



**Submission to the National Council of Provinces Portfolio Committee
on Cooperative Governance and Traditional Affairs**

**Traditional Courts Bill: Implications for Land and Agrarian Reform and
Rural Women's Rights**

4 September 2012

This submission from LAMOSA on the Traditional Courts Bill looks specifically at two areas where the Traditional Courts Bill will have grave impacts on the rights of rural communities. These are:

- i) land and agrarian reform
- ii) rural women's rights

The Traditional Courts Bill (TCB) gives traditional leaders powers to adjudicate on a very wide range of issues that impact people's rights, their wellbeing and their right to self determination. In particular, the TCB would have significant impacts on the land and property rights, while re-engineering social and power relations between the powerful and vulnerable groups. Because of this it is critical to examine the implications of the TCB more in detail on these two issues.

1 Implications for Land and Agrarian Reform

1.1 Communal Land Rights Act through the back door?

The TCB comes following the repeal in 2010 of the Communal Land Rights Act by the Constitutional Court. The judgment of the Constitutional Court indicated that Parliament should urgently revise a draft which would be in line with the Constitution. This has not been done. As such Traditional Courts will be operating in a legislative vacuum as regards the overall national policy relating to communal land tenure.

Because of this vacuum, the traditional courts will become the de facto governance system on land matters arising in rural communities (eg. land claims, inheritance disputes, allocation of traditional land etc.) Because traditional customs are prone to selective/biased and even arbitrary interpretation, there will be no other reference point that would be able to assist in ensuring fair and impartial judgments in land cases. In a situation where communal land is coming under increased pressure from mining, tourism, agribusiness and other powerful interests, the traditional leaders (themselves interested parties in how land is allocated) would be the party, judge and jury where there is dissatisfaction within communities about how land is allocated.

It is not possible for traditional courts to function in the spirit intended in the absence of a clear guiding policy and legal framework regarding communal land tenure, and the TCB must be developed in concert with such legislation.

1.2 A tangled web of institutions, policy and legislation

The TCB does not provide for the involvement of other statutory traditional and communal institutions, nor how traditional courts will interface with them. Yet customary law covers social, economic, environmental, cultural and political questions, which are currently dealt with in a variety of laws and policies. The TCB, which covers a many, though not all, criminal and civil cases, is naive about the number of existing and forthcoming policies and legislation that traditional courts will have to navigate. It is not possible to expect that customary law can exist in isolation from other laws and policies as was the case under apartheid.

On the whole, the Traditional Courts Bill is being promulgated in a context of disarray of communal land governance arrangements. Concurrently with the Traditional Courts Bill, the Department of Cooperative Governance and Traditional Affairs is preparing a National Traditional Affairs Bill which will combine the Traditional Leadership and Governance Act and the National Traditional Leadership Act; the Minister of Land Reform and Rural Development is working to refine new a Land Administration Framework under the Green Paper on Land Reform. Other laws such as those relating to mineral resources or environmental preservation are also being developed which will are likely to affect customary land laws.

Traditional Courts can not be expected to function in harmony with other laws and policies when so many critical pieces of policy and legislation remain at the drafting, consultation and review stage. More than one commentator has called for a more holistic review of laws governing the former Bantustans, which continue to be the most poverty stricken regions in South Africa. Given that land is the primary livelihood source for communities living in these areas, it is necessary to approach the political, administrative, legal and developmental aspects of these areas in a holistic fashion.

1.3 Constitutional Court Judgment on the Communal Land Rights Act: oversight or disregard?

The judgment of the Constitutional Court in regard to the Communal Land Rights Act appears to have been overlooked or disregarded in drafting the Traditional Courts Bill. Firstly, the question of consultation in drafting regulations (which is the purview of the Minister) in relation to the operation of Traditional Courts “must be made after consultation with the Cabinet Member responsible for traditional leadership matters and the National House of Traditional Leaders”. Yet the scope of the regulations that the Minister must draft is wide ranging, and therefore requires consultation with a much wider body of stakeholders and institutions.

The Concourt judgment ruled that the CLRA imposed a new regime on indigenous land law and traditional leadership. The same assessment is applicable to the Traditional Courts Bill, in the sense that the Bill does not explicitly exclude customary land laws. Similar to CLRA, the TCB in effect replaces existing institutions or office bearers in indigenous law that traditionally are mandated to resolve land and property cases by putting the power in the Presiding Officer to adjudicate land issues. This was the basis for the challenge to CLRA and the basis for its repeal.

Finally, by centralizing judicial arrangements under presiding officers and the Minister, without any other checks and balances present, there is little evidence that the TCB will really deliver the transformation of the land governance system envisaged in the Constitution.

1.4 Exacerbating land dispossessions?

The sanctions that may be given in a traditional court could include dispossession of land, since the bill allows for the confiscation of fixed assets in the list of sanctions. On the contrary, the TCB allows for courts to order settlements, payment of damages, payment of compensation ‘in monetary terms or otherwise’, which could include land. Traditional courts may also give “an order depriving the accused person or defendant of any benefits that accrue in terms of customary law and custom.” Under most systems of customary tenure, access to land would qualify as such a “benefit” rather than a right. It is not difficult to see how such provisions could be engineered to deprive community members of existing land entitlements for the benefit of more powerful interests, including those of traditional leaders themselves.

