LRC

LEGAL RESOURCES CENTRE

INTELLECTUAL PROPERTY LAWS AMENDMENT BILL 2010
Portfolio Committee Public Hearing 19 October 2010

INTRODUCTION

The key elements of the Intellectual Property Laws Amendment Bill [IPLAB]

1. There are three fundamental and far-reaching measures in IPLAB.

2. First is the vesting of the ownership or proprietorship of certain traditional intellectual property rights[1] in indigenous or traditional communities on registration of such rights, and the vesting of certain rights in the proposed statutory national trust. This applies to situations where a community already has ownership rights in terms of customary law.

3. Secondly, certain existing rights, once registered, attract new statutory regulatory measures including consent requirements and benefit sharing arrangements.

4. Thirdly, IPLAB provides for the representation of an indigenous community in respect of the registration of statutory rights, ownership or proprietorship thereof and deriving benefits from such rights.

The nature of living customary law and customary rights

5. The Constitutional Court has pointed out that the "living" customary law is in a constant state of development and adaptation to changing circumstances and needs:

> *"Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution".*[2]
>
> *As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated.*[3] *(emphasis added)*

---

1 Post 1958 property

2 Alexkor Ltd and Another v The Richtersveld Community and Others 2004 (5) SA 460 (CC) at [53].

3 Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC) at [45]

6. The Court has pointed to the need for great caution in making a determination of the content of customary law by reference to past writings on the subject. In the first place, it is well-established that the codification of indigenous law has in some cases led to fossilisation or vitrification[4] which has interfered with the process of evolution and development, and which raises questions as to the accuracy of and appropriateness of codified accounts.[5] In addition, there is a tendency to view indigenous law through the prism of legal conceptions that are foreign to it.[6]

7. The Court held in Shilubana and Others v Nwamitwa[7] -

> *"An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm, in line with the approach set out in* Bhe*. Equally, as this court noted in* Richtersveld*, courts embarking on this leg of the enquiry must be cautious of historical records, because of the distorting tendency of older authorities to view customary law through legal conceptions foreign to it."*[8]

8. The result is that while indigenous law may be established by reference to the writing of and judicial decisions on indigenous law and other authorities and sources, great caution has to be exercised in this regard. In Alexkor, the Court noted:

> *"Bennett … points to the need for caution in this respect. Although a number of text books exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied. Bennett points out that, although customary law is supposed to develop spontaneously in a given rural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term "customary law" emerged with three quite different meanings: the official body of law employed in the courts and by the administration (which, he points out, diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually lived by the people"*.[9]

---

4 Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC) at [172].

5 Alexkor at [53], footnote 54.

6 Alexkor at [54].

7 Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC).

8 Shilubana at [44].

9 Alexkor at [52], footnote 51.

9. The Court has therefore stressed the importance of observing what actually happens in practice, and not simply relying on official versions of the law.[10] In the context of land rights, the Court approved what was said by the Privy Council in Amodu Tijani v The Secretary, Southern Nigeria.[11]

> *"To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading".*

10. From this, it follows that:

> *"The determination of the real character of indigenous title to land therefore "involves the study of the history of a particular community and its usages". So too does the determination of its content"*.[12]

11. In Tongoane and Others v Minister for Agriculture and Land Affairs and Others[13], the Chief Justice points out specifically that the presence of living customary law as a form of regulation on the ground is not equivalent to a legal vacuum. It is rather a genuine presence that must be treated with due respect, even if it is to be interfered with.

> *"whether the community rules adopted under the provisions of CLARA replicate, record or codify indigenous law or represent an entirely new set of rules which replace the indigenous-law-based system of land administration, the result is the same: a substantial impact on the indigenous law that regulates communal land in a particular community." [90]*

> *"the field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend." [79]*

Key elements of customary law

12. A fundamental characteristic of customary law is the way in which rights, and decision-making in respect of those rights, are "layered".

---

10 Bhe and Others v Magistrate, Khayelitsha and Others 2005 (1) SA 580 (CC) at [111].

11 Privy Council in Amodu Tijani v The Secretary, Southern Nigeria [1921] 2 AC 399 (PC) at [404]; approved in Alexkor at [56]; and see also the judgment of Ngcobo J in Bhe at [156].

12 Alexkor at [57].

13 CCT 100-09, judgment delivered on 11 May 2010

Layered rights

13. At the heart of indigenous or customary systems is that the rights are controlled and exercised at different levels of social organisation. The rights are layered within one another, and extend upwards from the individual through the household, the family group, the neighbourhood, the village, and the ward, to the wider community or 'tribe', depending on the resources in question. For example, different land uses attract varying degrees of control at different levels of socio-political organisation. For example, allocations of arable land are often controlled at the level of the family and the neighbourhood, while grazing and woodland use is the concern of a wider segment of society. Land and other property rights thus have a shared nature and are acquired mostly through membership of social groups. The rights are not absolute; their content is dependent on other rights which co-exist within this layered system.

