being unreasonably rushed, contrary to the Constitutional Court's guidance. Last minute changes to legislative schedules and venues, as occurred during consultation on the TCB, are arguably also not consistent with the duty to facilitate public involvement in the legislative process.

In certain provinces serious objections were raised about the advertisement of hearings on the TCB. In Mpumalanga, monitors at the Provincial Legislature hearings discovered that many people did not know that public hearings were taking place. In Badplaas, Mpumalanga, members of surrounding communities travelled to an advertised venue only to learn after waiting for more than an hour that the venue had been changed to the Mpfuluzi Hall in Mayflower, approximately 40 kilometres away. At this same hearing a representative from the Local House of Traditional Leaders complained that traditional leaders would have attended in numbers if they had been aware of the meeting.¹⁶⁴

In KwaZulu-Natal some members of the public heard about a venue change en route to a hearing in Port Shepstone and were able to alter their travel plans. For others the change was additionally disadvantageous because the hearing was moved from a venue accessible to those from surrounding rural areas to the city centre.

In the Northern Cape participants said that a hearing was advertised at very short notice and the venue was inconvenient, while one traditional leader said that he had heard about the hearing only one day before it was held. One member of the public described finding 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]?¹⁶⁵

<http://www.pmg.org.za/files/doc/2012/120530negotiating.pdf> [accessed 2 July 2014]. See also minutes by Parliamentary Monitoring Group 'Traditional Courts Bill [B1-2012]: briefings by UCT and deliberations on process' (Meeting Report, 30 May 2012); available at <http://www.pmg.org.za/report/20120530-traditional-courts-bill-briefings-uct-and-deliberations-process> [accessed 2 July 2014].

¹⁶⁴ Nolundi Luwaya 'Report on the Provincial Traditional Courts Bill hearings: Exploring rural people's democratic participation and freedom of expression' *Issues in Law and Society*, Issue 2, November 2013 at 15.

¹⁶⁵ Nolundi Luwaya 'Report on the Provincial Traditional Courts Bill hearings: Exploring rural people's democratic participation and freedom of expression' *Issues in Law and Society*, Issue 2, November 2013 at 17. Members of the public seem to complain similarly in public hearings about short notice periods for submitting comments on other bills before Parliament – see PMG 'Overview of Fourth Parliament' at 25.

Complaints about the advertising of TCB public hearings and the choice of venues surfaced repeatedly across the provinces.¹⁶⁶ These issues seem to reflect a broader problem of poor communication by Parliament.¹⁶⁷

5.5.3 No participation without access

Last minute venue changes impede the ability of people to physically access public hearings. Venues that are far away from the people most directly affected by legislation, or that are difficult or expensive to travel to, have the same effect. Parliament has acknowledged the inadequacy of 'infrastructure and space' for public participation processes even within its own buildings.¹⁶⁸

The Bafokeng Land Buyers' Association wrote in a letter of protest to the North West Government in 2012:

It is the intention of the Association and other members of the affected public, to hold a peaceful public demonstration, not only against the passing of the bill by our North West Provincial Legislature, but also against the silent endorsement and 'blackout' by our traditional authorities on such important bills. Due to resource and time constraints, concerned members will not be able to travel 180km to Mahikeng, the seat of the North West Provincial Legislature, to make their submissions, a fault that mainly lies with the Provincial Legislature for failing to provide for adequate public involvement. To our knowledge, no public hearings have been called on the bill in our area to date.¹⁶⁹

In *Doctors for Life*, the Constitutional Court recognised the importance of physical access to meetings of Parliament,¹⁷⁰ where parliamentarians are briefed by government departments and laws are deliberated.¹⁷¹ It is true that public access to parliamentary business contributes to the openness of law-making and is thus a crucial element of participatory democracy. What the Court does not articulate, however, is the role played by political processes occurring on the side-lines of Parliament's official spaces. The political landscape in which legislation will be drafted is often sculpted in passages or at breakfast tables outside of Parliament's meeting venues. These political dynamics are often unrecorded, invisible to the public and only accessible to a portion of civil society organisations or journalists.

¹⁶⁶ Nolundi Luwaya 'Report on the Provincial Traditional Courts Bill hearings: Exploring rural people's democratic participation and freedom of expression' *Issues in Law and Society*, Issue 2, November 2013 at 16.

