

COMMISSION ON GENDER EQUALITY
5TH FLOOR, ABSA BUILDING
132 ADDERLY STREET, CAPE TOWN



SUBMISSION TO THE
PROVINCIAL AND LOCAL
GOVERNMENT
PORTFOLIO COMMITTEE

TRADITIONAL LEADERSHIP AND
GOVERNANCE FRAMEWORK BILL

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Tel: 021 - 426 40 80 Fax: 021 - 424 0549
Email: surayaw@sn.apc.org

INTRODUCTION

The Commission on Gender Equality is a statutory body set up under section 187 of the Constitution to protect and promote democracy and gender equality in South Africa. Its mandate is outlined in its constitutive Act 39 of 1996. Amongst its responsibilities is to 'evaluate...any system of indigenous law, customs or practices...' in terms of gender equality.

We would like at the outset to say that we accept that South Africa is a diverse society with a large number of people who identify themselves as belonging to a traditional community headed by a traditional leader, and subject to customary law. Our Constitution has recognised this reality, and the reality of legal pluralism. Any recognition of traditional structures has to be limited by the Constitutional principles of full equality, and particularly the principles of gender equality.

The recognition of traditional leadership and traditional communities however, needs to take account of the fact that these institutions are not democratic in their formation, are highly patriarchal, and historically have underpinned the subordination and oppression of women.

Democracy presupposes the principle of representation through the ballot box by voters who are citizens. In South Africa, democracy, that is rule by the people for the people, was achieved after considerable sacrifice. Any non-elective and non-democratic institution that wields authoritative and allocative power would threaten the principle of democracy. Thus the powers and role of traditional leadership must be subject to the principles, values and rules of democratic governance and the Constitution itself. Non-Sexism and gender equality in all aspects of governance are fundamental to this process, in particular the rights of women within traditional communities should be protected and extended to at least equal those enjoyed by men.

PREAMBLE

It is trite to state that the legal system of the past has largely failed to benefit the majority of South African women. In particular, black, working class and poor women living in rural areas have been marginalized, both by the so-called Westernised system of justice and the customary structures. The socio-economic and legal position of black women in South Africa has been shaped by Apartheid policy, customary and religious law and more recently by political reform. On the one hand, women have been marginalized and denied access to justice, while on the other hand, accessing justice is viewed as a fundamental human rights. For black women living in rural areas however, accessing justice is particularly difficult because of their socio-economic circumstances, low levels of literacy, discriminatory cultural practices, infrastructure and so on. Hence, the principles entrenched in the Constitution, particularly, the substantive equality principle is crucial to ensure the transformation of the status and lives of women.

We support the preamble, which compels the institution of traditional leadership, to promote freedom, human dignity, and the achievement of equality, and non-sexism. The disaggregation of who does what on a daily basis, who makes decisions, who controls assets and who does not, at every level in society, provides us with a more nuanced understanding of the sexual and gender divides in political and civil life. We have learned from the struggle for liberation and transformation in our country over the past forty years that gender relations are not static

We support the principle that the Constitution should be used as a guide, when interpreting the provisions of this Bill. This will ensure that Traditional Leadership and Governance, is practised according to the dictates of democracy. We applaud government's attempt to give greater meaning and clarity to the role and responsibilities of traditional leaders in our society within the broader context of transformation and commitment to a constitution founded on non-racialism, non-sexism and the need to rid our country of all other forms of unfair discrimination.

Our country's Bill of Rights, which we as a nation have adopted, and our obligations to international conventions, and above all, our commitment to the most marginalized in our country, the rural women, demands that this recognition of traditional leaders and the demarcation of their roles, take place within the inflexible parameters of democracy, constitutionalism and non-discrimination against women.

Article 2.7 of the Convention of the Elimination of all Forms of Discrimination Against Women (CEDAW) which South Africa has ratified without reservations states that:

State parties [governments are] to take all appropriate measures including legislation to modify and abolish existing laws, regulations, customs and practices which discriminates against women.

(Furthermore) State parties shall take all appropriate measures to modify social and cultural conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or superiority of other sexes or stereotyped roles for men and women.

