

**NEGOTIATING MANDATE OF THE TRADITIONAL COURTS BILL  
[B1B – 2017]**

**(Section 76 Bill)**

## 1. INTRODUCTION

The Chairperson of the Portfolio Committee on Cooperative Governance, Human Settlements & Traditional Affairs, Hon L Koloi, tables the Committee's negotiating mandate on the ***Traditional Courts Bill [B1B – 2017]*** as adopted by the Portfolio Committee on **Wednesday, 12 February 2020**.

## 2. PROCESS FOLLOWED

**2.1** The Speaker of the Northern Cape Provincial Legislature, on receipt, referred the ***Traditional Courts Bill [B1B – 2017]*** to the Portfolio Committee on Cooperative Governance, Human Settlements & Traditional Affairs on **11 November 2019**.

**2.2** On **Friday, 22 November 2019**, the Portfolio Committee on Cooperative Governance, Human Settlements & Traditional Affairs received a briefing on the Bill from the Northern Cape's Permanent Delegate to the NCOP, Hon A Gxoyiya.

**2.3** The Portfolio Committee resolved to hold public hearings on the referred Bill in all five regions and also called for written submissions to solicit the views of communities and stakeholders with regard to the ***Traditional Courts Bill***.

**2.4** Seven (7) Public Hearings were held from **28 January 2020 - 31 January 2020** in **Frances Baard, Pixley Ka Seme, ZF Mgcawu and John Taolo Gaetsewe regions and Namakwa Region** as per Committee resolution and both written and oral submissions were called for. The public hearing in Kakamas could not materialise due to poor attendance. The public engaged with the Members of the Provincial Legislature in respect of the Bill.

**2.5** Radio Adverts were conducted to inform stakeholders of the scheduled public hearings in all regions apart from John Taolo Gaetsewe region. The following radio stations were utilized: Radio Riverside, Radio Teemaneng, Radio Kaboesna, Radio Revival, Radio Lwazi, Radio NFM, Kurara FM, XFM and Radio Vaaltar FM. There was also a newspaper advert done with the diamond Field Advertisers indicating the dates and area of the public hearings

- 2.6 On **Wednesday, 12 February 2020** the Portfolio Committee on Cooperative Governance, Human Settlements & Traditional Affairs deliberated and considered the ***Traditional Courts Bill [B1B – 2017]***.

### 3. COMMITTEE INPUTS ON THE BILL

- 3.1 Further engagements and consultation with the National House of Traditional Leaders before the finalisation of the process will be of assistance.
- 3.2 The Department must adequately equip traditional houses in order to meet the proposals as captured in the bill.
- 3.3 Ensure that Presiding Officers at traditional courts are trained and developed on how to resolve conflict.
- 3.4 The amount of compensation in Clause 16 must be clearly stipulated.

### 4. STAKEHOLDERS'/PUBLIC INPUTS ON THE BILL

The following are inputs for consideration in the Bill:

- 4.1 The Traditional Courts system must be transparent and not allow any misrepresentation.
- 4.2 A concern was raised that two-thirds of the community must be present in accordance with legislation in order to vote on a Bill, it was however explained that this particular Bill targets the Traditional Communities and they were represented at the Public Hearing. The community was advised that the 50% + 1 rule apply as this is not a specific Constitutional amendment that requires a 2 thirds majority and the intention of the bill is to bring uniformity in this form of dispute adjudication.
- 4.3 The diversity of traditional communities and their respective practices is not representative or clear in the composition and participation in traditional courts.
- 4.4 The public welcome the extension for written submissions but emphasise the need for workshop on the Bill for all tribal authorities to make submission before 14 February 2020.
- 4.5 The R15 000,00 threshold, as stipulated under Clause 2, should be reviewed to a greater value. Noting the objective of the Bill is to harmonise and speed up restorative justice the threshold should be increased because traditional courts can deal with stock theft swiftly whilst the civil court process takes a lot of time.
- 4.6 The Bill is silent about who investigates the allegations brought before the traditional court.
- 4.7 The Bill is silent on security of the presiding officials in the traditional court processes.
- 4.8 The Bill does not indicate if Dikgosi and Dikgosana can be subjected to the proposed disciplinary actions.
- 4.9 Sufficiently empower Traditional Leaders and the clerk to handle and manage lawlessness especially drug related cases and corrupt foreign nationals who sell drugs from thier tuck shops.

- 4.10 Finalise the kingship of the Griekwas, so that they can be recognised and empowered to practice their culture as well as be catered for in the appropriation bill.
- 4.11 The credentials and/or criminal records of Traditional Court Leaders and clerks must be clean.
- 4.12 Traditional Leaders and Traditional Court Leaders must not serve a certain political party.
- 4.13 Ensure that Traditional Courts are not going to be used as kangaroo courts to murder and persecute perpetrators.
- 4.14 Provide a resolve for citizens that live in places that do not have traditional houses for people who want to elevate their issues to be handled or heard by a traditional court.
- 4.15 Traditional court leaders and clerks must be trained to manage lawlessness and corruption especially drug related matters.
- 4.16 The Bill must take cognisance of religious groups that can operate in a similar manner as traditional courts.
- 4.17 Allocated time for consultation and public involvement with the Traditional houses in terms of the Bill is too short, needs more time for consultation.
- 4.18 Favoritism by Tribal leaders is currently being applied in terms of penalties/fines of perpetrators.
- 4.19 The bill does not make mention of all the Traditional houses or Tribes by name eg: Ku and Kwe or Korana etc.
- 4.20 The Bill does not make provision for penalties or fines in terms of murder or sexual offences.
- 4.21 In Clause 4 – the R15.000 amount for theft should be increased.

## **5. WRITTEN SUBMISSIONS ON THE BILL**

Three written inputs were received from the following organisations /communities (Please see attachments):

- Northern Cape Provincial House of Traditional Affairs
- Traditional Leader of the //Hanaseb (the extended Kruiper Family)
- Land & Research Accountability Research Centre

## **6. STAKEHOLDERS POSITION ON THE BILL**

The majority of the stakeholders voted in favour of the Bill.

## **7. PORTFOLIO COMMITTEE POSITION ON THE BILL**

After due deliberation, the Portfolio Committee on Cooperative Governance, Human Settlements & Traditional Affairs supports the Bill.

## 8. COMMITTEE ADOPTION OF THE BILL

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

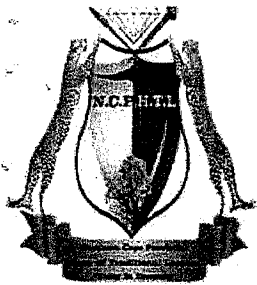
The Committee recommends to the House to mandate the Permanent Delegates to participate in deliberations at the negotiating stage and to **support** the Bill.



HON G Van Staden

Acting Chairperson: PC on Cooperative Governance, Human Settlements & Traditional Affairs

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Date



# NCPHTL

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NORTHERN CAPE PROVINCE

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Reference : INPUTS BILLS  
Tshupelo :  
Isalathiso :  
Verwysings :

Date : 29 January 2020  
Leshupelo :  
Umhla :  
Datum :

Mr Moopelwa  
The Secretary  
Northern Cape Provincial Legislature  
Private Bagx 5066  
Kimberley  
8300

Dear Mr Moopelwa

Attention of Mr Epang Matolweng

## INPUTS ON COURTS FOR TRADITIONAL COURTS BILL

In terms of Section 39(2) of the Northern Cape Traditional Leadership Governance and Houses of Traditional Leaders Act 2 of 2007 provides that:

"The Speaker of the Legislature must refer any Provincial Bill introduced in the Legislature that pertains to traditional affairs, customary law, traditions or customs of traditional communities in the province to the Provincial House of Traditional Leaders for its comment before the Bill is passed by the Legislature."

It was therefore correct that this Traditional Courts Bill be referred to the Provincial House for comments in terms of the Act.

