

THE TRADITIONAL COURTS BILL [B1- 2012] NEGOTIATING MANDATES

EASTERN CAPE

**EASTERN CAPE PROVINCIAL LEGISLATURE
NCOP UNIT**

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SUBJECT: NEGOTIATING MANDATE MEETING ON THE
TRADITIONAL COURTS BILL [B 1 – 2012] (S76)

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EASTERN CAPE PROVINCIAL LEGISLATURE

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NEGOTIATING MANDATE

To: The Chairperson: Select Committee on Security and
Constitutional Development
National Council of Provinces

Name of Bill : Traditional Courts Bill I
Number of Bill : [B1-2012]
Date of Deliberation : 01 October 2013

1. Vote of the Legislature

The province does not support the Bill and mandates the Eastern Cape delegate to the NCOP to negotiate against the adoption of the Bill.

The Province is of the view that the Bill is fundamentally flawed and no amount of amendments will be able to remedy the Bill.

The Committee wishes to raise the following matters for consideration.

(a) On the objects of the Bill (Clause 2 of the Bill)

One of the objectives of the Bill is to, *create a uniform legislative framework, regulating the role and functions of the institution of traditional leadership in the administration of justice, in accordance with the constitutional imperatives and values, and...*

The Bill does not create any form of uniformity and leave the process at the discretion of each traditional court to determine the content of the law.

This is unlike the civil justice system which is adequately and effectively regulated by the Criminal Procedure Act which spans into hundreds of sections so that each matter is properly regulated.

Among the pertinent issues that the Bill is silent on is the burden of proof, the question of privilege, right to call witnesses, right to cross examination, right to address the court on merits, right to address the court on sentence and so on. This is left at the discretion of each traditional court and therefore there will be lack of inconsistency.

Lack of similarities on these key issues will lead to two forms of justice system, with one justice system which is for the rural people which is left loose and solely at the discretion of the presiding officer and the other justice system in terms of which the rules are properly defined and which is for the people who does not stay in the rural areas.

It is proposed that the procedure in the traditional courts be strictly regulated so that there will be certainty and uniformity. Certain rights must be guaranteed in the Bill as it is done in the civil courts.

(b) Designation and training of traditional leaders as presiding officers (Clause 4)

The process for the designation of traditional leaders as presiding officers is too simplistic and does not look at the competency of the person to be designated. It is proposed that there must be some form of competency assessment to determine whether the person going to be designated is capable of carrying the important task they are given.

The Bill must state the key considerations that must be taken into account in designating a person as the traditional court presiding officer and this must not

be left to regulations as it is substantive and what must be left to the regulations must be the procedure for the designation.

A new form of traditional leadership called the principal traditional leadership has been created and the Bill is silent on this new traditional leadership.

In some traditional communities, the courts are chaired by the Council of elders or the forum of community leaders and not an individual. The Bill is silent on the status of this council of elders or the forum of community leaders and how decisions are going to be reached if the courts are being presided over by this council of elders or the forum of community leaders.

It is however confusing that the Bill recognized this council of elders or the forum of community leaders in the definition of the traditional courts but does not mention them again in the body of the Bill.

It is proposed that the powers must not be centralized with one traditional leader but must be exercised by these council of elders.

It is proposed that the traditional courts must be presided over by the council of elders or the forum of community leaders with fair representation of woman and not simply by the individual.

It appears that designation of the presiding officer may be revoked for failure to attend the training. This is simplistic. Instead designation must be revoked for failure to acquire the competency levels expected from a person presiding over important cases such as this prescribed in the Bill. Presiding officers must not only attend the training sessions but must also acquire a particular competency level before they begin to preside.

The Bill must set the age beyond which a person may not be competent to preside over the cases.

The institution of traditional leadership is patriarchal in nature and this is evidenced by the number of male traditional leaders as opposed to female traditional leaders in the country. There is no attempt in the Bill to address this matter. It is proposed that the courts be presided over by the council of elders or the forum of community leaders and the composition of the these council of elders or the forum of community leaders be properly defined to include a fair

representation of woman. This will enable woman to ascend the ranks of presiding officers.

It is proposed that the training should not be limited to designated presiding officers but members of the royal family and members of the council of elders or the forum of community leaders as they will eventually ascend to the position of the presiding officer or assist.

It is further proposed that all designated presiding officer must be subjected to training without exception. Every person must attend training before starting to preside over the cases. The Bill must close any possibility of a person presiding without being trained.

(c) Civil jurisdiction of the traditional courts (clause 5)

It is proposed that there must be more exclusions on the civil jurisdictions of the traditional courts and they must not hear cases such as those relating to determination of paternity and disputes relating to claims for maintenance, any issue relating to marriage, domestic violence, among others. The process to determine paternity is more sophisticated and traditional leaders do not have access to those technological assistance such as DNA testing.

(d) Criminal jurisdiction of the Bill (Clause 6)

Clause 5 is drafted such that it is made subject to section 10(1) as if section 10(1) has something to do with jurisdictional issues. Section 10(1) deals with sanctions and not jurisdiction.

It appears that the Bill create a closed list of matters that must be heard by the traditional courts and the traditional courts cannot hear any matter outside those mentioned in the Schedule to the Bill. The Bill must make it an offence for any traditional court to consider any matter that is not within the Schedule in the Bill and not merely allow a review process.

If hearing a case beyond your jurisdiction is made an offence, it will deter the traditional leaders who want to hear cases they are not supposed to hear.

Schedule 5 grants the traditional courts jurisdiction to consider an offence called *crimen injuria*, but subject to the amount determined by the Minister. It will not be possible to attach monetary value to *crimen injuria* as it is defined in our law.

(e) Sessions of the traditional courts.

The above clause provides that traditional courts may sit at any place determined by the presiding officer. On the face of it the clause is neutral but there are areas that traditional courts may not be allowed to sit at especially of those areas do not allow entry by woman. An example is the fact that there are traditional courts that sit at the kraal also called, ebuhlanti in isiXhosa.

By custom, woman cannot enter these areas and other areas defined as "sacred places" depending on various customs. It is therefore necessary that the Bill must expressly state that the traditional court may not sit in places where there are people who will not be allowed to enter.

In some instances woman can only bring a case to court through a male person. The Bill must expressly prohibit this practice.

In some instances, woman in mourning cannot speak and this will prejudice woman. This must be expressly outlawed.

In some instances, women are not allowed to dress in a particular way when they appear before traditional leaders. In view of the fact that there is no right to opt out, such practices must be outlawed in the traditional courts. The Bill must therefore expressly address all the inherent discretionary practices against woman and children within the traditional justice system.

(f) Procedure of traditional courts (Clause 9)

The fact that the procedure is not regulated in the Bill is worrying taking into account the fact that this is a substantive issue and that there must be some form of certainty in the procedure that will guarantee a sense of justice. It is important to note that some of the people who will appear before these courts either as complainants or accused people may be from outside the particular traditional area and they need some form of certainty.

It is proposed that legal representation be allowed in the traditional courts to safeguards the rights of the litigants. The right to legal representation is an important right in the country and it is for this reason that it has been elevated into the status of a constitutional right which guarantees a right to a fair trial as envisaged in clause 35(3) of the Constitution of the Republic Of South Africa, 1996 which provides that:

Every accused person has a right to a fair trial which includes the right to--

(f) to choose and be represented by, the legal practitioner , and to be informed of this right promptly,

(g) to have the legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly,

To deprive litigants appearing before the traditional court of the right to legal representation whereas the same right is afforded to the litigants appearing in the other types of courts is discriminatory and is tantamount to creating another set of justice system for people who are living in rural areas. It is even worrying that the right to legal representation is deprived to the people whose right to appeal is severely curtailed by clause 13 of the same Bill.

Clause 9(3)(b) perpetuate the fact woman are minors who must be represented by their male counterparts in the traditional courts. On the face of it, the clause seems to be neutral as it refers to both a male or a female but in practice this will not be the case and it will be women who are represented by their husbands thereby perpetuating the fact that they are minors which is not in line with the Constitution.

Clause 9(4) deals with the choice of law. The effect of this clause is that where two people are litigants in a traditional court but they all come from outside the jurisdiction of that particular traditional court, they will be forced to have their dispute considered in terms of the law they are not susceptible to and which is they may not understand.

The clause also assumes that if the litigants choose that their dispute must be determined by the traditional law from outside the jurisdiction of the court concerned, then the traditional leader presiding will be able to apply the law that they shall have

chosen which may not be the case as the law so chosen may not be known to the presiding officer.

It is unclear how the traditional court will apply the traditional law from outside their area which they are not even trained on. It is proposed that the Bill allows the litigants to opt out of the traditional courts especially if they do not consider themselves bound by such a traditional law or if they come from outside the jurisdiction of the particular traditional courts.

Clause 5(a)(ii) requires that the fines collected by the traditional courts be paid into the provincial revenue fund. It is proposed that the funds must not be paid into the provincial revenue fund but they must be utilized by the traditional community concerned for development purposes.

(g) Sanctions that may be imposed by the traditional courts (Clause 10)

Clause (9)(5) is clear on what must happen to the fines that are imposed by the traditional courts in so far as the fines are expressed in monetary terms. However this clause is silent on the orders that are not expressed in monetary terms like orders in the form of livestock as envisaged in clause 10(2)(b).

This begs a question as to what happen to the livestock which may be imposed as a sanction. Does it become the property of the presiding officer? The Bill must clarify this question.

It is unclear how the order envisaged in clause 10(2)(f) will operate as a form of sanction. It is inconceivable that the traditional court will hear a criminal case and as a sanction impose an order that the person be further prosecuted by the national prosecuting authority. This will expose the litigant to double jeopardy. If the traditional court is of the view that the matter is such that it warrant prosecution by the National Prosecuting Authority it must not even begin to consider it but must simply transfer it to the relevant authority.

An order referred to in clause 10(2)(g), (h) and (i) may violate the dignity of a person and may also be cruel, inhuman and degrading and it is proposed that it be removed. It cannot be acceptable that people must still be sanctioned to perform any form of service without remuneration as this is tantamount to legalizing slavery.

It is even worrying that clause 10(2)(g) and (h) is not limited to parties to the dispute because it covers both the parties to the dispute *or any other person*. This may mean that a child may be ordered to perform community service on behalf of the parents. It is unreasonable to punish *any other person* who is not a party to the dispute.

Similarly an order to the effect that a person must be deprived of community benefits is so couched in wide and general terms that it is open to abuse. This clause authorizes traditional courts to deprive people of land ownership as land is communally owned.

