REPORT OF THE PORTFOLIO COMMITTEE ON HUMAN SETTLEMENTS, CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS - TRADITIONAL COURTS BILL, [B1B - 2017]

1. INTRODUCTION

The Speaker referred the Traditional Courts Bill [B1B-2017] to the Portfolio Committee on Human Settlements, Co-operative Governance and Traditional Affairs (the Committee) for consideration and report back to the House in accordance with the Rules and Orders of the Mpumalanga Provincial Legislature.

In terms of section 118(1) of the Constitution of the Republic of South Africa, 1996, the Legislature has a mandate to facilitate public involvement in the legislative and other processes of the Legislature and its committees. It is against this background that the Committee conducted a public hearing to solicit inputs and views from members of the public on the above-mentioned Bill.

2. OBJECTIVES OF THE BILL

The purpose of the Traditional Courts Bill [B1B-2017] (the Bill) is mainly;

- To provide a uniform legislative framework for the structure and functioning of traditional courts; in line with constitutional imperatives and values; and

- To provide for matters connected therewith.
3. METHOD OF WORK

The Committee met with the National Council of Provinces (NCOP) permanent delegate, Hon Z. Zandamela (the Member), the Director, from the National Department of Justice, as well as Mpumalanga Department of Co-operative Governance and Traditional Affairs on 08 November 2019 for a briefing on the Bill. The Committee conducted public hearings after publishing an invitation in the print media, Lowvelder newspapers, Mpumalanga Press for the People by the people and Khanyisa Newspaper in order to solicit inputs/comments from interested stakeholders and members of the public. The Public hearings were conducted on 21 November 2019 from 10h00 – 13h00 in the following Districts.

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<tr>
<th>DISTRICT</th>
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The Committee thereafter met on 07 February 2020 to consider the Bill, inputs from the stakeholders and the public. A draft report was produced together with a negotiating mandate on the Bill and as such a negotiating mandate will be submitted to the NCOP.

4. INTERACTION BY THE COMMITTEE WITH NATIONAL COUNCIL OF PROVINCES (NCOP) PERMANENT DELEGATE, NATIONAL AND PROVINCIAL DEPARTMENT OF JUSTICE ON THE BILL

The Member, Mr Z. Zandamela and the Director made a presentation regarding the Bill. The Committee made some comments and asked clarity seeking questions.
The Member and the Director of the National Department of Justice highlighted the background on the Bill as follows;

The National Director also reported and highlighted on the main objectives of the Bill that:

- The object of the Bill is to create a uniform legislative framework, regulating the role and functions of traditional courts in the resolution of certain disputes, in accordance with constitutional imperatives and values.

- The Bill is intended to improve access to justice services by enhancing the effectiveness, efficiency and integrity of traditional courts for purposes of resolving disputes, with the view to promoting social cohesion, co-existence and peace and harmony.

- The focus of the Bill can be linked to the NDP targets of realising a developmental, capable and ethical state that treats citizens with dignity, broadening social cohesion and supporting the role of women as leaders in all sectors of society.

- Traditional courts exist and it is constitutionally essential that they be transformed to align them with the new constitutional dispensation. Chapter 12 of the Constitution recognises the institution, status and role of traditional leadership according to customary law, subject to the Constitution. Schedule 6 to the Constitution recognises the existence of traditional courts.
Every effort has been made to address the concerns raised in respect of the two previous Bills which were introduced into Parliament in 2008 and 2012, respectively, most significantly, in respect of the role of women and other vulnerable groups. Furthermore the Bill recognises other levels of dispute resolution in the traditional justice system, e.g. headman or headwoman’s court, senior traditional leader’s court and king or queen’s court.

The key features of the Bill are explained in the next slides.