Therefore, the Provincial House of Traditional leaders has studied the Bill and herewith submit the following comments:

### Provisions in the Bill

### Comments

Definitions- Clause 1	
The Bill defines a "Traditional Leader" as any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position and is recognized as such in	"traditional leader" means a person who has been recognised as a king or queen, principal traditional leader, senior traditional leader or headman or headwoman and includes regents, acting traditional leaders and deputy traditional leaders.

terms of an Act of Parliament.	
<p><b>“ Traditional court”</b> The Bill defines it as: a customary institution or structure, which is constituted and functions in terms of customary law and custom, for purposes of resolving disputes, in accordance with constitutional imperatives and this Act</p>	<p>In terms of Schedule 6(16) of the Constitution: “Courts”: Every courts including courts of Traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the applicable legislation.</p> <p>It is our opinion that Traditional court is a competent court and should be accorded its status as intended.</p>
<p><b>By Affiliation: “affirm –</b></p> <ul style="list-style-type: none"> <li>(i) the consensual nature of customary law;</li> <li>(ii) the principle and spirit of voluntary affiliation; and</li> <li>(iii) the right to freely and voluntarily opt in or opt out of the various applicable practices and customs;</li> </ul>	<p>We strongly oppose this insertion, it must be deleted entirely because for communities who are residing in Traditional areas, have subscribed to the life, practices, rites and cultural themes since time immemorial.</p> <p>It is our submission that Customary courts are accessible to all people, it should not be a choice as these people are already observing and practising customary law, tradition and respect their customs and practices.</p>
<p><b>Voluntary association:</b> facilitate the full, voluntary and meaningful participation of all members in a community in a traditional court in order to create an enabling environment which promotes the rights enshrined in Chapter 2 of the Constitution.</p>	<p>Traditional court and/or institution of traditional leadership is not a voluntary association and should be accorded with respect it deserves by government and its institutions.</p> <p>It cannot be equated to such Traditional court is thus recognised in the Constitution and should be accorded the status and respect of a competent court.</p>
<p><b>Institution of proceedings in traditional courts: Clause 4 (e) (ii)</b></p> <p>This clause provides for a traditional court not to make an order in respect of disputes referred to in schedule 1, and that nothing precludes the court from giving advice, counselling, assisting or guiding a party who has approached it,</p>	<p>It is recommended that this paragraph be deleted “ If it is done in a manner that does not have the potential of influencing the proceedings and outcome of the matter in a court which has jurisdiction to hear the matter”, because the court may submit a report with recommendations to the court/ institution/organization</p>

and facilitating the referral of the matter to another court, institution or organization. <b>The Bill further provides that this should not be done with the potential of influencing the proceedings or outcome of the matter in a court that has jurisdiction to hear the matter.</b>	and it will be up to the court to decide on whether to take the recommendations or not.  So we do not see how the traditional court can influence the proceedings or outcomes of any court.
<b>Composition of and participation in traditional courts: Clause 5</b>  This clause suggests that traditional courts must be constituted by women as parties and members thereof.	Traditional courts are always attended by community members, includes men and women as parties and members of the court.  The institution of Traditional leadership has evolved and has democratized and Traditional leaders are readily aware that women are part of the institutional leadership, for instance in Traditional councils, it will be an anomaly if women will be excluded.  Institutions like Commission on Gender and others should continue to capacitate Women and men to understand their roles in a traditional court.
<b>Enforcement of orders of a traditional court</b>  A party who is in wilful default of a traditional courts' order is problematic as it does not bring the matter to finality but it is rather referred to the Magistrates court.	The Traditional court should be empowered to deal with situations like these and not to frustrate the process and its effectiveness wherein another Court is given responsibilities of a Traditional court.
	For the Traditional courts to function optimally, the following should be in place: <ul style="list-style-type: none"> <li>❖ There should be a relationship with the Police Services</li> <li>❖ A Police official should be assigned to a traditional court for purposes of service of summons; assist in ensuring that there is order</li> </ul>

	<p>in Court and effecting orders of court when necessary.</p> <ul style="list-style-type: none"> <li>❖ Necessary budget must be made available by the Department of Justice.</li> <li>❖ Headmen should be Councillors in court.</li> <li>❖ Continued training of traditional leaders as Presiding officers and/or attend Justice colleges.</li> <li>❖ There should be a mechanism to deal with the composition of a traditional court when coming to women is beyond the control of the Traditional court and it should not be penalised for if this requirement is not met.</li> <li>❖ The quantum of R15 000 should be relaxed especially when dealing with livestock, one cow can easily cost R18 000, which technically exceed the maximum amount allowed for a Traditional court. This will be in the event a person is fine one cow. Provision should be made to allow for such competent verdict to be implemented by the Traditional court.</li> </ul>
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We hope that our inputs will be considered.

Yours faithfully



**Kgosi Pelonomi Toto**

**Chairperson:**

**Northern Cape Provincial House of Traditional Leaders**

**Date:** 30/07/2020



## Traditional Courts Bill

Comments from the Traditional Leader of the //Hanaseb (the extended Kruiper Family)

Mr Dawid Kariseb

And further recognising that customary law plays an integral role in the resolution of disputes in communities between members of those communities who observe the accepted practices and customs applicable in those communities;

And further recognising that customary law plays an integral role in the resolution of disputes in communities between members of those communities and to apply the accepted practices and customs applicable in those communities;

“restorative justice”— (a) means 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;

(b) does not extend to measures which, in good faith, purport to give effect to the objectives contemplated in paragraph (a) but which, in fact, do not meaningfully restore the dignity of, or redress any wrong-doing against any, person involved in the dispute; and

(c) results in redressing the wrong-doing in question and ensuring the restitution of the dignity of the person in question in a just and fair manner;

“restorative justice”— (a) means an approach to the resolution of disputes that aims to involve all parties to a dispute, the persons and community members concerned to 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;

(b) does not extend to measures which, in good faith, purport to give effect to the objectives contemplated in paragraph (a) but which, in fact, do not meaningfully restore the dignity of, or redress any wrong-doing against any, person involved in the dispute; and

(c) results in redressing the wrong-doing in question and ensuring the restitution of the dignity of the person in question in a just and fair manner;

2.(b) the existence of systemic unfair discrimination and inequalities or attitudes which are contrary to constitutional values or which have the propensity of precluding meaningful participation in traditional court proceedings by any person or group of persons, particularly in respect of gender, sex, including intersex, gender identity, sexual orientation, age, disability, religion, language, marital status and race, as a result of unfair discrimination, certain belief systems and harmful practices, brought about by colonialism, apartheid and patriarchy;

2.(b) the existence of systemic unfair discrimination and inequalities or attitudes which are contrary to constitutional values or which have the propensity of precluding meaningful participation in traditional court proceedings by community members, particularly in respect of gender, sex, including intersex, gender identity, sexual orientation, age, disability, religion, language, marital status and race, as a result of unfair discrimination, certain belief systems and harmful practices, brought about by colonialism, apartheid and patriarchy;

2.(e) a founding value on which customary law is premised, is that its application is accessible to those who voluntarily subject themselves to that set of laws and customs.

(e) a founding value on which customary law is premised, is that its application is accessible to those who subject themselves to that set of laws and customs.

#### Institution of proceedings in traditional courts

4. (1) (a) Any person may, subject to subsection (3), institute proceedings in respect of a dispute in any traditional court.

#### Institution of proceedings in traditional courts

4. (1) (a) Community members may, subject to subsection (3), institute proceedings in respect of a dispute in the designated traditional court in the area.

(4) (a) The clerk of the traditional court must, if a party, after having been duly summoned to appear in and attend the proceedings of the traditional court, fails to so appear and attend such proceedings, make a determination to that effect and must thereafter refer the matter to a justice of the peace appointed by the Minister in terms of section 2 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963), for purposes of this Act, who must deal with the matter in terms of the powers and duties as may be conferred or imposed on him or her under section 3 of the Justices of the Peace and Commissioners of Oaths Act, 1963.

(4) (a) The clerk of the traditional court must, if a party, after having been duly summoned to appear in and attend the proceedings of the traditional court, fails to so appear and attend such proceedings, make a determination to that effect and must thereafter refer the matter to the police to ensure enforcement.

#### Composition of and participation in traditional courts

5. (1) A traditional court must make allowance for a secretary to assist the clerk of the traditional court as in our opinion the work is too much for the clerk of the traditional court to manage on their own. Also, an interpreter must be appointed on a permanent basis at each traditional court. Furthermore, all presiding officers and staff remunerations must be budgeted for annually to make provision for their salaries. We are using Botswana as our benchmark, and will request the Minister to formulate special regulations for us, the bushman to apply the customary court legislation as it is applied in Botswana.

(5) (a) Where two or more different systems of customary law may be applicable in a dispute before a traditional court, the traditional court must apply the system of customary law that the parties expressly agree should apply.

(5) (a) Where two or more different systems of customary law may be applicable in a dispute before a traditional court, the traditional court must apply the system of customary law of the presiding officer the traditional leader.