Although the Bill's intention is to have non-punitive sanctions, the sanctions are nonetheless punitive and cruel.

(g) Enforcement of sanctions (Clause 11)

It is not clear why the traditional court must conduct an inquiry into a person's ability to comply with the order only after the order has been imposed and the person has not complied with it. It is proposed that the Bill must require that the presiding officer must conduct an inquiry into a person's ability to comply with the order even before such an order is imposed.

If the enquiry is done after the order has been made it will be after the fact and therefore illogical. This will in effect mean that the traditional court is required to review its own order and it will not be easy to set it aside.

(h) Appeals to the magistrate court (Clause 13).

It appears that the right to appeal is limited to appeal on sanctions and there is no appeal on merits or facts of the case. This assumes that any finding of guilty by the presiding officer is deemed to be correct and this may lead to unfairness. The finding of the presiding officer on merits must also be allowed to be subjected to appeal so that litigants must not be left at the mercy of presiding officers.

The Bill must clarify whether a person who takes the case to appeal or review is entitled to legal representation in prosecuting the appeal or review at the magistrate court.

Furthermore litigants must be allowed to appeal irrespective of the order imposed as a person may need to clear his or her name irrespective of the sanction or order.

The appeal structure in the Bill does not recognize the hierarchy in the traditional authorities. It is proposed that an appeal from the court chaired the headman must go to the chief and thereafter to the King

(h) Procedural review (Clause 14)

Clause (14)(1)(c) provides for gross irregularity as one of the grounds of review. This is unfair and it creates an impression that irregularity is tolerated in the traditional courts as long as it is not gross and therefore litigants must be subjected to irregularity which is not gross. It is proposed that any form of irregularity be subjected to review.

(i) Service fees

It is proposed that the Bill must prohibit the charging of any form of service fee by the traditional courts for the processing of cases.

(j) Separation of powers

The Bill does not recognize the principle of separation of powers and as the presiding officer is the one who define the law, apply it and enforce it.

(k) Dual justice system

The Bill allows a confusing dual justice system without any guidelines which marginalizes the poor who are mostly concentrated in rural areas. The following serve to illustrate the point:

A complainant on stock theft in the township will have the benefit of reporting his case to the South African Police Service who will use all the state resources and experts to investigate his or her case and have the case prosecuted by well qualified state prosecutors who use all the state resources and machineries to prove the case.

A complainant of stock theft in the traditional community will have to investigate his own case and present it to the traditional court on his or her own and the complainant will have no choice at all to decide whether his case must be considered by the civil courts. The choice will be exercised for him or her by the magistrate or the traditional presiding officer in terms of the Bill.

Similarly on exactly the same charge, an accused person who stays in town will appear in civil court where there are clearly defined rules of evidence and will be entitled to legal representation, and if needs be at the expense of the state, he or will be also entitled to an interpreter, judged in terms of the well written law and so on.

The only difference between the two accused people is that the one stays in town and the other stays in the traditional community.

(l) Maintenance of order in courts

In view of the fact that traditional courts cannot use any form of force, how will they secure the attendance of an unwilling person to court and how will order be maintained?

(m) Consultation

The stakeholders that were consulted in the process of the drafting of the Bill are indicated in the memorandum to the Bill. It appears on the list of stakeholders consulted that only institutions relating to traditional leadership has been consulted and therefore the consultation process was not balanced. The issue of lack of consultation at the conceptual stage of the Bill has been raised at most of the public hearings conducted by the Eastern Cape Legislature.



XOLILE NQATA

**CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON LOCAL GOVERNMENT
AND TRADITIONAL AFFAIRS**

FREE STATE



FREE STATE LEGISLATURE

PORTFOLIO COMMITTEE ON COOPERATIVE GOVERNANCE, TRADITIONAL AFFAIRS & HUMAN SETTLEMENTS

Negotiating Mandate

TO: Chairperson of the Select Committee on Security & Constitutional Development

NAME OF BILL: Traditional Courts Bill

NUMBER OF BILL: B1-2012

DATE OF DELIBERATION: 11 February 2014

INPUTS FROM THE LEGISLATURE:

The Portfolio Committee on Cooperative Governance, Traditional Affairs & Human Settlements as designated by the Free State Legislature proposes the following amendments on the Bill:

- That under Clause 5(1)(2)(b) it is incorrect to reiterate that the traditional court cannot get involved in matters of divorce or separation – the opinion is that the families should get involved when challenges arises in the marriage as per tradition;
- That the Bill was not explicit on the participation of women;
- That it was also not clear on where the "Seat of the Traditional Council" will be;

- that the challenge was that traditional courts are not assisted by the magistrate courts for example when an offender refuses to appear before a traditional court after being subpoenaed;
- Clause 8 – that the word “presiding officer” be substituted with the word “traditional council”;
- Clause 9(3)(a) – that “legal representation” be defined for the purposes of this Bill;
- Clause 9(3)(4)(b)(ii) – that this clause be totally removed from the Bill;
- Clause 10(2)(e) – provide for the training of person(s) that will;
10(2)(g) – be monitoring the process after an order is made.
(The purpose is to avoid further abuse of such sections wherein untrained people will abuse this power if left this vague)
The Bill must provide for how such persons will be trained;
- Clause 17 – that when officers are assigned, the Minister look into gender representation;
- That this Bill should be simplified in terms of making it easier for appeal purposes and also the financial implications for people who cannot afford the legal fees for making an appeal;
- That provision be made of two (2) assessors in principle, to comply with gender representation otherwise it might lead to the abuse of power.
- Another concern is that women might be prejudiced in certain circumstances. Although the Traditional Courts aim to have the Constitution and Bill of Rights as part of their Guiding Principles, in reality women remain more marginalised in certain areas, and this might be prejudicial to the way the Traditional Courts operate. For instance, matters of domestic violence (which do not fall under assault with the intent to do grievous bodily harm), or the targeting of elderly women for ‘witchcraft’, might not be handled in ways that promote non-sexism, and might actually result in the further disempowerment and marginalisation of women.
- Jurisdiction of Courts is a vague concept. When disputes centre on land ownership, land use and occupation, it may necessitate involvement of municipalities. Will the Traditional Courts have jurisdiction to add municipalities to such cases? This must be clarified from the outset.

- Furthermore, the jurisdictional areas of the courts follow the jurisdictional areas of the traditional authorities. Firstly, it is not clear in a number of instances exactly where such boundaries lie and this may give rise to jurisdictional disputes.

Secondly, the jurisdictional areas in all instances do not correspond with the areas of jurisdiction of municipalities. This will have the effect that in one municipality there will be at least two courts having jurisdiction. This may lead to conflicting interpretations on issues related to land use, occupation, and ownership having a potentially detrimental effect on the application of land use policy within the municipality.

- It is not clear whether the Department of Justice has the capacity to implement the Act - to train the presiding officers, to enforce jurisdictional issues, etc. Where ordinary magistrates' courts are called upon to adjudicate appeals, it is not clear from the Bill whether such appeal courts must have the required expertise to deal with traditional law.

The Free State delegates to vote in favour of the Bill.



MR CJ VAN ROOYEN

ACTING CHAIRPERSON OF PORTFOLIO COMMITTEE ON COOPERATIVE GOVERNANCE,
TRADITIONAL AFFAIRS & HUMAN SETTLEMENTS
FREE STATE LEGISLATURE

11 February 2014

GAUTENG



NEGOTIATING MANDATE

TO: The Chairperson of the Select Committee on Security and Constitutional Development

Hon. TMH Mofokeng

NAME OF BILL: Traditional Courts Bill.

(Section 76)

NUMBER OF BILL: [B1-2012]

DATE OF DELIBERATION: 18 May 2012

VOTE OF THE LEGISLATURE:

The Gauteng Provincial Legislature does not support the Bill in its current form and therefore **vote against** the Traditional Courts Bill with the attached amendments.

HON. E MAGERMAN

Chairperson of Local Government and Housing Committee

GAUTENG PROVINCIAL LEGISLATURE

Date: 18 MAY 2012



**LOCAL GOVERNMENT AND HOUSING PORTFOLIO COMMITTEE
NEGOTIATING MANDATE
ON THE:**

TRADITIONAL COURTS BILL [B1-2012]

18 May 2012

1. INTRODUCTION

The Chairperson of the Local Government and Housing Portfolio Committee, Mr. Errol Magerman, tables the Committee's Negotiating Mandate on the Traditional Courts Bill [B1-2012].

2. PROCESS FOLLOWED

The Speaker, on 30 January 2012, formally referred the *Traditional Courts Bill [B1-2012]* Section 76, to the Portfolio Committee on Local Government and Housing ("**the Committee**"), for formal consideration in terms of Rule 252 (1) (a) read with 254 (1) and 255 (1).

On 18 April 2012 the Permanent Delegate of the National Council of Provinces (NCOP), Honourable Amos Matila together with the officials from the Department of Justice and Constitutional Development briefed the Committee on the intentions of the Bill.

On 02 May 2012, the Legal Unit of the Gauteng Provincial Legislature presented the legal opinion and the Department of Local Government and Housing also made a presentation.

On 09 May 2012, the Portfolio Committee held a Public Hearing on the *Traditional Courts Bill [B1-2012]*.

The Portfolio Committee deliberated and adopted the Negotiating Mandate of the Bill on 18 May 2012. The oral and written submissions made at the public hearing were considered in developing the position of the Portfolio Committee on the Negotiating Mandate.

3. PRINCIPLES AND DETAILS OF THE BILL

This Bill seeks to provide for the establishment of the Traditional Courts; to affirm the recognition of the traditional justice system and its values based on restorative justice and reconciliation. It further provides for the structure and functioning of traditional courts which are intended to be in line with the constitutional imperatives and values. It enhances customary law and the customs of communities observing a system of customary law.

4. OBJECTIVES OF THE BILL

The objects of the Bill, are set out in Clause 2 of the Bill, and they are as follows:

- Affirm the values of the traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution;
- Affirm the role of the institution of traditional Leadership in:
 - Promoting social cohesion, co-existence and peace and harmony in traditional communities;
 - Enhancing access to justice by providing a speedier, less formal and less expensive resolution of disputes; and
 - Promoting and preserving traditions, customs and cultural practice that promote nation-building, in line with constitutional values
- Create uniform legislative framework, regulating the role and functions of the institution of traditional leadership in the administration of justice, in accordance with constitutional imperatives and values; and to enhance the effectiveness, efficiency and integrity of the traditional justice system.

