

**Joint statement by Alliance for Rural Democracy & Land and Accountability Research
Centre**

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**LITTLE COMFORT FOR RURAL COMMUNITIES AS NCOP PASSES
TRADITIONAL COURTS BILL WITHOUT OPT-OUT CLAUSE**

On 2 December 2020, the National Council of Provinces (NCOP) passed the Traditional Courts Bill [B1D-2017] (TCB) in a plenary session, after a rushed process that ignored significant concerns raised by numerous stakeholders. Seven provinces voted in favour of the Bill, with KwaZulu-Natal and the Western Cape the only provinces not in support. This follows the adoption of the report on the Bill by the Select Committee on Security and Justice on 25 November.

After the Select Committee had received Departmental briefings on the Bill in October 2019, public hearings were hastily held by Provincial Legislatures between November 2019 and February 2020. Due to the short notice of public participation processes, many rural communities were not able to attend the hearings. It appears that only people who were informed in advance about the hearings, such as traditional leaders and members of traditional councils, were able to attend. Furthermore, since public education about the Bill was minimal, even if members of the public attended the hearings, they were not necessarily in a position to engage with the content of the Bill. It is not only disappointing that Parliament continues to fall short of its duty to seek out and include the voices of people that are directly affected by such laws and policies; it is also unlawful.

The Select Committee subsequently dealt with the Bill in four meetings in October and November 2020.

The rushed processing of the Bill by Parliament makes a mockery of the long history of struggle from rural communities against this Bill. In 2008 and 2012, Parliament attempted to pass an unconstitutional version of the Bill that discriminated against women, allowed for degrading forms of punishment, and forced people living in the former Bantustans into a separate legal system from the rest of the country without providing a way to opt out. Strong opposition led by rural people who were to be directly affected by the Bill resulted in both attempts failing.

When the Bill was reintroduced in Parliament in 2017, it was markedly improved compared to its predecessors – it included protection mechanisms for women and vulnerable groups in traditional courts and recognised customary dispute resolution structures. It also included the opt-out clause that rural citizens and civil society had fought so hard for. This clause would allow a party before a traditional court to ‘opt out’ of its jurisdiction in favour of another legitimate forum or court. This version was the product of a reference group process that involved representatives from government, civil society and traditional leaders, who attempted to resolve previous issues with the Bill.

However, during deliberations by the National Assembly’s Portfolio Committee on Justice in 2018, the opt-out clause was removed from the Bill. In its place, a provision was introduced that requires all levels of the traditional court system to be exhausted before a matter can be referred to a Magistrate’s court. This means that once a dispute is in the traditional court system parties are stuck there. Traditional courts were also given the status of courts of law, rather than special dispute resolution tribunals, despite advice against this from state legal advisors. These changes by the National Assembly have been kept intact by the NCOP. The changes demonstrated, among other things, how little parliamentarians understand about the actual functioning of customary courts in different communities across the country.

Parliament has failed to take heed of the calls by rural people and civil society for the inclusion of the opt-out clause in the Bill.

Time and again, rural people have explained to Parliament that without an explicit opt-out provision, millions of rural citizens will be forced to appear before, and take their matters to, the traditional court in their area. This locks them into the jurisdiction of a traditional leader based on geography rather than voluntary affiliation, is contrary to the democratic nature of customary law and centralises extraordinary power in the office of the traditional leader. It also entrenches the idea of a parallel system of law that does not apply to South Africans living in urban areas. This is a betrayal of the Constitutional commitment to one South Africa for all. Sections 30 and 31 of the Constitution provide persons with the right to participate in a cultural life of their choosing. The Bill effectively undermines this right by failing to expressly include the choice to opt out of traditional courts.

The Select Committee assured the plenary session of the NCOP that sections 30 and 31 of the Constitution would sufficiently safeguard the voluntary nature of customary law and traditional courts. This kind of assertion betrays just how out of touch parliamentarians are with the experiences of rural communities. Without explicit safeguards of people's rights in the Bill, Parliament has left its application open to interpretation. Instead of Parliament proactively protecting rural people explicitly, they will now be left to bring challenges to the legislation once the anticipated violations of their rights become reality. Rural people, rather than their representatives in Parliament, bear the onus of upholding the Constitution.

The passage of the TCB follows on the heels of the Traditional and Khoi-San Leadership Act 3 of 2019 (TKLA) that was signed into law by the President in November 2019. Although it has not commenced operation yet, this law will also have detrimental consequences for traditional communities. This Act removed almost all references to democracy, transparency and accountability that were contained in the traditional leadership legislation it will replace. In terms of section 24, traditional councils are able to enter into agreements and partnerships with third parties without the consent of directly affected individuals and communities. Consultation requirements in the Act are weak and do not include customary decision-making processes. The TCB could therefore provide traditional leaders and councils with an enforcement mechanism to further suppress democratic customary law processes in rural areas. Together, these two pieces of legislation constitute an onslaught on rural democracy, the constitutional rights of rural citizens and resuscitate Bantustan geography.

Parliament and government have ignored the repeated pleas and submissions made to recognise the Constitutional and customary law rights of people living in the former Bantustans. Rather than engage meaningfully with those who will be directly affected by these laws, it seems traditional leaders are once again favoured in the national legislative scheme.

While the National Assembly is still to confirm the NCOP's amendments to the Bill, this will largely be a sign-off process and the Bill is likely to pass. Should it be passed, we call on President Ramaphosa not to sign the TCB into law, and to refer it back to Parliament or the Constitutional Court for consideration. The rights of citizens living within traditional communities cannot hinge on the goodwill of those tasked with implementing the TCB.

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