(12) A member of the traditional court must declare any direct personal interest that he or she or his or her immediate family member may have in a dispute before a traditional court in which that member is participating, and where appropriate, withdraw from participating in the resolution of that dispute.

(12) A This clause is not applicable to our community because the community members appearing in the court will be either direct or extended family members.

#### Orders that may be made by traditional courts

8. (1) A traditional court may make any of the following orders after having deliberated on a dispute before it:

(iv) for the payment of damages to an appropriate body or organisation which is not connected in any manner whatsoever to a member of the traditional court or a traditional leader:

(iv) for the payment of damages to an appropriate body or organisation which is not connected in any manner whatsoever to a member of the traditional court or a traditional leader: This clause is not acceptable to us because all bodies or organizations will be connected to a member of the traditional court or the traditional leader as the community members appearing in the court will be either direct or extended family members.

(c) an order directing a party against whom proceedings were instituted in terms of section 4(1) who is financially not in a position to comply with any order contemplated in paragraph (a), to render without remuneration some form of service— (i) for the benefit of the community; or (ii) for the benefit of any person or persons in the community in need who, in the opinion of the members of the traditional court, are deserving of that service, under the supervision or control of a person or group of persons identified by the traditional court who, in the opinion of the traditional court, promote the interests of the community and who must upon the completion or otherwise of the service in question report to the traditional court there on: Provided that no service whatsoever may be rendered to a traditional leader or his or her family or to any person acting in an official capacity in that traditional court;

Provided that no service whatsoever may be rendered to a traditional leader or his or her family or to any person acting in an official capacity in that traditional court; This clause is unacceptable to us because the traditional leader or his or her family or to any person acting in an official capacity in that traditional court; will be family as well as the community will be members of the extended Kruiper community.

(3) A traditional court may order that any payment contemplated in subsection (1) or part thereof be paid to a person injured by an act or omission for which the payment was imposed, on condition that such a person, if he or she accepts the payment, may not bring an action in any court in order to recover damages for the injury he or she sustained.

(3) This clause to be amended as follows:

A traditional court may order that any payment contemplated in subsection (1) or part thereof be paid to a person injured by an act or omission for which the payment was imposed, unconditionally and may bring an action in any court in order to recover damages for the injury he or she sustained.

#### Review by High Court

(g) The proceedings of the traditional court were not open to all members of the public, contrary to the provisions of section 7(6);

This clause to be amended as follows: The proceedings of the traditional court were not open to all members of the extended Kruiper community.

31 January 2020

Chairperson and Honourable Members

Portfolio Committee on Cooperative Governance, Human Settlements and Traditional Affairs

Northern Cape Provincial Legislature

c/o Mr. Tshandu and Mr. Haas

Per e-mail: [ntshandu@ncpg.gov.za](mailto:ntshandu@ncpg.gov.za) / [chaas@ncpg.gov.za](mailto:chaas@ncpg.gov.za)

### **Submission on Traditional Courts Bill, B 1B–2017**

#### **A. BACKGROUND**

The Land and Accountability Research Centre (LARC) is based in the University of Cape Town's Faculty of Law. LARC is an interdisciplinary research unit supporting mobilisation, advocacy and strategic litigation on land rights, traditional governance, mining on communal land, and the nature of living customary law. LARC partners with the Alliance for Rural Democracy to provide strategic support to struggles for the recognition and protection of rights in the former homeland areas of South Africa. An explicit concern of LARC is power relations, and the impact of national laws and policy in framing the balance of power within which rural women and men struggle for change at the local level.

When the Traditional Courts Bill B1–2017 was first introduced in the National Assembly in 2017, LARC made a written submission to the Portfolio Committee on Justice and Correctional Services (dated 15 March 2017)<sup>1</sup> congratulating the Department of Justice on the enormous progress that had been made since the highly contentious 2008/2012 version of the Bill. As introduced, the Traditional Courts Bill B 1–2017 was the outcome of one year of intensive negotiations within a reference group including civil society, government, traditional leaders and other stakeholders. The reference group came up with a Bill version that drew on the best features of customary law and, in most respects, complied with the Constitution. The Bill version that is now before the National Council of Provinces and Provincial Legislatures reverses the key improvements that had been made and renders the current Bill flagrantly unconstitutional again.

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<sup>1</sup> Land and Accountability Research Centre *Submission on Traditional Courts Bill, 2017* (15 March 2017), available at

[http://www.larc.uct.ac.za/sites/default/files/image\\_tool/images/347/Submissions/LARC\\_Submission%20on%20Traditional%20Courts%20Bill%202017\\_FINAL%20SUBMITTED.pdf](http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/LARC_Submission%20on%20Traditional%20Courts%20Bill%202017_FINAL%20SUBMITTED.pdf).

Negative changes to the Bill's content were made at the insistence of members of the National Assembly's Portfolio Committee on Justice and Correctional Services, including the Chair, despite clear legal advice to the contrary.<sup>2</sup> This is evident from a working draft discussed by the Portfolio Committee on 21 August 2018, wherein the Department of Justice explains the origins of changes proposed to the Bill's provisions.<sup>3</sup> The Portfolio Committee adopted a combative attitude to submissions by civil society at hearings in March 2018, even when support was expressed for some of the provisions put forward by the Department of Justice.<sup>4</sup>

Some of the key changes include the following:

- The removal of the "opting out" provision that had been the key improvement in the B 1–2017 version that was first introduced.
- Traditional courts will have the status of "courts of law", as per s 166 of the Constitution. This is the case even though no legal representation will be allowed, and criminal matters can be dealt with by the courts. This breaches the right to legal representation in criminal matters and to a fair trial in section 35(3) of the Constitution.
- Clarifying that the traditional court system will align with traditional leadership as recognised in the Traditional Leadership and Governance Framework Act of 2003, but only at higher hierarchical levels. This locks people into ascribed tribal identities and under the authority of traditional leaders whose legitimacy they may dispute. The previous version acknowledged that customary law is a consensual system and enabled people to opt into traditional courts.
- Traditional courts are now imposed on a specific section of the population – those living within former homelands. It thus discriminates between citizens based on the deeply racialised geography created by colonialism and apartheid.

This has reintroduced the constitutional flaws that the Department of Justice had carefully attempted to circumvent when it introduced the Bill (B 1–2017) to Parliament in January 2017. These changes are dealt with individually below as we comment on specific aspects of the Traditional Courts Bill [B 1B–2017] (or "B version") for the Legislature's attention.

It is LARC's submission that the positions associated with traditional courts in the Bill, namely clerks of the court, Justices of the Peace, and Provincial Registrars do not mitigate the constitutional flaws that are identified throughout this submission. These positions create a veneer of reasonableness and protection and give the impression that people will have access to due process and neutral officials where abuses occur or procedures are flouted in traditional courts. However, the Department has made it clear that no additional budget will be made available to fund these positions. All we are told is that existing resources will be used. Yet we know that resources are already critically constrained within South Africa's justice system. If every

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<sup>2</sup> Parliamentary Monitoring Group: meeting report on Traditional Courts Bill: deliberations (21 August 2018) available at <https://pmg.org.za/committee-meeting/26863/>.

<sup>3</sup> Parliamentary Monitoring Group: meeting report on Traditional Courts Bill: deliberations (21 August 2018) available at <https://pmg.org.za/committee-meeting/26863/> and link to working draft of Bill - [https://pmg.org.za/files/180821traditional\\_courts.docx](https://pmg.org.za/files/180821traditional_courts.docx)

<sup>4</sup> Marianne Merten 'Parliament: Opt-Out, Traditional Courts Bill supporters' most hated clause' *Daily Maverick* (19 March 2018) available at <https://www.dailymaverick.co.za/article/2018-03-19-parliament-opt-out-traditional-courts-bill-supporters-most-hated-clause/> and Andisiwe Makinana 'Presenters belittled at traditional courts hearing' *City Press* (18 March 2018) available at <https://citypress.news24.com/News/presenters-belittled-at-traditional-courts-hearing-20180318>.

headman's court was to have a clerk, government would need to cover additional salaries for thousands of new employees – and this in a context where headmen themselves are struggling to receive the salaries due to them by provincial governments.

LARC's concern is that inevitably the status quo set up by the 1927 Black Administration Act will be defaulted to – where senior traditional leaders (or “chiefs”) preside over official traditional courts with no recognition of the important dispute resolution that takes place at more local levels of the traditional justice system. Moreover, without clerks traditional court processes could lack written records and there would be no mechanisms available for people to enforce due process, lay complaints about abuses or contest traditional court findings.

