



BRIEFING NOTE ON SOUTH AFRICA'S COMMITMENT TO ADVANCING HUMAN RIGHTS AND PROTECTION FOR KHOI, SAN AND AFRICAN INDIGENOUS COMMUNITIES

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1. INTRODUCTION

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on 13 September 2007. UNDRIP details the rights of indigenous peoples in international law and policy while also encouraging the recognition, protection and promotion of these rights. The Declaration deals with both individual and collective rights while also giving attention to cultural rights. An important component of the Declaration is that it discourages discrimination against indigenous peoples and encourages their full participation in all matters that concern them.¹

This briefing note seeks to provide Members with a succinct perspective on South Africa's commitment to advancing human rights and protection for Khoi, San and African Indigenous Communities.

¹ Office of the High Commissioner for Human Rights, (2024)



2. SOUTH AFRICA'S COMMITMENT TO PROTECTION OF CULTURAL HERITAGE: INTERNATIONAL CONVENTIONS

South Africa has ratified several international conventions related to the protection, documentation and conservation of cultural heritage and heritage resources. The **UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage** (16 November 1972) is one of the most important conventions relating to protection of a country's cultural heritage. South Africa ratified this Convention in 1997. The Convention is a major international instrument for protecting the world's heritage. By signing this Convention, state parties undertake to not only conserve world heritage sites on its territory, but also to protect its national heritage. According to UNESCO, through ratifying this Convention, state parties benefit as they engage in an international community of concern for international sites that symbolise cultural diversity and natural wealth.²

Another UNESCO convention ratified by South Africa in 2006 is the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (20 October 2005). UNESCO recognises cultural diversity as a fact, since a wide range of distinct cultures exists universally. Awareness of cultural diversity has become relatively common. The notion of cultural diversity has important political implications in that it frees people from stereotypes and prejudices and accepts others with their differences and complexities.³ This Convention defines cultural diversity as follows:

“Cultural diversity” refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. [It] is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.

In December 2005, **African Union** Ministers of Culture developed the Charter for African Cultural Renaissance (hereinafter referred to as “the African Renaissance Charter”). Member States of the African Union (AU) adopted the Charter in Khartoum in January 2006.⁴ The inspiration for the development of the Charter was the Cultural Charter for Africa (hereinafter referred to as “the Cultural Charter”) adopted by heads of states and government of the Organization of African Unity (OAU) in Mauritius in 1976 and entered into force in 1990.⁵

The Constitutive Act of the AU, a range of international conventions and UNESCO declarations, guides the African Renaissance Charter.⁶ The African Renaissance Charter affirms, “African cultural diversity and unity are a factor of equilibrium, strength in African economic

² Meskell (2013).

³ UNESCO (2009).

⁴ UNESCO (2009).

⁵ Mitchell & Lane (2013).

⁶ African Union Charter for African Cultural Renaissance (2006).



development, conflict resolution and reducing inequality and injustice to promote national integration”⁷. It further emphasises, above all, the urgent need to:

- improve educational systems which symbolise African and universal values,
- ensure the promotion of African languages, and
- carry out a systematic inventory with the aim to preserve and promote tangible and intangible heritage.⁸

The key objectives and principles of the African Renaissance Charter centre on African cultural diversity, identity and renaissance. In summary, the African Renaissance Charter “is a tool developed to empower member states to promote Pan–Africanism, cultural renewal and identity as well as strengthening their national policies and other cultural instruments which will in turn contribute to the achievement of the continents’ socio-economic and cultural integration, to building sustainable peace, and to the fight against poverty”⁹.

The Government of the Republic of South Africa with the African Union Commission launched the African Cultural Renaissance for Southern Africa Development Community (SADC) Member States in November 2011 with the primary objective being to popularise the African Renaissance Charter in the fourteen countries of SADC.¹⁰

On 25 May 2012, the South African Minister of Arts and Culture signed the African Renaissance Charter. In the statement on the Cabinet meeting of 29 May 2013, Cabinet announced that it had approved that the African Renaissance Charter be submitted to Parliament for ratification.¹¹ This Charter was then ratified by South Africa in 2014, and it forms an important basis for the promotion of culture throughout Africa.

3. POLICY FRAMEWORK FOR TRADITIONAL LEADERSHIP IN SOUTH AFRICA

Traditional leaders play an important role in the well-being of citizens in rural areas. The rural communities have always had strong trust in the traditional leadership system due to the role that traditional leaders have been playing in their societies over the years. Traditional leaders play various roles in communities, for example, they serve as political, military, spiritual, and cultural leaders, and are considered as chief custodians of the values in societies.¹²

The Constitution of the Republic of South Africa (1996) recognises the traditional leadership institution as a governance institution through Section 212(1). It allows for national legislation to provide for the role of traditional leadership as an institution at local level on matters that affect local communities, over and above their role as custodians of customs and tradition.¹³

⁷ Ibid

⁸ Ibid

⁹ Department of Arts and Culture (nd).

