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# **Traditional Courts Bill**

Presentation to KZN Community members

13 April 2012

by

Commissioner Janet Love



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## Vision:

Transforming Society; Securing Rights; Restoring Dignity

## Mission:

The SAHRC, as the independent national human rights institution, is created to support constitutional democracy through promoting, protecting and monitoring the attainment of everyone's human rights in South Africa without fear, favour or prejudice

## Commissioners:

L. Mushwana (Chair); P. Govender (D. Chair); L. Mokate; B. Malatji, S. Baai  
(Part time): J. Love; T. Titus

# STRATEGIC OBJECTIVES

## Strategic Objectives:

Promote compliance with international obligations

Position the Commission as the focal point for human rights in South Africa

Strengthen advocacy and human rights awareness raising

Advance the progressive realisation of Economic and Social Rights

Advance the right to equality and access to information

Improve the effectiveness and efficiency of the Commission

## Fulfil Role as South Africa's recognised NHRI:

Based on 'Paris Principles'

Engage with International Treaty Bodies

Participate in Universal Periodic Review / Africa Peer Review Mechanism

Work with other NHRI's

Current Chair of NANHRI (for 2 years)



# CONSTITUTIONAL MANDATE OF THE SAHRC

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- ✘ **Chapter 9 of the Constitution** of the Republic of South Africa ,1996 sets out the mandate of the SAHRC.
- ✘ Section 184 provides that the SAHRC must:
  - + promote respect for human rights and a culture of human rights
  - + promote the protection, development and attainment of human rights, and
  - + monitor and assess the observance of human rights in the republic
- ✘ It achieves this through investigation, education, research, reporting and securing redress
- ✘ It uses **Section 5 Committees**

# ADDITIONAL POWERS

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- ✘ **The Human Rights Commission Act, 1994** gives guidance on some of the methods it can utilise in carrying out its work such as:
  - + *Information programs* to foster understanding of the Act, the bill of rights and its activities.
  - + Close *liaison* with the relevant institutions, bodies and authorities.
  - + Consider human rights related *recommendations, suggestions and requests* from any source.
  - + May bring proceedings in a competent *court* or tribunal in its own name, or on behalf of a group or class persons.
  - + Consider *alternative dispute resolution* mechanisms such as mediation, conciliation and negotiation.

# SAHRC AND PEPUDA

## The SAHRC must ensure that the spirit and letter of the Promotion of Equality and Prevention of Unfair Discrimination Act ,2000 becomes a reality

The main goals of the Act are to:

- + Prohibit unfair discrimination on the prescribed grounds
- + Prohibit the advocacy of hatred on one or more of the prohibited grounds
- + Prohibit harassment
- + Attain substantive or real equality
- + Educate on the importance of promoting equality and prohibiting unfair discrimination, hate speech and harassment
- + Ensure compliance with international law including treaty obligations
- + Provide effective remedies for victims of unfair discrimination, hate speech and harassment



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# SAHRC AND PROMOTION OF ACCESS TO INFORMATION ACT

- ✘ The PAIA provides the necessary legal framework to give effect to the right of access to information that is set out in Section 32 of the Constitution.
- ✘ The legislation imposes a number of duties and obligations on the Commission (Sections 14, 32 , 51)
- ✘ The SAHRC has specific reporting obligations to the National Assembly (Section 86)
- ✘ The Commission must conduct awareness and training in relation to PAIA (section 83) to advance the public's understanding in terms of exercising their rights; promote timely and effective dissemination of information by public bodies about their activities; train public officials and make recommendations to public bodies as to how to improve the administration of the Act.





