

Scrap 'Bantustan' Traditional Courts Bill

The Traditional Courts Bill in its current form rewinds the clock for over 40% of South Africans living in rural areas and should be scrapped writes **Nozizwe Madlala-Routledge**.

Last month I was at a community meeting where a chief expressed unhappiness that the people had abandoned tradition. He asked, 'Why are you no longer serving me? Where are the *madumbes*, the beans and the mealies?'

The chief was speaking to people who live on private land, who catch taxis into town to go to work, to pay their accounts or to see a movie. These were people who bought their vegetables from the supermarket in town.

In the room was a mix of people of all races who lived in the community. Some were migrant workers from the Eastern Cape. Others were people of mixed race, born and bred in that community.

Does the definition of a traditional community as outlined in the Traditional Courts Bill fit this community? What did the chief mean by tradition? Whose tradition was it? What will happen to these people under the current bill, if it becomes law? Will the chief try and punish them for not serving him?

Among other things, the bill denies people the right to make a choice. It says it is an offence for anyone within the jurisdiction of a traditional court not to appear when summoned by the presiding officer. This sends shivers down my spine.

The traditional leaders' claim to legitimacy is based on the

idea that they can represent the aspirations and consensus of all their subjects. This is questionable when many are active members of political parties and even stand as public representatives in elections. The present chairperson of the Congress of Traditional Leaders of South Africa is a Member of Parliament and the former leader of the KwaZulu homeland is also a Member of Parliament and leader of a political party.

How can such leaders claim to represent all the people in their territory? How can they be seen to judge without political bias in cases involving members of different political parties? Their active participation in politics and acting as presiding officers in terms of this bill also brings into question the separation of powers as required by the constitution.

In 1980 I was one of about 15 young people who were rounded up by traditional councillors (*oqonda*), abducted, beaten, detained and driven to Ulundi at the crack of dawn to appear before Inkosi Mangosuthu Buthelezi. What was our crime? We had committed no crime. We were simply political activists in KwaMashu, demanding our human rights.

However, we were taken against our will, beaten up and forced to appear before a structure with no legitimacy to try us - and where we had no legal representation.

There are important questions that should be asked regarding this bill. For example, it is not clear what tradition is, who defines it, and for whom? The same applies to justice. What is justice according to the bill? Who defines it, and for whom?

The bill's weaknesses are not improved by the concentration of power on kings, queens and senior traditional leaders. We can draw some lessons from history.

I recently finished reading *Zulu Woman: the life story of Christina Sibiya* by Rebecca Hourwich Reyher. The book is based on first-hand accounts by Queen Christina Sibiya Zulu, King Solomon kaDinizulu's first wife. Christina was the first Zulu queen to demand and receive a divorce from a husband in a polygamous marriage with 65 wives.

However, she waited over a year and half for her trial. Her husband, the king, from whom she wanted a divorce, was the only one with the power to convene the court to hear her case.

While keeping her waiting, he continued to subject Christina to humiliation and punishment and even took her sister as his wife! Where is justice in this traditional court where women have no say about how many women their husband can marry or sleep with?

The Traditional Courts Bill seeks to re-instate a tradition that

many have left behind. It seeks to impose a system that is no longer a part of many rural people's lives and takes away their choices and the right to equality that is in our Constitution.

The bill is based on an unwritten customary law supposedly passed down, by word of mouth, from generation to generation.

I could possibly see this working in a homogeneous community, but different regions have different traditions. These days, we have a constitution that allows free movement and freedom of association.

While campaigning for local government elections in deep Ndwedwe in KwaZulu-Natal, I found Zimbabweans and Somalis living there. Would they be tried under Zulu traditional law or their own? Are there pockets of South Africa where such communities exist that have been left intact and untouched by the changes that have taken place in recent times? What will happen if this bill becomes law, to those in the community who do not fit the profile of that community, or who come from a different tradition?

WOMEN AS MINORS

What will happen to the rights people have under our new found democracy, for which we sacrificed, and for which rural women paid dearly? The bill does not guarantee the participation of women in traditional courts - neither as members of the body of people who make decisions in the courts, nor as litigants. Women are often refused self-representation and even attendance of some traditional courts.

Women excluded from self-representation in the traditional courts are required to be represented by a male family member. The bill does not require that this customary law practice change but instead permits that women may continue being

represented by men, in accordance with customary law.

