



Wes-Kaapse Provinsiale Parlement Western Cape Provincial Parliament IPalamente yePhondo leNtshona Koloni

Ref Number: 11/4/3

(Negotiating Mandate stage) Report of the Standing Committee on the Premier and Constitutional Matters on the Traditional Courts Bill [B 1B-2017] (NCOP), dated 4 February 2020, as follows:

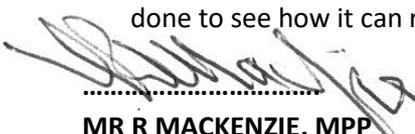
The Standing Committee on the Premier and Constitutional Matters having considered the subject of the Traditional Courts Bill [B 1B-2017] (NCOP), referred to it in accordance with Standing Rule 217, confers on the Western Cape's delegation in the NCOP the authority to not support the Bill.

In terms of Standing Rule 90, the African National Congress expressed its minority view to support the Bill.

The Committee does not support the Bill for the following reasons:

1. The late referral of the Bill from the Select Committee of the National Council of Provinces (NCOP), did not allow a fair legislative process, i.e. the Bill was not advertised sufficiently in local newspapers and other media platforms resulting in public hearings not being well attended. Local traditional leaders and groups were not well-informed about the Bill or not sufficiently consulted .
2. In terms of public participation, the Bill should be taken back to communities where cultural councils exist, in order for sufficient input to be received by the affected community structures. If input is limited, as is the case now, the Bill would essentially be enforced onto communities.
3. This Bill should not be signed into law before the recognition of traditional leaders in the Khoi-San community has been concluded.
4. The overall consequences where the legislative, executive and judicial power may be vested in one individual, who in this case is the traditional leader, could be unconstitutional.
5. This Bill places the traditional leader in an autocratic position and this power could easily be abused. This also stands in contrast to the Bill's definition of "restorative justice", which describes a collective process involving parties, families and community members.
6. The Bill is silent on the mechanisms to guide and monitor the relationship between traditional courts and the South African Police Services. It is also silent on the circumstances under which Section 7(3)(b)(ii) indicates that the Traditional Courts Bill [B 1B-2017] (NCOP), must be impartial but does not stipulate the mechanisms for ensuring impartiality.
7. The Bill does not stipulate how conflict of interest will be managed and monitored by external parties.

8. Section 7(11) “notes that determined fees payable to a traditional court in terms of customary law” – this will create opportunity for corruption and might limit access to justice for those unable to pay. The current system of patronage, patriarchy could entrench control and corruption and distort the principles of the traditional courts.
9. Implementation of this Bill will be extremely difficult. Laws are created but not effectively implemented.
10. The requirement that a compelling reason must exist before a matter will be allowed to be withdrawn or abandoned is inconsistent with the constitution.
11. Issues arises due to there being no prerequisite for those who serve on these traditional courts. As customary law is created by traditional leaders and councils, a real possibility exists that those who determine the law will also be allowed to apply it, which is a transgression of the doctrine of the separation of powers to which the Republic of South Africa subscribes to in terms of the Constitution.
12. Section 7(6) of the Bill provides that proceedings must be open to all members of the community. In the same section, subsection (8), customary law of procedure and evidence applies. This is, however, inconsistent with legislation that protects the rights of children to provide testimony in camera and, for sensitive matters to be held in a closed court. Considering that the court has the jurisdiction to hear matters pertaining to ukuThwala (an outlawed practice), initiation and the custody and guardianship of minors. Such a blanket provision is inconsistent with the constitutional requirement to provide protection to vulnerable sections of society. This is a matter that will have to be addressed.
13. The right to have a matter reviewed by the High Court has been included, but a closed list of instances in terms of which such applications may be referred is included. It would be preferable if the grounds for review were expanded to include all matters pertaining to the application of formal or procedural law during traditional proceedings. Furthermore, section 11(1)(f) refers to “representation” in terms of section 4, whereas the applicable section refers to assistance, as indicated above. This inconsistency is suspicious and must be corrected.
14. No provision has been made to have a matter referred for appeal and substantive errors in the adjudication of customary law cannot be challenged.
15. It is difficult to not view this Bill as an election ploy and means to garner support from traditional leaders.
16. There is limited understanding around customary law and not much work or research has been done to see how it can realistically co-exist within the constitutional framework.



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MR R MACKENZIE, MPP

CHAIRPERSON: STANDING COMMITTEE ON THE PREMIER AND CONSTITUTIONAL MATTERS

DATE: 4 FEBRUARY 2020