The concept community

14. In the Tongoane case, the applicant communities were concerned that the Communal Land Rights Act, read together with the Traditional Leadership and Governance Framework Act, confirms disputed tribal authority boundaries and undermines more localised decision-making at layered levels of social organisation. This jeopardises the ability of groups of users—whether at the level of the family, the user group, the village or the clan—to exercise control over their land. The same argument applies in respect of land related and other property rights in respect of users and beneficiaries.

15. State-imposed fixed boundaries of jurisdiction undermine indigenous mechanisms that mediate power and see it fluctuate depending on leaders' capacity to mobilise support. This problem is compounded by disputed former tribal authority boundaries, established under the to be repealed Bantu Authorities Act of 1951, becoming 'default' community boundaries under the TLGFA and IPLAB.

16. The history of South Africa indicates that the boundaries of authority of traditional leaders expanded and contracted all the time, depending on the outcome of wars and on any particular leader's capacity to preserve or extend his authority in the face of challenges from others. Sometimes the challenges came from rival groups, sometimes from 'royal' brothers disputing the chieftaincy, and sometimes from lesser 'chiefs' challenging the hierarchy of seniority, influence and control. Power was mediated by the existence of competing loci of power which existed in a state of constant tension.

17. The 1951 Bantu Authorities Act made chiefs agents of government. According to Govan Mbeki (1964),

> *'[m]any Chiefs and headmen found that once they had committed themselves to supporting Bantu Authorities, an immense chasm developed between them and the people. Gone was the*

> *old give-and-take of tribal consultation, and in its place there was now the autocratic power bestowed on the more ambitious Chiefs, who became arrogant in the knowledge that government might was behind them.'*
>
> *The Act, in s 2(3), provided for the government to determine the area of jurisdiction of Bantu authorities, with fixed boundaries published in the Government Gazette. This gave chiefs powers over people living within their 'jurisdictional' boundaries irrespective of whether those people supported them or not. It thereby undermined one of the key mechanisms of accountability: the opportunity for people to ally themselves with a challenger, who with their support would previously have been able to 'expand' his sphere of authority to include them.*

18. 'Community' means much more than a land area defined by property rights. It perpetuates the idea that traditional knowledge is something that can be divided, fractured and commoditised, such that local communities can be sourced for information and then paid-off, with little thought of their customary law, its development and the perpetuation of their culture.

Community defined in new statute law[i]

19. The definition of indigenous community in the Bill reads as follows:

> *" 'indigenous community' means any community of people living within the borders of the Republic, or which historically lived in the geographic area located within the borders of the Republic"*

20. Any reference to indigenous communities must take into account customary law and practices that define community membership. We hesitantly propose, with the provisos regarding public participation elaborated upon below, that any definition of community should refer to

> *a group of persons with shared rules of*
>
> *a) access to,*
>
> *b) use of, or*
>
> *c) benefit from*
>
> *a resource or property rights held in common by the group or part of a group.*

21. The approach more appropriate to the definition of indigenous community is one which recognizes social boundaries and social aspects of the concept “community” rather than defining community in terms of geographical boundaries.

22. In the Restitution of Land Rights Act No 22 of 1994 community means any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group.

23. In the Interim Protection of Informal Land Rights Act No 31 of 1996 community means any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group.

24. In the Communal Property Associations Act No 28 of 1996 community means a group of persons which wishes to have its rights to or in a particular property determined by shared rules under a written constitution and which wishes…to form an association.

25. In the Upgrading of Land Tenure Rights Act No 112 of 1991 community means a group of persons of which its members have or wish to have their rights to or in a particular piece of land determined by shared rules.

26. All of these laws recognize that communities are defined in terms of social boundaries and custom, and recognition is given to decision-making at layered levels of social organization. The abovementioned laws do not define communities in terms of geographical areas which are reminiscent of tribal authority boundaries and which will exclude certain people from receiving protection, or will include disinterested persons.

27. Imposing fixed boundaries onto constantly fluctuating systems undermines indigenous mechanisms that mediate power and see such power fluctuate depending on leaders’ capacity to mobilize support. There is a need for indigenous legal processes to be recognized and supported. The problem is then exacerbated by imposing boundaries onto communities. It must be noted that boundaries expand and contract all the time depending on a myriad of factors, including a leader’s capacity to preserve or extend authority. A particular concern is that by reinforcing boundaries as the key indicator of membership of a community, the Bill may find itself bolstering chiefs’ unilateral power and undermining indigenous accountability mechanisms.

28. It is clear that the above laws acknowledge social and political organisation, which organisation is not bound by locality, but which is bound by shared customary laws and values. Communities rather define themselves through a shared identity created through practice, expression, mutual recognition of culture.

29. In UNEP's *Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law* the United Nations and its member states acknowledged that indigenous peoples should be allowed to maintain, reinforce and develop the distinct social structures they had managed to preserve despite colonization. The international legal community must acknowledge indigenous people as peoples enjoying the right to self determination and as enjoying the right to define communities by factors specific to each community rather than meaningless boundaries that are not followed on the ground.

