

Concerned Residents of Herschel

Submission on the Traditional Courts Bill (TCB)

2012

1. Background

On 15 April the group of Concerned Residents of Herschel convened workshop at which the TCB process and its contents were analysed. The following villages were represented at the workshop Mokhesi, Tapoleng, Tienbank, New Rest, Ducie's Nek, Blue Gums, Manxeba, Hlomendlini, Magwiji, Jozana, Phelandaba, Mkhetheng, Silindini. While representation at the workshop was not along tribal lines, effectively, all the 6 Tribal Authority areas (BaSotho, Amahlubi, Amaqwathi, Batlokwa, Abayemane and Amavundle) were represented at the workshop. The workshop participants decided to call themselves 'Concerned Residents of Herschel'. Mr B.W. Mafantiri of Magwiji and Mrs B.M. Valashiya were nominated by the workshop participants to compile and make a submission on behalf of the group. This document is a summation of the input made by the Herschel Concerned Residents at the workshop.

2. Procedural Concern relating the TCB process

The communities of Herschel have not been consulted about the Bill. The processes followed in publicizing the hearing and the location of the hearing, makes a mockery of the consultation process. 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 kilometers 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 TCB process. If there were any

discussion that took place about the TCB, Traditional Leaders kept to themselves. The Concerned Residents of Herschel heard about the hearing from an unofficial source and convened own workshop to consider the implications of the TCB. 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. It is our contention that this Bill requires an open discussion with the ordinary people on the ground.

3. We see the bill as problematic for the following reasons.

3.1 Traditional Courts Bill is arguably at odds with the constitution for the following reasons.

- 3.1.1 Rural women, often being the most marginalised from traditional courts are not guaranteed participation in traditional courts, neither as members of the body of people who make decisions in the courts, nor as litigants.
- 3.1.2 In terms of the Bill, people attending customary courts are denied legal representation.
- 3.1.3 The TCB contradicts the separation of powers required by the Constitution. This legislation effectively gives traditional leaders power to make customary law and adjudicate disputes, in addition to the executive powers such as land administration and development that they are being given.

3.2 Substantive problem areas of the TCB

- 3.2.1 There are theoretically 6 tribal areas in Herschel and none of these areas had a homogenous tribe. In all the areas people were mixed, which would make administration of customary law by traditional leaders highly problematic. The reigning traditional leader would be left with no option but to impose one tribe's

- customary law over people of different tribes. There is no way traditional leaders will be able to determine content of customary law under these circumstances. This is as a recipe for war between people and traditional leaders. It is inescapable that the Bill will recognize Apartheid 'Tribal' boundaries, when the people within those boundaries are reality mixed, as they are in Herschel.
- 3.2.2 The bill gives recognition and more power to the senior traditional leaders or chiefs than they really have, ignoring the parallel community structures that are in operation in the communities. The Bill does not give any recognition of the parallel structures that do some of the work which the traditional leaders are not doing. In real life, adjudication of disputes take place at different levels, (i) within the household, (ii) within the wider extended family at neighborhood level, (iii) at a village or administrative area levels and possibly (vi) between tribal areas. Traditional leader cannot unproblematically be given all the power to adjudicate at each of these different levels. This will not work in practice.
- 3.2.3 Many traditional leaders are so tainted with the past role they played as oppressors, and are viewed as corrupt, that they cannot function with any legitimacy. The TC Bill imposes these "illegitimate" structures to exercise unfettered power over the communities. Taking the same point further, the TCB does not take into account that there are many people in the same tribal areas who do not recognize traditional leaders as their legitimate leaders.
- 3.2.4 The TCB is linked to and is an extension of the Black Authority Act and the Traditional Leadership and Governance Framework Act. Workshop participants noted with concern that the Bill was effectively giving power to illegitimate, undemocratic structures.
- 3.2.5 The participants at the workshop noted with concern that the TCB is tabled for discussion, when the legitimacy of some of the traditional leaders has not been concluded. This contradiction is equivalent to imposing illegitimate traditional leaders over communities.

- 3.2.6 The Traditional Courts Bill allows the traditional leader to impose excessive sanctions in civil law cases. For instance, the traditional leader may require forced labour for the benefit of the community. This is open to abuse, in that people have experiences of tribal courts being used to fight enemies of traditional leaders.
- 3.2.7 The Bill simply pays lip-service to the question of protection of women. The Traditional Courts Bill painted a beautiful picture in its introduction, highlighting in particular women and disabled as if they will be protected according to the South African Constitution, but when you reach the content of the bill, it is contradictory, it doesn't state clearly how women are protected in their access to land and its ownership, women's participation in talks of customary law which is already oppressive to women and also cultural issues that force women to go to traditional courts. The main challenge is that this bill is violating people's rights, gives recognition and more power to the dictators (the chiefs) and doesn't open space for people's participation.
- 3.2.8 The Bill as it stands gives traditional leaders powers that can be potentially used to deprive people of their customary entitlements. Traditional leaders could use these powers to deprive people of their land rights, as they are already doing in real life.
- 3.2.9 The Bill as it stands limits sanctions (e.g. banishment), but there is no limit on civil matters.
- 3.2.10 Traditional courts may impose coercive sanctions where there is no compliance. Under the TCB it becomes an offence not to appear before a traditional court, when summoned. People should be given an option to opt out of customary courts when they choose so.
- 3.2.11 The Bill in all its manifestations, if passed into law, will only create more divide between traditional leaders and communities. We therefore see no point in government passing into law legislation that will not work.