It was further reported that it was important for the Portfolio Committee to note objectives and the main content of the Bill. The Bill consists of the following Chapters:

Clause 3: Guiding principles

The guiding principles in clause 3 of the Bill set the scene for what is expected of traditional courts when they deal with disputes. Constitutional values are of paramount importance, for instance the right to dignity, achievement of equality, the promotion of non-racialism and non-sexism, freedom of sexual orientation and identity. The Bill emphasizes restorative justice and reconciliation through mediation. When dealing with disputes, the courts must be mindful of the existence of systemic unfair discrimination and inequalities or attitudes which are in conflict with the Constitution or which have the susceptibility of excluding meaningful participation in traditional court proceedings by any person or group of persons, particularly in respect of gender, gender identity, sexual orientation, age, disability, religion, language, marital status and race brought about by colonialism, apartheid and patriarchy. A founding value of customary law is that its application is accessible to those persons who voluntarily subject themselves to that set of laws and customs.
Clause 4: Institution of proceedings in traditional courts

- Proceedings may not be instituted in traditional courts if the dispute is being dealt with at another level in the traditional justice system or if the matter is pending before a court of law or being investigated by the police or has already been dealt with in a court.

- A traditional court may only determine or make an order in respect of any matter referred to in Schedule 2 to this Bill. If a person approaches the traditional court for any relief in respect of any matter not referred to in Schedule 2 and the matter is placed before the court, nothing precludes such a traditional court from counselling, assisting or guiding a party to the dispute or facilitating the referral of the matter to another traditional court, court or an appropriate institution.

- Clause 4, read with Schedule 2, sets out the types of disputes a traditional court may deal with, thereby limiting the matters which these courts can hear, to less serious disputes which disturb harmonious relationships within communities.

- Also, in clause 4, and elsewhere in the Bill, reference is made to "disputes", meaning that there is no distinction between civil and criminal jurisdiction in these courts, which is one of the concerns raised in respect of the earlier Bills. The clerk of the traditional court plays a role in facilitating the attendance of parties at court.

Clause 5: Composition of and participation in traditional courts

- Traditional courts must be composed of women and men in accordance with the spirit of promoting the right to equality as envisaged in section 9 of the Constitution.
They are presided over by a traditional leader of a person designated by the traditional leader.

The courts are required to promote and protect the representation and participation of women, both as parties and as members of the courts. The Minister and the Commission for Gender Equality must furthermore put measures in place to promote gender equality in these courts and to report annually Parliament thereon.

Before any proceedings of a traditional court can begin, the traditional leader or the designated person preside over the court must say a pledge that he or she will protect and promote the values enshrined in the Constitution.

In terms of clause 5, every traditional court has a clerk of the court whose appointment is regulated by the laws governing the public service.

The functions of these clerks include issuing summons to parties to attend court proceedings, keeping attendance registers of sessions of traditional courts, keeping records of proceedings, filing decisions of traditional courts with Provincial Traditional Court Registrars, transferring disputes to other traditional courts or other courts or forums as envisaged in the Bill and submitting prescribed reports to the Provincial Registrar.

Clause 6: Nature of traditional courts

Traditional courts, are courts of law, the specific purpose of which is to promote the equitable and fair resolution of disputes, in a manner that is underpinned by the value system applicable in customary law and custom, and function in terms of the Constitution.
Their main emphasis is on preventing conflict, maintaining harmony and resolving disputes in a manner that promotes restorative justice, social cohesion and reconciliation.

The traditional court system is made up of the following levels of traditional leadership as contemplated in the Traditional Leadership and Governance Framework Act and recognised in terms of customary law:

(i) A headman or headwoman’s court;
(ii) A senior traditional leader’s court; and
(iii) A king or queen’s court, where available.

Clause 7: Procedure in traditional courts

This clause re-enforces the guiding principles in clause 3 by building in safeguards for the protection and assistance of vulnerable groups, with particular reference to women, as litigants and as members of the court, the elderly, children and the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity.

These safeguards require for example, that all court proceedings must be open to all members of the community at a place which is accessible to all members of the community; proceedings must be conducted in the presence of both parties; and both parties must be able to participate fully in the proceedings without discrimination on any of the prohibited grounds mentioned in section 9 (3) of the Constitution.

