



Commission for Gender Equality
A society free from gender oppression and inequality

SUBMISSION TO THE NCOP – SELECT COMMITTEE ON SECURITY AND
CONSTITUTIONAL DEVELOPMENT ON THE TRADITIONAL COURTS BILL
[B 1-2012]

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CHAIRPERSON OF THE CGE



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1. INTRODUCTION

1.1 INTRODUCTORY REMARKS

The Commission for Gender Equality (CGE) is a Chapter 9 Institution and in terms of Section 11 of its empowering legislation obliged to evaluate legislation and make recommendations to the relevant legislature. This responsibility is exercised with the primary aim of promoting, protecting and developing gender equality in South Africa.

1.2 ESSENCE AND PURPORT OF THIS COMMENT

South African society displays a rich diversity second to none in the world and customary law continues to play an important role in the lives of millions of South Africans. It must be acknowledged that traditional leaders still wield considerable power and influence despite the establishment of a democratic government. This places them in a position where as leaders they have the ability to express the will of the people that they represent and also if they so wish to suppress that will. This influence by traditional leaders is especially strong in rural areas where due to the strong preservation of traditional norms and values in the communities, traditional governance structures and practices still flourish. Cognisance must be taken of the fact that alongside the existence of a legitimate traditional leadership and governance framework there is in existence a progressive and liberal constitutional dispensation. Against this background the CGE cannot ignore the fact that in developing a traditional courts bill it is appropriate to combine the legitimacies from all relevant sectors which includes the traditional leaders, traditional communities and elements of our democratic society. This approach to traditional leadership is critical in the quest for a stable and transparent democracy in South Africa. This approach by the CGE is informed by Sections 211 and 212 of the Constitution which gives recognition to the institution, status and role of traditional leadership. Furthermore, the Constitution requires that national legislation may be developed relating to matters of customary law, the customs of communities and the observance of any system of customary law by relevant communities. Therefore, developing a traditional courts bill is provided for in the Constitution. However, as the CGE we seek to ensure that the development of such a law will fulfil constitutional muster to the extent that it will protect the rights of both men and women. The Commission believes that this approach to traditional leadership is necessary because these structures are continuously evolving within the constitutional paradigm. Accordingly, the CGE will propose a reshaping of the Traditional Courts Bill with the expectation that it will play a vital role in the promotion of a society free from all forms gender inequality and oppression.



Commission for Gender Equality

A society free from gender oppression and inequality

The CGE acknowledges the role of traditional courts in contemporary South African society and more especially within a society that is transforming itself. Therefore, the CGE expectation is that the Traditional Courts Bill will eventually pave the way for a “single” justice system for all South Africans irrespective of where they live.

Accordingly, our submission is designed towards the creation of a platform for an evolution of the traditional justice system where it will eventually be embraced by the Constitution and form part of one judicial system that will serve a unified South Africa. As a constitutional institution this is our core mandate and we support initiatives that strive towards this ideal.

1.3 CGE ASSESSMENT OF THE TRADITIONAL COURTS BILL [B1-2012]

The CGE finds that the Bill [B1 -2012] displays numerous shortcomings when measured against the Constitution. These include a denial of legal representation in a tribunal where a person may be tried for crimes such as assault and malicious damage to property and the failure to provide the accused who is convicted in terms of Clause 20 an opportunity to appeal his or her sentence. In addition to this the Bill fails to take into account the full range of traditional justice structures such as the courts of headmen and traditional councils where gender equity is more prevalent. Such weaknesses favour a complete overhaul of the existing Traditional Courts Bill [B 1-2012] or major redrafting at the least and this Commission makes an earnest appeal to this Committee to consider these options.

2. COMMENTS

2.1 CLAUSE 3 : GUIDING PRINCIPLES OF THE TRADITIONAL COURTS BILL

In terms of Clause 3 that there is a need to align the traditional justice system with the Constitution in order for the said system to embrace the values of the Constitution inclusive of rights such as the right to human dignity, equality and non – sexism.

