



COUNCIL
FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN
CONSTITUTION

4 September 2012

Mr Gurshwyn Dixon
Secretary
Select Committee on Security & Constitutional Development
National Council of Provinces
Cape Town

Per email: gdixon@parliament.gov.za

Submission on Traditional Courts Bill

Dear Mr Dixon

Please find attached a submission from the Council for the Advancement of the South African Constitution (CASAC) on the Traditional Courts Bill.

CASAC would also like to request an opportunity to make an oral submission to the Select Committee when it conducts public hearings.

Yours sincerely

Lawson Naidoo

Executive Secretary

**CASAC SUBMISSION TO THE SELECT COMMITTEE ON SECURITY AND
CONSTITUTIONAL DEVELOPMENT (NCOP)
ON THE TRADITIONAL COURTS BILL**

The Council for the Advancement of the South African Constitution (CASAC) welcomes the opportunity to submit our considered views on the draft Traditional Courts Bill to the Select Committee on Security and Constitutional Development. We also request an opportunity to make oral submissions before the Select Committee.

CASAC is a non-governmental organization, functioning as a voluntary association. It is an initiative led by progressive people who seek to advance the South African Constitution as a platform for democratic politics and the transformation of society and who believe in the advancement of a society whose values are based on the core principles of the Constitution – the promotion of socio-economic rights, judicial independence and the rule of law, public accountability and open governance.

The draft Bill is aimed at amongst other things; a) to address the role of traditional leadership, b) recognise the place of customary law in the post apartheid constitutional democracy in South Africa and c) to affirm African Cultural practices.

These are important aspects of consolidating our democracy and building a South Africa that is envisaged in the constitution. Colonialism and Apartheid bequeathed us a legacy that is not only undesirable but also suppressed freedom of expression of one's cultural identity and legacy.

It distorted customary law as a living law and robbed it of its dynamism and people centredness. It created chiefdoms that were not grounded on the legacy of the people's upon whom these chiefdoms were to rule. In essence, the colonial and apartheid project was a state driven agenda to construct new identities and impose those who would preside over these and the communities. The alienation that resulted from this project goes far deeper in our society and needs to be addressed vigorously.

Against this complex background of dislocation and denial of people's cultural freedoms CASAC believes that the time has come for South Africans to engage with the meaning of freedom, particularly in the context of this Bill.

The draft TCB fails to address these concerns. On the contrary, it reinforces the colonial and apartheid legacy on so many levels.

Constitutional Grounds

CASAC recognises the constitutional principle of customary law as a living law. We also recognise the important role of traditional leaders in the context of restoring the dignity of African Cultural practices and customs in the post apartheid constitutional democracy.

It is precisely because of this that CASAC believes the TCB departs from what it states as its purpose. The main sections of the constitution (excluding the Founding Provisions) which are relevant for the recognition of customary and traditional leadership are, a) The Bill of Rights, b) Chapter 12 on the role of Traditional Leaders and “other courts”.

None of these sections provide for a Bill with such wide-ranging powers that alters the nature and content of South African citizenship in the way the TCB does.

Firstly, provisions of the Bill are in contradiction with the constitution and the principle of one law for one nation.

In giving such extensive powers to traditional leaders, the TCB in its current form denies full citizenship for more than 18 million South Africans, 53% of them being women.

The proposed location of the Traditional courts within geographical boundaries reproduces the distortions and injustice of apartheid spatial design and manipulation of identity through geo-political design. This affirms and in fact gives more power to traditional leaders than the Black Administration Act of 1927, which it is supposed to repeal, ever did.

In other words, the geographical design and boundaries upon which the TCB is based reintroduces segregation and undermines the principle of common citizenship. This is patently unconstitutional. It also goes against the foundations and values upon which the post apartheid South African constitutional democracy is built.

These boundaries continue to be a subject of historical and contemporary contestation amongst communities. The NCOP must take into consideration that some of the “chiefdoms” upon which this Bill gives power and control were an artificial apartheid creation aimed to deny others access to land and identity. In some cases, these were part of ‘punishing’ traditional leaders and communities who opposed apartheid policies.

Customary Law and Traditional Leadership

The process of drafting the Bill, it is claimed, entailed wide consultation. It is not clear how far this consultation went and how the comments of ordinary people were taken into the drafting of the Bill. CASAC submits that a clear distinction must be made between customary law as a living law and the interpretation that seeks to freeze customary law in time.

Had communities been properly consulted during the drafting process the dynamism of customary law would have been clear and that creative usage of living customary law would have been integrated and incorporated in the draft.