Parties must be allowed to be assisted by any person of their choice in whom they have confidence.
Legal representation is not allowed in these courts. There seems to be general consensus that legal representation is not suited for the traditional justice system.

Session of a traditional court must be held at the time and at a place which is accessible to all members of the community.

The proceedings of a traditional court, including the notice to attend and manner of preserving the dignity of the court and the manner of executing any order made by it, must be in accordance with customary law and custom, which may differ from place to place in the country.

The proceedings of the court must be in a language that is most widely used in the area in question.

Fees payable to a traditional court in terms of customary law may be determined by the Minister by notice in the Gazette.

Clause 8: Orders that may be made by traditional courts

The orders that a traditional court may make are set out in clause 8 of the Bill, and address the concerns that were raised in the past. Unlike the previous 2 Bills, this Bill does not provide for the imposition of any fines or the deprivation of customary law benefits, among others, as these could lead to abuses.

The emphasis is on restorative justice orders, e.g. compensation and redress, which are aimed at restoring the relations between parties and promoting social cohesion in the community.
The payment of compensation may, however, not exceed the value of the damage that gave rise to the dispute or the amount determined by the Minister by notice in the Gazette from time to time, whichever is the lesser.

No fines may be imposed. Any community service ordered must be for the good of the community and not for the benefit of any member of the court or a traditional leader.

Clause 9: Enforcement of orders of traditional courts

A mechanism for ensuring that orders of traditional courts are complied with is required, otherwise litigants could resort to unlawful measures and bring traditional courts into disrepute. The mechanism proposed in the Bill is as follows:

- If a party fails to comply with an order, the aggrieved party can approach the clerk of the traditional court who will try to mediate. If unsuccessful, the clerk must refer the matter to a justice of the peace appointed by the Minister for that purpose in terms of the Justices of the Peace and Commissioners of Oaths Act, 1963.

- The justice of the peace will deal with the matter in terms of the powers given to him or her as may be conferred on him or her under the same Act.

Clause 10: Provincial Traditional Court Registrars

The Bill provides for the appointment or designation of Provincial Traditional Court Registrars and sets out their role and responsibilities. These include the following:

- compiling and maintaining a prescribed register of all traditional courts in the province;
referring cases of public interest to the High Court in order to contribute to jurisprudence or enhance the reform of customary law;

transferring cases in respect of which traditional courts do not have jurisdiction, to the appropriate court; and

Assisting parties and guiding and supervising the functioning of traditional courts.

The required qualifications and experience of these Registrars will be prescribed in regulations.

**Clause 11: Review by High Court**

- Provision is made for the review of procedural short-comings in the High Court.

- If any of the important procedural requirements referred to in clause 7 are not complied with, the matter can be taken on review, for instance if the court was not properly constituted or the parties were not allowed to be represented by persons of their choice. Clause 11 lists a whole range of pre-requisites as well, eg the dispute does not qualify in terms of Schedule 2 to the Bill or the pledge was not done by the presiding officer.

- The High Court can confirm, alter, set aside or correct the order made by the traditional court; set aside or correct the proceedings of the traditional court; make the order the traditional court ought to have made or re-send the case to the traditional court to deal with it in the matter ordered by the High Court.

- These reviews will contribute to precedents and enhance jurisprudence in matters of this nature.
Clause 12: Referral of matters from traditional courts to Magistrates' Courts

- The Bill allows for the referral of matters from traditional courts to the magistrate's court having jurisdiction if a party is aggrieved by a decision or order of a traditional court.

- This, however, can only be done after the party in question has exhausted all traditional court system appeal procedures available in terms of customary law.

- A magistrate's court can hear evidence and give any order or decision on the matter it deems competent to give in the matter.

- This provision replaces the provisions of the Bill as introduced into Parliament which made provision for parties to opt out of the traditional court system should they so wish.