The CGE is mindful that in order to align the traditional justice system to the Constitution national legislation must be developed. Accordingly, the traditional courts bill would be an appropriate starting point. Therefore, it is not the traditional courts bill that must be perceived as a problem because such an initiative is constitutionally sound. Instead the substantive elements and more especially the contents of the traditional courts bill must be evaluated objectively to ensure that it promotes equality and non-sexism.



Commission for Gender Equality
A society free from gender oppression and inequality

Therefore, the CGE takes note of the guiding principles because these principles promote the values of the Constitution and provides benchmarks which can be used to hold traditional courts accountable towards the promotion of gender equality within the relevant jurisdictions. Unfortunately, most of the clauses in the Bill go against the guiding principles. This invariably results in a collision between clauses in the Traditional Courts Bill and sections of the Bill of Rights as contained in the Constitution. Such circumstances will create fertile ground for sections of the Traditional Courts Bill to face constitutional challenges on promulgation. Therefore, these shortcomings should be addressed at this stage in order to ensure that the Bill meets Constitutional muster. Such an approach is not only necessary but also a prerequisite if the Legislature has the intention to create a law that will serve the best interests of the rural communities in South Africa.

2.2 CLAUSE 4 : DESIGNATION AND TRAINING OF TRADITIONAL LEADERS

The training of presiding officers is critical for the proper working of traditional courts because training will develop the requisite skills required. In addition training will also enable presiding officers to function effectively and act with uniformity. Therefore, the CGE is concerned that certain designated incumbents may be exempted. This exemption will most probably give rise to a skills gap. This will undermine the administration of justice by traditional courts and also infringe the right to equality because people may end up being treated differently in similar disputes. This cannot be condoned by the CGE.

Furthermore, the fact that only designated presiding officers will be offered training is also a cause for concern because in the event of resignations, decease or dismissals a shortage of trained presiding officers will arise. Accordingly, the CGE does not support Clause 4 of the Bill [B1-2012] in its current form because it ignores potential presiding officers such as family members of kings, queens, headmen, headwomen and senior traditional leaders who could also be considered for training where reasonable.

The recommendation of the CGE is that this section must be revised to pass Constitutional muster. Accordingly, it must be expanded to include headmen, headwomen and senior traditional leaders in an equitable manner so that both men and women are targeted equitably. In addition to this the CGE recommends compulsory training for all presiding officers and a public awareness programme to popularise and educate both the rural communities that will be affected as well as presiding officers who will serve these communities.



Commission for Gender Equality

A society free from gender oppression and inequality

2.3 CLASUE 5 : SETTLEMENT OF CERTAIN CIVIL DISPUTES OF A CUSTOMARY NATURE

- (i) This Clause refers to the jurisdiction of matters relating to cause of action and issues which may be adjudicated by a traditional court. Effectively, Clause 5 seeks to limit jurisdiction.

Although the CGE recognises the fact that succession and inheritance is also regulated by customary law it is these issues which generate controversy giving rise to disputes and have a tendency to prejudice women. Unfortunately, this Clause fails to provide protection for women and children who may be affected by adverse decisions made in respect of issues related to succession and inheritance. There is a need for this competency to be excluded from the jurisdiction of traditional courts.

- (ii) Furthermore, the composition of traditional courts and their patriarchal nature tend to favour male interests and render women vulnerable. Therefore, steps should be taken to exclude jurisdiction over the following matters :
 - (a) Violence against women and children (inclusive of rape, sexual assault, domestic violence and similar matters)
 - (b) Maintenance
 - (c) Status Claims such as civil and customary marriages.
- (iii) Traditional Courts must have clearly defined territorial jurisdictions. An inability to provide guidelines relating to territorial jurisdiction will create uncertainty on who will be subject to the various traditional courts and how they will become subject to the jurisdiction of these courts. The right to freedom of association is infringed by such a dispensation.

Accordingly, the CGE does not support Cause 5 in its current form and recommends revision to the extent where appropriate protection is extended to women and children relating to issues of succession, inheritance, territorial jurisdiction as well as the exclusion of certain matters. The CGE recommends the specific exclusion of matters that affect women and children in instances where such matters have the potential of being adjudicated unfairly due to the patriarchal nature of traditional courts.