Further to this, the primary accountability mechanism provided in the Bill is a Code of Conduct for persons with a role in traditional courts. After the National Assembly's latest changes, the Code of Conduct will now be enforced by respective provincial Houses of Traditional Leaders. Yet, in practice no provincial House or the National House of Traditional Leaders has condemned or intervened in instances of egregious corruption or criminality by traditional leaders – even in high profile public cases such as that involving King Buyelekhaya Dalindyebo or Nyalala Pilane or the Bapo ba Mogale traditional administration. In these cases, substantial and systemic abuses have come to light through court judgments, at both the Constitutional Court and Supreme Court of Appeal, the Baloyi Commission report, regarding the Bakgatla ba Kgafela, and in a report by the Public Protector in the case of the Bapo ba Mogale. The systemic nature of these abuses has also been highlighted by the Presidential Advisory Panel Report on Land of 2019, the Motlanthe High Level Panel report of 2017 and in a 2018 report of the South African Human Rights Commission.

Despite appearances, this Bill is not about regulating traditional courts. At its core, it enables traditional leaders to justify continuing to exercise the powers that they have assumed in practice, often outside the law. The measures created by this Bill to mitigate potential harms, such as the provision of clerks and Justices of the Peace, are inherently cynical when there is simply no budget available to pay them. One need only look to the reopening of the land restitution claims process in 2014 to see government's track record of making grand promises with no budget to fulfil them. Government stated in 2012 that there are 11 officially-recognised kings, 829 senior traditional leaders and 7399 headmen in South Africa.<sup>5</sup> If each of these leaders was to convene a traditional court, 8239 clerks would have to be deployed to the public service. These figures are disputed in some provinces such as KwaZulu-Natal where many de facto headmen do not enjoy official recognition.

It is imperative that legislation (and draft legislation) be interpreted within its particular context, as has been found by the Constitutional Court. Throughout this submission LARC thus brings to the attention of the Provincial Legislature the particular social, political and historical context in which the Traditional Courts Bill will operate, as well as prevailing circumstances within the former homelands today. The Traditional Courts Bill will not operate separately from this context. On the contrary, the Traditional Courts Bill will be embedded within the Bantustan era legal frameworks and practices still remaining in these areas at present.

Finally, LARC would like to remind lawmakers about the massive public outcry that accompanied the previous iterations of the Traditional Courts Bill as Bill 15 of 2008 and Bill 1 of 2012. Parliament received written and verbal submissions from all sectors of South African society on these two Bills, including: rural-based activists, non-governmental organisations, community-

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<sup>5</sup> Written reply to an internal question to the Minister of Cooperative Governance and Traditional Affairs in the National Assembly (Question 63, Internal question paper number 1 of 9 February 2012).

based organisations, academics, Chapter 9 institutions, legal centres, traditional leaders, trade unions, and ordinary citizens.<sup>6</sup> Provincial legislatures similarly received written and verbal submissions on the 2012 Bill. Collectively, provincial legislatures conducted 30 hearings in various locations across the provinces.<sup>7</sup> Despite shortcomings in the public participation process, many ordinary citizens, including those from rural and traditional areas, were able to raise their concerns about the unconstitutionality of the 2012 Bill.<sup>8</sup> These submissions all form part of the public memory of the Traditional Courts Bill, and it is Parliament's and the Legislatures' duty to ensure that previous public input on the Bill is honoured throughout the coming parliamentary process. Parliament cannot take South Africa back to the 2008 and 2012 versions of the Bill.

## B. COMMENTS ON SPECIFIC ASPECTS OF THE BILL

### 1. Status of traditional courts

As explained earlier, the Portfolio Committee on Justice and Correctional Services of the National Assembly introduced a change in the status of traditional courts in the Bill. The Committee insisted that traditional courts must be courts of law in terms of s 166 of the Constitution. They also insisted that the courts must have the jurisdiction to deal with certain matters of a criminal nature (see Schedule 2) and that no lawyers should be allowed to represent people before traditional courts. This clearly breaches s 35(3) of the Constitution which provides that every accused person has the right to a fair trial, including the right to be represented by a legal practitioner of their choice before an "ordinary court".

The previous Bill version had tried to define traditional courts as separate and distinguishable from the courts of law envisioned in s 166 of the Constitution, and called them "courts of law under customary law". While the precise meaning of this term was unclear, the Department seemed to be envisioning special dispute resolution forums for people to use alongside the formal court system. By insisting that traditional courts be courts of law exactly as other courts are, discrimination is created on the basis of geographical location. This is because those people who have officially recognised traditional leaders (in other words, living within the boundaries of the former homelands) will be forced to use traditional courts either in place of, or in addition to, other courts, whereas South Africans outside of these homeland boundaries will use the "ordinary courts".

Discrimination on the basis of your place of residence has been found to be unconstitutional by a unanimous decision of the Constitutional Court. In *Graham Robert Herbert N.O. and Others v Senqu Municipality and Others* [2019] ZACC 31 it was stated at paragraph 46:

... Under our democratic order there can be no justification for denying secure

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<sup>6</sup> Many of the submissions that were verbally presented at Parliament are available through the website of the Parliamentary Monitoring Group. See <https://pmg.org.za/bill/409/> for access to submissions on the Traditional Courts Bill [B 15–2008] and <https://pmg.org.za/bill/159/> for access to submissions on the Traditional Courts Bill [B 1–2012].

<sup>7</sup> Nolundi Luwaya 'Report on the provincial Traditional Courts Bill hearings: Exploring rural people's democratic participation and freedom of expression' *Issues in Law and Society* 2 (Centre for Law and Society, November 2013) at 39 – 40. Hereafter referred to as "Luwaya".

<sup>8</sup> Thuto Thipe, Monica de Souza and Nolundi Luwaya "'The advert was put up yesterday': Public participation in the Traditional Courts Bill legislative process" 60(2) *New York Law School Law Review* (2015/16) at 519 – 551.



rights to a large group of people on the account of where they live in the country. Nor can there be good reason for a land tenure that continues to entrench insecure land rights of the apartheid era. The Constitution guarantees equality to everyone. This means that people of all races are entitled to equal land rights, regardless of where they live in the country. Any land tenure system that affords people less secure rights in land on the basis of where they are located is inconsistent with the Constitution and the values on which our Constitution was founded.

The Constitutional Court highlighted the specific plight of people living in the former homelands in paragraphs 36 and 37:

The discriminatory differentiation to which millions of black people continue to be subjected in the former homelands should have been remedied a long time ago.

...

As noted here the continuing operation of laws that deny black people secure rights in land is inconsistent with the Constitution, our supreme law. The dignity of the affected people is persistently impaired by the enforcement of those laws. The victims of the unfair differentiation brought about by these laws have become second class citizens to whom the fruits of the Constitution remain a dream, deliberately kept out of their reach.

This discrimination also links closely to the removal of the opting out mechanism that had initially been provided for in the Bill. Without a means to opt out of the court's jurisdiction, South Africans living within the former homelands are locked into this discrimination.

When it was first introduced in 2017, the Bill emphasised that customary law is a consensual system of law that people are free to opt into and opt out of. The Objects of the Bill made it clear that customary law was a system based on affiliation where people could elect which customs and practices to ascribe to. Since people were choosing to opt into a special system and were not being forced to use it, different standards could apply. If they willingly and freely agreed to suspend some of their rights by opting in, they were exercising a cultural choice. However, rights such as the right to a fair trial cannot be suspended where people are being forced into attending a certain court based on where they live. These aspects of the Bill are dealt with in the next section.

There are furthermore questions around the status of dispute resolution forums for Khoi and San communities in the Bill. The Bill refers to "traditional courts" for Khoi-San communities as "tribunals". What will be their status in relation to other traditional courts – will Khoi-San courts be differentiated in any way, and is there a customary law basis for this?

Khoi-San communities were not included in the 2008 and 2012 versions of the Bill. This seems to make explicit the links between the 2017 Traditional Courts Bill and the pending Traditional and Khoi-San Leadership Bill [B 23–2015] ("TKLB"), which is set to replace the Traditional Leadership and Governance Framework Act 41 of 2003 ("Framework Act").<sup>9</sup> However, as will be explained in the next section the 2017 Traditional Courts Bill will only regulate courts run by traditional leaders recognised in terms of the Framework Act. The Framework Act only

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<sup>9</sup> See also points raised in the following section on links between traditional courts and apartheid and colonial spatial geography.

recognises traditional leaders and communities in the former homelands – not Khoi-San leaders and communities as per the TKLB.<sup>10</sup>

Does this mean that traditional courts for Khoi and San communities will only be regulated after the TKLB comes into force? What will be the status of Khoi-San “tribunals” if this Bill comes into force before the TKLB? The TKLB is yet to be signed into law by the President.<sup>11</sup> If Khoi-San “tribunals” are forced to remain outside of the Bill’s regulation due to the emphasis on official statutory recognition of leaders, how will the discrimination against Khoi-San dispute resolution forums be justified?

