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 **April 2018**

**SUMMARY OF THE TRADITIONAL COURTS BILL (BI-2017)**

1. Introduction

The Traditional Courts (Bill) that is current before Parliament is the result of re- drafting and revision of previous Traditional Courts Bills that were once before Parliament in 2008 and 2012. Various critical stakeholders objected to certain provisions within those Bills, and the Ministry of Justice had to revise them.

1. Preamble

The stated preamble of the Bill is to align the current traditional dispute resolution mechanisms with the provisions of the Constitution Act of the RSA. The Bill recognises and acknowledges that many South African citizens still ascribe to customs and customary laws. Therefore, the Bill is about ensuring alignment of the traditional courts with Constitutional values. The Bill also recognises and affirms the spirit of voluntary participation and affiliation, granting those citizens who do not wish to subscribe to custom and customary law autonomy to opt out.

1. Object of the Act

This section of the Bill provides for resolution of disputes by traditional courts through a system of restorative justice. Restorative justice as defined in the Bill is:

“ ***an approach to the resolution of disputes that aims to involve all parties to a dispute, the families concerned and community members to collectively identify and address harms, needs and obligations by accepting responsibility, making restitution and taking measures to prevent a recurrence of the incident which gave rise to the dispute and promoting reconciliation***”

According to the Bill, the role of traditional courts is to promote peace and harmony, provide ease of access to justice and to preserve traditions and customs.The Bill in this section also explicitly states and affirms the autonomy of citizens to choose to opt out of the traditional courts system and choose a different dispute resolution mechanism.

1. Guiding principles

The main guiding principle of the Bill is alignment of the traditional courts system to the Constitution by adhering to the following principles:

* Human dignity
* Equality
* Non- sexism and non- racialism
* Freedom of sexual orientation and religion

The following are conducts considered to be infringing on human dignity as listed on schedule one (01) of the Bill:

* discrimination against the dignity of members of the Lesbian, Gay, Bisexual, Transgender and Intersexed community;
* promotion of homophobia;
* denigration, or discrimination against elderly persons who suffer from mental health conditions such as memory loss, dementia and Alzheimer’s disease;
* discrimination against persons who are mentally or physically infirm or disabled on the basis of existing perceptions or beliefs;
* discrimination against persons living with albinism
* discrimination against unmarried persons

The other envisage guiding principle of the Bill is the implementation of restorative justice programmes in the resolution of disputes. The Bill also proposes empowerment and capacity building for the members of the traditional courts.

1. Proceeding in traditional courts

According to this section, any member of the community can institute proceedings in respect of a dispute in any traditional court. On receiving the notice of the dispute, the traditional court can by agreement and consent of the parties to the dispute agree on a venue, which might not necessary be the venue where they usually held traditional courts sessions. Any other person other than the regular traditional leader can chair the session. A traditional court cannot hear any of the following disputes:

* If the matter has already been resolved by another recognised structure
* If the matter is being investigated by the SAPS
* If the matter has been finalized by a Court
* If the matter is pending before any other traditional court

In spirit of voluntary participation and affiliation, any person who is party to the dispute and receives summons to appear before the traditional court, but for whatever reason, elects not to have the matter resolved by a traditional court must inform the clerk of the traditional court about that decision within 14 days. Those who opt out of the traditional court system may not be intimidated or threatened. The Bill also provides that for those who consent for their disputes to be resolved by a traditional court cannot withdraw from the proceeding unless there are compelling reason to do so.

The Bill mandates the traditional courts to make determinations in relation to the following disputes as stipulated in schedule 2 of the Bill:

**“(a***)* ***Theft where the amount involved does not exceed R5 000-00.***

***(b) Malicious damage to property where the amount involved does not exceed R5 000-00.***

***(c) Assault where grievous bodily harm is not inflicted.***

***(d) Breaking or entering any premises with intent to commit an offence either at common law or in contravention of any statute where the amount involved does not exceed R5 000-00.***

***(e) Receiving any stolen property knowing it to be stolen where the amount involved does not exceed R5 000-00.***

***(f) Crimen injuria.***

***(g) Advice relating to customary law practices in respect of—***

***(i) UkuThwala;***

***(ii) Initiation;***

***(iii) Customary law marriages;***

***(iv) Custody and guardianship of minor or dependent children;***

***(v) Succession and inheritance; and***

***(vi) Customary law benefits.***

***(h) Any matter arising out of customary law and custom where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette and different amounts may be determined in respect of different categories of disputes.***

***(i) Altercations between members of the community”***

1. Composition and participation in traditional courts

This section of the Bill explicitly mandates that traditional courts must promote equality by ensuring that membership in the traditional courts is comprised of women and men. The Bill also goes further and mandates the traditional courts to promote representation and full participation of women as parties in the traditional courts. The Bill mandates the traditional courts to adhere to the principle of non-sexism. The Commission for Gender Equality is given an imperative role by the Bill to report annually to Parliament about representation and participation of women and gender equality in traditional courts.

1. Nature of traditional courts

The Bill mandates the traditional courts to recognise the consensual nature of customary law and stipulates that traditional courts while operating under customary law should promote access to justice, prevent conflict and to maintain harmony.

