

## The Role of the SAHRC

The South African Human Rights Commission (SAHRC) is an independent body set up by the Constitution to monitor, protect and promote the attainment of human rights in our country.

South Africa has a rural population of over 20 million. The Traditional Courts Bill (TCB) was drafted without the participation and consultation of the rural communities. The SAHRC has received a number of complaints relating to a lack of information regarding the content and implications of the TCB, including around the lack of consultation during the drafting process.

The African customary law system is integral to the lives of many who live in this country. In an effort to address the question of how to improve access to democratic, rights-based justice that the Constitution envisions, it is necessary to include public participation in all democratic processes, including those in rural areas. The SAHRC recognises customary law that develops with the changing conditions of a globalising world and is consistent with our constitution.

The TCB, if it becomes law, could lead to violations of the rights of women and their families. Given the history of patriarchy and apartheid distortions, the TCB would enable a perpetuation of discrimination against women.

The Government is given its power by the people and must serve the people. It is necessary for TCB to address the problems contained therein. Those with power must listen to the rural communities and develop laws that protect their rights.

Although the SAHRC has limited capacity and resources, it works with other Chapter 9 Institutions and NGOs to assist communities to ensure that the human rights concerns are dealt with in a re-drafted TCB.

*The aim of the SAHRC is to transform society, secure rights and restore dignity!*

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**ENGLISH**



## WHAT IS THE TRADITIONAL COURTS BILL?

**SAHRC overview**



Community engaging on Traditional Courts Bill during workshop

**Transforming society**

**Securing rights**

**Restoring dignity**

## What is the Traditional Courts Bill?

### Background:

- The Traditional Courts Bill (TCB) was first introduced in Parliament in 2008 by the Department of Justice and Constitutional Development, and it was intended to provide a legal framework and recognition for traditional courts and customary law in line with the Constitution.
- The process of drafting the TCB was marked by an absence of consultation with the most vulnerable in affected communities. Only traditional leaders were consulted.
- The early TCB was opposed by stakeholders for a number of procedural and substantive concerns.
- The same TCB, with the same concerns, was re-introduced to the National Council of Provinces (NCOP) in 2012 to obtain feedback from the provinces, through provincial hearings.
- The NCOP failed to guide consultation with the rural public in a manner that ensured the ability of all to express views without fear or favour – something particularly important with such usually marginalised voices.
- The SAHRC, civil society, and affected individuals again opposed the TCB by making oral and written submissions, and participating in the provincial hearings.

### Traditional Law

- Section 211 of the Constitution provides that the institution, status, and role of traditional leadership are recognised and subject to the Constitution.
- Traditional leadership has historically been central to the organisation of and dispute resolution within rural communities, from the lowest level to the highest.
- It is important that the manner in which cases are heard in the customary proceedings instils a sense of confidence in the parties.
- Customary law provides consistent points of reference for rural dwellers, and is in tune with the norms of cultural diversity in our society.
- It is important to recognise cultural norms and customs and to seek to uphold South African cultural values. Several provisions in the Constitution affirm that, like common law, customary law is now subject to and must be in line with the Constitution

## Problems with the current TCB include:

- Absence of consultation with rural people during the drafting process and problematic consultations around the TCB;
- Two different sets of access to justice rights are created: one for those living in rural lands; and another for the rest of South Africa. This is similar to the Apartheid system of Bantustans;
- The TCB does not offer the possibility to opt in. Customary law and practice varies from one community to another within South Africa and is part of the cultural richness and choice provided for in our Constitution. The individual must be able to voluntarily make the choice of whether to be bound by the rules of a customary community;
- The TCB concentrates at the level of the traditional leadership thus disregarding the various other levels and layers of customary authority;
- It makes a traditional leader the sole presiding officer of a traditional court. This centralises power in a single individual who may have a conflict of interest in the matter being decided. The TCB gives traditional leaders power to make the law, implement the law and decide on disputes arising from their own administrative actions. In this way the TCB makes it difficult to test or challenge decisions which are incorrect;
- Jurisdiction of the envisaged courts undermines the importance of independent decisions being reached concerning who should be charged in a complaint. Charging should be done separately;
- There will be no clear approaches to complaints of a similar nature, and no way to predict what kind of conduct to avoid in the future. Each leader can preside in a manner they personally see fit thereby making different leaders apply the law differently;
- The right of appearance and protection of women is not explicitly stated;
- Rights of children are not adequately protected;
- Possible sanctions can include forced, unpaid labour and may result in the infringement of other rights, thus undermining the right to be treated with dignity;
- Despite the contraventions of basic rights, numerous decisions and sanctions would not be appealable. This will deprive people of the right to have their matter heard or appealed in a civil court.

## Where are we now?

The TCB was sent to the provinces and hearings were conducted in April and May 2012. There were difficulties with how the hearings were convened; who presided over them; the possibility for people to speak; and communities' travel logistics to the hearings. Nevertheless, some rural communities were able to take the opportunity to engage on the TCB.

The SAHRC, together with civil society stakeholders, held workshops about the TCB and were present at the hearings. The SAHRC, along with several others, made written and oral submissions on the TCB to the Parliamentary Portfolio Committee on Justice and Constitutional Development. The SAHRC also highlighted its concerns on the TCB through various community radio stations.

The Provincial Legislatures considered the TCB, and all but two provinces rejected it in its current form, the others rejected it and proposed amendments to the provisions. The NCOP Committee then decided to insert into the process something not part of the regular sequence of dealing with legislation – an additional step whereby the provinces take back the same TCB in order to repeat a consultation process and to revert to the NCOP Committee a second time with a mandate.

In August 2012, the Minister for Women, Children, and Persons with Disabilities raised concerns about the TCB. The Department of Justice and Constitutional Development, which is responsible for the TCB, indicated that it would not be withdrawn, but that amendments would be undertaken by the NCOP Committee representatives.

## Traditional Dispute Resolution Mechanism

For the TCB to be constitutional, it must ensure that it is drawn up with full consultation involving rural communities, in particular women, who are drawn together in a way that promotes the fullest participation and protects all from potential intimidation. There is a need for the current problems mentioned above to be corrected.