30. It is important to note that a sense of place and belonging within a community comes from the practice of the community, community organisation and identity, rather than geographical indications of groups. Real social groups cut across geographical barriers and when departing from categorisations based upon place, community, as understood in customary law, resists determination and placement.

PARLIAMENT IS FOLLOWING THE WRONG PROCEDURE

Parliament incorrectly tagged IPLAB

31. Parliament is considering IPLAB in accordance with the procedure prescribed by s 75 of the Constitution. This is a mistake. It should follow the procedure prescribed by s 76 of the Constitution. The mistake is material.

32.

32.1. ss 75 and 76 prescribe different procedures for the enactment of bills that do not affect the provinces and bills that do so. All ordinary bills must accordingly be classified or "*tagged"* as the one or the other.

32.2. Sections 76(3) to (5) identify the categories of bills that affect the provinces and must thus be enacted in accordance with s 76. The relevant category for purposes of this case, is any bill which "*falls within a functional area listed in Schedule 4"*. IPLAB falls within the functional areas of "*indigenous law and customary law"* and "*traditional leadership"* listed in schedule 4.

32.3. The tag test that is whether the provisions of IPLAB "*in substantial measure fall within a functional area listed in Schedule 4"*.[14]

33. The Constitutional Court distinguished between the wider tag test on the one hand and the narrower legislative competence test on the other, in the Liquor Bill case.[15]

---

[14] *Ex parte* President of the RSA: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC) para 27.

[15] *Ex parte* President of the RSA: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC).

33.1. The CC distinguished between the legislative competence issue and the tagging issue and made it clear that they were governed by different tests.[16]

33.2. The CC held that the proper tag test in terms of s 76(3) required "that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under section 76".[17]

34. The Liquor Bill case accordingly established and confirmed the following principles:

34.1. Different tests govern the classification of legislation to determine its legislative competence on the one hand and the correct procedure for its enactment on the other.

34.2. The legislative competence test classifies legislation on the basis of its subject-matter. It asks whether the subject-matter of the legislation falls within schedules 4 or 5. If it does, the fact that many of its provisions may fall outside schedules 4 and 5, does not affect its classification.

34.3. The tag test for purposes of determining the procedure for the enactment of a bill, is much wider. It classifies a bill on the basis of all its provisions and not only its subject-matter. It includes a bill, not only if its subject-matter falls within schedules 4 and 5, but if any of its provisions "*in substantial measure"* fall within those schedules. If it meets this test, then it must be tagged as a s 76 bill, even if its subject matter falls outside schedules 4 and 5.

The legislative competence test

35. Section 44 describes the general powers of parliament.[18] It has a general power to enact legislation on "*any matter"* except that it may only enact legislation "*with regard to a matter falling within a functional area listed in Schedule 5"* when it is necessary for certain limited purposes.[19]

36. The power to enact legislation depends on whether it is legislation "*with regard to a matter"* within the functional areas listed in schedules 4 and 5. But legislation often deals with matters which include matters within schedules 4 and 5 and matters beyond their scope. One accordingly has to determine how to classify legislation which straddles schedule 4 and 5 matters but also deals with matters beyond their scope.

---

16 Paras 27 to 28 and 61 to 69.

17 Para 27.

18 Other provisions of the Constitution confer specific legislative powers on parliament to enact particular laws.

19 Sections 44(1) and (2).

The tag test

37. Sections 75 and 76 of the Constitution prescribe the procedures parliament must follow when it passes ordinary bills. They prescribe different procedures for bills that affect the provinces and bills that do not. If a bill does not affect the provinces, it must be passed by the procedure prescribed by s 75. If it does affect the provinces, it must be passed by the procedure prescribed by s 76. All ordinary bills must accordingly be classified or "*tagged*", either as a s 75 bill or as a s 76 bill, depending on whether it affects the provinces.

38. Sections 75 and 76 both proceed from the premise that the bills to which they apply, are within the legislative competence of parliament. They only apply to bills within its legislative competence. The distinction they make between bills that affect the provinces and bills that do not, accordingly have nothing to do with the question of whether they fall within the legislative competence of parliament or not.

39. The purposes of the distinction between bills that affect the provinces and bills that do not may be gleaned from the differences between the procedures for their enactment prescribed by ss 75 and 76 respectively. The main differences relate to the role of the National Council of Provinces and through it, the provinces themselves, in the enactment of legislation that affects the provinces:

    39.1. Under the s 75 procedure for the enactment of bills that do not affect the provinces, the members of the NCOP each have a vote which they exercise as they see fit.[20] Under the s 76 procedure for the enactment of bills that do affect the provinces, each province has a vote which the head of its delegation in the NCOP casts on its behalf.[21] He or she does so under and in accordance with a mandate from the provincial legislature.[22] In this way, the provinces participate in and have a say over the enactment of bills that affect them.