5. CLAUSE BY CLAUSE ANALYSIS OF THE BILL

CLAUSE 1

Clause 1 deals with the definitions and we are of the opinion that all the relevant definitions have been clearly defined and thus comply with the Constitution and other applicable laws.

CLAUSE 2

This clause deals with the objects of the act and what it seeks to achieve. The clause is saturated with reference to upholding the principles of the constitution and affirming the roles of the traditional leadership. The contents in clause 3 to clause 21 will determine whether the bill is in alignment with the constitution.

We note furthermore that while the objectives of the Bill are to amongst others affirm the values of the traditional justice system, align with the Constitution and enhance the effectiveness, efficiency and integrity of the traditional justice system, there are

inherent challenges with some of the provisions of the Bill in the light of our constitutional jurisprudence which has at its core the achievement of equality and advancement of human dignity, non-sexism and non-racialism enshrined in the Bill of Rights and the establishment of a single system of courts the Judiciary. We discuss in detail below some of the material clauses of the Bill.

CLAUSE 3

This clause deals with the guiding principles that should be implemented by those who will be implementing the bill. The clause is in accordance with the constitution.

CLAUSE 4

This clause deals with the designation and training of traditional leaders. It empowers the Minister who must consult with the Premier to appoint a recognised senior traditional leader or a king or Queen to be a presiding officer within the jurisdictional area of such senior traditional leader. Basically this section state that the presiding officer should by birth be a member of the royal family, a designated headman or headwoman, king or Queen. Such presiding officers will be trained. The criteria of appointing presiding officers is one issue that needs to be looked at carefully. This process does not recognise the possibility that persons may emerge organically from within communities at its lower hierarchical levels as being appropriately qualified and respected as persons capable of resolving disputes in a customary setting who do not come from the ranks of potential presiding officers prescribed in terms of the bill.

There seems to be no balance of power, we need to question as to what happens in a situation where a traditional leader or any other member of the royal family has an interest in instituting either a criminal or civil matter in terms of customary law. Will the presiding officer adjudicate over a matter which he might have an interest on, how will conflict of interest issue be managed? The focus on the royal family means that where a dispute involves the interest of the royal family or a member of the royal family, there will be a risk of at least the appearance of bias. In the courts refereed in section 166 of the constitution and other tribunals such as CCMA Presiding officers must recues themselves when faced with a matter that they have direct or indirect interest on or a conflict of interest that may arise therein. We recommend that a provision in the bill should be inserted which must deal with a situation where there is a conflict of interest and such presiding officer must recues himself or herself.

But then again, if such presiding officer recues himself or herself who will be there to act on his/her behalf, is it going to be a headman or headwoman who is appointed as an alternative presiding officer in terms of clause 4(4) of the bill. The alternative presiding officer who is the headman, headwoman or senior traditional leader is

recognised in terms of section 11(1) (a) (i) of the Traditional Leadership and Governance Framework Act¹, the section provides that:

“11 (1) whenever the position of Senior Traditional Leader, headman or headwoman is to be filled:

The royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to applicable customary law:

Identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section 12(1))a) and (d) apply to that person.....”

There is no deterrence of the royal family in appointing a presiding officer, they have the authority even in appointing the alternative presiding officers (the headman and the senior traditional leader).

The criteria of appointing presiding officers makes it difficult to ensure that fairness and the principles of the constitution will be adhered to at all times when interpreting this bill.

Clause 4(5) makes a provision that training programmes must be provided to presiding officers as soon as they are designated. This is a good initiative to empower the presiding officer and to ensure that they properly implement the bill and other customary law subject to the constitution. However clause 4 (5) states that the training programme is completed after a person has been designated as a presiding officer, this is not a good initiative of the bill because it has the effect of allowing improper and uninformed implementation of the bill. Satisfactory completion of the training programme should be a pre-requisite to designation.

CLAUSE 5

This clause deals with the nature of civil law matters in terms of customary law which may be heard, adjudicated and settled by the traditional courts. Clause 5(1) deals with the jurisdiction of the civil dispute which arises from where the occurrence of the dispute was within the jurisdiction of the traditional court. Jurisdiction of civil disputes on customary law should not be limited to where the act or omission has occurred but should also be extended to the consent of the parties with an option to refer the matter to any desirable court that the parties may wish. This will be consistent with the custom of alternative dispute resolution. It promotes greater legitimacy to the decisions of such traditional courts and would remove the element of compulsion inherent in the powers conferred by the bill.

¹ Act no. 1 of 2003

Clause 5(2) highlights on matters that the traditional court may not deal with which include among others divorce or separation arising out of a customary marriage under the Recognition of Customary Marriages Act 25 of 1961. The civil matters in terms of customary law that may be dealt with must at least be outlined in the bill or regulations to be proposed in order to guide parties on what kind of matters can be referred to traditional courts.

CLAUSE 6

This clause confirms that the traditional court can adjudicate over criminal matters which are read together with the schedule attached at the end of the bill. The jurisdiction of Traditional Courts in criminal matters emerge to operate outside the Criminal Procedure Act and fair trial provisions of section 35(3) of the constitution, including section 35(3)(c) which confers on every accused person a right to a public trial before an ordinary court.

CLAUSE 7

This clause explains the status and nature of the Traditional Courts, it is said to be distinct from courts referred in section 166 of the constitution. Section 166 of the constitution outlines the full extent of the judicial sphere of government. The object of the traditional courts is to operate in accordance with a system of customary law to prevent conflict, maintain harmony and resolve dispute where they have occurred, in the manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the constitution. The proposed traditional courts bill is constitutionally unprincipled because the system operates contrary to the doctrine of separation of powers which has been said to motivate and be understood in the constitution. (SEE President of the RSA v Hugo 1997 (4) SA 1 (CC) at para 11. GOLDSTONE J held that:

"(11) There are only three branches of government viz. legislative, executive and judicial. The powers of the President, other than those set out in section 82(1), are without question executive powers. The question is whether those referred to in section 82(1) fall within a different category. In my opinion they do not. Whether the President is exercising constitutional powers as head of the executive (ie the Cabinet) or as head of state, he is acting as an executive organ of government. His powers are neither legislative nor judicial and there is no fourth branch of government."

CLAUSE 8

This clause deals with the sessions of the traditional courts which will be held in accordance with customary law. It complies with the principles of the constitution and other applicable laws.

CLAUSE 9

This clause deals with the procedure of traditional court, it recognises the need to ensure that women are afforded full and equal participation in the proceedings as men are, vulnerability consideration of children, disabled and elderly persons. The adherence of the rules of natural justice.

Clause 9(3) (a) of the bill raises constitutional concerns, it states that "no party to any proceedings before a traditional court may be represented by a legal representative". The constitution in terms of section 35(3) provides that:

"Every accused person has a right to a fair trial, which includes-

(a)

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly."

Legal representation is a constitutional right when appearing in courts referred in section 166 of the constitution. The Presiding officers are offered an opportunity to be trained on the implementation of the bill, what about the community, who is going to guide the members of the community who are to appear before a traditional court as to how does the bill affect them and what legislation guides the presiding officers, there is no guarantee that the parties before the Traditional Court will have the knowledge as to what governs the traditional courts and what their rights are in terms of the bill and customary law.

Legal representation is necessary to assist not only in courts referred in section 166 but also Traditional Courts in both criminal and civil dispute in arriving at decisions which are respectful of and compliant with the Constitution and the rule of law.

CLAUSE 10

This clause deals with the sanctions and orders that may be given by traditional court. It prohibits the court to impose punishment which is inhumane, cruel or degrading or which involves any form of detention including imprisonment and corporate punishment and others. However the clauses 10(2) (g) which states that "an order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision

or control of a specified person or group of persons identified by the traditional court". This particular provision raises concerns.

These provisions create a strong potential for abuse of power. Clause 10(2)(g) as it provides for certain forms of unremunerated, forced labour may well be in conflict with domestic law, the constitutional right in section 12(1)(e) of the constitution "not to be treated or punished in a cruel, inhuman or degrading way", section 13 of the constitution which provides that "No one may be subjected to slavery, servitude or forced labour" and South Africa's duties in terms of international law.

CLAUSE 11

This clause deals with the enforcement of sanctions of traditional courts where there is none compliance with the court's order, it will cause such person to appear before the court. The court will conduct an inquiry as to why there was none compliance with the order and will make a determination as to whether the failure was due to intentional fault or not. If the failure is unintentional the court will re evaluate the order and make an appropriate order which will ensure compliance. Further none compliance will allow the traditional court to impose further sanctions and in accordance with custom and customary law. Such judgment may in terms of clause 11(2)(d) be enforceable by execution in the magistrate court in accordance with the Magistrate Courts Act². This clause complies with the principles of the constitution and other applicable laws .

CLAUSE 12, 13 AND 14

These clauses imposes limits on the right of appeal against an order of a traditional court and the rights to subject an order of a traditional court to judicial review in terms of the right to administrative justice in section 33 of the constitution. Clause 12 deals with the validity and authority of an order of a traditional court. The order of the court is final except where there is an appeal or review of the court order.

Clause 13 deals with the appeals, the bill states that appeals may be lodged at magistrate courts, either in a matter of criminal or civil. An appeal may be lodged against any order stated in clause 10 of the bill, with an exception of some of the orders and the manner in which the Magistrate court may deal with an appeal from the Traditional courts. The limitation of the right of appeal to one in respect of only certain of the sanctions impacts upon the right of access to court enshrined in section 34 of the Constitution.

² Act 32 of 1944

Clause 14 deals with the procedural review against the traditional court which may be referred to the magistrate court. The grounds for procedural review are stated in the bill.

The fullest powers of appeal and review should be granted in considering the powers inherently granted to a select royal family and its lineage/family roots, the vulnerable position in which rural communities find themselves and the powers conferred on traditional courts to impose sanctions.

CLAUSE 15

This clause deals with the pre-requisite that before a presiding officer take office he/she must take an oath or affirmation of office before a magistrate within the court having jurisdiction. The prescribed register of presiding officers when taking office is kept by the DG of the Justice and Constitutional Development Department. This clause complies with the constitution and other applicable laws.

CLAUSE 16

This clause deals with the incapacity, gross incompetence or misconduct of presiding officers. Where there is a complaint against the presiding officer a complaint may be lodged by means of a prescribed affidavit or an affirmed statement which must specify the nature of the complaint and the facts upon which the complaint is based. The clause also deals with the grounds on which a complaint against the presiding officer may be lodged. It further deals with the manner in which the DG, the Premier and the Minister may handle the complaints and decide on the remedial measures applicable. What if as one of the remedial measures a presiding officer (who is a king or Queen or headman or headwoman)'s appointment is revoked due to gross misconduct, will he/she continue with his position as a Traditional Leader? Will the community still have trust in his/her leadership? The minister after consultation with the premier and after an investigation report on the complaints lodged against the presiding officer from the premier may communicate his decision in writing to the presiding officer.