1.5 An inadequate appeals system

The TCB gives powers to Magistrates Courts to review decisions made in the traditional courts on appeal. However without legislation covering communal land rights, magistrates will not have a statutory law basis on which to make alternative judgments.

At the same time, where a plaintiff decides to have recourse to a magistrates’ court on a land related matter, the TCB empowers the magistrate to refer the

matter to back to a traditional court. By default therefore, most cases on land rights will be dealt with by traditional courts, as the only existing legislative framework is indigenous law. Where community members do not have confidence in traditional courts, alternatives such as magistrates courts are all but ruled out.

1.6 No separation of powers or provision for conflict of interest

The TCB empowers only two offices: that of the Presiding Officer (traditional leaders) and that of the Minister. This is in contradiction to the assertion that the TCB will bring customary law in line with the Constitution, which provides for the separation of powers and the institution of checks and balances. This means that communal land governance questions (amongst other things) will be open to serious conflicts of interest; where land disputes might involve traditional leaders themselves, there is no recourse for plaintiffs or defendants to make a case through the traditional court system. Unlike the statutory law system, the TCB does not make any provision for Presiding Officers to recuse themselves in situations of conflict of interest.

2 Rural women's land rights

The second part of this submission relates specifically to rural women's land rights. Gender inequalities perpetuated through tradition have been a major issue of contention with traditional law. In this section, we try to highlight how sections of the TCB conflict with the aspirations of the Constitution to ensure gender equality.

2.1 Assumption of impartiality on women's rights

The TCB makes a romantic assumption of impartiality and munificence on the part of traditional leaders unseen anywhere else in legislation. It is assumed that once Presiding Officers have taken a (yet to be drafted) oath, and have (maybe) received some training, they will be fit to make fair, equitable and just decisions on the cases brought before them. Yet we have seen in the debates about LGBT rights, that traditional leaders themselves are prepared to disregard the Constitution if it opposes their ideological positions. Women's rights are also a deeply ideological issue—with traditional leaders holding a range of positions from highly progressive to deeply conservative. Where women have to encounter the latter, the burden is placed on female plaintiffs and/or defendants to show that a traditional leader has violated constitutional and legal provisions on gender equality.

2.2 Gaps between objects, principles and operationalization

The objects and guiding principles of the TCB enunciate a number of pro-women intentions, but the nod to gender equality in the TCB begins and ends with these two sections. No efforts are made in the rest of the Bill to ensure women will be treated fairly—whether in terms of representation on the traditional courts, procedural questions or appeals systems. Where some at-

tempts (however tokenistic) have been made to ensure women's representation in traditional instances (eg. Traditional Councils), these traditional instances do not have any power to intervene in the Traditional Courts. It is only the Minister of Justice who has direct oversight over the Traditional Courts: other executive offices, such as the Department for Women's Affairs, are neither empowered nor resourced to ensure that the operation of Traditional Courts upholds the provisions of the Constitution on gender equality. The TCB therefore places the burden on rural women alone to take the matter up with higher instances to show that a decision taken in the Court is discriminatory towards them on the basis of gender.

2.3 Ensuring women's access to justice

The TCB states that traditional courts may not deal with issues that relate to (i) constitutional rights (ii) separation or marriage (iii) custody of minor children (iv) wills (v) land matters above a certain amount. All these are matters that affect women significantly; while the TCB claims to facilitate easier access to the blanket exclusion of family law could disadvantage women in certain communities, if indeed this is realistic. Women's choices about which legal systems they would prefer to have their cases heard under will be constrained by the TCB. The object of enhancing women's access to justice is further defeated by the TCB's provisions that (i) appeals must be made to a magistrates court (which may or may not be familiar with the customary laws brought before it) and that (ii) complaints against the Presiding Officer must be made to the Minister. Where some customary practices might provide for a local system of appeals, the door to appeal to these instances will be closed by the TCB itself, forcing women to appeal through far more inaccessible channels.

Where women do not wish their cases to be heard by a traditional court, they may be compelled to do so as a result of at least two provisions in the TCB. Firstly that land matters or civil suits are handled by Traditional Courts below a certain limit defined by the Minister. In this case, women are particularly affected by this provision, as they tend to have small land holdings. Secondly, the TCB empowers magistrates to refer matters brought before it back to Traditional Courts, should the magistrate feel that matters are best dealt with by Traditional Courts. Here again, rural women are deprived of choices in which legal systems to use, even where they judge that a particular system will discriminate against them on the basis of their sex.

2.4 Procedures, Sanctions and Enforcement

The TCB states that sanctions must be in line with tradition, but does not state what must be done where traditional forms of sanction violate Constitutional provisions such questions as gender equality. Furthermore, the TCB does it allocate specific responsibilities to an accessible body to verify that traditional court rulings advance the interests of women.