Clause 13: Record of proceedings

- The Bill also regulates the keeping of record of proceedings of traditional courts;
- The traditional court clerk fulfils a role in this regard;

The following must be recorded, among others:

1. The date on which the dispute was dealt with;
2. The nature of the dispute;
3. A summary of the facts of the dispute;
4. The particulars of the parties and their witnesses;
5. The decision or order of the court; and
6. An indication that the pledge was made.
Clause 14: Transfer of disputes

- In terms of clause 14 disputes can be transferred from a traditional court to a magistrate's court or even a small claims court in certain circumstances, for instance if the matter cannot be dealt with by the traditional court because it is too serious or complex. The magistrate's court then hears the matter afresh.

- In similar vein, a matter before a magistrate's court or small claims court can be transferred to a traditional court. A traditional court must be competent to hear a matter that is to be transferred.

Clause 15: Limitation of liability of members of traditional courts

A member of a traditional court is not liable for anything done or omitted in good faith.

Clause 16: Code of conduct and enforcement thereof

- The Justice Minister, in consultation with the Minister responsible for traditional affairs and the National House of Traditional Leaders, must compile a code of good conduct “for all persons who have a role in terms of customary law for the effective functioning of traditional courts, including persons who facilitate sessions of a traditional court on behalf of traditional leaders, clerks of traditional courts and interpreters”.

- The code must be approved by Parliament.

- The code serves as the prevailing standard of conduct which must be adhered to by the persons referred to above.

- Any breach of the code must be reported to and investigated by the relevant Provincial House of Traditional Leaders.
Sanctions for a breach of the code include an apology to the complainant, a reprimand, a written warning, any form of compensation, appropriate counselling and being relieved of the role in the traditional court for the duration of his or her rehabilitation.

Clause 17: Regulations

The Justice Minister is empowered to make regulations regarding numerous different matters in order give effect to the Act.

The Minister can regulate on the following, among others:

1. The role and responsibilities of clerks of traditional courts.
2. The pledge to be taken before any proceedings in a traditional court.
3. The qualifications and experience of a Provincial Registrar.
4. The manner of taking matters on review to the High Court.
5. The training of traditional leaders and persons designated by traditional leaders to preside over traditional courts.
6. The involvement and training of paralegals and interns in the functioning of traditional courts.

Consultation

A Reference Group, established by the National Dialogue on the Bill in December 2015 and chaired by the Deputy Ministers of Justice and Constitutional Development and Traditional Affairs, met on numerous occasions during 2016. The Reference Group consisted of representatives of civil society, traditional leaders and Government.
The mandate of this Reference Group was to discuss outstanding matters relating to the Bill, assist in the development of a Bill and to pave the way for the introduction of the Bill into Parliament. The deliberations of the Reference Group helped shape the Bill in its current form, which was later introduced into Parliament. The concerns raised in respect of the 2008 and 2012 versions of the Bill were taken into account and addressed.

Financial implications

The Bill, before it was introduced into Parliament, was subjected to a costing exercise by the Costing Unit in the Department. Because of current economic constraints, it was accepted from the outset that existing resources would have to use in the implementation of this legislation. The main financial implications for the State will be in the form of personnel, training and goods and services. Accommodation has not been catered for on the assumption that the officials will be accommodated within the Regional Offices of the Department. It is thought that the Provincial Registrar should be an official at the level of Director, bearing in mind as stated above, that the person in question must have the required status and stature in order to command the necessary respect from the institution of traditional leadership and civil society alike and that he or she should also have an appropriate qualification and relevant experience. The Provincial Registrar, it is thought, would have to be supported by at least a secretary and an Administrative Officer. The projections indicate that an amount of approximately R11 million per annum will be needed if new personnel are appointed for this purpose.

The Committee welcomed the presentation.
5. INTERACTION BY THE COMMITTEE WITH STAKEHOLDERS ON THE BILL

The following stakeholders were invited by the Committee to attend the public hearing.