Clause 16(7) deals with the situation where a traditional leader is removed from office in terms of the Traditional Leadership and Governance Framework Act, is deemed to have had his or her designation as a presiding officer revoked. The bill also need to cater for a situation where the presiding officer's appointment is revoked due to any wilful or grossly negligent conduct referred in terms of clause 16 (3) (c) and (d) which in the eyes of the Minister it is so damaging to the integrity of the traditional leadership, each case will be decided on its own merits, such presiding officer should be removed from office as a traditional leader in accordance with the applicable legislation on customary law.

CLAUSE 17

This clause deals with the assignment of officers to assist traditional courts, within the resources available at the Magistrate Court in which jurisdiction the traditional court seats, the Minister may assign one or more officers to assist the traditional court in performing its functions under the Act. This clause complies with the principles of the constitution and the applicable laws.

CLAUSE 18

This clause deals with the record of proceedings wherein traditional courts in a prescribe manner must record or cause to be recorded the nature of each dispute, a summary of the facts of the case and the decision of the court which must include the sentence, order or sanction of the court. The absence of the duty in terms of clause 18 to keep a record of the evidence led in a case before a traditional court renders the clause inefficient when exercising any meaningful right of appeal or review. The parties to the proceedings should be able to access the court file, if they need to and make copies of the file contents.

CLAUSE 19

This clause deals with transfer of cases from Traditional court to Magistrate court or Small Claims Court and from the latter to the Traditional court. Such transfer will depend on the nature of the case whether it is civil or criminal in terms of schedule 6 of the bill and where it involves difficult or complex questions of law or fact that should be dealt with by the Magistrate Court or Small claims Court. A customary law matter which must be dealt with appropriately in terms of customary law and custom in a traditional court may be referred to the traditional court by a prosecutor, magistrate or commissioner of a small claims court as the case maybe. It will serve the principle of fairness quite right if the parties are informed in advance of such decision of transfer of their cases by the court.

CLAUSE 20

This clause deals with the offences and penalties applicable in the event any person wilfully insults presiding officers, interrupts court proceedings and fail to attend proceedings despite having been invited and without any sufficient cause or fails to remain in attendance until the conclusion or until excused from further attendance by the presiding officer. Such person shall be guilty of an offence and liable on conviction or to a fine. For the purposes of maintaining order during court proceedings. This clause complies with the principles of the constitution.

CLAUSE 21

This clause deals with the regulations which empowers the Minister to make regulations which among others includes the training programmes of traditional leaders, the manner in which a traditional court may issue receipts in respect of fines, pay fines received into the provincial revenue fund the records of financial transactions relating to money paid in the relevant provincial . The lodging of appeals and procedural reviews, powers of magistrates in respect of procedural reviews etc.

CLAUSE 22, 23 AND 24

These clauses deals with the delegation of powers under this act to ensure proper implementation of the bill, they further deal with the transitional provisions and repeal of laws and the short title and commencement of the Act.

6. OVERVIEW OF THE PUBLIC HEARING

On the 09 May 2012, the Portfolio Committee conducted public hearing on the Bill. Approximately four hundred (400) people attended the hearing.

The public hearing was well received by the attendees who robustly and interactively engaged on the substance and objects of the Bill. Some of the views expressed were in support of the *Traditional Courts Bill [B1-2012]*, however other say that the Bill is unconstitutional.

7. SUMMARY OF STAKEHOLDERS SUBMISSIONS MADE DURING THE PUBLIC HEARING

The following are the summary of submissions from different organizations:

National Movement of Rural Women (NMRW)

The NMRW does not support the current Traditional Courts Bill. The NMRW moves for the reinstatement of the first Bill on Traditional Court which was drafted by the South African Law Commission which catered for the development of customary law and courts. NMRW argues that the current Bill does not create room for the system of customary law to develop. However, the NMRW applauds the idea of aligning the existence and jurisdiction of Traditional Courts with the Constitutional provisions because currently Traditional Courts manifest tensions with regards to women's dignity and other right of women and other vulnerable groups. The current Bill is not concerned with the gender composition in traditional courts. Furthermore NMRW argues that the current Bill like the Traditional Leaders Framework Act stipulates that 30% women's presentation in traditional Councils without devising mechanism of achieving that goal. It is necessary that fund be included in these structures for capacity building towards empowering women to understand their role in these structures.

The definition section of the Traditional Courts Bill fails to define what it means by customary law.

Land Access Movement of South Africa (LAMOSA)

LAMOSA says that the Bill does not give any indication on how the traditional courts will be constituted. The only legally recognized official in the system is the Presiding Officer. All other traditional or statutory institutions are not recognized. LAMOSA also mentioned that Traditional Leader cannot be expected to operate as judge and jury while exempting themselves from the normal disciplines of the rule of law as mentioned in the Constitution. LAMOSA recommends that:

- Traditional Courts Bill should not deal with any cases regarding land until relevant land governance frameworks are put in place, in particular the revision of CLRA and the finalization of the Land Reform Green Paper.
- If Traditional Courts are to be given coercive powers, they must be subjected to the same checks and balances as all other legal institutions including review and scrutiny by Chapter 9 institutions, Judicial Services Commission and the Constitutional Court.
- Role clarification of other traditional institutions and land governance acts (traditional councils and CPAs) in relation to the administration of justice in the application of traditional law.
- Parliamentary Committees, JSC and Chapter 9 institutions must be involved in deciding whether a traditional leader is qualified to be appointed as a presiding officer in traditional courts.
- Traditional Courts should not be allowed to deal with criminal cases as these must be dealt with by statutory judicial authorities
- Principles of restorative justice must be spelt out and guide the type of judgments that traditional courts may make.

Amãndebele-Ba-Lebelo Traditional Council

The following are submission submitted by the Traditional Council:

- Provision should be made to ensure that the designation and training should be extended to any other person who is appointed duly by the Traditional Council.
- There should be classification and security of information relating to the sensitive nature or for the protection of the reputation of individuals or entities who may be harmed by the making public of such information, whether in their personal or

professional capacity and whether such information may harm or interfere with their function or work in society.

- In relation to the Procedure of the Traditional Court, recognition should be given to the nature of the language, attire and protocol in relation to the customary practices of the tribe concerned.

Tshwaranang Legal Advocacy Center

Tshwaranang Legal Advocacy Center rejects the Bill in its entirety. The reasons for rejecting the Bill by Tshwaranang are as follows:

- Under clause 6 (Settlement of certain communal disputes by Traditional Courts), Tshwaranang is concerned that matters involving physical abuse as defined in the DVA may be heard by a Traditional Court.
- Under clause 3(b) (Access to justice), women who are in mourning are forbidden access to the Royal Kraal. Should a dispute arise she won't be able to represent herself and where a third party acts on her behalf, may fail to represent her case properly
- Tshwaranang is concerned that the current Traditional Courts Bill doesn't provide for the exclusion of harmful traditional practices.

People Opposing Women Abuse(POWA)

Section 5(1) provides for a Traditional court to hear and determine civil disputes arising out of customary law and custom where the act or omission occurred within the area of jurisdiction. It further excludes certain matters from being heard in the courts these being constitutional matters, those relating to nullity, divorce or separation arising out of a marriage and matters relating to guardianship and custody of children. This section omits maintenance and domestic violence from the exclusion of traditional courts whereas the experiences in traditional courts for women is that because it is mainly made up of male adjudicators issues of maintenance and domestic violence are likely to be handled in a biased manner that unfairly prejudices women.

The Bill further confines persons living in former homelands to the jurisdiction of the traditional systems and this is not optional. As indicated that Traditional courts are in most cases based on patriarchal values where the representatives in most cases are male this section, by restricting persons to the jurisdiction of these courts, has the potential of denying women the ability to choose forums that may adjudicate matters in a more just and less prejudiced manner against them.

Section 9(3)(a) of the Bill is not in compliance with the constitutional provision which also has the potential of impacting on the equality provision especially because women in rural

areas tend to be illiterate and poor therefore their restriction on this clause denies women the possibility of being fairly represented through accessing such a service. POWA therefore submits that the Bill provide for the right to legal representation in the alternative women should be allowed to bring in their cases in other forums

POWA further submits that women be guaranteed the ability to represent themselves or be afforded the right to legal representation, in the alternative the right to approach other flora for relief on their matters.

Commission for Gender Equality (CGE)

The Commission for Gender Equality submits the following:

That there are numerous shortcomings in the Bill [B 1-2012] which are fatal to the extent that it renders the Bill an inadequate attempt at affirming the rights of women, girls and communities who will be regulated by the proposed legislation. Accordingly, the Traditional Courts Bill is not supported by the CGE.

The Traditional Courts Bill allows for the Minister to designate a senior traditional leader as the presiding officer of a traditional court in terms of Clause 4(1). This provision will have a tendency to centralize power in the hands of traditional leaders. Such circumstances will allow for traditional leaders to enforce controversial versions of customary law that favour their interests. This has a potential to erode the customary entitlements of women as well as ordinary members of the traditional community.

Accordingly, the CGE believes that such a clause will further prejudice women because their disputes will be adjudicated by individuals who may have a tendency to uphold patriarchy and customary practices that are inherently prejudicial to women. Therefore, the CGE is unable to support a Bill which has the potential to indirectly discriminate against women.

South African Association of Women Graduates

The South African Association of Women Graduates (both Nationally and from the Johannesburg branch) are opposed to provisions in this Bill as, although it is supposed to bring traditional courts more in line with the constitution of South Africa, it, in effect, attempts to reinstate unequal powers to traditional leaders. SAAWG sees these provisions as, in many instances, reverting back to the apartheid era. We are equally concerned that these provisions and the powers provided to traditional leaders will inevitably negatively affect rural women. Also, by entrenching existing customs in law this Bill violates the rights of women, which we fought so hard to achieve in the Constitution.

It is disquieting to note that there are no provisions for appeal or to have the decision taken by a traditional leader reviewed. The lack of checks on the power which would be afforded traditional leaders is a serious omission and is unconstitutional.

Law, Race And Gender Research Unit (LRG)

LRG argues that the current Bill is fatally flawed and should be withdrawn and a proper consultation process embarked on to ascertain the view and experiences of a proper cross-section of ordinary rural people participate fully.