¹⁶⁷ PMG 'Overview of Fourth Parliament' at 25.

¹⁶⁸ PMG 'Overview of Fourth Parliament' at 5.

¹⁶⁹ Bafokeng Land Buyer's Association. TCB Submission. 2012

¹⁷⁰ In accordance with ss 59, 72 and 118 of the Constitution. These sections generally require legislative buildings and meetings to be open to the public.

¹⁷¹ *DFL* at para [137].

During the NCOP process on the TCB, some civil society organisations suspected that political concerns were delaying the Select Committee's consideration of initial negotiating mandates and caused the unusual authorisation of a second round of provincial hearings. In respect of the latter, the Alliance for Rural Democracy and the Tshintsha Amakhaya platform issued a joint statement asserting that the Select Committee was acting on 'pressure from the Executive not to withdraw the TCB'.¹⁷²

Responses to the TCB consultation process illustrate that physical access to Parliament and its meetings does not guarantee participation as the Court suggests,¹⁷³ because attendance in Cape Town requires time and resources that many South Africans do not have. The proximity of provincial legislatures to their constituencies is important for precisely this reason.¹⁷⁴ If members of the public are unable to attend even provincial law-making forums, they have to rely on media reports for up to date information on legislative processes. They are also then limited to the submission of written proposals – a problem for those who are illiterate or uneducated.

Several written submissions on the TCB showed that participation did not depend only on an ability to physically reach hearings, but also on an ability to speak freely in the hearings. In this broader context, access, and political dynamics that shape access, include power relations that determine the ability to communicate realities freely. Women's voices in particular were suppressed at many public hearings.¹⁷⁵ The presence of traditional leaders in some provincial hearings had a clear impact on the atmosphere and how people framed their inputs.¹⁷⁶ At hearings across the country people were warned to think about how they spoke in the presence of traditional leaders and how they referred to them. This was particularly pertinent in the Eastern Cape and Mpumalanga. In KwaZulu-Natal the special treatment of traditional leaders was characterised by displays of great deference, including proceedings being stopped to introduce traditional leaders who arrived late and special thanks for their attendance.

Traditional leaders' participation varied from province to province and from hearing to hearing. Much of their participation took the form of closing remarks and rebuttals to what people had said, as was the case in Mthatha, Eastern Cape. In making his closing remarks at this hearing, a traditional leader said he supported the bill, adding that what he supported, all his people also supported.¹⁷⁷ He warned that

¹⁷² Alliance for Rural Democracy and Tshintsha Amakhaya 'NCOP succumbs to pressure from the Executive not to withdraw the TCB' (Media Release, 22 October 2013); available at <http://www.customcontested.co.za/ncop-succumbs-pressure-executive-withdraw-tcb/> [accessed 3 July 2014].

¹⁷³ *DFL* at para [137].

¹⁷⁴ See *DFL* at para [161].

¹⁷⁵ PMG 'Overview of Fourth Parliament' at 19 and 25.

¹⁷⁶ Nolundi Luwaya 'Report on the Provincial Traditional Courts Bill hearings: Exploring rural people's democratic participation and freedom of expression' *Issues in Law and Society*, Issue 2, November 2013 at 9.

¹⁷⁷ Pearlie Joubert 'King has final word' *City Press* (28 April 2012), available at <http://www.citypress.co.za/politics/king-has-final-word-20120428/> [accessed 1 July 2014].

any person who did not support the bill was not under his chieftaincy.¹⁷⁸ This could be interpreted as a threat of expulsion against people living in the traditional community that he leads.

Traditional leaders also made closing remarks at hearings in Ulundi, KwaZulu-Natal, and Bushbuckridge, Mpumalanga. There were however other hearings at which traditional leaders did not participate. Although the reasons for this are not clear, at some hearings the provincial government made a point of saying that the bill had been taken to the National House of Traditional Leaders (NHTL) and to corresponding Provincial Houses. Traditional leaders had therefore already been given an opportunity to engage with the bill. At hearings in Vhembe and Sekhukhune, Limpopo, members of the Limpopo Legislature noted that there had been a pre-public hearing meeting that only traditional leaders attended. The traditional leaders who attended this pre-hearing meeting did not speak at the Vhembe hearing. At this same hearing it was observed that traditional leaders were given a form to fill in so that they could receive reimbursement for the cost of their travel to the hearing. No such accommodation was made for other participants.¹⁷⁹

The hearings thus illustrate the extent to which people want to be part of legislative processes and their willingness to overcome significant obstacles to make their opinions heard. Some people had to travel great distances using unreliable and costly public transport; many others were not familiar with the bill and had their inputs subjected to restrictions; still others were informed of hearing schedules and venues at unreasonably short notice. Despite this, they managed to tell their stories and express their dissatisfaction with the bill and its implications as they understood them.