Customary law does not have to be tied to traditional leadership. It is based on a systematic understanding of social relations, laws and cultural principles that evolve over time. Often, its practice is independent of regulatory process and governance issues, be they through traditional leaders or otherwise.

We submit that this Bill has more to do with recognition of Traditional Leaders and their role than it has to do with customary law. Consequently, it is important that this distinction is clarified in any legislative process.

Opting Out of the System

The constitution provides for recognition of customary law, cultural practices and belief systems. All this is subject to the constitutional principles of equality, human dignity and the Bill of Rights.

Departing from the constitutional framework, customary law is therefore an “opt in” process. That means, those who want to use customary law in their lives and resolve disputes or build relations, have to choose to do so, irrespective of where they live. The TCB however imposes customary law and traditional leadership on citizens because of their geographical location. It also defines parts of South Africa, along the lines of these boundaries – so when people pass through, whether they choose to be subject to customary law or not – they are forced to do so.

This offends against the constitution. It also distorts the constitutional provisions for customary law in South Africa.

Forcing citizens who fall within these geographical boundaries into this system and denying them the choice to ‘opt out’ is to treat them differently and unequally from their compatriots. CASAC submits this is unwarranted and it is unconstitutional. We submit that it introduces “tiers of citizenship” and forces those who live in the areas designated as “traditional communities” into the status of “tribal subjects”. This is against the spirit of common citizenship enshrined in the constitution.

Gender Inequality and prejudice against women

CASAC is concerned about the implications of the Bill for the majority of South Africans who live in rural areas. Whilst the Bill purports to provide space for recognition of women and their full participation, women’s lived experience shows a different reality.

Ongoing cases in current tribal courts and authorities show this prejudice and exclusion. For example, women who are in mourning are not supposed to be seen in public spaces amongst many communities. CASAC believes that if this is the chosen culture of families, this is accepted as the constitution provides for choice. However, we draw the attention of the Select Committee to numerous problems and case studies of widows who are marginalised, disposed of their property and who are socially excluded.

Most of the traditional courts take place in spaces that are considered inaccessible to women, especially when they are in mourning as they are expected to be in seclusion. In some communities women at this stage of their lives are considered impure and therefore their presence would be considered polluting the sacred spaces where traditional leaders live and hold the courts.

Gender inequality and exclusion is not only restricted to women. Whilst the Bill makes provision for men or women to be represented or to represent each other (in the case of husband and wife) there are numerous case studies that show high levels of intolerance and exclusion of women. These are carried out by the majority of traditional leaders who will preside over these courts.

CASAC submits that arguments for women’s direct participation in the Traditional Courts are not sufficient. It is our considered opinion that is but one of the manifestations of gender inequality and prejudice. We draw attention of the Select Committee to the very nature in which these courts will

be constructed. They are constructed on the basis of a male centred culture, power and privilege. It is not easy (we saw during the recent public hearings) for women to speak in these spaces. If the problems were blatantly clear during the Provincial Public Hearings, it boggles the mind how it can be expected that women will be allowed to speak and be heard in these courts.

We submit to the Select Committee that addressing prejudice and exclusion goes far deeper than a superficial definition that is provided in the Bill. This Bill reproduces these patterns to the detriment of women and children, especially the girl child.

Social exclusion and victimisation

CASAC draws the attention of the Select Committee to other forms of social exclusion and victimisation. In some areas where this Bill will operate, there are clear distinctions between men and women of property and social hierarchies.

Amongst these we want to highlight the following communities or sections of communities:

- **Difference on grounds of sexual identity and orientation**
- **Difference on grounds of origin (migrant communities)**
- **Age group hierarchies**
- **Exclusion of uncircumcised men in parts of the country – who are considered as boys**
- **Difference on grounds of belief systems**

The point of departure of the Bill is the assumption that the communities defined as “traditional “are homogenous. This creates enormous problems both at legal and social levels. This point of departure reinforces inequality and discriminatory hierarchies. It renders people vulnerable.

CASAC reiterates that customary law and cultural identity is chosen and it is within a larger context of diverse and fluid communities. The constitution remains the supreme law of the land. The rationale behind the Bill undermines this in multiple ways.

Land and Rights

CASAC submits to the Select Committee that the Bill as it stands reinforces dispossession of people and denial of their right to land. The Bill is based on the assumption of communal land tenure. There are numerous case studies that show abuses of this tenure system and victimisation of people using land as resource and source of power, privilege and patronage.

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