- Community Members
- Department of Co-operative Governance and Traditional Affairs
- Chairperson of Mpumalanga House of Traditional Leaders (HTL) and local houses
- The Congress of Traditional Leaders of South Africa (CONTRALESA)
- Public Service Commission (PSC)
- South African Local Government Association (SALGA)
- Speakers of the local municipalities in the Districts
- Councillors
- Ward Committees
- Community Development Workers
- South African Police Service (SAPS)
- Civil Society

The written submissions has been extended from 29 November 2019 to 13 December 2019. Written submissions were received from the following stakeholders:

- Nkangala Local House of Traditional Leaders
- Land and Accountability Research Centre (LARC)
- Legal Resources Centre (LRC)
- Association For Rural Advancement (AFRA)
- Abathungi Besikhethu
During the public hearings, members of the committee explained the Bill thoroughly in the local languages spoken in each of the communities where the public hearings took place. The legislative processes and timeframes for processing the Bill through the relevant channels of the National Council of Provinces (NCOP) were also explained. The public was made to understand their Constitutional rights in relation to them making inputs in the processing of bills by the Legislature.

The Committee also reported that the Bill under review had some implementation challenges hence the proposed amendments. The Committee and the Legal of the Mpumalanga Provincial Legislature also responded to the questions of clarity raised thereafter. The community members and stakeholders who were present at the public hearing generally supported the Bill. Most people raised concerns which were also related to the Bill as follows:

- Ensure that a thorough consultation process is conducted on this Bill, with sufficient prior notice and information for people to attend and contribute meaningfully.

- There must be transformation in Traditional and Rural Communities.

- Government to assist in building a strong relationship between communities and Traditional Leaders within the Province.

- There is a clear need for regulation in the form of framework legislation because otherwise the status quo will remain. This presently means that establishment and existence of traditional courts is based on ss12&20 of the Black Administration Act. In addition, many communities voice concern over the fact that a number of traditional courts operate in the absence of any form of regulation and hence often act in an arbitrary and unjust manner. Thus communities have stressed the importance of enacting legislation that will vastly improve the status quo.
One of the major concerns raised was that the Bill would vastly increase the powers of Senior Traditional Leaders since they would be vested with extensive judicial powers (in addition to political and administrative powers they enjoyed in terms of such legislation as the Traditional Leadership Governance Framework (TLGF) Act etc.) Many communities and individual members were concerned that this would entrench abuse of power that was currently a reality in many traditional areas.

On the other hand civil society voiced concern over the fact that the exercise of judicial powers by traditional leaders violated the underlying doctrine of separation of powers and hence, if challenged, would be determined to be unconstitutional.

Another widespread criticism levelled at the Traditional Courts Bill (TCB) during this process was that the Bill consolidated all judicial powers in the Senior Traditional Leaders thereby marginalising other courts such as Headmen’s courts etc.

Traditional courts should be focused on mediation and conciliation, and their judicial powers should be clearly defined and circumscribed.

The Bill must clearly outline the steps to be taken by the Traditional Courts, in cases an individual fails to attend/avail him/herself (on a number of occasions) after being issued a notice (s) to appear before the Traditional Court.

The Bill should allow for traditional court cases to be appealed in the Traditional Councils prior to them taken to the Magistrate Courts (in cases one or both parties are not satisfied with the ruling of the Traditional Court).

The Provincial Registrars to be appointed should be people who understand and respect traditional values and customs, with preference to individuals within Tribal Councils.
• The community and traditional leaders raised concerns that the bill is biased; it has a western system and consultation processes was limited.

• The traditional leaders wanted to know what will happen if they issue a judgement and the person doesn’t have money to pay his/her fine because the bill is not clear.

• When summons are issued who will take them to the relevant person because in western court sheriff of the court assist, but on the traditional Leader bill is silence and doesn’t explain the process.

• Who will manage the Clerk of the court and the people who assist him/her, and who is going to pay them and who is going pay all the stakeholders for an example; Clerk and the people who are assisting the processes of the court?

• The government must provide traditional leaders with the proper structure, provide stationery and police service should be rendered.

• The bill must provide the hierarchy structure, provide definition and job descriptions for people involved in the process structure.

• The budget is too little (limited) for training of traditional leaders of the province.

• 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.
● 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.

● 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.

● 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.

● 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.

● 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.
● 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.

● 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.

● 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.

● 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.