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A society free from gender oppression and inequality

2.4 CLAUSES 6 : SETTLEMENT OF CRIMINAL DISPUTES

It is not a requirement that presiding officers of traditional courts should have legal education. This means that when certain criminal matters are adjudicated in traditional courts the same standards will not be applied to similar matters adjudicated in Magistrate's Courts. In addition to this the criminal matters as set out in the Schedule will be adjudicated differently in the various traditional courts as well.

The above situation infringes the right to a fair trial which is conflict with Section 35 of the Constitution. Accordingly, the CGE does not support Clause 6.

The recommendation of the CGE is for the deletion of Clause 6.

2.5 CLAUSES 7-8 : NATURE AND SESSIONS OF TRADITIONAL COURTS

The CGE supports the abovementioned clauses in the current form.

2.6 CLAUSE 9 : PROCEDURES OF TRADITIONAL COURTS

This Clause excludes legal representation and allows for both men and women to represent each other as well as family members.

Although the CGE supports this clause and takes cognisance of the fact that the guiding principles seek to affirm the principles of equality formally but notes that substantive equality may be compromised by the fact that wives seldom represent their husbands in traditional courts and their appearance is not even permitted in certain traditional courts.

Accordingly, the CGE does not support Clause 9 in its current form and recommends the inclusion of a penalty clause for any contravention of this clause. Such a provision will ensure compliance by traditional leaders, presiding officers and will serve to promote the rights of women effectively.

2.7 CLAUSE 10 : SANCTIONS AND ORDERS OF A TRADITIONAL COURT

Sub-clause 10 (2) (g) provides as follows :

An order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court;



Commission for Gender Equality
A society free from gender oppression and inequality

The above sub-clause is unconstitutional because it allows the court to impose a duty on any person who may not be a party to the dispute to provide free labour. Taking cognisance of the fact that most people in a rural area are mostly women and children who are impoverished and have to bear the brunt of manual labour to survive such a provision will add to their burden.

A further problem is that the persons who are most likely to benefit from free labour are traditional leaders.

Against the above background the CGE does not support sub-clause 10 (2) (g) and recommends that it be deleted.

2.8 FREEDOM OF ASSOCIATION AND OPTING OUT

The fact that a Traditional Court will have territorial jurisdiction implies that traditional courts will exercise jurisdiction over existing traditional communities and serve clearly defined communities. Notwithstanding this the traditional courts will exercise jurisdiction over a wide range of issues and other courts will have concurrent jurisdiction alongside traditional courts. Such circumstances will allow for the opportunity to choose between a traditional court and ordinary courts for the adjudication of certain matters. Unfortunately, the absence of an opportunity to exercise the right to choose a court infringes the right to freedom of association and is unconstitutional.

Accordingly, the CGE does not support such a position and recommends the inclusion of a clause which allows for a party to choose a court that will adjudicate any dispute in a manner that promotes the interests of justice. This approach will promote the requisite standard envisaged in Section 35 of the Constitution.

2.9 SEPARATION OF POWERS

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

Under the circumstances the CGE proposes that a clause be inserted which prohibits presiding officers from holding leadership and others positions that will undermine the administration of justice by traditional courts. Such a provision will promote the independence of traditional courts.



Commission for Gender Equality
A society free from gender oppression and inequality

2.10 CENTRALISED POWERS AND DISTORTION OF LIVING CUSTOMARY LAW

Traditional Courts are multilayered and comprise of family courts, clans, wards and village councils which dispense traditional justice. A failure by the Traditional Courts Bill [B 1-2012] to recognise the full range of traditional courts disadvantage women who serve in traditional councils. Where the participation of women in traditional councils are protected in terms of legislation it will promote the decentralisation of power and enable women to influence the living customary law.

Under the circumstances the CGE recommends the insertion of relevant clauses which will accord recognition to further traditional justice structures and promote deeper protection to participation and contribution by women in the traditional justice framework.

