

COSATU Submission on the Traditional Courts Bill



Submitted to:

**Portfolio Committee on
Justice and Correctional Services**

National Assembly

Republic of South Africa

1. Introduction

COSATU would like to thank the Portfolio Committee for the opportunity to share the views of its 1.7 million members and their families and the broader working class.

Traditional courts are a matter of great concern and importance to workers and their families, whether they live in urban or traditional areas.

COSATU was strongly opposed to the previous drafts of the Traditional Courts Bill as our members felt it gave too much power to traditional leaders at the expense of creating one country, one judicial system and the need to advance the rights of women and other vulnerable persons in particular.

COSATU has many reservations about traditional courts and leaders. However we recognise the reality of their existence, that the Constitution provides roles for them and that within the current legislated framework can play a positive role in their communities.

We recognise that many of our members come from traditional areas and that it is important to find a consensual approach to the role of traditional courts. We believe that many community disputes etc. are better off being resolved in a community or in a traditional court as opposed to remote, inaccessible and expensive magistrates' courts.

COSATU notes and welcomes the many, important and progressive changes that the Department of Justice in conjunction with the panel of civil society and other experts has made to the bill. These improvements have gone a long way to address many of our members' concerns.

Having noted these positive amendments, there are still critical areas that COSATU feels we can make further improvements to strengthen the progressive intent of the bill and in particular to protect the rights of women and vulnerable persons.

2. Improvements to the TC Bill

COSATU commends the Department of Justice for having held extensive engagements with key civil society organisations. COSATU appreciates the establishment of a panel by the Department to make improvements to it in response to civil society's critical concerns.

COSATU welcomes and supports the following amendments that have been made to the bill:

2.1 Opt Out

COSATU appreciates and welcomes as an important victory to protect the rights of citizens who do not want to fall under traditional courts, the insertion of the clause guaranteeing the accused the right to opt out of traditional courts.

2.2 Jurisdiction

COSATU welcomes the limitation of the jurisdiction of traditional courts to civil matters and not to cases involving amounts valued at below R5000. This will help to avoid duplicating judicial processes and allow traditional courts to focus on community and traditional matters.

2.3 Anti-Discrimination Measures

COSATU welcomes the various provisions that seek to protect women and vulnerable persons from discrimination and to promote gender representivity in the traditional courts. We specifically welcome measures to promote persons from discrimination based upon gender or sexual orientation.

2.4 Sanctions

COSATU welcomes the limitation of sanctions to no more than R5000 and to measures that are not abusive, exploitative, involve detention or are inhumane.

2.5 Appeals and Grounds for Review

COSATU welcomes the right to appeal to High Courts and the various grounds for automatic review. This helps to ensure the inherent right to appeal.

2.6 Department of Justice Supervision

COSATU welcomes the oversight role provided for the Department in ensuring minimum national norms and standards with regards to the functioning and roles of traditional courts.

3. COSATU Proposals to Strengthen the Bill

COSATU is generally not keen on traditional courts or expanding their role. We are also wary of diluting the role of the judiciary throughout the territory of the republic and would prefer the expansion of community or small claims courts.

However we recognise the reality of traditional courts and are proposing the following measures to further align the bill with the progressive ethos of the Constitution and to protect the rights of women and vulnerable persons.

3.1 Opt Out

COSATU welcomes the provisions providing for the accused to opt out of a traditional court. However we are concerned that this progressive provision is not sufficiently binding and that the accused may not be aware of this right.

COSATU Proposals

- COSATU thus proposes that the bill be amended to compel the clerk to inform the accused of their right to opt out of a traditional court and to have the matter referred to another court of their choosing.

3.2 Jurisdiction

COSATU appreciates the provisions to limit traditional courts to matters below the value of R5000 and that are not before any other court or under investigation by SAPS.

However we are worried that traditional courts will still be entitled to deal with criminal matters of theft up to the value of R5000.

COSATU believes that all criminal matters should be dealt with by criminal and not traditional courts.

COSATU is concerned that a role is provided for traditional courts to make recommendations about matters relating to Ukuthwala. COSATU is of the view that Ukuthwala is not legal or provided for in law and that this is a matter of great debate and thus how can recommendations be made about such matters? COSATU is of the understanding that a separate bill will be drafted by the Department to deal specifically with Ukuthwala.

COSATU Proposals

- COSATU thus proposes that the provision for traditional courts to deal with criminal matters must be removed in its entirety.
- COSATU requests that matters relating to Ukuthwala be deleted in their entirety from this bill and deferred to a future bill and discussion.

3.3 Gender Representivity and Discrimination

COSATU welcomes the various provisions to provide for gender representivity and prohibit discrimination.

However we are worried that the commitment to ensure gender representivity in traditional courts is not sufficiently binding.

COSATU is of the belief that women are vulnerable persons and in particular in matters under traditional courts.

COSATU Proposals

- COSATU proposes that traditional courts be required to ensure a 50/50 balance in favour of gender representivity.
- COSATU proposed that women be included in the categories defined as vulnerable groups in the bill.

3.4 Sanctions

COSATU welcomes the various limitations on the types of sanctions that traditional courts may set. However we believe that based upon recent experiences these should be further specified with the intention of protecting the accused.

COSATU Proposals

- COSATU proposes that the limitation on sanctions specifically prohibit corporal or physical punishments, the deprivation of land rights and expulsion from the community.
- COSATU proposes that financial sanctions and their payment timeframes should be reasonable and affordable.

3.5 High Court Referrals

COSATU welcomes the right of appeal to a High Court. However High Courts are not accessible geographically to most rural areas and are also prohibitively expensive to ordinary residents.

COSATU Proposals

- COSATU thus proposes that the bill be amended to allow persons to appeal traditional court judgments and sanctions to magistrate's courts as these are much more accessible and affordable in terms of legal representation.
- COSATU also proposes that legal aid representation should be automatically offered to persons seeking to appeal cases to higher courts in order to make this right of appeal affordable and a practical reality.

3.6 Grounds for Review

COSATU welcomes the various grounds for automatic review.

COSATU Proposals

- COSATU proposes that failure by traditional court clerks to inform the accused of the right to opt out, intimidation against the accused not to exercise their right to opt out or punishments for them exercising their right to opt out should all be grounds for automatic referral to higher courts.

3.7 Transgressions by Traditional Leaders and Clerks

COSATU welcomes the code of conduct and possible sanctions for transgressions by traditional leaders and courts. COSATU is still concerned that these sanctions may not be sufficient and in some cases amount to a slap on the wrist.

COSATU Proposals

- COSATU thus proposals that an additional sanction be provided for traditional leaders and court clerks who are found to have committed transgressions can

be removed from presiding or participating in future traditional court cases if their offence is of a serious nature.

4 Conclusion

COSATU welcomes the significant improvements made to this bill by the Department after engaging with civil society on its deep concerns with regards to the previous version.

The amendments to the bill have gone a long way to addressing the need to ensure traditional courts operate within the confines of the Constitution and to protect women and prohibit unfair discrimination.

COSATU is still concerned with regards to several key areas of the bill and has thus made the above proposed amendments.

We hope that the Committee will look at our proposals favourably and include them into the final draft of the bill.

As always we are available to assist the Committee in its critical tasks.

Thank you.

Yours comradely,



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