6. CONCLUSION

The responses to the TCB consultation process illustrate the extent to which public participation has been undermined at different levels throughout this process and the complex ways in which the silencing of voices at different points has substantively compromised the bill's content. The development of the TCB has demonstrated that representation and voice are not cosmetic additions but are crucial to the character and values of legislation. The silencing, both active and passive, of the voices of the majority in the TCB drafting consultation process resulted in a bill that could not speak to or for the majority.

The Constitution's requirement for public participation underlines the extent to which these processes can influence national legislation in ways that reflect the realities of different groups and that nurture participatory democracy. The consultation process for the 2008 version of the TCB and again for the 2012 version

¹⁷⁸ Pearlie Joubert 'King has final word' *City Press* (28 April 2012), available at <http://www.citypress.co.za/politics/king-has-final-word-20120428/> [accessed 1 July 2014].

¹⁷⁹ Nolundi Luwaya 'Report on the Provincial Traditional Courts Bill hearings: Exploring rural people's democratic participation and freedom of expression' *Issues in Law and Society*, Issue 2, November 2013.

at different levels failed to adequately facilitate meaningful participation by the public. The meaningfulness of participation opportunities, as well as people's ability to effectively make use of them, was undermined throughout the process. In so doing, these processes compromised the legitimacy of the bill in the eyes of those that it was intended to serve and undermined the bill's role as a vehicle for supporting and enriching customary law in line with the Constitution.

The consultation process in 2008 was not broadened, as the majority of submissions from that year called for. When precisely the same version of the TCB was reintroduced in 2012, submissions again criticised the TCB's consultation process, raising many of the same concerns as in 2008. These consistencies between 2008 and 2012 reflect the state's failure to take feedback from the 2008 submissions into account when the Bill was reintroduced – both in relation to the content of the bill and in relation to the consultative processes around it. Rather than transformation and engagement, the TCB's consultation process in many ways perpetuated exclusion and misrepresentation – undermining principles of accountability, responsiveness and openness that are at the core of the Constitution.

Notwithstanding these problems with the duty of Parliament and provincial legislatures to facilitate public involvement in the TCB legislative process, some individuals and organisations managed to make use of the opportunities provided and voice their opinions on the bill and its potential impact. Provincial public hearings were most effective in this regard because they alerted some provincial legislatures to strong public opinion on the bill, which could form the basis for their negotiating mandates.

In the end, no outright majority in favour of the bill could be achieved in the NCOP Select Committee. This is a testament not only to the ability of the NCOP to be a platform for enriched, grounded and comprehensive debates on legislation, rather than merely a 'rubber stamp' for the National Assembly,¹⁸⁰ but also to the power of public participation in the law-making process. Even when deficiently implemented, public involvement can significantly influence a bill's passage through Parliament.

The responses to the TCB consultation reflect the extent to which public participation was undermined at different levels throughout the process. The majority of the input from people who would have been most directly affected by the TCB indicates that there were sophisticated, systematic mechanisms for silencing their voices, and that this silencing substantively compromised the bill's content and its ability to promote 'living' customary law. The links made in many submissions between the poor consultation process and the bill's problematic and potentially damaging provisions confirm the substantive value that consultation plays in shaping legislation and affirms the importance of consultation to the legitimacy, relevance and meaningfulness of legislation – particularly in the realm of customary law.

¹⁸⁰ This has been asserted by the NCOP – see PMG 'Overview of Fourth Parliament' at 22. See also Alliance for Rural Democracy 'Traditional Courts Bill is dead!' (Media Release, 21 February 2014), available at <http://www.customcontested.co.za/traditional-courts-bill-dead/> [accessed 9 July 2014].