● Corporal punishment, banishment and cruel, inhuman and degrading punishment should be explicitly excluded from the permissible orders listed in clause 8 of the Bill.

● 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).
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.

The enforcement procedure in clause 9(4) should be clarified, preferably to align with the similar procedure contained in clause 4(4).

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.

Clause 15 should also explicitly prohibit abusive and harmful conduct by traditional court members.

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.

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.

Appeal 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.

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.
Clause 4 (2) (a) (iii) by removing the whole sentence and add the new sentence that says anyone who reside within the area of jurisdiction of that Traditional Council is bound by the laws of that area. The case cannot be heard to another area of jurisdiction.

The Court of a Principal Traditional Leader must be provided for in clause 6(3) by insertion of the levels Court of a Principal Traditional Leader

The bill must accommodate the hierarchy of traditional institutions in terms of dealing with cases and appeals.

There should be a new position that will ensure that matters before the Traditional Court are treated with the necessary urgency and professionalism that it requires. This is suggested to be included as follows:
By insertion of a new position called Regional Registrar which will report to the Provincial Registrar. The new position will ensure that all districts have a regional registrar who will report to the Provincial Registrar. The duties of the regional registrar should amongst others review with recommendations all matters that must be reviewed by the High Court. The regional registrar would study all matters that were decided by the traditional court and advise the provincial registrar accordingly on those issues to be referred to the High Court. The regional registrar would be appointed in the same manner as the provincial registrar.

By insertion in Clause 5(3) (b) as follows: The Commission for Gender Equality referred to in Chapter 9 of the Constitution as well as the National House of Traditional Leaders established in terms of the National House of Traditional Leaders Act, 2009 (Act No 22 of 2009) must, in its report to Parliament each year, report on the participation of women and the promotion of gender equality in traditional courts and may, to this end, make recommendations on legislative and other measures.
By insertion of the following in Clause 5(4) (a) For every traditional court there must be a clerk of a traditional court who is after consultation with the Provincial House of Traditional Leaders appointed, designated from Traditional Council concern or seconded in accordance with the laws governing the public service and who has the powers, duties and functions as set out in this Act or as may be prescribed. The Clerks of the Court to be capacitated after the Act has been enacted for them to perform their duties efficiently. The current staff of Traditional Institutions be the first priority to be appointed and be capacitated to deal with cases efficiently.

Costs: the Bill will have an impact on government budgets because of the hiring of new clerks, the instituting of new procedures, and potentially increased need for legal aid. The National government has not accurately costed the implementation of the bill.

No opt-out clause: when the 2017 version of the Bill was first introduced, it contained an "opt-out" clause at 4(3), along with protections for individuals who wish to exercise their right to elect not to proceed in the traditional court. This section has now been removed, and this presents serious problems. It undermines the voluntary nature of customary law and creates a mandatory second tier system of law for those residing in traditional territories.

The Traditional Court’s power to counsel: in clause 4(3)(a), the Bill states that a traditional court can advise, assist or guide a party to a dispute, even in the absence of another party. Given that these are powers currently unknown to courts in South Africa and not clearly delineated in the Bill, they potentially undermine both the procedural and substantive fairness of proceedings in traditional courts.
Separation of powers: The Bill lacks any consideration of the separation of powers, which is a pertinent principle enshrined in the Constitution. The distinct separation between the three arms of government being the executive, judiciary and legislature is important for upholding principles of accountability, openness and responsiveness. There are also no checks and balances on the powers granted to traditional leaders in terms of the Bill. These powers grant unilateral authority to act as legislators, administrators, and judges of customary law. This, at the very least, will not inspire confidence in parties appearing before the courts that they are impartial, with impartiality being another judicial principle enshrined in the Constitution. Traditional courts will also have the power to deal with cases of a civil and criminal nature.

Denial of legal representation: Legal representatives are not allowed to participate in proceedings through the operation of section 7 (4) (b) of the Bill. The right to legal representation is provided for in the Constitution, and preventing this will deny many persons the right to a fair trial.