# MAKING OF LEGISLATION

- + Pre-parliamentary stage: policy-making and public consultation
- + Cabinet
- + Bills that amend the Constitution (s74); that are national (s75); that are national and provincial (s76); money bills (s77)
- + Committee stage in National Assembly: written and verbal submissions
- + Committee stage in National Council of Provinces: written and verbal submissions
- + Consultation in the provinces under the auspices of the legislature
- + First reading, second reading, presidential assent, promulgation



# BACKGROUND TO THE BILL CURRENTLY BEFORE PARLIAMENT

- ✘ In 1927 the Black Administration Act provided for traditional leaders to play a role in the administration of justice
- ✘ The SA Law Reform Commission finalised a report on traditional courts in 2003
- ✘ The TCB was initially put before Parliament in 2008 and then lapsed in the face of the 2009 elections
- ✘ It was formally withdrawn in March 2011
- ✘ It was reintroduced in February 2012
- ✘ **CONCERN: At no point was there adequate consultation with most affected communities**

# SAHRC SUBMISSION

Whether a 'court' in terms of Constitution (s166) or a tribunal: a dispute resolution mechanism implies consent of all parties which is not provided for in the Bill

Blurring between what is a 'customary dispute' and a civil or criminal matter

Article 7 of the African Charter recognises the right to a fair trial

SA has signed and ratified the International Covenant on Civil and Political Rights (ICCPR) which disallows binding judgments without fair trial rights being met (s.14)

Bill is silent on the number of Traditional Courts, their location and which Department will be responsible for their maintenance

Bill is silent on procedures of these Courts and leaves this to regulation which is inadequate: In some customary situations, women are not allowed to enter. Thus the law should clearly state that women have the right to be present

The law needs to affirm the right to a public the trial. The limitation on a person's right to appeal goes against the Constitutional right to a fair trial (s35)

The Koi-San peoples are excluded from the Bill

# SAHRC SUBMISSION

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Bill provides for geographic jurisdiction rather than one based on custom and thus fails to embrace current differences in traditional systems: e.g. Transkei and KZN

The distinction between criminal and civil disputes is inherently a feature of common law not custom.

There is no provision for appeals within the framework of the customary systems

Traditional leaders have to take an oath or affirmation before a Magistrate thereby suggesting subordination

The Bill diminishes community involvement by stipulating that the Minister may designate a senior traditional leader after consultation only with a Premier and may designate a King or Queen only after consultation with the President.



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# SAHRC SUBMISSION

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The African Charter on Human and Peoples Rights does not recognise work as a sanction but as a right that is accompanied by fair remuneration

Minister may determine maximum amount of a fine but there is no guideline in this regard

No guidelines about sanctions when dealing with a matter involving a child

Sanction options are too broad, particularly clause 10(2) which states that the Traditional Courts may make any order that it deems appropriate

It is utterly unacceptable that the Bill enables sanctions to be imposed on persons who are not parties to the proceedings or even present while they are taking place

The Bill gives a traditional leader unlimited power to deprive a person of any benefit including access to and use of land and property. This violates the property and housing rights enshrined in the Constitution and can undermine a person's ability to provide for himself or herself and his or her family



# KEY CONCERNS IN RELATION TO THE TRADITIONAL COURTS BILL

- + Two legal systems are created: one for those residing in communal lands and another for the rest of South Africa. This is a resurrection of apartheid-style divisions based on residential criteria and without regard to choice. No possibility to opt out.
- + Conflicts with the separation of powers between law making, executive authority and judiciary
- + Jurisdiction of the envisaged courts in relation to various criminal offences – undermines the importance of independent decisions being reached concerning prosecutorial decisions; fails to uphold the rights a fair trial including access to representation, established procedures and the basis for review.
- + Potential for arbitrary conduct and lack of system on the basis of which precedents can be clearly established and drawn upon which is contrary to the constitutionally recognised system of common law.
- + Role of and protections for women unspecified.



# KEY CONCERNS IN RELATION TO THE TRADITIONAL COURTS BILL

- + The possible sanctions can lead to forms of forced, unpaid labour and may result in the infringement of various rights including the right to dignity
- + No possibility of appeal to the civil courts in all cases
- + Lack of clarity about the conduct, skills and experience required to preside over matters including how records will be kept and how there will be proper access to them
- + Perpetuates the colonial distortion of chiefly power



# THANK YOU

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## Questions, ideas, discussion