## **2. Opting out, apartheid spatial geography and the consensual nature of customary law**

When the Bill was first introduced to the National Assembly it explicitly emphasised the voluntary and consensual nature of customary law – that people could choose whether or not to belong to a group with shared rules and values or participate in customary practices.<sup>12</sup> Thus, the Bill acknowledged that people should have a choice about whether to participate in customary dispute resolution processes in traditional courts. This aspect of the Bill was praised by LARC and others, but the National Assembly’s Portfolio Committee chose to remove references to the voluntary and consensual nature of customary law from the B version.

The 2017 Bill also introduced a welcome understanding<sup>13</sup> of the “living” nature of customary law that has been upheld by the Constitutional Court in several judgments dealing with customary law.<sup>14</sup> The “living” nature of customary law has been explained as follows:

The evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of ascertaining the true indigenous law as practised in the community. This law is sometimes referred to as living indigenous law. Statutes, textbooks and case law, as a result, may no longer reflect the living law. What is more, abuses of indigenous law are at times construed as a true reflection of indigenous law, and these abuses tend to distort the law and undermine its value. The difficulty is one of identifying the living indigenous law and separating it from its distorted version.<sup>15</sup>

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<sup>10</sup> Clause 5(1)(b) of the Bill dealing with the composition of traditional courts similarly refers only to “traditional leaders” and not to “Khoi-San leaders” that could be recognised in terms of the Traditional and Khoi-San Leadership Bill of 2015.

<sup>11</sup> See, for example, LARC’s submission on the Traditional and Khoi-San Leadership Bill (2 February 2016), accessible at [http://www.larc.uct.ac.za/sites/default/files/image\\_tool/images/347/Submissions/Submission%20on%20TKLB\\_LARC\\_20160202.pdf](http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/Submission%20on%20TKLB_LARC_20160202.pdf).

<sup>12</sup> See for example the Preamble, Clauses 2(c), 3(2)(e), 4(2)(a)(iii) and 6(2) of B 1–2017.

<sup>13</sup> Clause 1(2).

<sup>14</sup> *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) (14 October 2003); *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) (15 October 2004) (“Bhe case”); *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9, 2008 (9) BCLR 914 (CC), 2009 (2) SA 66 (CC) (4 June 2008); *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14, 2013 (4) SA 415 (CC), 2013 (8) BCLR 918 (CC) (30 May 2013) (“Mayelane case”).

<sup>15</sup> Bhe case at para 154.

These conceptualisations of customary law help to negate the notion that customary law stands in opposition to the rights contained in the Constitution.<sup>16</sup> Instead, customary law is equal to the common law and the Constitution entreats both sources of law to develop in line with constitutional values where there may be conflict.<sup>17</sup>

The 2008/2012 version of the Traditional Courts Bill was criticised for failing to accurately reflect the nature of customary law in practice, both historically and in present-day South Africa.<sup>18</sup> Instead, those Bills chose an interpretation that was rigid, autocratic and based on “official” colonial and apartheid distortions of customary law.<sup>19</sup> It is appropriate that such unconstitutional understandings of customary law not be included in the current version of the Bill. However, while the B version of the Bill incorporates language about the flexible and living nature of customary law, it no longer reflects the voluntary, consensual and affiliation-based nature of customary law. LARC submits that the Bill should speak to all of these aspects of customary law and that all legislation related to customary law should similarly incorporate explicit acknowledgements of the consensual and living nature of customary law.<sup>20</sup>

When first introduced, the Bill [B 1–2017] gave effect to the living, voluntary and consensual nature of customary law by including a so-called opting out mechanism at what was then clause 4(3). This mechanism was a direct response to major critiques against previous versions of the Bill.<sup>21</sup> Providing a means for opting out of having one’s dispute dealt with by a traditional court also aligned with the constitutional rights to access justice and participate in a cultural life of one’s choosing.<sup>22</sup> By stating that a traditional court could only hear and decide a dispute if both parties agree freely and voluntarily, the Bill supported an approach to justice that was restorative to social relationships, rather than punitive. This restorative justice approach was furthermore endorsed by several provisions in the Bill, which still remain in the B version.<sup>23</sup>

LARC and others submitted to the National Assembly’s Portfolio Committee that the retention of a mechanism enabling people to opt out of traditional courts was imperative. Without it, the Bill would betray not only the inputs made by South Africans in the last two parliamentary processes, but also the nature of customary law and the rights enshrined in the Constitution. We pointed out that to be properly consistent with the consensual nature of customary law, the emphasis should be on opting in mechanisms for all parties involved, rather than an opting out mechanism, since “opt out” means at least one person has initially been opted in by default.

However, the National Assembly’s Portfolio Committee insisted on making amendments to the Bill to remove any mechanism allowing a person to opt out of having a particular dispute heard by a traditional court. This once again brings to the fore all of the concerns previously raised about the 2008 and 2012 versions of the Bill.

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<sup>16</sup> Mayelane case at para 50.

<sup>17</sup> Section 39(2) of the Constitution of South Africa, 1996.

<sup>18</sup> Thuto Thipe ‘Voices in the legislative process: A report on the public submissions on the Traditional Courts Bill (2008 and 2012)’ *Issues in Law and Society* 1 (Centre for Law and Society, August 2013) at 29 – 36. Hereafter referred to as “Thipe”.

<sup>19</sup> Thipe at 29 – 36.

<sup>20</sup> For example, the Traditional and Khoi-San Leadership Bill 23 of 2015, currently before the President, should incorporate similar provisions acknowledging the constitutional interpretation of the nature of customary law.

<sup>21</sup> See for example Luwaya at 23 – 25.

<sup>22</sup> Respectively, section 34 and sections 30 and 31 of the Constitution of South Africa, 1996.

<sup>23</sup> Clauses 1(1), 2(a), 3(1)(b) and (d), and 6(2).

What were these concerns? A major criticism of the 2008 and 2012 versions was that the geographic jurisdictions of traditional courts aligned with those established for “tribes”, “tribal authorities” and “chiefs” in terms of the Native Administration Act of 1927 and the Bantu Authorities Act of 1951.<sup>24</sup> This was because a traditional court was to be established for each “traditional community” headed by a “senior traditional leader” as recognised under the Traditional Leadership and Governance Framework Act 41 of 2003 (Framework Act).<sup>25</sup> When the Framework Act came into force in 2004, all of the “tribes” and “chiefs” recognised in terms of the Native Administration Act of 1927 were automatically converted into “traditional communities” and “senior traditional leaders”.<sup>26</sup> Similarly so for “tribal authorities” recognised in terms of the Bantu Authorities Act of 1951, which were converted into “traditional councils” with the old tribal authority areas of jurisdiction intact.<sup>27</sup> Some submissions noted that attempts to transform these institutions through the Framework Act’s own mechanisms had largely failed.<sup>28</sup> This meant that traditional courts would operate within the same tribal authority areas that collectively formed the Bantustans under apartheid, without any ability for people to opt out of the geographic jurisdictions.

Submissions pointed out that by linking to the structures recognised in the Framework Act, the 2008 and 2012 versions ignored the history of oppression and manipulation that accompanied the creation of the Bantustans.<sup>29</sup> Furthermore, that the Bills were creating a bifurcated and unequal legal system by forcing people living within the former Bantustan areas of South Africa to acquiesce to traditional courts, and then denying them constitutional rights through the Bills’ controversial provisions.<sup>30</sup>

The B version of the 2017 Bill replicates this problematic model. The Bill now makes reference to each traditional court being “presided over” by a “traditional leader”.<sup>31</sup> Any remaining dispute resolution forums in a particular customary justice system will not be regulated by the Bill as “traditional courts” or receive official recognition. This, despite submissions pointing to the multi-layered and complex traditional justice systems that exist in practice.

The definition of “traditional leader” in turn states as follows:

“traditional leader” means any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position and is

<sup>24</sup> Thipe at 13 – 22.

<sup>25</sup> Clause 4(1) read with definitions at Clause 1 of Traditional Courts Bill 15 of 2008 and 1 of 2012.