Any order of the traditional court in terms of the Act must be reviewable by the magistrates' court even if all traditional court system procedures have not been exhausted. The court may then; Confirm such an order in whole or in part; Set aside such order in whole or in part; Substitute such order in whole or in part; and Remit the case to the traditional court with directions to deal with any matter in such a manner as the magistrates' court may think fit, taking into account the tradition and customary law practiced in the area.

In each traditional court there must be assessors who are legally qualified, to ensure that the rights contained in the Bill of Rights are not transgressed in the course of traditional court proceedings.
The Traditional Court’s power to counsel and advise should be clearly defined in the Schedules.

Criminal matters should be removed from the jurisdiction of the traditional court in Schedule 2.

Section 7(4) (b) should be removed, and replaced with a provision that compels the traditional court to advise parties of their right to legal representation.

Paragraph 3(2) (e): This paragraph states that "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." [Emphasis added]. As was mentioned above, the removal of the opt-out clause is incompatible with this principle. There is nothing voluntary about subjecting those living in traditional territories to imposed and inescapable jurisdiction of traditional courts.

Paragraph 4(3) (a) provides the procedure for summoning a person to appear before the traditional court. It is unclear how people will be summoned, whether written summons will be served, by whom, and how.

Paragraph 7(3)(b) states that "the following rules of natural justice are adhered to: (i) That persons who may be affected by a decision must be given a fair hearing by the traditional court before the decision is made; and (ii) that any decision by the traditional court must be impartial." [emphasis added] For a hearing to be fair, this entails four principles. First, a party to an enquiry must be afforded an opportunity to state his or her case before a decision is reached, if such a decision is likely to affect his or her rights or legitimate expectations. Secondly, prejudicial facts must be communicated to the person who may be affected by the decision, in order to enable him or her to rebut such facts.
Thirdly, the rule also stipulates that the tribunal (traditional court) which has
taken the decision must give reasons for its decision. Fourthly, the rule entails
that the traditional court exercising the discretion must be impartial. It is not
clear in the Bill whether people will be given an opportunity to state their case,
examine, lead evidence, cross-examine, and file closing arguments. Without
these, the right to a fair hearing is severely compromised.

- **Paragraph 7(5) (a)** states that "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." In situations where there is no consensus, it is
unclear which system of customary law should be applied.

- **Subclause 7(10)** provides that: "If any of the parties does not understand the
language used in the traditional court, an interpreter must be provided." It is
not clear who covers the costs of the interpreter.

- **Subclause 8(1):** This subclause lists the types of orders that may be made
after deliberating on a dispute before it. The section refers to orders made in
terms of monetary loss or otherwise, including loss of livestock. However, the
phrase "proven financial loss" does not provide any guidance on how it may
be proved. We would like clarity on what factors are to be taken into account,
and whether experts will be allowed in the traditional courts.

- The traditional courts can also make orders directing a party who cannot
provide financial compensation to perform "without remuneration some form
of service" to the offended party per paragraph 8(1) (c). This section is highly
problematic and an infringement of section 13 of the Constitution which
prohibits servitude and forced labour.
Paragraph 8(1) (d) allows for "an order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct being complained of." This power is functionally equivalent to forcing "specific performance without an alternative for payment of damages" within the meaning of section 46(2) (c) of the Magistrates' Courts Act 32 of 1944. This provision appears to grant traditional courts powers beyond that of the Magistrates' Court.

Paragraph 8(1) (h) allows for "an order that a party attends any form of training, orientation or rehabilitation that is consistent with the relevant customary law...the Constitution and this Act and does not include any form of detention or deprivation of any customary law benefits." It is unclear how the costs of training, orientation or rehabilitation will be covered. Is it provided by the offending party? The Traditional Court?

Paragraph 8(1) (i) allows for "an order requiring any party to the dispute to make regular progress reports to the traditional court regarding compliance with any condition imposed by the traditional court". This provision raises the question of whether traditional courts will be, or should be allowed to grant structural interdicts in the form of supervisory orders.