LRG maintains that the only way forwards is for the Traditional Courts Bill as currently worded to be withdrawn and replaced with legislation based on a framework that fully accommodates the well-documented practices of local communities. The LRG concerns amongst others are as follows:

- Consultation on the Bill's content was unequal
- Power is centralised to a "Senior Traditional Leader" hence customary law is distorted
- Opting out of the jurisdiction of a traditional court is not permitted and people living in the former homelands are forcibly "subjected" to traditional authority according to apartheid-defined jurisdictional boundaries

Legal Resources Centre (LRC)

LRC stipulates that opposition to the Traditional Courts Bill that reinforce discriminatory law is not opposing the institution of traditional leadership or customary law. LRC also specify that the Traditional Courts Bill is not widely known or understood by the citizens living in former homelands and on communal land.

LRC states that the Traditional Courts Bill reflects a disturbing trend towards the concentration of power in the hands of an institution which is not subject to the democratic controls and accountability mechanisms of the three constitutional spheres of government.

LRC urges the withdrawal of the Bill from the legislative process.

Other Comments (from media)

The rural and traditional communities in and around Tshwane states that there are many loopholes in the Traditional Courts Bill which needs to be closed before it is supported and allowed to be passed into law.

Some Traditional Leader has also slammed and opposes many part of the Bill and says that it undermines Traditional Leadership.

8. VIEWS OF THE DEPARTMENT OF LOCAL GOVERNMENT AND HOUSING

The following are the comments made by the Department of Local Government and Housing ("the Department"):

The Department is of the view that there are elements of unconstitutionality within the Bill and should allow for representation in traditional courts and this should not be limited to lawyers but could include family members. The Bill does not make provision for the anomaly in the province where the traditional justice system is largely practiced in the townships in the province. If these courts are not recognised in the Bill then it may require monitoring and policing.

The Department of Justice and Constitutional Development should not overlook the matter of unfunded mandates and the cost implications on provinces.

The Department is of the view that the Bill in its current form is not rigorous enough to be taken to the next phase in the legislative process.

9. FINANCIAL IMPLICATIONS

The matter of unfunded mandates and the cost implications of the Bill on provinces should be addressed as there are financial implications.

The Gauteng Department of Local Government is currently implementing the Traditional Leadership and Institution's affairs through Programme 4 (Traditional Institution Development); and this programme is allocated the smallest share of the Departmental budget amounting to R4 617 000 (0.1%). In addition, this programme has only 7 personnel employed to implement traditional affairs in the province.

Therefore the costs that will be incurred by the Department in implementing the Traditional Courts if enacted, which are not stipulated in the Traditional Courts Bill include:

- ☐ The Compensation of Employees and Payments on Machinery and Equipment as more personnel should be employed;
- ☐ The recording of the court proceedings will require equipment (e.g computers and sound equipment);
- ☐ The remuneration of Traditional Courts Clerks who will be providing administrative support to the Traditional Courts; and
- ☐ Training programmes for Traditional Courts officials as well as traditional communities.

In addressing the financial implications of the Bill, the Portfolio Committee recommends that the Department of Justice and Constitutional Development should include the implementation plan as well as the budget for the Traditional Courts Bill.

10. COMMITTEE'S RECOMMENDATIONS

The Portfolio Committee recommends that --

The Bill should be re drafted to ensure compliance with the constitution and other applicable laws.

11. NEGOTIATING POSITION ADOPTED BY THE COMMITTEE

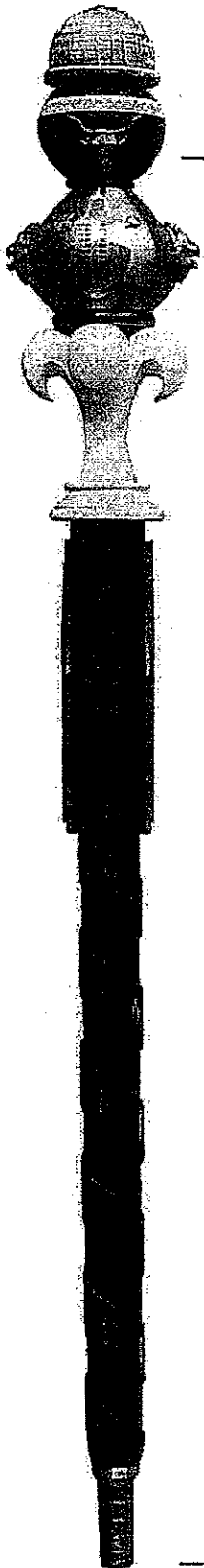
The Committee had a number of issues which were dealt with in the clause by clause analysis which needs the attention of the drafters. The bill seeks to outline the traditional court as a court system "distinct from courts referred to in section 166 of the constitution. The three spheres of government are only recognised as the Judiciary, Executive and the Legislature. The system of Traditional Courts may fall outside the territory of the Constitution as the Constitution does not recognise existence of the judicial arm of government beyond those expressly and impliedly provided for in section 166 of the constitution.

We propose that in remedying this problematic issue the statutory jurisdiction of the Traditional Court should be based on consent of the parties and not on coercion/force. The Courts referred in section 166 do allow legal representation as part of the judicial administration; we propose that the Traditional Court should also do the same. The courts referred in terms of section 166 are the Courts of record, each and every proceeding is recorded and this makes it easier when a matter is referred for appeal or review, evidence is usually well assessed as presented, the situation as outlined in the bill is not well conducive as there is no provision in the bill which state that the evidence is recorded.

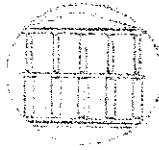
The intention of the traditional court is to enhance restorative justice and reconciliation, this is a good motive considering the fact that Traditional Courts are currently operating without a legislative guidance, however the Constitution is the Supreme Law of the country, compliance with the constitution is essential. The bill should be re drafted to ensure compliance with the constitution and other applicable laws.

In Light of the above, we are of the view that the Bill in its current form would not pass constitutional muster and therefore recommend that the Bill should not be passed in its current form.

**KWAZULU-
NATAL**



IPHALAMENDE LAKWAZULU-NATALI



KWAZULU-NATAL PROVINSIALE PARLEMENT

KWAZULU-NATAL PROVINCIAL PARLIAMENT

Hon TMH Mofokeng

**Chairperson: Select Committee on Security and Constitutional Development
National Council of Provinces**

Dear Hon Mofokeng

NEGOTIATING MANDATE ON TRADITIONAL COURTS BILL [B1-2012]

The KwaZulu-Natal Legislature Portfolio Committee for Co-operative Governance and Traditional Affairs met today, 11 October 2013, to deliberate on the Traditional Courts Bill [B1-2012].

Due to timeframes that were set for the Bill, the Committee was of the view that further consultations would have been necessary to come to the consensus regarding the position of the committee on this Bill.

As a result of this, the Committee therefore resolved to abstain from voting on the Bill.

Thanking you in anticipation

HON GN SWARTBOOI-NTOMBELA

**CHAIRPERSON: SELECT COMMITTEE ON COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

**ISISHAYAMTHETHO SAKWAZULU-NATAL****KWAZULU-NATAL WETGEWER****KWAZULU-NATAL PROVINCIAL LEGISLATURE**

NEGOTIATING MANDATE

TO: HON. MR TMH MOFOKENG
CHAIRPERSON: SELECT COMMITTEE ON SECURITY AND
CONSTITUTIONAL DEVELOPMENT

NAME OF BILL: TRADITIONAL COURTS BILL

NUMBER OF BILL: B1-2012

DATE OF DELIBERATION: TUESDAY, 22 MAY 2012

VOTE OF THE LEGISLATURE:

The Portfolio Committee on Cooperative Governance and Traditional Affairs met today, Tuesday, the 22nd of May 2012 to consider the Traditional Courts Bill [B1-2012].

The following comments and amendments were proposed and considered on the Bill:

Clause 1: Definitions

"traditional court" means ...

(iii) ["inKantolo ye Ndabuko"] "Inkundla yoMdabu" in isiZulu

Clause 9: Procedure of traditional court

1. Deletion of clause 9(3)-(a) as it is unconstitutional and goes against the provisions of section 35(3) of the constitution.
[(3) (a) No party to any proceedings before a traditional court may be represented by a legal representative.]
2. Amendment of clause 9(5) (a) (ii) as follows:
"pay any fine collected in terms of subparagraph (i) into the [provincial revenue fund of the province] traditional council's fund in question; and"
3. Insert clause 9(6) and (7) on page 7 as follows:

"(6) (a) The presiding officer must recuse him or herself from the proceedings in the event where:

- (i) he or she has a direct or an indirect interest in the matter before him; and/or
- (ii) the accused person makes a reasonable request for him or her to do so.

(b) The traditional council must inform the relevant magistrate within the magisterial district of the local house about such recusal.

(c) The relevant magistrate must appoint another senior traditional leader within the magisterial jurisdiction, who has been designated as a presiding officer to preside over the matter."

Clause 17: Assignment of officers to assist traditional courts

Insert clause 17A on page 10 as follows:

"(a) The Minister must recognize the existing traditional courts constables as officers of the court.

(b) The traditional court constables shall serve summonses in writing or orally.

Clause 21: Regulations

1. Amendment of clause 21(1) as follows:


"(1) The Minister must make regulations after consultation with the National House of Traditional Leaders regarding the following:"

2. Amendment of clause 21(1)(h) as follows:

"(h) the manner in which a traditional court must cause persons, who have not complied with any—

- (i) sanctions imposed by it; or
- (ii) summons or subpoenas issued by it.

to appear before it, as contemplated in section 11(1).