The procedures of TCB block opportunities to introduce office bearers that could assist traditional justice systems to fall in line with the constitution. Most critically, the TCB does not allow parties to a dispute to have legal representation but instead states that be represented by a spouse, family or community member, who themselves might be biased or prejudiced towards women's rights. This provision ignores the reality that many of the discriminatory practices in customary law are part of deeply embedded belief systems buttressed by heavy social pressure—including threats of violence--to conform with them. The TCB leaves women high and dry to carry the burden of seeking justice in the face of social prejudice and entrenched patriarchy.

The sanctions and enforcement regime in the TCB further disadvantages poor rural women in the sense that the TCB, while proclaiming to implement "restorative justice", is very much a coercive, retributive regime, allowing for community participation or collective action. Restorative justice suggests a voluntary and alternative means of allowing parties to settle disputes or conflicts outside the formal courts system. Indeed the TCB explicitly states that orders by a traditional court "has the effect of a civil judgement of a magistrate's court, in accordance with the Magistrates' Court Act, 1944." Given the coercive nature of the TCB, it must be concluded that the intent of the TCB is to create a parallel, centralised and highly discretionary legal system without the disciplines imposed by statutory law to ensure fairness. Abuse of women's rights is likely to become even more exacerbated under such a regime because it widens the power disparities between traditional leaders and the communities they are expected to serve and the women who should be able to rely on them to defend their rights.

The sanctions imposed by the TCB may be pursued through compensation (in cash or in kind) or by the requirement of unremunerated community service or service to the victim. The TCB also allows for decisions that "deprive the accused person of any benefit that accrues in terms of customary law and custom." Such sanctions can have extremely serious implications for rural women's meagre circumstances, for offences that the TCB fails to define clearly, and through procedures that carry flimsy guarantees of fairness and impartiality. The TCB could easily become an instrument for victimisation and persecution of women by family and community members to grab their property or to extract one form or another of their unpaid labour for their personal benefit.

2.5 Exclusion of women in development of regulations

The TCB empowers the Minister to make regulations regarding a large number of issues relating to the operation of the traditional courts. But the Minister is only obliged to consult the Cabinet Minister responsible for traditional leadership matters and the National House of Traditional Leaders. This is in contradiction to the Constitution to consult stakeholders in the development of policy and legislation that affects them. The exclusion of women's organisations, of women's governmental structures, (eg Commission for Gender

Equality, Department of Women's Affairs) to help transform traditional legal systems to defend women's rights can not happen without ensuring that kind of participation in such matters.

2.6 Transforming traditional governance for greater gender equality

Traditional custom and law will not be enhanced through the institutionalisation of conservative patriarchal authoritarian models, particularly in a context of rapidly changing global and national realities, particularly the rights-based regime that is at the core of what South Africa is today. In this sense, the TCB, by excluding the many stakeholders that could assist in enhancing and developing traditional justice systems that can be relevant in the coming century—civil society, academics, legal professionals, parliament and government bodies—defeats the very purpose it aims to serve. Most importantly but continuing to pay only lip service to women's rights, the TCB deprives the opportunities of harnessing women's knowledge of traditional systems and their creativity and understanding of how to preserve the best of customary law and practice.

3 Conclusions and recommendations

1. The TCB should not be able to deal with any cases regarding land until relevant land governance frameworks are put in place, in particular the revision of CLRA and the finalization of the Land Reform Green Paper. Any new legislation to be developed in relation to traditional courts must be done in concert with other legislative initiatives such as the National Traditional Affairs Bill so that the national legal framework puts together a coherent institutional framework for the administration of customary law.
2. If traditional courts are to be given coercive powers, they must be subjected to the same checks and balances as all other legal instances including review and scrutiny by Chapter 9 institutions and the Judicial Services Commission and the Constitutional Court. Traditional Courts must also ensure that all office bearers in the traditional system have the same training demanded of officer bearers in magistrates' courts. Otherwise settlement of cases in Traditional Courts must be on a voluntary basis.
3. The TCB must involve Parliamentary committees, the mainstream judicial oversight committees in deciding whether a traditional leader is qualified to be appointed as a presiding officer in traditional courts. It is simply undemocratic for these decisions to allow the Minister to be the sole decision maker on such issues. The Traditional Courts Bill must respect the principle of separation of powers demanded by the Constitution. As such the current provisions that hand power to kings, queens and chiefs cannot pass the Constitutional test. Finally this system of administering traditional justice will contradict the principles and values that have been used to achieve fair and balanced customary legal systems.

4. Clear checks and balances must be included in the operation of the Courts to ensure that they do not discriminate against women. This could include widening the scope for qualification of presiding officers to include women, training women community leaders to assist in the settlement of cases involving women, establishment of forums to support the evolution of gender equitable customary laws and so forth.
5. Women's access to justice, political empowerment and equal access to land and property must be a priority consideration guiding the development of traditional governance systems, including traditional courts. Traditional leaderships must be accountable to Parliament and judicial oversight instances to ensure that they are carrying out their duties in keeping with the Constitution, as these relate to eliminating gender discrimination.

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