    39.2. Under the s 75 procedure, the National Assembly may, by a simple majority, overrule the NCOP.[23] Under the s 76 procedure on the other hand, the National Assembly requires a two-thirds majority to override the NCOP.[24]

    39.3. Section 76 accordingly affords the provinces a far more direct and weighty say in the enactment of legislation that affects them.

---

20 Section 75(2)(a).

21 Section 65(1).

22 Section 65(2) read with the Mandating Procedures of Provinces Act 52 of 2008.

23 Section 75(1)(c) and (d).

24 Section 76(1)(e) and (i) to (k).

40. Sections 76(3) to (5) identify the categories of bills that affect the provinces and that must consequently be enacted under s 76. The relevant category for purposes of this case, is any bill which "*falls within a functional area listed in Schedule 4"*. We submit with respect that this court correctly interpreted it in the Liquor Bill case, to include any bill "*whose provisions in substantial measure fall within a functional area listed in Schedule 4"*.

    40.1. Its language differs from the language the Constitution uses for purposes of determining the legislative competence of parliament and the provinces. When the Constitution demarcates their legislative competence in ss 44(1)(a)(ii), (1)(b)(ii), (2) and (3) and 104(1)(b)(i) and (ii), it speaks of legislation "*with regard to any matter"* within schedules 4 and 5. It in other words classifies legislation according to its "*matter"*, that is, the subject-matter to which it relates. For purposes identifying a bill that affects the provinces on the other hand, s 76(3) includes any bill which falls within schedule 4. One must accordingly take account of all the provisions of the bill and not only its subject-matter for purposes of this classification.

    40.2. The CC's interpretation also gives effect to the purpose of s 76(3), which is to require parliament to follow the s 76 procedure whenever a bill affects the provinces. A bill which in substantial measure trenches upon schedule 4, clearly affects the provinces. That is so first because schedule 4 defines the domain of their legislative competence and secondly because the provinces are obliged in terms of s 125(2)(b) to implement all national legislation within schedule 4.

The correct tagging of IPLAB

41. IPLAB should have been tagged as a s 76 bill because its provisions in substantial measure fall within the functional areas of "*indigenous law and customary law"* and "*traditional leadership"* listed in schedule 4.

42. When one considers whether legislation falls within the functional area of customary law, there is an important preliminary consideration to bear in mind:

    42.1. It is highly unlikely that a statute would deal with customary law in the abstract. The most obvious examples of statutes which deal with customary law are those which repeal, replace or amend customary law. But the customary law which is so repealed, replaced or amended, in turn has a subject-matter of its own, whether it be matrimonial property or intestate succession or the occupation and use of communal land. In other words, any legislation with regard to customary law will ordinarily and almost invariably also be legislation with regard to the underlying subject-matter of the customary law in question.

    42.2. It follows that, when one considers whether legislation falls within the functional area of "*customary law"*, one should also include legislation which

in substance repeals, replaces or amends customary law. The mere fact that the customary law which is so repealed, replaced or amended, might have a different subject matter of its own, does not detract from the fact that it also falls within the functional area of customary law.

43. An important starting point in the characterisation process is IPLAB's long title. It is a bill to amend various acts and in particular "*to provide for the recognition and protection of*

43.1. *traditional performances having an indigenous origin and a traditional character;...*

43.2. *copyright works of a traditional character; ...*

43.3. *terms and expressions of indigenous origin;...*

43.4. *traditional designs of indigenous origin...*

[own formatting]

44. The clauses dealing with definitions also refer to "traditional" and "indigenous".

45. The clauses determining the scope and reach of the relevant legislation expand the operation of the laws to traditional communities, organised in terms of customary law, and communal ownership of intellectual property.

46. While the definitions make no reference to customary law in terms, it manifestly has in mind the customary law-based systems of intellectual property which typically include communal land and other property as central features.[25]

47. Accordingly, whenever IPLAB speaks of traditional intellectual property, it speaks predominantly of rights which are defined by customary law.

48. A proper understanding of the effect of IPLAB also requires that regard be had to the new institutions established by it. The memorandum to the bill, at paragraph 2.1(d) thereof describes the new institutions to be established as follows:

- a national council to advise the Minister and the registrars of intellectual property on **traditional intellectual property**;

[25] Alexkor v Richtersveld Community 2004 (5) SA 460 (CC) paras 42 to 64.

- a national trust fund to facilitate the **commercialisation of traditional intellectual property** and the application of income generated to the benefit of indigenous communities; and

- a national database for **traditional intellectual property** to facilitate access to information regarding traditional IP;

49. The stated intent is to commercialise traditional intellectual property currently defined and resorting under customary law.

Traditional leadership

50. The bill requires application procedures by traditional communities and explicitly refers to the authorised person or body that will represent the community. For example, clauses 19 and 25, refer to "the applicant for registration and the registered proprietor shall be the indigenous community or a person or body authorised to act on its behalf", and "person or body authorised to act on behalf of an indigenous community, may submit to the Council a request together with the appropriate information for a traditional term or expression to be recorded in the database".