¹⁰ Department of Arts and Culture (2013c).

¹¹ Department: Government Communication and Information System (2013).

¹² Matrons, N. and Sithola, S. (2017).

¹³ Ibid.



There are two major policies, among others, that provide an indication of the role of traditional leaders. These are the 1998 White Paper on Local Government and the White Paper on Traditional Leadership and Governance, 2003.

3.1 White Paper on Local Government

According to the White Paper on Local Government, traditional leaders should¹⁴:

- act as head of the traditional authority and, as such, exercise limited legislative powers and certain executive and administrative powers;
- preside over customary law courts and maintain law and order;
- consult with traditional communities through imbizo/lekgotla;
- assist members of the community in their dealings with the State;
- advise Government on traditional affairs through the Houses and Council of Traditional Leaders;
- convene meetings to consult with communities on needs and priorities and provide information;
- protect cultural values and provide a sense of community in their areas through a communal social frame of reference;
- be the spokespersons generally of their communities;
- be symbols of unity in the community; and
- be custodians and protectors of the community's customs and general welfare.

3.2 White Paper on Traditional Leadership and Governance

According to the White Paper on Traditional Leadership and Governance, the roles that the traditional leadership institution can play in governance and development are¹⁵:

- promote socio-economic development;
- promote service delivery;
- contribute to nation building;
- promote peace and stability amongst the community members;
- promote social cohesiveness of communities;
- promote the preservation of the moral fibre and regeneration of society;
- promote and preserve the culture and tradition of communities; and
- promote the social well-being and welfare of communities.

¹⁴ Ibid.

¹⁵ Matrons, N. and Sithola, S. (2017).



While these two policies attempt to outline roles and functions for traditional leaders in the democratic context, it should be noted that they do not indicate how the mentioned roles should be performed.¹⁶

Another important framework around traditional leadership in South Africa is the Traditional and Khoi-San Leadership Act, 2019

3.3 Traditional and Khoi-San Leadership Act, No. 3 of 2019

The Traditional and Khoi-San Leadership Act, 2019 provides for, amongst others, the following¹⁷:

- the recognition of traditional and Khoi-San communities, leadership positions and for the withdrawal of such recognition;
- the functions and roles of traditional and Khoi-San leaders;
- a code of conduct for members of the National House of Traditional and Khoi-San Leaders, provincial houses, local houses and all traditional and Khoi-San councils;

4. RECENT DEVELOPMENTS

In 2022, the Traditional Affairs General Amendment Bill was introduced in the National Assembly. The purpose of this Bill was to amend the Local Government: Municipal Structures Act, 1998, so as to correct certain references to the Code of Conduct. In addition, this Bill sought to amend the **Traditional and Khoi-San Leadership Act, 2019**, so as to provide clarity on a forum to be consulted. The Bill was also intended to repeal a section of the Local Government: Municipal Structures Amendment Act, 2021.¹⁸

In 2023, the Constitutional Court held that the process Parliament and the provincial legislatures had followed in the processing of the Traditional and Khoisan Leadership Bill was deficient, failed to attain meaningful public participation, and therefore rendered the Act unconstitutional and invalid. The declaration of invalidity was suspended for a period of 24 months to allow Parliament to re-enact the legislation in a manner that is consistent with the Constitution.¹⁹

As a result of the Constitutional Court findings, the **Traditional Affairs General Amendment Bill** was also impacted and subsequently withdrawn. Given South Africa's commitment to recognition of its various groups, Parliament has committed itself to undertaking a constitutionally aligned process on this matter. On 17 September 2024, the Portfolio Committee on Cooperative Governance and Traditional Affairs (COGTA) received a briefing from

¹⁶ Ibid.

¹⁷ Traditional and Khoi-San Leadership Act

¹⁸ Government of the Republic of South Africa, (2022).

¹⁹ Parliament of the Republic of South Africa, (2023).



Parliament's legal services on the judgment of the Constitutional Court in the matter of Mogale and Others v Speaker of the National Assembly and Others (Mogale case) that was delivered on 30 May 2023, and its impact on the Traditional and Khoi-San Leadership Act of 2019. In addition, Parliament's legal services also briefed the committee about the consequent withdrawal of the Traditional Affairs General Amendment Bill of 2022.²⁰

5. CONCLUSION

In its response to the ruling by the Constitutional Court, Parliament noted that “public participation is a cornerstone and an indispensable feature of a democratic parliament. In this regard, Parliament developed the public participation model with a view to strengthen public involvement in its decision-making processes”²¹. Furthermore, Parliament emphasised that it views the ConCourt judgement “as an important enrichment to Parliament's endeavour to continually improve its public participation function to ensure that the decisions the institution takes fully reflect the views, aspirations, and hopes of South Africans”²². As such, Parliament as an institution will continue to allow the necessary processes to be followed and ensure that all relevant stakeholders are included in public participation endeavours.

²⁰ Parliament of the Republic of South Africa, (2024).

²¹ Parliament of the Republic of South Africa, (2023).

²² Ibid



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