.....
HON GN SWARTBOOI
CHAIRPERSON OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS PORTFOLIO COMMITTEE

22.5.2012
DATE

LIMPOPO

Limpopo Legislature

OFFICE OF THE SECRETARY

Physical Address:

Lebowakgomo
Government Complex

Postal Address:

Private Bag X9309
Polokwane
0700

NEGOTIATING MANDATE

To : The Chairperson of the Select Committee on
Security and Constitutional Development

Name of Bill : Traditional Courts Bill

Number of the Bill : [B1 – 2012]

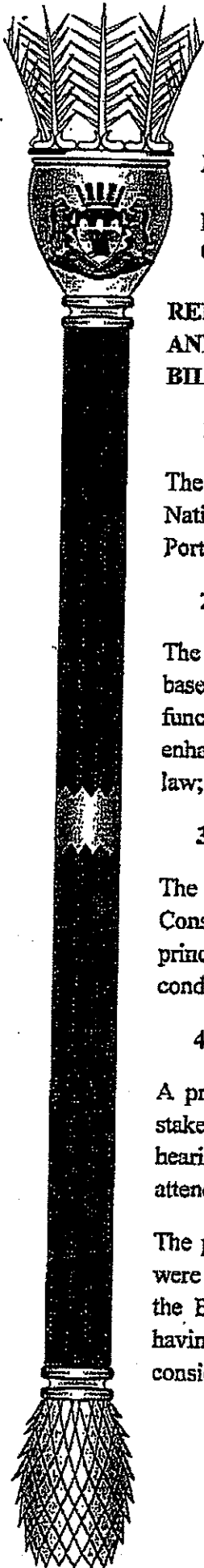
Date of Deliberation : 11 October 2013

Vote of the Legislature : NCOP Permanent Delegates not to support the
Bill, considering the inputs mentioned in the
attached Report.


.....
HON. T. MORAKA

CHAIRPERSON: PORTFOLIO COMMITTEE ON
COOPERATIVE GOVERNANCE, HUMAN SETTLEMENT
AND TRADITIONAL AFFAIRS

11/10/2013
.....
DATE



Limpopo Legislature

OFFICE OF THE SECRETARY

Physical Address:

Lebowakgomo
Government Complex

Postal Address:

Private Bag X9306
Polokwane
0700

REPORT OF THE PORTFOLIO COMMITTEE ON LOCAL GOVERNMENT AND HOUSING ON NEGOTIATING MANDATE ON TRADITIONAL COURTS BILL, 2012 [B 1 2012]

1. INTRODUCTION

The Traditional Courts Bill, 2012 [B1 2012] was introduced in the august House from the National Council of Provinces (NCOP) and the Bill was subsequently referred to the Portfolio Committee on Local Government and Housing for consideration and inputs.

2. OBJECTS OF THE BILL

The Bill seeks to affirm the recognition of the traditional justice system and its values, based on restorative justice and reconciliation, to provide for the structure and functioning of traditional courts in line with constitutional imperatives and values, to enhance customary law and the customs of communities observing a system of customary law; and to provide for matters connected therewith.

3. CONSIDERATION OF THE BILL

The committee met the NCOP delegates together with the Department of Justice and Constitutional Development on 10 April 2012 to receive a detailed briefing on the principles and objects of the Bill. It was in this meeting that the committee resolved to conduct public hearings in the district municipalities of the province.

4. PUBLIC HEARINGS

A pre-public hearing workshop was held on 11 May 2012 in Polokwane to prepare stakeholders to participate from an informed perspective during the actual public hearings. Public hearings were held on 16 and 18 May 2012. Various stakeholders attended to give inputs and comments on the Bill.

The public hearings were an overwhelming success and constructive inputs on the Bill were made. However, the Bill was received with mixed feelings and some people felt that the Bill must not be proceeded with, especially in Vhembe district. The committee, having considered the inputs, makes the following submission to the NCOP for consideration:

Purpose of the Bill

The long title to be amended in line 3 as follows: to [enhance] **promote** customary law and the customs of communities observing a system of customary law;

1. Definitions

- There is no provision in this Bill to define family courts to deal with issues affecting women and children.
- The word "Traditional Leader" must be replaced with "Kgoshi" and "senior traditional leader" with "kgoshikgolo".
- Definition of Traditional Leadership and Governance Framework Act – the word "as amended" should be added.

4. Designation and training of traditional leaders

- Training programs should not only be limited to Kings, Queens and Senior Traditional Leaders but extended to headman, headwoman, members of traditional councils and officials working for traditional councils.
- ABET training should also be provided to traditional councils and traditional leaders.
- It should not be assumed that magistrates and clerks of courts understand customary laws. Traditional affairs matters are complex and complicated in their nature. There must be budget to extend training programs to magistrate and clerks of courts.
- There must be a joint workshop with the National Department and Department of Cooperative Governance, Human Settlements and Traditional Affairs to address budgetary issues to funding of training of magistrates, infrastructure, IT personnel, transcription and records, forms and paralegal stipends.
- Traditional leaders and clergy must also be part of traditional courts.
- Training programs should not only be a prerogative of the Minister but must involve traditional leaders since they are designed for them.

6. Settlement of certain criminal disputes by traditional courts

- The Bill must clearly specify different types of assaults (e.g. Common assault, assault with intention to commit grievous bodily harm) and offences such as witchcraft as contemplated in the Schedule to the Bill.

9. Procedure of traditional courts

- Any fines or revenues collected under this section should be deposited into a tribal account or account created for traditional courts, not deposited into the provincial revenue fund.
- Compliance with PFMA must not be overlooked when such revenues are collected
- It must be compulsory for all offences to start at traditional courts thus allocating more powers to these courts.

10. Sanctions and orders that may be given by traditional courts

- Sanctions and orders made by traditional courts will be impossible for the traditional courts to enforce as they do not have the necessary resources. Moreover, the task is not different to those being currently enforced by the magistrate courts. This is duplication of the system regardless of where they are being enforced.

11. Enforcement of sanctions of traditional courts

- Any order made by the court has the effect of a civil judgment by the magistrate court having jurisdiction. This literally means that persons in a rural area will have to travel a long distance to the office of the sheriff in order for the order to be executed. It is common cause that only the sheriff may execute a court order. Where do we expect poor people in communities falling within the jurisdiction of traditional authorities to have monies for the payment of sheriff services? The person will have to pay storage cost in case there is attachment of property.
- The Bill must provide for means to force offenders to pay their fines and fines must be high to discourage offenders from continuing with their offences.
- The Bill must empower traditional leaders to remove an offender from the community if they see fit and in the interest of the community.
- The Bill must provide for protection of traditional leader against the offender removed from the village.

Schedule

There is a need to remove "assault" and replace it with "common assault" in the schedule of offences.

11. NEGOTIATING MANDATE

The Committee, having considered the provisions of the Bill and inputs received from the general public and the stakeholders, does not support the Bill.



HON. T. MORAKA
COMMITTEE CHAIRPERSON

MPUMALANGA

OFFICE OF THE SPEAKER

Eng: Mr P Thwala (013) 766 1249

13 November 2013

Honourable MJ Mahlangu

Chairperson: NCOP

P.O. Box 15

CAPE TOWN

8000

Dear Honourable Mahlangu,

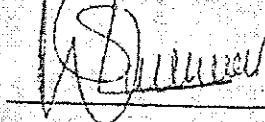
FURTHER DELIBERATIONS ON THE TRADITIONAL COURTS BILL [B1 – 2012] (S76)

The letter from the Chairperson of the Select Committee on Security and Constitutional Development, Hon TMH Mofokeng, dated 30 October 2013 regarding the Traditional Court Bill ("the Bill"), refers.

Kindly be informed that on the 13th of November 2013, the Portfolio Committee on Public Works, Roads and Transport; Community Safety, Security and Liaison ("the Committee") met to deliberate on the way forward regarding the Bill and noted that the Legislature had already conferred a negotiating mandate to vote in favour of the Bill on 30 October 2012, with proposed amendments. The negotiating mandate has since been transmitted to the NCOP (please see attached).

The Committee therefore resolved to stand by its earlier decision.

Kind regards,



HON SW LUBISI (MPL)

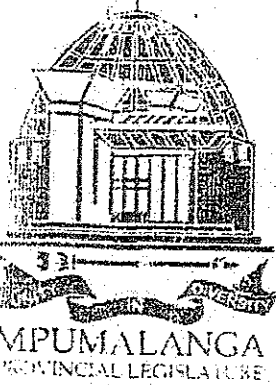
13/11/2013

DATE

SPEAKER: MPUMALANGA PROVINCIAL LEGISLATURE

CC: Hon TMH Mofokeng

Chairperson of the Select Committee on Security and Constitutional Development.



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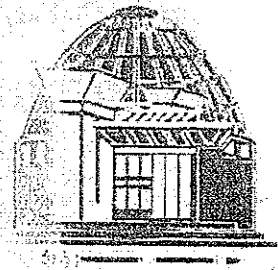
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OFFICE OF THE SPEAKER

Enq: Adv B Mdluli
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Tuesday, 30 October 2012



The Chairperson
Select Committee on Security & Constitutional Development
Honourable TMH Mofokeng
CAPE-TOWN
8000

Dear Hon. Mofokeng

NEGOTIATING MANDATE: TRADITIONAL COURTS BILL, B1-2012

Attached herewith please find negotiating mandate from the
Mpumalanga Provincial Legislature.

I trust that the above shall be received in order.

Yours sincerely

HON. SW LUBISI, MPL
SPEAKER: MPUMALANGA
PROVINCIAL LEGISLATURE

01/11/2012
DATE

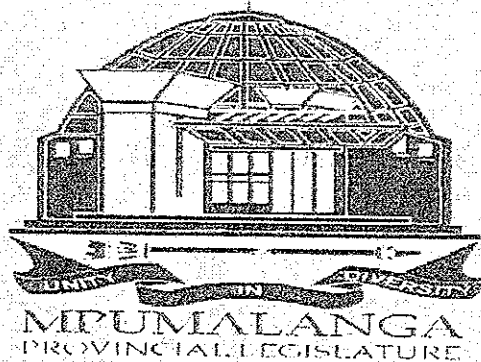
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Office of the Chairperson

Portfolio Committee on Public Works, Roads and Transport; Community Safety, Security and Liaison

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NEGOTIATING MANDATE

To: The Chairperson: Select Committee on Security and
Constitutional Development
National Council of Provinces

Name of the Bill: Traditional Courts Bill

Number of the Bill: [B1-2012]

Date of Deliberation: 26 October 2012

Vote of the Legislature: The Portfolio Committee on Public Works, Roads and Transport; Community Safety, Security and Liaison, after considering the Traditional Courts Bill, 2012 ("the Bill"), confers on the permanent delegate representing the Province of Mpumalanga in the NCOP, the mandate to negotiate on the Bill in accordance with the views of members of the Committee and also taking into account the proposed amendments stated below.

The following comments and amendments were emphasised by the Committee:

1. Short title of the Bill

The Bill should be called the "Restorative Justice and Reconciliation Bill" instead of Traditional Courts Bill in order to include all parts of the South African community. This change would make the Bill more encompassing and also bring it in line with the objects of the Bill which advocate a traditional system that is embedded on restorative justice and reconciliation.