51. The Traditional Leadership and Governance Framework Act of 2003 provides that a traditional council has the following functions:

> *"(a) Administering the affairs of the traditional community in accordance with customs and tradition; ...*
>
> *(f) participating in the development of policy and legislation at local level; ...*
>
> *(i) promoting indigenous knowledge systems for sustainable development and disaster management; ...*
>
> *(l) performing the functions conferred by customary law, customs and statutory law consistent with the Constitution."*

52. A traditional leader is bestowed with the following functions in terms of section 19 of the TLGFA:

> *"A traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation."*

53. The TLGFA thus defines the person or body that may represent a community for purposes of the IPLAB.

54. Based on the above analysis, the following conclusions may be drawn:

54.1. Prior to IPLAB, traditional intellectual property has been regulated in accordance with living customary law, subject to statutory intrusions.[26] IPLAB replaces both the institutions by which these matters are decided and the rules in accordance with which they do so. Under living customary law, traditional intellectual property is determined at various levels within the community. Under IPLAB, the power to hold and apply for recognition of traditional intellectual property rights is to be centralised in a traditional council or traditional leader. IPLAB accordingly replaces both the institutions which decide traditional intellectual property rights and the rules in accordance with which they do so. This means that IPLAB at least in substantial measure falls within the functional area of "*indigenous law and customary law"* listed in schedule 4.

54.2. IPLAB gives traditional councils and traditional leaders new powers and functions. Insofar as IPLAB makes these changes to the role and powers of traditional councils, its provisions in substantial measure fall within the functional area of "*traditional leadership"* listed in schedule 4.

The error is fatal to IPLAB

55. Our legal system has in both the pre- and post-constitutional era recognised that non-compliance with manner and form provisions is fatal to the validity of the legislation passed in breach of those provisions.[27]

56. In the constitutional era, the position is explicitly provided for in section 44(4) of the Constitution as follows :

> *"When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution."*

57. This court has confirmed that non-compliance with manner and form provisions gives rise to invalidity.[28] In Doctors for Life, Ngcobo J (as he then was) said –

---

[26] Which vary depending on which legislation applied in the particular area from time to time.

[27] R v Ndobe 1930 AD 484; Harris & Others v Minister of the Interior & Another 1952 (2) SA 428 (A); Minister of the Interior & Another v Harris & Others 1952 (4) SA 769 (A); Collins v Minister of the Interior & Another 1957 (1) SA 552 (A); B Beinart Sovereignty & the Law 1952 THRHR 101. See also the historical analysis pertaining to manner and form provisions in Mulaudzi & Others v Chairman, Implementation Committee, & Others 1995 (1) SA 513 (V) at 531ff.

> *"[208] It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid...*
>
> *[211] In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid."*

58. As is pointed out by Budlender in Constitutional Law of South Africa –

> *"The problem presented by ss 75 and 76 is constitutional. … Even where all the political parties agree that a particular Bill should be dealt with under one section, if the Bill, objectively, is one which ought to have been processed under the other section, it must remain open to members of the public to challenge the validity of any law which purports to have been created by the enactment of the Bill."*[29]

59. In Tongoane and Others v Minister for Agriculture and Land Affairs and Others[30], the Chief Justice points out specifically that the presence of living customary law as a form of regulation on the ground is not equivalent to a legal vacuum. It is rather a genuine presence that must be treated with due respect, even if it is to be interfered with.

> *"whether the community rules adopted under the provisions of CLARA replicate, record or codify indigenous law or represent an entirely new set of rules which replace the indigenous-law-based system of land administration, the result is the same: a substantial impact on the indigenous law that regulates communal land in a particular community." [90]*
>
> *"the field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend." [79]*

---

[28] Doctors for Life International v Speaker of the National Assembly & Others 2006 (6) SA 416 (CC) at paras 207 – 213; United Democratic Movement v President of the Republic of South Africa & Others (South African Christian Democratic Party & Others intervening); Institute for Democracy in South Africa & Another as *amici curiae*) (No. 2) 2003 (1) SA 495 (CC) at paras 107 – 113; the Liquor Board case above at para 26; Matatiele Municipality and Others v President of the RSA and Others 2006 (5) SA 47 (CC) 2006 (5) BCLR 622) at par 73; Matatiele Municipality and Others v President of the RSA and Others (No 2) 2007 (6) SA 477 (CC) (2007 (1) BCLR 47) at paras 6 and 85.

[29] Above at p 17-32.