<sup>26</sup> Sections 28(1) – (3) of the Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>27</sup> Section 28(4) of the Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>28</sup> Luwaya at 30 – 31. See also LARC submission on Traditional and Khoi-San Leadership Bill 23 of 2015 at 9 – 10. Indeed, Cabinet approved the publication of a Draft Amendment to the Traditional Leadership and Governance Framework Act to address the failures of one of its transformative mechanisms – namely, the election of traditional council members. See the Cabinet statement at <http://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-1-march-2017> and the consequent Traditional Leadership and Governance Framework Amendment Bill [B8 D-2017] at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/181107B8Dof2018.pdf>. The Traditional and Khoi-San Leadership Bill does little to undo these failures or improve the transformative mechanisms.

<sup>29</sup> Thipe at 13 – 22.

<sup>30</sup> Thipe at 22 – 29.

<sup>31</sup> Clause 5(1)(b). Note that the initial version of the 2017 Bill (as introduced in Parliament) stated that traditional leaders “convened” traditional courts. This wording was changed by the National Assembly’s Portfolio Committee.

recognised in terms of the Traditional Leadership and Governance Framework Act...<sup>32</sup>

The definition makes it clear that, in order to “preside over” a traditional court, it is not sufficient for a traditional leader to be recognised according to the customary law of a particular group of people. The leader must also be recognised by statute. As previously stated, the relevant statute governing the official recognition of traditional leadership in South Africa at present is the Framework Act, now explicitly named in the definition referenced above.<sup>33</sup> Since the Framework Act inherently couples the official recognition of traditional leaders with traditional communities,<sup>34</sup> traditional councils and their geographic jurisdictions, the 2017 Traditional Courts Bill inevitably links back to the colonial and apartheid underpinnings of the Framework Act.

LARC submits therefore that it will be impossible to effectively implement the 2017 Traditional Courts Bill in a manner that honours even its positive intentions until fundamental problems with the Framework Act’s implementation have been resolved legislatively and politically. For example, in an area where an officially-recognised traditional leader is contested by another claimant and there are ongoing disputes about support and legitimacy, who will be responsible for presiding over a traditional court? It is an immediate and pressing reality that officially-recognised traditional leaders regularly apply for, and obtain interdicts stopping groups who dispute their authority from meeting or organising within their jurisdictional area. They do this on the basis of producing the Government Gazette notices issued in terms of the Bantu Authorities Act of 1951 and the Native Administration Act of 1927 in both Magistrates’ and High Courts. Examples of this are particularly prevalent in Limpopo and North West.

Given this history and prevailing context, LARC maintains that an opting out mechanism is a minimum requirement for ensuring that the Traditional Courts Bill complies with the rights and freedoms set out in the Constitution and customary law. South Africans should not be forced to give up their rights and use a dispute resolution forum built on a particular group’s cultural norms based merely on where they live. To do so would contradict the inherent nature of customary law.

Finally, LARC is concerned that serious abuses could emanate from the “counselling, assisting or guiding” powers that the Bill grants to traditional courts even where the court is not competent to hear a matter because it is not listed in Schedule 2.<sup>35</sup> Similar advisory powers are granted in respect of several contentious matters listed at item (g) of Schedule 2, which the court presumably cannot pronounce on, although this is unclear.

LARC submits that in practice this provision could mean that the traditional court could still, in a public sitting, hear one party’s version of events and discuss the matter in order to give advice. The social consequences of the matter being discussed without the other party present to provide an explanation or alternative version could be devastating and could result in social ostracisation. LARC questions whether this advisory role should be played by a court, which is tasked with resolving disputes between parties. We submit that this advisory role is an intrinsic feature of customary law and is ordinarily provided outside of court sittings. By granting this power to

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<sup>32</sup> Clause 1(1).

<sup>33</sup> Presumably, if the Framework Act is repealed by the Traditional and Khoi-San Leadership Bill of 2015, the latter law will replace the Framework Act in this definition.

<sup>34</sup> Traditional leaders are also coupled with traditional communities in the definition of “traditional leader” at clause 1 of the Traditional Courts Bill 1 of 2017.

<sup>35</sup> Clause 4(3).

traditional courts, the Bill also seems to contradict its own requirements that all traditional court “proceedings” take place in the presence of both parties.<sup>36</sup>

LARC submits therefore that the powers to counsel, guide or assist be removed from Clauses 4(3) and Schedule 2(g) of the Bill. The traditional court should only be granted the power to facilitate the referral of a matter elsewhere where it is not competent to hear the matter.

### **3. Recognition of different levels of dispute resolution**

The initial version of the 2017 Bill did not stipulate at which “level” of traditional leadership traditional courts would be convened. This was aimed at addressing concerns that the previous 2008 and 2012 Bills did not acknowledge the existence of dispute resolution forums convened by traditional leaders who were not officially recognised as senior traditional leaders in the Framework Act’s hierarchy.<sup>37</sup> Submissions, including by traditional leaders, had previously pointed out that existing customary law processes of dispute resolution are complex, diverse and involve a multitude of role-players within and beyond traditional leadership.<sup>38</sup> While the first 2017 version’s acknowledgment of this was lauded as a positive change, it was unclear which traditional courts would then in practice be regulated by the Bill. LARC questioned whether there would automatically be a traditional court for each officially-recognised traditional leader. This raised concerns about the increased costs of implementing the Bill since it would depend on how many traditional courts were going to be resourced, with a clerk for example, in terms of the Bill.

The B version of the Bill now clarifies that the traditional court system aligns with the leadership hierarchy created in the Framework Act. Specifically, the traditional court system consists only of headman’s courts, senior traditional leaders’ courts and kings’ courts. In addition to there being no opting out mechanism, the B version forces people who wish to challenge a traditional court’s finding to take their disputes through all of these levels before they can refer the matter to a Magistrate’s Court instead. This is unlikely to provide easy, cheap and effective access to justice as the Traditional Courts Bill is meant to do. Since there are a limited number of senior traditional leaders and kings per districts and provinces, it is more likely that Magistrates’ Courts will be easier for people to access than these higher levels of traditional dispute resolution forums. High costs are likely to be incurred to travel the distances required to reach these forums.

Thus, while the Bill clarifies which “levels” of courts will be regulated, it ignores the complex network of dispute resolution forums available to people under customary law at the local level, including within the family, at the sub-headman level and specialised forums that deal with particular disputes (such as those relating to initiation). It also ignores the everyday reality of how people use dispute resolution forums – motivated by where they perceive they will receive the best “justice” for their particular problem.

The power to resolve disputes in terms of customary law is thus concentrated within the hands of recognised, official traditional leaders at higher hierarchical levels. Yet in terms of customary law traditional leaders’ powers should derive from the support of people and lower level traditional

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<sup>36</sup> Clause 7(7), read with clause 11(1)(h).

<sup>37</sup> Clause 4(1) of Traditional Courts Bill 15 of 2008 and 1 of 2012.

<sup>38</sup> Law, Race and Gender Research Unit *Submission on the Traditional Courts Bill (B1-2012)* (15 February 2012) at 6 – 8. Hereafter referred to as “LRG submission”. See also Thihe at 37 – 40.

leaders, rather than be imposed from above through state law.<sup>39</sup> This is an important mechanism for ensuring accountability and legitimacy.

Moreover, despite clarifying the recognised “levels” within the traditional court system, concerns about associated implementation costs are not resolved. Government stated in 2012 that there are 11 officially-recognised kings, 829 senior traditional leaders and 7399 headmen in South Africa.<sup>40</sup> If each of these leaders was to convene a traditional court, 8239 clerks would have to be deployed to the public service.

Given these difficulties, LARC submits that it is unlikely that there will be sufficient state resources and capacity in order to regulate all of these dispute resolution forums as official “traditional courts”. There is a danger that a model that centralises convening power at the level of senior traditional leaders will be defaulted to in practice. This would take us back to the 2008 and 2012 versions of the Bill.

#### **4. Protections against discrimination**

The inclusion of protections against forms of discrimination in various provisions of the Bill is a significant improvement from the previous 2008 and 2012 versions and indicates that the concerns raised previously were seriously considered in the drafting of this Bill.<sup>41</sup> For example, Clause 2 of the Bill states that the Bill aims to enable full participation of members of a community in traditional courts without discrimination and in a way that promotes the rights in the Bill of Rights, such as gender equality.