2. Application of the Bill

The Bill should apply to all South Africans residing in rural and urban areas, regardless of whether they do not fall within the jurisdiction of a traditional leader. It is believed that South Africans who are residing in townships, for instance,

may also wish to have their disputes resolved by means of the application of customary law, and the current restriction would constitute denying them access to justice.

3. Clause 4: Designation and training of traditional leaders / Presiding officer

- a) The designation of persons as traditional leaders should not be limited to kings, queens and senior traditional leaders, but should be extended to any persons that the Minister may appoint. This could be any person who is regarded as being of good standing in the community such as a priest or school principal.
- b) Further, *tindvuna* or headmen/women should also be designated as alternate presiding officers. This is important because a senior traditional leader may for instance be having 13 villages falling within his or her jurisdiction. In such a case, it would not be practically possible for one presiding officer to preside over matters for all 13 villages.
- c) Linked to the above, it is a fact that most headmen/ women are elderly people most of whom are illiterate, and therefore, they should be trained to preside over cases by means of oral examination, as is the case when illiterate persons test for their learner driver's licences. Training should also be extended to officials appointed to serve in the traditional courts.

4. Clause 6: Settlement of certain criminal disputes by traditional court

The Bill must be explicit and not create room for doubt, and it must be clearly stated that traditional courts cannot hear rape cases, for instance. It is proposed that a Schedule explaining offences that cannot be heard by a traditional court be included in the Bill.

5. Clause 9: Procedure of traditional court

- a) Although, clause 9(2)(a)(i) advocates for the respect of the human rights of women, the Committee's view is that such a clause was **broadly** drafted and would not address the challenges encountered by rural women at the hands of some traditional leaders. In some traditional courts, the current practice is that men still continue to treat women like perpetual minors or persons of inferior status and women who are in mourning are also precluded from participating in the processes of traditional courts or councils. Therefore, clause 9(2)(a)(i) needs to be drafted in such a manner that ensures that the rights of women are protected.
- b) Other vulnerable groups such as children, the elderly and the persons with disabilities should be treated in a manner that takes into account their vulnerability and should not be discriminated against. For instance, children appearing before the traditional court either as a complainant or accused should be assisted by their parents or guardians. Interpreters and language

practitioners and other assistive devices should be made available to assist persons with disabilities and the aged [clause 9(2)(a)(ii)].

- c) The prohibition of legal representation before traditional courts, including criminal matters, is in direct conflict with the Constitution. As such, this provision deprives accused persons of their constitutional right to be represented by a legal representative of their choice. It is therefore, the Committee's view that the Bill would be good for the country without clause 9(3)(a).

Alternatively, should legal representation be prohibited in the final draft of the Bill, the procedure that is followed in the small claims courts when resolving civil disputes should also be adopted in the traditional courts when dealing with criminal and civil matters and each party should be allowed to represent him or herself.

- d) A clause should be included in the Bill where the rights of the accused, as stipulated in the Constitution and the Criminal Procedure Act are incorporated in the Bill. This would make the Bill constitutional and this is critical since the Bill affects traditional communities where some members of the community, including traditional leaders are not sophisticated and do not have a comprehensive understanding of their fundamental rights.
- e) It is not expressly articulated whether the Bill allows a person to opt out of the jurisdiction of a traditional court, in favour of a magistrate's court even where such a person resides within the jurisdiction of the traditional court. This current situation in the Bill may be open to abuse, and if a party fails to appear before a traditional court when summoned, the presiding officer, who would be the senior traditional leader, may later impose any punishment as he or she sees fit when the party subsequently appears.
- f) With regard to clause 9(5)(a)(ii), all revenue collected by the traditional court should be deposited into the account of the relevant traditional council and be used to develop the community as well as assist in the running of the traditional council.

- 6. **Clause 10: Sanctions and orders that may be imposed by traditional court**
Clause 10(2)(l) of the Bill is too wide, and the manner in which it is currently drafted gives traditional courts unfettered discretion to impose any order that they would deem fit. The above-mentioned clause provides that a traditional court may, in the case of both civil and criminal disputes make "*any order that the traditional court may deem appropriate and which is consistent with the provisions of the Act*". Most importantly, clause 10(2)(l) is not appealable in terms of clause 13(1). Clause 10(2)(l) should therefore be deleted from the Bill since it is not only open to abuse by traditional courts, but is also

unconstitutional as it deprives a party of his or her constitutional right to appeal or review in terms of section 35(3)(o) of the Constitution.

7. Clause 19: Transfer of cases

The jurisdiction of traditional courts versus the magistrates' courts should be clearly defined, particularly the process to be followed when it comes to the transferring of cases from a traditional court to a magistrate or small claims court. Of particular importance, the Bill should clearly state what happens in a situation where a party raises a point that a traditional court lacks jurisdiction to hear his or her matter.

8. Clause 23: Transitional provisions and repeal of laws

The Black Administration Act should be repealed, but the Traditional Courts Bill should not form the basis for its repeal hence it was proposed in paragraph 1 above that the Bill should be called the Restorative Justice and Reconciliation Bill.

9. General

- a) There is an indication that, normally, traditional leaders do not operate in the same way, and the Bill should make provision that traditional courts may be allowed to operate according to their custom.
- b) Resources and oversight are essential in ensuring that traditional courts are capacitated and developed into more functional and constitutionally just institutions that truly dispense restorative justice whilst serving the needs of their communities. The financial implications and resources that will be required for the successful implementation Bill should be taken into account during the drafting of the Bill and its regulations.


SIGNATURE

HON J.L. MAHLANGU

CHAIRPERSON: PORTFOLIO COMMITTEE ON PUBLIC WORKS, ROADS AND
TRANSPORT; COMMUNITY SAFETY, SECURITY AND LIAISON

2012/10/30
DATE

NORTHERN CAPE



NEGOTIATING MANDATE FOR THE TRADITIONAL COURTS BILL [B1 -2012]

(Section 76 Bill)

1. INTRODUCTION

The Chairperson of the Standing Committee on Constitutional Affairs, Petitions and Public Participation, Hon KD Molusi tables the Committee's negotiating mandate on the **Traditional Courts Bill, [B1 - 2012]** as adopted by the Standing Committee on **29 May 2012**.

2. PROCESS FOLLOWED

- 2.1 The Speaker of the Northern Cape Provincial Legislature, on receipt, referred the ***Traditional Courts Bill, [B1 - 2012]*** to the Standing Committee on Constitutional Affairs, Petitions and Public Participation.
- 2.2 The Standing Committee received a briefing on the Bill by Hon. Gunda (NCOP) and an official from the Department of Justice & Constitutional Development on **03 May 2012**.
- 2.3 The Standing Committee resolved at the meeting of **03 May 2012**, to hold a public hearing on the referred Bill in **Kuruman**, to solicit the views of communities and stakeholders with regard to the ***Traditional Courts Bill [B1-2012]***.

A public hearing was held on **the 17 May 2012 in Kuruman**, as per Committee resolution and both written and oral submissions were called for. The public engaged with the Members of the Provincial Legislature in respect of the Bill.

- 2.4 The Standing Committee consulted the Provincial House of Traditional Leaders on **28 May 2012**.
- 2.5 On **23 May 2012, 25 May 2012** and the **29 May 2012**, the Standing Committee on Constitutional Affairs, Petitions and Public Participation deliberated and considered the ***Traditional Courts Bill [B1-2012]***.

3. PUBLIC INPUTS ON THE BILL

- 3.1. The bill offers no protection for the traditional leaders and seeks to undermine customs and traditions.
- 3.2. No code of good practice is explained in terms of the relationship between the parties involved in a dispute.
- 3.3. The bill is silent on respect for the rights of individuals appearing in a traditional court, for example the right to remain silent.
- 3.4. The bill should be customized to the areas affected.
- 3.5. The bill does not address the empowerment of women in rural areas.
- 3.6. The bill makes no mention of the Chief's Council.
- 3.7. There will be disputes between the values of the magistrate courts and those of the traditional courts as the two have different value systems (western values opposed to customary values).
- 3.8. A Para-legal be allowed to represent a lay person appearing before a traditional court to promote fairness as the traditional leader will have undergone training.
- 3.9. The bill does not explain how a traditional court will enforce compliance to the offender to appear before it if the offender is from outside the village.
- 3.10. More time for consultation and engagement is needed for this bill.
- 3.11. Expulsion as a sanction should be retained.
- 3.12. Misconduct process against a presiding officer in a Tribunal Court is not clearly detailed.

The public hearing held by the Standing Committee was **successful**.

The majority of the people who attended the public hearing wanted more time to engage and consult on the Bill.

4. INPUTS BY THE TRADITIONAL LEADERS

- 4.1. The bill does not recognise the existence of hierarchy in traditional committees, especially with regard to the lodging of complaints.
- 4.2. As a sanction corporal punishment should be maintained for it helps to deter further transgressions.
- 4.3. An interim measure must be put in place to recognise the Khoisan whiles awaiting legislation to that effect.
- 4.4. In event there's conflict by and between a certain legislation with the customary court bill which legislation takes precedence.
- 4.5. The dress code must at all time be adhered to by the women.
- 4.6. The Bill must also make provision that the authority of traditional leaders is not undermined in as far as land ownership and utilization is concerned.

The Dikgosi of the Northern Cape Province overwhelmingly supports the **Traditional Courts Bill [B1-2012]**.

5. WRITTEN INPUTS ON THE BILL

A written submission was received from the Commission for Gender Equality. The Commission made the following inputs:

5.1 Non-compliance with UN Resolution 66/129 which urges member states to integrate the gender perspectives of rural women by promoting consultation with and ensuring participation of rural women inclusive of indigenous women and women with disabilities in the design, implementation and follow-up to development of policies.

The CGE does not support the manner in which public participation is being elicited because a major constituency namely rural women is not being embraced adequately by an absence of workshops, education sessions and consultative hearings within deep rural South Africa

5.2 Gender Equality and Traditional Courts

A limited number of women will be able to participate as presiding officers. In this regard patriarchy has made it difficult for women members of traditional leaders' families to preside over a traditional court because this is not considered as a customary practice. Although the Bill is gender neutral and expressly provides for gender equality in Section 3 and 4 the reality is that a limited number of women will ascend to the ranks of presiding officers.

5.3 Geographical Location of Traditional Courts and appointment of Presiding Officers

Although the procedure of the appointment may appear rational as the Minister may be held accountable for giving effect to the promotion of gender equality, the issue of the number, geographical location and distribution of courts remains uncertain. This may impact negatively on the ability of communities to access traditional courts. Under the circumstances the CGE does not support the manner in which Clause 4 of the Bill seeks to establish seats of traditional courts and the manner in which presiding officers will be identified.