We recommend, that where reference is made to customary law, in this Bill, it is followed by the following clause "including the Constitutional principle of equality". Eg. Clause 17(1) will read as follows: "...provided for in terms of customary law, including the constitutional principle of equality, and practices of the traditional community concerned..." This will reinforce, and ensure that the customary laws are interpreted in the constitutional spirit of equality. We recommend that this insertion be used in Clause 19(1)(a); Clause 9(3), Clause 11(1), Clause 10(1)(a), and elsewhere where it is referred to in this Bill.

CHAPTER 1 DEFINITIONS

‘Kingship’; ‘Headmanship’

The masculine language adopted in this Bill contributes to the perpetuation of a male orientated society, in which women are seen as having a lower status. “... The general use, of masculine nouns and pronouns, implies that personality is really a male attribute, and that women are human subspecies.”¹ This is offensive, and we recommend the following:

“Queenship” is used for a position held by a Queen;

“Headmanship” only refers to a position held by a headman;

and “Headwomanship” refer to the position held by a headwoman.

We also request that where the wording is gender specific, and refer to both sexes in the same phrase, Eg. Throughout clause 11: the word “king”, always precedes the word “queen”, “headman” precedes “headwoman’, etc. We recommend an alternation of the gender specific terms.

CHAPTER 2 TRADITIONAL COMMUNITIES and TRADITIONAL COUNCILS

We support the commitment to ensure that women are represented on these structures, and the move towards democratic representation, and the accountability of traditional authority institutions. We are however concerned about unelected representatives, and the inaccessibility to these structures. We believe that one third representation of women on these structures is insufficient, as it will not ensure actual participation at all levels, by women.

¹ Summary of Thornton 74-77

Clause 3(2)(b) stipulates that the Traditional Council MUST consist of 25% democratically elected officials. The other 75% is elected by the principal traditional leader. This faces a possible constitutional challenge, as it currently makes a mockery of democracy. Democracy is premised on elected representativity. We need to caution unelected representivity in a democracy.

These institutions are hereditary patriarchal, and we have concerns around patriarchy. Our concern is how gender power relations determine the life chances of women and men in this society. To a great extent, our focus has been on geographic (national/provincial, rural/urban), racial, cultural and class divisions. The gendered nature of power relations in society is key to an understanding of who has access to and participates in public power and authority. This means we have to look beyond the public modalities of politics and power- the conventional sphere of public life- to understand the link between low formal participation rates of women in public life and the arena of private power and authority within households.

RECOMMENDATION

1. Clause 3(1) and Clause 3(2) refers to the representation of women and also the percentage of elected, and unelected members.

The Commission on Gender Equality has embarked on a 50/50 campaign, which is campaigning for 50% women's representation at all levels of government. We recommend that the representation of women on the Traditional Council, be amended from 30%, to at least 50%, as appointees and also those elected.

The democratic elected content of 25 percent is inadequate, and we recommend that it be at least 50%.

2. Clause 3(2)(a) refers to the needs of traditional communities. We recommend the inclusion of "and in accordance with the values of non-sexism and gender equality". One of the problems in suggesting that administering the affairs of the traditional community in accordance with custom and tradition is that these have been male-centric, hierarchical and exclusive. The question about the interests of the community, especially those of women in terms of access to land, inheritance, and participation in decision-making in the kgotla's and traditional councils, remains one that is not adequately met in this section.

3. Clause 4(1)(h) should be removed, as traditional councils do not have legislative powers. Their participation in such process is the same as any other civil society participation.
4. Clause 4(2) provides for the regulation of the functions of the traditional council. We are concerned about the use of the word “may”, and recommend that it be replaced with “must”, to oblige provincial legislation to regulate the performance of the traditional councils. We are concerned that most of the provincial legislation dealing with the traditional establishments, was promulgated prior to the 1996 Constitution, and will therefore not purport the democratic objectives of the Constitution. In the absence of provincial legislation, regulating the performance and functions of the traditional councils, it will be difficult to ensure compliance by the traditional councils. We are concerned that this Bill does not provide a penalty sanction for non-compliance by the traditional council, and recommend that a penalty for non-compliance by the traditional council be included in this Bill.
5. Clause 5(3) should be deleted, and the functions of the traditional council should be limited to a supportive one. This is already covered in Clause 4(1)(b), and Clause (4)(1)(c). Should this clause remain, it could be interpreted, and lead to the expectation, that traditional council be given preference with regard to service delivery tenders. This could also lead to traditional councils doubling up as surrogate local government with regard to service delivery. Service delivery should remain the responsibility of local government.
6. Clause 7(2)(a). We request that a community, or a member of the community should also be afforded the opportunity, to request the withdrawal of the recognition as a traditional community.