1. Procedure in traditional courts

The Bill puts forth the following procedures for the sessions of the traditional courts:

* Sessions to be held at a time and venue easily accessible to members of the community.
* Sessions to be held in accordance to customs and customary law while adhering to the Bill of Rights as contained in the Constitution.
* Women must be afforded opportunity for full and equal participation as parties and members
* Protection of vulnerable persons like elderly, people living with disabilities and those with different sexual orientations.
* Fair hearings with impartial decisions.
* Legal assistance not allowed.
1. Orders by traditional courts

The following are the orders that the traditional court may make in relation to a dispute:

* Monetary in full or in part including livestock not exceeding the value of the damage
* Rendering of some specific service to the aggrieved party, for the benefit of the community or any other person.
* Order prohibiting certain behaviours and conducts
* Unconditional apology
* Order for attendance of some training programme and /or rehabilitation programme
* Combination of orders
* Referral of the matter to the National prosecuting authority for institution of criminal proceedings
1. Enforcement of orders of traditional courts

Non- satisfactory adherence to orders may lead to the aggrieved party bringing the matter to the attention of the Clerk. The Clerk to inquire into reasons of non-adherence and if due to no fault of the party, then measures to assist the party to adhere will be implemented. If the fault is due to the party, the matter may be referred to the Justices of the Peace and Commissioners of the Oaths Act.

1. Provincial Traditional courts registers

Provinces are mandated by the Bill to appoint and designate persons as Provincial Traditional court Registrars.

1. Review by High Court

The Bill states that any party in a traditional court may take the proceedings on review to a High Court having jurisdiction over that particular traditional court. One of the stated grounds for review is when if women were not afforded full and equal participation as parties and members in a traditional court.

1. Conclusion

The following provisions of the Bill are an achievement in relation to women:

* The assurance of full and equal participation of women irrespective of sexual orientation and/or religion as both members of the traditional courts and as parties in a dispute is very commendable.
* Autonomy to opt out of the traditional courts system
* Training and capacity building for members of traditional court enabling them to adhere to Constitutional imperatives
* Promotion and protection of vulnerable persons like elderly women and those living with disabilities
* CGE being given a role to report annually on participation and representation of women in traditional courts
* One of the stated grounds for review of traditional courts proceedings and decisions is non-adherence to full and equal representation and participation of women
* Sexual crimes not part of matters to be dealt with by the traditional courts

The following are noted concerns

* The Bill does not stipulate the number of members (officials) who are to constitute the traditional courts, so it would not be easy to identify whether the women are adequately represented as convenors and/or officials of traditional courts.
* Also related to the abovementioned, the level of representation and participation as members of traditional courts is not specified. An example on this issue is that, with the Traditional leadership and Khoisan Bill it is stipulated that women should comprise 40% in all traditional councils. Stipulating the level of representation would also assist the CGE to determine whether there is adherence or otherwise in relation to women participating in traditional courts as members and as parties.
* If the Bill provides an opt out option, there should be mechanisms put in place to empower communities about that provision and their rights in relation to it. Communities must be made aware that the opt out option does not mean that the individual is no longer a member of that community, and as such will continue to participate in community activities like attending and helping during funerals and other occasions or attend community meetings.
* The Bill does not stipulate sanctions for non- compliance and/or non-adherence to ensuring participation of women including sex workers and LGBTI persons.
* Whether the CGE is adequately resourced to monitor all traditional courts, and whether reports by the CGE will be taken into consideration and implemented by the Department of Justice.
* It is also concerning, that; the traditional courts are also expected to give advice in relation to ukuThwala.
* The Bill also provides that the traditional courts can give advice in relation to succession and inheritance. This is concerning because of the customary law of male primogeniture and the practice of “**ukungena”** when the widow has no male son. The Customary law of male primogeniture was successfully challenged in the case of Bhe *and Others v The Magistrate, Khayelitsha and Others* but some traditional courts may advise in favour of male succession.
* The Bill provides for protection of vulnerable persons, then this brings a question about the kind of assistance to be available for vulnerable persons , for example in criminal courts children can be assisted through intermediary services, so how will the traditional courts promote and protect vulnerable persons.
* One of the orders that can be made by a traditional court is rendering of some specific service by the offending party to the aggrieved party or for the benefit of the community. This has negative implications for women who are already burdened by unpaid care work; imagine being ordered to do community service in addition to being a primary caregiver of the household.
* The Bill also mentions training and capacity building, but does not stipulate the kind of training, so it would be advisable to ensure that the training also includes training on gender mainstreaming.
1. Recommendations
* To invite the Ministry of Justice to brief the Multi- Party Women’s Caucus about this Bill.
* The Multi-Party Women’s Caucus to consolidate all the views and inputs made by Members to make a formal submission to the Portfolio and/or Select Committee on Justice about the traditional courts Bill.
* The Members of the MPWC to empower women in their various constituencies about the provisions of the Bill and encourage them to participate in the public hearings to be convened by the Parliamentary Committees.