However, while these developments are most welcome and commendable, the provisions could be strengthened further and the Bill is unclear on how many of these protections against discrimination can or will be effectively implemented.<sup>42</sup> For example, at present the only consequence for failing to comply with the prohibitions contained in Schedule 1 is that this establishes a ground for taking the dispute for review by a High Court. It is important for remedies to be clarified and expanded in the Bill, especially since these protections are likely to be met with resistance as they seek to transform deeply patriarchal and finely segmented socio-cultural systems. Even the minimal requirements for gender transformation within traditional councils in terms of the 2003 Framework Act have not been met substantially. Without an ombud position or complaints mechanism being put in place by law it is difficult to have any confidence that instances of discrimination will be addressed.

It is unclear how these much-needed protections are going to intersect with the deeply entrenched patriarchal socio-cultural rules and practices prevailing in many traditional communities. For example, how will ensuring women’s participation in traditional courts as members intersect with the fact that in some socio-cultural contexts it is taboo to discuss initiation in the presence of women and uninitiated men, let alone allow them to participate in such a discussion? In some contexts, unmarried people are similarly not allowed to discuss marriage-related issues, like ukuThwala; while daughters-in-law cannot be involved in the discussions of matters concerning

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<sup>39</sup> Thihe at 40 – 47.

<sup>40</sup> Written reply to an internal question to the Minister of Cooperative Governance and Traditional Affairs in the National Assembly (Question 63, Internal question paper number 1 of 9 February 2012).

<sup>41</sup> See Clauses 2(e), 3(1)(a), 3(2)(b), 3(3), 5(2), 5(3), 7(3)(a), 7(6) and Schedule 1.

<sup>42</sup> See also the National Assembly submissions by Lawyers for Human Rights, Women’s Legal Centre, Sonke Gender Justice and the joint submission by the Children’s Institute and Centre for Child Law in this regard.

their marital home. How will the Bill be able to practically ensure participation in contexts where traditional courts are convened next to kraals – a space around which daughters-in-law may be expected to practice the rule of avoidance? In reality this will mean that daughters-in-law who become members of the community through marriage will be less likely to participate in traditional courts as members.

It is furthermore unclear from the Bill what well-considered and practical mechanisms will be put in place to ensure that the protections against discrimination are implemented effectively, but without being interpreted as destroying or inventing new custom by participants in traditional courts. Where it is perceived that customary law is being distorted or imposed by the traditional courts that the Bill regulates, it may impact on their perceived legitimacy. The composition and procedures of the courts need to be considered in relation to the current realities of customary law contexts. Without clear and practical implementation mechanisms, and grassroots shifts in patriarchal attitudes and practices, these protections could be rendered null and void.

We note with concern that various categories of vulnerable groups are not included in those listed by the Bill and recommend that these groups be included in the Bill for protection.<sup>43</sup> This is particularly evident in Schedule 1 where gender discrimination and conduct harmful to children is omitted.

Finally, LARC was alarmed to learn that during its deliberations of the Bill, the National Assembly's Portfolio Committee attempted to remove the protections against discrimination and provisions ensuring the participation of women from the Bill's content.<sup>44</sup> If they had succeeded, it would have been a blatant and unconstitutional betrayal of the widespread demands by stakeholders to explicitly include these protections in the 2008/2012 versions.

## **5. Express prohibition of unlawful orders**

LARC is pleased to note that several orders and sanctions that were permitted under clause 10 of the 2008 and 2012 Bills have been expressly limited in clause 8 of the 2017 Bill. Submissions on the previous Bills pointed out that traditional courts would have the power to impose sanctions that were coercive and contrary to protections against cruel and degrading punishment, forced labour, and rights to human dignity, security of the person and land tenure security.<sup>45</sup> To permit similar orders in the 2017 Bill would undermine not only constitutionally-protected rights, but also the restorative justice approach that the Bill purports to adopt and the voluntary and consensual nature of customary law. It would furthermore open the door for abuses of power and oppressive conduct in traditional courts. It is therefore commendable that the 2017 Bill specifies that:

- Damages cannot be paid to an organisation that is connected to a member of a traditional court or traditional leader
- A person can only be ordered to perform a service, instead of compensation, for an aggrieved party if both parties consent

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<sup>43</sup> For example, discrimination on the basis of nationality or ethnicity is not explicitly included in the Bill.

<sup>44</sup> Parliamentary Monitoring Group: meeting report on Traditional Courts Bill: deliberations (21 August 2018) available at <https://pmg.org.za/committee-meeting/26863/> and link to working draft of Bill - [https://pmg.org.za/files/180821traditional\\_courts.docx](https://pmg.org.za/files/180821traditional_courts.docx)

<sup>45</sup> LRG submission at 10 – 12.



- A person cannot, instead of compensation, be ordered to perform a service for a traditional leader, his family, or another person acting in the traditional court
- An order of the court cannot include any form of detention
- An order of the court cannot include the deprivation of customary law benefits (such as access to land, although not expressly mentioned).

LARC submits that corporal punishment, banishment and cruel, inhuman and degrading punishment should additionally be explicitly excluded from the permissible orders listed in clause 8 of the Bill. Furthermore, that the consent of both parties should be required before any order to perform services in lieu of compensation is made, in respect of both clauses 8(1)(b) and (c).

## 6. Access to review proceedings

LARC notes that in terms of clause 11 of the Bill traditional court matters can be reviewed on procedural grounds in a division of the High Court. However, LARC questions whether High Court proceedings are accessible to most ordinary South Africans given the resources required to litigate at High Court level.

LARC therefore recommends that the Bill should put in place an express provision that grants persons access to legal aid if they want to bring a review in terms of clause 11.<sup>46</sup> This is particularly pertinent since persons would have been eligible for legal aid for many of the subject matters dealt with in traditional courts, had their cases been heard outside of a traditional court.

## 7. Accountability of members of traditional court and traditional leader

LARC would like to highlight two provisions which relate to the accountability of members in traditional courts, including traditional leaders.

First, LARC notes clause 15 of the 2017 Bill, which limits the liability of traditional court members for actions or omissions committed in good faith.

A 2016 application by the Congress of Traditional Leaders of South Africa (Contralesa) to the Western Cape High Court illustrates the background to this liability provision. Contralesa argued that traditional leaders should be deemed to have blanket immunity for all conduct related to their customary adjudication of disputes.<sup>47</sup> Thus, they argued that AbaThembu King Buyelekhaya Dalindyebo should not have been convicted of arson, kidnapping, assault and defeating the ends of justice<sup>48</sup> for his criminal conduct since he was responding to an ongoing dispute in his community as a judicial officer.<sup>49</sup>

<sup>46</sup> See, for example, the case of *Nkuzi Development Association v Government of South Africa and Another* (LCC10/01) [2001] ZALCC 31 (6 July 2001).

<sup>47</sup> *Congress of Traditional Leaders of South Africa v Speaker of the National Assembly and Others* (2474/16) ZAWCHC. See Notice of Motion at paragraph 3.

<sup>48</sup> *Dalindyebo v S* (090/2015) [2015] ZASCA 144, [2015] 4 All SA 689 (SCA), 2016 (1) SACR 329 (SCA) (1 October 2015).

<sup>49</sup> *Congress of Traditional Leaders of South Africa v Speaker of the National Assembly and Others* (2474/16) ZAWCHC. See Notice of Motion at paragraphs 5 – 7.

LARC submits therefore that although the wording of clause 15 requires good faith on the part of traditional court members, the provision should also explicitly prohibit abusive and harmful conduct by traditional court members. The broad wording of clause 15 should not be allowed to legalise, condone or justify the kinds of abusive practices that resulted in the conviction of the AbaThembu King.

Second, LARC notes that in terms of clause 16, a Code of Conduct is still to be drafted for persons with a role in traditional courts. LARC submits that clause 16(1) should be amended to additionally require the Minister of Justice and Correctional Service to consult with ordinary people about the content of the Code of Conduct. As presently drafted, the Minister need only consult with the Minister responsible for Traditional Affairs and the National House of Traditional Leaders. LARC submits that, as the primary users of traditional courts, ordinary people are best placed to comment on the kinds of abuses that should be prevented in the Code of Conduct.

Moreover, the B version of the 2017 Bill changes the responsibility for enforcing the Code of Conduct from the relevant MEC for Traditional Affairs in each province, to the relevant provincial House of Traditional Leaders. Provincial Houses of Traditional Leaders will be tasked with receiving reports of breaches of the Code, investigating those reports and then imposing remedial steps at their discretion. As previously stated, given the poor track record of these Houses with condemning or intervening in highly publicised cases of egregious abuse, criminality and corruption by traditional leaders to date, it is unlikely that this will be an effective mechanism for oversight or accountability. LARC submits therefore that the responsibility for enforcement of the Code of Conduct should remain with provincial MECs as originally envisioned in the 2017 Bill.