CHAPTER 3 LEADERSHIP POSITIONS WITHIN INSTITUTION OF TRADITIONAL LEADERSHIP

We recommend that clause 11(1) only be applicable in respect of Principal Traditional leader, only in the absence of a female heir apparent.

Clause 14(1)(b) should be confirmed by medical evidence.

CHAPTER 5 ROLES AND FUNCTIONS OF TRADITIONAL LEADERSHIP

The CGE's own experience and research indicates that women are constantly marginalized in and by traditional structures, and traditional leaders often have no concept as to the notion of discrimination. The host of issues facing women range from marriage, violence against women, land ownership and tenure, inheritance and succession. In our experience, these have not been dealt with in accordance with the principles of equality, dignity and in women's best interest.

The following two quotes from an opinion survey conducted by the Commission on Gender Equality in 1999, illustrates the above. "The headmen and chiefs were somewhat aware of the language of gender equality – or some parts as it and even gave the impression that they shared in these ideals. In one area we were assured by the Chief that the women played a full and vital role in his traditional court. When we arrived there we found that women are seated on a bench against the wall at the back behind everybody. They were called only to court as witnesses and not to participate in the processes. For the Chief in question, this was evidently a "full and vital role" for women. In another region, the headman assured us that women were allowed to participate to "their full potential" in the proceedings of the traditional courts – which may even have been the case except that they were barred from participating in the caucus (*Kgoro*

tshitumbe) where all the major decisions for the overall running of the village are taken. The “full potential’ of women, evidently did not go far enough to actually extend into this forum.²

RECOMMENDATION

In light of the above concerns, Clause 18 which allocates roles and functions for traditional leaders and council, is vague. We therefore **recommend** that this clause be reworded to clearly indicate that the role will be restricted to an **advisory role only**, and **will not include an implementation role**.

This will also take into account the international obligation on government in terms of CEDAW; Article 14 (1), which states that: State parties shall take into account the particular problems faced by rural women and the significant role which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy. [...and] shall take all appropriate measures to ensure the application of the provisions of the Convention to women in rural areas.

CHAPTER 6 DISPUTE RESOLUTION and COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS

The CGE is concerned that this Bill is unclear as to the jurisdiction of such an institution. It seems to introduce a new level of bureaucracy which does not have the same level of accountability to society as democratic government does. In particular, the CGE believes that the establishment of a Commission on Traditional Leadership Disputes and Claims would create a barrier to justice and the courts for the most vulnerable people subject to customary law, especially poor rural women. We believe that any claims made by women of a legal nature can be dealt with through the normal processes of the court system.

² Interview with a fieldworker held in Durban on 7 September 1999.
And Interview with a fieldworker in Umtata on 17 September 1999.

Any governance model that deals with customary and traditional legal matters should not undermine the existing institutions of the civil, criminal, and family justice system. We oppose the introduction of this Commission, if their jurisdiction extends to all customary law disputes.

However, if section 19(1)(a) has a limited application in that it applies only to matters arising from the implementation of this legislation, we recommend that the wording of this section be amended. This will avoid interpretation and implementation problems that are likely to arise as a result of the present formulation.

CONCLUSION

On promulgation of this legislation, government should rise to the challenge, to ensure that democracy does prevail, when transforming the institution of traditional leadership. The Constitution and our international obligations demand that women and men are treated equitably in all spheres, but particularly in respect of succession to leadership positions, access to justice and access to opportunities.