PRESENTATION BY CONTRALESA ON TRADITIONAL COURTS BILL – B1-2017

DATE: 20/03/2018

VENUE: PARLIAMENT OF REPUBLIC OF SOUTH AFRICA

The Traditional Courts Bill: B1-2017 – DEPARTMENT OF JUSTICE.

INTRODUTION

CONTRALESA (CONGRESS OF TRADITONAL LEADERS OF SOUTH AFRICA)

Our organization is one of the mass democratic movements as it represents the masses of our rural South African communities. It is a voice of the majority of the people residing within the traditional leaders areas of jurisdiction. It is the key to rural development, and it derives its mandate from the communities, kings and Queens, Senior traditional leaders, Headmen and Headwomen and hence we are here to make submission for promulgation and support the enactment of the Traditional Courts Act culminating from the Bill under debate.

We represent the institution of traditional leadership which occupies an important place in the African life and, historically in the body politic of South Africa. It embodies the preservation of culture, traditions, customs and values of the African people while also representing the early forms of societal organizations and governance. It survived the onslaught of colonialism and apartheid.

One of the main responsibilities of the traditional leadership is to settle disputes of their communities with the main aim of restoring relationships and to advocate for unity, peace and stability.

The first Traditional Courts Bill was introduced in 2008 but was subsequently rejected outright as a result of major public outcry.  The Bill was reintroduced in Parliament in 2012, however, with the content of the Bill having not changed. It was again met with strong opposition by civil society and organisations representing the interests of women and rural communities. This earlier version of the Bill was heavily criticised for several reasons, all of which would potentially undermine ‘the rights of rural people, particularly women, and (fail) to facilitate access to justice in the rural areas.

However the 2017 Traditional Courts Bill has been heavily revised after more than a year of consultation with reference groups consisting of traditional leaders and members of civil society. Having dropped many of the previously contested provisions, the Bill is now more in line with the requirement of ensuring that the Traditional Courts comply with the Constitution and the Bill of Rights. The Bill also places a duty on the Traditional Courts to ensure greater involvement and protection for women and vulnerable groups in the community.

BACKGROUND

The following comments flow from a review of the Traditional Courts Bill [B1-2017]. Although we are not making a detailed and exhaustive submission on the Bill, our comments will hopefully assist.

Traditional courts exist and they are used by millions of people to resolve disputes according to customary law in a manner which should promote justice. They provide communities with dispute resolution mechanisms and focus on the implementation of restorative justice. It is time to regularise the existing system and make sure that these systems are in line with the Constitution

South Africa has a hybrid legal system, which consists of a mixture of types of law such as civil law, common law, and customary law.  It is important to note that the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the

Constitution Sec 211 the courts are enjoined to apply customary law Sec 212 of the constitution. Leaders continue to function and exercise jurisdiction as outlined in Schedule 6 of the Constitution. Customary law enjoys the same status as Roman-Dutch law in our legal system, and as a system of law, it is used by many South Africans to regulate their lives in a multicultural society.

The Traditional Courts Bill was originally developed in order to replace S12 and S20 of the Black Administration Act of 1927, which empowered traditional leadership to resolve disputes and certain offences in Traditional Courts . Although the Act has been repealed, the provisions which regulated the traditional courts were kept until new legislation would be enacted. The Traditional Courts Bill purports to provide a uniform legislative framework for the structure and functioning of traditional courts, in line with constitutional imperatives and values.

Definitions:

Clause 1 Traditional Leader – it is submitted that the definition of a Traditional to read (Means any person who in terms of customary law of the Traditional Community concerned holds a traditional leader position, and is recognised in terms of the Act (Traditional Leadership and Governance Framework Act 41 of 2003 as amended)

Composition of courts

Clause 5(1)(b) provides that the traditional court must be convened by a traditional leader or any person designated by the traditional leader. We believe parameters should be placed on who would qualify to be so designated by the Traditional Leader.

Training

Although Clause 7(3) enjoins the traditional courts to apply the principles of the Constitution, especially the Bill of Rights, it is important that the traditional leader and any person designated by him / her as contemplated in Clause 5(1)(b) must be sufficiently and competently trained to comply with the Constitution, so as to guard against the High Court being saddled with review proceedings in terms of Clause 11. It must be made peremptory that the designated person must also be trained. Careful consideration should be given to the training model, as experience has shown that teaching by way of a manual, delivering a lecture and evaluation by way of question and answer is not always appropriate. Material should be created that, as far as possible, resembles real life situations. Sufficient budget has to be made available to ensure ongoing training.

Delegation of powers to the designated person It should be clarified whether the powers of traditional leaders may be fully delegated or whether some would remain the preserve of the traditional leader when handling matters by the designated person Legal representation

Clause 7(4)(b) denies a party to the proceedings before a traditional court the right of legal representation. It is important that to note that the objectives of the Bill is to ensure the speedily resolution of disputes and are based on restorative justice and reconciliation. There is no need for persons to act in their representative capacity, participation in the traditional courts is voluntary and that there are alternative ways through which a case can be ventilated. Moreover, there is recourse for review by the High Court in terms of Clause 11. Jurisdiction of traditional courts There is no distinction on this bill between civil and criminal jurisdiction in customary law, vide provisions of Clause 4(2)(b)(I), i.e. that criminal matters referred to in terms of Schedule 2, can be dealt with by the traditional courts, except those that are already being investigated by the South African Police Service. It is proposed that the criminal matters finalised must be recorded so that they can form part of the statistics of the country.

Clause 4(3)(f) provides that a traditional court may give counselling, guidance or assistance if approached by a party, even in matters not referred to in Schedule 2. We note that such counselling, guidance and advice should be done in a manner that does not have to potential of influencing the proceedings of another court or forum. Orders that can be made by traditional courts We support in toto the provisions of Clause 8 which empowers the traditional courts to make relevant sanctions. Clause 16(6) gives the Member of the Executive Council responsible for traditional affairs in the province the power to impose remedial steps. We believe that this power should vest with the Judicial Service Commission or the Magistrates’ Commission. We reiterate our view that the general principles relevant to civil and criminal courts should also apply in respect of traditional courts. It is inappropriate to have an executive authority exercising powers against a different arm of government, i.e. the judiciary.

Record of proceedings

The Bill makes provision for the record of the proceedings [Clause 13]. However, no provision is made for the keeping of mechanical record of the entire proceedings. This will make review and appeal proceedings difficult and we suggest that this issue be addressed.

The question of opting out.

The people resides within traditional communities by their own choice and interests, people residing within the same community practice their customs and culture without any form of coercion

Courts are mainly defined by their area of jurisdiction. The opting out is not encouraged as that will defeat the main objective of bringing justice closer to people, justice which is speedily, accessible and cheap.

The question of participation of women

It is strongly supported that women participate fully in the traditional courts because it is their court as members of the community within their areas of jurisdiction. No one has a right to discriminate another person because of race, colour, sex, etc.

**Conclusion**

It is disgusting, discouraging to talk about black administration act 38 of 1927 with special reference to section 12 and 20 thereof.

We support the provisions and clauses of the Bill and we move for the promulgation and speedily enactment of the traditional courts act.