5.4 Training of Presiding Officers

The CGE is concerned that certain designated incumbents may be exempted. This exemption will most **probably** give rise to a skills gap. This will undermine the administration of justice by traditional courts and also infringe the rights to equality because people may end up being treated differently in similar disputes. This cannot be condoned by the CGE.

5.5 Centralization of Power

The Traditional Courts Bill allows for the Minister to designate a senior traditional leader as the presiding officer of a traditional court in terms of Clause 4 (1). This provision will have a tendency to centralize power in the hands of traditional leaders. Such circumstances will allow for traditional leaders to enforce controversial versions of customary entitlements of women as well as ordinary members of the traditional community.

5.6 Potential to prejudice participation by women

The participation by women in traditional courts especially within rural communities may be limited by discriminatory practices. These practices exist within the traditional justice system itself and include the following:

- i. Women in rural areas are regarded as people of lower social status and without economic power.
- ii. Women have limited chances of participating in traditional councils as men are biased towards women and resist sharing substantive authority with women.
- iii. Widows in mourning clothes may not be allowed to speak in traditional courts. In some communities they may even be prohibited from entering such courts and must speak through a male person.
- iv. Some traditional leaders demand sexual favours from women in exchange for assistance.
- v. In some communities women may only bring a dispute to court through a male intermediary who will address the court on her behalf. Furthermore, no cross examination will be allowed by the female

5.7 Conflation between Executive and Judicial responsibilities

The combining of both executive and judicial functions on the part of traditional leaders is contrary to the principle of separation of powers. In this regard traditional leaders are expected to represent communities, uphold customary practices and also act as impartial presiding officers where disputes on customary law issues arise. In such instances the independence of the presiding officer may be compromised.

5.8 Multilayered nature of traditional justice system ignored in Bill

The nature of customary law and traditional justice systems are complex. Traditional dispute resolution mechanisms such as ward level tribunals and appeals which exist are not embraced by the Bill. In this regard the exact locus of traditional courts within the traditional justice system and appeals as well as review status of magistrate courts should be clearly defined in the Bill.

This is necessary to ensure uniformity in the administration of traditional justice and the manner in which an aggrieved party may resolve his or her dispute.

5.9 Freedom of association and opting out

The Bill allows for traditional courts to operate within fixed geographical jurisdictions and will be able to preside over different racial groups among others. This is a rigid approach and in conflict with the freedom of association provided for in the Constitution.

This Bill is therefore unconstitutional in the absence of an escape clause. One of the reasons that may be forwarded for opting out is the absence of legal representation in traditional courts. Therefore, jurisdiction cannot be enforced where the constitution in terms of Section 35 (3) (f) allows for every accused person to choose a legal representative of his or her choice. In addition to this Section 34 guarantees every person the right to access to courts which includes the right to be tried in a court that is independent and impartial inclusive of all *sui generis* judicial tribunals.

It is submitted that the provisions of the Bill are in conflict with the constitution to the extent that they indirectly limit access to a competent court and also violate the right to a fair trial by enforcing jurisdiction instead of providing for an opting out of jurisdiction.

In this regard the CGE is not supportive of the Bill that is in conflict with the Constitution.

6. COMMITTEE INPUTS ON THE BILL

- 6.1. Recognition of all spheres of traditional leaders must be ensured.
- 6.2. Corporal punishment cannot be maintained.
- 6.3. The Traditional Courts Bill must be in sync with other legislation.

7. STANDING COMMITTEE POSITION ON THE BILL

After due deliberation and taking note of the Public's input, the Standing Committee on Constitutional Affairs, Petitions and Public Participation recognising and acknowledging that the Constitution is the supreme law of the country, compliance with the constitution is therefore essential.

Recognising that public participation plays an integral part and is a requirement in terms of the Constitution. The Standing Committee acknowledge the installation of the first female traditional leader, Kgosi Toto, in the Northern Cape Provincial House of Traditional Leaders

The committees' view is therefore to enhance the Bill by considering the views as expressed during public participation process and deliberations of the committee. The Standing Committee on Constitutional Affairs, Petitions & Public Participation is in favour of the principle of the **Traditional Courts Bill [B1-2012]**.

8. COMMITTEE ADOPTION OF THE BILL

The Committee adopted this negotiating mandate duly signed by the Chairperson of the Committee.

HON KD Molusi

Chairperson: SC on Constitutional Affairs, Petitions & Public Participation

NORTH WEST



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NEGOTIATING MANDATE

TO: Hon T H Mofokeng, MP
Chairperson of Select Committee on Security &
Constitutional Development

Name of the Bill/Question: Traditional Courts Bill

Number of Bill/Question: [S1-2012]

Date of deliberation: 21 November 2013

Vote of Legislature: The portfolio Committee on Local Government &
Traditional Affairs vote in favour of the Bill
noting the concerns that have been highlighted
and the attached submissions of communities.


Hon A Mothupi
Chairperson - PC: Local Government & Traditional Affairs

Date: 22/01/2014

COMMUNITY PARTICIPATION

PARTICIPATION BY DR KENNETH KAUNDA DISTRICT

The community accepted the bill without any amendments.

PARTICIPATION BY BOJANALA DISTRICT

The community accepted the bill with the following amendments:

- "Equitable representation of women in these courts should be progressively realized". This input relates to clause 7.
- There should be role clarification between the Chief (Kgosi) and the Headman (Kgosana). This input is regarding to clause 4.
- All Traditional leaders should be properly briefed on Section 10 of the Bill and they should also be provided with the Constitution and be properly workshopped. This input is regarding clause.

PARTICIPATION BY NGAKA MODIRI MOLEMA DISTRICT

The Community accepted the Bill stating that traditional courts are better than Constitutional Courts because they restore morality within the communities, making communities to return to their old customs.

PARTICIPATION BY DR RUTH SEGOMOTSI MOMPATI DISTRICT

The Community accepted the Bill with the following amendments:

- Equitable representation of women in these courts should be progressively realised. This input relates to clause 7.

WESTERN CAPE

Wes-Kaapse Provinsiale Parlement
Western Cape Provincial Parliament
IPalamente yePhondo leNtshona Koloni



NEGOTIATING MANDATE

To: Hon. T H Mofokeng
Chairperson: Select Committee on Security and
Constitutional Development

Name of Bill: Traditional Courts Bill

Number of Bill: [B1-2012]

Date of deliberation: 15 May 2012

Vote of Legislature: The Standing Committee on Local Government begs
to report that it confers on the Western Cape's
delegation in the NCOP the authority not to support
the Bill for reasons contained in Annexure A.


Signature

16/05/2012
Date

Hon J J Visser
Chairperson: Standing Committee on Local Government

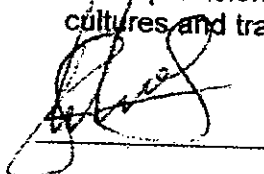
ANNEXURE A

Traditional Courts Bill [B1 – 2012] (NCOP)

The Standing Committee on Local Government hereby informs the NCOP Select Committee that it cannot support the Bill in its current format due to the following reasons –

- 1.1. The Western Cape Standing Committee on Local Government hereby recognises that customary practices play an important role, that the Black Administration Act provisions are inappropriate and that a new legislative and regulatory framework is required.
- 1.2. The process of consultation during the drafting of the Bill was inadequate in that consultation was limited to traditional leaders. Important stakeholders such as, for example, rural communities that would directly be affected by the Bill, certain cultural communities as well as advocacy groups who undertake research and advocacy on areas of customary law were not consulted.
- 1.3. The process of consultation was also impeded by the fact that the Bill was only issued in English, in a language that is not understood by the majority of people who would be affected by the Bill. In addition, the process of consultation did not allow communities the opportunity to substantially engage with the provisions and possible implications of the Bill.
- 1.4. There is a need to affirm the values of the traditional justice system but this should be done in terms of Section 34 of the Constitution of the Republic of South Africa [No. 108 of 1996] with Traditional Councils being contemplated as "independent and impartial tribunal or forum" constituted of community members. The Traditional Courts should therefore not be contemplated as courts in terms of Section 166 of the Constitution of the Republic of South Africa [No. 108 of 1996]. A system where mediation and arbitration could be exercised similar to the Commission for Conciliation Mediation and Arbitration (CCMA) systems as part of labour relations processes should therefore be investigated.
- 1.5. The Bill would centralise Judicial, Executive and Legislative authority with traditional leaders acting as presiding officers. This is contrary to the constitutionally enshrined principle of "separation of powers". In practice the traditional leader would therefore have other arenas of authority, such as the allocation of communal land, in which alternative sanctions can be imposed should the traditional leader not be satisfied with the outcomes of processes within the Traditional Court or Council or with the fact that the potential defendant has opted for a hearing within the formal justice system.

- 1.6. The jurisdiction to institute legal action against persons and to preside over criminal matters should not lie with a Traditional Court or Councils. In the case of especially criminal proceedings before a traditional court as contemplated in the Bill, the fact that the Bill does not allow legal representation for any party to such proceedings is contrary to section 35(3) of the Constitution of the Republic of South Africa [No. 108 of 1996] which provides for the right to legal representation in criminal matters.
- 1.7. Legal representation should however also be available to persons who appear before the Traditional Court or Council on a civil matter.
- 1.8. Definitions contained within the Traditional Courts Bill are taken from pieces of legislation that are to be repealed once new legislation is promulgated. This includes the Traditional Affairs Bill, which is due to replace the Traditional Leadership, and Governance Framework Act, 2003 as well as the National House of Traditional Leaders Act, 2009.
- 1.9. The Bill does not advance the principles of a constitutional democracy as contained within Section 9 of the Constitution of the Republic of South Africa [No. 108 of 1996], particularly with regards to the rights of women and children.
- 1.10. The various sanction options available to the presiding officer should be reviewed to ensure that traditional communities are protected from abuse.
- 1.11. The appeals process should be strengthened to ensure that traditional communities have legitimate processes through which to appeal against the decision of the Traditional Court or Council.
- 1.12. Persons should have the option of "opting out" of the jurisdiction of a traditional court system.
- 1.13. The Bill is not clear on how proper record keeping and administration will be maintained and conducted. This has the potential of impacting on interested parties' right to access information.
- 1.14. There is no system of documenting customary law, a Bill of this nature should make provision for documentation of customary law of the various traditional cultures and traditions.



JJ Visser (MPP)

Chairperson

Date of Adoption

: Standing Committee on Local Government
: 15 May 2012