It is telling that the National Assembly's Portfolio Committee decided to remove a provision from the Preamble of the Bill which acknowledged the need to "address certain abuses prevailing in some traditional courts as they currently exist". It seems that, rather than ensuring that there will be no room for potential abusive practices within traditional courts in future, Parliament has chosen to ignore the existence of these practices and insulate the institution of traditional leadership from external oversight. How will this ensure accountability and transparency?

## **8. Drafting anomalies**

LARC has identified two apparent drafting anomalies in the Bill that should be addressed by the Committee:

- Clause 8(1)(a) to (c) specifies that orders in the form of monetary compensation or unremunerated services can only be granted in favour of the party who instituted proceedings in a traditional court (or against the party against whom proceedings were instituted). It is unclear why the Bill assumes that such orders will only be appropriate when the court decides in favour of the person who initiates a case before the court. Since the Bill takes a restorative justice approach, it cannot be assumed that the person who institutes a case will not also need to take action in order to resolve the dispute. LARC therefore recommends that this restriction be removed and that the orders listed in paragraphs (a) to (c) can be granted in favour of any party to the dispute, as with the other orders listed in clause 8.
- Clause 9 seems to set out two contradictory procedures for when an order of a traditional court has not been complied with and it is deemed to be the fault of the relevant party. Clause

9(2) to (4) entreats the clerk to determine whether fault lies with the party or not, and if there is fault then enforcement is referred to a justice of the peace. Yet clause 9(4)(b)(i) implies that the justice of the peace has the power to act as though no fault lies with the non-complying party – even though the clerk has already determined there to be fault. LARC recommends that this procedure be clarified in the drafting of the provision, and that the enforcement procedure set out in clause 4(4) is preferable.

### **C. SUMMARY OF SPECIFIC SUBMISSIONS AND RECOMMENDATIONS ON TRADITIONAL COURTS BILL 1B OF 2017**

1. All legislation related to customary law, including this Bill should incorporate explicit acknowledgements of both the consensual and living nature of customary law. At present the Bill denies that the use of dispute resolution forums in terms of customary law is voluntary and consensual.
2. An opting out mechanism is a minimum requirement for ensuring that the Traditional Courts Bill complies with the rights and freedoms set out in the Constitution and customary law. To be consistent with the consensual nature of customary law the Bill should preferably be reconfigured to require that both parties expressly opt in.
3. The Bill must furthermore impose an explicit duty on the clerk of a traditional court to inform all parties who are summoned to the court, and also those who bring cases to the court, that it is their choice whether to participate in proceedings.
4. Where an opt-out mechanism is included, grounds for review should be added in clause 11 to address situations where: a person's right to opt out has been impeded or denied; the clerk fails to inform any party of the right to opt out of traditional court proceedings; or a person has experienced intimidation, manipulation, threats or denigration for trying to opt out.
5. Unless and until resources are set aside to ensure that sufficient clerks and Justices of the Peace are put in place, the Bill should not be further considered. Without such officials being in place widely across forums, traditional courts are likely to default to forums convened by senior traditional leaders. This contradicts the purpose of the Bill to regulate customary dispute resolution, and will, in practice, inevitably elevate the courts of senior traditional leaders over the myriad of other lower level forums that dispense justice on a day to day basis.
6. The status of traditional courts as courts of law at clause 6 results in unconstitutionality on at least two fronts: it denies accused persons the right to a fair trial and also discriminates against persons based on their geographic location. This denial of rights is particularly exacerbated with no mechanism for opting out of a traditional court's jurisdiction.
7. It will be impossible to effectively implement the Traditional Courts Bill in a manner that honours even its positive intentions until fundamental problems with the 2003 Traditional Leadership and Governance Framework Act's implementation have been resolved legislatively and politically.
8. Serious abuses could emanate from the advisory or guiding powers that the Bill grants to traditional courts. Whether this advisory role is consistent with the Constitution is questionable. The powers to counsel, guide or assist should be removed from clauses 4(3),

and Schedule 2(g) of the Bill. The traditional court should only be granted the power to facilitate the referral of a matter elsewhere where it is not competent to hear the matter.

9. Remedies should be clarified and expanded to ensure implementation of the provisions that aim to protect traditional court participants against discrimination, beyond High Court review. This could be achieved through an ombud or complaints mechanism, separate from the clerk's role. The composition and procedures of traditional courts need to be considered in relation to the current realities of customary law contexts. Without clear and practical implementation mechanisms these protections will be rendered null and void.
10. We note with concern that various categories of vulnerable groups are not included in those listed by the Bill, and recommend that these groups be included in the Bill.
11. Corporal punishment, banishment and cruel, inhuman and degrading punishment should be explicitly excluded from the permissible orders listed in clause 8 of the Bill.
12. The consent of both parties should be required before any order to perform services in lieu of compensation can be granted. In other words, in respect of both clauses 8(1)(b) and (c).
13. Traditional courts should be able to grant the orders listed in paragraphs (a) to (c) of clause 8(1) in favour of any party to the dispute, as with the other orders listed in clause 8, not just in favour of the person who institutes proceedings.
14. The enforcement procedure in clause 9(4) should be clarified, preferably to align with the similar procedure contained in clause 4(4).
15. The Bill should put in place an express provision that grants persons access to legal aid if they want to bring a review in terms of clause 11.
16. Clause 15 should also explicitly prohibit abusive and harmful conduct by traditional court members.
17. Clause 16(1) should be amended to additionally require the Minister of Justice and Correctional Services to consult with ordinary people about the content of the Code of Conduct. As the primary users of traditional courts, ordinary people are best placed to comment on the kinds of abuses that should be prevented by the Code of Conduct.
18. Responsibility for enforcement of the Code of Conduct in terms of clause 16(5) and (6) should remain with provincial MECs as originally envisioned in the first version of the 2017 Bill.

#### **D. NOTE ABOUT PROCESS**

LARC appeals to the Provincial Legislatures and National Council of Provinces to permit additional time for the receipt of submissions on the B version of the 2017 Traditional Courts Bill and for further direct engagement with the public. The voices of ordinary South Africans, in particular those living in customary law and rural contexts, are crucial to understanding the impact of the Bill in people's lives. To this end, lawmakers should ensure that a thorough consultation process is conducted on this Bill, with sufficient prior notice and information for people to attend and contribute meaningfully. This will facilitate participation in the law-making process by the

general public and also those who are likely to be most affected by the Bill.<sup>50</sup> Rushing the legislative process will only deprive the process of these valuable inputs.

LARC is concerned that the National Council of Provinces and Provincial Legislatures appear to be rushing the processing of the Bill with no apparent reason for the urgency. After the Bill's revival in national Parliament on 17 October 2019, Provincial Legislatures were initially required to conduct public participation in time for submitting final mandates by 27 November. Even with an extension granted to the NCOP's Select Committee on Security Justice, Provincial Legislatures have only until 13 December to conduct public participation. This is little time for proper engagement with a Bill that will directly affect millions of historically marginalised South Africans – especially given its contentious legislative journey thus far and the unusual manner in which it was passed by the National Assembly just before national elections.<sup>51</sup>

LARC notes further that the time frames set by the NCOP have created confusion and meant that Provincial Legislatures have been providing short notice about public hearings, and there have been constraints around public education and the provision of transport in some provinces.<sup>52</sup> These factors call into serious question the legitimacy of the parliamentary process thus far.

## E. CONCLUSION

LARC is grateful for the opportunity to present comments on this important Bill, and would be amenable to requests for further details on our submissions if deemed necessary.

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<sup>50</sup> This is mandated by sections 59, 72 and 118 of the Constitution of South Africa, 1996, as has been upheld in several judgments of the Constitutional Court, inter alia: *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006); *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10, 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC) (13 June 2008); *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (CCT40/15) [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (28 July 2016).

<sup>51</sup> Gaye Davis "Chaos in parliament as MPs vote on Traditional Courts Bill" *Eyewitness News* (12 March 2019).

<sup>52</sup> Land and Accountability Research Centre "Public hearings over contentious Traditional Courts Bill to start in some provinces" (Press Statement, 4 November 2019), available at <https://www.customcontested.co.za/larc-statement-on-traditional-council-bill-hearings/>.