2.11 CLAUSE 20 : OFFENCES AND PENALTIES

Clause 20 allows for a traditional court to impose fines where any person insults a presiding officer, misbehaves or disrupts proceedings. Such a provision is necessary to protect the “dignity” and promote efficiency within traditional courts. However, the CGE is concerned that no guidance is provided on the nature of the fines, limits on fines that can be imposed and where unfair fines are imposed for appeals to be lodged.

Accordingly, the CGE recommends that Clause 13 be revised to include appeals from Section 20. In addition to the aforementioned, the nature and limitations of fines that may be levied must also be enumerated more concisely as this will prevent the potential for exploitation, abuse and unfairness to prevail.

2.12 MARGINALISATION OF LGBTI COMMUNITY BY TRADITIONAL COURTS

Traditional leaders continue to display prejudice and intolerance towards the LGBTI community and individuals from this category will face exclusion, punishment and bias from traditional leaders who act as presiding officers.

In order to extend protection to the LGBTI community the CGE recommends that a special clause be inserted that speaks to the rights of LGBTI individuals that must be upheld in traditional courts.



Commission for Gender Equality
A society free from gender oppression and inequality

3. CONCLUSION

The CGE has monitored the engagement between Parliament and other stakeholders in the provinces regarding the Traditional Courts Bill. In the North West Province there was mixed reactions at the two hearings where the public called for the scrapping of the bill in Rustenburg whereas the people who attended in Mafikeng supported the bill. In the Eastern Cape the hearings amounted to a limited awareness campaign on the bill because the public had either limited or no knowledge on the contents of the Traditional Courts Bill and were unable to participate. Therefore, the public hearings were revised to make people aware on key clauses of the bill and their right to make submissions. In Kwa-Zulu Natal public hearings were held at Port Shepstone, Kwa-Dukuza in Stanger and Ulundi. Once again the CGE observed that there was a lack of proper understanding on the provisions in the bill. Therefore, the public was unable to participate effectively. Furthermore, in KZN the major concern of the public was the potential for abuse of powers by traditional leaders and the resultant abuse of women. The aforementioned trends were also observed in the Northern and Western Cape Provinces.

Flowing out of the public hearings four provinces rejected the bill, a position which does not constitute a majority rejection of the bill at provincial level. Accordingly, government made a decision to proceed with the bill. This development calls for further engagement on the Traditional Courts Bill. Accordingly, the CGE considers its appropriate to revise its position and participate robustly with all relevant stakeholders in order to ensure that women who will be affected by the bill are protected.

The CGE believes that an outright rejection of the Traditional Courts Bill in the current circumstances is a simplistic and untenable position. Such an approach will effectively exclude millions of women and children from participating in the process that will be required to reshape the Traditional Courts Bill.

Instead it must be acknowledged that the promulgation of legislation is a Parliamentary prerogative. Furthermore, the recognition of traditional leadership and customary law is entrenched in the Constitution and the development of legislation to regulate customary law and traditional leadership is provided for in the Constitution.

Against the above background the CGE seeks to promote the best interests of women in an attempt towards attaining formal and substantive gender equality. In pursuit of this mandatory objective the Commission elects to exercise its independence and to participate within the Constitutional framework by engaging with the Legislature and Executive who are custodians of the Traditional Courts Bill currently.

CGE urges the Committee to observe Gender Equality related International Instruments when considering the Traditional Court Bill.



Commission for Gender Equality
A society free from gender oppression and inequality

Finally, cognisance must be taken of the fact that in order to reshape and constitutionalise the traditional justice framework inclusive of traditional courts it is necessary for legislation to be passed in terms of Section 211 and 212 of the Constitution. Therefore, the importance of initiatives such as the Traditional Courts Bill must not be confused with any shortcomings that are inherent in the bill itself. Instead the bill must be tailored so that it aligns the traditional justice framework which includes traditional courts to the Constitution. Therefore, the CGE seeks to ensure that this constitutional imperative is achieved and commits itself towards ensuring that the Traditional Courts Bill will provide the necessary protection to traditional communities and more especially women in rural areas.

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