

**SUBMISSION ON TRADITIONAL COURTS BILL [B 1–2017]**

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7. **Who is ARD**

The Alliance for Rural Democracy (ARD) is a cross-section of civil society organisations sharing a common concern about the on-going struggle to defend rural land rights and democracy against the onslaught of new laws and policies that favour the interests of traditional leaders and politically connected business investors at the expense of the land and political rights of poor South Africans living in the former Bantustans.

The ARD was formed in 2008 because of the introduction of the Traditional Courts Bill, concerned about the detrimental effects that the Traditional Courts Bill will have on the rural constituencies they serve and support.

1. **Background and Introduction**

The original bill was first introduced in 2008 with a justification that there is a need to regularise traditional courts as a way of providing justice that’s accessible to ordinary rural people. Even though the justification was generally accepted, the contents of the bill was rejected outright by the Civil Society and the communities. for its insensitivity to the reality of most rural people’s lives. The argument was that the bill was unconstitutional and was drafted without input by ordinary rural people and therefore did not reflect the true picture and aspiration of the people

The bill was reintroduced in 2012, with the same concerns raised in the first round, and therefore was voted against by 5 provincial mandates and as a result the bill lapsed in early 2014.

1. **What was fundamental problems and unconstitutional about the old bill**

* Terms such as ‘Presiding Officer’ that gives power to a “senior traditional leader” This distorted a living customary law that’s, in fact, based on distributed power and strives for participation and consensus among the members of a community;
* The refusal of right to legal representative, and the adopted definition of Community that denied rural people choice and forcibly rendered them subjects in line with the former homelands’ jurisdictional boundaries;
* Its failure to address gender inequalities that exist under the patriarchal arrangements that prevail in many customary communities

1. **The Progressive provisions in the 2017 New Version of Traditional Courts Bill**

The latest draft suggests some progress in addressing the substantive concerns raised by the ARD communities and its alliance partners

* It recognises the voluntary nature of affiliation to a certain customary practice through an opt in – opt out provision, that means parties can freely opt out if they are summoned to appear in the traditional court, even though it imposes a limited 14-day time frame to indicate so, which might not be possible for many migrant citizens. Furthermore, it allows any person to initiate their case in any traditional court. YET the court may still hear the matter in your absence… concern about opting out not necessarily amounts to protection. Even if on paper one can opt out, unless you are prepared to suffer exile and losing basic services, you cannot really afford to opt out
* section 7 subsection (3) (b)… on the issue of natural justice and fair hearing and impartial decision … it sounds good but if the court is not impartial, or if there was no fair hearing, your only remedy is to go the high court in a city [clause 11] and very few people have the money to go the high court
* types of orders that a court may make, e.g. fines but if a person is poor they may be ordered to do community service [subsection c]
* The 2017 bill is also strong on the need to eliminate discrimination of all kinds in traditional courts. Women and other vulnerable groups are to participate freely, both as litigants and members of the courts.
* It also incorporates important exclusions, thus attempting to make it impossible for traditional leaders to use these courts to secure personal benefits and exploit ordinary rural people.
* The traditional leader is no longer labelled as “**the presiding officer**” in traditional courts but **different customary layers of dispute resolution** from the family is recognised. it recognises a central role for community actors who are not traditional leaders.

1. **Problematic sections and Concerns over the new Bill**

* The bill’s definition is based with in the unmentioned Act of Parliament, and it is obvious that the empowering act of this bill is the **Traditional Leadership and Governance Framework Act of 2003** since the Traditional Leadership and Khoisan Bill is still in pipeline and highly contested. The Deputy Minister’s highest hope is that the Traditional Leadership and Khoisan Bill will be the Act of Parliament that the bill is referring to.
* The unequal treatment of communities and Traditional leaders in consultation is a concern to the Alliance. The department continues to consult the elite Traditional leaders recognised according to the colonial construct and leaves out 18 million rural citizens wo will be affected by this law.
* Administrative process e.g. **The registrar and court fees** to take a matter to court: clause 13: traditional courts will have to keep records of proceedings; and make reports; with no budget from the department to do these things, so the expectation is that the courts themselves will set fees for launching proceedings. **RIA**
* **Review and Appeal: cannot appeal to the magistrate’s court; must appeal to a customary institution of higher standing; we think it may be the house of traditional leaders [clause 12 of TCB**: escalate a matter to a customary institution or structure in accordance with customary law and custom for purposes of reconsidering the decision or order made by the traditional court] even though it is said that these would be deemed Courts of Law, the mentioning of customary law is perpetual throughout the document
* The lack of **enforcement and sanctions** for traditional leaders who breach the proposed Code of Conduct as according to the TLFGA and the failures of Provincial Government and Houses of Traditional leaders to exercise oversight in relation to the Code of Conduct and checks and balances that were built into the controversial [Traditional Leadership and Governance Framework Act of 2003](http://www.customcontested.co.za/wp-content/uploads/2013/03/TLGFA-2003.pdf).
* It is the Government’s role to ensure robust public consultation on this bill.
* The department has also left some of the substantive concerns in place. This could partly be because of the compromises made with traditional leaders who see traditional courts as having authority over and above to that of state courts.
* The ambiguity created by the new bill. On the one hand, it says that traditional courts must operate according to customary law and customs. On the other it describes them as “courts of law”, allowing them to develop the common law.
* The Traditional Leadership and Governance Framework Act centralises traditional leaders as the custodians of custom. It refers to traditional leaders “convening” the courts and holding top-down authority that they can “delegate” to other actors to establish lower level traditional courts. This assumption remains even though the bill also says that customary law is voluntary and consensual, and the courts are not “presided over by judicial officers”.
* The definitions of community and traditional leader as defined in the **Traditional Leadership and Governance Framework Act of 2003** still recognises traditional leaders only if their authority can be territorially linked to a traditional community (formerly “tribe”) that came into existence under the **Black Authorities Act 68 of 1951** and observes those apartheid-era boundaries.
* This conception of traditional authority contradicts the bottom up nature of customary law and does not allow traditional courts to be created independently. Moreover, the bill should provide for appeals to state courts, not just procedural reviews to state courts and appeals to other traditional courts exclusively. It should also have stronger requirements concerning women’s equal membership of traditional courts.

1. **Way-forward** 
   * There was a reason why the justice system established different courts to deal with different matters such as **Maintenance Court, Land Claims Court, the Labour Court etc.** The different competencies required to be able to execute cases is essential and therefor it should be clear what kind of cases the Traditional Court cannot handle
   * The introduction of new structures such as the REGISTRAR brings about a new debate, how is it identified and at what cost?
   * The ARD wants to note and welcome the progressive moves made by the Department and the drafters in this new version, and calling for some public dialogue which will results in a final document that will assist that the bill meets the justice needs of rural people.
   * Going forward the ARD calls for consultation with the people who will be most directly affected by the bill: ordinary rural people who rely on traditional courts for their daily access to justice and security.

Alliance is calling Government to put make resources available for public consultation and participation, as well as additional funding to implement the bill. We need to be advised on the cost implications for this new bill to function. Adequate resources are needed to educate ordinary rural people and ensure enforcement of their rights under an improved bill.

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