[30] CCT 100-09, judgment delivered on 11 May 2010

60. The following statement of the court in the Tongoane matter also comes to mind:

> *"What matters for the purposes of tagging is not whether the system contemplated by CLARA is good or bad. What matters is that the new system contemplated by CLARA replaces the indigenous-law-based system currently managing the administration of communal land".*

Conclusion

61. IPLAB should have been classified as a s 76 bill.

PARLIAMENT MUST FACILITATE PUBLIC PARTICIPATION

Introduction

62. In relation to the National Assembly, we submit that, although it is facilitating a degree of public involvement in its process, the following is required –

    62.1. adequate information about the legislation must be disseminated;

    62.2. the advertisements pertaining to the public participation process must have sufficient reach;

    62.3. adequate notice must be afforded to communities (particularly marginalised rural communities) of the opportunities to submit written and oral comment; and

    62.4. adequate arrangements are made to ensure that those who might not be able to participate in public hearings in Cape Town can nonetheless participate.

63. The failure to facilitate public involvement represents a challenge to the constitutionality of IPLAB which is distinct from that referred to in the previous chapter on parliament having wrongly tagged IPLAB.

64. In this note we do not deal with the relevant facts but only with the applicable legal principles and the application of the principles to IPLAB.

The applicable legal principles

65. We identify the principles emerging from the cases which have dealt with the duty to facilitate public involvement in the processes of legislative bodies under the Constitution. These were largely laid down by the Constitutional Court in Doctors for Life International v Speaker of the National Assembly and Others.[31]

Duty to facilitate public involvement derives from the right to political participation

66. The duty to facilitate public involvement is a corollary of the fundamental human right to political participation. [32]

67. As has been pointed out by the Constitutional Court, there are two components to the right to political participation, which are recognized in both international and domestic law. These components are the general right of citizens to participate in public affairs and the more specific right to participate in elections either as a voter or as a candidate standing for election as a public representative.[33]

68. The content of the two components of the right varies from state to state and depends on the manner in which and extent to which the *populus* has chosen to delegate political power through its constitutional structure. Participatory democracy outside of the elective process has many different manifestations in different countries.[34] In describing its character in the South African context, the Constitutional Court had regard to the unique history of democratic resistance to apartheid which included a *"legacy of active participation by the public"* [35] and went on to hold as follows:[36]

> '*The duty to facilitate public involvement in the legislative process under our Constitution must therefore be understood as a manifestation of the international law right to political participation. Public involvement in the legislative and other processes of the legislatures of our country is a more specific form of political participation than the participation in the conduct of public affairs that is contemplated by article 25 of the ICCPR*
>
> *Thus the Constitutional Assembly, in framing our Constitution, was not content only with the right to vote as an expression of the right to political participation. It opted for a more expansive role of the public in the conduct of*

31 2006 (6) SA 416 (CC) (2006 (12) BCLR 1399).

32 Doctors for Life above at para 90.

33 Doctors for Life above at paras 90 – 109.

34 Doctors for Life above at paras 90 – 109.

35 Doctors for Life at paras 108, 113.

36 Doctors for Life at para 107.

public affairs by placing a higher value on public participation in the law-making process.'

69. In South Africa's constitutional democracy, parliament's obligations are specifically designed to enhance participatory democracy so that everyone and '*particularly the most marginalised communities'* have a meaningful voice in democratic processes.[37]

70. The significance and role of participatory democracy was described as follows:[38]

> *"In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. … 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, … 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.*"

71. This Court has consistently emphasized the fundamental importance of legislative organs honouring their constitutional obligation to facilitate public involvement in the legislative process.[39]

The basic content of the right and correlative duty

72. It is not sufficient for the legislature merely to allow public participation. It has a positive obligation actively to take steps to facilitate public participation.[40]

---

37 Doctors for Life at paras 113, 174, 237, more specifically, where the Court emphasized that the duty to consult traditional healers must be understood in light of their history of marginalisation and discrimination. The importance of participation by marginalised communities was again emphasised in Matatiele Municipality and others v President of RSA and others (Matatiele 2) above at para 61.

38 Doctors for Life at para 115.

39 Matatiele Municipality and others v President of the Republic of South Africa and others (Matatiele 1) above; Matatiele Municipality and others v President of RSA and others (Matatiele 2) above; Merafong Demarcation Forum v President of the Republic of South Africa 2008 (5) SA 171 (CC) (2008(10) BCLR 969).

40 Doctors for Life at para 131; *Matatiele 2* at paras 51 – 64.

73. There are three basic elements to public participation, all of which must be present if there is to be a proper exercise of the right of the public to participate directly in the legislative process. These are –

    73.1. the dissemination of information concerning legislation under consideration by the legislature;

    73.2. the communication of an invitation to participate in the process; and

    73.3. a process of consultation in relation to the legislation.[41]

74. Precisely how those elements are constituted in any particular case will be context specific and determined on a case by case basis.