Despite the right to gender equality in our constitution and various efforts by the government to remedy the situation, South African society remains male dominated. The bill does not address this issue, both in its drafting and in the public consultation processes.

In patriarchal societies, women are often marginalised from spheres of both private and public decision-making. Traditional courts are a stark example of this exclusion, and the bill needs to look clearly at the marginalisation of women in traditional structures and take affirmative action to overcome this.

The memorandum in the new bill says it was drafted in consultation with the National House of Traditional Leaders. Although the South African Local Government Association and Chapter Nine bodies were consulted, rural communities and women in particular were not.

According to Aninka Claassens, writing in the *Mail and Guardian* in 2008, the earlier draft of the bill, prepared by the South African Law Reform Commission after a

process of extensive research and public hearings, 'had dealt with the problem of exclusion and bias against women in customary courts.' How then can it be that a bill comes to parliament that does not recognise the patriarchal nature of traditional culture and leadership?

As a young activist in the 1980s, I was inspired by the courage of rural women and women from the shanty towns who fought against pass laws. Women of Ixopo led the struggles against land dispossession while women of KwaZulu-Natal refused to fill dipping tanks. Women of KwaKito closed down municipal beer-halls and women of Limehill, Dimbaza and Mutse resisted forced removals.

According to SA History Online Dora Tamana urged women to take action against their oppression. Said Tamana: 'We, women, will never carry these passes. This is something that touches my heart. I appeal to you, young Africans, to come forward and fight. These passes make the road even narrower for us. We have seen unemployment, lack of accommodation and families broken because of passes. We



Community meeting at Tshaba Dimaketse in Boksfontein, North West Province.

William Maitala



Citizens queue to vote at Makause informal settlement near Germiston.

have seen it with our men. Who will look after our children when we go to jail for a small technical offence – (of) not having a pass?

Where were the traditional leaders when women stood against apartheid? Is this resistance by women now considered part of traditional culture? Most probably it is not.

The process of consultations conducted by the National Council of Provinces, has uncovered serious limitations and constraints. The hearings that took place did not address the main problem with the bill while traditional leaders dominated the hearings. The hearings were also poorly publicised, if at all. So most women did not attend and were unable to give their views.

Furthermore, women were not sufficiently protected so that they could speak freely on the problems they had with the bill. Asking women to speak in front of their traditional leaders was not the wise thing to do as women feared victimisation.

The bill fails to recognise the customary dispute resolution processes, although it uses the idea of restorative justice – it's only about words.

It concentrates power on 'senior traditional leaders'. Claassens says, 'If the primary purpose of the bill was to support restorative justice and the development of living customary law, it would recognise the full range of customary courts that operate.'

BANTUSTANS THROUGH BACK DOOR

The bill violates the right to choice by not allowing people to 'opt out' of traditional courts. In terms of the bill, people attending customary courts are denied legal representation. This undermines their right to legal representation. Why are traditional leaders imposing themselves through the back door, using this bill?

A central problem with the bill however is its recognition of the boundaries developed by the apartheid government as part of the division of our country under the Bantustan policy. We fought against Bantustans only to find them being re-instated by the democratic government through this piece of legislation.

We fought for equality, citizenship and justice for all our people. While we think there is a role for traditional courts and that the values on which they are founded need to be affirmed, this bill threatens the rights in the

constitution. It takes us back to the dark days of apartheid.

The bill must be scrapped and the process started again on the right footing by consulting ordinary people and providing them with safe spaces in which to speak freely. This is important especially for women, young men and other vulnerable groups. Parliament is wasting time and money, conducting provincial hearings on a flawed bill, which will fail the constitutional test.

The way the bill is written will not achieve the stated aim of 'affirming the recognition of the traditional justice system and its values, based on restorative justice and reconciliation'. It is a recipe for conflict and it goes against the grain of the human rights in the constitution.

Legislation that is based on apartheid boundaries, as entrenched by the Traditional Leadership and Governance Framework Act of 2003 (section 28) can never be consistent with our Constitution. The Traditional Courts Bill's reliance on those boundaries and definitions of customary identity is deeply flawed within our constitutional democracy.

Legislation that denies equality and citizenship to 17-21 million rural South Africans could not be in line with our constitution. This bill not only undermines democracy but tramples on the hard-won rights in our constitution and must be scrapped now. **LB**

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