

South Africa: Traditional Courts Bill out of step

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New laws governing traditional courts could strip 22-million rural South Africans — and women in particular — of some of their most basic rights. The Traditional Courts Bill, on which public comment closed this week, aims to set a framework whereby customary courts will have legal clout. Civic organisations have slammed it as being unconstitutional, but traditional leaders argue that the Bill has been grossly misinterpreted by civil society.

First introduced in 2008, the Bill met with wide opposition. Civic organisations cried foul and the parliamentary joint monitoring committee on improvement of the quality of life and status of women made recommendations to bring it in line with the Constitution.

Yet the Bill today is the exact one that was introduced in 2008 and is expected to be reintroduced in the National Council of Provinces in the near future.

The Bill lists criminal offences that can be heard by a traditional court. Cases in which the amount of damages sought by the complainant does not exceed limits determined by the minister of justice and constitutional development, cases of theft (whether under common law or a statutory provision), malicious damage to property and crimen injuria can be tried by such a court, as well as assault that did not result in grievous bodily harm.

The Bill allows for the minister to appoint a traditional leader as the presiding officer of the court — without community input. Presiding officers have the power to hear cases and to pronounce judgment “after being advised in terms of customary law and custom”.

The Bill does not allow a defendant to have an attorney, nor does it give a defendant the option of being tried in a mainstream court.

New bill leaves room for conflicts of interest

Dr Sindiso Mnisi Weeks, senior researcher at the law, race and gender research unit of the University of Cape Town, said this was problematic. “It [the Bill] conceives of a traditional court as having just one presiding officer. It centralises power to a single individual who may have conflicts of interest.”

Mnisi Weeks explained that the Bill contradicted the structure of traditional courts in which the community was afforded an opportunity to resolve disputes.

However, Zolani Mkiva, head of the presidency of the Congress of Traditional Leaders of South Africa, was confident that presiding officers would be unbiased. “With any form of unfairness, people are free to take it to another level.” The Bill provides for appeal to a magistrate’s court against a traditional court order.

In September 2008 the parliamentary joint monitoring committee stated that “given that the system is rooted in patriarchal traditions, the Bill would need to include provisions to indicate how the representation of women in decision-making capacities in traditional courts will be ensured”.

Jacob Mshishi, senior manager in the office of the chairperson of the National House of Traditional leaders, said: “I can assure you that women will be on board.” He said concerns about women’s rights and representation in these courts were “proved not to be true”.

However, Mazibuko K Jara, of the Democratic Left Front, said that for the past month he had “listened to harrowing stories from many women and other rural dwellers about the conditions they face living under unaccountable and undemocratic chiefs. The struggle for democracy has only just begun again in rural areas.”

Nomonde Mbelekane, president of the Rural People’s Movement, testified in 2010 about injustices at the hands of traditional leaders.

“Some of the chiefs in Peddie have said that women are impure, dirty and involved in witchcraft. In Prudhoe village, an eight-month pregnant woman was called to the Dabi tribal court. She had tried to claim damages from the man who made her pregnant. The court decided that she was just accusing the man and dirtying his name. The court said the man’s father is rich and important; he cannot just have his family name pulled through the mud. She was then sentenced to corporal punishment.”

Consultation process is problematic

Another contentious issue is the consultation process followed in drafting the Bill. The department of justice and constitutional development consulted with structures of traditional leaders at national and provincial level, the South African Local Government Association, the National House of Traditional Leaders, as well as magistrates and prosecutors. The South African Human Rights Commission and the Commission for Gender Equality were also consulted.

However, the policy framework and the Bill supporting it were eventually drafted in consultation with only the constitutional affairs committee of the National House of Traditional Leaders. Rural women and communities at grassroots level were not consulted. The parliamentary joint monitoring committee urged that communities be included during the second round of consultations, but there was no second round.

Mshishi defended this, saying there was still a space for women to be heard on the matter because the Bill had been reintroduced in the National Council of Provinces and consultation at provincial level was yet to take place.

Justice department spokesperson Tlali Tlali said the department was aware of the concerns raised about the Bill during the public hearings. “As the Bill must be enacted by December 30 2012, the intention is to have the concerns addressed during the parliamentary process in the National Council of Provinces, together with any new concerns that might be raised there.”

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