The extent of the duty to facilitate public participation

75. The extent of the duty to facilitate public participation is to be determined according to the criteria of reasonableness and effectiveness. In other words, the public must have had a reasonable opportunity to participate effectively in the legislative process. [42]

76. Reasonableness is a standard that is context dependent and sensitive to the facts and circumstances of a particular case.[43]

77. In making the assessment of whether the legislature has acted reasonably, the Constitutional Court has indicated that it will have regard to the following factors:

    77.1. the nature and importance of the legislation;[44]

    77.2. the intensity of its impact on the public;[45]

    77.3. whether the persons impacted upon by the legislation are from marginalised groups in society;[46]

---

41 Doctors for Life at para 221.

42 Doctors for Life at paras 125 – 129.

43 Doctors for Life at para 127.

44 Doctors for Life at para 128, 146.

45 Doctors for Life at para 128, 146.

46 Doctors for Life at paras 113, 174, 237. Matatiele 2 at para 61.For a pre-constitutional case in the labour context, see Nkomo v Administrator, Natal (1991) 12 ILJ 521 (N). This case dealt with illiterate hospital workers that were given 48 hours to prepare representations concerning their dismissal. The court held that it was totally inadequate. See also Cape Killarney Property Investments (Pty) Ltd v Mahamoba 2000 (2) SA 67 (C). This case dealt with an eviction claim of 520 'unsophisticated workers.' The written notice in this instance should have been combined with loudspeakers in their language.

77.4. the adequacy of notice of and information about the intended legislation;[47]

77.5. practicalities such as time, expense and the efficiency of the law-making process, provided that "the saving of money and time in itself does not justify inadequate opportunities for public involvement";[48]

77.6. what parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency;[49]

77.7. rules adopted by the legislature for public participation;[50]

77.8. whether the opportunities provided were meaningful and effective;[51] and

77.9. whether measures were taken to ensure that people had the ability to take advantage of the opportunities provided.[52]

78. At the same time, the Constitutional Court had recognized that, given the political nature of the duty in question and the need to balance respect for parliamentary institutional autonomy with the right of the public to participate,[53] legislatures have a 'considerable discretion' to determine how best to fulfil their duty to facilitate public involvement.[54]

79. Parliament has a wide range of procedures to choose from in order to ensure effective and meaningful public participation, including receipt of written submissions, oral hearings, parliamentary enquiries, surveys, round-table conferences, workshops and local meetings.[55] As held in Matatiele 1, '*(t)his may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing.*'[56]

---

47 Doctors for Life at para 131.

48 Doctors for Life.at para 128, 146.

49 Doctors for Life at para 128, 146.

50 Doctors for Life at para 146.

51 Doctors for Life at para 129.

52 Doctors for Life at para 129.

53 Doctors for Life at para 122

54 Doctors for Life at para 123.

55 Hoexter C; *Administrative Law in South Africa*; page 79; quotting from Richard Fuggle & Andre Rabie (eds) *Environmental Management in South Africa* (1992) page 764.

56 Matatiele 1 at para 67 with reference to Doctors for Life at paras 132 and 145.

Both the National Assembly and the NCOP are obliged to facilitate public involvement

80. Both the National Assembly and the NCOP are under an obligation to facilitate public involvement in the legislative process.

81. The obligation on the National Assembly is found in section 59(1)(a) of the Constitution in the following terms:

> *"59 (1) The National Assembly must-*
>
> *(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees.."*

82. The obligation on the NCOP is cast in the same terms in section 72(1)(a) of the Constitution:

> *"72 (1) the National Council of Provinces must-*
>
> *(a) facilitate public involvement in the legislative and other processes of the Council and its committees;"*

83. The National Assembly and the NCOP together make up parliament,[57] in which the national legislative authority vests.[58] They nevertheless represent different interests.

84. As held in Doctors for Life:[59]

> '*These democratic institutions represent different interests in the law-making process. The National Assembly represents 'the people … to ensure government by the people'.*[60] *The NCOP 'represents the provinces to ensure that provincial interests are taken into account' in the legislative process.*[61] *Both must therefore participate in the law-making process and act together in making law to ensure that the interests they represent are taken into consideration in the law-making process. If either of these democratic institutions fails to fulfil its constitutional obligation in relation to a bill, the result is that Parliament has failed to fulfil its obligation*.' (emphasis added)

---

57 Section 42(1) of the Constitution.

58 Section 43(a) and 44(1) of the Constitution.

59 Doctors for Life para 29.

60 Section 42(3) of the Constitution.

61 Section 42(4) of the Constitution.

85. The particular interests represented by the NCOP have been highlighted in the previous chapter.

86. Nor is it sufficient for the NCOP merely to consider the outcome of the public consultation process in the National Assembly. Thus in Doctors for Life, the Constitutional Court said:

> '…*The NCOP, however, cannot as a matter of course have regard to these representations [those in the National Assembly] only in complying with its duty to facilitate public involvement in its legislative processes and those of its committees. The same is true of the provincial legislatures. Both the NCOP and the provincial legislatures have a crucial constitutional role in our democracy; they must ensure that the provincial interests are represented in the national law-making process. To this extent they must give the people in the provinces the opportunity to participate in their respective legislative processes.*'[62]