Clause 9 of the Bill gives the clerk of traditional courts wide powers including certain judicial powers. For example, subclause 9(2) states that: "The clerk must inquire into or cause to be inquired into the reasons for non-compliance with the order and make a determination as to whether the non-compliance was due to fault on the part of the party against whom the order was made." [emphasis added] This power to make a determination is a judicial power that exceeds the other prescribed duties of a clerk of the traditional court.
Subclause 10(1) states that "The role, functions and responsibilities of Provincial Court Registrars are as may be prescribed, in addition to the following... (b) referring and reporting on cases of public interest, in the prescribed circumstances and prescribed manner, to the High Court having jurisdiction for review in order to contribute to jurisprudence or enhance the reform of customary law" [emphasis added]. The procedure for referring or initiating cases to the High Court is either by way of application or by way of action. Following these procedures requires legal training and qualifications. It is not clear whether traditional court registrars will be legally trained and qualified, if they will be assisted by the court clerks, or otherwise.

Subclause 11(1) states that "A party to any proceedings in a traditional court may, in the prescribed manner and period, take those proceedings on review to a division of the High Court having jurisdiction on any of the following grounds." Litigation in the High Court is expensive, complicated and adversarial. It requires people with legal training, and it is unclear whether legal aid will be provided to people taking matters on review to the High Court. They are also concerned with the limited grounds of review available in the High Court, as they are primarily procedural. Key grounds of review such as suspected bias are also absent from the enumerated list.

Paragraph 14(1)(a) states that "If a traditional court is of the opinion that a dispute before it is not a matter which it is competent to deal with, as contemplated in section 4, or if the matter involves difficult or complex questions of law or fact that should be dealt with in a Magistrate’s Court or small claims court or if it is a matter as contemplated in section 4(4)(b)(ii) or section 9(4)(b)(ii), the traditional court may, in the prescribed manner, transfer such dispute to the Magistrate’s Court or small claims court having jurisdiction and notify the parties to the dispute of the transfer." [Emphasis added].
As in subclause 10(1), above, this determination should be made by someone with legal training, and a traditional leader or member of the traditional council would not necessarily be qualified to do so. Once referred, it is also not clear whether normal Magistrate’s Courts procedures would then be followed. If so, who will represent the parties and who will pay for that representation?

- **Schedule 2** gives the traditional court powers to deal with criminal matters such as malicious damage to property, assault, *crimen injuria*, abduction etc. They strenuously object to providing traditional courts with jurisdiction over criminal matters.

6. **OBSERVATIONS AND FINDINGS MADE BY THE COMMITTEE**

- Oral submissions that were made by the public were considered accordingly.

- Other submissions that do not talk to the content of the Bill will be dealt with in different ways by including in the Regulations and by the National Department of Justice and the Department of Co-operative Governance and Traditional Affairs by ensuring that critical matters raised are taken into consideration.

- Generally, members of the public were in support of the Bill.

7. **RECOMMENDATIONS**

The Portfolio Committee on Human Settlements, Co-operative Governance and Traditional Affairs after considering the Bill confers on the permanent delegate representing the Province of Mpumalanga in the NCOP, the mandate to negotiate in favour of the Bill.
8. CONCLUSION

The Chairperson wishes to thank all members of the public for their worthwhile participation in the public hearings and for the inputs or comments they have made. A word of gratitude to the NCOP Permanent Delegate, Hon Z Zandamela, the Director from the National Department of Justice, Mpumalanga Department of Co-operative Governance and Traditional Affairs, House of Traditional Leaders, Congress of Traditional Leaders of South Africa (CONTRALESA) South African Local Government Association (SALGA), Public Service Commission (PSC) Speakers, Councillors of the Local Municipalities, Members of the Portfolio Committee on Human Settlements, Co-operative Governance and Traditional Affairs, for their efforts in ensuring that the committee meets its obligation and the support staff who contributed to the success of the public hearings and the production of this report.

Hon MC Masilela

CHAIRPERSON: PORTFOLIO COMMITTEE
ON HUMAN SETTLEMENTS; CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS

DATE
07/02/2020