The application of the principles to IPLAB

The factors

87. On the basis of the factors relevant to the assessment of the reasonableness of the public consultation measures adopted, the following observations may be made:

87.1. the nature and importance of the legislation cannot be overstated. The communities affected by IPLAB are constituted by many millions of South Africans. IPLAB introduces far-reaching changes to the systems of indigenous knowledge in South Africa which trace their roots over centuries. The legislation seeks to address the consequences of racial discrimination over centuries in relation to intellectual property rights;

87.2. those affected by the legislation include the most marginalized, and vulnerable rural communities in South Africa;

87.3. having regard to the importance of the bill, there is a need to provide a significant quantum of explanation and clarification about the bill, its content, purpose and likely effect in the process of notifying communities about the legislation and inviting them to participate in the process;

87.4. in the circumstances, any perceived practicalities relating to time and expense had to make way for the proper fulfillment of the duty to facilitate public participation on a widespread basis by affected communities;

---

62 Doctors for Life para 151

87.5. given that marginalised, rural communities will be affected, there is a special duty on the National Assembly and the NCOP to ensure that the opportunity to participate in the legislative process is widely publicized;

87.6. the parliamentary rules clearly provide for public participation in both the National Assembly and the NCOP by way of both written and oral submissions;[63]

87.7. the circumstances place a particular burden on the National Assembly and the NCOP to ensure that the opportunities to participate are meaningful and effective and that communities affected are able to take advantage of any opportunities provided.

88. Having regard to the fact that the obligation to facilitate public participation rests separately on both the National Assembly and the NCOP, we consider each of these separately.

89. The right of particularly rural communities to participate in the legislative process pertaining to IPLAB cannot be circumscribed by considerations of urgency. The Constitutional Court said the following in this regard in Doctors for Life :[64]

> *"It is true … that time may be a relevant consideration in determining the reasonableness of a legislature's failure to provide meaningful opportunities for public involvement in a given case. There may well be circumstances of emergency that require urgent legislative responses and short timetables. … When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable."* (emphasis added)

Conclusion

90. As is apparent from the analysis in the previous chapter on parliament's having wrongly tagged IPLAB, the consequences of the failure to comply with manner and form provisions, including those requiring the facilitation of public involvement in the legislative process, is the constitutional invalidity of the legislation passed on the basis of this flawed process.[65]

---

63 Rules 241 and 249 of the rules of the National Assembly and Rule 5 of the rules of the NCOP

64 Doctors for Life para 194.

65 Doctors for Life at paras 198 – 213; Matatiele 2 at para 87.

TABLE OF AUTHORITIES

[i] A number of statutes define community and membership. Relevant definitions, note dealt with in the text above, include the following:

UPGRADING OF LAND TENURE RIGHTS ACT NO. 112 OF 1991
"community" means a group of persons of which its members have or wish to have their rights to or in a particular piece of land determined by shared rules;
[Definition of "community" inserted by s. 1 (a) of Act No. 34 of 1996.]
"community resolution" means any decision taken by a majority of the members of the community over the age of 18 years present or represented at a meeting convened for the purpose of considering the disposal of a right in land lawfully occupied by or allocated for the use of such community, of which they have been given sufficient notice, and in which they had a reasonable opportunity to participate;
[Definition of "community resolution" inserted by s. 1 (a) of Act No. 34 of 1996.]
"tribal resolution", in relation to a tribe, means a resolution passed by the tribe democratically and in accordance with the indigenous law or customs of the tribe: Provided that for the purposes of this Act any decision to dispose of a right in tribal land may only be taken by a majority of the members of the tribe over the age of 18 years present or represented at a meeting convened for the purpose of considering such disposal, of which they have been given sufficient notice, and in which they had a reasonable opportunity to participate;
[Definition of "tribal resolution" substituted by s. 1 (b) of Act No. 34 of 1996.]
Wording of Sections
"tribe" includes—
(a) any community living and existing like a tribe; or
(b) any part of a tribe living and existing as a separate entity.

COMMUNAL LAND RIGHTS ACT, 2004
"communal land" means land contemplated in section 2 which is, or is to be, occupied or used by members of a community subject to the rules or custom of that community;
"community" means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group.

TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT, 2003.
2. (1) A community may be recognised as a traditional community if it-
(a) is subject to a system of traditional leadership in terms of that community's customs; and
(b) observes a system of customary law.

NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT
and PROTECTED AREAS ACT
"local community" means any community of people living or having rights or interests in a distinct geographical area;

NATIONAL ENVIRONMENTAL MANAGEMENT ACT
'community' means any group of persons or a part of such a group who share common interests, and who regard themselves as a community;

NATIONAL FORESTS ACT NO. 84 OF 1998
"community" means a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law

MINERALS AND PETROLEUM RESOURCES DEVELOPMENT ACT 28/02 as amended by 36/08 [amd not in operation]
'community' means a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law:
Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community.